Monticello

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A Non-Profit Organization for Architect-Lawyers

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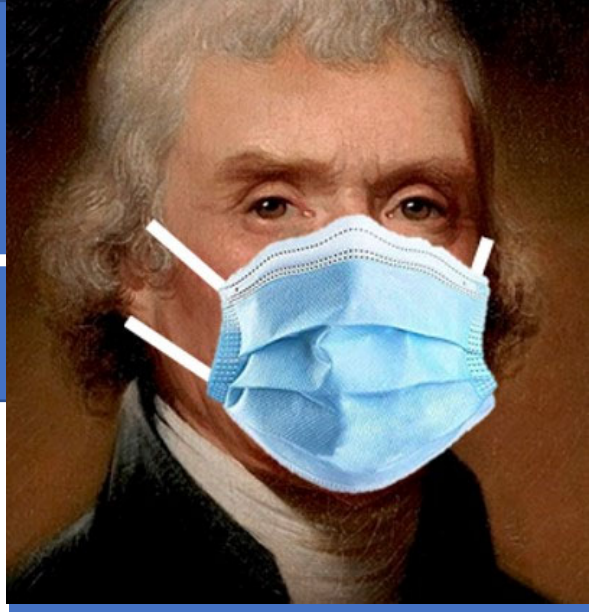


PRESIDENT'S MESSAGE:

By Donna M. Hunt, AIA, Esq.
Ironshore Specialty Casualty

A lot has changed since the writing of my last TJS President's message. Over the weekend of March 28th, the World Health Organization reported more than 30,000 deaths, and almost 640,000 confirmed cases worldwide, from COVID-19. With these numbers, it's increasingly likely that you, or someone you know — friends, family, colleagues — have been directly affected by this virus. Aside from horrible sickness, many people are now unemployed and struggling. It is a new world - one where if we have the ability and means, it is up to us to reach out to help those less fortunate and those who are "high risk" with groceries and other necessities. I know you join me in sending our sincerest and heartfelt thoughts to all TJS members, and their families, who have been impacted. Most of us are now working from home. See photos on pages 5-7 of a few TJS members' home offices.

As many of you know, the AIA has postponed AIA20. It is unclear if the conference will be rescheduled to another date or if the AIA will wait until AIA21. In accordance with the TJS Bylaws, we will hold an annual meeting, by conference call, at the end of May. During the meeting we will elect new officers and directors and receive updates from the Membership Committee; Website and Other Technology Improvements Committee; AIA Continuing Education Committee; and the status of "Admission Day" at the United States Supreme Court, which is still scheduled for Monday, Nov. 16, 2020 at this time. See page 22.

With COVID-19, things that once we took for granted are now cherished. Who knew that there would be no toilet paper, paper towels or pasta? I have faith that if we are all diligent and follow all lockdown procedures we will get through this historical pandemic. We are all in this together.

Stay safe, stay home, and wash your hands. We will get through this – together.

Sincerely,

Donna

Know of Another Architect-Lawyer Who Has Not Yet Joined The Jefferson Society, Inc.?

Send his or her name to TJS President Donna M. Hunt, AIA, Esq. at: donna.hunt@ironshore.com and we will reach out to them. Candidates must have dual degrees in architecture and law.

Inside This Issue:

Check us out on Facebook and LinkedIn

JEFFERSON, EPIDEMICS AND SOCIAL DISTANCING.

(edited from www.governing.com) April 1, 2020 edition.

The yellow fever epidemic of 1793 changed Thomas Jefferson's thinking. Always anti-urban in his social outlook, the future president began to formulate a radical plan for the development of new states and new communities. Jefferson lived through one of the most serious plagues in American history. The U.S. capital was located in Philadelphia in the 1790s, and as the nation's first secretary of state, Jefferson lived in one of the city's suburbs when yellow fever swept through the capital. With 50,000 residents, Philadelphia was the most populous city in the country at the time. Between August 1 and mid-November, 1793, nearly 5,000 residents of that city (one in 10) were killed by the epidemic. On Sept. 1, 1793, Jefferson wrote to James Madison, "About 70 people had died of it two days ago, and a many more were ill of it … and is considered infectious Every body, who can, is flying from the city, and the panic of the country people is likely to add famine to disease." He later reported that deaths were increasing and "This week they will probably be about two hundred, and it is increasing. Every one is getting out of the city who can. The President … set out for Mount Vernon… I shall go in a few days to Virginia." He left for Monticello in mid-Sept. for the fresh air and rural space of the countryside.

Thomas Jefferson was an agrarian visionary who wanted America to be a nation of small family farms. His distaste for cities is well known. He called them "pestilential to the morals, the health, and the liberties of man." Jefferson believed that cities were unhealthy places, with poor sewage and narrow streets, urban crowding put people into close contact with each other. The great scourge of Jefferson's era was smallpox, followed by yellow fever, malaria, tuberculosis, measles and dysentery. He concluded that cities were hothouses for infectious diseases because of the density of urban populations and the frequency of inadvertent human contact. Disease spread much less efficiently in rural populations, he observed. Maps of the coronavirus in the U.S. confirm his view that rural places are healthier than urban centers, as the majority of COVID-19 cases tend to be clustered in heavily populated urban areas rather than in rural states.

Social Distancing by Design? In a Feb. 8, 1805 letter to his French friend Constantin Volney, Jefferson wrote: "the yellow fever …is generated only in low close, and ill-cleansed parts of a town, I have supposed it practicable to prevent it's generation by building our cities on a more open plan. Take for instance the chequer board for a plan. let the black squares only be building squares, and the white ones be left open, in turf & trees. every square of houses will be surrounded by four open squares, & every house will front an open square. The atmosphere of such a town would be like that of the country, insusceptible of the miasmata which produce yellow fever. I have accordingly proposed that the enlargements of the city of New Orleans … shall be on this plan."

Today's COVID-19 travel restrictions in many states harken back to Jefferson's observation that infected persons "going from the infected quarter, and carrying its atmosphere in its hold into another State, has given the disease to every person who there entered her…It is certainly, therefore, an epidemic, not a contagious disease; and calls on the chemists for some mode" of cure. Ironic that a lab bearing his name, in Philadelphia, may have found a cure! See below.

JEFFERSON RESEARCHERS DEVELOP COVID-19 VACCINE.

(Philadelphia) Researchers at Thomas Jefferson Univ. have reportedly developed a COVID-19 vaccine candidate. Matthias Schnell, director of the Jefferson Vaccine Center in Philadelphia, said Coravax is made from part of the current coronavirus, which is combined with another proven vaccine that serves as a carrier. "The benefit is that the 'carrier' vaccine has already been rigorously tested, and shown to be safe and effective," Schnell said. Schnell notes manufacturing plants around the world already have the technological know-how to produce large quantities of the carrier vaccine. "We need a vaccine that's not only safe and effective, but also one that can be made to scale in a way that can get to potentially all the world's population. Coravax has that potential." Wouldn't it be remarkable if a vaccine to prevent COVID-19 came from the university bearing the name "Thomas Jefferson"!

Our Mission

The Jefferson Society, Inc. is a non-profit corporation, founded on July 4, 2012 for the advancement of its members' mutual interests in Architecture and Law. The Society intends to accomplish these purposes by enhancing collegiality among its members and by facilitating dialogue between architects and lawyers.

MINUTES OF THE BOARD MEETING

A meeting of the Board of Directors of The Jefferson Society was held on Feb. 13, 2020. Present (by telephone) were: Donna Hunt (President), Jose Rodriguez (Treasurer), Suzanne Harness (Vice President), Jeffrey Hamlett (Assistant Treasurer), Jacqueline Pons-Bunney, Mark Ryan, Joshua Flowers (Secretary), Michael Bell, Laura Jo Lieffers; also present were Founders: Chuck Heuer, Bill Quatman, Tim Twomey, and Craig Williams. President Hunt called the meeting to order and asked for a Treasurer's Report from Jose Rodriguez, Treasurer.

Treasurer's Report:

Board Chair Donna Hunt called on Jose Rodriguez to give the Treasurer's Report. Jose Rodriguez reported that the current account balance is $18,040.40. This amount includes a $2,000.00 sponsorship contribution by the law firm Weil & Drage for the annual meeting. There are no outstanding checks. 101 out of 116 Members paid their 2019 membership dues; the 2020 dues were delayed pending the new website development, so no 2020 dues were reported. Four members did not pay their 2018 of 2019 dues. Two members asked to withdraw their membership, Scott Shea, as of 02/10/2020; and Hank Reder, as of 02/11/2020.

Old Business:

A. Technology. Ms. Hunt reported that the next item of business was a report on Web Site and Other Technology. Alexander Van Gaalen gave the following update. The new website is up and running. Information is being uploaded onto the site. The New Square Space web site is almost complete and will allow e-commerce for dues and other payments: $216, plus tax and 3% transaction fees. We will also have new email for use by the Executive Committee, with the tag line of: @thejeffersonsociety.org. The Google Suite account is set up and will be used for secure business records storage, minutes, lists, calendaring: $360 is the annual cost. Mail Chimp for a member list serve is being set up at no cost.

B. Membership. The Membership Committee consists of Bill Quatman, Jeffrey Hamlett, Donna Hunt and Craig Williams. Bill Quatman reported that as of Feb. 7, 2020 the Committee had identified 46 potential members who were dual credentialed, and had made efforts to contact them all. So far, 8 joined; 2 declined; 7 we were not able to locate; and 29 were contacted and have not responded. Bill and his committee will continue to reach out to those who have not responded. New members include: Col. Tom E. Lewis, FAIA, Esq.; Michael W. Spinelli, JD, AIA; Travis B. Colburn, Esq.; James Holmberg, III AIA NCARB Esq.; Rick Salpietra, Esq. CCAL; Ryan Westoff, Esq.; and Bruce Spence, RA, Esq.

C. Continuing Education Provider. Chuck Heuer and Laura Jo Lieffers reported that TJS is now an AIA Continuing Education Service (CES) provider. There was discussion on: developing program(s) for HSW credit; procedures for program submission; and procedures for issuing credit through CES program to AIA members.

D. SCOTUS Admission. Donna Hunt reported for Jessyca Henderson and Jessica Hardy that the next U.S. Supreme Court admission for TJS members and friends is set for Nov. 16, 2020.

E. 2020 Annual Meeting. Donna reported that the Annual Meeting and Dinner would be on Weds., May 13, 2020 in Los Angeles California ***(Note: this was later postponed due to the COVID-19 crisis).*** Jacquie Ponns-Bunney had agreed to look into locations for the Annual Meeting in Los Angeles. The dinner would be sponsored by the law firm of Weil and Drage; our prior sponsor, RIMKUS, declined to sponsor this year.

New Business:

A. Nominating Committee. Current committee members are Jose Rodriguez, Joshua Flowers, and Donna Hunt. Josh reported that a new committee member was needed to replace Donna Hunt. He reported that the Executive Board and Director positions to fill at the Annual Meeting would be: President-Elect; and Secretary. Two directors would be needed to replace Jaqueline Pons-Bunney and Suzanne Harness, whose terms expired.

President Donna Hunt reported that the next Board meeting would be in April 2020. There being no further business to discuss, on motion duly made and seconded, the meeting was adjourned.

Relying on Manufacturer Representations.

In Jan. 2020, the AIA Trust published this article (reprinted here):

One of the issues faced increasingly by design firms is whether they have a right to rely on the information provided by manufacturers of products, materials, and systems. The standard of care states that if the reliance of the design firm on a manufacturer's information or representations is reasonable at the time of the design recommendation, the design firm has met its professional obligation. However, contractual obligations and client expectations could still lead to claims. Of course, evidence of informed consent by the project client to the design firm's recommendations can make a big difference should claims be filed by the client or third parties. The issue of reliance on manufacturer representations has become prominent on projects where energy efficiency and sustainability are demanded by clients. The plethora of new products, materials, and systems—and the claims made by their manufacturers—often bring up the issue of what is "reasonable" when specifying a component of a project.

Green Materials Case Study

One of the most significant "green" cases where this issue came to the attention of the design professions involved the failure of beams and columns used in the design of The Chesapeake Bay Foundation building constructed about 15 years ago. The issue was finally, but not publicly, resolved on July 23, 2015 when the parties in the lawsuit (*The Chesapeake Bay Foundation, Inc., et al v. Weyerhaeuser Company, et al*) filed a Stipulation of Dismissal with Prejudice following a confidential Settlement Agreement and Mutual Release it ended protracted litigation with a private settlement. The Foundation contracted with an architectural firm to design its headquarters on the Chesapeake Bay in Annapolis, Maryland. It also hired a general contractor to oversee the construction, which spanned from 1999 into 2000. The sustainable design called for exposed structural wood members that penetrated the building's façade.

The manufacturer of the beams, Weyerhaeuser, agreed to provide laminated beams which have a roughhewn appearance and are manufactured by bonding together strips of wood for use as the exposed wood members. However, the lack of uniformity in the wood strips creates channels that run through the laminated beams, allowing water to infiltrate the portions used outdoors. To protect against rotting, the structural laminates are pressure-treated with a wood preservative. A new preservative, PolyClear 2000, was to be used because it was a LEED low-emitting product. A subcontractor supposedly applied the preservative. But five years later, the Foundation discovered that the beams had deteriorated; it subsequently learned that the beams had not been treated with PolyClear 2000 - as certified - and that PolyClear 2000 was not appropriate for the job of preserving the beams. Weyerhaeuser had knowingly given false assurances to the contrary. The Foundation sought $6 million to compensate it for the remedial work of replacing the deteriorated laminated beams.

The Chesapeake Bay Foundation case highlights concerns that specifying new or untried materials and products comes with unique risks. When new products fail and cause damage, a claim against the design professional will inevitably follow even if it is obvious that the product did not live up to the reasonable expectations based on the representations of the product manufacturer.

Minimizing Risk

Procedures in the negotiation and administration of the construction contract can help to minimize the risk. It is imperative to document that a careful thought process went into the material, product, and system recommendations. Clients should always be informed that while the design professional's responsibility is to use professional judgment to make recommendations based on available information, it is the client who makes the final decision based on a balance of factors, including risk. Documenting the selection process is important. It should include evaluating comparable projects using the product being considered, obtaining technical data and not just promotional material, and notifying the manufacturer in writing of how the product is to be used to obtain appropriate specifications.

It is also prudent to research the manufacturer. While it may not be reasonable to look into the manufacturer's operations and evaluate its financial condition, a basic evaluation of the manufacturer in the marketplace could provide information on the company's viability and its ability to have the product available at construction. The client should be fully informed of the risks and advantages of using a product. Once the client gives informed consent for a product, the design firm can carefully specify its usage and observe that it is installed according to manufacturer requirements. In many cases, it is

(continued on p. 7).

Show Us Your Home Office!


Michael Bell (Covington, LA)


Craig Williams (Richardson, TX)


Julia Donoho (Santa Rosa, CA)


Chuck Heuer (Charlottesville, VA)

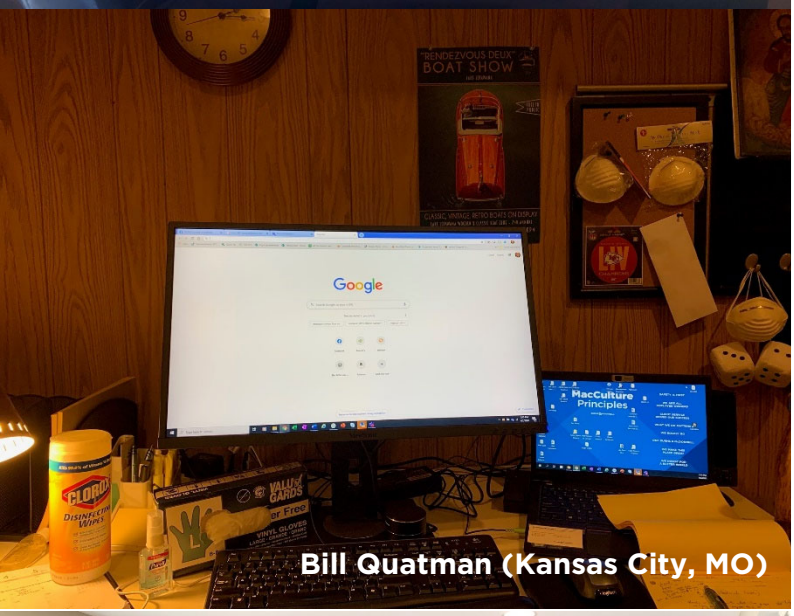

Jacqueline Pons-Bunney (Tustin, CA)


Joyce Raspa (Red Bank, NJ)

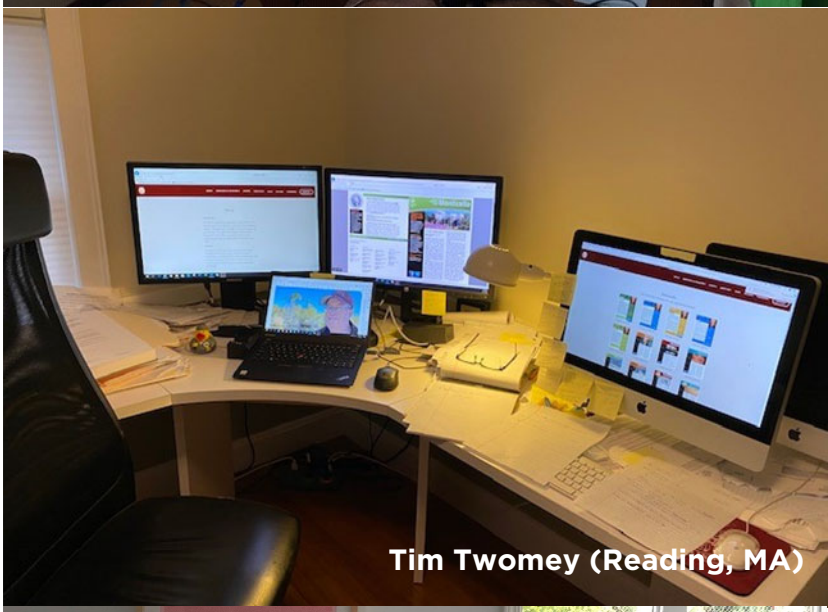
Show Us Your Home Office!


Jose Rodriguez (Miramar, FL)


Bruce Waugh (Leawood, KS)



Bill Quatman (Kansas City, MO)


Tim Twomey (Reading, MA)

Laura LoBue (Arlington, VA)


Ryan Manies (Leawood, KS)

Show Us Your Home Office!

(Above) "Less Is More"? Maybe the most austere home office we saw was Alex's plain stool, a bed sheet divider and – if you look closely – no letters on his keyboard!

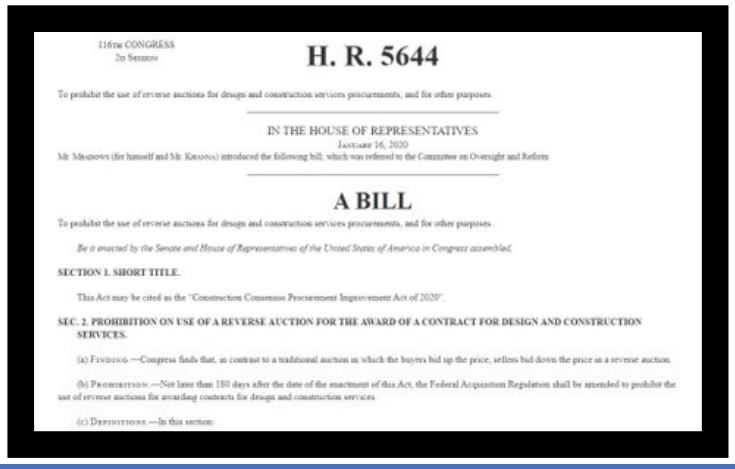
(Above) But, our favorite home office photo was submitted by Laura LoBue, whose adorable children keep her company in their "fort" next to mom's desk! It was worth a second photo.

Manufacturer's Representations (continued from p. 4)

important to require the manufacturer to have a field representative present to certify proper installation. It is critical to the financial viability of design firms that information provided by manufacturers is both factual and reliable. Throughout the process, it is vital that the standard of care for specifying materials is met.

Bipartisan Bill Would Ban Reverse Auctions for Federal Construction Contracts.

On Jan. 16, 2020, House members introduced the "Construction Consensus Procurement Improvement Act" (H.R. 5644), a piece of bipartisan legislation to improve the procurement process for federally funded construction projects. If passed, the bill would ban federal agencies from using reverse auctions to award design and construction contracts, a method that often favors the lowest price, rather than the most qualified, they said. The Senate passed its version (S. 1434) in late Dec. 2019.



116TH CONGRESS
2D SESSION

H. R. 5644

To prohibit the use of reverse auctions for design and construction services procurements, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 16, 2020

Mr. MEADOWS (for himself and Mr. KHANNA) introduced the following bill; which was referred to the Committee on Oversight and Reform

A BILL

To prohibit the use of reverse auctions for design and construction services procurements, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Construction Consensus Procurement Improvement Act of 2020".

SEC. 2. PROHIBITION ON USE OF A REVERSE AUCTION FOR THE AWARD OF A CONTRACT FOR DESIGN AND CONSTRUCTION SERVICES.

(a) FINDING.—Congress finds that, as contrast to a traditional auction in which the buyers bid up the price, sellers bid down the price in a reverse auction.

(b) PROHIBITION.—Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation shall be amended to prohibit the use of reverse auctions for awarding contracts for design and construction services.

(c) DEFINITIONS.—In this section:

MASSACHUSETTS. DESIGN-BUILDER LOSES SUIT AGAINST ENGINEER FOR COST OVERRUNS; COURT SAYS PRELIMINARY DRAWINGS CAN'T BE EXPECTED TO BE AS PRECISE AS FINAL DOCUMENTS.

In this 2019 case, a design-builder of a bridge sued its engineer subconsultant for costs allegedly attributed to errors in preliminary designs and cost/quantity estimates provided under the terms of a Teaming Agreement. From the outside, this looked like a successful project. The design-builder's proposal price was $89.7 million, approximately $3.5 million lower than the next lowest bidder, and it was awarded the contract. The design-builder was actually paid $107.5 million (which included about $18 million of change orders) while the DOT's estimate set out in the RFP was $118 million; the project was finished ahead of time; and it won design awards.

"all that can be expected of [the engineer] under the Agreement is preliminary design work sufficient to estimate costs and, if the bid is successful, there will be substantial design development."

Under budget, ahead of schedule, award winner! All good, right? Behind the scene, however, it was not as pretty a picture, at least according to the design-builder. Following a bench trial, the court rejected most of the design-builder's claims, finding that the contractor was essentially arguing that the preliminary plans prepared for bidding purposes should have been complete and accurate to the same extent as if they were final construction documents. The design-builder claimed that if the engineer had not breached the Teaming Agreement it would have bid more and made a greater profit. The court focused in on the terms of the Agreement, noting: "It is important to note here that the pre-bid design work was preliminary in nature, no greater than what was required to respond to the RFP, and sufficient to allow [design-builder] to prepare cost estimates. Further, "no other representations or warranties, whether express or implied, [were to] be imputed to [engineer's] services."

The Teaming Agreement stated that: "The Design/Builder and Engineer agree that the applicable standard of care for the Engineer's services shall be that degree of skill and care normally exercised by practicing professional engineers performing similar services on similar projects under similar conditions." Citing to Massachusetts law, the court noted that this would have been the appropriate standard to apply to the engineer's services on the project even in the absence of this provision. There was no evidence that the engineer failed to meet the standard of care for preliminary design documents and nothing suggested anything the engineer did caused the project to be more expensive. An important aspect of the decision was the rejection of the design-builder's claim that the engineer breached the standard of care by not knowing that the DOT would ultimately reject its proposed design pitch of the bridge deck. Expert testimony supported the reasonableness of the engineer's design and the court stated the design-builder might have recovered from the DOT if it had only pursued a claim against DOT. The court concluded, "There appears to be no reason to charge [engineer] with [design-builder]'s strategic decision not to press this claim."

It was understood by the parties that the engineer would only provide preliminary design during the bid phase, and only about 3% of the engineer's total fee for the project was for its pre-bid, preliminary design services. The court concluded that the project was aggressively bid without clear definition of how much was included in the bid price to reflect a profit margin or allowance for contingencies. A number of experts testified concerning industry standards regarding the amount of contingency that a contractor should include when bidding a design-build project. Consensus seemed to be that cost increases in the range of 10% should be expected. The court said, however, it was not necessary to find what the proper percentage for contingency was in this case. All of the experts, however, agreed, and the court found, that in design-build projects weights, complexities and therefore construction costs invariably increase after the contract is awarded as design development proceeds to the final approved-by-owner construction design. The fact that the design-builder was required by contract to include a "contingency" was an acknowledgment, per the court "that all that can be expected of [engineer] under the Agreement is preliminary design work sufficient to estimate costs and, if the bid is successful, there will be substantial design development." In the end, the court awarded just $138,507, with interest, each party to bear their own costs. *Middlesex Corporation, Inc. v. Fay, Spofford & Thorndike, Inc.,* 2019 WL 3552609 (Mass. Super. 2019).

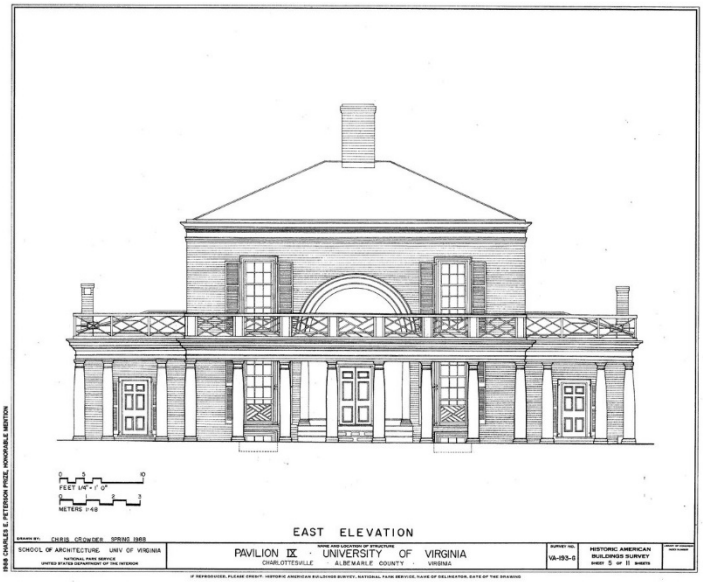
JEFFERSON SOCIETY 2020 ANNUAL DINNER IS POSTPONED.

Each year since our founding, the Society has held its annual meeting and dinner on the evening prior to the start of the AIA annual convention, and in the convention city. This year, that meeting was planned for Weds., May 13 in Los Angeles, CA. However, when the AIA announced that it was cancelling its convention due to the COVID-19 pandemic, the Board of the Jefferson Society promptly postponed its annual dinner meeting as well. TJS president Donna M. Hunt, AIA, Esq. issued this message to the members:

"Dear Members of The Jefferson Society: As you may now be aware, the AIA has made the difficult decision to postpone the AIA Conference on Architecture 2020, May 14–16 in Los Angeles due to the COVID-19 outbreak. In the interest of the safety and well-being of our members the board of directors of The Jefferson Society has postponed our Annual Meeting that was scheduled for May 13. The board is considering options for the Annual Meeting to allow TJS members to participate remotely, including the possibility of holding our 2020 Annual meeting as a conference call in early June. Please be on the lookout for more details in the weeks ahead. We hope you are doing well as we navigate this challenging time. Thank you as always for being a part of this important network of professionals. Donna M. Hunt, AIA, Esq., President"

PRESIDENT TRUMP'S PROPOSED EXECUTIVE ORDER DRAWS AIA's FIRE.

"Why Trump Shouldn't Be Allowed to Dictate How Federal Buildings are Designed." That was the headline in the Feb. 6, 2020 article in the *Washington Post* which reported that the National Civic Art Society, an educational nonprofit group, was advocating for the president to issue new guidelines that could radically change the look and feel of federal buildings in the nation's capital. A proposed draft Executive Order (which was somehow leaked) would mandate that new federal buildings, especially those in and around the District of Columbia, be built in "classical architectural style." This drew strong opposition from the AIA, which promptly issued a letter to Pres. Trump after news broke about the leaked draft Order, asking the president to "ensure that this order is not finalized or executed." The AIA also issued a memo to its 95,000 members urged them to contact the president and vocalize opposition to the Executive Order. In its Feb. 2, 2020 letter, the AIA wrote: "The AIA does not, and never will, prioritize any type of architectural design over another. There are many examples of beautiful and innovative buildings in all styles of architecture, including the styles explicitly mentioned in the draft executive order: Classicist, Brutalist, Spanish Colonial. America has proven uniquely able to incorporate, modify, and advance architectural traditions from a variety of other eras and places." The AIA letter concluded: "President Trump, this draft order is antithetical to giving the 'people' a voice and would set an extremely harmful precedent. It thumbs its nose at societal needs, even those of your own legacy as a builder and promoter of contemporary architecture. Our society should celebrate the differences that develop across space and time. AIA remains staunchly opposed to this proposed Executive Order. Please ensure that this order is not finalized or executed." It appears that the AIA's letter had its desired effect, as no formal Executive Order has been issued by the president as of March 31, 2020.



NEVADA. LAW FIRM NOT LIABLE FOR OWNER'S LITIGATION COSTS RESULTING FROM ARCHITECT FILING LIEN FOR NON-PAYMENT OF FEES.

This case involves two different legal actions: a legal malpractice action and an architect's lien foreclosure action, each stemming from a failed real estate transaction. A landowner hired the Hale Lane law firm to help sell an undeveloped property in downtown Reno. The would-be purchaser, who planned to develop a high-rise condo project on the property, contracted with an architect-

ural firm to perform design services for the project. Hale Lane represented both the seller and the would-be purchaser (any conflicts of interest?). After the purchaser failed to obtain financing, and the proposed sale fell through, the architect filed a $1.8 million mechanic's lien against the property for unpaid fees. Nevada statute 108.245(1) requires that mechanic's lien claimants deliver a written notice of right to lien to the owner of the property after they first perform work on or provide material to a project. The architect failed to do this. As a result, the law firm tried to expunge the lien, arguing that it was filed without statutorily required notice. The architect argued that the landowner had actual notice of the architect's work, however, and that a legal exception excusing strict compliance with pre-lien notice requirements applied because the owner had "actual notice." The law firm argued that the actual notice exception did not apply to "offsite work" when that work has not been incorporated into the property. The trial court agreed with the architect and rejected the law firm's attempt to expunge the lien. The court then ordered further discovery in the action to foreclose the mechanic's lien. Upset at that outcome, the landowner changed law firms and moved forward with the litigation challenging the architect's lien, also filing a third-party complaint against the Hale Lane law firm for professional malpractice and negligence, alleging that the law firm negligently executed the failed transaction, specifically in failing to advise that the seller protect against a lien by filing a notice of non-responsibility, and subsequently failing to expunge the mechanic's lien. The lien suit proceeded while the professional negligence action against Hale Lane was stayed.

The underlying lien case went all the way to the Nevada Supreme Court, *Iliescu v. Steppan,* 394 P.3d 930 (Nev. 2017), which ruled unanimously in favor of the landowner, voiding the lien on the basis that the architect could not file a lien for offsite design services without giving statutory notice. As a result, the law firm moved for summary judgment, arguing that its original attempt to expunge the lien should have succeeded, and that the supreme court decision validated the firm's position. The trial court agreed, holding that, despite any purported negligence on the law firm's part, once the trial court erroneously rejected Hale Lane's legal argument, there was no causal connection between any alleged "transactional negligence" and the landowner's litigation damages. In other words, it was not the law firm's fault that the litigation proceeded – it was the fault of the trial court! The landowner appealed. In upholding the summary judgment, the Nevada supreme court held that the law firm's purportedly negligent failure to warn or protect against a mechanic's lien was not sufficient, by itself, to bring about the filing of the mechanic's lien. Instead, it was the developer's own conduct in hiring of the

People On The Move.

Make note of new contact information for these TJS members:

Ross C. Eberlein, R.A., NCARB, Esq.
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ross@myvernacular.com

TJS Secretary **Josh Flowers** has moved here:
Joshua Flowers, Esq., FAIA
Senior Risk Manager, Legal Counsel
Gresham Smith
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Nashville, TN 37201-2308
josh.flowers@greshamsmith.com

Bill Chapman may now be reached at:
bill@erwinconsultants.com.

Laura Jo Lieffers has moved in-house and can now be found here:
Laura Jo Lieffers, Assoc. AIA, Esq., B.C.S.
Associate General Counsel
Perkins & Will
1818 Bayou Grande Blvd., NE
St. Petersburg, FL 33703
Laura.Lieffers@perkinswill.com

Have you recently changed firms or moved?
Let us know by emailing our webmaster: Alexander Van Gaalen at vangaalen@crestrealestate.com

architect who filed the lien, the architect's performance of offsite design services, and the developer's default and subsequent failure to compensate the architect for his work, which resulted in the lien. The court held that the landowner must instead establish that, "but for Hale Lane's alleged transactional negligence, a mechanic's lien would not have been filed." The landowner then argued that the law firm should have conditioned the purchase agreement on a lien release, but that ignored Nevada law that, generally, "conditions, stipulations, or provisions in a contract that require a lien claimant to waive lien rights" are void. *Iliescu v. Hale Lane Peek Dennison and Howard Professional Corporation*, 2020 WL 406781 (unpublished at 455 P.3d 841)(Nev. 2020).

2020 THOMAS JEFFERSON AWARD GOES TO RONA ROTHENBERG, FAIA.

The 2020 Thomas Jefferson Award for Public Architecture was given to Rona Rothenberg, FAIA, known for her work in public architecture. "She has set an exemplary example as an architect in nontraditional practice and has demonstrated considerable leadership as an architect in government service by passionately advocating for the value of design, historical preservation, and sustainability," wrote 2019 AIA California president Benjamin Kasdan, AIA, in a letter supporting Rothenberg's nomination. "Her work has greatly enhanced the user experience concerning justice and related institutional facilities for the benefit of the public." She spent time in private practice focused on significant educational, office, and military projects before the California Chief Justice called on her to spearhead the development of a 57-courthouse capital outlay plan. Since stepping into the role of lead senior capital program manager for the Judicial Council of California, Rothenberg has overseen two major capital campaigns that total more than $10 billion and has worked with prominent architectural firms to deliver compelling work for the nation's largest judiciary.

Ms. Rothenberg's ideals have resulted in several award-winning projects, such as the 11-story San Bernardino Justice Center. The center, with 34 courtrooms and two hearing rooms, replaced an aged, non-secure facility for one of California's largest jurisdictions, providing nearly 2.5 million residents access to safe and beautiful facilities. Situated near a fault line, the courthouse is resilient both structurally and environmentally and achieved LEED Gold certification.

FLORIDA. ARCHITECT'S CONTRACT WAS AMBIGUOUS ON BONUS PROVISION.

A golf course owner hired an architect to convert the golf course into residences. There was, of course, a falling out over fees and litigation ensued. The backstory is this: The architect was hired to develop a Master Plan for the redevelopment and coordinate, the obtaining of necessary zoning and other approvals from the applicable governmental entities and neighboring landowners, condominium associations, and cooperatives, etc. as appropriate. The architect was to perform its work in three phases: 1) a programmatic phase; 2) a master plan preliminary design phase; and, 3) a master plan final design phase, which would include a full color rendering plus sketches and drawings of the proposed project "*for use in the permitting process*." The architect's base fee was $250,000, with additional services paid hourly per a rate schedule. The contract also contained a bonus of 2,500 per unit with a cap of $1,250,000 upon approval of the removal of the restrictive covenant(s), approval of the city and any other required governmental agencies. The bonus was deemed earned and payable upon the sale by the owner of the property to which the Master Plan developed by the architect applied. The architect performed the three work phases, for which the owner paid the $250,000 base fee. The architect also performed additional services, for which the owner paid according to the hourly rate schedule. However, the parties disputed whether the condition referenced in the bonus fee provision's second sentence – the owner's receipt of all "approvals and permits necessary to develop the property in conformance with the Master Plan" was *in addition to*, or *synonymous with*, the first sentence's two conditions of the (1) "approval of the removal of the restrictive covenant(s)"; and (2) "approval of the City of Hollywood and any other required governmental agencies" of the architect's proposed master plan.

The owner argued that the wording meant that further approvals, such as building permits, were needed to trigger the bonus and - according to the owner - it never received any building permits, because it abandoned the project when the real estate market crashed shortly after the city approved the architect's master plan. The architect argued, of course, that it had no control over the owner's decision to abandon the project, thus denying it building permits and it was entitled to the bonus. The trial court granted summary judgment to the architect and the owner appealed. The Court of Appeals held that the bonus fee provision

was ambiguous, and that neither the architect nor the owner was entitled to summary judgment. Thus, it reversed and remanded for a trial on the merits, during which the parties may present parol evidence allowing the trial court to interpret the bonus fee provision's meaning. Using hornbook law, the Court held that: "Whether a contract provision is ambiguous is a question of law, to be determined by the court" and "A contract should be read as a whole." After reading the contract as a whole, and after considering the rules of construction, the Court concluded the bonus fee provision "is susceptible of interpretation in opposite ways and reasonably or fairly susceptible to different constructions. The arguments which each side has presented are both reasonable, and we can discern no reason to favor one rule of construction over the others in this case." *Hillcrest Country Club Limited Partnership v. Zyscovich, Inc.,* 288 So.3d 1265 (Fla. App. 4 Dist. 2020).

ILLINOIS. CGL INSURER REQUIRED TO DEFEND ENGINEER FROM SUIT DESPITE "PROFESSIONAL LIABILITY" EXCLUSION.

