



YOUR 50 STATE PARTNER®

It (Occasionally) Takes a Tragedy: Regulatory Responses to Construction-Related Catastrophes

July 18, 2023
Lisa Cappelluti
Virginia Trunkes
Robin Sagstetter

INTRODUCTIONS



Lisa Cappelluti

Partner, San Francisco
lcappelluti@grsm.com



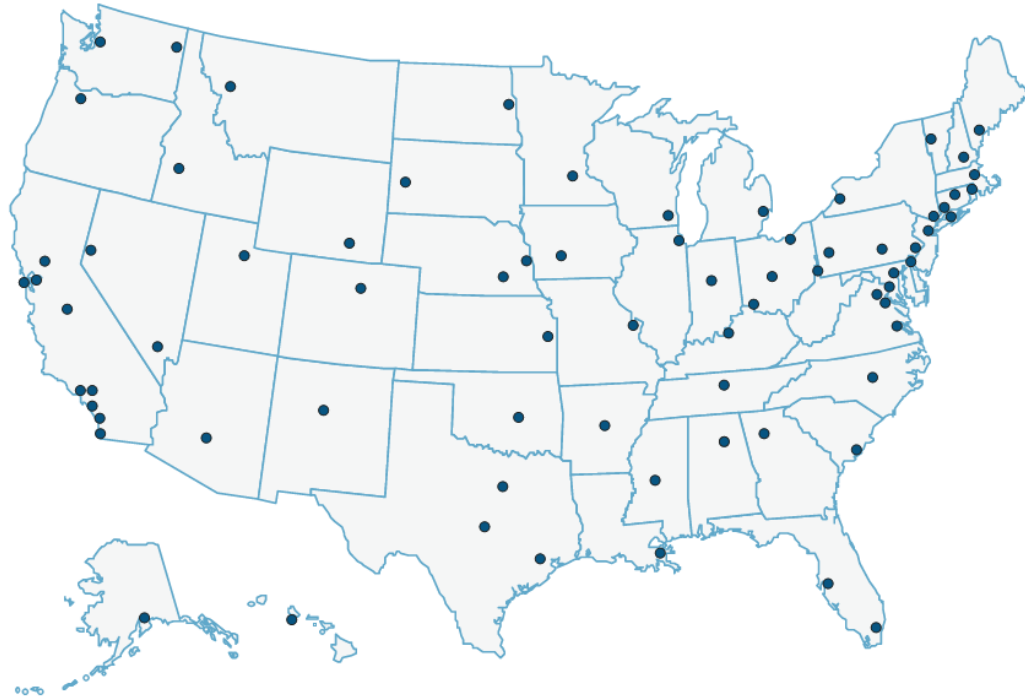
Robin Sagstetter

Associate, Irvine
rsagstetter@grsm.com



Virginia Trunkes

Partner, New York
vtrunkes@grsm.com



YOUR 50 STATE PARTNER®

Recognized among the 30 largest law firms, with more than 1,100 lawyers in all 50 states, Gordon & Rees provides full service representation seamlessly across the United States.

As the only law firm with offices and attorneys in all 50 states, we deliver maximum value to our clients by combining the resources of a full-service national firm with the local knowledge of a regional firm.

