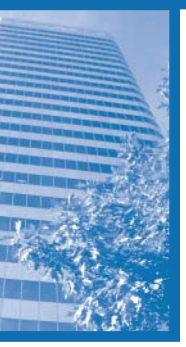
September
2010
Volume 2
Issue 3

BEAN KINNEY & KORMAN PC
ATTORNEYS



Construction and Land Use Newsletter

Inside This Issue:

Our Practice Areas:

BUSINESS & CORPORATE

- Appellate Practice
- Business Services
- Construction Law
- Copyright/Trademark
- Creditors' Rights
- Employment Law
- Government Contracts
- Immigration
- Land-Use, Zoning, & Local Government
- Landlord/Tenant
- Lending Services
- Litigation
- Mergers and Acquisitions
- Nonprofit Organizations
- Real Estate Services
- Title Insurance

INDIVIDUAL SERVICES

- Alternative Dispute Resolution
- Domestic Relations
- Negligence/Personal Injury
- Wealth Management & Asset Protection
- Wills, Trusts & Estates

Timothy R. Hughes Named "Leader in the Law" for 2010 by Virginia Lawyers Weekly

I am pleased to announce that I have been named a "Leader in the Law" by Virginia Lawyers Weekly for 2010. The list for 2010 includes some very well regarded and high caliber lawyers and it is quite humbling and gratifying to be included in such company. For further information, we have a more detailed announcement on our webpage at www. beankinney.com under Latest News.

Our firm is very proud to say that VLW has recognized three attorneys from Bean, Kinney & Korman in the last three years with this honor. Raighne Delaney received this recognition in 2009 and Carol Schrier-Polak was named in 2008. We believe this repeated recognition is a reflection of our firm's philosophy and dedication not just to our clients, but also to our community and the law as a whole.

Arbitration: An Effective Alternative to Litigation

by Juanita F. Ferguson, Esquire

Dispute resolution is an important, yet often overlooked term when parties enter into construction contracts. At the outset of a relationship between a contractor and a customer, there is often negotiation on the contract price, the start and end dates for construction, and the scope of work. The parties are less likely to give equal consideration to what happens when the parties' interests begin to diverge.

Consider the following scenario: The contractor and the customer enter into an agreement for the construction of a mixed-use building. They reach agreement on the scope of work to be provided by the contractor, the cost to complete the project, and the acts by either party that allow the other party to terminate the contract.

2300 Wilson Boulevard, 7th Floor, Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com

Arbitration: An Effective Alternative to Litigation
Continued from Page 1

There is a small provision that references dispute resolution. It states that all disputes must be resolved through arbitration. It is assumed that the parties read the provision prior to executing the agreement.

The project is expected to last six months. For the first five months of the project, the customer is satisfied with the progress of the project and the contractor's monthly invoices are paid in a timely manner. During the sixth and final month of the project, the customer begins to question the quality of construction and refuses to make final payment. The contractor has little leverage as the work is essentially complete. Despite numerous attempts on the part of the contractor to satisfy the customer's concerns, the customer refuses to make final payment. Frustrated at the turn of events, the contractor decides to sue for the remaining balance, only to learn later that the right to sue the customer does not exist. The dispute resolution provision of the contract states that resolution of disputes is governed by the rules of the American Arbitration Association ("AAA").

While the concept of arbitration may appear less familiar than having a judge or a jury resolve the dispute, it is nonetheless an effective, and potentially, less time-consuming alternative than traditional litigation. Once notified by the parties, the AAA acts quickly to set fees for the arbitration and to assist the parties with the selection of an arbitrator. Unlike a lawsuit, where the court assigns a judge to hear the matter, in an arbitration the parties get to review the qualifications of potential arbitrators and actually rank the list of arbitrators presented. Only in the event that the parties cannot reach an agreement on the selection of an arbitrator will the AAA select an arbitrator from a panel of arbitrators. The arbitrator is usually a practicing attorney or a retired judge with considerable experience with the type of case that is being arbitrated. Once selected, the arbitrator usually meets with the parties to discuss the exchange of relevant documents, the list of potential witnesses, and a timetable to conduct the arbitration. Usually, the parties are not allowed to communicate with the arbitrator directly and all communications with the AAA must be shared among the parties to prevent any unfair surprises to opposing parties. Depending upon the complexity of the matter, an arbitration can occur within a few weeks of the parties contacting the AAA. The length of the actual hearing can last one to several days, depending upon the number of issues to be resolved and the number of parties in the arbitration. After all of the evidence has been presented, the arbitrator makes an award. In most circumstances, the award cannot be challenged in court and the award is final. All fees for the arbitration, including the arbitrator's compensation, are paid equally by the parties, unless the arbitrator awards otherwise. Compared to traditional litigation which could keep the parties in court for several months, an arbitration is a fast-moving process that allows the parties to reach a resolution promptly.

This article is not intended to provide specific legal advice but, instead, as a general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice will depend on your facts and the laws of your jurisdiction.

