



Greetings from the Editor

BR&H had a great 2007 marked by the steady growth of the firm and a number of substantial victories for our clients in mediations, arbitrations, and court trials. And we started off 2008 with a bang in early January when the California Court of Appeal reversed a significant trial-court decision relating to arbitration and contractual attorney fees that had gone against BR&H's client.

To meet the increasing demand for our expertise while offering the best-possible service, the firm recently welcomed two experienced associates to the fold. We are delighted to introduce Randy Parent and Elizabeth Harvey as the newest members of the construction law practice. They each bring considerable expertise and diverse skills to our burgeoning team. We're also adding some seasoned paralegals, data clerks, and support staff to help to keep our gears moving smoothly. Watch for a little dust around the offices as we expand into some new space to accommodate all the exciting talent here. Get all the details at www.brhlaw.com, and be sure to join us on February 8 for the Breakfast Forum (details on page 9).

—Paul Kotapish ❖

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SHOULD YOUR CONSTRUCTION CONTRACT INCLUDE A FORCE MAJEURE PROVISION?

THE CONSTRUCTION INDUSTRY IS STILL RESONATING with the aftermath of Hurricane Katrina. With climatologists predicting an increase in such devastating events around the globe and the specter of a catastrophic earthquake in California an ever-present potential, it's worth taking a fresh look at force majeure provisions in construction contracts.

The purpose of a contractual force majeure provision is twofold—to excuse performance if a specified event occurs and to allocate the risk of an unanticipated event. Whether it is advisable or necessary to include such a provision in a construction contract depends on whether the parties intend to displace the common law of commercial impracticability. That is, unless a force majeure clause expressly states that it provides the exclusive remedy to excuse the performance of a contractual obligation, or plainly assigns the risk of an unanticipated event to one party, the party seeking to be excused from performance may rely not only on the force majeure provision of the contract as a defense but also on the defense of commercial impracticability.

To understand how California courts will evaluate the legal effect of a contractual force majeure provision requires a journey back in time to early statutory and case law.

CALIFORNIA STATUTORY LAW

California Civil Code Section 1511, enacted in 1872 to codify British and American common law, provides that an obligation under a contract is excused when it is prevented or delayed by an “irresistible, superhuman cause” or “by the act of public enemies of this state or of the United States” (in other words, “war”) unless the parties expressly agree otherwise. Twenty years later, in *Ryan v. Rogers*, the California Supreme Court held that an “irresistible, superhuman cause” is the equivalent of an “act of God” and refers to natural causes whose effects cannot be prevented by the exercise of prudence and diligence and care. Similarly, the few California cases addressing the subject have held that “war” cannot excuse performance if the danger of war was a foreseeable event and not addressed in the contract. If war is foreseeable at the time of contracting, the party promising to perform assumes the risk that war may impact its performance unless that risk is somehow allocated differently in the contract.

Civil Code Section 1511—which expressly provides that parties to a contract
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SHOULD YOUR CONSTRUCTION CONTRACT INCLUDE A FORCE MAJEURE PROVISION? *Continued from page 1*

can agree that performance will or will not be excused by an “act of God” or “war”—opened the door to the inclusion of the modern force majeure provision as a means of allocating the risks of unanticipated events.

The terms “act of God” and “force majeure” are sometimes used interchangeably, but they have different meanings, at least under California law. Generally speaking, an act of God excludes the concept of human agency, whereas force majeure does not. Traditionally, acts of God included events such as tornados, lightning, floods, earthquakes, droughts and unusually severe weather conditions. Force majeure events typically include not only “acts of God,” but also human-made or human-caused events such as strikes, lockouts, riots, wars, explosions, sabotage and governmental acts. However, contracting parties are free to create, identify, and bargain for their own force majeure events.

CALIFORNIA CASE LAW

Impossibility/Impracticability of Performance

Except for acts of God, early edicts from the California Supreme Court were quite strict in holding contracting parties to their promises. Here are some of the early holdings from the Court, which have not been overruled and whose concepts remain applicable to determining liability under a contract:

1. “Where a party has expressly undertaken, without any qualification to do anything not naturally or necessarily *impossible* under all circumstances, and does not do it, he must make compensation in damages, though the performance was rendered *impracticable* or even *impossible*, by some *unforeseen* cause over which he had no *control*, but against which he might have provided in his contract.”
2. “He who agrees to do an act must do it unless it is absolutely *impossible*. He should provide against contingencies in the contract.”