TOP 15

FIRMS FOR FEMALE ATTORNEYS

Law360 Glass Ceiling Report

TOP 25

FIRMS FOR DIVERSE ATTORNEYS

American Lawyer Diversity Scorecard

100%

RATING FOR LGBT ATTORNEYS

Corporate Equality Index

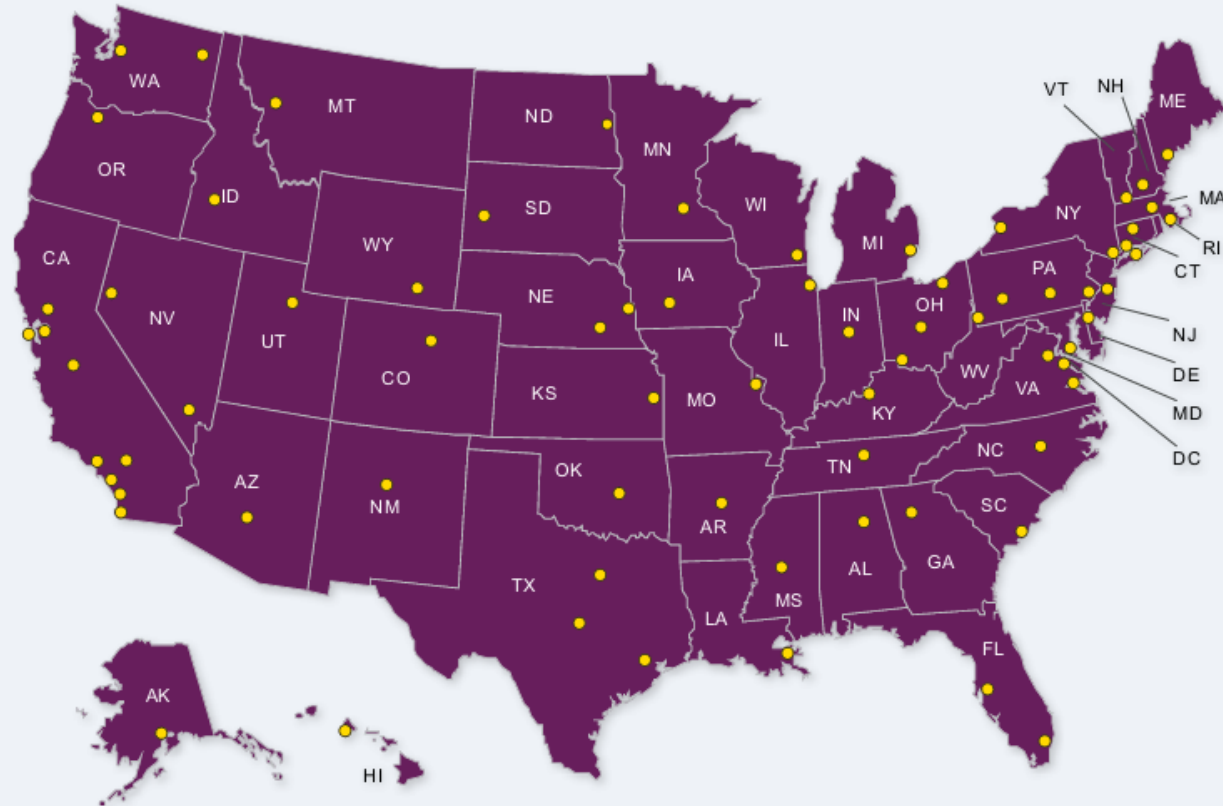
Women Leaders in Construction Law

Gordon & Rees' Construction Group includes dynamic women attorneys who work in all aspects of construction law to provide legal representation for our clients nationwide.

These leaders build our construction teams on a case by case basis. They work together in a multi-disciplinary approach involving attorneys from our firm's Business Litigation and Transaction, Employment, Insurance, Intellectual Property and Real Estate practice groups to handle your construction legal needs from inception to completion.

NATIONAL PLATFORM

With offices and attorneys in all 50 states, Gordon & Rees' Women in Construction attorneys provide seamless service across the United States



Agenda/What We Will Cover

- Categories of Building Safety
- Federalism/Tenth Amendment
- Historical Tragedies, Legal-Liability Disputes/Determinations & Regulatory Reactions
- Sweeping Legislation/Guideline Examples at Federal Level
 - OSHA
 - NFPA
 - Federal Interstate Bridge Policy Changes
 - FEMA
- Recent State/Local Regulatory Responses to Tragedies
- Analysis of How the Laws Interplay with Contract Obligations and Culpability

Categories of Building Safety

- Fire
- Weight Distribution/”Load”
- Weather
 - Wind/Water/Snow – combination
 - Hurricanes/Blizzards > structural/support/load-bearing/drainage
 - Temperature Differentials
- Seismic – below foundation trigger



