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CONSTRUCTION LAW

New Asbestos Regulations To Boost Costs, Enforcement

On Oct. 13, 2009 new regulations will begin to take effect that govern the way asbestos abatement projects are filed, performed and inspected in the City of New York.¹

The new regulations are the result of Mayor Bloomberg's initiative to improve the safety of demolition and abatement operations, particularly for building occupants and first responders, and to enhance interagency communication between city agencies responsible for oversight of demolition and Abatement projects: the New York City Department of Environmental Protection (DEP), the New York City Department of Buildings (DOB) and the Fire Department (FDNY).

Among the most significant changes contained in the new regulations are the following:

- Abatement projects that affect means of egress or fire protection systems and projects that involve work requiring a DOB permit will now require the issuance of an asbestos work permit;
- Persons undertaking abatement projects (i.e., property owners, tenants, etc.) will be required to retain licensed design professionals to prepare construction documents and to properly close out jobs performed pursuant to asbestos work permits and, in some cases, to assist in the preparation of a Work Place Safety Plan (WPSP); and



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- DOB permits will no longer be able to be issued concurrently with the performance of the abatement work and all abatement must be completed before DOB permits will be issued.

The asbestos work permits will be issued by a newly formed Asbestos Technical Review Unit (A-TRU), which will consist of DEP technical review staff and DOB technical review staff.

Questions remain concerning how the new regulations are going to be interpreted and implemented by DEP and DOB. For example, it is unclear the extent to which construction related activity may be performed during or as part of the abatement project. In fact, until further regulatory guidance is issued, it is unclear whether any DOB permitted construction activity may be performed when asbestos containing materials (ACM) are present, even if the ACM will not be disturbed. While we do not know the resolution of these (and other) questions of interpretation of the new regulations, we do know that the new regulations will add to the time and the cost of performing abatement projects (such as the additional cost of design professionals and increased oversight) and, in addition,

will subject project participants to increased exposure to DEP, Building Code and Fire Code enforcement.

On Aug. 18, 2007 a seven-alarm fire broke out on the 17th floor of the former Deutsche Bank building at 130 Liberty St. in Manhattan that was undergoing demolition. Asbestos abatement work was being performed in connection with the demolition when the fire started. As required by applicable regulations, abatement containment areas had been constructed to prevent the escape of asbestos fibers during the performance of abatement activity. The polyethylene sheeting erected as part of the containments also trapped smoke, impeding the efforts of firefighters. The building also had no functional standpipe; therefore, firefighters had to run hoses from the street to combat the flames. Two firefighters, Joseph Graffagnino and Robert Beddia, lost their lives fighting the fire.

Following the Deutsche Bank fire, Mayor Bloomberg formed the Construction Demolition & Abatement Working Group (CDA), comprised of representatives from DEP, the DOB, FDNY and the Mayor's Office of Operations. The CDA was tasked to assess, among other things, the extent to which the roles of city agencies overlap with respect to construction, demolition and abatement operations, the degree to which agencies communicate with one another and share information, the current inspection and oversight practices and the rules governing the safe conduct of construction, demolition and abatement work. As a result of its assessment, the CDA made 33 recommendations to the Mayor in its July 2008 report titled "Strengthening the Safety, Oversight and Coordination of Construction,

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Demolition and Abatement Operations, Report & Recommendations to Mayor Michael R. Bloomberg.” CDA’s recommendations ultimately resulted in amendments to the New York City Administrative Code (which were signed into law by Mayor Bloomberg on June 29, 2009), including new section 24-146.3 requiring DEP to establish a permit requirement for abatement projects “effecting the safety of a building.”

The New Regulations

The new regulations are contained in revisions to Chapter 1 of Title 15 of the Rules of the City of New York Governing the Asbestos Control Program. 15 NYCRR §1-01 et seq. Foremost among the revisions are entirely new §§1-21 through 1-29 governing Notifications, Permitting and Recordkeeping. 15 NYCRR §§1-21 through 1-26. Section 1-26 establishes permitting requirements, including circumstances under which an asbestos work permit will be required, the procedure for applying for and obtaining the asbestos work permit and the duration of and procedures for closing out the asbestos work permit.

Not every abatement project will require the issuance of an asbestos work permit and many projects will be performed pursuant to rules similar to existing rules governing asbestos abatement. The specific items that trigger the requirement for an asbestos work permit are listed in 15 NYCRR §1-26(a). Generally, if the abatement project will result in or involve (a) the compromise or obstruction of means of egress from the building or work area or the removal of any part of the building’s fire protection systems, or (b) the removal of passive fire protection, such as spray applied fire proofing or fire rated walls, an asbestos work permit must be obtained from A-TRU.

