Message from the Chair

Inaugural Edition for New Division 10

This edition of 2x4x10 is our first edition as a reorganized Division 10. In addition to a name change to Transportation, Energy and Environment, we have changed our focus. Division 10 is now committed to providing education, resources, and a forum to discuss legal issues which arise on transportation and energy projects nation-wide. We will continue to provide a forum to discuss environmental legislation and programs which affect the construction industry, and will focus our environmental education on how environmental legislation and programs impact transportation and energy projects.

This edition of 2x4x10 will provide our membership with an overview of our new focus. We have articles on the hurricane preparedness, Los Angeles and Long Beach Harbors, and private activity bonds. If you are looking to get involved with Division 10’s publication efforts please contact Asha Echeverria, Division 10’s Publications Chair, at aecheverria@bernsteinshur.com. We look forward to seeing many of you at the Forum’s Mid-Winter Meeting in Fort Meyers, FL.

Allen W. Estes III, Division 10 Chair
Hurricane Harvey dumped more than twenty-seven trillion gallons of rain over Texas and Louisiana in six days. As of October 13, 2017, at least eighty-eight fatalities had been confirmed, most of which were drownings. Many locations in the Houston metropolitan area observed between thirty and fifty inches of precipitation; more than Houston usually receives in a year. Harvey was the wettest tropical cyclone on record for not only Texas but the United States; its toll, both emotional and economic, has been equally extreme. With such unprecedented rainfall, any city likely would have faced serious flooding problems, but was Houston in a more vulnerable position compared to other U.S. cities? Could legal codes, land use regulations, and zoning requirements have minimized some of Harvey’s devastation?

Houston is naturally prone to flooding; the city spans an extremely flat, low-lying part of the Gulf Coastal Plain — formerly forested land, marshes, swamp, and prairie — where clay-based soils provide poor drainage. The flood of 1935 moved local Houston authorities to petition the State of Texas to form a flood authority, and the Harris County Flood Control District (“HCFCD”) was born. For the next 60 years, the HCFCD, in unison with the U.S. Army Corps of Engineers, modernized Houston’s drainage system by building canals, widening bayous, creating concrete-lined waterways, and building reservoirs.

These efforts only partly succeeded, but flooding did not slow Houston’s growth. The area saw a population explosion of forty-two percent between 1995 and 2015. By comparison, the population of the United States has grown by about fifteen percent since 2000. Harris County, which encompasses Houston, added more people than any other U.S. county for eight straight years until 2016, when it fell to second. Recently, however, flooding has once again become a serious concern in Houston. In the years before Harvey, Houston’s Memorial Day Flood of 2015 took seven lives and caused $459.8 million in property damage, and Houston’s April 18, 2016 “Tax Day Floods,” resulted in eight deaths and caused $452.6 million in property damage losses.

Houston’s meteoric growth over the past two decades was accompanied by a construction boom. In 2014, Houston was third on the Forbes list of “Cities with Most New Constructions.” From January 2011 through December 2016, more than $90 billion in commercial, industrial, and residential contracts were awarded. With increased urbanization and development, Harris County has lost almost thirty percent of its freshwater wetlands. This loss has hindered Houston’s flood mitigation efforts because, wetlands slow, contain, store, and filter flood waters. When floodplain wetlands are allowed to function properly (and are not drained or impounded), floodwaters spread, reducing the velocity of flowing water and allowing time for water to slowly seep into the ground or be filtered by vegetation and sediment before flowing into rivers and bayous. Wetlands can hold water for days or even weeks, unlike paved surfaces or landscaped space, which release water in a matter of minutes or hours.

Coastal wetlands further serve as storm surge protectors when hurricanes or tropical storms come ashore. In the Gulf Coast area especially, barrier islands, shoals, marshes, forested wetlands, and other features of the coastal landscape serve as an important buffer from wind–wave action and storm surge. The Houston area formerly had acres of deeply rooted prairie grass, with a capacity to absorb water for days on end or even permanently. But most of that land has now been paved over. For example, recent development in the Katy Prairie northwest of Houston has reduced formerly flood-absorbing land acreage by three-quarters.