3. Even when an act of God was involved, the Court found a way to hold a party to its contract: “The benefit of the sanctity of the rule that no one is responsible for damages caused by the act of God does not inure to one who could have avoided the damage by complying with his contract.” For example, high winds would not have prevented performance of a contract if performance had begun on the date specified in the contract.

4. “Parties should be careful about making contracts and creating agents, but when once made the courts will not relieve them for light or trivial reasons. Public policy is much better served in such cases by leaving the parties and their rights to be measured by the terms of their contracts.”

5. “The rule is, that if performance of a contract is possible, it is none the less a breach, although the obligor himself may have become wholly unable to perform. The *impossibility* must consist in the nature of the thing to be done, and not in the inability of the party to do it. If what is agreed to be done is possible and lawful, it must be done. Difficulty of accomplishing the undertaking will not avail the party who commits a breach of the contract . . . The rule has its foundation in common sense and honesty, and compels parties to abide by their contracts. Any other rule would leave all contracts in a sea of uncertainty without rudder or compass.”

In 1916, with its holding in *Mineral Park Land Co. v. Howard*, the California Supreme Court created the doctrine of “commercial impracticability.” That case involved a contract for hauling gravel and earth from plaintiff’s land, which the defendant needed to construct a bridge. The defendant had promised to take all the gravel it needed to construct the bridge from the plaintiff’s land, but only took a portion because some of the gravel was below water level and would have cost 10 to 12 times more than the cost of removing gravel from land. The

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plaintiff brought suit to enforce the contract. The court accepted the defendant's excuse for nonperformance, concluding that "a thing is impossible in legal contemplation when it is not practicable; and a thing is not practicable when it can only be done at an excessive and unreasonable cost."

The *Mineral Park* approach has been incorporated into the Uniform Commercial Code (U.C.C. Section 2-615) and the Restatement of Contracts (Rest.2d, Contracts, §261). Because the U.C.C. generally applies to contracts for the sale of goods (and not contracts for services), the Restatement is more applicable to construction contracts. The Restatement at Section 261 provides:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate to the contrary.

The Restatement incorporates the doctrine of commercial impracticability articulated by the California Supreme Court decisions and adds that the doctrine may vary depending on the language or the circumstances of the case. In other words, a party may, by appropriate language, agree to perform in spite of impracticability that would otherwise justify its nonperformance under the rule.

According to the Comments to the Restatement, even without an express agreement, a court may decide, after considering all the circumstances, that a party implicitly assumed a greater obligation. Those relevant circumstances include a party's ability to include within the contract a provision expressly assigning the risk of impracticability to a particular party. This will depend on (1) the extent to which the agreement was standardized, (2) the degree to which the other party supplied the terms, and (3) in the case of a particular trade or other group, the frequency with which language so allocating the risk is used in that trade or group.

Courts will generally read the doctrine/defense of commercial impracticability into a standard, boilerplate, catch-all force majeure clause. However, if the force majeure clause is unambiguous and its terms are specifically bargained for by both parties, the defense should not

supersede the specific terms bargained for in the contract. And even if the commercial impracticability defense is read into a force majeure provision, a mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction—unless well beyond the normal range—does not amount to impracticability. The Restatement authors reasoned that this is the sort of risk that a fixed-price contract is intended to cover. Furthermore, parties are expected to use reasonable efforts to surmount obstacles to performance, and a performance is impracticable only if it cannot be done in spite of such efforts.

Frustration of Purpose

In 1944 in *Lloyd v. Murphy*, the California Supreme Court addressed for the first time a doctrine called frustration of purpose. This doctrine is similar to the doctrine of commercial impracticability and may also excuse performance in certain circumstances. In *Lloyd*, the plaintiffs leased property to the defendant in 1941 to sell cars. In 1942, the government restricted car sales because of the war. The defendant repudiated his lease, asserting that his entire purpose in entering into the contract was frustrated due to the government's restrictions and that as a result his obligations under the lease should be excused.