Federalism/Tenth Amendment

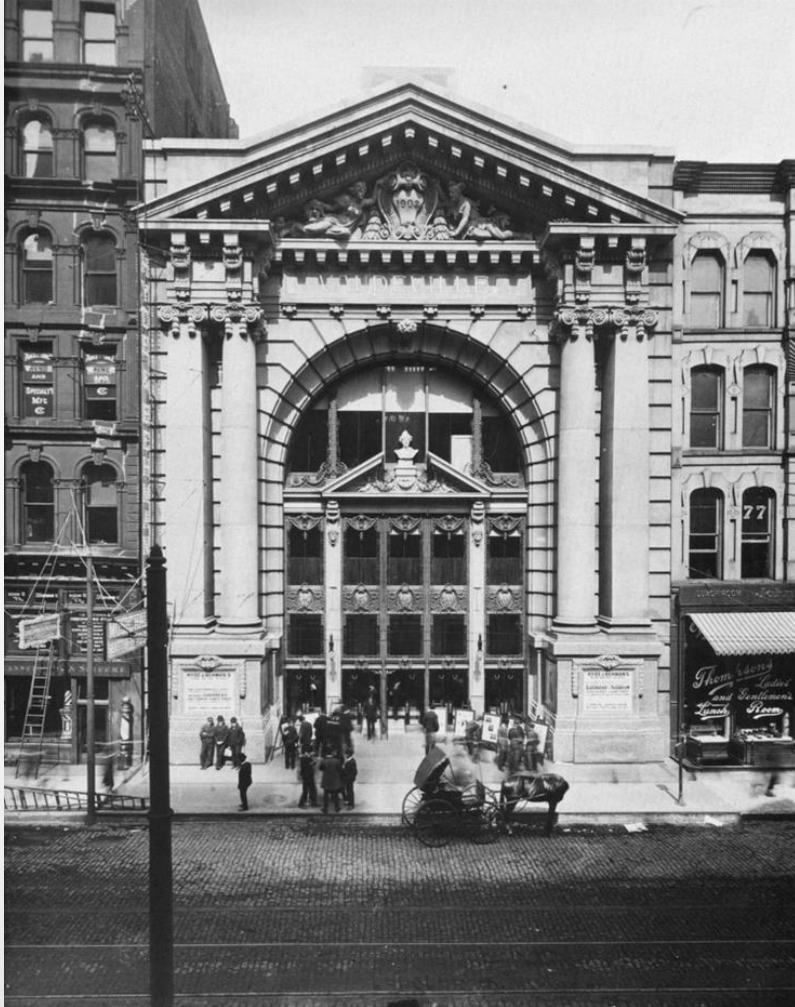


- U.S. Constitution (1789): Art. 1, § 8: Congress is, entrusted with “enumerated powers”: *e.g.*, borrow money, lay taxes, create a post office, declare war, and “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution ...”
 - “necessary and proper” > Art. 1, § 8, clause 3: “Commerce Clause” > affect interstate commerce
- 10th Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.”
 - “Police power”- implied constitutional power of government to regulate private property - *Lawton v. Steele*, 152 U.S. 133, 136 (1894).
 - “Public safety, public health, morality, peace and quiet, law and order. . . are some of the more conspicuous examples of the traditional application of the police power”. *Berman v. Parker*, 48 U.S. 26 (1954) (emphasis added).
 - “The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.” *Chicago, B. & Q.R. Co. v. McGuire*, 219 U.S. 549, 567 (1911)
- Example of early building “regulation”: state government responses to emergencies:
 - Fires: Demolition of buildings to create firebreaks during emergency: **Russell v. Mayor of New York**, 2 Denio 461, 461-65 (1845) (Great New York Fire of 1835); **Surocco v. Geary**, 3 Cal. 69 (1853); **Keller v. City of Corpus Christi**, 50 Tex. 614, 625 (1879)
 - Non-emergent: **King v. Davenport**, 98 Ill. 305, 308 (1881)
 - Floods: create barriers, *e.g.*, post “Superstorm Sandy”

