

## Underpinning under the new building code



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As construction safety receives increased scrutiny from the Department of Buildings (DOB), owners, architects, engineers and contractors throughout the five boroughs are paying particular attention to its new code concerning protection of properties adjacent to new construction.

The DOB requires underpinning of the foundations of such structures before site excavation to prevent settlement, which involves extending the foundation's breadth and depth so it either rests on more supportive soil or distributes its load across a greater area. Under the new building code (effective July 2008), the roles of owners and professionals in determining when to underpin has been both clarified and obscured, while the DOB has shifted the burden of ensuring safety onto the professionals themselves.

Section § 27-1029 of the 1968 code imposed a general safety requirement on excavation projects adjacent to other property, whereby the adjacent owner must be notified of subsurface operations, while § 27-1031(b)(1) provided that structures adjacent to an excavation site had to be underpinned or protected by other means by the "person causing the excavation" when the excavation was 10 ft. or more below curb level. In contrast, the adjacent property owner had to protect his own property when the excavation was less than 10 ft. below curb level. Under the new code (Building Code § 1814.1), the 10 ft. guideline has been eliminated, thus leaving the need for protection to the discretion of the engineer / architect. This is not to say that the code requires underpinning less often, but rather, that it has shifted the need assessment.

The new code has also changed the timing of inspections, which had previously occurred after the excavation and before installation of the footings, followed by notification to the DOB that the inspection occurred. Now, however, the DOB must receive notice before commencement of excavation. Thus, while professional discretion has become more important before excavation, the DOB maintains the right to ensure good judgment before the fact.

Additionally, Building Code § 3301.1.1 eliminates the contractor's obligation to notify the architect or engineer that excavation is about to commence (as previously required by the 1968 code), placing an additional burden on the architect or engineer to ensure that safety measures are being followed according to plan, thereby eliminating the architect and engineer's lack of notice defense when safety measures are not followed. Ironically, though the DOB has the discretion to issue a stop work order if it is not notified before excavation begins, it will not know of the absence of notice. If the owner and his professionals do not give notice, the adjacent owner - the only other person with the interest and motivation to ensure site safety - is now, in effect, charged with policing his neighbor's construction to ensure code compliance.

Besides the prospect of DOB violations, owners and their professionals can be held strictly liable in a civil litigation for damage to adjacent property arising from the failure to underpin, regardless of whether they are at fault. The new code's elimination of the 10 ft. guideline in reliance on professional discretion is not expected to alter this well-established public policy. Similarly important is the owners' and professionals' nondelegable duty under common law to protect adjacent properties during inherently dangerous work, meaning an owner cannot escape liability by blaming his architect, the architect cannot pass the blame onto the contractor, and so on down the line.

Adjacent property owners continue to rely on the issuance of DOB violations to prove liability in civil litigation. Under certain well-established legal principles (with occasional exception), a finding in one forum precludes reexamination of the issue in the same or another forum. Thus, an environmental control board finding (the administrative body that adjudicates DOB violations) that a contractor violated the building code may be conclusive evidence of the violation in a civil litigation against that contractor, leaving the contractor unable to reopen the issue.

Occasionally, a professional causing issuance of a violation against an owner may wish to shield the owner from being fined. The professional may choose to "take the hit" by substituting himself in for the owner before the environmental control board, resulting in no finding against the owner. However, the owner may be held liable in a subsequent litigation because the board's finding against the professional makes civil liability against the owner more likely.

One cannot expect the building code to resolve complex evidentiary issues such as these in a civil litigation; however, architects, engineers and contractors should remain aware that findings before the environmental control board may be relevant in subsequent proceedings.

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