

Construction Law Newsletter

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MESSAGE FROM THE CHAIR

David Douthwaite
J.E. Dunn Construction

I am honored to serve as the Chair of the Construction Law Section for 2003. Many talented lawyers serve in this Section and on its Executive Committee. At the end of this newsletter is list of the members of the Executive Committee. All of us are available to the Section members.

We see a major part of our responsibility to you to present timely and pertinent educational programs. There are several ideas in the planning stages:

1. A panel discussion among in-house counsel for construction companies as to how lawyers in private practice can best serve the needs of the construction company.
2. A joint seminar with the Government Law Section after the Legislature recesses to review the changes, modifications and additions that the Legislature makes.
3. A larger seminar in the November time frame to cover insurance coverage and risk allocation issues.

Please let us know if you have any other ideas for seminars, or if you would like to be involved in the planning of any of these seminars.

Another powerful educational tool is the newsletter. Alan Mitchell has been the editor and has published a most informative one. I am sure that he would like to publish it more often, but he is limited by a dearth of materials. Despite all of our good intentions, we do not send him enough articles. I am sure that we all spend a lot of time explaining some intricacy of construction law either to one of our partners or clients. We could use those materials in some form to help educate the Section members through the newsletter. Please show your support by sending Alan an article that you have prepared.

We want to help you address any issues that you have with respect to the area of Construction Law. Please contact any of the Executive Committee members listed below if you have any questions, or if you believe we should be addressing an issue of particular interest to you!

DEVELOPER LICENSING WITH THE OREGON CCB

Mike Peterkin
Michael Peterkin PC

Is your client a developer who must be licensed with the Oregon Construction Contractors Board? You may be surprised by the answer and the consequences. Unlicensed developers can face fines up to \$5,000.00 per violation and can be denied access to judicial and administrative remedies.

Assume the following. You are the owner of land that has or will be subdivided. You will fund development of the property and the build-out of a subdivision. You will arrange through a licensed contractor to have houses constructed on lots with the intent to sell completed houses to the public. You do not intend to hold the houses for rental properties and you do not intend to occupy the houses after completion.

Based on the above facts, the CCB asserts that you are a developer that must be licensed. The CCB bases its opinion, in part, on the definition of "contractor" in ORS 701.055(2) and on a recent Oregon Court of Appeals case, *Tandem Properties, LLC v. Construction Contractors Board*, 184 Or App 28 (2002).

In *Tandem Properties*, the developer filed a CCB claim against a licensed contractor it hired to build one house. The developer did not supply labor, materials or equipment but the developer owned the land. The contract between the developer, Tandem Properties and the contractor provided that Tandem intended to market and sell the house as construction neared completion. Compensation was contingent on the sale of the house.

Neither member of Tandem Properties intended to occupy the house before sale occurred.

Under these facts, the Court held that the developer was required to be licensed and the failure to be licensed barred the developer from an administrative remedy through CCB and barred the developer access to the contractor's bond.

Tandem Properties illustrates that the impact of being a non-licensed entity can be severe. An unlicensed contractor or developer may not obtain judicial or administrative remedies, with some exceptions. ORS 701.065. Essentially, this statute denies the unlicensed or improperly licensed developer from access to any court, arbitration or administrative action.

The analysis that leads to developer licensing is no different than the analysis that is applied to subcontractors. In the case of developers who hire a general contractor or in the case of subcontractors who work under general contractors, the ultimate responsibility for construction rests with the general contractor. But, the fact that the general contractor is ultimately responsible for construction does not insulate subcontractors from licensing. This rationale is equally applicable to the developer-general contractor relationship. Essentially, the developer is the general contractor of the project and hires another contractor to build the structures.

The apparent dividing line for licensing of a developer is drawn by CCB rule between the infrastructure work and building of structures. If only the infrastructure work is completed, then the developer does not need a license: "Improvements of lots with the intent of selling the lots without structures when contracting with licensed contractors" does not require a CCB license for the developer. OAR 812-002-0240. Nevertheless, there is still some risk that CCB or a court will "interpret" the rule differently. It is better to have a license than to need a license. See the definition of "contractor" below and notice the words "or do any part thereof."