The Filing and Review Process

As part of the changes required to implement the new regulations, DEP plans to launch the new Asbestos Reporting and Tracking System (ARTS), which will be accessed through DEP’s Web site (www.nyc.gov/dep) and will be the new central location for building owners and abatement contractors initially to file and subsequently to manage asbestos notifications and amendments. The process begins with the newly revised Asbestos Notification Form (Form ACP-7) that must be filled out electronically using the ARTS. The information provided on the Form ACP-7 will determine whether the project requires the issuance of an Asbestos Work Permit.

If the answers to the questions on the ACP-7 indicate that the performance of the abatement project will involve or result in the compromise of means of egress or the removal of active fire protection systems (as listed in 15 NYCRR §1-26(a)(1-8 and 13)), the applicant must submit to A-TRU the ACP-7, together with a WSPSP “and any other applicable construction documents, which shall be prepared by a registered design professional.” 15 NYCRR §1-26(b)(1). In addition to construction drawings and floor plans, the WSPSP must also contain “[a] written description of all measures taken to mitigate compromised fire protection systems or means of egress, including but not limited to surveillance by a fire watch and an action plan setting forth procedures to be taken for the safety of building occupants in the event of

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an emergency.” 15 NYCRR §1-26(b)(3)(vi).²

Once all required documents have been submitted to the A-TRU, DEP A-TRU staff will review the submission to confirm that abatement means and methods comply with applicable DEP regulations and DOB A-TRU staff will review plans and drawings related to construction aspects, including containment area plans, for Building Code compliance. According to the Draft DEP Guidance, the A-TRU review process will take two to three weeks. If the asbestos work permit application is approved by A-TRU, the applicant will be able to obtain a copy of the permit through ARTS and abatement may begin. At the very least, the time to lawfully commence an Abatement Project is likely to be lengthened dramatically.

More Exposure to Violations

During the performance of the abatement work and until the asbestos work permit has been closed out in accordance with §1-26, all safety measures contained in the WSPSP or otherwise required by A-TRU must be complied with fully or the project will be subject to violations, including DEP, DOB and Fire Code violations.³

For projects performed under the existing rules, the abatement contractor is ordinarily in control of the work areas until the abatement project has been fully closed out. Accordingly, abatement contractors typically assume all risk associated with violations that may be issued by DEP or other agencies during the performance of the work. Under the new regulations, however, there are circumstances (as in the case of a conditional close-out in accordance with 15 NYCRR §1-26(C)(2)(ii)) where the asbestos work permit may remain open for considerable time after the abatement work is completed and the abatement contractor has relinquished control over the work areas. As long as the asbestos work permit remains open, however, the work areas remain subject to DEP inspection and jurisdiction; therefore, there must be continued oversight of the work areas to assure that the safety protocols are maintained.

There may also be circumstances where, even before the abatement project filings are made, building conditions exist that would otherwise trigger the need for an Asbestos Work Permit (i.e., previously dismantled fire alarm systems, etc.) if the conditions were created by or during the performance of the abatement work. Unless the applicant filing the ACP-7 is aware of the existing non-compliant conditions, the applicant’s information on the ACP-7 may not trigger the issuance of the asbestos work permit. If the project is later inspected by DEP and the non-compliant conditions are noted, DEP may issue a violation on the grounds that an asbestos work permit should have been obtained prior to commencement of the abatement project pursuant to §1-26. The new regulations provide that the failure to comply with the permit requirements of §1-26 carries a maximum penalty of \$15,000.

The DEP’s focus during inspections is also expanded under the new regulations. Under existing regulations, DEP inspectors are typically only concerned with compliance with DEP rules concerning the performance of the abatement work and handling of waste. If violations are noted, it is DEP’s practice to issue concurrent violations to the property owner and to the abatement contractor. Under the new abatement regulations, certain Building Code requirements (related to the conditions that trigger the need for an asbestos work permit) are incorporated in the DEP’s regulations. DEP will also have authority to enforce the Fire Code. Accordingly, the persons performing the abatement work may be subject to violations

issued by the DEP that they have not been subject to traditionally.

Duration of the Permit

Unless closed out sooner, asbestos work permits are good for one year following issuance by A-TRU. Permits can be extended, if necessary, for additional six month periods by payment of a fee equal to the initial fee paid to obtain the asbestos work permit.

