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Construction Industry News

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WELCOME

INSIDE

My say on things...

2016 begins with the issuance of this Construction Industry Newsletter, our fifth. In this issue, we have articles on vapor intrusion, liability for project design, enforcement of mechanic's lien and bond waiver clauses, and the lesser known obligation of Virginia licensed contractors to self-report violations of the "Dig With Care Act" and other statutes. We hope that you will find one or more of these articles of interest or of use in your business.

2016 also marks the beginning of my 40th year practicing construction law. It seems like yesterday that I was a first-year attorney trying to find his way to the right table in the right courtroom. Since then, the projects have become bigger, the contracts more complex and the stakes higher. I have met many people along the way; some have become friends, many well remembered and a few best forgotten. Looking back, I would do it all again, but maybe with a few changes. Looking forward, there is still much to do. Our Construction Group continues to grow; we are excited about the future and the continuing evolution of the construction industry.

In the meantime, send us your ideas for articles so we know what is of interest to you. Our future issues will likely include articles on drones on the construction project, geo-fence and other developments in the construction industry.

23RD ANNUAL COMMUNITY IMPROVEMENT DAY - 2015

Pictured above: John S. Mitchell, Jr., Peter Cashmere, Brian Cashmere and Stephanie Lipinski Galland

On September 26, the Williams Mullen Construction Practice Group co-sponsored and joined the District of Columbia Building Industry Association (DCBIA) for their 23rd Annual Community Improvement Day! In collaboration with the University of the District of Columbia and the Urban Waters Federal Partnership, volunteers from the D.C. Real Estate and Construction Community worked alongside one another to renovate and program the UDC Urban Farm & Aquaponics Project in Ward 7, a vacated three-acre lot with educational and recreational activities.

VIRGINIA CONTRACTS

Is the Mechanic's Lien or Bond Waiver Clause in Your Contract Enforceable in Virginia?

BY W. ALEXANDER BURNETT

A new Virginia law invalidates any mechanic's lien or payment bond waiver signed before work has commenced.

The Governor recently signed new legislation into law, effective July 1, 2015, that invalidates waivers of subcontractors', sub-subcontractors' and suppliers' mechanic's lien and payment bond rights if executed before the waiving lien claimant has begun furnishing labor or materials to the project. The previous language of Virginia Code Section 43-3 stated that "Any right to file or enforce any mechanic's lien granted hereunder may be waived in whole or in part at any time by any person entitled to such lien." The new code section appends the following to that sentence:

> except that a subcontractor, lower-tier subcontractor, or material supplier may not waive or diminish his lien rights in a contract in advance of furnishing any labor, services or materials. A provision that waives or diminishes a subcontractor's, lower-tier subcontractor's or material supplier's lien rights in a contract executed prior to providing any labor, services or materials is null and void.

In the past, it has been common in Virginia to see contracts between general contractors and subcontractors or other lower-tier subcontractors and suppliers that waived mechanic's lien or bond claims before the project was even underway. Generally, these types of prospective lien waivers could be enforced in Virginia so long as the mechanic's lien was either expressly and unambiguously waived or waived by clear implication.

Prior to this legislation a party could prospectively waive mechanic's liens, but subcontractors and materialmen could not be deprived of their liens "unless they expressly waived their lien rights" or expressly or by clear implication agreed to be bound by the lien waiver of another. By its decision in *VNB Mortgage Corp. v. Lone Star,* 215 Va. 366, 371, 209 S.E.2d 909, 914 (1974). Through *VNB Mortgage Corp.,* the Supreme Court of Virginia issued a "bright line rule" for lien waivers, putting contractors, owners, lenders and insurers "on notice that, in Virginia, lien waivers either had to be express or established by clear implication." *McMerit Constr. Co. v. Knightsbridge Dev. Co.,* 235 Va. 368, 374, 367 S.E.2d 512, 515–16 (1988); *see also First Am. Bank of Virginia v. J.S.C. Concrete Constr., Inc.,* 259 Va. 60, 69, 523 S.E.2d 496, 501 (2000) ("When the contract is considered as a whole, and the

Work Completion Certificate is read as a part of the contract, the contract clearly provides a binding waiver of mechanic's lien rights.") This new legislation, however, puts an end to that practice.

Importantly, this new law does not prohibit the waiver of mechanic's lien and bond rights signed after the lien claimant begins to provide labor, services or materials. In other words, it does not affect the common practice of requiring contractors to execute lien and bond waiver forms in exchange for payment for services and materials provided through the date of payment.

This new legislation's scope, however, is limited, and there are some key scenarios that are not affected by this new law.