Another limited exception is specified in ORS 701.055. A partnership or joint venture is "licensed" with CCB for bidding purposes only if any of the partners or joint venturers whose name appears in the business name of the partnership or joint venture is licensed with CCB. But, forming general partnerships or joint ventures is always risky because partners have unlimited liability for the partnership and for the acts of the partners.

Developers may argue that they only contract with licensed contractors to perform construction and, therefore, developer licensing is not required. The terms "developer" and "contractor" have different meanings under Oregon law. Under OAR 812-002-0240, a "developer" is:

a person who owns property and contracts with a primary contractor to construct, improve or alter one or more structures on the land for the purpose of selling structures.

Whereas ORS 701.005(2) defines a "contractor" in pertinent part as:

a person who, for compensation or with the intent to sell, arranges or undertakes or offers to undertake or submits a bid to construct, *** for another, any *** improvement attached to real estate or to do any part thereof.

The distinction between development and construction is not clarified by the licensing statute, ORS 701.055(1). This statute by its express terms applies only to contractors. The word "developer" is not found under the very law that CCB is enforcing. Since the legislature did not see fit to include the term "developer" under ORS 701.055(1), it could be argued that CCB has no authority to interpret the statute differently. In fact, there is no reference to "developers" in all of ORS Chapter 701 which covers contractors. It is a basic rule of law that an administrative agency may not, by its rules amend, alter, enlarge or limit the terms of a statute.

The developers' argument, therefore, is that developers "contract" with bonded and licensed contractors to build structures and rely on the general contractors to arrange construction. The developer does not "arrange" to construct the house or building; that is the job of a contractor. The CCB would counter that the owner should have access to the bond of the entity that sold the improved property. However, the CCB could adopt a rule giving an owner access to the bond of the contractor who actually constructed the improvement; an unlikely event without legislative change.

After *Tandem Properties*, the above developer's argument would not likely succeed. But a valid question in the context of CCB administrative penalties is this: Did the developer know it was required to be licensed before *Tandem Properties* was decided in October of 2002? The CCB may argue that the definition of contractor gives sufficient notice and a fine should be imposed.

Oregon law gives developers and contractors a window of opportunity to avoid loss of judicial and administrative remedies if the developer or contractor becomes licensed within 90 days from notice. Compliance with the 90-day rule however, may not avoid CCB administrative penalties, which can be significant.

For each licensing violation, the initial penalty is \$1,000.00 if there is no consumer complaint. If there is a consumer complaint, then the potential penalty is \$5,000.00. The rules go on to state that if the unlicensed

developer/contractor cures the problem, then the fine can be reduced to \$750.00 per violation. Right now a developer in Sunriver, Oregon is facing approximately \$70,000.00 in fines because it allegedly built 66 houses without being licensed and has one consumer complaint.

Developer licensing raises at least the following questions: How should CCB enforce licensing laws against developers? For example, should CCB fine a developer who did not know of the licensing requirements if the developer obtains a license within 90 days from notice? If there are no consumer complaints against the developer, then how is the public served by fining the newly licensed developer for past conduct? Should CCB fine for conduct before *Tandem Properties* was decided? The civil penalty cases now before the CCB may answer these questions.

In conclusion, developers like Tandem Properties are required to be licensed under current law even if they contract with a licensed contractor to build structures. Penalties are significant if a license is required but not obtained. The adverse economic and legal consequences of non-licensing far outweigh the burden of licensing.

CASE NOTE: *TANDEM PROPERTIES*

Kenneth P. Childs
Stoel Rives LLP

Background

Whether real estate developers fall within the definition of “contractor” contained in ORS 701.005(2) and are therefore required to be licensed with the Oregon Construction Contractors Board has been the subject of significant recent litigation.

The issue is often raised as a defense by contractors who are being sued by real estate developer/owners on construction defect claims. The contractors in such cases assert that the developer/owner who fails to be licensed with the CCB is barred from pursuing any type of judicial remedy. ORS 701.065. There have been a mix of conflicting trial court rulings on the issue, but until recently, very little appellate authority.