With the increasing severity of weather events, rapid growth, urbanization, and accompanying wetlands loss—it is perhaps not surprising that many articles have predicted flooding as Houston’s new norm. Even prior to Harvey, some questioned how Houston’s urban design and policy (or, impliedly, lack thereof) has contributed to worsening flood conditions and heightened human safety risks.
Houston expressly does not have formal zoning and is the only major U.S. city without a zoning code. Land use laws and zoning requirements can be effective ways to control and align development with overall flood mitigation policies. Every attempt to enact a zoning code in Houston has failed at the ballot. In 1948, voters rejected zoning by greater than a two-to-one margin. Similar ballot measures in 1962 and 1993 also failed. Houston does have ordinances, a building code, and other legal and governance mechanisms—including deed restrictions and historic designations—that allow homeowners in a neighborhood to impose rules that function as a sort of de facto, locally-controlled zoning. These tools, however, are localized and fail to address flood mitigation on a regional level.

Also, it seems that not all Houston developers have followed the few rules in place. For example, to obtain a permit under the Clean Water Act, developers who build in protected wetland areas must submit paperwork showing completed mitigation measures. In 2015, a Texas A&M study analyzed a sample of permits issued from 1990 to 2012 in the greater Houston area and found that developers had submitted complete paperwork in fewer than half of the cases; in two-thirds of the cases, there was no documentation that any type of mitigation occurred.

Houston’s fast-track regulations that turn undeveloped land into developed land (platting) have contributed to Houston’s economic growth and conversely Houston’s lack of natural environmental protection. Enforceable private deed restrictions have been at the heart of Houston’s private regulation for decades. Such restrictions have allowed homeowners to control their neighborhoods, and businesses in designated urban districts to band together to influence development. If Harris County and/or Houston had substantive land use laws or zoning requirements, development could have been curtailed or harmonized with an overall master plan contemplating flood mitigation policies for the entire county.

The group Residents Against Flooding (“RAF”) believes that the City of Houston is a root cause of disastrous flood events. On May 25, 2016, RAF and six other plaintiffs filed suit against numerous defendants, including the City of Houston, alleging that government action has benefited private developers at the expense of Houston residents. The case is now on appeal following the defendants’ successful motions to dismiss, but the factual allegations of pending disaster contained in the lawsuit seem eerily prescient post-Harvey. Outside the courts, partisan positions are being taken on the issue of whether stricter zoning rules, planning, or land use regulations could have saved Houston from Harvey’s devastation. Supporters of Houston’s no-zoning policy argue that Harvey was such a record-breaking storm that no amount of regulation would have made a difference.

Others contend that unrestricted construction exacerbated Harvey’s destructiveness, or that land use regulations could have been enacted specifically to prohibit development in floodplains, thereby lessening the habitable area affected by flooding and providing a collection area for much of the floodwater. Accounts from both camps vary in their reliance on hard data and tendencies for hyperbole. But with over one hundred people dead in the Houston area in the last two-and-a-half years as a result of flooding, maybe the time for partisan debate is over. The issue for Houstonians now, and really all Americans, as so much taxpayer money is at stake, is what to do going forward. Should it choose, Houston has a variety of planning roadmaps and best practices to choose from, developed by both national and international authorities.

FEMA, the very entity that has to deal with the aftermath of flooding disasters, recommends incorporating flood mitigation in local planning and opines that “[c]omprehensive planning and floodplain management can mitigate flooding by influencing development.” FEMA’s recommended strategies for local governments include incorporating floodplain and coastal zone management in comprehensive planning, developing a floodplain management plan, establishing a “green infrastructure” program to link, manage, and expand existing parks, preserves, and greenways, and obtaining rights to privately-owned land for temporary water retention and drainage. FEMA also recommends that development be limited or restricted in floodplain areas through regulatory and/or incentive based measures and that the International Building Code (“IBC”), the International Residential Code (“IRC”) , and ASCE 24-05 Flood Resistant Design and Construction be adopted. In fact, FEMA lists twenty-three categories of policies/strategies for municipalities to prevent or at least mitigate flood damage.