- First, the prohibition does not apply to general contractors. Contracts between owners and general contractors, therefore, can still waive a general contractor's mechanic's lien and bond rights before the project has even started.
- Second, the statute does not apply retroactively. In any contract entered into before July 1, 2015, waivers of lien and bond rights may still be enforceable (to the extent they were valid and enforceable to begin with).
- Third, the new law does not address subordination of mechanic's lien rights to a deed of trust. While it is unclear what effect, if any, this law has on subordination agreements, theoretically a provision that subordinated mechanic's lien rights to a lender's deed of trust may be enforceable.
- Fourth, this law does not affect the validity of a mechanic's lien or bond waiver after the lien claimant has begun providing labor or materials. Under a plain reading of the statue, a general contractor could require subcontractors to waive future lien or bond rights after the lien claimant has started work on the project without running afoul of the revised law. As discussed above, this law clearly does not prohibit the exchange of a lien waiver for payment of money for labor or materials through the date of the payment.
- Fifth, this new legislation does not otherwise affect the mechanic's lien or bond enforcement rules. All other time frames and requirements for mechanic's liens and bond claims remain the same.

If you're a general contractor subject to Virginia law, the language in your form subcontracts and your mechanic's lien waiver and release forms may be outdated and unenforceable. You need to check these important documents of subcontract administration. Subcontractors and suppliers, you may still have mechanic's lien rights and payment bond rights if your general contractor has used a now outdated form.

DESIGN LIABILITY

Liability for the Project Design – Two Cases in 2015 to Note

BY ROBERT K. COX

The "Spearin Doctrine" and the implied warranty of project design, contract terms disclaiming the adequacy of the project design and clauses calling for the contractor to review the design for errors and omissions; the common thread is who will be liable for the costs and delay from defective design documents?

If you are an owner, engineer or contractor, you should take note of two rulings in 2015 on the issue of liability for project design: one, a federal court decision from Virginia finding the project owner's contract terms were insufficient to disclaim the owner's liability for defective design documents; and the second case, a Pennsylvania state court decision that the project architect could be liable to a project subcontractor for negligently including faulty information in the architect's design documents.

THE PROJECT OWNER'S CONTRACT TERMS DID NOT DISCLAIM THE OWNER'S LIABILITY FOR FAULTY DESIGN DOCUMENTS

In *Costello Construction Co. of Maryland, Inc. v. City of Charlottesville,* 97 F. Supp. 3d 819 (W.D. Va. 2015), the defendant project owner, the City of Charlottesville, had contracted the plaintiff Costello Construction Co. to construct a new fire station for the City. Upon substantially completing construction, the contractor Costello filed a complaint in the U.S. District Court for the Western District of Virginia that included a claim for damages against the City for allegedly providing faulty plans and specifications to bid and construct the fire station. The contractor claimed the City, as the supplier of the design documents, impliedly warranted the adequacy of those design documents under the Spearin Doctrine; and the City breached that warranty by issuing design documents with purported errors and omissions.

The City defended with a motion to dismiss the contractor's complaint, arguing that the terms of the parties' contract provided that the construction documents were "complete and sufficient for bidding, negotiating, costing, pricing and construction of the Project," and that the contractor had agreed to those terms. The City argued further that the contractor did not comply with the contract terms imposing on the contractor a "... continuing duty to review and evaluate the Construction Documents," and to notify the City of problems the contractor discovered in the construction documents.

In its ruling, the federal court noted that a Virginia state court had already ruled that a public works owner could

disclaim the implied warranty of the Spearin Doctrine with express contract language. The contract language addressed in that state court case required the contractor to "verify all … details shown on the drawings" and to "notify [the engineer] of all errors, omissions, conflicts and discrepancies."

In the *Costello* case, however, the federal court ruled the contract language did not amount to an express warranty by which the contractor affirmatively accepted the burden of any defects in the City's design documents. Consequently, the federal court rejected the City's reliance on its contract language as a defense. The litigation ultimately settled.

Whether the federal court came to the correct conclusion on the parties' contract terms can be hotly debated. For this article, the significance is that, while a public works owner can disclaim the implied warranty of design adequacy under the Spearin Doctrine, the disclaiming owner must do so with express contract language that leaves no doubt the risk of design defects is shifted to the construction contractor.

