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WHEN DO VIRGINIA CONTRACTORS NEED A LICENSE?

BY TIMOTHY R. HUGHES, ESQUIRE

The question of exactly what triggers a requirement for a contractor's license comes up frequently in my practice. Like many other things in the law, the answer is not particularly clear and can be somewhat circular. Still, there are some practical signposts that provide definition and allow for some risk analysis.

Starting Point: What Does the License Statute Say?

The starting, and likely the ending, point of the analysis is the applicable licensing statute. The Virginia code at section 54.1-1100 provides:

> "Contractor" means any person, that for a fixed price, commission, fee, or percentage undertakes to bid upon, or accepts, or offers to accept, orders or contracts for performing, managing, or superintending in whole or in part, the construction, removal, repair or improvement of any building or structure permanently annexed to real property owned, controlled, or leased by him or another person or any other improvements to such real property.

The general definition of "construction" and "improvement" suggests that practically anyone involved in the trade needs a license. This may surprise quite a few painters, folks laying limited tile work or flooring installers.

The code states further in section 54.1-1103 that no person shall engage in, or offer to engage in, contracting work without a license. That means that not only can you not perform the work without a license, but you cannot even market and offer your services without a license.

Do Permit Requirements Make a Difference?

The license discussion is often triggered by permit applications. Local building permit applications require inclusion of the contractor's license obligations. When facing electrical and plumbing issues, substantial work clearly requires a permit.

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Similarly, even small scope projects that involve any structural alterations generally require a permit.

Certain less involved services do not appear to require a permit. The Virginia Uniform Statewide Builder Code 2009 edition (adopted effective 2012) provides that limited scope work does not require a permit, such as:

- Fences under six feet,
- Replacements of doors or windows,
- Replacements of plumbing fixtures without water supply or distribution alteration,
- Roof replacement,
- Flooring finish installation or replacement,
- Cabinetry or trim, and
- Painting or wallpapering.

Arlington, Fairfax and Prince William County each state on their website that permits are not required for the replacement of windows, installation of residential cabinets, installation of floors or finishes, or painting and wall papering.

Because these minor scope items do not require a permit, they may not trigger the conversation of whether a license is required. My thinking is that individuals and businesses performing this work should be conservative and not assume that the exception from permitting excuses a license requirement.

Getting Paid – Licensing is a Very Big Deal

There are various Virginia cases which indicate that a failure to hold a required contractor's license can absolutely bar your ability to file suit to get paid. More recently, the Virginia General Assembly passed a statute amendment barring mechanic's liens by contractors who perform work without a valid license or without the proper class of license. The lien memorandum form in the code now explicitly requires listing the contractor's license information. What this means is that regardless of the permit laws, you may still need a license to get paid for your work.

Conclusion: Think Conservatively

Given the lack of licensing statute clarity and the potential limits on your ability to enforce payment, the conservative approach is to obtain a license even if there is some question about whether you need it. Whether the quote is attributed to Frank Kafka or not, "it is definitely better to have that and not need it, than to need it and not have it."

Timothy Hughes is a shareholder at Bean, Kinney & Korman and lead editor of the firm's blog at http://www.valanduseconstructionlaw.com. He represents clients in construction and commercial litigation, and corporate, contracts, and general business matters. He can be reached by e-mail at thughes@beankinney.com and 703.525.4000.

NEWBERRY STATION: POLITICAL CONTRIBUTIONS VS. POLITICAL REALITIES

BY MATTHEW G. ROBERTS, ESQUIRE

Political contributions and developer-politician interaction are facts of life in the development community. And it makes sense too – developers bring many benefits to communities, such as housing, work space, shopping, and contributions to community amenities, while politicians help marshal the project in a manner they believe will benefit constituents. To be sure, there must be reasonable limits that prevent Chicago-style politics from arising. Virginia has several such laws, including the State and Local Government Conflicts of Interest Act (Va. code section 2.2-3100, et seq.) and various other "conflict of interest" statutes.

One such statute, Virginia code section 15.2-852, came under scrutiny recently in *Newberry Station Homeowners Association, Inc. v. Board of Supervisors of Fairfax*

County. In *Newberry Station*, the HOA challenged the Board's approval of a rezoning for a Washington Metropolitan Area Transit Authority (WMATA) bus maintenance facility. The HOA claimed that Supervisor Cook should have recused himself, because he received more than $100 in contributions from the applicant's agent, and that Supervisors Hudgins and McKay should have recused themselves by virtue of being WMATA directors. Ultimately, the HOA dropped its challenge to Supervisor Cook, and the Virginia Supreme Court upheld the Board's vote, as WMATA is a governmental agency and the supervisors did not receive compensation for their services as directors.

The Supreme Court based its holding, however, on an interpretation of section 15.2-852 that abolished a long-standing distinction between conflicts of interest in Fairfax County. Section 15.2-852 governs disclosures in land use cases in counties that have adopted the Urban County Executive form of government. The statute discusses two types of conflicts of interest. First, the statute definition of "business or financial relationship," includes gifts and contributions that, collectively or individually exceed $100, between the Board of Supervisors, Planning Commission or Board of Zoning Appeals and the land use applicant (title owner, contract purchaser, lessees and agents).

By statute, these "relationships" must be disclosed. Second, the statute requires the government member to disclose a "business or financial interest" between the member and the title owner, contract purchaser or lessee of the property, but also to abstain from voting on the matter or "participate in any way" in the case or the hearing.

In Newberry Station, the court read these two terms to mean the same thing. Although the court did not discuss the consequences of reading these two terms together, it has caused board members to recuse themselves and defer decisions in land use cases.

Given the potential consequences for Fairfax County land use cases, it is advisable that property owners, contract purchasers and lessees of property reconsider how and when to make political donations or gifts in Fairfax County. In general, these should be avoided in the 12 months before and up to the date of a hearing. Where donations have already been made, it will be important to assess how much was given to date and whether further direct contact with a supervisor is advisable. Similarly, applicants in Loudoun County should read and understand *Newberry Station* as Loudoun County is subject to a sister statute (Virginia Code section 15.2-2287.1) with identical language governing disclosures, recusals and restrictions on participation.

There is some discussion that *Newberry Station* will be addressed in the next session of the General Assembly. However, it remains the law in Virginia for the time being.

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MEET OUR ATTORNEYS - RICHARD D. KELLEY

Richard Kelley is a shareholder with Bean, Kinney & Korman. His practice focuses on complex civil litigation, primarily in the areas of business and construction litigation.

Rich regularly litigates and advises on matters involving intellectual property rights, defamation, business torts, commercial real estate contracts, construction and building compliance, commercial landlord/tenant disputes, trade secrets, and non-compete clauses and other restrictive covenants in employment, partnership and joint venture agreements.

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Rich's clients include contractors, developers, banking and financial institutions, business owners, homeowners associations and individuals.

Rich has extensive experience in all Northern Virginia state and federal courts and has argued numerous appeals before the Virginia Supreme Court and the Fourth Circuit Court of Appeals.

Rich regularly speaks and writes on topics related to his practices. He has authored articles published in The Legal Times and Virginia Lawyers Weekly. Rich has also been featured in the Washington Business Journal and Virginia Lawyer's Weekly for e-discovery and issues related to the Interstate Land Sales Full Disclosure Act and property owners associations.

Prior to joining the firm as a shareholder, Rich was an attorney at Reed Smith LLP.

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