April
2010
Volume 2
Issue 2

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ATTORNEYS

Construction and Land Use Newsletter

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GBCI To Pull LEED Certifications Back In-House

by Timothy Hughes, Esquire

In 2008, the United States Green Building Council (USGBC) announced it was planning to shift its internally-run certification of buildings to independent certifiers administered by a sister non-profit, the Green Building Certification Institute (GBCI).

The outsourcing to GBCI and third party certifications was initially described as adding greater independence. Commentators also discussed the potential for removal of conflicts of interest, first with the initial transfer of testing and accreditation from USGBC to GBCI a year prior to the transfer of certifications. Last year, USGBC faced reports of significant delays in the certification process. Most notably, Vandana Sinha of the Washington Business Journal reported in May 2009 on, "a backlog of hundreds of LEED certification requests that has stretched processing periods from what should be five weeks to closer to five months." USGBC touted that the new shift to GBCI, coupled with extensive additional managed third party reviewers, would wipe out the backlog by June 26. As detailed in our article for Building Washington, Volume 24, No. 3, "Green Overgrowth", review times were still estimated by USGBC staff at twelve weeks in August 2009.

We had not heard much anecdotal grumbling over review times in the last few months. GBCI staff informed us that review times generally are within the estimates of 25 business days for preliminary construction phase reviews and 15 business days for final construction reviews. Assuming this is true, it appears that the backlog has been worked off. How much is due to efficient administration as opposed to an evaporating construction pipeline due to the tanking construction economy is a valid question.

It is against this historic backdrop that we must view the casual bombshell dropped by Stuart Kaplow, Chair of USGBC Maryland during the USGBC - NCR event on March 17 of this year that USGBC was taking steps to bring the LEED certification process back in house to USGBC. Mr. Kaplow described some specific struggles and frustrations with the certification process in the wake of GBCI administration where credits were misinterpreted by reviewers and historic positions were ignored during the process. After posting this on our blog, Virginia Real Estate, Land Use and Construction Law, GBCI

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provided a very intriguing official response. The full language is in the comments section of our blog post, but the relevant first paragraph reply states:

There has been some misunderstanding about recent process changes at GBCI, the third party that provides certification for LEED projects. GBCI is bringing the technical review of project documentation in house over the next two years rather than continuing to manage the process exclusively through other certification bodies. This move will allow us to have closer technical oversight of reviews and more direct communication with our customers to ensure consistency and clarity throughout the process. This doesn't change anything project teams are doing now.

We appreciate the comment and clarification, as well as the delicious nuance this adds to the discussion. It appears that:

1. The plan is not to transfer control back to USGBC from GBCI for the LEED certifications as initially stated by Mr. Kaplow; however,

2. It appears there are in fact substantive and substantial changes anticipated to the current certification regime;

3. GBCI in fact is taking at least some level of technical review back "in house";

4. I am struck in particular by the "ensure consistency and clarity throughout the process" language ... that suggests that process changes were needed to reign in and create consistency amongst the various third party outside bodies. While the detail is shifted a bit, that clearly fits with Mr. Kaplow's description of process and credit review issues.

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"Please pull up to the first window."
by Frederick Taylor, Esquire

Far be it for a lawyer to bite the hand of the system that feeds him, but the issue of whether jurisdictions should regulate drive-through windows is worth discussing.

Drive-through windows have been around before the Golden Arches and as long as there are automobiles, there will be a demand for them. That demand sometimes emanates from the business operator, sometimes from the customer and most times from both. Local jurisdictions have a tendency to scrutinize and regulate the issue of drive-throughs and this article looks at whether such scrutiny is justified and whether the effort is worth the jurisdiction's time and resources, not to mention the taxpayer's dollars.

The land use representation associated with drive-through windows, at times, seems disproportionate with the result, but our experience is that everyone is happy with the positive result. Why is this? The answer probably depends on the use. The primary users of drive-throughs are fast food establishments, banks and pharmacies. But if you look hard and far enough, you'll find drive throughs for almost anything: beer stores along the North Carolina coast and even a peep show in Pennsylvania. Like most regulated uses, jurisdictional control coincided with the burgeoning popularity of a particular use. The first McDonald's drive-through was not regulated, but as more and more appeared, so did associated controls. It was only after an explosion of drive through uses that the controls came to be. Uses became victims of their own success.