PENNSYLVANIA STATE COURT FINDS PROJECT DESIGN CAN BE CONSTRUED AS REPRESENTATION BY ARCHITECT THAT PLANS AND SPECIFICATIONS, IF FOLLOWED, WILL RESULT IN A SUCCESSFUL PROJECT

Under current Pennsylvania law, an architect can be liable to a contractor or subcontractor for negligent misrepresentation claims when it is proven that the architect included faulty information in the project's design documents. This liability is from the 2005 Pennsylvania Supreme Court decision in *Bilt-Rite Contractors, Inc. v. The Architectural Studio,* 581 Pa. 454, 866 A.2d 270 (2005).

In 2015, an intermediate Pennsylvania appellate court addressed whether there must be an explicit negligent misrepresentation of a specific fact, or whether the design itself is a representation that, if followed, the project could be constructed. In *Gongloff Contracting, L.L.C. v. L. Robert Kimball & Associates, Architects and Engineers, Inc.,* 119 A.3d 1070 (Pa. Super. 2015), the plaintiff structural steel erector, a project subcontractor, sued the defendant architect alleging that the original roof design for the convocation center was inadequate to bear construction and in-situ loads, resulting in significant costs to the steel erector as it attempted to comply with the architect's design. Ultimately, the architect acknowledged that the as-designed, long span trusses for the roof system were inadequate to accommodate construction loads, and changes to the design were issued during construction.

The lower trial court, the initial forum, dismissed the steel erector's claims against the architect, ruling the steel erector had failed to demonstrate that the architect had expressly or impliedly represented that the structure could safely sustain all required construction and in-situ loads. The intermediate appellate court reversed the ruling.

After examining Pennsylvania law, the appellate court wrote:

> The design itself can be construed as a representation by the architect that the plans and specifications, if followed, will result in a successful project. If, however, construction in accordance with the design is either impossible or increases the contractor's costs beyond those anticipated because of defects or false information included in the design, the specter of liability is raised against the design professional.

119 A.3d at 1078. The appellate court cautioned, however, that in order to avoid dismissal, it was not enough to simply claim negligent misrepresentation by faulty design; the steel erector still had to allege facts of some specificity substantiating its claim of faulty design. The court found the steel erector had made sufficient factual allegations and reversed the lower court ruling.

> "Consequently, liability for project design errors and omissions will continue to evolve as those who now bear the risk seek to shift that liability, and those who bear the cost and delay seek to assure their recovery."

The cost of defective design documents can be high, and the delay in correcting them can be lengthy. Consequently, liability for project design errors and omissions will continue to evolve as those who now bear the risk seek to shift that liability, and those who bear the cost and delay seek to assure their recovery.

VAPOR INTRUSION

Has Vapor Intrusion Given Your Redevelopment Project a Foul Air?

BY HENRY R. "SPEAKER" POLLARD, V

Redevelopment projects can present great opportunities for re-purposing existing facilities and structures. At the same time, certain commercial and industrial uses of a site may have left legacy environmental contamination in the soils and ground water. While evaluating and remediating the contamination itself can be problematic enough, it is also possible that such contamination may create a risk of vapor intrusion ("VI") into the project's buildings. VI is receiving greater attention at the site acquisition due diligence level and now at the remediation stage with recent changes by EPA to its VI guidance.

What is VI? Typically, it is the intrusion of vapors of petroleum compounds or volatile organic compounds ("VOC's") through crawl spaces or through fissures or the porous material in slab floors and basement walls into the occupied spaces of buildings or other structures. Common examples of VI-source contamination include gasoline and organic solvents (used in dry cleaning, degreasing solvents and oil-based paints). Occupant exposure scenarios vary according to structure use but hinge mainly on whether the structure is being used for residential or commercial/industrial purposes. Residential use normally presents greater risks due to longer exposure periods and greater sensitivity of children to such exposure. Other factors, such as soil type, construction design and building ventilation, can also impact such risks.

Legal liability arising from occupant exposure to VI can be a significant concern. Traditional common law claims such as trespass, nuisance and negligence can arise if VI occurs in a structure causing personal injury, damage to property, loss of use or loss of property value. There is also a potential for regulatory liability under environmental and worker safety laws. Recent changes in both property due diligence standards and VI guidance of the U.S. Environmental Protection Agency ("EPA") are forcing closer examination of VI for potential adverse effects on the occupants of existing structures. This trend pertains to buildings the use of which will continue as before as well as to newly built or repurposed structures.

