

Construction Law

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Chair's Report

by John Evans – John Evans Law, PLLC

First of all, thanks to those of you who were able to brave heavy traffic and blustery weather to attend the October 29 presentation on Seattle's Town Hall. For those unable to attend, it was interesting to learn from Scott Redman, the president of Sellen Construction; Weinstein Architects and Urban Developers; and Town Hall director Wier Harman about the renovation plans and challenges in preserving this historic Seattle landmark.

SAVE THE DATE

The Section is proud to announce its

Third Annual Dinner Meeting and CLE

Thursday, February 25, 2016

Cutter's Crabhouse

2001 Western Ave., Seattle, WA

5:30 to 8:30 p.m.

The event will feature a hosted reception followed by dinner and a CLE presentation (approval pending for one hour of CLE credit).

The presentation will be by **Mike Purdy**. Mike is the former contracting manager at three major public agencies: the City of Seattle, the Seattle Housing Authority, and the University of Washington. Many of you know him as the insightful and prolific author of Mike Purdy's Public Contacting Blog. Although he recently closed that blog, he continues to publish the Presidential History Blog (www.PresidentialHistory.com) that enables him to pursue his other major interest.

Combining his construction expertise and his interest in presidential history, Mike has prepared an informative and entertaining talk and slide show entitled "**Barely Avoiding Disaster: Lessons Learned from the White House Reconstruction Project during Harry Truman's Presidency.**" In the late 1940's the White House was unsafe and was virtually falling apart – sagging plaster ceilings, cracked walls, old and brittle beams, "floors that sagged and sloped like a roller coaster." Concerns for the president's safety spurred a major design and reconstruction effort in a public works project that was beset with problems and issues familiar to all of us who practice in this area – project management, cost overruns, schedule delays, quality control, etc. Mike will provide the fascinating details of this little-known project and will conclude with lessons learned that are applicable

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2015 Fall Forum; Seattle Town Hall Renovation Project: Recap

by Roy Lundin – Oseran, Hahn, Spring, Straight & Watts PS

This year's Fall Forum was a tour of Seattle's Town Hall and a presentation on the upcoming \$30 million renovation of the building. Town Hall is a non-profit organization founded in 1999 and located on Eighth and Seneca next to Virginia Mason on the west side of Seattle's First Hill neighborhood. The building is a Greek-revival, historical landmark constructed by the Fourth Church of Christ, Scientist, from 1916 to 1922. The center and its 90 community partners offer a wide range of concerts, lectures, meetings, programs, gatherings, and performances involving music, humanities, civic discourse, and other cultural events. All in all, the center hosts over 400 events each year.

Representatives from Town Hall; the architect, Weinstein A+U; the construction manager, Point 32; and the general contractor, Sellen Construction, were on hand to talk about the mission and work of Town Hall, the history and construction of the existing building, the features and elements of the renovation design, and the scope and anticipated challenges of the construction work. The project is scheduled to start June 2016 and will include restoration of key historic features; a copper roof for the building's prominent dome; structural upgrades and seismic retrofitting to be largely installed behind existing finishes and surfaces and ultimately hidden from view; extensive remodeling; accessibility upgrades; new mechanical, electrical, and plumbing systems; central-

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today to any major public works project. You will not want to miss this talk.

Look for details and a notice from the Bar Association in early February to sign up. We anticipate the cost will be only \$50 or so, a great value. Space will be limited and last year we reached capacity quickly. So save the date now. We hope to see you there.

We will be holding our annual "Construction 101" CLE in the Vancouver/Portland area during the spring and expect the format to follow last year's Bellingham and 2014's Spokane events. The goal of this rotating event is to present information regarding construction legal issues to members of the Bar throughout the state since so many of our Section events are located in Seattle. Please watch for further details.

Lastly our all-day midyear meeting and CLE will be held in Seattle on June 10 at the new WSBA conference center in the Puget Sound Plaza at Fourth and Union. In addition to our annual case law and legislative updates, we will have a lunch-time presentation by King County Superior Court judges regarding the do's and don'ts of trying a construction case. This year's theme is construction dispute damages and as always there will be an hour of ethics credit.