Tandem Properties Ruling

In a recent ruling, the Oregon Court of Appeals held that a real estate developer who hired a builder to construct a residence on the developer’s own land with the intent of selling the residence once it was completed was a “contractor” under ORS 701.005(2) and, as such, was required to be licensed with the CCB as a condition

to asserting a claim against the builder. *Tandem Properties, LLC v. CCB*, 184 Or App 28 (2002).

The claimant, Tandem Properties, was a limited liability company that had contracted with the respondent/builder to construct a residence on property the claimant owned. Tandem Properties supplied none of the material or labor for the project and intended to sell the residence after it was completed. When the builder was unable to complete the project by the contract completion deadline, Tandem Properties filed a claim with the CCB. The CCB, however, ruled that it lacked jurisdiction to hear the claim because Tandem Properties was not licensed.

The relevant statute defines “contractor” to mean “a person who, for compensation or with the intent to sell, arranges or undertakes or offers to undertake or submits a bid to construct ... for another, any building.” ORS 701.005(2).¹ Tandem Properties focused on the words “for another” and argued that because it was having the residence built on its own property, it had not contracted to construct an improvement “for another”, but instead for its own use. The CCB disagreed, ruling that the words “for another” referred to the person to whom Tandem Properties intended to sell the property. The Court of Appeals agreed.

As an alternative argument, Tandem Properties asserted that it fell within the exemption provided by ORS 701.010(5), which essentially exempts owners who contract to have work performed by a licensed contractor.

The court, however, rejected this argument as well, since the exemption itself contains an exception stating that it “does not apply to a person who, in pursuit of an independent business, constructs, remodels, repairs or for compensation and the intent to sell the structure, arranges to have constructed, remodeled or repaired a structure with the intent of offering the structure for sale before, upon or after completion.” ORS 701.010(5).

Tandem Properties contended that the carve-out to the exemption did not apply. It argued that because it had contracted to have the structure built on its own property, there was no third-party from whom it could seek “compensation.” The court, however, rejected this argument, concluding that by its ordinary meaning, the word “compensation” meant “payment for value received” and therefore included a return on investment.

¹ In 2001, the Oregon legislature amended several of the ORS chapter 701 statutes. Prior to 2001, ORS 701.005(2) was numbered 701.005(3). The Tandem Properties opinion refers primarily to the pre-2001 numbering. This article will refer to the post-2001 numbering.

While Tandem Properties involved a “residential contractor” and while some may argue that the holding should be limited to residential developers, it’s difficult to construe the case that narrowly. Since the opinion relies primarily upon the definition of “contractor” rather than the definition of “residential contractor,” it likely applies to commercial developers as well.

Appeal of Tandem Properties Decision

Tandem Properties petitioned the Supreme Court for a review of the Court of Appeals’ decision, asserting a number of arguments.² Most of the arguments advanced focused on various words in the relevant statutes. First, Tandem Properties argued that the lower court erred in construing the “for another” language in the definition of “contractor” to include prospective purchasers.

Second, Tandem Properties argued that the lower court ignored the requirement in the definition of “residential contractor” that a contractor be someone who “performs work” in connection with residential structures, and pointed out that the it did not “perform” any actual work, but instead retained a licensed contractor to do so.

Third, Tandem Properties argued that the lower court disregarded the statutory language “for compensation” and “in pursuit of an independent business” in the licensure exemption statute.

Finally, Tandem Properties argued that, aside from whether it came within the definition of “contractor,” it was not barred by ORS 701.065 from pursuing a claim, because that statute only precludes a contractor from pursuing claims for compensation for work Tandem Properties actually performed.

In advancing the above arguments, Tandem Properties also relied upon both *J.L. Ward Co. v. Landscape Contractors Board*, 141 Or App 181, 916 P2d 887 (1996) (holding that an owner performing work on his or her own property does not need to be licensed as a landscape contractor merely because he or she intends to sell the project after completion), and *Schlumberg Technologies Inc. v. Tri-County Metropolitan Transp. Dist. of Oregon (Tri-Met)*, 145 Or App 112, 929 P2d 331 (1996), modified on other grounds 149 Or App 316, 942 P2d 862 (1997) (holding that a party submitting a bid on a public project assuring that the work would be performed by a licensed contractor, did not itself need to be licensed with the CCB).

Tandem Properties was supported in its appeal with an amicus brief filed by the Oregon Association of

² The Supreme Court recently announced its decision to deny review.

Realtors®. The OAR’s brief focused primarily upon Tandem Properties’ final argument – that, regardless of whether Tandem Properties was required to be licensed, it was not barred by ORS 701.065 from pursuing a claim against the builder, since that section should be narrowly construed to bar only claims by builders for construction work actually performed by them. Similar arguments have been advanced by developers in other cases that have not advanced beyond the trial court level – that ORS 701.065 bars only upstream claims by contractors against owners, not downstream claims by owners against contractors or by contractors against subcontractors.

Pending Legislation

Legislation is currently pending (*i.e.*, HB 3159) that would address the issue raised by Tandem Properties by exempting certain types of developers from the contractor licensure requirements. Until and unless such legislation passes, though both commercial and residential developers will want to take steps to protect themselves. The safest course for developers is to become licensed with the CCB. Absent doing so, a developer potentially runs the risk of being without recourse to any legal remedies whatsoever relating to a construction project.

2003 OREGON LEGISLATURE HIGHLIGHTS CONSTRUCTION CONTRACTING MEASURES

Dana Anderson
Assistant Attorney General
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The 2003 Regular Session (72nd Oregon Legislative Assembly) offers an interesting variety of contracting measures, both as to public and private improvements. This article summarizes a number of measures that may be of interest to construction law practitioners. As used below, “SB” refers to a Senate Bill and “HB” refers to a House Bill.

HB 2059 sets the procedure for filing bond or depositing money when a possessory chattel lien is claimed for storage of chattels.

HB 2097 specifies that required contract conditions (ORS 279.312 to 279.318, and 279.334) be included in public improvement contracts and bid documents, rather than in all public contracts. Similar changes are made through HB 2341, the ORS Chapter 279 revision noted below.

HB 2104 adds crimes relating to contractors, vehicle dealers and vehicle rebuilding to the list of crimes that constitute racketeering activity.

HB 2107 expands the definition of manufactured dwelling park for certain statutes relating to site improvements and requires the provider to comply with contractor bidding statutes when providing cost estimate for manufactured dwelling site improvements.

HB 2210 increases the amount a person contracting for construction, alteration, abandonment or conversion of wells must have in a surety bond or irrevocable letter of credit.

HB 2212 modifies the duties of Advocate for Minority, Women and Emerging Small Business, changes eligibility requirements for certification of a business as an emerging small business, and extends the period of time during which an eligible business may be certified. Also allows reinstatement of formerly certified business.

HB 2232 authorizes the CCB to establish standards of practice and professional conduct for home inspectors.

HB 2233 allows the CCB to impose fees on parties to file claims with the CCB and also allows the CCB to require that claimant prove it gave prior notice to the contractor of the intent to file claim.

HB 2279 enacts Revised Uniform Arbitration Act.

HB 2326 establishes the Construction Contractors Board (CCB) as a semi-independent state agency. Also, see HB 2716 on expanded CCB membership.

HB 2341 is the comprehensive ORS Chapter 279 rewrite developed through industry consensus over the interim following the 2001 session. It revises requirements and procedures for public contracting, establishing three separate public contracting chapters (279C for Public Improvements and Related Contracts, 279B for other Public Procurements and 279A for General Provisions that affect both). The operative date is March 1, 2005.

HB 2389 establishes a "notice of defect" procedure as a prerequisite to compelling arbitration or commencing court action to recover damages for residential construction defects. Requires contractor to provide owner with notice of procedures.

HB 2590 allows a principal real estate broker to claim a lien upon commercial real estate that is subject of sale, lease or other conveyance.

HB 2646 revises numerous laws relating to judgments.

HB 2680 removes the requirement that contractors and subcontractors pay flaggers state prevailing wage rate on project regulated under federal Davis-Bacon Act.

HB 2726 rescinds capital construction authority granted to the Department of Public Safety Standards and Training (DPSST). It also deletes provisions authorizing DPSST to provide training to certain public safety personnel.

HB 2918 requires licensing of persons providing home defect inspection services. Also requires the plaintiff in construction defect proceedings to include an inspection report prepared by the home defect inspector as part of the initial court filing. Requires court to hold hearing and determine whether to dismiss a contractor from proceeding if the inspection report does not identify work of the contractor as a possible cause of defect.

HB 3003 requires interest on a progress payment under a public improvement contract to commence 15 days after submission of an invoice by a contractor to the public contracting agency. Requires the agency to notify the contractor within seven days when an invoice is defective or the agency disputes an invoice. Requires interest on payment of retainage to commence 15 days after the work on a public contract is completed and accepted.

HB 3004 revises the definition of "lowest responsible bidder" in public contracting. Revises the process and reasons for disqualifying a contractor from consideration for award of public contracts.

HB 3007 increases from three to five years the maximum period of disqualification from consideration for award of certain public contracts.

HB 3042 requires contractors and subcontractors on public works projects to pay state prevailing wage rates or federal prevailing wage rates, whichever is higher, when a project is subject to state and federal prevailing wage rate laws.

HB 3092 modifies subcontractor disclosure requirements for bids on public contracts. Modifies the definition of "lowest responsible bidder".

HB 3159 creates a new construction contractor license class for certain property owners and developers.

HB 3174 provides for payment to contractors and subcontractors on construction contracts. It requires

a 30-day billing cycle for construction contractors and requires the owner to approve or decline to approve bill within 14 days and make payment within seven days following approval. It further requires the contractor to make payment to subcontractors within seven days of receiving payment from owner. It prescribes the interest penalty for unpaid amounts and specifies grounds for a contractor or subcontractor to suspend work or terminate a contract.

HB 3218 exempts the intermediary in a tax-free exchange of property from licensure as construction contract.

HB 3368 eliminates the authority of a public contracting agency to exempt certain public contracts from competitive bidding requirements.

HB 3373 transfers the duties, functions and powers of both CCB and LCB to BOLI.

HB 3421 requires a person awarding a private construction contract to make prompt payment of moneys owing on contract. It also requires progress payments and interest payments.

HB 3422 requires a bidder on a public improvement contract to disclose first-tier subcontractors immediately after the deadline when bids are due.

HB 3441 requires the CCB to adopt standards of practice and procedure for contractors engaged primarily in painting residential structures. It also reduces the project value that triggers the requirement for a written construction contract from \$2,500 to \$2,000.

HB 3464 requires a public contracting agency to respond to certain public improvement contract claims within 21 days of receiving the claim. Entitles a prevailing contractor to costs and, in certain circumstances, attorney fees.

HB 3468 requires a licensed construction contractor to display its business name and license number on vehicles.

HB 3507 exempts projects in rural areas for which the contract price does not exceed \$100,000 from requirements of the prevailing wage rate laws.

HB 3539 directs the seller of certain residential property to provide protection for purchaser of property regarding construction liens perfected after the property sale is completed. It provides for civil penalties and for maximum criminal penalties of \$2,000 fine, six months' imprisonment, or both.

SB 96 exempts contracts between certain public agencies from competitive bidding and proposal

requirements. Requires a bid submitted to a public contracting agency by a state agency to include all costs associated with the bid.

SB 168 provides that Department of Human Services contracts for client services to individuals with mental illness, mental retardation or other developmental disability, including services to construct, repair or improve community housing, are neither public improvements nor public works.

SB 186 directs the State Board of Higher Education to establish exemptions from competitive procedures adopted by the board for purchasing, procurement and contracting of goods and services. Also, see **HB 2628** removing Portland State University from the Oregon University System, reorganizing it with the Oregon Health and Science University.