The Court pointed out that although commercial frustration had been recognized as an excuse for nonperformance by the courts of England, the soundness of the doctrine has been questioned. Additionally, although commercial frustration is akin to the doctrine of commercial impracticability, it is different in that performance remains possible but the expected value of the performance to the party seeking to be excused has been destroyed by an unanticipated event. Finding that frustration is no defense if the frustrating event was foreseeable at the time of entering the contract or if the contract remains valuable, the Court determined the defendant was not entitled to relief from his lease because in 1941 the defendant could have foreseen the war and its consequences for car production and the value of his lease was not totally destroyed because he was still permitted to sell some cars and use the premises for other purposes.

The Restatement of Contracts has adopted an approach to a frustration-of-purpose defense that is similar to the commercial-impracticability defense. Section 265 of the Restatement provides:

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Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

This defense is difficult to prove. For example, a California federal court in 2002 considered whether the defense should apply in a case where a company agreed to buy software from PeopleSoft and then determined it could not use it. The company returned the software unopened and agreed to pay for training expenses, but PeopleSoft refused the returned product and sued for breach of contract. Rejecting the defendant's frustration-of-purpose defense (and granting a summary judgment to PeopleSoft), the Court held that the frustration-of-purpose defense has three elements, all of which must be satisfied before the defense applies. First, the basic purpose of the contract, which has been destroyed by the supervening event, must be recognized by both parties to the contract. Second, the event must be of a nature not reasonably foreseeable, and the frustration must be so severe that it is not fairly to be regarded as within the risks that were assumed under the contract. Finally, the value of counter performance to the party seeking to be excused must be substantially or totally destroyed.

The question of whether a risk was foreseeable is different from the question of whether it was contemplated by the parties. When a risk is contemplated and voluntarily assumed, foreseeability is not an issue and the parties will be held to the bargain they made. This applies to both frustration-of-purpose and commercial impracticability defenses. If the language of a contract plainly assigns a risk to one party, neither doctrine comes into play.

Contractual Force Majeure Clauses: A Four-Step Analysis

The modern legal definition of a force majeure clause is a "contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled."

Application of a contractual force majeure clause to a particular fact pattern always requires three steps and an

optional fourth step if the contract contains procedures for claiming impacts from a force majeure event.

Step One: Determine whether the unanticipated event is defined in the contract as a force majeure event.

Step Two: Determine whether the unanticipated event was beyond the reasonable control of the party invoking the force majeure provision.

Step Three: Determine the effect of the force majeure event, in other words, whether the contract can still be performed.

Step Four: If the contract included procedures for claiming an impact due to a force majeure event, determine whether those procedures were followed.

The force majeure clause sets forth the scope of unforeseeable events that might excuse performance by a party and the party relying on the force majeure clause to excuse performance bears the burden of proving that the event was (1) beyond the party's control and (2) not a consequence of its own fault or negligence. A force majeure clause is not intended to buffer a party against the normal risks of a contract. For example, the normal risk of a fixed price contract is that the market will change, and a force majeure clause will not excuse performance if such change occurs.

In addition, California case law requires courts to apply a reasonable-control limitation to each force majeure event specified in the contract. The California Supreme Court has defined two aspects of that reasonable-control limitation — good faith in not causing the excusing event and diligence in taking reasonable steps to ensure performance.

Moreover, California law provides that if a disruptive event is foreseeable and the party promising to perform fails to protect itself by means of an express provision in the contract (a force majeure clause), the promisor is deemed to have assumed the risk of that event occurring. That is, when a force majeure event is foreseeable and not encompassed within the force majeure clause, a party cannot rely on that clause to excuse its performance, particularly when the clause includes standard boilerplate events.

When parties expressly contemplate a known risk, they are expected to allocate that risk and not rely on a boilerplate force majeure clause. However, even if the contract does not include a specific event in the force majeure

FEDERAL ESTATE TAX UNCERTAINTIES

The amount an individual can leave to heirs free of federal estate tax is steadily increasing and sounds like a lot of money to most of us. However, Californians who have owned real property for a substantial amount of time, or who have life insurance policies or retirement plans can quickly find themselves with estates worth more than the exclusion amount. Moreover, the exclusion amount is a moving target. For these reasons, you should regularly consult with your estate-planning practitioner.

