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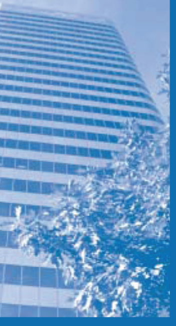
Construction and Land Use Newsletter



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The Benefits of LEDs

by Jonathan C. Kinney, Esquire

LED is not a misspelling of LEED, but rather an integral part of energy efficiency and environmental stewardship. LED stands for Light Emitting Diodes. Unlike your current light bulb, which is heated by electricity, with an LED light, electrical current is converted directly into protons of light. By 2020, LED lighting will be standard, with all new commercial and multi-family residential development expected to embrace this technology.

The reason for this is explained in part due to governmental requirements. The United States is phasing out the incandescent bulb in 2012. Local jurisdictions are currently experimenting with LED street lights: Arlington, for example, recently purchased 80 LED street lights on a trial basis. New site plans are likely to see this as a requirement or "proffer" – LED lighting is seen as a community benefit.

The other reason is probably more appealing to landlords and property owners. LEDs produced in 2010 are 8 to 10 times more energy efficient than the standard incandescent bulb and twice as efficient as compact florescent bulbs. LED bulbs have a lifespan of 10+ years. While LED bulbs may now cost 10 times more than an incandescent bulb, they also last over 10 times as long.

Then there is Haitz's law. Named after the scientist, Roland Haitz, this law predicts that the performance of LEDs – i.e. the amount of light that can be produced per diode – increases 20 fold every ten years, while the cost of the LED lightbulb

The Benefit of LEDs
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decreases ten-fold. If this is the case, the argument for LED light bulbs and lighting becomes extremely attractive. The cost of a LED light bulb is on a downward trend. Even at its current $35.00 cost, the payback is three year's in energy costs if your lights are on 12 hours a day.

Walmart is already in the process of converting all of its retail outlets to LED lighting. Their larger retail LED lights cost around $100 each but there are still substantial savings due to the hours the lights are on in a regular retail operation – not to mention the savings in maintenance costs of replacing light bulbs.

Property owners should consider getting ahead of the curve with LEDs. There are at least two good reasons for considering LED lighting now. One, the PR value of "going green." Tenants and employees respond positively to efforts by the landlord to make their building more green. Two, savings. The price of LED lighting is coming down. It is much more energy efficient than your existing lighting. Although the pay back savings differs in each situation, LED lighting is financially accretive to the bottom line. If Haitz's law is correct, costs will continue to come down and efficiencies are going to continue to increase.

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Renovators Beware: Lead Paint Regulations Due to Change in April

by Timothy R. Hughes, Esquire

Owners, developers and builders working in the renovation business beware: the Environmental Protection Agency's (EPA) new regulations on lead paint take effect on April 22, 2010. The new regulations, contained in Title 40, Part 745 of the Code of Federal Regulations, are the result of a 2008 decision by the EPA to take measures to protect against the risks of lead paint particulate disturbed by common renovation practices such as sanding and demolition.

Under the new rules, contractors performing renovation, repair and painting projects in homes, schools and daycare facilities constructed prior to 1978 must follow accepted work standards and must obtain certification prior to the commencement of the project. Even relatively minor work is swept up in the requirements. Generally, work disrupting more than 6 square feet of painted area is regulated (40 CFR 745.80, 745.83). There are only very limited exceptions to this rule, such as where a certified inspector has determined that the project site is free from lead paint beyond permitted levels (40 CFR 745.82). Project sites which have no occupancy by children or pregnant women occupancy can also qualify for exclusion, but only if the owner signs off that the contractor is not required

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to meet the accepted regulatory practices (40 CFR 745.82).

The new standards fall into three main areas: 1) standards for renovation activities; 2) standards for post-renovation cleaning verification; and 3) optional dust clearance testing. Each arena contains highly detailed regulations.

With the introduction of these new standards, contractors should be mindful of their insurance coverage in light of potential employee personal injury claims and OSHA inspections and violations as well (40 CFR 745.85). In addition to the new standards regarding actual work, contractors performing renovations have extensive obligations to provide disclosure and notice to building occupants in writing prior to commencing work (40 CFR 745.84). This includes the provision of mandated EPA publications, such as Renovate Right, provision of which is already expressly required by the EPA rules (40 CFR 745.81).

On a final note, the EPA has established an entire training and certification regime. In a down economy, this may be a good area in which contractors can focus their expertise in order to improve marketability and distinguish themselves from the rest of the pack.

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Pad Site Developers: Beware of Hidden Risks When Bonding Projects

by Lori K. Murphy, Esquire and Amy Bruno, Paralegal

Developers are accustomed to submitting several types of bonds to guarantee that they will develop a project as approved by a local jurisdiction. The local jurisdictions in Northern Virginia often require our developer clients to submit construction performance bonds, erosion and soil control bonds and landscape bonds. Additionally, VDOT will require its own bonds. Due to the different requirements in the several Northern Virginia jurisdictions, the bonding process can be quite burdensome. Thus, working with knowledgeable attorneys and engineers can often expedite the process and decrease the associated costs.

Although smaller bonds may easily be satisfied by a client putting up its own cash, most bonds are satisfied by obtaining either a corporate surety or a letter of credit. It is important to realize that there is no state-wide uniform standard for bonding projects. Each jurisdiction maintains its own requirements. For example, Fairfax County requires that a surety be issued from a company that has been rated as Class A VI or better in the Key Best Rating Guide. Prince William County requires a Key Best rating of Class A XV or higher and Arlington County does not have a minimum requirement for surety companies.

