



# The Drawingboard

## Queens Chapter

New York State Society of Professional Engineers

March 2007

Volume 7, Number 3

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### President's Message

*By Brian E. Flynn, P.E.  
President*

I had the privilege of being invited by the Queens AIA to attend their April meeting as part of a panel discussion.

The topic was on Controlled Inspections and the recommended changes for the new Code.

The panel asked for three changes from the DOB. First was to require errors and omission insurance for all Controlled Inspection applicants.

The second was to no longer require the plans applicant from endorsing the controlled inspection applicant.

The third was to allow a filing to be made and approved with only the controlled inspections identified. It was requested that the identification of the Controlled Inspection applicant be made prior to issuing a permit.

The first and second recommendations have to do with liability issues. The legal nightmare of professional liability has many design professionals trying to hide under a desk. The entire meeting essentially told First Deputy Commissioner of Operations **Robert LiMandri** that the Architects wanted to be separated and isolated from the construction phase. In a state where the lawyers liability is only several years, our liability is several years past our own passing. In this sense, we have become the legal scapegoats for the construction industry.

The third request corrects a catch 22 that requires the filing applicant to take paper responsibility for the inspections long before a permit is issued. The building code only requires the identification of the required inspections for plan review. FDC LiMandri promised that this would be taken care of procedurally.

*[\(Continued next page\)](#)*



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At the AIA meeting, representatives of the New York City Department of Buildings also reviewed its timetable to implement the International Construction Codes (Building, Fuel Gas and Mechanical Codes) as the new Building Code of NYC.

The agency has done an excellent job of trying to bring our building code into the 21st Century. The DOB carefully analyzed and modified the ICC by technical committees to make them appropriate for the high-density urban environment of New York City. Fortunately, NYC's modifications to the International Building Code will help to bring those codes into the 21st Century as well.

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One aspect of the NYC Building Code that stood out from the IBC was the required use of Professionals, Architects and Engineers alike in all aspects of the construction process from preparing plans to inspecting and certifying construction under Controlled Inspections (27-132). The new code will allow private "certified agencies" to replace architects and engineers in the field, providing and certifying construction assemblies that are required to safeguard life, health and property, using the application of engineering principles and data. When I asked about this change, The DOB responded that since the state had already adopted the ICC, they saw no legal problems with creating an industry of private and unlicensed code compliance inspectors.

It has been a long standing objective of the standards community to level the playing field and allow almost anyone meeting shallow requirements to become a certified professional.

ANSI and ASTM standards are famous for requiring "certified specialists" that take limited specific training in such diverse fields as construction, testing, environmental investigation, etc.; to the exclusion of the more learned professions of Architecture and Engineering. Many governmental agencies also favor this approach. The Federal EPA has specifically created many 24 to 72 hour trained specialists. The International Construction Codes, Uniform Building Codes and others also try to exclude licensed Professionals from the actual construction process in favor of private "certified inspectors" for special inspections.

[\(Continued next page\)](#)

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### Chapter Seeks Donations to PDC Library

The Queens Chapter is still seeking donations of books for the Professional Design Center Library

Queens Chapter President Brian Flynn would like all to know that the Professional Design Center Library is still in need of Books, Magazines and other materials. The Queens Chapter is asking all members to donate any reference material, such as textbooks, catalogs and product literature that they can.

### Please Note:

Members are advised that the Queens Chapter meeting on Thursday, April 26<sup>th</sup> 2007 will be held at our Fort Totten office. At the Fort Totten gate tell the guard you are a member of the P.E. Society and that your name is on the list that they keep there. Any non-members and guests not placed on the list will be denied entrance-If this happens the guest should ask the guard to call the phone number on the membership list. A board member will then come down to bring the guest in

In NY State, The practice of the profession of engineering is defined as performing professional service such as consultation, investigation, evaluation, planning, design or supervision of construction or operation in connection with any utilities, structures, buildings, machines, equipment, processes, works, or projects wherein the safeguarding of life, health and property is concerned, when such service or work requires the application of engineering principles and data. Private code compliance inspections fall directly into the definition of the practice of engineering. Just because NY State ignores the law does not make it right.

There is a gray area of engineering services that should be clarified under Article 145, the practice of engineering. Testing labs that provide concrete, soil exploration and other types of testing provide engineering services utilizing technicians to perform field and lab work. The end result is a certified engineering report that the designs and plans are dependent on. General business corporations authorized to provide professional engineering services are required to obtain a Certificate of Authorization from the State Education Department. I propose that a separate Certificate of Authorization for Testing Labs should be mandatory and added to Article 145 under the practice of Engineering in order to offer Engineering Testing Services as a general business corporation. This would require any private testing and construction inspection companies utilizing technicians in field service to be properly staffed with the licensed professionals responsible for certifying the engineering documents. How else can we safeguard life, health and property, when applying engineering principles and data. How else, especially when we are the only ones being held accountable.