Under the Economic Growth and Tax Relief Reconciliation Act of 2001 (the EGTRRA), the amount of assets excluded from estate tax liability has increased steadily from \$675,000 in 2001 to \$2 million today and will further increase to \$3.5 million in 2009. There will be a one-year repeal of the estate tax in 2010; however, following the EGTRRA's sunset, the estate tax will return in 2011 and the exclusion amount will decrease to \$1 million.

While the estate tax exclusion amount has increased under the EGTRRA, the federal estate tax rate has fallen. The old gradual rate tables (with a maximum pre-2001 rate of 55%) have been replaced with a flat tax of 45%

(starting in 2007) for estates over the \$2 million exclusion amount but will revert back to 55% in 2011 if further changes are not enacted before then. Estate tax planning will be imperative to avoid paying these high taxes.

The changing exclusion amounts and tax rates are made more complicated by the EGTRRA's sunset uncertainty. Most commentators believe Congress will take action before the EGTRRA lapses and make permanent some form of estate tax relief short of repeal. Provisions currently debated in Congress would set the exclusion amount somewhere between today's \$2 million level and a level perhaps as high as \$5 million. But with Congress' regular tinkering, tax planners know there is never anything permanent about tax laws.

If Congress fails to take action and the estate tax is repealed in 2010, the benefits won't come without a cost. The EGTRRA includes complex provisions to alter (and limit) the income tax basis step-up rules once the estate tax ends. If the estate tax repeal actually happens, income tax planning will replace estate tax planning as the focus of post-death planning.

But keep in mind tax planning is only one facet of estate planning. Avoiding the time-consuming and expensive probate process, planning for incapacity, and properly directing in a will or trust where one's assets should pass at death remain important goals of estate planning which are not impacted by the uncertainty surrounding future tax laws.

—Leslie Bishop Franco ❖

FORCE MAJEURE *Continued from page 4*

provision, a party may still be excused from performance if that specific event occurs. Unless the contract provides that the force majeure provision is the exclusive remedy for excuse of performance, the common law doctrine of commercial impracticability may provide a defense, notwithstanding the force majeure provision.

Most courts interpreting force majeure provisions have held that nonperformance dictated by economic hardship is not enough to excuse performance. That is, a mere increase in expense does not excuse performance under a force majeure provision (or under the doctrine of commercial impracticability) unless the increased expense is extreme and performance becomes unreasonably diffi-

cult as a result. The best guidance for the kind of expense or difficulty necessary to excuse performance in California is the Supreme Court's 1916 decision in the *Mineral Park Land* case discussed above.

In summary, contracting parties may bargain for a force majeure provision which will excuse performance if a specified event occurs after the contract is signed and/or allocate risk to one party if that event occurs. However, unless the parties intend to make the force majeure provision in the contract the exclusive remedy for excuse of performance, the common law doctrine of commercial impracticability will apply even if the unanticipated event is not addressed in the contract.