Juanita Ferguson is an Associate with the law firm of Bean, Kinney & Korman in Arlington, Virginia. She can be reached by e-mail at jferguson@beankinney.com and by telephone at 703-525-4000, extension 343.

LEED for Neighborhood Development Hailed as Benchmark for Green Communities

by Ela K. Flynn, Paralegal, LEED AP

The Leadership in Energy and Environmental Design (LEED) for Neighborhood Development

LEED for Neighborhood Development Hailed as Benchmark for Green Communities
Continued from Page 2

rating system, launched on April 29, is intended to promote development around existing communities, transportation systems and other infrastructure in order to reduce the environmental impact of urban sprawl and decrease automobile dependence.

The rating system is the resulting effort of a coalition of the U.S. Green Building Council (USGBC), Natural Resources Defense Council (NRDC), and Congress for the New Urbanism (CNU). Smart growth, green building, and new urbanism are cited as the guiding principles of the new rating system. By focusing new development within existing communities and promoting community connectivity, Neighborhood Development conserves valuable land, places a greater emphasis on the efficiency of transportation and allows for greater pedestrian access, dubbed as "walkability."

Both the Environmental Protection Agency and the Department of Health and Human Services advocate the benefit of transit-oriented development in proximity to the location of jobs, services and other amenities. The benefit to human health is also well supported by numerous studies on the issue. Community connectivity to local transportation options, as well as local retail and other services also has a proven benefit to localized and regional economies.

The shift in emphasis contained within the Neighborhood Development rating system is not simply a question of where to build over how to build. The system's coalition of founding partners has set out a series of greater goals: by providing easier access to transportation and resources, healthier, safer communities and inclusive neighborhoods are created where people from all walks of life can live and work together.

This form of compact and complete design is the thrust of the New Urbanism movement and appears to be the antithesis to sprawl. Planners envision communities with a range of available types of housing, a dynamic mix of uses within close proximity to each other, pleasant open spaces, and well-planned, connected street systems which adequately meet the needs of pedestrians, cyclists, and transit and vehicle users alike.

LEED for Neighborhood Development projects may range from whole communities to much smaller projects. Due to the possible scale of projects within the rating system, projects are measured based on acreage – a departure from the other rating systems which are all based on square footage.

This rating system is considered by its proponents as a new benchmark for sustainable, green neighborhood design, with projects seeking certification having to achieve points under three principal categories: Smart Location and Linkage, Neighborhood Pattern & Design, and Green Infrastructure & Buildings. The rating system is scored across the new standardized 110 point scale.

In tandem with the launch of the new rating system earlier this year, the new LEED Accredited Professional (AP) Neighborhood Development (ND) credential for those engaged in the design and development of neighborhoods was also announced.

This article is not intended to provide specific legal advice but, instead, as a general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice will depend on your facts and the laws of your jurisdiction.

Ela K. Flynn is a paralegal with the law firm of Bean, Kinney & Korman in Arlington, Virginia. She can be reached by email at eflynn@beankinney.com and by telephone at (703) 525-4000, extension 332.

BEAN KINNEY & KORMAN PC
ATTORNEYS

Case Summary: Stop The Beach Renourishment, Inc. v. Florida Department of Environmental Protection

by Heidi Meinzer, Esquire, LEED AP

Over 2,000 miles of shoreline and 825 miles of beaches make Florida the state with the most oceanfront real estate, defining Florida's most lucrative industry – tourism. But Florida's tourism industry faces constant challenges due to the ongoing natural erosion of Florida's valuable beaches.

Understandably, Florida has embraced the "public trust doctrine," dictating that tidal lands are held in trust for the people of Florida. The boundary between tidal lands and private properties lies traditionally at the "mean high water line" ("MHWL"). The MHWL may move inland due to erosion or seaward when land forms gradually, through the process of "accretion." But the MHWL will not change due to avulsion, which involves sudden shifts of the shoreline, including changes due to human intervention.

Recognizing the need to protect Florida's beaches, Florida's legislature enacted the Beach and Shore Preservation Act ("BSPA") in 1965. An estimated 200 miles of beaches have been restored as a result. In 1970, an amendment to the BSPA redefined the boundary for restoration projects as the "erosion control line" in an effort to avoid constantly shifting boundaries due to coastal dynamics. Under the BSPA, the state would relocate sand to a restoration area in order to create a buffer of "sacrificial sand" meant to protect the beaches and abutting private properties.

In an effort to focus on an area of Florida's coast devastated by recent hurricanes and storm damage, Florida planned to restore approximately seven miles of beach in Walton County, located in Florida's panhandle. Florida planned to spend $15 million on this project, with the majority of costs coming from local community contributions. What resulted was a fierce legal battle from private landowners against the state and local government officials.

Government officials argued that the restoration project protected against storm damage and erosion control without depriving private landowners of their property rights. By contrast, private landowners saw a "land grab" in which the government dumped sand in their backyards to artificially create a public beach, thereby eliminating their right to continuous and direct contact with the water and any possibility of gaining land through accretion.