## Computer and Office Donations Needed

Is your firm or company updating its computer or other office equipment and planning to get rid of the older systems? If so, please consider donating such equipment to the Queens Chapter of the NYSSPE.

The Queens Chapter is seeking donations of computer and office equipment. For more information contact Brian Flynn, Queens Chapter President at 718-539-2649



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## Upcoming Meeting Information

### *Our Next Chapter Meeting*

*Thursday, April 26, 2007 – 6:30 PM*

Presenter: [Greg McEwen](#)  
[Integrated Paving Concepts Inc.](#)

#### Decorative Asphalt:

- What is Decorative Asphalt and how it is installed
- Who is using Decorative Asphalt and why
- Why and where would you NOT use Decorative Asphalt
- Where is it being installed in NY, around the USA and around the world
- How does Decorative Asphalt compare to other forms of decorative paving

#### *Location:*

[\*422 Weaver Ave., Fort Totten, New York\*](#)

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## 2007 Chapter Meeting Schedule

### Mark Your Calendar

For your convenience the Queens County Chapter NYSSPE meeting schedule is provided below.

Directors' meetings and general meetings are held on the second and fourth Thursdays of each month except November and December meetings which will be held on the first and third Thursday of the month due to holidays. So mark your calendar. The schedule is as follows:

#### Directors' Meeting (6:30 PM)

April 12, 2007  
May 10, 2007  
June 14, 2007

#### Membership Meeting (6:30PM)

April 26, 2007  
May 24, 2007  
June 28, 2007

## Quick Links

### Contact the Author:

[Martin Schwartzberg, Esq.](#)  
[L'Abbate, Balkan, Colavita & Contini,](#)  
[L.L.P.](#)

1001 Franklin Avenue, 3rd Floor  
Garden City, New York 11530  
(516) 294-8844

# Ask the Lawyer

*By Martin A. Schwartzberg, Esq.  
L'Abbate, Balkan, Colavita & Contini,  
L.L.P.*

## **Engineer's Liability for Underpinning Controlled Inspections**



A recent trial court decision had a favorable result for an engineer where its alleged liability was premised upon its obligation to perform underpinning controlled inspections pursuant to the TR-1 it filed with the Department of Buildings ("DOB"). Before discussing the case, a little background is in order.

Section 27-169 of the Building Code provides as follows:

**Notice to Adjoining Owners** - No demolition or removal permit shall be issued unless and until at least five days prior written notice for the permit application shall have been given by the applicant to the owners of all adjoining lots, buildings and service facilities which may be affected by the proposed demolition or removal work.

Section 27-195 of the Building Code provides:

**Notice of Commencement of Work** - At least twenty-four hours written notice shall be given to the commissioner before the commencement of any work for which a permit has been issued. Before any work is commenced on an item of construction requiring controlled inspection, all persons responsible for such controlled inspection shall be notified in writing at least seventy-two hours prior to such commencement.

*[\(Continued next page\)](#)*

With regard to controlled inspections, Section 27-724 of the Building Code provides as follows:

**Construction Required for or Affecting the Support of Adjacent Properties or Buildings**

- Except in cases where a proposed excavation will extend less than ten feet below the legally established grade, all underpinning operations and the construction and excavation of temporary or permanent cofferdams, caissons, braced excavated services, or other constructions or excavations required for or affecting the support of adjacent properties or buildings shall be subject to controlled inspection. The details of underpinning, cofferdams, caissons, bracing, or other constructions required for the support of adjacent properties or buildings shall be shown on the plans or prepared in the form of shop or detail drawings and shall be approved by the architect or engineer who prepared the plans.

With regard to excavations more than ten feet in depth, Building Code Section 27-1031(b)(1) provides as follows:

**(b) Support of Adjoining Structures (1) EXCAVATION DEPTH MORE THAN TEN FEET**

- When an excavation is carried to a depth more than ten feet below the legally established curb level the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures, the safety of which may be affected by such part of the excavation as exceeds ten feet below the legally established curb level provided such person is afforded a license to enter and inspect the adjoining buildings and property.

[\(Continued next page\)](#)

All of the above Building Code sections came into play in the case where an engineer was retained pursuant to a written agreement to provide design services in connection with construction of a building consisting of eight residential condominium units. Pursuant to its contract, the engineer agreed to provide structural, mechanical and electrical designs. The structural drawing containing the underpinning design details, described in the specification as "suggestions only", limited each underpinning "cut" to no more than four feet wide. The plan notes declared the contractor "solely responsible for the safety of all existing property and persons during underpinning operations" and also provided for "[t]he contractor ... to propose and submit his own underpinning details" through a professional engineer and further stated that "[a]ll underpinning work shall be supervised by the contractor's engineer."