HISTORICAL TRAGEDIES, LEGAL-LIABILITY DISPUTES/DETERMINATIONS & REGULATORY REACTIONS



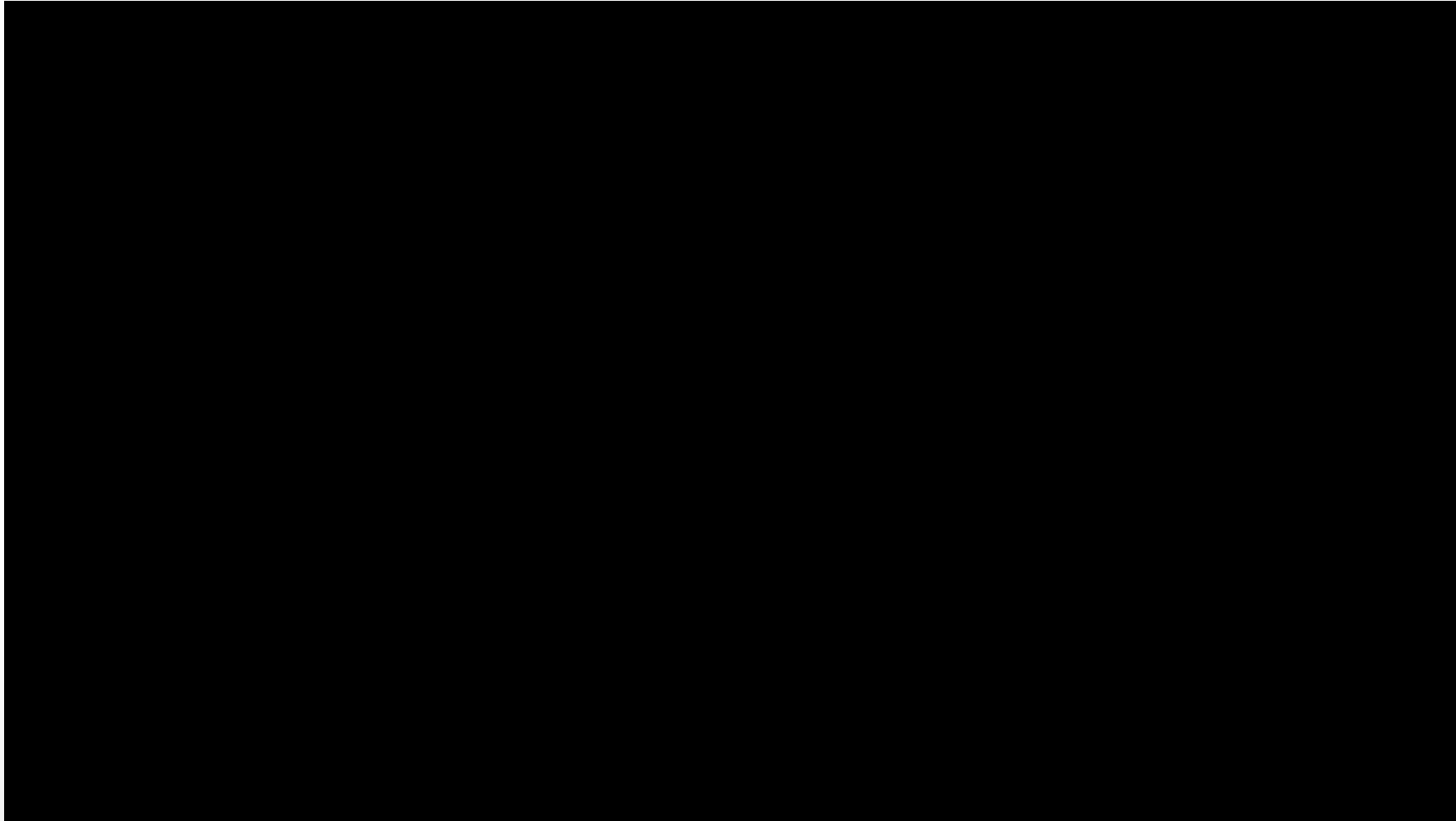
The Iroquois Theater, Chicago (Fire – 1903)