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Likewise, each jurisdiction also has varying standards for letters of credit. For example, for financial institutions, it is important to determine whether the local jurisdiction will allow the institution to issue its own letter of credit. Some jurisdictions allow this and this can save a lot of time and money in securing the bond.

As construction progresses on a project it may be necessary for the developer to file for bond reductions and/or extensions. Knowledge of these often-complicated procedures can also help reduce the associated cost of bonding. For example, bond amounts are established by using the jurisdictions' unit price list. When a bond reduction is requested, the new bond amount is determined using the most up-to-date unit price list. If, since the original bond amount was established, the unit price list has been updated to account for inflation, a reduction request may have the unintended result in an increased bond amount even though only a portion of the project is now being bonded.

It is also important to understand how to assist developers to get "off bond" or to have the bond released and cancelled. Once a developer is off bond, the developer can stop paying annual bond insurance fees. If the developer posted a cash bond rather than a surety bond, then once a developer is off bond, it will receive a return of its cash bond (i.e., a return of its cash that was formerly deposited with the local jurisdiction).

We have seen a few hiccups over the years. For example, Prince William County formerly had a policy that impacted pad-site developers. Even if a pad site developer completed all improvements to satisfy its bond obligations, the County would require that the bond be maintained until the shopping center owner had completed its bond obligations. This policy extended to pad sites located in shopping centers that may have been approved and developed years ago. Thus, during the lease negotiations between a pad-site developer and a shopping center landlord, it would be wise to require the landlord to ensure its land use approvals or bond process does not impact the pad-site tenant. For example, a lease may provide that the landlord's own bonding status may not unreasonably interfere with the developer's bonding status such that the landlord would agree to complete the usually minor requirements to get off bond itself in order for the developer to get off bond.

As the real estate market tightens and as projects are put on hold, it is possible that some developers will go into default and cannot finish bonded improvements. Prince William County recently addressed this scenario when the Board of County Supervisors adopted revisions to its bond requirements that significantly relax standards if a developer finds itself in this unfortunate situation (these relaxed standards will also appeal to banks who take back projects whose loans are in default). Although the County's action is welcome among developers, developers need to be aware of the recent change to state

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law which is also intended to address the housing crisis. Va. Code Sec. 15.2-2209.1. That law requires the localities to extend the approvals of certain land use approvals until July 1, 2014 or longer if the locality agrees. Also, state law requires bonds to be extended throughout this period of time. Thus, it is important for a developer who is unable to complete improvements to speak with the locality about extending approval dates for certain types of developments and to address continuing bonding obligations. Also, our office will assist you with your bonding matters throughout the term of a project.

For more information please contact Lori Murphy at (703) 525-4000 or lmurphy@beankinney.com.

Case Note: Local Contractor Shells Out Cash To Settle Wages Class Action Suit

by Timothy R. Hughes, Esquire

Rockville based contractor, Hann & Hann, will pay $600,000 plus the plaintiffs' legal fees to settle a wage and overtime based class action suit. As reported in the Washington Post by Rubin Castaneda on January 30, 2010, Hann & Hann agreed to pay overtime plus 50% for every employee working with the company who was not paid overtime between May 8, 2006 and May 8, 2008.

There are a couple of very important lessons learned from this case. First, reports describe the 200-plus employees and former employees as almost all Spanish speaking immigrants. This naturally raises questions of whether the contractor was perceived as taking advantage of employees less able to defend themselves. In this case, the employees not only had the Immigrant and Refugee Rights Project at the Washington Lawyers' Committee for Civil Rights and Urban Affairs on the case, but also the firm of Arnold and Porter, who represented the employees pro bono.

Second, claims by employees for unpaid overtime and wages have been a hot topic over the last several years. Back wages, penalties and attorneys' fee claims are a big risk in this arena, as is the underlying threat of more involved scrutiny as the weight of the government comes to bear. Contractors should:

- Take employee classification seriously
- Understand that mistakes in classifications can translate to serious damages
- The short term benefit of cutting corners can come at a cost that buries your company
- As a result, handle classifications conservatively and pay out overtime accordingly

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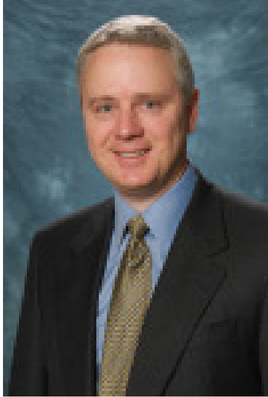

David C. Hannah is a Shareholder with the firm. His practice concentration is in all aspects of real estate law, including acquisition, development, construction, lending/finance, leasing and land use.

Mr. Hannah is a LEED Accredited Professional with knowledge of the law as it relates to the design, construction and operation of green buildings. In addition, he has extensive experience in counseling business owners on entity formation and governance and providing gen eral business guidance. Because of his prior entrepreneurial experience as a senior executive in an international real estate development and construction management enterprise, Mr. Hannah combines in-depth legal expertise with an understanding of the practical business issues faced by his clients.

Mr. Hannah holds an undergraduate degree from Rollins College in Winter Park, Florida and a law degree from the George Mason University School of Law in Arlington, Virginia, where he was a member of the Law Review. He is admitted to practice in the Commonwealth of Virginia. Mr. Hannah can be reached at dhannah@beankinney.com.

This newsletter was prepared by Bean, Kinney & Korman, P.C. as a service to clients and friends of the firm. The purpose of this newsletter is to provide a general review of current issues. It is not intended as a source of specific legal advice. © Bean, Kinney & Korman, P.C. 2009.

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