International studies also identify land use strategies as an essential part of municipal flood prevention. For example, the 2003 European Union white paper, “Best Practices on Flood Prevention, Protection, and Mitigation,” recommends a good combination
of structural measures, preventive measures, and operative measures during flood events, and further recommends that building codes and legislation be enacted to keep structures away from flood-prone areas. As regards land use and zoning, the paper specifically recommends that flood plains be identified and designated by law as priority sites for flood retention or to restore, as far as reasonable, mobility to waterways, and that development in the immediate areas at risk of floods or dam failures should be prohibited or severely restricted.

Seemingly, the authorities in the United States and in Europe both strongly recommend zoning and land use regulations in the battle against catastrophic flooding. Hopefully, Harvey can take Houston beyond discussions and lead to firm action.

Adrian D’Arcy, Esq. is a partner at Shields | Mott, LLP in New Orleans, Louisiana where he focuses his practice on commercial, construction, and surety litigation.

UPCOMING FORUM EVENTS

2018 Midwinter Meeting: Fort Myers, FL, January 17–19
2018 Trial Academy: Dallas, TX, February 7-10
2018 Annual Meeting: New Orleans, LA, April 11-13
2018 Fall Meeting: Montreal, Canada, October 3-5

IMPORTANT DIVISION DATES

Division 10 Conference Calls: Time: 10 am PST/1 pm EST

February 1, 2018
March 1, 2018
June 7, 2018

Call in: 866-646-6488 Passcode: 660 581 7144
The Economic Benefits of Environmental Improvements at Los Angeles and Long Beach Harbors

By: Kirk J. Retz, Esq.

In order to support growth, the two largest ports in the United States, which happen to be located in the same bay, Los Angeles Harbor and Long Beach Harbor, invested in a twelve to fifteen year 4.5 billion dollar capital environmental improvement program to clean up the existing area and put in place operations and infrastructure to reduce future harm. In the process, the harbors have created an economic and construction boom, creating jobs and expanding operations.

Together, Los Angeles Harbor and Long Beach Harbor account for approximately sixty-five percent of all U.S. imports, twenty-five percent of exports, and forty percent of the nation’s total container import traffic. The two harbors occupy over 15,000 acres, have sixty-eight miles of shoreline, and house 152 ship-to-shore cranes including some of the tallest cranes in the world. The harbors are an economic powerhouse, supporting 2.8 million jobs, paying five billion dollars in customs revenues annually, creating 4.9 billion dollars in local, state, and federal taxes, and generating forty-seven billion dollars in direct and indirect business annually.

Unfortunately, all this wealth comes at a price. The ports are the single largest fixed source of air pollution in the entire LA basin. A once thriving fish canning industry, which represented nearly seventy-five percent of all fish canned in California and supported thousands of jobs, vanished due in large part to port related industrial pollution. The desolation of wetlands and construction of breakwaters to create the ports changed the natural runoff patterns and ocean flows from what was once a free-flowing drainage system into an industrial waste catch basin. As a result, nearly all sea life died or left the ports.

When the ports needed to expand and modernize to stay competitive, the pollution they generated prevented further growth. To break through this road block, the ports (which had competed against one another for decades) pooled their resources and created a Green Port Policy (“GPP”). They completely re-examined the way business was conducted with the goal of obtaining zero emissions. Such changes include modifying leases to mandate improvement of air and water quality and aquatic ecosystems, industrial sediment clean-up initiatives, and investing substantial capital into sustainable structures. The result has been world leading breakthroughs in port operations and billions of dollars in new construction.