After an embankment supporting tracks for the Chicago Transit Authority's ("CTA") Yellow Line collapsed in Skokie, disrupting train service for several months, the CTA sued the contractor and several subs, which suit was settled; however, CTA then sued the design-builder's engineer for general negligence and professional negligence. The design-builder sued its subcontractors, including the engineer, and the cases were consolidated for discovery. In the contractor's suit, the contractor alleged professional negligence, negligent misrepresentation and breach of contract. The engineer notified its CGL insurer, Travelers, and sought defense to the two suits. However, Travelers declined to defend, contending the CTA's claims fell within a "professional liability" exclusion in the policy, which excluded from coverage any losses for bodily injury or property damage "arising out of the rendering or failure to render any 'professional services.' " The engineer filed a declaratory judgment action against Travelers for its failure to provide a defense. Both sides filed cross-motions for partial summary judgment solely on the duty to defend. The federal trial court ruled in favor of the engineer and against Travelers, finding that the insurer had a duty to defend.

The engineer was hired by the contractor to perform "professional design services" including "providing design calculations and drawings for the earth retention system." The court noted that the burden of proving that a claim falls within an exclusion rests squarely on the insurer. Illinois courts take an expansive definition of the term – "professional," covering "any business activity conducted by the insured which involves specialized knowledge, labor, or skill, and is predominantly mental or intellectual as opposed to physical or manual in nature." Using that standard, the court looked to the allegations in the contractor's suit and concluded the allegations clearly fell within the exclusion and, therefore, Travelers has no duty to defend the insured *in that suit*. Looking then at the CTA allegations *in the other lawsuit*, the court noted that "not all of the allegations, however, are so explicit — especially those recited under the general negligence claim." Specifically, there were allegations that the engineer "failed to construct" the work in a skillful, professional, workmanlike and prudent manner.

> The CGL policy included a professional services endorsement which excluded from coverage any losses for bodily injury or property damage "arising out of the rendering or failure to render any professional services."

Each of these allegations, the court ruled, particularly one concerning the operation of equipment, could be construed to cover conduct that "is predominantly ... physical or manual in nature." Therefore, the court ruled, that: "Without more evidence that the CTA action concerns only professional services, Travelers has fallen short of meeting its burden of proving that the policy exclusion applies. Even if this evidence suggests that [engineer] engaged only in professional services, that is simply not enough to relieve Travelers of its duty to defend." As a result, the insurer was obligated to defend. *Collins Engineers, Inc. v. Travelers Prop. Cas. Co.*, 2020 WL 1491136 (N.D.Ill. 2020).

[Editor's Note: It is not uncommon for plaintiff's lawyers, who do not understand what engineers do, to lump them in with the contractor, alleging that the engineer performed construction work. If so, there may be a duty to defend under a CGL policy.]

KENTUCKY. BANK THAT ISSUED CONTRACTOR'S LETTER OF CREDIT NOT BOUND TO MEDIATE OR ARBITATE.

On this construction project, the owner opted to have the contractor provide an Irrevocable Letter of Credit ("LOC") in lieu of a performance bond. The AIA construction contract required mediation and arbitration of disputes. After the owner declared the contractor in default, it called on the bank to draw on the LOC. The owner then sued the contractor and the bank in state court. The bank removed that suit to federal court. The contractor then moved to compel mediation and arbitration, per the AIA contract terms, and to stay proceedings in the interim. The bank responded that it was not bound by the construction contract to mediate or arbitrate. The owner did not dispute the motion and was ordered to mediate and arbitrate with the contractor. Turning then to the bank's LOC, the court noted that non-signatories may be bound to an arbitration agreement under at least five theories, including "ordinary contract and agency principles" or under an estoppel theory "when the non-signatory seeks a direct benefit from the contract while disavowing the arbitration provision." Here, however, while the LOC made "extensive reference to the contract," it contained its own disputes clause, which required any action arising out of or relating to the LOC be commenced and prosecuted in a Kentucky court. The court said that, "Insofar as [bank] might have *implicitly* incorporated by reference any part of the Contract, it has *explicitly* provided that disputes under the LOC would be litigated, not arbitrated. Since [the bank] unambiguously negated the Contract's arbitration provision, it cannot be compelled to arbitrate." However, based on the nature of the case and the "inter-relatedness" of the owner's claims against the contractor and bank, the court felt that granting a full stay of litigation was appropriate, pending mediation and arbitration. *Jr. Food Stores, Inc. v. Hartland Construction Group, LLC,* 2020 WL 1442889 (W.D.Ky. 2020).

INDIANA. ARCHITECT CANNOT SUE CONSULTING ENGINEER IN TORT FOR PURE ECONOMIC LOSSES.

This case arises from the design and construction of a Marriott Courtyard Hotel in Indianapolis. The owner hired an architect who, in turn, hired an engineering firm for structural, mechanical, plumbing and electrical design for the hotel. The owner sued the architect over various alleged design defects and the architect joined the engineer, seeking damages for breach of contract, breach of professional standard of care, and common-law indemnity. The engineer filed a motion for summary judgment on the professional negligence claim, saying that such a tort claim was barred by the economic loss doctrine ("ELD"). The architect agreed the damages were only economic, but argued that the ELD applied only to general negligence claims, not to a claim for breach of professional standard of care. The court disagreed, holding that in Indiana, the ELD bars recovery in tort for economic loss in a case such as this. Therefore, the engineer was entitled to summary judgment on the claim for breach of professional standard of care. MHG Hotels, LLC v. Studio 78, LLC, 2020 WL 1307205 (S.D.Ind. 2020).

MINNESOTA. INSURER HAD DUTY TO DEFEND DESIGN-BUILDER FOR INTERIOR DAMAGE CAUSED BY LEAKING ROOF.

A number of problems arose during the construction of a luxury apartment complex and the property owner sought damages against the general contractor, a design-build firm, in arbitration. Evidence showed that the construction project "was plagued with problems from the start," which eventually led the property owner to terminate the contractor a little over a year after construction began. Over the next few months, workers allegedly discovered significant architectural and structural problems caused by the original contractor and its subcontractors. This discovery led to threats of legal action, which prompted the contractor to seek coverage under its CGL policy with Westfield. The contractor asked Westfield to defend it, but Westfield instead filede suit against the insured contractor in federal court for declaratory judgment that it had no duty to defend.