One potential environmental liability for VI remediation that is of particular concern exists under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), also known as the Superfund law. CERCLA is an environmental liability dragnet and is often the major liability concern for redevelopment projects with significant historical contamination. CERCLA liability extends in part to costs to respond to disposal or other

releases of hazardous substances and to remediate conditions to safe levels. EPA has for some time viewed migration of hazardous substances in vapor form through building parts, such as basement walls, into the interior of the structure as an event that can trigger CERCLA liability for response costs to address the exposure of the occupants to the vapors or associated risks of their intrusion, such as explosion or fire.[1] Potentially responsible persons ("PRP's") include, among others, current owners and operators of a property and even those who were owners or operators of a property when such disposal occurred, regardless of fault in connection with the release. Generally, any one of these PRP's can be held responsible for all of the response costs, even where other parties contributed to the contamination. Defenses to CERCLA liability are few in number, narrow in scope and conditional. Therefore, the potential for CERCLA liability associated with VI into buildings should be considered seriously.[2]

If the affected structure will be occupied by business or industry, then the evaluation of VI risks must also account for federal and state worker safety laws and regulations. Protection of workers against unsafe exposure to VI is also required with respect to specific levels of exposure to certain chemicals set by the federal Occupational Safety and Health Administration ("OSHA") and, arguably, through the so-called "general duty" rule of OSHA that requires in rather generic terms that employers provide a safe workplace for their employees. Also, once information is gathered suggesting that indoor air quality may exceed OSHA standards, notification of the employees and their representatives (usually a union) and protective measures may also be required.

Environmental due diligence of the property and evaluation of VI risks and potential liabilities *before* investing in the property can help identify and manage VI risks and costs on the front end. For redevelopment of property already owned or leased by the developer, such due diligence may still be appropriate to confirm whether VI-source contamination may be present and, if so, whether it will affect redevelopment plans. In any event, a prudent lender may insist on such investigation before approving any financing of such redevelopment.

In this practical sense, but one also with implications for CERCLA liability management, the 2013 revisions to the ASTM protocol for performing

1. *See Response Actions at Sites With Contamination Inside Buildings,* Memorandum from Henry L. Longest, II, OSWER Directive 9360.3-12 (Aug. 12, 1993). Note also that CERCLA includes language that can change the commencement date for the running of a statute of limitations for state law claims from the date that injury first occurred to the date of discovery of such injury. The actual state statute of limitations periods are not affected, however.

2. Environmental liability for VI remediation costs may also arise under hazardous waste laws, state groundwater protection programs and petroleum release law, so a full review of such issues is appropriate.

Phase I Environmental Site Assessments ("Phase I ESA's") become important. They require greater focus on the question of whether VI could be a concern for the property. When followed, this ASTM protocol helps ensure compliance with EPA's "All Appropriate Inquiry" ("AAI") regulation issued to set requirements for defenses to potential liability under CERCLA. In part, a prospective purchaser or tenant of a property can be eligible for certain defenses to CERCLA liability if the purchaser or tenant conducts AAI as to the property before purchasing or leasing it and meets other eligibility criteria.

Revisions by EPA this summer to its VI guidance have led to more stringent VI exposure risk assessment standards. In turn, they are in certain cases driving more rigorous corrective actions to alleviate unacceptable exposure.[3] Because these EPA risk criteria are also used for evaluation of VI risks under other regulatory programs and for voluntary cleanup programs, these changes in EPA guidance have implications beyond actual CERCLA cases. To make matters more complex, in these recent guidance revisions EPA has jettisoned its previous reliance on OSHA personal exposure levels ("PEL's") for certain chemicals as the acceptable exposure levels for environmental cleanups, stating in rather clear terms that it now finds the PEL's inadequate for assuring worker safety. Thus, conflicting sets of exposure standards for VI exist, creating a dilemma for addressing VI in non-residential structures or mixed-use structures with commercial space on the lower level.

There are a number of design and project management measures that can avoid or minimize VI exposure to the point of reaching safe levels for occupants, including removal of "hot spot" soil areas, groundwater remediation, vapor barrier systems under building pads, sub-slab or crawl space vapor extraction systems and good site planning to locate buildings away from VI sources where possible. In some cases, these measures can be performed under state voluntary cleanup or remediation programs that can provide liability management and remediation cost assurance to all parties. Note, though, that performing the due diligence for one purpose or addressing one form of legal liability risk may activate duties under another legal theory or regulatory program, so a holistic legal analysis of these concerns is recommended.

For architects, engineers and site plan designers, it is important to have access to environmental assessment information to confirm whether potential sources of VI may exist, to locate on the property areas where any sources of VI may be, to determine appropriate engineered controls to mitigate VI exposure scenarios within the planned structures and to plan logistically and financially for the installation and management of such controls throughout the project life. In addition, VI scenarios for utility trenching and other excavation can also present safety concerns for such work. Finally, parties working on a redevelopment need to understand whether any specific engineered controls are required by law or have been agreed to as part of a voluntary cleanup program certificate.