2015 FALL FORUM; SEATTLE TOWN HALL RENOVATION PROJECT: RECAP from previous page

ized restrooms, and state-of-the-art upgrades to the facility's lighting, audiovisual, and acoustical systems.

After the presentation, the project team walked the group through the Great Hall and the Downstairs. The Great Hall is a magnificent, amphitheater-style space with stained-glass windows, a thrust stage, vaulted ceilings, a central dome, and the original wooden pews. When the renovations are complete, the Great Hall will feature a world-class digital stage capable of hosting events such as TED talks and YouTube video presentations. The Downstairs space is configured with a small stage and hosts more intimate events such as community programs, author readings, panels, and other small events. When the renovations are complete, the Downstairs will feature an entrance bar, catering, and a new lobby and entrance to serve as a "connection" with downtown Seattle.

The 2015 Fall Forum was another great success. For those of you who were not able to attend, the Council encourages you to make next year's event. The venue is always new and interesting and the annual program provides members with a great opportunity to reconnect and visit with colleagues over refreshments and a unique experience. See you *somewhere* next year!

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2014-2015

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UPCOMING EVENTS

Third Annual Dinner Meeting – February 25, 2016, 5:30-8:30 p.m. (Cutter's Crabhouse)

Spring CLE – Spring, Vancouver/Portland area (exact date and location TBA)

Mid-Year CLE – June 10, 2016 (WSBA Conference Center)

Legislative Update: Venue Clauses in County Contracts No Longer Enforceable

by Brett M. Hill – Ahlers & Cressman PLLC

Public works contractors obtained a victory in Olympia in the last legislative session. A bill passed and was signed into law by Governor Jay Inslee that makes certain venue clauses in Washington state county construction contracts void and unenforceable.

The bill, House Bill 1601, modifies RCW 36.01.050. RCW 36.01.050 provides that any person or entity commencing a lawsuit against a county may file the lawsuit in the county itself or in either of the two nearest judicial districts (which are often the two nearest counties). The original purpose of the statute appears to have been to avoid the appearance of impropriety with having to resolve disputes with a county in that county's home court. *Cosset v. Skagit County*, 119 Wn.2d 434, 438, 834 P.2d 609 (1992) (Statutory purpose is "to provide plaintiffs with alternative forums without the need to demonstrate bias or impartiality in any other forum").

In recent years, Washington state counties have been getting around RCW 36.01.050 by including clauses in their construction contracts that require contractors to waive their rights under RCW 36.01.050 and have all disputes resolved in the county's home court. House Bill 1601 was drafted to allow contractors to receive the benefit of RCW 36.01.050 and make the venue clauses in county contracts unenforceable.

The bill was drafted by the National Utility Contractors of Washington and supported by the Associated General Contractors of Washington and the Washington Construction Industry Council (WCIC). WCIC's 12 member organizations represent over 11,000 companies employing the vast majority of Washington's construction industry.

The new law became effective on July 24, 2015 and amends RCW 36.01.050 to add the following language to the statute:

(3) Any provision in a public works contract with any county that requires actions arising under the contract to be commenced in the superior court of the county is against public policy and the provision is void and unenforceable. This subsection shall not be construed to void any contract provision requiring a dispute arising out of the contract to be submitted to arbitration.

Court of Appeals Affirms Brightwater Judgment, Reviews Law Regarding Differing Site Conditions and Surety Obligations

by Bart Reed – Stoel Rives LLP

On November 9, 2015, Division I of the Court of Appeals affirmed a 2012 King County trial court judgment that joint-venture tunneling contractor Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper (VPFK) was liable to King County for \$144 million in damages and attorney fees.

The case arose from the Brightwater project, a wastewater treatment plant north of Woodinville with a tunnel system that conveys wastewater to the plant and treated water to a marine outfall in Puget Sound. VPFK was awarded a \$212 million contract to build two segments of the 13-mile tunnel system. Unfortunately, VPFK's two tunnel-boring machines broke down several hundred feet beneath Lake Forest Park and Bothell. The machines required extensive repairs that threatened to delay the completion of the overall project.

