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The Site Report

Construction Law Insights

January 31, 2022

Welcome to 2022 and a new year of construction law insights. We are continuing with our monthly publication and hope you find this issue helpful.

If you have a moment, we encourage you to fill out our survey found at the bottom of this newsletter. This will help us plan for this year and hopefully provide you with important information in a timely manner.

If you are looking for more reading materials, our own Cliff Kinney and Matt Georgitis contributed to this newly published book by the ABA - *Construction Checklists, Second Edition: A Guide To Frequently Encountered Construction Issues*. You can order it by clicking [here](#).

As always, thank you for reading.

[Stephanie U. Eaton](#) - Co-Chair, [Construction Group](#); Vice Chair of Southern Offices, Litigation Department; Editor, *The Site Report*

and

[Julian E. Neiser](#) - Co-Chair, [Construction Group](#); Vice Chair of Northern Offices, Litigation Department

[How Climate Change is Changing the Game for Concrete](#)

"A new American Concrete Institute committee is assessing the affect of global climate change on sustainability of concrete structures, as more-severe salt-water intrusion and high wind loads lead to failures like Florida's Surfside Condos."

Why this is important: The assessment of sustainability of concrete structures by the American Concrete Institute ("ACI") is important first and foremost to prevent loss of life and property like what the nation saw occur at the Surfside Condominiums in Miami, Florida in July 2021. Climate change, and the resultant degradation of reinforcing steel incorporated into concrete structures from extended exposures to salt water, flooding and extreme wind loads, is a reality. Collaboration among owners, developers, engineers, architects, concrete subcontractors and product manufacturers is needed to evaluate, test, and provide recommendations to prevent spalling and damage to buildings exposed to extreme weather events and higher sea levels. The ACI's October 2021 meeting to model and document effects of climate change on concrete structures is a good first step. The construction community should expect building code changes, new product development, and enhanced and more frequent inspections of concrete structures to prevent future tragedies like Surfside. --- [Stephanie U. \(Roberts\) Eaton](#)

[Regulations to Know Before Starting a Construction Drone Program](#)

"Switching from traditional base-and-rover surveying to drone surveying is one of the most effective ways to upgrade your construction workflow, setting you and your team up to make better, data-driven decisions."

Why this is important: Using a drone, or unmanned aircraft system as referred to by the Federal Aviation Administration, to survey, conduct site inspections, and gather other project data has been on the rise for years as businesses learn the efficiencies drones can create. This article focuses on the efficiency gains and additional data analytics drones can add to surveying operations, but drones can be, and are, used by construction businesses in a variety of other ways. As outlined by this article, the biggest hurdle to adding a drone program most businesses see is navigating the regulations, which are published by the FAA in the United States. However, navigating the regulations and implementing a successful drone program is far less daunting than it seems. While the process was previously ambiguous and cumbersome, over the last five years the FAA has put significant time and resources into making the drone registration and remote pilot licensing processes accessible. This article is a great primer on the process and regulations with links to get you headed toward implementing a successful drone program. --- [Steven C. Hemric](#)

[NC Licensing Board to Conduct Criminal Background Checks After WBTV Investigates Contractors Taking Money, Leaving Work Unfinished](#)

"North Carolina Senator Steve Jarvis authored a bill that was signed into law last year allowing the North Carolina Licensing Board for General Contractors to conduct criminal background checks on applicants and charge them for it."

Why this is important: It could be time to worry about that misdemeanor charge that you got as a teenager. The North Carolina Licensing Board for General Contractors now will require a background check, and this could mean that if the licensee for a GC has a spotty criminal history, even if it was several years ago, the Board could deny the GC's application for a new license. It is unclear if bankruptcies or civil actions also will be included in the background check. In preparing your application to obtain your GC license, you should run your own background check for both criminal and civil actions. You should then consult the attorneys at Spilman about expunging the criminal charges from your record and resolving the civil actions so that your application will be approved without inquiry by the Board. If you need help with your GC license application, we can provide you invaluable legal advice so that your application is approved. --- [Matthew W. Georgitis](#)

[West Virginia, Worst in the Nation on Bridges, Gets \\$500 Million to Improve Them](#)

"That comes under the historic Bridge Replacement, Rehabilitation, Preservation, Protection, and Construction Program under the federal infrastructure law passed by congress and signed by the president."

Why this is important: The U.S. Department of Transportation has launched the Bridge Replacement, Rehabilitation Preservation, Protection, and Construction Program (Bridge Formula Program) as part of the Infrastructure Investment and Jobs Act. As part of the program, West Virginia will receive \$506 million of the \$26.5 billion over a five-year period dedicated to support bridge improvements. This formula funding could not come soon enough. West Virginia's bridges, roads and highways are among the worst in the nation, making tourism, business and everyday travel difficult for all West Virginians. Senator Joe Manchin praised the funding and stated "our state has the highest percentage of bridges in poor condition in the country. Without considerable investment now, the number could jump significantly, representing a safety hazard for West Virginians." In addition to providing safety for West Virginia travelers, the funds will assist in creating thousands of good paying jobs for local workers and contractors. Workers will be paid the federal prevailing wage rates and in turn, those local paychecks will hopefully be used to stimulate the West Virginia economy. --- [Victoria L. Creta](#)

[NC House Bill 489](#)

"An Act to provide various building code and development regulatory reforms."