The Florida Supreme Court sided with the government, concluding that the State had a constitutional duty to protect Florida's beaches by reasonably balancing public and private interests. The Court also found that the landowners had no property rights to the new narrow strip of dry sand, and as a result, had no basis to demand compensation. The landowners continued their legal battle by appealing to the United States Supreme Court, arguing that the Florida Supreme Court's decision amounted to a "judicial taking."

The United States Supreme Court affirmed the Florida court's decision in a unanimous 8-0 opinion, but the opinion was far from unanimous about the concept of a "judicial taking." Justice Scalia, writing for Justices Thomas, Roberts and Alito, concluded that there could be such a thing as a "judicial taking" if "a court declares that what was once an established right of private property no longer exists." However, those justices concluded that the Florida Supreme Court decision did nothing to abolish property rights, and merely clarified that the landowners' property rights were not implicated by the project due to the doctrine of avulsion. Basically, Florida law allowed the State to fill in its own seabed, and the State still owned the suddenly exposed land, even though the State itself caused the avulsion.

The remaining Justices agreed that the Florida decision did not result in a termination of the landowner's private

Case Summary: Stop The Beach Renourishment, Inc. v. Florida Department of Environmental Protection
Continued from Page 4

property rights, but refused to go as far in their analysis of a "judicial taking." Justices Kennedy and Sotomayor suggested that if a true "judicial taking" case were to come along, the Court could tackle the issue at that time, and should look to the Due Process Clause, requiring the government to give landowners notice of the government's plans and an opportunity to be heard.

Justices Breyer and Ginsburg completely sidestepped the issue of a "judicial taking" test, preferring to leave the determination of when a federal court can review whether a state court decision has amounted to a taking for "another day." Unlike Justices Kennedy and Sotomayor, Justices Breyer and Ginsburg did not hint about the kind of "judicial taking" test they would prefer.

The looming question is what impact this case may have on the massive clean up operations after the BP oil spill crisis. Perhaps there was no better time for the Court to re-affirm the government's right to protect its beaches.

This article is not intended to provide specific legal advice but, instead, as a general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice will depend on your facts and the laws of your jurisdiction.

Heidi Meinzer is an shareholder with the law firm of Bean, Kinney & Korman in Arlington, Virginia. She can be reached by e-mail at hmeinzer@beankinney.com and by telephone at 703-525-4000, extension 348. Heidi is also an editor for the firm's blog which at www.valanduseconstructionlaw.com.

EPA Storm Water Regulations – Potential Impediment to Development

by Timothy R. Hughes, Esquire, LEED AP

The Environmental Protection Agency is in the process of developing proposed national rulemaking to strengthen its storm water program. The proposed rulemaking announcement in the Federal Register on Dec. 28, 2009 could dramatically alter the playing field for development of all types. This is particularly true in the D.C. region given its placement in the Chesapeake Bay watershed. The EPA recently proposed sediment limits for the Chesapeake Bay in addition to previously issued limits for nitrogen and phosphorous.

The Commonwealth of Virginia's efforts to regulate storm water run-off were tabled after industry pushback and in the wake of the election of Gov. Bob McDonnell. EPA's efforts appear to go far beyond the limited regulatory changes proposed and dropped by Virginia. The National Association of Home Builders has quoted, and Associated Builders and Contractors has supported, an estimate of up to $10 billion in cost annually to meet the overall national regulations as proposed by EPA.

On August 13, 2010, EPA was forced to withdraw a portion of its proposed storm water management regulations in the context of a pending court challenge by NAHB and other parties. In the pending appeal to the United States Court of Appeals for the Seventh Circuit, the EPA filed an unopposed motion to vacate part of its final rule regarding "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category."

The rule proposed to establish a numeric effluent limitation on pollutants from construction and development. The rule limited turbidity to an average daily level of 280 "nephelometric turbidity units" (NTUs). EPA concedes in its motion that, "[T]he Agency has concluded that it improperly interpreted

Contact Us
2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com

EPA Storm Water Regulations - Potential Impediment to Development
Continued from Page 5

the data and, as a result, the calculations in the existing administrative record are no longer adequate to support...” the rule.

By agreement, the motion requested that the case be held in abeyance for 18 months until February 15, 2010, to allow EPA to address the flaw. It will be quite interesting to see whether the partial retreat by EPA sets off a chain reaction of challenges or delays in other aspects of the pending regulations.

This article is not intended to provide specific legal advice but, instead, as a general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice will depend on your facts and the laws of your jurisdiction.

Tim Hughes is a construction and business lawyer and is a LEED Accredited Professional. He is Of Counsel to the law firm of Bean, Kinney & Korman in Arlington, Virginia, www.beankinney.com. He is the Lead Editor of the firm's blog which is located at www.valanduseconstructionlaw.com and may be reached by email at thughes@beankinney.com and by telephone at (703) 525-4000, extension 162.

BEAN KINNEY & KORMAN P.C.
ATTORNEYS

2300 Wilson Boulevard, 7th Floor
Arlington, VA 22201

GETTING IT DONE®