The engineer filed the plans with the DOB and signed a TR-1 obligating it, or qualified personnel it supervised, to perform the required controlled inspections. However, the contractor commenced underpinning operations before it had hired a structural engineer to perform controlled inspections and without giving the engineer written notice of the underpinning operations as required by Building Code Section 27-195.

Notwithstanding the lack of written notification of the underpinning work, the engineer went to the site that day after having received a call from the owner of the adjacent building who alleged that settling was occurring. The engineer discovered two underpinning openings approximately eight feet in length, two times the length "suggested" in his structural drawings. A DOB violation was issued which noted that "approved plans dated 4/21/03 indicate underpinning work must be done in four foot wide sections. Now underpinning work ... being done in sections approximately ten, seven and six feet wide at once."

[\(Continued next page\)](#)

As a result of the damage allegedly sustained to the adjacent building, the engineer was sued. One claim alleged was that the engineer had a duty to protect the adjacent land owner's property through controlled inspections of the underpinning work. The engineer filed a motion to dismiss arguing that it owed no duty of care to the adjacent land owner regarding the underpinning operations contractually undertaken by others. It further argued that the typical underpinning detail in its structural drawing was not deficient and there was no proof that the engineer actually performed or supervised the excavation, foundation or underpinning work. It further contended that the project owner and contractors actually performing the excavation work were responsible for damages for loss of lateral support due to the excavation and/or underpinning work. The engineer also argued that the contractor bore responsibility to hire a licensed engineer to perform controlled inspections and that such engineer was intended to replace it as the responsible party on the TR-1 form. In this regard, the engineer described itself merely as a DOB "place holder" prior to the new engineer's retention by the contractor. Significantly, the engineer further argued that the absence of the seventy-two hour written notice before excavation work began nullified any obligation by it to perform a controlled inspection.

In dismissing all claims against the engineer, the trial court held that the failure of the contractor to provide seventy-two hour written notice as required by Section 27-195 of the Building Code required dismissal of the claims against the engineer. The Court further noted that the supporting memorandum by the then Building Commissioner in support of the seventy-two hour written notice requirement noted that "it is important that the registered architect or licensed professional engineer responsible for controlled inspections of a construction operation be alerted when work on that specific operation is to be commenced, so as to assure his presence at the jobsite when the controlled inspection should be performed." As a result, the Court found that the seventy-two hour written notice to the design professional was required, and that the engineer's notice of excavation sent to neighboring land owners sent pursuant to Building Code Section 27-169 failed to fulfill the underpinning notice requirement.

[\(Continued next page\)](#)



The Court also found that liability also failed to arise from the engineer's identification of the possible need for underpinning and the "suggested" underpinning drawings since the parties opposing the motion failed to submit an expert affidavit indicating that the plans were inadequate. The Court further noted that the engineer's recognition of the need for underpinning and its suggested plans and drawings for proper underpinning also provided no basis for recovery against the design professional. In this regard, the Court noted that Building Code Section 27-1031(b)(1) places responsibility for the safety of adjoining structures on the person who causes such excavation to be made. Based upon all of the above, the Court held that the engineer's tenuous relationship to the actual underpinning operations failed to make it liable to the adjacent land owner for any of the damages claimed.

While this decision is certainly favorable for engineers who sign the TR-1 forms assuming responsibility for the underpinning controlled inspections with the anticipation that an engineer retained by the owner or contractor will actually perform the inspections, this was only a trial court decision and a Notice of Appeal has been filed. Nonetheless, the decision is helpful in defending cases where the engineer filed the TR-1 accepting responsibility for underpinning controlled inspection as the "place holder" for the engineer who is eventually retained to actually perform the inspections.

A valuable lesson to be learned from the case is that on any project where underpinning controlled inspections are required, the specifications prepared by the engineer should require that the contractor comply with Section 27-195 of the Building Code. In addition, if an engineer does undertake responsibility for underpinning controlled inspections and the contractor does not initially provide the seventy-two hour written notice as required by the Building Code, the contractor should be reminded in writing that in the future the engineer is required to be provided with seventy-two hours written notice.

## Hotline for Members

Are you an NSPE member with a question about engineering ethics, licensure, or law? If so, call 888-285-NSPE (6773) or e-mail [legal@nspe.org](mailto:legal@nspe.org). Please provide your 9-digit NSPE member number.