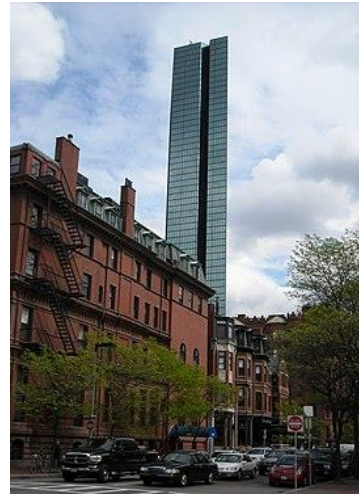
The Knickerbocker Theater, District of Columbia (Snow [roof support] – 1922)



Tacoma Narrows Bridge (“Galloping Gertie”), Washington (Wind – 1940)



John Hancock Tower, Boston (Heat – 1973)



Cont'l Cas. Co. v. Gilbane Bldg. Co., 391 Mass. 143, 143 (1984) (declaratory judgment action brought by insurer against CM and curtain wall subcontractor)

Liberty Mut. Ins. Co. v. Cont'l Cas. Co., 771 F.2d 579, 580 (1st Cir. 1985) (b/w excess and primary insurers)

Am. Home Assur. Co. v. Libbey-Owens-Ford Co., 786 F.2d 22 (1st Cir. 1986) (b/w excess insurer and its insured, a window manufacturer, re: lawsuit brought by the building owner)

Trinity Church in the City of Bos. v. John Hancock Mut. Life Ins. Co., 405 Mass. 682 (1989) (affirming judgment in favor of adjacent landowner against skyscraper owner for property damage resulting from excavation during construction of skyscraper)

Illinois Union Ins. Co. v. Fireman's Fund Ins. Co., No. CIV. A. 88-2078-F, 1989 WL 149279, at *4 (D. Mass. Dec. 5, 1989) (referring to the insurance litigation with the construction manager as the “now-famous window catastrophe in Boston's John Hancock Tower”)

Hyatt Regency Walkway, Kansas City (Weight Distribution – 1981)



Balcony Collapse in Berkeley, California (Water – 2015)



Sweeping Legislation/Guidelines Examples at Federal Level

- Occupational Safety and Health Act of 1970 (29 USC 651)
 - Created Occupational Safety & Health Administration (OSHA) – part of U.S. DOL
 - Ensures safe and healthful working conditions for workers
 - Sets and enforces standards
 - Provides training, outreach, education and assistance
 - Enforces whistleblower statutes and regulations
 - Section 2(b) of the Act: “The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.”



Sweeping Legislation/Guidelines Examples at Federal Level

- NFPA – Adopted by federal agencies for life-safety minimum standards (e.g., CMS)
- Federal Interstate Bridge Policy Changes (I-35W in Minneapolis – 2007)
- FEMA
 - 2020 Building Code and Floodplain Management Administration and Enforcement (FEMA Policy FP 204-079-01) was signed; defines the framework and requirements for consistent and appropriate implementation of the 2018 Disaster Recovery Reform Act (DRRA) section 1206 through the PA Program.
 - 2022 FEMA Building Codes Strategy is released, acting as the blueprint for organizing and advancing FEMA’s building code efforts over the next several years to help people before, during and after disasters.

RECENT STATE/LOCAL REGULATORY RESPONSES TO TRAGEDIES

Key Themes of Legislation

- Legislation enacted to respond to catastrophic issues involving life safety often has very broad language which may omit key details needed for interpretation and also unclear guidance on its enforcement.
- Statutory Language can create added liability for cases if a party case use the statute to establish a violation and argue that there should be a negligence per se finding which holds that if the violation occurred than there should be an automatic finding of negligence against the party who was in violation of the statute.
- Contract language which is often used in various contracts to require compliance with safety standards can be used in conjunction with these newly enacted statutes to argue for a breach of contract claim as well for safety violations.

California Balcony Bill – History and Purpose

- The requirements of SB 721 are designed to ensure the safety of individuals and avoid a reoccurrence of a tragedy similar to the 2015 Berkeley balcony collapse.
- It mandates the regular inspection of wood exterior elevated elements and associated waterproofing elements throughout California, inspection reports, and follow-up repairs as necessary.
- The law took effect on January 1, 2019 and applies to all buildings with three or more multifamily dwelling units, including apartment buildings, triplexes, and multi-unit buildings.
- SB 721 does not apply to common interest developments, such as condominiums and community apartments.