Fast food restaurants realized that seventy five percent of its sales were generated out of the ten percent of the space that windows took up. The business model changed, and almost every fast food restaurant looking for a new site conditioned its lease or purchase on the ability to operate a drive-through window. Banks and pharmacies followed with a demand upon sellers or landlords for window capability. Bank

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customers did not want to leave their car to make a simple deposit. Pharmacy patrons did not want to come into the store to pick up a prescription. Unlike fast food, banks and pharmacies demand for drive-throughs came from a different paradigm: fast food drive-through was driven by the realization that demand could be multiplied and investment could be leveraged though a little window. Banks and pharmacies responded to customer demand and the reality of competition: if your competition offered the convenience, you had no choice but to match it.

The basic issue of regulation is much more based on a question of traffic generation than it is of some perceived nuisance. The problem is that all drive-through uses have been painted with the same brush and they should not be. One size does not and should not fit all. A fast food restaurant generates multiples more traffic than a bank or pharmacy, but these latter uses are viewed and regulated from a perspective of fast food. In one jurisdiction, the local Burger King was set as the exemplar of what should be required and regulated by the governing body before approving any drive-through us! Stacking (the number of cars in line, waiting for the window) requirements for all uses, including the less traffic intense bank and pharmacy, utilize outdated standards based on fast food requirements. Have you ever seen a line of cars at a pharmacy rival that of a fast food operation? For that matter, how often have you seen any line at a pharmacy window? Do you do some of your banking on-line? This would clearly result in a reduced need to visit a bank at all, let alone a teller window. Nonetheless, stacking requirements have not changed from the impervious pavement-friendly days of the '70s, when everyone had to walk or drive to a bank.

If times have changed, why haven't the regulations? There probably are a few answers:

Governmental disdain for automobile related uses.

The automobile is not evil. It's a convenience for most, a necessity for some. We don't live in Manhattan, but some jurisdictions may sometimes think that way. In a zoning world where we were used to having to convince the nearby residents that an "automobile oriented use" was not an intrusion into their lives, we now find circumstances where the citizens feel that their government has been overly exclusive of such uses at the citizens expense and those citizens often speak at public hearings in favor of such uses.

Governmental desire to maintain control over the development process.

Some time ago, one of the major jurisdictions was considering changing bank and pharmacy drive through uses to uses 'by right' as part of a general overhaul of the zoning ordinance. The revised ordinance was advertised, hearings were held and there appeared to be no opposition to the revision. But, at the time the revised zoning ordinance was presented to the Board of Supervisors, the provision relating to drive-throughs had been deleted. The word on the street was that, in the interim, one of the supervisors had been offended by what was felt to be a reneging on the part of a developer to do some conditional landscaping associated with a drive-through use. The supervisor was able to compel the work to be done because it was part of a development condition associated with a special exception and felt that if the special exception process was eliminated, that ability to control would be diminished.

Perception that automobile related uses will interfere with long range development plans or "visions".

The tension between improving the present and providing for the future exists in most land use cases. But that tension is more than one between time; it is often one between reality and possibility. Land use history is full of plans that come and go. The ones that stay can be good. The ones that don't can be an unnecessary temporary impediment to the general improvement of an area. Sometimes what local citizens view as welcome reinvestment in a declining area is not welcomed by planners because those improvements take the pressure off to change the area dramatically.

Opportunity for extractions.

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If a use is a use 'by right', the developer is only constrained by normal setback and height requirements, building codes and the like. If a use requires a special exception, the jurisdiction can require transportation improvements, control signage beyond what is actually required by code, and control architecture and many other design elements. The jurisdiction can extract fees or "contributions" to various funds with a questionable nexus to the requested use.

A typical land use application for a drive through use takes the better part of a year before the public hearing process is concluded. Filing fees have increased significantly in various jurisdictions, but not to the point that the fees cover the real cost to a jurisdiction for reviewing and processing an application. It is common for the prosecution of a drive-through use to require one hundred to two hundred attorney hours and an amount of civil engineering approaching that required for a full rezoning effort.

So what is the answer, or what is a proper balance? Loudoun County revised its zoning ordinance to allow up to two drive-throughs for a bank without going through the entire process. This requires a user to think hard and long about whether those one or two extra lanes are really worth the effort. It also gives the user an opportunity to operate the business and, if he is right, go back to the jurisdiction in a year or two and request the expansion of the use because it has operated uneventfully and not negatively impacted the area. A variation on that theme would be to follow the tempered Loudoun alternative, but also impose additional development standards directed at the perceived impact of automobile related uses, thereby controlling the use by site plan rather than public hearing.

