



Rulemakers

Regulatory and Legislative Actions

CONNECTICUT As a result of widespread complaints about faulty home foundations, Connecticut passed a law in June requiring residential contractors to keep records of their concrete suppliers. About 20 towns in northeastern Connecticut have catastrophic foundation problems in homes built since the 1980s. The concrete is crumbling and cracking, and homes built on these faulty foundations are gradually collapsing. Concrete from a single quarry has been used in as many as 20,000 houses in the state. A government probe found the concrete mixture's stone aggregate carried a high level of pyrrhotite, a mineral that can cause swelling and cracking when it reacts with oxygen and water. The concrete, traced to quarry company Becker Construction Company and concrete maker Joseph J. Mottes Company, has not been reported failing in commercial projects. The companies attribute the problem in housing developments to improper installation—possibly overuse of water in the mix by contractors. Homeowners filed a class action lawsuit in February against home insurers that have denied coverage, and a coalition of victims is also accusing state officials of negligence for not responding to the problem when it was first brought to their attention in the mid-1990s. Four of 29 insurers operating in the affected communities have agreed to take part in a financing program to compensate victim homeowners for about 90% of their costs to replace the subpar foundations. Mottes and Becker have voluntarily stopped selling material containing the aggregate in question for use in residential foundations in Connecticut until June 2017.

House of Cards

Your liability for underpinning should be expressly clarified within your contracts or you could draw the ace of spades in court.

BY KENNETH MCLELLAN

A recent real estate boom in the New York City area has led to a great deal of construction work being done, particularly in Brooklyn. A recent article in the *New York Post* described Brooklyn's "real-estate bubble." A 17-foot-high, 900-square-foot "mini-house" located near a mansion once owned by actress Jennifer Connelly in the Windsor Terrace neighborhood of Brooklyn near Prospect Park was offered for sale for \$1.25 million. The *Post* mentions that "zoning allows the new owner the right to tear the bungalow down and build a monstrous three-story giant in its place." The fact that there are such valuable parcels of land with older buildings on them, coupled with a frenzy of development, sometimes means older buildings will be demolished and sites will be excavated next to existing buildings. When this happens, neighboring buildings can be adversely affected if they are not shored up properly.



A recent report in the *Gothamist* described a situation that occurred in the Bedford-Stuyvesant section of Brooklyn. The story detailed an adjacent landowner's complaint and discussed his claim of workers digging under his building. The *Gothamist* article described "shoddy construction" where a "speculative building boom is underway amid tight quarters." This type of situation has caused conditions where design professionals can be vulnerable. Important case law has arisen recently from issues involving excavation and underpinning.

What Is Underpinning?

Underpinning is the "installation of temporary or permanent support to an existing foundation to provide either additional

A SWING AND A MISS

The Hartford Stadium Authority in Hartford, Conn., in June terminated its contract with Dunkin' Donuts Park developers DoNo Hartford and Centerplan Cos. after months of missed deadlines, failed negotiations and increasingly inflammatory public accusations. Mayor Bronin faults the developers for cost overruns and delays and says Centerplan couldn't assure the city it had the financial resources to complete the minor league baseball park. Arch Insurance is the surety on the project and is said to be investigating the city's claim for cov-

erage. The developer has publicly stated that the city's design for the stadium did not meet building codes, which—along with more than 100 design change orders from the city—caused the delays and cost overruns. The stadium authority's chairman, Charles Mathews, has said his group will sue Arch if the insurer doesn't step in and get the park done. Meanwhile, city authorities neglected to arrange for insurance for the property in the interim, so as of press time, the stadium had no coverage for property losses and couldn't find coverage. ■

depth or an increase in bearing capacity. ...Construction of a new project adjacent to an existing building may lead to the need for underpinning,” according to a 2007 PowerPoint presentation by University of Washington professor Kamran Nemati. This is the situation we often see in our cases in the New York City area and particularly in Brooklyn: new multistory buildings with deeper basements and foundations than adjacent buildings, which are often smaller, older, industrial buildings or small residential buildings.

As observed recently by foundation engineer Richard Driscoll in a LinkedIn article, “[indifference] to the risks related to underpinning, and abutting structures generally, is a common attitude, and it is a routine source of damage claims by abutters to construction projects in urban areas.” Driscoll notes in the article: “As cities are revitalized and densified, the need for new buildings to abut existing construction will continue to require underpinning. For these projects to be viable, it will be necessary that project teams and building officials require that best practices be proactively implemented in the design and construction of underpinning.”

Statutory and Case Law Point to Some Issues

The most important concern for design professionals in the New York metropolitan area is whether they bear statutory liability for excavation work or failure to underpin, that is, to shore up, existing buildings.

Under the New York City Building Code, Section 3309.4, “...regardless of the excavation or fill depth, whenever soil or foundation work occurs, regardless of the depth of such, the person who causes an excavation or fill to be made shall, at all times...preserve and protect from damage any adjoining structures, including but not limited to footings and foundations[.]”

A 2014 case involving this section is instructive. In *87 Chambers, LLC v. 77 Reade, LLC*, the court dismissed a claim against an architect because the archi-

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tect was “not ‘the person who cause[d] an excavation or fill to be made’ within the meaning of that provision (§ 3309.4). Indeed, BKS [the architect] was neither the owner of the 77 Reade Street property nor the contractor who performed the excavation[.]” However, the court refused to dismiss a claim against the engineer, holding that:

Weidlinger [the engineer] was not entitled to summary judgment dismissing plaintiffs’ Administrative Code section 3309.4 claim as asserted against it, since there is an issue of fact as to whether Weidlinger substantially contributed to the design and methodology employed during the excavation process and therefore was a “person” who “cause[d] an excavation” within the meaning of section 3309.4. Furthermore, the court properly denied Weidlinger’s motion seeking dismissal of plaintiffs’ negligence claim. Although Weidlinger’s employee testified that Weidlinger had no duties during the excavation phase of the project, plaintiffs submitted admissible evidence suggesting that Weidlinger assumed responsibilities related to the excavation and recommended excavation design changes, which were adopted over the excavation contractor’s objections and purportedly were the cause of the damage to plaintiffs’ building.

In another more recent case, in 2015, *American Sec. Ins. Co. v Church*

of God of St. Albans, the court held that the relevant building code section imposed liability upon the “person who causes” an excavation to be made but an architect involved in the project was not liable under that section because “he was neither the person who made the decision to excavate nor the contractor who carried out the physical excavation work.” The court also dismissed a negligence claim, finding that the architect’s “contract with the owner did not specifically impose any duties with respect to the excavation phase of the project and expressly stated that the architect did not have control over, and was not responsible for, the construction means and methods or the safety precautions taken in connection with the work.”

Design professionals working in urban areas should be aware of the relevant building codes. If they are not going to be involved in underpinning or support of excavation design, that should be specifically excluded from the scope of work in their contracts. If they are going to be involved in construction administration, any involvement or non-involvement with excavation or underpinning should be specifically delineated in the contract. Recent case law has shown us that a design professional’s assumption of duties related to excavation can potentially lead to statutory liability if there are problems down the road. ■

Kenneth McLellan is a partner at Winget, Spadafora & Schwartzberg, New York. mclellan.k@wssllp.com