California Balcony Bill – Key Topics of Discussion

- Buildings Subject to Inspection
- Timing of Inspections and Persons Qualified to do Inspections
- Landlords Right of Entry to Inspect and Repair
- Conducting Inspections
- Inspection Reports
- Emergency Conditions
- Repairs and Timeline to Conduct Repairs
- Risks of Noncompliance
- Record Keeping and Disclosure
- Condominium Conversions

California Balcony Bill - Conclusion

- The requirements of SB 721 are designed to ensure the safety of individuals and avoid a reoccurrence of a tragedy similar to the 2015 Berkeley balcony collapse.
- Residential building owners that are not conducting inspections are not only risking the potential safety of tenants and their guests but may be exposed to potential liability in the event of a catastrophic failure, in addition to civil penalties and building safety liens.
- Owners of buildings should pay careful attention their disclosure and reporting obligations.

Seven Major Collapses in the United States From the Last 5 Years

- **2018**- Florida International University Pedestrian Bridge Collapse
- **2021**- Surfside Condo Collapse
- **2021**- Orlando AdventHealth Parking Garage Crane Collapse
- **2022**- Pittsburg Fern Hollow Bridge Collapse
- **2023**- Charlotte, NC Scaffolding Collapse
- **2023**- NYC Parking Garage Collapse
- **2023**- Davenport Iowa Apartment Building Collapse

Florida International University Bridge Collapse



Deadliest Non-Deliberate Structural Engineering Failures in U.S. History

- 3rd Place- 98 deaths- Surfside Condo Collapse in 2021
- 3rd Place- 98 deaths- Knickerbocker Theater in 1922
- 2nd Place- 114 deaths- Hyatt Regency Hotel in 1981
- 1st Place- 88-145 deaths- Pemberton Mill in 1860

Surfside, a town in Miami, Florida



Surfside Condo Collapse



Recent State/Local Regulatory Responses to Tragedies in Florida

- Florida State Senate Bill 4D
- 14 Florida Administrative Code 14-48.0011- Safety Inspection of Bridges
- DOT- Bridge and Other Structures Inspection and Reporting
- Title 23, Code of Federal Regulations Part 650- Subpart C— National Bridge Inspection Standards

New York, New York

- Façade Inspection & Safety Program (FISP)

- corroded masonry & fractured terra cotta

-1980 > 1998 > 2008 > 2020

-2015 tragedy

-2019 tragedy

- 2020 Local Law 11 inspection -- 1 RCNY § 103-04

- enhanced qualifications for Qualified Exterior Wall (QEWs), façade inspection requirements, and increased civil & criminal penalties for non-compliant owners

- Also: Local Law 102: study drones -- see report:

<https://www.nyc.gov/assets/buildings/pdf/LL102of2020-DroneReport.pdf>

- Underground: 2022 revisions: “Soils and Foundations”

- Revised Code requires applicants for new construction projects to file with the DOB additional documents including valuable, detailed information about the project’s below-grade environment.



Analysis of How the Laws Interplay with Contract Obligations and Culpability

- Standard Construction and Design Services Agreement Language Concerning “legal requirements”
- Evaluating negligence *per se*
 - Example: In order to prove a violation of an OSHA standard, OSHA must prove four elements:
 - The standard cited applies to the conditions;
 - There was noncompliance with the standard;
 - An employee was exposed to or had access to the hazardous condition; and
 - The employer knew or should have known of the hazardous condition.
- Common Characteristics of Regulatory Measures Following Disasters
- Impact on Contractual Relationships
- Role of Construction Counsel

Questions?

2023 National Construction Law Webinar Series

GORDON&REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER®

GORDON&REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER®



Upcoming Tuesday Talks: Women in Construction Webinars

- October 17, 2023 – Contracts
- November 14, 2023 – Alphabet Soup and Insurance Policies

GORDON&REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER®