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CONSTRUCTION UPDATE
Solutions

JULY 2010

Dear Readers,

In this, our summer issue of Robinson & Cole's Solutions: Construction Update, we feature three articles highlighting recent developments in construction laws and other practice areas related to construction. We have also included a note regarding new legislation reducing the allowable retainage on private construction projects in Connecticut. The first article reports on a very recent decision by the Massachusetts Judicial Court regarding the applicability of public construction bidding laws to a privately owned and operated development that was the subject of a lease agreement by a public institution. The second provides useful insight in categorizing and utilizing 1099 contractors to control labor costs while avoiding fines or penalties assessed by various federal and state agencies for the misclassification of such workers. And our final article explores the impact of BIM and IPD on the long-standing Spearin Doctrine.

As always, our readers are encouraged to provide us with any news, information, or other developments from the construction industry. Of course, for the latest information about our firm and its Construction Practice Group, please be sure to visit our Web site at www.rc.com.

Peter E. Strniste, Jr.
Editor

ARTICLES

The SJC Applies Massachusetts Public Construction Bidding Law to a Private Development Undertaken for Lease to a Public Entity

By: [Karla L. Chaffee](#) and [Michael S. Giaimo](#)

The Supreme Judicial Court recently had the final word in a well-publicized dispute between the office of the attorney general (OAG) and a private developer over the applicability of Massachusetts' public construction bid law to a privately owned and operated development that was subject to a lease agreement for future occupancy by one of the state's major public institutions. In *Brasi Development Corp. vs. Attorney General*, decided on May 10, 2010, the Supreme Judicial Court decided that Massachusetts' public construction bid law does apply to the proposed construction of a dormitory building located near the University of Massachusetts, Lowell (UML). The OAG initially found that the project, although structured as a private development leased to UML upon completion, was actually a public construction project. After, Brasi filed a declaratory judgment action in Superior Court. The SJC's recent ruling reversed Superior Court Judge Jane Haggerty's holding that Brasi had an agreement to lease a newly constructed building to UML, rather than an agreement to construct a building for UML, and that Brasi's construction activities were "merely incidental to the underlying lease agreement." [Click /A> to read full article.](#)

Government Refocus on Independent Contractors Could Result in Significant Liability for Businesses

By: [Mitchell L. Fishberg](#) and [Catherine Moreton Gray](#)

Many companies utilize 1099 contractors to supplement traditional W-2 employee workforces. If done correctly, this can be a useful method for controlling labor costs and engaging needed expertise, especially in the construction industry, w the volume of work may not be consistent throughout the year. Some companies, however, either negligently or intentionally violate the law by misclassifying workers as contractors instead of employees. In light of such abuse, federal and state agencies have announced plans to crack down on such arrangements, stepping up enforcement and increasing penalties. As a result, the likelihood that employers paying individuals on a 1099 basis will be audited by either the federal or a state DOL agency has increased dramatically. *Click /FONT> to read full article.*

Reconsidering Spearin in the New World of BIM

By: [Alexandria Baez](#) and [Elizabeth K. Cunha](#)

The use of Building Information Modeling (BIM) throughout New England is on the rise. Its broad appeal lies in the potential to achieve time and cost savings through information exchange, collaboration, and coordination. Working with integrated models encourages owners, designers, and contractors, along with key consultants and trade contractors, to become cooperatively engaged in the design process from project infancy, a method sometimes referred to as Integrated Project Delivery (IPD). In contrast with traditional design-bid-build delivery, IPD invites the exchange and use of information within a collaborative environment. Ideally, this information-sharing process helps minimize project pitfalls such as errors, delays, and unanticipated changes. With BIM's growing acceptance and use in the regional construction industry, however, firms that invest in BIM tools and technologies must be cognizant of the risks associated with the blurring of traditional design and construction roles, and how those challenges may be avoided or otherwise managed through careful contract documentation. *Click /A> to read full article.*

Connecticut Lowers Limits on Retainage in Private Construction

By: [Martin A. Onorato](#)

On June 11, Governor M. Jodi Rell signed into law Public Act 10-148, lowering the maximum retainage on private construction from 7.5 percent to 5 percent. This measure received strong support from trade contractors' organizations, and was opposed by the banking industry, which warned that the reduction would make construction lending more risky and expensive. Despite the opposition, the bill passed the Legislature nearly unanimously. The revised law becomes effective on October 1, 2010.

This is the first reduction in the limit since Connecticut began limiting retainage on private construction contracts in 1999 with the passage of the so-called "Act Concerning Fairness in Financing in the Construction Industry." The retainage limit applies to all construction contracts and subcontracts on projects over \$25,000, excluding public works, HUD-funded projects, and residential buildings containing four units or less. Connecticut continues to require that private retainage be placed in escrow in an in-state bank.

FIRM NEWS & NOTES

At the Podium

Construction attorney [Gregory R. Faulkner](#) participated in a panel discussion during the Professional Women in Construction (PWC) program "Getting What You Bargained for in a Tough Economy." Mr. Faulkner and the rest of the PWC panel discussed legal and practical options to ensure payment and performance on construction projects. Founded in 1980, PWC is a nonprofit 501(c)3 organization committed to advancing professional, entrepreneurial, and

managerial opportunities for women and other nontraditional populations in construction and related industries.

Real estate attorney [Carla M. Moynihan](#) chaired a half-day panel presentation for Massachusetts Continuing Legal Education entitled Real Estate Development through Public-Private Partnerships. The presentation is available via webcast (<http://www.mcle.org/on-demand-programs/browse-on-demand-programs.cfm>).

Insurance and reinsurance attorneys [Rebecca Levy-Sachs](#) and [Deborah A. Vennos](#) recently presented a program on "Green Buildings and Insurance" at the Sustainability and Climate Change Breakfast Seminar sponsored by Robinson & Cole's Environmental and Utilities Practice Group. Approximately 40 clients, attorneys, and local government officials attended the 12th seminar in the series, which was simulcast in Hartford, Boston, Stamford, and New York. The program provided an overview of green building standards and green building codes, the insurance industry response to green building, recent green building endorsements offered by property and builders risk insurers energy efficiency, green building coverage availability under policy law and ordinance provisions, and hypothetical green adjustment issues. Jon C. Held, president of J.S. Held, Incorporated, a national construction consulting firm headquartered in New York, served on the panel.

Insurance and reinsurance attorneys [Gregory P. Varga](#) and [Deborah A. Vennos](#) presented "Chinese Drywall: The Next Asbestos or the Next Y2K?" at a recent meeting of the New England Claims Executives Association (NECEA). They discussed scientific principles and complex insurance coverage issues driving widespread litigation from allegedly defective Chinese drywall used in home construction. During the meeting, Mr. Varga was honored for his contributions to NECEA over the years as a speaker and panelist. NECEA was founded in 1930 to promote professionalism among claims people in New England.

Environmental attorney [Pamela K. Elkow](#) spoke at the Construction Institute's (CI) Regional Construction Forecast Series titled "I-95 Corridor Regional Construction Forecast: Positioning for the Future...What's happening next and why?" This program provided insight into the future of design, construction, and commercial real estate in Connecticut's Gold Coast Region. Ms. Elkow discussed the development of brownfields along the I-95 corridor. CI, a division of the University of Hartford, is a nonprofit, nonpartisan association of diverse professionals working to improve the construction industry by sharing experiences and knowledge, advancing relationships, and developing business leaders.

Construction attorney [Martin A. Onorato](#) chaired the May Roundtable of the Professional Practice Committee of the Connecticut Chapter of the American Institute of Architects on the topic of "The Business of BIM and IPD." He also joined the Industry Practices Committee of the Connecticut Building Congress to discuss how BIM impacts project delivery systems.

On March 11, 2010, Real estate attorney [Edward S. Hill](#) spoke at the Connecticut Bar Association's CLE Seminar on Condominium Documents and Practice under the Sweeping 2009 Amendments to the Common Interest Ownership Act. Mr. Hill spoke about requirements for public offering statements, resale certificates, and right-to-cure provisions regarding construction defects. He was a member of the Connecticut Law Revision Commission Study Group on the Amendments to the Common Interest Ownership Act that developed the changes to the act.

Tax and tax-exempt attorneys [Felicia S. Hoeniger](#) and [John R. Shaughnessy, Jr.](#), recently discussed several topics to members of the Institute for Professionals in Taxation in New Orleans, Louisiana. Ms. Hoeniger appeared at the Advanced Sales Tax Seminar, sponsored by the American Bar Association and the Institute for Professionals in Taxation, as part of a panel titled "The Definition of 'Is': Should Taxpayers Give Deference to Tax Agencies in the Interpretation of Tax Statutes—A Tax Administrator and Practitioner Debate on Current Issues." Mr. Shaughnessy spoke at the same seminar about "State and Local Tax Issues for Construction Contractors." He also spoke at the Advanced Property Tax Seminar, where he covered the Northeastern U.S. as part of a panel discussing current developments around the country.

Tax and tax-exempt attorneys [Felicia S. Hoeniger](#) and [John R. Shaughnessy, Jr.](#), also presented at the CBIA's 2010 Connecticut Tax Conference held in Farmington. Mr. Shaughnessy discussed the Application of Connecticut Sales and Use Tax to Construction Contractors with copresenter Paul Greenfield, Tax Unit Manager of the Department of Revenue Services. Ms. Hoeniger's topic

was Connecticut Tax Issues—An Overview for Property Developers and Managers. Her copresenter was Michael J. O'Sullivan of the State of Connecticut's Department of Revenue Services with a special thanks to Matt Nick.

Real estate attorney [Edward S. Hill](#) participated in a panel discussion at the 13th Annual Condominium/Homeowners Association Conference & Expo sponsored by the Connecticut Chapter of the Community Associations Institute on March 13, 2010. The panel consisted of common interest community lawyers that conducted a question and answer session for association officers and directors, and condominium managers, about condominium documentation and governance issues concerning recent changes in condominium law. Mr. Hill was a member of the Connecticut Law Revision Commission Study Group on the Amendments to the Common Interest Ownership Act that developed the changes to the act.

Construction chair [Dennis C. Cavanaugh](#) will moderate the "How to Keep Construction Arbitration from Running Wild and Becoming Just like Litigation," a program that will be held on the campus of Central Connecticut State University on September 29. The program will be cosponsored by the Connecticut Bar Association's Alternative Dispute Resolution Section.

Construction attorney [Gregory R. Faulkner](#) will present on the topic of sustainability at the 8th Annual Higher Education Real Estate Lawyers Conference, hosted by Princeton University on October 14 and 15, 2010.

Construction attorney [Keane E. Aures](#) spoke at the Connecticut Bar Association CLE Seminar on the Construction Law Updates for 2010 on May 14, 2010. Mr. Aures spoke of the various surety and bond law decisions handed down by the court of the State of Connecticut during 2009 and provided a general synopsis of surety and bond law for the program's attendees.

In Attendance

Robinson & Cole attorneys [Gregory R. Faulkner](#) and [Megan R. Naughton](#) attended the National Association of College and University Attorneys 50th Annual Conference, held June 27-30 in Washington, D.C.

Robinson & Cole attorneys [Carla M. Moynihan](#) and [Alexandria Baez](#) recently attended the New England Construction Industry's networking event held on April 29 at McFadden's in Providence.

Construction attorneys [Todd R. Regan](#), [Peter E. Strniste, Jr.](#), and [Alexandria Baez](#) attended the Construction Institute's 3rd Annual Member/Guest Spring Social, held at The Boathouse in Hartford on May 20.

Construction attorneys [Todd R. Regan](#) and [Peter E. Strniste, Jr.](#) participated in the 16th Annual van Zelm Golf Tournament held at the Tunxis Plantation Country Club on June 4.

Robinson & Cole attorneys [Martin A. Onorato](#), [Gregory R. Faulkner](#), [David M. Panico](#), and [Stephen W. Aronson](#) participated in the 21st Annual Danbury Hospital Cancer Golf Tournament held on June 8 at the Ridgewood Country Club.

Construction attorney [Alexandria Baez](#) recently attended the Associated General Contractors (AGC) of Massachusetts Annual Meeting, which celebrated the association's 75th anniversary. Begun by a group of contractors in 1935, the association has grown to one of the most active of the 96 chapters across the country, offering its members advocacy with legislative and regulatory agencies, management education, and safety training for the industry.

In Print

Construction chair [Dennis C. Cavanaugh](#) recently authored the Connecticut chapter in the book *A State-by-State Guide to Construction and Design Law: Current Statutes and Practices*, Second Edition. Mr. Cavanaugh's chapter provides a comprehensive review of Connecticut design and construction law and is a valuable resource for lawyers negotiating or reviewing construction or design contracts for projects outside their jurisdiction. The guide is published by the Real Property, Trust and Estate Law Section of the American Bar Association. Construction attorney [Martin A. Onorato](#) and associate [Keane E. Aures](#) assisted Mr. Cavanaugh with the drafting of this chapter.

Of Note

Construction attorney [Peter E. Strniste, Jr.](#), has been reelected to a third term as vice president of the Connecticut Surety Association, a chapter of the national Surety & Fidelity Association of America (SFAA). The SFAA is a trade association consisting of companies that collectively write the majority of surety and fidelity bonds in the United States. It also promotes preserving the use of fidelity and surety bonds to protect public and private interests. The Connecticut chapter is composed mostly of surety underwriters, bonding agents, and other construction professionals. Mr. Strniste has served on the executive board of this organization since 2004.

Construction attorney [Gregory R. Faulkner](#) was recently appointed as a commissioner to the Rocky Hill Planning and Zoning Commission for a two-year term. Mr. Faulkner previously served as an elected member of the Rocky Hill Zoning Board of Appeals for two separate terms. The Planning and Zoning Commission is the primary agency responsible for overseeing development with the town and must approve all new development prior to construction. The commission also has an educational role in which it serves to stimulate interest in planning. In addition, it performs a coordinator role in working with other public and private agencies to integrate the total governmental planning effort.

Construction attorney [Christopher J. Hug](#) has been elected to a two-year term as general chair of Connecticut Swimming, Inc., a nonprofit youth swimming organization and an affiliate of USA Swimming, Inc., the governing body for competitive swimming in the United States. Mr. Hug's term begins September 1, 2010. Connecticut Swimming, Inc. has more than 5,000 athlete members and more than 70 different clubs servicing the geographical area of Connecticut.

Construction chair [Dennis C. Cavanaugh](#) was named president-elect of the National Board of Directors of the University of Connecticut Alumni Association for the 2010 to 2011 term. According to association bylaws, Mr. Cavanaugh will become president in June 2011.

For more information, please contact Dennis C. Cavanaugh (dcavanaugh@rc.com).

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