The ports’ capital improvements are wide ranging and diverse. These improvements include measures to minimize carbon emissions, such as shutting down engines on docked ships, using port based electric motors to unload cargo, incentivizing commercial truck owners to trade in or convert their diesel powered trucks to electric, hybrid, or other burning motors, and converting cranes to electric power. Other improvements include the implementation of a master storm water pollution prevention program and constructing new bridges and improvements to freeways and docks. Listed below are a few of the current and future projects.

$1.5 Billion Gerald Desmond Bridge Replacement

One of the major initiatives of the GPP (funded by the California Department of Transportation, Port of Long Beach, U.S. Department of Transportation and the Los Angeles County Metropolitan Authority) is a 1.5 billion dollar plan to replace the Gerald Desmond Bridge. This bridge was built in 1968 and is in such poor condition that nets were strung underneath to catch falling concrete. The new, 1.5-mile-long, cable-stayed bridge will add traffic lanes, contain 300,000 cubic feet of concrete, and erect more than 90 million pounds of steel. The design of the bridge created some significant engineering challenges since it spans multiple earthquake faults and a labyrinth of oil and gas lines directly in the path of its supporting piles. The new bridge will have two 500-foot-tall towers making it the nation’s tallest cable-stayed bridge when complete. It will be forty-five feet higher than its predecessor with 200 feet of clearance to allow larger ships into the port. More than 300 construction workers, welders, engineers, and other design and construction professionals are expected to be working on the bridge on any given day.
$1.3 Billion Middle Harbor Redevelopment Project

Two shipping terminals will be combined into one larger, more efficient, state-of-the-art container terminal. Among the improvements are the addition of on-dock rail capacity, shore power connections for docked ships and electric dredging, and a longer wharf to move twice the cargo with half the air pollution. The addition of on-dock railing is an essential component of the GPP and is designed to reduce road traffic congestion and improve air quality.

$65 Million Environmental Grants Program

The Long Beach port authority has committed nearly sixty-five million dollars in grants which will be awarded to local organizations for air filters and other health programs to assist those who are most affected by port activities. The health programs include medical screenings and diagnosis, outreach, case management, education, and health worker training for those affected by asthma and other respiratory and cardiopulmonary illnesses.

Other Projects

Other projects to be constructed include improvements to streets, sidewalks, bus stops, access for the disabled, and landscaping. A new terminal administration and operations complex, a new maintenance and repair facility and a new arrivals building are being constructed, each of which are designed to LEED Gold standards.

The bottom line - it’s good to be green. These two ports were prevented from any further economic development because of the pollution created by the very success of their operations. Together, they created a new approach to the entire concept of port operations and, in the process, created jobs, expanded their operations, and worked through difficult seismic engineering and construction challenges. This innovative and cooperative approach has cleaned the air and re-established wildlife in, around, and under the ports. They have also created significant opportunity for more growth locally and around the globe for years to come.

Kirk J. Retz is a partner at Retz & Aldover, LLP in Palos Verdes Estates, California. He advises clients on construction and business matters representing owners, developers and subcontractors.

Trump Administration Looks to Boost Private Activity Bonds

By: Joshua A. Claybourn, Esq.

President Trump’s proposed budget, released this past summer, includes an expansion of the Transportation Department’s private activity bond program (“PAB”). This expansion should benefit projects using public-private partnerships (“P3”) by allowing the Department of Transportation to allocate authority to private entities constructing highway and freight transfer facilities to issue tax-exempt bonds.

“The administration’s goal is to seek long-term reforms on how infrastructure projects are regulated, funded, delivered and maintained,” the White House said in a fact sheet. The administration went on to say “Providing more federal funding, on its own, is not the solution to our infrastructure challenges.”

The federal tax code classifies state and local bonds as either governmental bonds or PABs. Governmental bonds are intended for governmental projects, and PABs are for projects that primarily benefit private entities. Typically, the interest earned by holders of governmental bonds is exempt from federal income taxes.