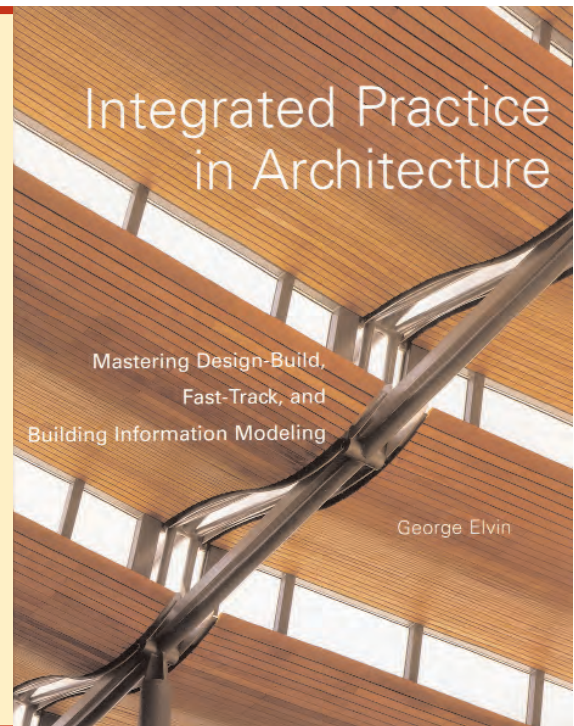
—Carol K. Watson ❖

BOOK REVIEW

**INTEGRATED PRACTICE
IN ARCHITECTURE:
MASTERING DESIGN-BUILD,
FAST-TRACK AND BUILDING
INFORMATION MODELING**

By George Elvin, PhD

Published by Wiley, 2007



Reviewed by Roland Nikles

The industry is abuzz with new talk of integrated project procurement, lean project delivery, alliancing, and building information modeling. Much of this talk consists of vague prescriptions that appear difficult to clearly define in written contracts, difficult to enforce in practice, and that bring to mind Rodney King: why can't we all just get along for the good of the project. George Elvin in *Integrated Practice in Architecture: Mastering Design-Build, Fast-Track, and Building Information Modeling* (Wiley, 2007; \$70) passionately articulates a clear argument why this new talk matters.

The construction industry must improve. Available statistics indicate a drop in productivity over the past half century. By some counts, 12% of construction costs in the U.S. are attributable to corrections and re-work. See, Patrick J. O'Connor, Jr., "Productivity and Innovation in the Construction Industry: The Case of Building Information Modeling," JACCL 135 (Winter 2007). Elvin, an associate professor in the College of Architecture and Planning at Ball State University, draws on his experience of running his own integrated design/construction firm for ten years, twenty-five years in design and construction, and

more than 50 interviews with practitioners of integrated architecture to lay out a clear and convincing explanation of how the historical separation of architecture from construction has led to inefficiencies and how new technology in the form of building information modeling ("BIM") and a reintegration of construction and architecture may lead to real improvement.

From the dawn of civilization to the Industrial Revolution major projects were delivered under the supervision and guidance of Master Builders closely aligned with the crafts and the arts: stonemasons, carpenters, sculptors and painters. Speed was not of the essence. The Basilica di Santa Maria del Fiore in Florence, for example, was started in 1296 and construction lasted 170 years overseen by a series of master-builders to magnificent results. In the service of God and the City State, money—and time—was no object.

During the Enlightenment architects began to redefine their role in society. They moved further from their craft-based origins, spending less time at the job-site and more time in their ateliers. Architectural education moved to academies. These changes raised the status of architects, but distanced them from the crafts of production. As architecture has withdrawn from the project site, architects

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have understandably sought to limit their risk from construction. For example, under the AIA documents, architects used to “supervise” construction; now they merely “observe.”

The separation of design and construction was formalized through the establishment of professional societies like the American Society of Civil Engineers (ASCE) in 1852, American Institute of Architects (AIA) in 1857, and the Associated General Contractor (AGC) of America in 1918 and the creation of standard contract documents prepared by the American Institute of Architects (AIA), the Engineer’s Joint Documents Committee (EJCDC) and the AGC. Elaborate organizational infrastructure, licensing procedures, laws, and regulations all helped to reinforce the fragmentation of architecture into a network of interrelated but autonomous disciplines. For example, by 1954, the AIA had barred architects with contractor’s licenses from its ranks. The age of the Master-Builder was gone!

This formal separation of architecture from construction established hurdles to communication and introduced many opportunities for error as project components are handed off from one participant to another. The architect completes schematics and hands the design “over the wall” to engineering disciplines; they do their work and hand it back “over the wall” to the architect for further action. Once completed, the design is passed “over the wall” by the Owner to the Contractor, and the Contractor hands design “over the wall” to subcontractors for coordination and completion of shop drawings.

At the same time, projects need to be built faster and are more complex. In 1931 the 34 story Kansas City Power & Light Art Deco landmark was constructed in 19 months off 30 plan sheets. The building, however, was relatively simple; it contained no HVAC system other than opening windows, no security systems, and no fancy communication systems. The lack of multiple systems crowding above ceiling spaces allowed for greater tolerances of fit.