## Useful websites for Engineers:

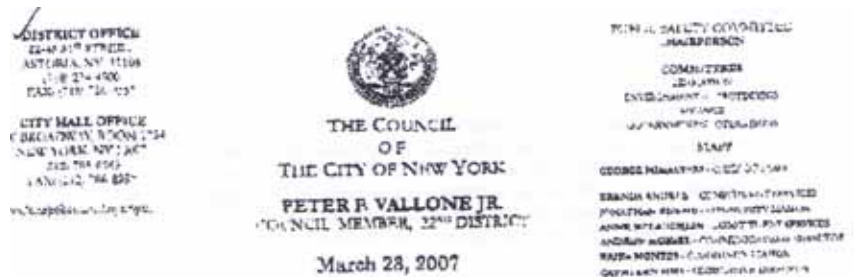
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## Fort Totten Update:

George Tavoulatreas, PE

As many of you know, we are being evicted by the NYC Parks Dept. We have maintained the building, and offered free lectures to the public for more than ten years. We have also spent more than \$150,000 in maintaining the building throughout the years.- Its our home We deserve a fair shake

Senator Frank Padavan And Councilman Peter Vallone, Jr. wrote a letters to Mayor Bloomberg and the Parks Commissioner.



Hon. Michael R. Bloomberg  
Mayor  
City of New York  
City Hall  
New York, NY 10007

RE: Building 422  
Fort Totten, Queens, NY


Dear Mayor Bloomberg:

I am writing on behalf of the Professional Design Center (PDC) currently occupying Building 422 at Fort Totten. The Department of Parks & Recreation has instructed the PDC to vacate the building no later than the close of business on March 31, 2007. PDC, a Not-for-Profit Corporation, is a singular entity acting as an umbrella organization for the Queens County Chapters of the American Institute of Architects and the New York State Society of Professional Engineers and wish to remain at their present location. An integral part of the PDC's program is to provide educational forums free to the public, a mission which is compatible with the Parks Department and other City agencies.

PDC has been located at Building 422 since they entered into a sublease agreement with the Fire Department in 1997. They have spent a considerable amount of money and time on capital improvements and general maintenance of the building. They use the first floor of the building for public meetings, usually three to four per month as well as three directors' meetings monthly. Additionally, the PDC provides educational programs with topics such as Landscape Architecture, Zoning and Building Codes, Environmental issues in Queens, FEMA Flood and Hurricane Standards, and the Annual "Mathcounts Competition" for New York City Schools with winners competing on a state and national level for scholarships totaling in excess of \$1 million.

I have been informed that the PDC has met with representatives from the Parks Department in an attempt to amicably resolve this matter. The PDC is a vital component at Fort Totten and a desirable entity in the community. They provide an unparalleled service to the Borough of Queens and the entire city. Their presence is a benefit to the public and any consideration given to their request to remain at Building 422 would be appreciated.

Very truly yours,

  
PETER F. VALLONE JR.  
Chair, Public Safety Committee

PFVJ:am

- c. Commissioner Adrian Benepe  
Queens Parks Commissioner Dorothy Lewandowski  
Robert LoPinto, P.E., Chair, PDC

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February 27, 2007

Mr. Adrian Benepe, Commissioner  
N.Y.C. Department of Parks & Recreation  
The Arsenal, Central Parks  
New York, NY 10021

Dear Commissioner Benepe:

Please find enclosed copies of pertinent documentation I received from Mr. Robert LoPinto, PE, Chair of the Professional Design Center (PDC), currently located at Fort Totten, Building 422. As you are aware, I have been intimately involved with matters concerning Fort Totten over the years, and I wish to convey to you my support for PDC's request to be permitted to remain in Building 422.

In apparent compliance with the stipulations of the Public Trust doctrine and the Department of Parks and Recreation's (DPR) policy concerning utilization of space at Fort Totten, the PDC's mission and activities correspond to the objectives of the DPR, and the vital services it provides constitute "appropriate use of parkland."

The PDC has a vital role furthering the goals and aiding the functioning of the DPR in various and sundry ways. The PDC has offered professional assistance to the DPR and can provide an essential service in the restoration and maintenance of facilities at Fort Totten. This is further evidenced by its programs relative to landscape architecture, environmental issues, and geology, as well as educational and informative offerings regarding building codes, zoning changes, energy conservation and local history. The product of these endeavors is a better informed public concerning matters of conservation, historical preservation, and usage of public space, indeed complementary of and compatible with the mission of the DPR.

In view of the above, I ask that you make every effort to accommodate the continuing presence of the PDC, as a designated 501(c)(6) not-for-profit entity operating consistent with the stated purposes of the DPR, at its present location in Building 422, giving prudent consideration to this entreaty in accordance with a submitted "request for proposal" (RFP) or otherwise.

I thank you in advance for your prompt attention to this matter.

Parks Commissioner Benepe  
February 27, 2007  
Pg. 2

Sincerely,

Frank Padavan  
State Senator



FP:dajd

Enc.

C: Mr. R. LoPinto  
Mr. B. Haber

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