VI is an unwelcome complication for any redevelopment project. However, VI does not have to doom an otherwise sound project, if the VI is properly investigated and planned for early on, factored into overall site design and costs and addressed in compliance with applicable standards.

3. These guidance changes came in two packages: the first applies to federally regulated remediation sites under CERCLA and hazardous waste programs, whereas the second pertains to VI at petroleum UST release sites. These guidance documents can be found at http://epa.gov/oswer/vaporintrusion.

CONTRACTORS MUST SELF-REPORT

Do Not Put Your Virginia Contractor's License at Risk: Self Report

BY KELLEY C. HOLLAND & W. ALEXANDER BURNETT

If you are a licensed contractor in Virginia, do you have an affirmative duty to self-report a violation of the Dig With Care Act and any resulting settlement with the State Corporation Commission (SCC)? Even if the settlement contained a disclaimer of liability? The answer is YES!

In 1979 the Virginia General Assembly passed the Underground Utility Damage Prevention Act (Act), often referred to as the "Dig With Care Act," contained in §§ 56-265.14 et seq. of the Code of Virginia (Code). The purpose of the Act is to prevent excavation and demolition damage to underground utilities throughout the Commonwealth. In 1994, the SCC was authorized to enforce the Act.

Human nature being what it is, and despite all due care and precautions, accidents happen on construction sites and utility lines are broken. The reporting and repair process will trigger an investigation by the SCC, and, if found, the SCC may issue a notice of violation often resulting in a settlement or consent order to resolve any violation. Any settlement of a violation with the SCC can negatively impact the contractor's license.

Contractor's licensing in Virginia is regulated by the Board of Contractors of the Virginia Department of Professional and Occupational Regulation (DPOR). These regulations are contained in §§ 54.1-1100 et seq. of the Code and Title 18, Chapter 22 of the Virginia Administrative Code (VAC). According to the Board of Contractors, the act of entering into a settlement agreement alone constitutes probable cause to open an investigation into possible violations of prohibited acts listed in 18 VAC 50-22-260, including: Subsections B 5 (Negligence and/or Incompetence in the Practice of Contracting); B 6 (Misconduct in the Practice of Contracting); and B 26 (Failure of Contractor to Comply with the Notification Requirements of the Act). These are in addition to any other regulation that may be found to have been violated during the course of the investigation.

The notification clause really depends on the type of violation. The Board of Contractors would most likely find a violation of 18 VAC 50-22-260 B 24 if a contractor has been disciplined by any county, city, town or a state or federal governing body, including any action taken by the Virginia Department of Health, if the contractor fails to properly inform the Board of such violation. Any actions taken against the contractor, if warranted, could result in the contractor being charged with misconduct for failure to inform. See 18 VAC 50-22-260 B 6. Dependent, however, upon the type of violation, a contractor can also be charged with violating 18 VAC 50-22-260 B 3 (Failure of the responsible management, designated employee or qualified individual to report to the board, in writing, the suspension or revocation of a contractor license by another state or conviction in a court of competent jurisdiction of a building code violation, if the disciplinary action involves a suspension or revocation or a conviction of a building code violation, and they do not report it).

Contractors licensed in Virginia have an affirmative obligation to self-report all actions taken against them by other regulatory bodies. Failure to do so is a violation of the statutory and administrative codes governing a contractor's license. The Board of Contractors is currently working with the SCC to better facilitate and ensure prompt notification to the Board of Contractors when licensed contractors are brought before the SCC for alleged violations of the Act.

Seasoned contractors know that disciplinary actions are kept on record for fifty years and can readily be viewed by the public at large. The disciplinary order (final or consent) along with the summary and recommendation (for final orders) and the report of findings (final and consent) are publicly accessible.

All contractors should be prudent and pay careful attention to the governing regulations to protect the integrity of their occupational license.

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Williams Mullen's Construction Litigation practice received a National First-Tier Ranking in the 2015 *U.S. News - Best Lawyers'* 'Best Law Firms' list and the Construction practice received a Band 2 Ranking for Virginia in the 2015 edition of *Chambers USA.*

UPCOMING EVENT

Construction Management: Sharpening Your Project Risk Mitigation Tools, Lessons from the Trenches

Willis Towers Watson
& Williams Mullen Seminar
(and Happy Hour)
Tuesday, April 19, 2016
4:30 to 7:00 PM
Congressional Country Club
8500 River Rd.
Bethesda, MD 20817

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