



DEVELOPING THE 21ST CENTURY: LAND USE, CONSTRUCTION LAW AND
PROJECT FINANCE IN THE BUILT ENVIRONMENT

SYNOPSIS OF JANUARY 25, 2011 EVENT AND COMMITTEE REPORT

On January 25, 2011, the Construction Law, Project Finance and Land Use Planning and Zoning Committees jointly sponsored a multi-disciplinary investigation of critical issues in the Built Environment. This event is the latest in a series of Built Environment educational events that were inspired three years ago when the Construction Law Committee released its report, *21st Century Construction 20th Century Construction Law*.

In 2008, when Wicks Law reform was in the air, the Construction Law Committee articulated the problem with the State's public construction laws as greater than the problems posed by the Wicks Law. The entire statutory framework, of which the Wicks Law is a part, is archaic and out of step with modern construction practice. But it is necessary to articulate the problems posed by the statutory scheme in a way so that policy makers can see their impact "on the ground". Thus, the report focused on service delivery methods and the needs of the project and those of the archetypal project participants—the owner, the designers and the contractors. The "on the ground" focus quickly broadened to take in the construction industry and economy as a whole, so the report expanded in a multi-disciplinary manner to focus on the fragmented nature of the construction industry, insufficient levels of research in the industry and regulatory complexity reducing competition.

Next, the Construction Law Committee went "on the road" with this multi-disciplinary educational effort, co-sponsored multi-disciplinary educational events in Albany on the need to modernize the State's built environment laws, first, with the New York State component of the American Institute of Architects, in November 2008, and then with the AIA and Albany Law School, the following year, in November 2009. These events, of which the January 25th event was the latest iteration, bring together the various disciplines involved in the built environment.

These multi-disciplinary events view issues from the context of a project, which begins with planning and then moves to construction and finance. So at the January 25th event, the Land Use panelists discussed land use issues of local concern, such as community benefits agreements and the "disconnect" between localized land use practices and regional smart growth and sustainability agendas. The Construction Law panelists discussed the need for, and manner of, modernizing public construction procurement laws for all public owners, as the first step in moving New York

construction law into the 21st Century. And, the Finance Law panelists discussed the necessary conditions for public private partnerships in New York.

After Terri Matthews, Senior Policy Advisor, New York City Department of Design and Construction, introduced the multi-disciplinary approach to the program, James Parrott, Chief Economist, Fiscal Policy Institute, painted a broad picture of the economy, placing the City and construction industry in context, and stressed the importance of public infrastructure as an economic stimulus to enhance long-term productivity. Since an urban center's public infrastructure supports its labor market, taxes to support public infrastructure cannot be viewed in isolation.

The morning panel on *Issues in Land Use Planning*, moderated by Peter Ebright, Deputy Director of Special Enforcement, New York City Department of Buildings, began with a lively discussion on community benefits agreements (CBAs). Kenneth Fisher, Cozen O'Conner, and Margaret Stix, Margaret Stix & Associates, discussed two recently released reports on CBAs: the report of the City Bar's Land Use Planning and Zoning Committee, entitled *The Role of Community Benefits Agreements in New York City's Land Use Process* and the *Recommendations of the Task Force on Public Benefits Agreements* presented to Comptroller John C. Liu. In an environment of fulsome local land use regulation that increases project risk, owners/developers will be attracted to CBAs as one tool to contain risk and related cost increases. In the absence of legislation defining the nature and limits of CBAs, there will continue to be diverse opinions regarding their legality and scope. Michael Gerrard, Columbia Law School, discussed the consideration of sustainability issues in the environmental review process for new construction projects, focusing on how such projects' green gas emissions affect the environment and, conversely, how the changing environment will affect projects. Mark Strauss, FXFOWLE, discussed architecture as public policy and how land use planning as a multi-disciplinary field connected with the physical built environment is critical to developing sustainable policy in transportation and housing.

Richard Anderson, President, New York Building Congress, was the keynote speaker at the luncheon, and spoke eloquently about the state of the City's construction industry, as well as the role of the construction industry in the City's economy. He noted the impact of budget stress on the industry and the City.

The panel after lunch, *Modernize Public Construction Law*, moderated by Robert Fliieger, Senior Manager, Deloitte Financial Advisory Services, LLP, focused on the need for, and manner of, modernizing public construction procurement laws for all public owners, as the first step in moving New York construction law into the 21st Century. The large and diverse cast of construction stakeholders consisted of Joseph Hogan, Vice President, Associated General Contractors New York State; Paul Fernandes, Building and Construction Trades Council of Greater New York; John Miller, Patton Boggs; Commissioner David Perini, Massachusetts Division of Capital Asset Management and Maintenance; Deputy Commissioner David Resnick, New York City Department of Design and Construction; Howard Rosen, Peckar & Abramson;

Thomas Scarangelo, Chairman, Thornton Tomasetti; and Marla Simpson, Director, New York City Mayor's Office of Contract Services. Themes that emerged from the discussion included how the State's public procurement laws limit the ability of public owners to take advantage of modern construction management tools and service delivery methodologies that are commonly used elsewhere. The State's public procurement laws' mandatory separation of the designer from the contractor limit the ability of public owners to adopt delivery methodologies such as design/build and integrated project delivery and present an obstacle to public owner's use of building information modeling to improve coordination, minimize conflicts and avoid or mitigate costs due to rework. It was suggested that a precursor to effective implementation of modern procurement tools might be agency culture within various public owners that may be resistant to change, complicating efforts to modernize. It was also suggested that public owners within the State may have different levels of institutional capacities to manage change as a general matter, and change in the laws may not be a sufficient condition for change in practice.

Among the highlights of the afternoon discussion were Dr. Miller's conceptual analysis of the various service delivery methodologies authorized in the Model Code for Public Infrastructure Procurement and Commissioner Perini's recounting of how Massachusetts modernized its public construction laws in 2004. A "big tent" approach that included all built environment stakeholders, including representatives from both executive branches as well as representatives of labor, focused on incremental modernization strategies and succeeded where earlier "blue ribbon" commission efforts had failed in the past.

The last panel of the day, *Modernize Project Finance—Public and Private*, focused on the necessary statutory conditions for authorizing public private partnerships (PPPs) in New York as well as practical pre-requisites for implementing PPPs and best practices. George Miller, Mayer Brown LLP, moderated the panel, which consisted of Betty Cerini, Dewey & LeBoeuf LLP; Joseph Aiello, CEO, Meridiam Infrastructure; Kenneth Bond, Squire, Squire, Sanders & Dempsey L.L.P.; and Flip Huffard, The Blackstone Group. Since PPPs require a focus on life cycle costs and project functionality, not merely initial construction costs, and access to the design-build service delivery methodology, New York State law renders PPPs unavailable for most public owners. There are two major statutory impediments to PPPs in New York—the mandatory award to the bidder with the lowest initial construction cost and the multiple prime requirement for public works projects. In addition to these aspects of PPPs that permit owners/operators to contain project cost risk and life cycle costs, PPPs also permit public sector access to pools of capital funds that currently do not invest in purely publicly-financed projects.

* * *

Copies of the committee report, event materials and presentations can be found at: <http://bit.ly/iQKIEN>.