

NJAR WINS LAWSUIT VOIDING DEP REGULATION

by Barry S. Goodman, Esq., NJAR Legal Counsel

The New Jersey Appellate Division invalidated a regulation that was promulgated by the New Jersey Department of Environmental Protection (DEP) in which owners of contaminated sites throughout New Jersey were required to send deed notices concerning their remediation plan for the site to the New Jersey Association of REALTORS® (NJAR) so that NJAR and its members could disseminate this information as widely as possible. As set forth at length below, the Court held that the regulation was void ab initio, e.g. from the moment it was promulgated, because it conflicted with the New Residential Construction Off-Site Conditions Disclosure Act (the Disclosure Act).

By way of background, DEP adopted a series of regulations called the Technical Requirements for Site Remediation, which were effective February 3, 2003. These Technical Requirements established certain duties to investigate and remediate environmentally contaminated sites. One of those duties was to provide deed notices containing any conditions or restrictions for the property due to the contamination to various entities, including municipal clerks, the mayor and council where the property is located, the DEP case manager, county and municipal health departments, and NJAR. DEP's stated objective was to ensure the wide

distribution of the information concerning the contaminated properties to as large a segment of society as possible. NJAR never received any notice about the proposed regulation before it was promulgated.

Shortly after the regulation became effective, NJAR began receiving deed notices. NJAR immediately contacted DEP to withdraw the portion of the regulation that required owners to send the notices to NJAR, but DEP refused. As a result, NJAR filed suit seeking to have the Court declare that the requirement that these deed notices be sent to NJAR was void ab initio since it violated numerous laws. NJAR did not challenge any other portion of the Technical Requirements.

More specifically, NJAR's challenge to the requirement that NJAR and its members receive and disseminate these deed notices was based upon five legal arguments. First, NJAR argued that the requirement that the notices be sent to NJAR and its members violated the Disclosure Act. The Act specifically provides that, if real estate licensees provide notice to buyers that the municipal clerk maintains a list of contaminated sites, they shall be "deemed to have disclosed fully the off-site conditions relating to the residential real estate and shall be deemed to have satisfied fully the seller's disclosure duties

pursuant to New Jersey law." In addition, NJAR and its members would have to compile lists of the contaminated sites when they received deed notices. However, the Disclosure Act specifically provides that real estate licensees shall not be required to compile lists of such sites since they are maintained by municipal clerks.

In addition, NJAR argued that DEP improperly failed to provide NJAR with notice of its intent to promulgate the regulation. The Administrative Procedures Act specifically requires that an agency provide such notice to inform those persons most likely to be affected or interested in the intended action of the agency.

Next, NJAR contended that REALTORS® were being denied their right to equal protection. By only providing the notice to REALTORS® and to no other real estate licensees, REALTORS® were being singled out for additional duties and liabilities that would arise from the obligation to reveal information about such contaminated sites to buyers even though other real estate licensees did not have such a duty or liability. The fourth point raised by NJAR was that the regulation was too vague to be enforced. The regulation failed to provide NJAR or its members with any meaningful guidance as to what

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REALTORS® Should Recommend Buyers and Sellers Use Licensed Home Inspectors

Real estate licensees are protected from liability for punitive damages and attorney fees under the Consumer Fraud Act for providing false, misleading or deceptive information if they (1) had no actual knowledge that it was false, misleading or deceptive and (2) made a reasonable and diligent inquiry to ascertain if the information was false, deceptive or misleading. This reasonable and diligent inquiry requirement will be deemed satisfied if the information was provided in a report or as a representation by a person licensed or certified by the State of New Jersey, including but not limited to home inspectors, appraisers, plumbers and electrical contractors.

However, not all home inspectors currently have a license. Under the Home Inspection Professional Licensing Act, home inspectors have until June 30, 2004 to become licensed.

NJAR therefore strongly suggests that its members recommend to their clients that they use licensed home inspectors. If a real estate licensee communicates misinformation from an unlicensed home inspector, the real estate licensee may not be protected by this exception to the Consumer Fraud Act. A list of licensed home inspectors is available online at <http://www.state.nj.us/lps/ca/pels/inspectors.htm>.

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they were to do with these notices, except DEP's statement in a comment that it was DEP's intent that these deed notices be widely disseminated.

Finally, NJAR argued that the regulation was not reasonably related to DEP's stated purpose of disseminating the information about the contaminated sites as widely as possible because DEP only was sending the deed notices to NJAR and not to the New Jersey Real Estate Commission for dissemination to all real estate licensees.

On February 25, 2004, the Appellate Division held that the requirement that deed notices be sent to NJAR was void ab initio because it was such a blatant violation of the Disclosure Act. As a result, the Court explained that it did not even have to respond to NJAR's other arguments. The Court decided that DEP's requirement that these deed notices be sent to NJAR improperly

placed a burden on REALTORS® to compile a deed notice register and to forward the deed notices to purchasers in violation of the Disclosure Act. The Court invalidated the portion of the regulation pertaining to NJAR so that it was void from the very moment it was promulgated and permitted NJAR to return all the deed notices that it has received or will receive to their respective senders. The Court also held that NJAR has no further obligations with respect to such deed notices.

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith, Ravlin, Davis & Himmel LLP, represented NJAR in this lawsuit against the DEP. He is a trial attorney who focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders and partnership disputes.

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For further information, call Karen Truncale, NJAR, at 732-494-5616.

GRI II: The Service One Association of REALTORS® in Cherry Hill, NJ will host a GRI II course on **Mondays, June 14, 21, 28, July 12 & 19, 2004**. The exam date is July 26, 2004.

GRI IV: The Hunterdon/Somerset Association of REALTORS® in Branchburg, NJ will host a GRI IV course in June.

GRI VI: The Ocean County Board of REALTORS® in Toms River, NJ will host a GRI VI course on **Tuesdays, June 8, 22, 29, July 13 & 20, 2004**. The exam date is July 20 (after lecture).

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