By contrast, buildings today contain many more systems, from HVAC, to electrical, to security, to communications. Tolerances are more exacting; spaces are more crowded and difficult to coordinate, and regulation is much more extensive. As a result, the error rate on plans and the resulting inefficiencies are much greater.

Computer-assisted design plans are still imperfect approximations. The lack of information is typically addressed by warning the contractor that the design is “diagrammatic” and that coordination will be required. Traditionally, the coordination process will move forward with the contractor creating physical drawings of different systems that are overlain on light tables to determine if the

various systems can actually be constructed in the allowed space. Conflicts that are identified are brought to the designer’s attention through the request for information process, where solutions can be developed and clarifications issued. Even if the light table is replaced by a series of virtual layered sheets in a CAD drawing, the perspective is inherently a two-dimensional process applied to a three-dimensional problem, which is notoriously difficult and fraught with error. For these reasons, despite risk-shifting provisions, conflicts are one of the primary sources of contractor claims.

On complex projects, conflict identification and resolution is an extraordinarily expensive and difficult task. For example, if a

column is removed to modify a space, the designer must recalculate the size of adjacent columns, resize beams, reanalyze load paths, and re-detail the connections. These changes must be separately tracked and accounted for in all of the design disciplines (architecture, mechanical, plumbing, electrical, and structural, etc.). The architect’s consultants need to upload and maintain the basic design backgrounds they receive from the architect. These backgrounds, however, will change as the design develops and each party must take considerable care to ensure that they are working with the latest versions of the basic documents. As any party makes changes, the changes must be

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transferred back to the others. Mistakes can, and will occur at many locations. When time is short, it is virtually impossible for the design to incorporate all of the changes as they are made. The construction documents will have mistakes.

What is missing on most projects is real integration of the participants' collective knowledge and wisdom. The goal of BIM is to build an electronic project model to contain and reflect all of the information related to a building facility and that is available to anyone involved with the design, construction, management, and operation of that facility throughout its useful life. The availability of this information in a single, comprehensive, electronic database, it is hoped, will revolutionize business processes for everyone involved, with the result that buildings will be designed, constructed, and operated far more efficiently than is now possible.

Steel detailers, HVAC designers, and others, have used modeling technology focused on their particular needs for some time. However, outside of certain integrated firms, there are several hurdles that must be overcome before BIM can become an industry standard and all project information can truly be integrated in the way that BIM envisions. A significant investment is required for individual companies to acquire and master BIM software. Moreover, in order for all project participants, from planning through operation, to successfully use BIM comprehensively on a single project, all of the players must invest in and master the same technology application. At present, however, there is no standard application (the equivalent of Microsoft Word for word processing) for players to buy, learn and use. In other words, today it would be difficult to assemble a project team whose members are all versed in and experienced with a particular BIM technology. Elvin forcefully argues that the path to overcome these limitations is for the industry to consolidate in integrated design/build firms—a modern day return of the Master Builder!

BIM is a collaborative technology. The owner, the contractor, subcontractors, and even suppliers will all (ideally) have the ability to provide input into the model. No one person or entity will be responsible for all of the information in the model. This creates a difficulty illustrated by the adage: "Where everyone's responsible, no one is to blame." Legal relationships between parties on construction projects are driven by clear allocations of roles and risks. Risk allocation in a collaborative environ-

ment is not worked out in any of the standard industry agreements and may be difficult to achieve. Who is responsible if a BIM project goes wrong? That remains the \$64 million question.

Similarly, the professional standard of care for architects is now well established. Insurance products have developed over many decades in line with this clear understanding. A collaboratively built model driven in large part by the BIM software throws considerable uncertainty into the question of what the standard of care should be, and who will breach this new standard under what circumstances. What happens if Hal won't open the pod bay doors?

Elvin discusses these issues in a readable format with many concrete examples amply illustrated with photographs and charts. He provides practical strategies and methods for an integrated practice. If BIM can successfully deliver buildings cheaper and faster as envisioned, Elvin may be correct that integrated design and construction firms are in the best position to take advantage of the new technology and that these Master Builder firms will gain significant market share over the next decade.