VPFK repaired one machine and completed one tunnel segment, but the County did not accept the lengthy delay and additional cost proposed for the repair of the second machine. The County hired Jay Dee Coluccio (JDC) to complete the remaining tunnel segment between Shoreline and Lake Forest Park. The Brightwater project began full operation in late 2012.

King County sued VPFK and its sureties for approximately \$156 million, based on its costs arising from project delays and design modifications. VPFK counterclaimed for approximately \$70 million, arguing that its delays were excused by differing site conditions and defective project design. King County acknowledged some of VPFK's claims totaling about \$4.7 million.

After a nearly three-month trial, the jury awarded \$156 million in damages to King County, offset by \$26 million to VPFK for its counterclaims. The court awarded King County its attorney/expert fees in the approximate amount of \$14 million, for a net judgment of \$144 million to the County.

The trial and appeal involved a number of interesting issues, two of which are summarized here.

1. The contract documents identified different soil types that contractors could expect to encounter during excavation of the tunnels. They depicted which soil types had been found in boreholes, but did not purport to show soil types between the boreholes. VPFK complained that its work was delayed because the soils frequently changed from one type to another. The question was whether this situation constituted differing site conditions under the contract. The trial court (on summary judgment) said no. The appellate court agreed, summarizing earlier cases to derive the following definition of differing site conditions:

a. the contract documents indicated certain

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COURT OF APPEALS AFFIRMS BRIGHTWATER JUDGMENT...
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conditions,

- b. the contractor reasonably relied on those indications when making its bid,
- c. actual conditions materially differed from those which were indicated in the contract, and,
- d. the materially different conditions were not foreseeable.

The court concluded that VPFK had not satisfied the first two factors because the contract documents did not indicate the frequency of soil changes and VPFK did not show that its bid was calculated in reliance on any particular number of soil changes. The appellate opinion could be a good starting point for research into Washington law relating to differing site conditions.

2. The contract between King County and VPFK included no fee clause, but the trial court awarded fees to King County against VPFK's sureties. The basis for the award was *Olympic Steamship, Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), as extended from insurance companies to sureties in *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007).

The sureties argued that King County should recover no more than the fees expended for litigation efforts specifically directed against the sureties. This argument was rejected because the sureties had adopted all of VPFK's arguments and because the various claims and defenses in the case were so interconnected that no reasonable segregation of fees could be made. The appellate opinion could be a good starting point for research into Washington law relating to *Olympic Steamship* fee awards against sureties.

David Goodnight and Karl Oles of Stoel Rives represented King County. Pete Ralston and Tom Krider of Oles Morrison Rinker Baker represented VPFK and the sureties.

WSBA Construction Law Section Legal Writing Competition for Law Students

by Athan Tramountanas – Short Cressman PLLC

The Construction Law Section is holding its 2015-2016 legal writing competition for law students. This is the second year of what we hope will be an annual event. There is a prize of \$2,500 to be awarded to the winning submission on one of the following three topics:

- (1) Independent duty doctrine as applicable to construction projects in the state of Washington;
- (2) Concurrent delay claims arising from construction projects; or
- (3) Potential liabilities arising from failure of a tunnel-boring machine on a major public works project.

The competition is open to all second-year and third-year-law students in good standing, as of October 15, 2015, at the University of Washington Law School, Gonzaga Law School, or Seattle University School of Law. If you know of any law students that may be interested, please let them know about the competition. Details are available from Tom Wolfendale (tom.wolfendale@klgates.com), Amber Hardwick (alh@gyseattle.com), or me (athant@scblaw.com). Submissions are due at noon on February 15, 2016.

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Your Input Is Needed!

The Construction Law Section Newsletter works best when Section members actively participate. We welcome your articles, case notes, comments, and suggestions concerning new developments in public procurement and private construction law. Please direct inquiries and submit materials for publication to:

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October 1, 2015 – September 30, 2016

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