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New Jersey's New Environmental Regulations For Day Care Centers

The Editor interviews Martha Donovan, Partner, Norris McLaughlin & Marcus, P.A.

Editor: Please tell our readers about your work and the environmental practice at Norris McLaughlin and Marcus.

Donovan: We have 11 lawyers in our firm who practice environmental law exclusively. Part of our work is in the transactional area, handling the environmental piece of mergers and acquisitions from soup to nuts. On both the state and federal level, we negotiate with agencies on compliance and enforcement issues such as air, water, hazardous and solid waste. We are very involved in Brownfields redevelopment and routinely handle Industrial Site Recovery Act ("ISRA") cases involving manufacturing facilities that sell, close or transfer operations. We also handle Superfund work, cost recovery (either defending against the government for various clients or trying to recoup from other parties if our clients have made expenditures), as well as environmental insurance coverage work.

I am both in the litigation and in the corporate departments as part of the overall "environmental group." I have handled regulatory work, including ISRA, Superfund, cost recovery and contribution actions, both on the plaintiff and the defendant side, negotiated with agencies, handled a wide variety of litigation matters in both state and federal courts, appeared before the Office of Administrative Law, and drafted the environmental portions of contracts.

Editor: How have you seen environmental laws change in New Jersey since Governor Corzine took office?

Donovan: I have seen the Department of Environmental Protection ("DEP") becoming more like the department that existed when I first began practicing in 1985. There seems to be more of an emphasis on enforcement and a real refocusing of the department on mak-

ing sure that sites already in the system, including child care centers, are truly going to be remediated. There is more of a critical eye on what people are doing with contaminated sites and how quickly they are moving.

Editor: I understand that in August of last year, the governor called for stricter regulations on the physical plant of child care centers.

Donovan: Governor Corzine was largely responding to the Kiddie Kollege debacle in August, in which it was discovered that a child care center in Gloucester County had been operating on the site of a defunct thermometer manufacturing factory where little, if any, clean-up had occurred. It should never have been opened there to begin with, and I think that there are two reasons why it happened. First, after the NJDEP issued a directive calling for the cleanup of the site, it failed to follow through with enforcement. The company went into bankruptcy, and years later the property was bought through a tax sale certificate, and the rest is history. Second, there was a lack of knowledge at the local level as to what had been operating at the site. (Certificates of occupancy and construction permits are obtained from the municipality.) The Corzine Administration has been instrumental in having the ISRA statute amended such that it requires entities going through the ISRA process to file disclosure forms with local entities. Essentially this gives a kind of "heads up" to those on the local level who will be issuing these permits as to how the site previously was used. Someone should have caught the Kiddie Kollege issue along the way, and the Corzine Administration is trying to make sure such an oversight doesn't occur again.

To that end, first emergency guidelines and then emergency regulations governing day care centers were put in place last fall and were in effect through December of last year. Recently reenacted (and slightly modified) regulations went into effect in mid-Jan-

uary, 2007. Clearly, this is only the beginning of the process. Since these regulations affect both new centers and centers already in operation, I am certain more changes will be coming down the road.

Editor: How do the new regulations operate?

Donovan: The bottom line of the regulations is that in order to obtain a license to operate a day care center, you need to work with three different departments: the Department of Children and Families ("DCF"), from which you will ultimately get your license; the Department of Health and Senior Services ("DHSS"), which deals with the interior of your facility; and the Department of Environmental Protection ("DEP"), which deal with the soil and groundwater at the site. You must satisfy both DHSS and DEP regarding the environmental safety of your facility before you can obtain a license from or renew a license with the DCF.

The three departments are still finding a way to work together in a coordinated fashion. At the moment, we only have the new DCF regulations (enacted in mid-January), and the DEP's old technical requirements. DHSS has not promulgated its regulations yet.

Editor: Can you walk us through the changes to the law?

Donovan: On January 11, 2007 new statutory amendments were enacted. They are in three parts. First, they require DHSS to adopt rules and regulations by January 11, 2008 addressing procedures to assess the interior of buildings and establishing maximum contaminant levels for them. Essentially, the DHSS must give you a certificate stating that the interior of your building is safe for children if you want to operate at that facility. Since DHSS has not promulgated the regulations yet, it will likely make decisions for the time being on a case-by-case basis. Note that the statute

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imposes penalties of \$25,000 per day for the first offense and \$50,000 per day thereafter for failing to properly acquire a certificate from DHSS.

Second, if you want to either alter an existing day care structure or build a new one, you have no worries from DEP if you are on a nice pristine site. But if you are on the site of a former nail salon, dry cleaner, gas station or other contaminated site you must not only get the DHSS certificate, but must also obtain a "No Further Action" letter from the DEP before you get a construction permit or certificate of occupancy. The No Further Action letter is not an easy document to get: once you have done the sampling and work plans and completed the cleanup of contamination required by DEP, hopefully DEP will say you have successfully cleaned up and what is left behind is not of concern and will issue the No Further Action Letter. However, to obtain it often requires a significant amount of time and money spent unless the prior occupants had acquired a "No Further Action" letter before you.