SB 209 allows qualifying architects licensed outside of Oregon to provide architectural services in affiliation with an Oregon architect having responsible control of the work. Also, see SB 210 that redefines the practice of architecture, and **SB 211** that expands the disciplinary authority of the State Board of Architect Examiners.

SB 210 redefines the definition for "practice of architecture."

SB 298 specifies that a construction lien claim does not bind an improvement for more than 120 days unless suit is brought to enforce lien and notice of pendency of suit is filed in county where improvement is located.

SB 358 directs community colleges, state institutions of higher education and the Oregon Health and Science University to promote commercialization of research and ideas. Exempts contracts entered into by state institutions of higher education from review by the Attorney General. Allows the State Board of Higher Education to establish competitive procedures for purchasing, procurement and contracting of technology, and exemptions from those procedures.

SB 411 requires specifications for subcontracts for public works to contain provisions on prevailing rates of wage. Prohibits a public contracting agency from paying a contractor until the contractor files certified payroll statements with the agency, and prohibits a contractor from paying a subcontractor until the subcontractor files certified payroll statements with the agency.

SB 412 transfers the duties, functions and powers relating to building and structural codes from Department of Consumer and Business Services to BOLI.

SB 483 prohibits a public agency from constructing a public improvement with its own equipment and personnel if the estimated cost exceeds \$125,000.

SB 515 modifies the seller's obligation to disclose information about real property to prospective buyers to include disclosures to mold.

SB 537 modifies provisions for release of claim of lien following full payment of claim.

SB 546 requires a public contracting agency to subtract a five-percent bid evaluation preference from the bid of a resident bidder in determining the lowest responsible bidder.

SB 575 changes the definition of contractor to exclude businesses that supply personnel for performance of work under the direction and supervision of licensed contractors.

SB 611 imposes pleading requirements for claims against construction design professionals, requiring that the claim be accompanied by an affidavit stating the attorney has retained an expert qualified, available and willing to testify to admissible facts and opinions sufficient to create a question of fact as to professional liability.

SB 772 authorizes the Oregon Department of Transportation (ODOT) to enter into public-private partnerships for transportation projects, and exempts related contracts from ORS Chapter 279. Also, see **SB 777** authorizing ODOT to establish a public-private partnership research and development program, with joint agreements for product development.

SB 792 provides that proof by owner of a residential building that all original contractors were paid by the owner is a complete defense to any construction lien claimed against the residential building.

Information on these and other measures may be obtained on line at www.leg.state.or.us by selecting "Bills/Laws" from the top banner menu and then selecting "2003 Regular Session". Links are provided for the full text, measure history, staff summaries, topic index, tables and search methods.

UPCOMING CLES

Summer, 2003: "Working with In-House Counsel"

This CLE will be a one-hour presentation about coordinating with in-house counsel, both before and after problems arise. We are planning to follow the presentation with a cocktail hour.

The exact date for this CLE has not yet been determined. For details, contact Roger Lenneberg at (503) 684-5533.

October, 2003: "2003 Legislative Update"

This CLE will be a full-day overview of 2003 legislation that impacts construction law practitioners. The CLE will be co-presented with the Government Law Section. The morning joint session will cover the major changes in ORS Chapter 279. The afternoon will have two break-out sessions, one on government law and the other on construction law.

The exact date for this CLE has not yet been determined but will likely be on a Friday. For details, contact Dana Anderson at (503) 378-6060.

November, 2003: "Construction Litigation"

This CLE will be a full day seminar addressing the following issues in construction litigation: Risk Management, Insurance Issues, Expert Testimony and Contract Issues.

The exact date for this CLE has not yet been determined. For details, contact Reg Perry at (503) 691-2949.

Practitioner's Guide to the CCB

I have about eight remaining copies of the print materials from the December 2002 CLE entitled "2002 Practitioner's Guide to the CCB." They are available for \$30.00 each (make checks payable to the Oregon State Bar). Call Alan Mitchell at (503) 620-4540 if you are interested.

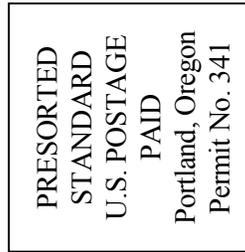
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