The federal tax code allows state and local governments to use tax-exempt bonds to finance certain projects that would be considered private activities. The private activities that can be financed with tax-exempt bonds are called “qualified private activities.” Congress uses an annual state volume cap to limit the amount of tax-exempt bond financing generally and restricts the types of qualified private activities that would qualify for tax-exempt financing to selected projects defined in the tax code.
Due to the tax-exemption, qualified PABs typically borrow at rates substantially lower than interest rates on conventional borrowings. PABs are often issued on behalf of a private entity for highway and freight transfer projects, allowing a private project sponsor to benefit from the lower financing costs of tax-exempt municipal bonds.

As a result, PABs are quite popular. Many P3s take advantage of PABs as part of their overall finance package. Since PABs were defined in 1968, the number of eligible private activities have gradually increased from 12 to 22. As of January 23, 2017, nearly $6.6 billion in PABs have been issued. PAB allocations approved by the U.S. Department of Transportation total approximately $4.3 billion.

Lifting the Cap on PABs

Current law places a $15 billion cap on all PABs and directs the Secretary of Transportation to allocate this amount among qualified facilities. Under the Trump administration’s budget proposal, this cap would be lifted in order to allow more financing for P3s.

According to the Trump administration’s fact sheet, it recommends removing the cap “to ensure that future P3 projects can take advantage of this cost-saving tool, and encourage more project sponsors to take advantage of this tool.” Passage of such private activity bond legislation reflects the federal government’s desire to increase private sector investment in U.S. transportation infrastructure. Providing private developers and operators with access to tax-exempt interest rates lowers the cost of capital significantly, enhancing investment prospects. Increasing the involvement of private investors in highway and freight projects generates new sources of money, ideas, and efficiency.

Expanded Eligibility

The administration’s budget proposal requests that PAB eligibility be expanded to allow states to use tolls beyond interstate highways. The administration also recommended expanding the Transportation Infrastructure Finance and Innovation Act (2017), or TIFIA, loan program, which helps finance surface transportation projects through direct loans, loan guarantees, and lines of credit. The administration’s budget would increase funding for TIFIA to $1 billion annually for 10 years and expand program eligibility guidelines. One dollar of TIFIA subsidy leverages about $40 in other investment, according to the administration’s fact sheet.

The budget proposal also calls for the U.S. to sell certain power transmission assets, including transmission lines, towers and substations, and to impose a fee for commercial use of inland waterways. Many states will also be pleased by the administration’s call for reducing restrictions on states from tolling existing interstate highways. The ability to toll can create streams of revenue needed to attract private investment for building or maintaining roads.

The president’s budget is just a recommendation, and congressional leaders have already said they won’t necessarily defer to his suggestions, but the budget blueprint will help set the tone and serve as a guidepost for future legislation. The final budget is expected to be considered by both houses of Congress within months.

A Word of Caution

Private activity bonds are good in the sense that, like with any municipal bond, the interest received on the bond is tax free (they are, however, subject to the Alternate Minimum Tax). These bonds are basically allowed to be issued as municipal bonds because the private corporation’s project can be shown to serve a public need or enhance the economy of the municipality. However, they should also come with a large disclaimer as these bonds carry all the same risks as a corporate bond. Normally this means they also carry much more credit risk than a typical municipal bond.

Joshua A. Claybourn is an attorney with Jackson Kelly PLLC in Evansville, Indiana. He advises clients on matters of business and corporate law, governmental services, and public finance.
Hurricanes are a part of life on the east coast and gulf shores; from New York to Louisiana, just about every eastern and southern seaboard state has seen massive property loss from hurricanes during the past ten years. Harsh outcomes are far too common for those who own costal homes or commercial property. However, one area which is equally important and often overlooked is the effect on on-going construction or projects that are about to begin. If you are building on the coast or advising a client who is doing so, do not underestimate the importance of evaluating the following risk aversion issues.

**Insurance Policy Considerations**

Anyone who regularly works with construction projects is familiar with Builder’s Risk or All Risk Insurance. Unfortunately, contrary to the name of the policy, “All Risk Insurance” does not cover all risks. Instead, it is nearly the opposite. If a peril is not specifically added to the Builder’s Risk or All Risk Insurance policy through an endorsement, it most likely is not covered. Coverages your client may need for coastal projects include windstorm, named storm, hurricane, landslide and flood endorsements.