In order to close out an asbestos work permit, the owner must retain a registered design professional to prepare and submit to A-TRU a final inspection report on Form A-TR1. The Form A-TR1 must certify that all work permitted by the asbestos work permit has been completed and that all fire safety systems removed as part of the abatement work have been fully restored and the building is compliant with all Building Code requirements. Alternatively, the design professional may confirm that the building remains non-compliant, but that subsequent DOB-approved construction or demolition activities will occur that will return the building to a Building Code compliant state. In the latter case, the DEP may issue a conditional Close-Out Form authorizing the DOB to issue building permits. The asbestos work permit, however, will (and must) remain open until the DOB building permits have been issued, whereupon the asbestos work permit will be automatically closed out.

A Potential Catch-22

One aspect of the new regulations that remains a bit murky are the circumstances under which activity that requires a DOB permit may be performed during or as part of the abatement activity. Under current regulations, DOB permits can be obtained by submitting to DOB either a Form ACP-5 (Not an Asbestos Project), indicating that the work to be undertaken will not involve the disturbance of more than 25 linear feet or 10 square feet of asbestos containing materials, a Form ACP-7 (An Asbestos Project), indicating that more than 25 linear feet or 10 square feet of asbestos containing materials will be disturbed as part of the project, or a Form ASB-4 (Asbestos Exemption Form). Under the new regulations, however, a Form ACP-7 will no longer be accepted by the DOB and all abatement activity must be completed before DOB will issue any permits. In fact, the new regulations provide, in part, that an ACP-5 can only be filed to obtain DOB permits if "the building (or portions thereof) affected

by the work are free of asbestos-containing materials." 15 NYCRR §1-22(b)(1).

Here is the dilemma: What happens if some of the DOB permitted construction activity must (or should logically) be performed in order to facilitate the abatement work? In the case of abatement projects that will require the issuance of an asbestos work permit, the language of the new law and the new regulations would seem to indicate that the non-abatement construction work can be performed under the asbestos abatement permit. In fact, new §28-106.3 of the Administrative Code provides that a DOB building permit will not be required for work performed "in the course of and only for the purpose of an asbestos project" that is required to have an asbestos work permit. Administrative Code §28-106.3. Also, the new abatement regulations require the submission to A-TRU of "applicable construction documents" and the A-TRU process includes DOB technical review. The question remains, however, as to how the words "in the course of and only for the purpose of an asbestos project" will be interpreted.

In other words, how much of the construction operations can be performed under the asbestos work permit cover? At what point will the construction work be deemed not in the course of and only for the purpose of an asbestos project? Consider the case of a project requiring gut renovation of an entire floor of a building and the floors are covered in vinyl asbestos floor tile (VAT). In such a case, the demolition would logically proceed (and may, logistically, have to proceed) before the VAT abatement work is performed. Would the new regulations consider the interior demolition construction activity to be exempt from permitting requirements if a valid asbestos work permit is obtained instead or would the full demolition be considered as exceeding work that is only for the purpose of an asbestos project and, therefore, requiring a separate DOB permit? The rules themselves, of course, prohibit the issuance of DOB permits until the abatement work is completed and closed out, therefore, until there is clarity regarding the extent to which non-abatement construction may be performed under an asbestos work permit, many projects may be hung up in the abatement phase.

Conclusion

When the new asbestos abatement regulations begin to take effect, it is likely that questions will still remain concerning

how the regulations will be interpreted and implemented and whether the regulatory agencies affected by the regulations will agree on the interpretation. Undoubtedly, abatement projects in New York City will be affected greatly by the new regulations and it will take some time for the abatement industry and property owners to adjust to the profound changes. Owners and abatement contractors are well advised to read carefully the revised regulations and Draft DEP Guidance.

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1. The new regulations (contained in revisions to 15 NYCRR §1-01 et seq.) will be phased in between Oct. 13, 2009 and Jan. 13, 2010. The regulations themselves, as well as the DEP's draft "Guide to the New Asbestos Regulations" ("Draft DEP Guidance") can be obtained from the DEP's Web site (www.nyc.gov/dep).

2. If the abatement work involves the removal of passive fire protection installations, a WPSP will not be required, however, the applicant must submit to A-TRU floor plans showing the abatement containment areas proposed for the work and construction drawings indicating how the work areas will be restored to Building Code compliant conditions following the completion of the abatement.

3. Under the new regulations, DEP will have authority to enforce the Fire Code.