—Roland Nikles ❖

A SINGLE, COMPREHENSIVE,
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BR & H BREAKFAST FORUM

Growing the Port of Oakland

An Essential Bay Area Resource Meets the Challenges of the 21st Century



DATE Friday, February 8, 2008

TIME 7:30 a.m. Full Breakfast
8:00 a.m. Presentation

LOCATION **Scott's Restaurant**
2 Broadway
Jack London Square
Oakland

Convenient parking on the Square

For directions: www.scottsrestaurants.com

FOR RESERVATIONS TO ATTEND THIS FREE EVENT, CONTACT:

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BELL, ROSENBERG & HUGHES LLP

is pleased to announce Omar Benjamin, Executive Director of the Port of Oakland, as the guest speaker at our February 8 Breakfast Forum.

THE BUSTLING PORT OF OAKLAND is an essential Bay Area resource constantly evolving to meet the needs of Oakland and Northern California. It includes a world-class international cargo transportation and distribution hub, a major metropolitan airport, and substantial real-estate and development concerns along the Oakland estuary. Oakland was a leader in adopting the intermodal container operations which revolutionized international trade and created the global economy, and its cargo volume makes it the fourth busiest containerport in the United States. Port-managed real estate holdings comprise a significant asset slated for over \$1.2 billion worth of new development.

ABOUT OMAR BENJAMIN

Mr. Benjamin is responsible for the administration and operations of the Port organization and reports to the Board. He was most recently the Deputy Executive Director of Operations for the Port of Oakland, where he had oversight of



the Port's revenue divisions: Maritime, Aviation, and Commercial Real Estate. Before that he was Director of Commercial Real Estate for the Port of Oakland and has been with the Port since February of 1997.

He serves as Vice President of the California Association of Port Authorities (CAPA). He is a full member of the Urban Land Institute and serves on the Board of Directors for community organizations such as the Paramount Theatre of the Arts, the Center for Elders Independence, and the Oakland Economic Development Corporation.

Learn more at www.brhlaw.com.

Green Corner

Recently I attended a forum where the presenter was a manufacturer of an electric-powered sports car that went from zero to sixty faster than Porsche Carrera (and it looked faster too). When asked about marketing, the presenter noted that the company rarely mentions the eco-sensitive aspects of the car. The company knows that people buying sports cars want performance and style first. If consumers find inspiration with the car's electric functionality, that's gravy. The same can be said for the housing market. Home buyers want a low price and high quality. For many, environmentally friendly features are accessories.

With price pressure on selling finished projects as high as it has been in over a decade, contractors and developers need to cut costs without sacrificing quality. For a growing number of developers and builders, the answers come from municipal and utility based financial incentives for green construction.

Some features are easier to add than others. Even with rebates or other financial incentives, the upfront cost of solar power is more expensive than receiving electricity from your local energy provider. However, the cost for using green products for necessities such as insulation or sheetrock is falling. Manufacturing costs are down, and strong financial incentives such as tax breaks and rebates level the playing field. Thankfully, finding the applicable incentives is not as difficult as it may seem.

The Database of State Incentives for Renewables & Efficiency (DSIRE) has a wonderful website replete with almost every piece of useful information a builder or developer could want. Go to www.dsireusa.org to learn more. DSIRE provides short summaries of incentives from federal, state, and even local governments, as well as the incentives from local energy suppliers. DSIRE separates

the incentives by locality, so when you're bidding on a project in a new area of California (or nationwide) you can check the same place on DSIRE for a comprehensive list. Additionally, the website provides contact information for each program, so everyone has a go-to person for questions. DSIRE's website couldn't be a better one-stop-shop for anyone looking to save money.

The homepage has a handy map, and you can click on California, or whichever state interests you. Be sure to have the "renewable energy" and "energy efficiency" check boxes selected to maximize your results and savings!

