

From: rjc@spsk.com [mailto:rjc@spsk.com]
Sent: Tuesday, November 07, 2006 8:29 AM
To: NJSBA Corporate Section Member
Subject: Environmental Issues- New Developments

1. Introduction: The topic of this message was discussed at a recent ISRA/Environmental Issues Committee of the NJSBA Business Law Section. It was also discussed at the November 6 Section Board of Directors meeting. At the request of the Board, I am alerting the Section to these issues. While of most importance to child care centers and educational institutions, the issues are of broader relevance, potentially affecting properties and businesses involved with child care centers, educational purposes, residential uses and/or remediation.

2. Context: In the past year there have been several newsworthy problems involving new construction and contamination. Most notably, during the summer of 2006 a child care center was found operating at the site of a former thermometer manufacturing facility, with resulting fears of child exposure to mercury. Other issues arose involving PCBs in fill materials, including recycled concrete, at sites of school construction and residential developments. Thus, there is a current NJDEP and NJDHSS regulatory focus on how to prevent exposure to contamination in these contexts. Some of the solutions are novel to New Jersey.

3. Emergency Regulation of Child Care Centers: Emergency changes to N.J.A.C. 10:122-5.2 are now in effect until December 16, 2006. Comments to the proposal to adopt these changes permanently can be provided to the Department of Children and Families by December 6, 2006.

In brief, the regulation applies to existing and proposed licensed child care centers, and imposes environmental precautions as physical plant requirements for all centers (references are to the rule proposal):

- (i)1 requires a certification on whether certain historic uses existed of the "building" due at any of several times: initial application, any renewal application, relocation of an existing licensed center and, any other time requested. These uses are: i. Group F - factory/industrial, ii. Group H - high hazard, iii. Group S - storage, iv. Group B - dry cleaners or nail salons.
- (i)3 provides that if such a use did exist then the licensed facility must certify: it complies with NJDEP soils standards; interior issues have been addressed per recent guidance; and all other risk issues have been addressed per that guidance. For the current guidance see <http://www.nj.gov/dep/dccrequest/>.
- (i)4 provides that, in the same frequency, the applicant must certify "that the center provides a potable water supply provided by a public community water system." If it cannot, then sampling is required of the water supply.
- (i)5 provides that, in the same frequency, the applicant must certify that "the center complies with all existing Department of Children and Families regulatory requirements for child care centers with respect to radon, asbestos and lead listed in N.J.A.C. 10:122-5.2(a)14, 5.2(h) and 5.2(j)."
- Importantly, (i)6: "Effective June 1, 2007, at the time of the initial application, any renewal application, relocation of an existing licensed center and, in the discretion of the Office of Licensing, any other time, the facility operator shall submit to the Office of Licensing a No Further Action letter from the Department of Environmental Protection which indicates that

no further remediation is needed for the site on which the center is located." {This is potentially a extraordinarily onerous requirement}.

- Finally as of 1/1/07, licensing of centers located near dry cleaners and nail salons are restricted without actual indoor air sampling data.

You can access the adoption and proposal at:

<http://www.state.nj.us/dcf/notices/EmergencyRuleChildCare10.19.06.pdf>

4. Proposed Legislation: Two bills on this topic are pending in the state legislature: A3529 and S2261. It is difficult to accurately predict the fate of any proposed legislation, or the final form if adopted. But it does seem likely that a bill addressing some of the same topics, and potentially more, will pass the legislature in the near future because public perception supports enhanced protection of children. At present, rumors are that the Assembly language may have an edge. Those with concerns should monitor the progress of these bills.

4.1 S2261: The following is a rough overview of the Senate bill:

- NJ Department of Health and Senior Services (NJDHSS) is given 9 months to adopt regulations. A critical focus will be the adoption of a procedure for assessment of interior conditions and setting interior maximum contaminant levels (presumably objective criteria).
- As part of licensing, an applicant must demonstrate and, if so, NJDHSS will provide a certification, "that the building interior is safe for use as a child care center, or for residential or educational purposes" upon a demonstration that established procedures for the evaluation and assessment of building interiors have been followed, and there are no contaminants present in the building that exceed the maximum contaminant levels.
- Importantly construction permits cannot issue for any structure that: (1) was previously used for industrial, storage or high hazard purposes, (2) is on a contaminated site, (3) is on a site on which there is suspected contamination, or (4) is on an industrial site that is subject to the provisions of the "Industrial Site Recovery Act," P.L.1983, c.330 (C.13:1K-6 et al.) EXCEPT upon a submission of the required certification.
- Further, construction permits cannot issue for the construction or alteration of any structure to be used as a child care center, or for residential or educational purposes, on (1) a contaminated site, (2) on a site on which there is suspected contamination, or (3) on an industrial site that is subject to the provisions of the "Industrial Site Recovery Act," P.L.1983, c.330 (C.13:1K-6 et al.) EXCEPT after submission by the applicant to the construction official of documentation sufficient to establish that the site has been remediated consistent with the remediation standards and other remediation requirements established pursuant to section 35 of P.L.1993, c.139 (C.58:10B-12) and a no further action letter has been issued by the Department of Environmental Protection for the entire site.
- There are changes to ISRA and other remedial statutes, including some tinkering with penalty provisions.

4.2 A3529: The Assembly variant differs in several important respects from the Senate Bill:

- It does not apply to residential construction.
- It allows 12 months for required regulations instead of 9.
- Regulations should account for the differences between children and infants and adults. This may result in more strict standards for interior contaminants.
- It adds a penalty provision.

- It expands the applicability of the restrictions on issuance of construction permits beyond new construction to "reconstruction, alteration, conversion, or repair of any building or structure".
- It expands the litany of problematic history to include prior use "as a nail salon, dry cleaning facility, or gasoline station,..."
- It allows issuance of a building permit for reconstruction etc to comply with regulatory requirements under this same law and/or to conduct remediation.
- It restricts issuance of a certificate of occupancy for a building (presumably thereby catching buildings constructed under prior grandfathered construction permits and changes in ownership and operation requiring new COs) until assessment shows that these contaminant issues have been addressed.

5. Conclusion: Those with concerns should monitor the progress of this rule proposal and these bills. Those with businesses and property affected by these issues should be alerted. The potential for further changes to remediation and construction law should not be ignored. The requirement for no further action letters in advance of certain construction could be very problematic.

The ISRA/Environmental Issues Committee of the New Jersey State Bar Association Business Section seeks new members. Our next meeting will be in January 2007. Any Section member having an interest in this matter or other business issues associated with environmental regulation is welcome to contact the undersigned as Chair of the Committee to join.

Thanks, Richard J. Conway, Jr.
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