It seems that there are solutions to the expensive, time consuming process. But, it is a matter of whether the jurisdictions are willing to strike a balance of their own. They need to remove some of the use from the public arena and delegate some of the public (read that as political) oversight to the technical staff. It's a nice idea, but I suspect that I will continue to be busy doing what I have been doing.

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Chinese Drywall Verdict and the Economic Loss Rule

by Timothy R. Hughes, Esquire

On April 8, 2010, seven Virginia families were awarded $2.6 million in damages by New Orleans federal Judge Eldon Fallon in the pending Chinese Drywall class action litigation. The very significant verdict permitted recovery of extensive elements of the claimed damages and made some potentially damaging factual findings. Taking a deeper look at the case highlights the critical importance of understanding applicable law. Crossing a border from one state to a neighboring one can have a tremendous potential impact on the legal landscape, rights and risks that attach to a construction project.

Findings of Fact and Reaction to Damages Claims

The judge's opinion contains a number of interesting points and findings that are worth highlighting:

1. The case was tried by default against the defendants. A number of other interested parties initially intervened, then dropped back out of the case.
2. The case issued extensive scientific findings regarding problems with Chinese drywall; time will tell how much portability this court's factual findings have, particularly in light of the empty defense table. The court's opinion suggests there was defense expert information presented for consideration by the intervenors.
3. The plaintiffs were able to convince the court that the drywall caused their home to be classified as a "severe industrial corrosive environment".

With respect to the damage claims, the court ordered

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that all drywall needed to be removed even in homes with mixed Chinese and non-Chinese drywall. The court required complete removal and replacement of all electrical wire, copper piping, HVAC units, and extensive numbers of electrical equipment and appliances needed to be removed and replaced. All carpet, hardwood flooring, counter-tops, bathroom fixtures, trim, insulation, and cabinets also needed to be replaced. The remediation scope included post remediation, HEPA filtering and independent testing and certification is required. The court analyzed each home owner's situation and awarded damages for repair costs, loss of personal property, economic losses caused by the disruption (such as foreclosure and bankruptcies), alternative living arrangements, and loss of use of the homes and personal property. The court found that loss of value damages were speculative.

Thoughts on the Economic Loss Rule Application in Virginia

In Virginia, you generally need a contract to recover disappointed economic expectations, or "economic losses". The home owners purchased a single unitary home from various builders and claimed that one part of the home (the drywall) damaged others (piping, wiring, HVAC, etc). There is a strong argument the home owner property damage claims would be barred by the seminal Virginia economic loss rule case, *Sensenbrenner v. Rust*, *Orling & Neale*. In *Sensenbrenner,* a pool leaked and damaged the foundation of a home. The court found that because the owner had the home and pool built as part of a single contract, one part of the project damaging another constituted economic loss. Recovery thus required privity of contract.

The remaining theories of recovery against remote manufacturers would be for breach of warranties under the Uniform Commercial Code (UCC). The next layer of analysis would be to evaluate whether the repair costs claimed are direct damages or whether they were consequential damages requiring privity of contract that are thus barred. In products liability construction cases, this has often meant that plaintiffs are limited to recovering the statutory damages under the UCC which is the difference of the value of the product as warranted versus as delivered.

Reading the court's opinion issued last week in the drywall case, the court never discussed any of these issues. The court discusses Virginia law, property damage, and recoverable measures of damages for property damages at length. The economic loss rule is never mentioned, nor is the Sensenbrenner case, nor is the UCC line of cases on direct versus consequential damages. This case may have turned out very differently if tried in a Virginia court.

The Importance of the Applicable State

Virginia is very conservative when it comes to questions of tort liability and the economic loss rule. Its neighbors might look at the Chinese drywall litigation very differently. For example, while Maryland generally applies a restrictive view on suing people without contracts, there is an exception where the case involves allegations of a threat of serious personal injury or death. While the personal injury elements of the Chinese drywall situation have been debated, there is an argument that the various corrosive chemicals released pose a risk of personal injuries which might permit such a claim to survive under Maryland law. A trip across Virginia's southern border into North Carolina by comparison is travel to a land where all bets are off, the economic loss rule basically does not apply, and the parties are far freer to raise claims against each other.

Conclusion

The Virginia plaintiffs scored a big victory on many fronts on April 8th, but getting paid may be a far different story. The result and the opinion issued by the court raise questions about whether the case would have turned out the same in Virginia. Finally, all players in the construction industry need to understand the laws that apply to their projects, and in particular who can sue whom for what. A failure to understand this most basic question can be a recipe for disaster when entering into contracts relating to construction

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projects.

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