Most likely you will need a lawyer and a consultant to help you get through the process. I should add here that this is not a complete "Catch 22." If you really want to construct your new center at a particular location (or alter it), the DEP and local officials will provide you with the necessary permits to try and bring your land and facility into conformance with DHSS and DEP requirements. Of course, while you are doing the remedial work, you will not be operating a day-care center there.

Third, the amendments change the ISRA statute. (Day care centers are not directly affected by ISRA which deals primarily with manufacturing facilities.) When manufacturing facilities go through the ISRA process, they will now be required to notify local government. This will raise the necessary flag to local officials that this particular site has had an industrial site on it. This alone might have prevented the Kiddie Kollege situation.

As we discussed, the DCF regulations, also effective in January, 2007, in turn, focus on both the DHSS and DEP requirements of a "healthy" building interior and "healthy" site. They focus on the licensing aspect of day-cares, preventing DCF from either issuing or renewing a license without sign-off from both DHSS and DEP.

I should also note that these statutory amendments (and ultimately the DHSS regulations) will affect not only licensed day care centers, but also public, private and charter schools.

Editor: What about day care centers already in operation? Is there any grace period for this?

Donovan: The DCF regulations apply to

every licensed day care center in New Jersey. If your renewal is up on or before June 1, 2007 or you are seeking a new license, you have until June 1, 2007 to obtain a No Further Action letter from the Department of Environmental Protection. If your license comes due for renewal after June 1, 2007, then you need not have the No Further Action letter until it is up for renewal.

Editor: Can you tell us about the *Sabrina's* case?

Donovan: We handled the *Sabrina's* case from start to finish. *Sabrina's* came to us on September 1, 2006 when it was ready for a license, at which time emergency August guidelines (in the wake of Kiddie Kollege) had just come down. Ultimately *Sabrina's* got stuck in the process. The facility was located on an old camera shop – not a film processing establishment, just a shop. The focus of our original intervention in the *Sabrina's* case was on what everyone needs to bear in mind in these cases. The important question is whether there is any harmful exposure to children: what are the children smelling, eating and drinking? Are the children going to be safe in that facility from environmental exposures? It's important to remember that everyone wants to protect children and this should be the focus.

We were able to show that there were no issues where children would be exposed to contaminated soil or water, not only because this was not an industrial site, but also because an impermeable barrier exists there. Ultimately we put together a package of materials to show that the center was fine, and this required a legal team and environmental consultants, including an industrial hygienist. It also required a lot of patience dealing with the various agencies and trying to set up lines of communication among them and us. The process took two or three months.

Our point has been and will continue to be, as lawyers, that if exposure routes don't exist, then our day care facility clients ought to be able to operate. This is where we feel day care center regulations differ from ISRA. For instance, contaminated groundwater flowing deep underneath a day care site does not matter as long as the children do not come in contact with it. We need to keep an eye on where the DEP comes out on this issue, because this is not the approach DEP takes when dealing with ISRA for property cleanups or in issuing No Further Action letters.

Editor: Do you have any suggestions for day care operators today?

Donovan: All day care operators, but particularly operators that fall under the contaminated site category, should think about

getting a No Further Action letter from DEP now, or at least starting the process now. There is not much time.

Day care centers operating in the same structure as dry cleaners and nail salons should take note: they will have to pass a test from DHSS to prove that there is no exposure in the air that will affect the children. If your day care center is located in such an area, you might consider relocating before you have to deal with these issues.

Editor: How do you handle the landlord/tenant issues that may arise from relocating?

Donovan: Landowners should not want to have a day care facility on a site that has not already been reviewed by DEP. The DCF regulations do not assign responsibility, only stating that a day care facility needs a No Further Action letter to continue operations.

I have sat with our corporate and real estate partners who have and will be creating contractual language for landlord-tenant agreements which will include provisions regarding whose responsibility it is to comply with the DCF regulations, who pays for the work, the notifications to be given, etc.

Editor: Has there been any other fallout?

Donovan: DEP has arrived unannounced at day care centers to review their sites and has also sent out letters to contaminated facilities that are close to day care centers. DEP has, to date, targeted for inspection the day care centers that are closest to contaminated areas to rule out the possibility of that proximity affecting the children at their facilities.

Editor: Do other states have similar programs in place?

Donovan: I have not been able to find one. The EPA has been on top of lead, water, radon and asbestos for years. However, I could not find specific programs in other states setting forth a similar protocol for licensed day-cares in their jurisdictions.

Editor: Any thoughts in closing?

Donovan: I think that day care owners and operators need to be very proactive as a group. A trade group would benefit them immensely because if they join together, they might help persuade DEP, DHSS and others to come up with a system that works for everyone, so that they can protect the children's welfare but not be put out of business. For instance, inner city day cares may have greater difficulty meeting the DHSS and DEP standards than those in the suburbs, but don't they need to operate too?