Why this is important: NC House Bill 489 is important because it included regulatory reform changes to the North Carolina State Building Code and was supported by the NC Home Builders Association. This bill revised the licensing laws under NCGS 87-10 to require applicants seeking general contractors' licenses to consent to and pay for criminal background checks, and allows for remote learning courses for continuing education. Further, Bill 489 revised NCGS 143-138 to limit the Building Code Council's review of proposed amendments and revisions to the North Carolina State Building Code to a "cost-benefit" analysis. In addition, the bill revised permits for erosion control plans, and added a new subsection to NCGS 113A-54.1 to address situations where development of single-family residential lots under one acre in size where the lot builder/developer is also the entity responsible for the land-disturbing activity, wherein financial responsibility for that land-disturbing activity passes from the builder/developer to the new lot owner after the deed is recorded with the Register of Deeds and there has been notice provided to the office/program that approved the erosion control program. --- [Stephanie U. \(Roberts\) Eaton](#)

[Dan King Plumbing Heating & Air Conditioning, LLC, Plaintiff, v. Avonzo Harrison, Defendant](#)

Why this is important: This North Carolina Court of Appeals case touches on a number of common issues in North Carolina construction disputes, most prominently the evidence required to support a workmanship claim and the bases for unfair and deceptive trade practices ("UDTP") claims. Regarding workmanship claims, the case confirms that every proponent of a workmanship claim should be armed with expert testimony. The exceptions to this rule are limited and must be carefully evaluated. Regarding UDTP claims, this case highlights the variance of UDTP claim success based on the specific facts at issue in each case, even when fraud clearly exists. Under the specific facts at issue in this case, a homeowner was not able to support a UDTP claim based on evidence that the contractor forged his signature on a change order and presented him with a fraudulent "installation checklist." Even though the fraud was clear, the Court of Appeals held that the facts did not meet all of the requirements to support a UDTP claim in a construction case involving parties in contractual privity. However, the Court of Appeals also held that the contractor's alleged sale of duplicative warranties to the homeowner may be able to support a UDTP claim. In the end, this case highlights the importance of conducting a thorough review and analysis of each dispute on a construction project to determine whether a fraud or UDTP claim is appropriate under the circumstances. --- [Steven C. Hemric](#)

[How Banks can Lead the Way on the Race Toward Net Zero and Make Decarbonization Banking Sense](#)

"The establishment earlier this year of the industry-led, UN-convened, Net-Zero Banking Alliance bringing together 53 banks from 27 countries representing almost a quarter of global banking assets (over US\$37

trillion), is the most vivid demonstration of this."

Why this is important: You should read this article, even though you've read many like it before. I feel a bit of a rant coming on; I must be getting old. I remember a day when banks owed their first duty to their depositors, to keep those deposits safe. Banks' next duty was to shareholders, to try to return that investment trust with a profit, and maybe even a dividend. Of course, surrounding all of this were a myriad of complicated bank rules that primarily were aimed at keeping banks out of financial and legal trouble. That was then; this is now.

Many years ago, Congress and bank regulators, in their infinite wisdom, began piling on banks a myriad of social justice responsibilities. First came ending redlining, which made sense. That was a horrible practice committed by many banks to keep minorities in certain areas of "town" and out of others. It always was a stupid practice that could have been shut down for inefficiency alone. No smart bank would have engaged in that, but for the racial intent. It was wrong and bad business. Later, regulators, gradually, began to expect bank management to reflect their communities, including gender and racial diversity. This was believed necessary to overcome inertia, the theory being that old white men tend to know, hang out with, and recommend other old white men. Hard to refute that! Banks still have a way to go in this effort, but it is better. Also, banks with more diverse leadership can see its community in new ways and become more effective. Next came CRA, or the Community Reinvestment Act, which scored banks on their "investment"/lending in economically-depressed areas of their market. Forgetting for a moment that many rural, community banks operate in nothing but economically-depressed communities, many banks do operate in markets where they can focus lending only in businesses that are likely to repay and security that will cover the amount of loan. This was "social justice," but it could be seen also in terms of supporting the where community each bank works. A more successful community, over time, should provide more opportunity for business and the bank.

Now, banks may be required to score a host of such issues. The SEC and others call it "ESG," for environmental, social and governance. Some politicians are pushing for the entire list, some are focused on one part or another. The largest push now seems to be measuring a bank's "risk," in part, relating to how the bank "plans for" climate change, which the article addresses. All of ESG is not part of bank regulation, yet, but many institutional investors are being pressured to require ESG planning in the companies/banks those investors select. More and more, our government is being influenced to evaluate banks not on how well they "bank," but on how well they do a host of other things, meeting changing social norms that often have nothing to do with traditional banking. What's wrong with that? Well, some of this risk is real. Climate change is real, so how wise is an investment in property below sea level, for example? But how far do we take that? What about an established natural gas company? Don't we still need natural gas? Many of the specifics of ESG are societal goals not directly connected to business or lending. Do we really want to drive outcomes at the expense of businesses, including banks? As taxpayers and depositors, we financially support the FDIC insurance that guarantees these bank deposits. When we dilute banks' responsibilities, we put ourselves in more danger as taxpayers and as depositors. We also, through more regulation, impose more expense on banks, making banking more expensive for everyone. Two states are "solving" that problem by providing "banks" owned and operated by the state, aimed at serving the poor. The government trying to run a bank? That will go well! --- [Hugh B. Wellons](#)

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