Windstorm endorsements apply to tropical storms, but can also cover winter nor’easters and other types of storms. Named storm endorsements cover damage caused by storms named by the World Meteorological Organization, including tropical storms. Hurricane endorsements only apply to named storms that qualify as at least Category 1 hurricanes when making landfall. The exact difference in these triggers can vary depending on state law. The same is true with flood and landslide endorsements.

While wind and rain can cause significant hurricane loss, storm surge actually causes some of the most substantial problems for shoreline properties and even properties well inland. The general rule in assessing water related claims is if a property sustains water damage from the top down, it will generally be covered as a normal peril. However, if water damage is from the bottom up, it may be considered flood damage, which requires a flood insurance endorsement. Keep in mind that storm surge damage can affect properties as far as thirty miles inland. Consequently, flood insurance may be required even if the project is not directly on the coast.

Wind related damages can also occur in non-hurricane events such as tornados. As you might expect, windstorm insurance is designed to cover harm caused by high winds and may cover damages from tornados, hail, and other weather events that are accompanied by strong wind gusts.

If the project is on or around a hillside, you should consider advising your client to obtain a landslide endorsement. When water soaked earth movement occurs a rule of thumb is that if the land looks like chocolate pudding, a flood insurance endorsement would be required for coverage. If the land looks like chocolate cake, a landslide endorsement would be required for coverage. Since you won’t know if you have pudding or cake before the storm, projects on hillsides should consider both.

In addition to analyzing specific endorsements, be sure to review the “excluded perils” in the policy. Even though a policy may provide some of the coverages identified above, aspects of coverages may be carved out or otherwise limited in the excluded perils section of the policy.

As essential as a review of specific endorsements and excluded perils is to the analysis, insurance deductibles and limits are just as important. Typically, there are separate deductibles and separate policy limits for each peril. For example, claims through a named storm or hurricane endorsement may each have a separate specific deductible or a deductible tied to a percentage of the project cost. The policy limits for these specialized endorsements may also be significantly less than the limit identified in the main policy. You should also review coverage, limits and deductibles for property and materials coverage, delay costs, and other particulars.
Contractual Considerations

In addition to evaluating the insurance policy endorsements and exclusions, pay special attention to the construction contract as well. For example, do not rely on a generic force majeure definition. Include language which specifically identifies, but is not limited to, hurricanes, named storms, tropical storms, severe tropical weather, floods and landslides. Including such language could help avoid a dispute over damages for delay or other contractual non-performance related to such perils.

You should also consider creating a force majeure contingency allocation. Projects on the east coast or gulf shores should contain language allowing contingency funds to be released and allocated in the event of major storm related force majeure events. Such language will entitle your client to make the adjustments necessary to finish the project in a quality and timely manner and get paid for doing so. The costs associated with safe storage and storm protection are also key considerations related to a major storm. The owner will expect to have high cost materials and a partially constructed structure shielded from the elements. The contract should allow contingency funds to be expended for this purpose and identify the specific elements for how the costs of the contingency will be calculated. In emergency circumstances, the contractor should have the independent ability to make decisions about what commercially reasonable steps are necessary to protect the project if the time necessary for the owner’s authorization would cause additional damage.

Bottom line, with profit margins squeezed from so many directions, some clients are tempted to cut corners on insurance premiums and contractual analysis. Instead of saving costs, the incorrect insurance provisions or contractual conditions could actually erase all profit from a job or worse.

Clay Olson is a partner at Harper Whitwell PLLC in Charleston, South Carolina focusing on litigating commercial matters pertaining to contractors, developers, manufacturers, design professionals, and insurance companies. Harper Whitwell has offices in Charleston and Oxford, MS.

Kirk J. Retz is a partner at Retz & Aldover, LLP in Palos Verdes Estates, California. He advises clients on construction and business matters representing owners, developers and subcontractors.