THE DATABASE OF STATE
INCENTIVES FOR RENEWABLES
& EFFICIENCY (DSIRE) HAS
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USEFUL INFORMATION A BUILDER
OR DEVELOPER COULD WANT:
WWW.DSIREUSA.ORG

Two New Green Certification Programs For Residential Projects

Green certification programs offer builders and developers an opportunity to set themselves apart from competition. With the declining cost of implementing green features into construction, builders and developers don't need to spend green to "go green." According to Jeff Ihen of Michaels Engineering, attaining LEED certification adds an average of 0.5% to 2% of initial cost to a building, and adds only .04% when one considers the cost to

build and operate a facility for 20 years. (*Lorman Construction Update, August 2007*). Some green features do add costs to the price of a home, but the opportunity to offer a home that will not have an energy bill may be a benefit for which homebuyers are willing to pay a premium. Through "energy netting" local energy suppliers offer energy credits to users who produce more energy than they use. With photovoltaic cells in full use during the day while a resident is away from their home, the resident only pays basic service fees for energy, and may pay nothing for actual energy usage.



■ The California Green Builder program (www.cagreen-builder.org) created by the Building Industry Institute—the research arm of the California Building Industry Association—has been guiding builders for over two years, but two new certifications for residential homes made their debut in 2007. Build It Green (www.builditgreen.org), a professional nonprofit membership organization whose mission is to promote healthy, energy- and resource-efficient buildings in California, launched the GreenPoint Rated system; and the U.S. Green Building Council (USGBC) formally announced the Leadership in Energy and Environmental Design (LEED) for Homes rating system during the first week in November of 2007 (www.usgbc.org). The LEED program has been helping commercial developers and builders for years, but the LEED for Homes program is the first LEED for single-family residences. These three programs offer developers, builders and buyers a scale of options for measuring environmental friendliness. The good news is picking one certification program does not preclude you from fulfilling the requirements of another.

The LEED for Homes system offers a wide range of options for builders and developers. Projects can be “Certified,” “Silver,” “Gold,” or “Platinum,” based on the level of environmental friendliness. One clear advantage is the program is building a nationwide reputation, so buyers moving to California from other states will recognize the LEED brandname. The USGBC officially launched LEED for Homes at the Greenbuild Conference in Chicago in November 2007, although the pilot program was launched in 2005 and modified in February 2007.

LEED for Homes is not for every builder or buyer, and the USGBC forecasts that the program will only be a deciding factor for 25% of home buyers nationwide. Attaining a LEED rating at any level adds some cost for the independent verification process. However, Californians have a high standard for home building, and a unique affinity for environmental sensitivity. Add to that the higher cost of energy in California, and one can imagine the demand for LEED rated residential homes will likely outpace national averages. In fact, of the 134 certified LEED for Homes projects built nationally under the pilot

program, 55 were in California, and of the 336 units, 78 were in California. That’s 41% of the projects and 23% of the units nationwide! (Large public housing projects in other states account for the discrepancy between unit and project percentages.)

■ Unlike the LEED program, Build It Green’s GreenPoint Rated program is a California-centric system. GreenPoint Rated is specifically designed to be compatible with developers and builders who may want to eventually strive for the more stringent LEED standards, but prefer to start with a smaller bite of the green apple. GreenPoint Rated is also compatible with the California Green Builder, and the National Association of Home Builders’ guidelines. Indeed, Build It Green and the USGBC are working closely together, so their systems compliment rather than compete with each other. Significantly, GreenPoint Rated’s requirements are more generally defined, but provide points for features particularly important to California. One major criticism of the LEED program is that in creating a national sustainability standard LEED ignores regional needs. The GreenPoint Rated system answers these criticisms by exclusively tailoring their incentives for homes located in California.

The California Green Builder program is also California-centric, and has been utilized by builders and developers in California since 2005. Like the GreenPoint Rated system, the California Green Builder program offers a more general approach to achieving sustainability goals. Since the program was designed by the Building Industry Institute, the California Green Builder program is seen as being more builder-friendly.

As energy bills rise, so too does the public’s awareness of carbon footprints. The public now recognizes green certification programs mean real dollar savings. When developers and builders construct green residences with a negligible increase in cost, earning green certification is an easy way to generate buyer interest in a highly competitive market.

—Steve Sachs ❖



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Breakfast Forum

Omar Benjamin, Executive Director of the Port of Oakland, speaks on *Growing the Port of Oakland: An Essential Bay Area Resource Meets the Challenges of the 21st Century*. **See page 9 for more information and RSVP options.**

Friday, February 8, 7:30 A.M. ■ Scott's, Jack London Square

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