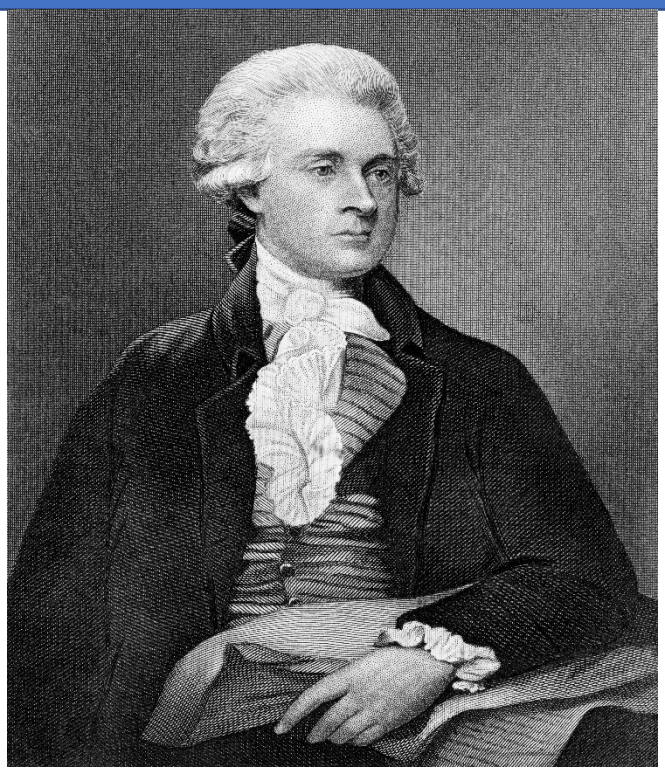
The federal trial court ruled against the insurer on the duty to defend. However, as for the duty to indemnify, the court was not yet ready to say whether the insurer would be responsible for any damages awarded in the arbitration, so it stayed resolution of that question. Westfield appealed, arguing that it had no duty to defend the contractor since there was no property damage caused by "an occurrence." In affirming the ruling for the contractor, the Eighth Circuit Court of Appeals held that water had come through a defectively installed roof and damaged the "finishes and electrical work in the building's interior." This claim,

the Court held, arguably falls under the initial grant of coverage in the policy, which includes "property damage" caused by an "occurrence." Westfield argued there was no property damage (to other property than the work itself) because the whole apartment complex was the insured's responsibility. The Court of Appeals noted, however, that it is far from clear that the roof, which is on the building's *exterior*, and the finishes and electrical work, which are in the building's *interior*, are the same "particular part of the property." Dissecting the policy language, the Court concluded that the claims against the insured contractor do not "clearly" fall outside the scope of coverage. Recognizing that under Minnesota law, an insurer's duty to defend is broader than its duty to indemnify, the court found there was certainly a duty to defend. Therefore, the insurer had a duty to defend the contractor. *Westfield Insurance Company v. Miller Architects & Builders*, 949 F.3d 403 (8th Cir. (Minn.) 2020).

MONTANA. ARCHITECT WHO DESIGNED ROADWAY ON ANOTHER'S PROPERTY PROVES "PRESCRIPTIVE EASEMENT" AS WAY TO DEFEAT NEGLIGENCE CLAIM.

The defense lawyers for this architect were very clever, getting their client out of a case in which the architect was most likely negligent! Kudos to them. Here are the facts: In 1902, the city abandoned its right of way on a portion of Chambers Avenue. Barrett owned lots to the west of the abandoned right-of-way, and the city owned a parcel to the east. In 2004, a local school district leased the city's parcel to build a new high school. One of the specifications of the conditional use permit issued by the city to the district for construction of the high school was that the school would have two access roads. CDA was the architect on the school construction project and was instructed to extend Chambers Avenue north from the intersection with 5th Street, and to curve the road toward the northeast to connect the secondary access road with the school. Construction of the school began in 2007, and the access road was completed in 2008, when traffic use began. In Sept. 2016, Barrett hired a surveyor which found that the school access road encroached upon Barrett's lots by 5 feet for a length of 130 feet. Barrett took the position that, until this survey was completed, it had no actual notice of the encroachment upon its property.

On May 26, 2017, Barrett sued the city and school district, alleging inverse condemnation, negligence, and state constitutional violations. The city joined the architect alleging, that CDA was negligent in the design and building of the access road across Barrett's property. Following discovery, CDA moved for summary judgment, contending the city and/or the school district had acquired "a prescriptive easement" across Barrett's property. The trial court granted the motion and Barrett appealed.



To establish an easement by prescription, the party claiming an easement "must show open, notorious, exclusive, adverse, continuous and uninterrupted use of the easement claimed for the full statutory period." Here, the only disputed element was whether the encroachment was open and notorious. Barrett argued it did not have actual notice until it surveyed the property in 2016. But the trial court found that the circumstances surrounding the access road were sufficient to put Barrett on constructive notice of the encroachment, which was affirmed. The state supreme court held that even assuming the survey completed in 2016 provided the first actual notice to Barrett, "nonetheless, the access road was, by its nature, obviously visible and not undetectable to the untrained observer." The court held that CDA was entitled to judgment as a matter of law upon establishing all of the elements of a prescriptive easement, demonstrating the city and the school district obtained a prescriptive easement for the access road over Barrett's property. *Barrett, Inc. v. City of Red Lodge*, 457 P.3d 233 (Mont. 2020).

MEMBER PROFILE: ALEX VAN GAALEN

Crest Real Estate

Los Angeles, CA

(Above) Alex inside a slot canyon at Antelope Canyon in Page, Arizona.

Alexander ("Alex") van Gaalen is a code consultant, with expertise in the design, permitting and construction of high-end single-family residences in the hillside areas of Los Angeles. But, his career did not start out this way. Like most of us, his life has had several twists and turns. "As a child, I did not have any specific ambition to be an architect," he said. But out of high school, Alex applied for, and was accepted into, the Mechanical Engineering Department at Carnegie Mellon Univ. (CMU). It was in a 101-level engineering class that a teaching assistant offered a hypothetical involving designing a bolt for Caterpillar in Peoria, IL. "That scared me out of engineering for many reasons. I thought the life of an architect would be more interesting." So, it was the five-year program at CMU's School of Architecture where he learned about building design.

After graduation from CMU in 2002, "times were tough," he said. "My first job out of architecture school was at a small architecture firm on Canal Street in New York called Kushner Studios. I got in through a friend. It was and is a true design-build office, where the owner carried a general contractor license and had to build what he drew. We did ambitious new-out-of-the-ground buildings in the City." His next job changed his life in a rather unexpected way. Alex moved onto a more traditional role at the New York City offices of Gensler, where he worked on the design of several law offices. It was at client meetings that Alex began to think about law school. "At meetings I would think it would be better to sit on the other side of the table," he recalled. So, he applied to, and was accepted at, Brooklyn Law School. "I chose that school because I was already living in Brooklyn. In my mind, I was on a new adventure. I graduated from law school in 2009. The job market was tough and I never got the opportunity to practice law."

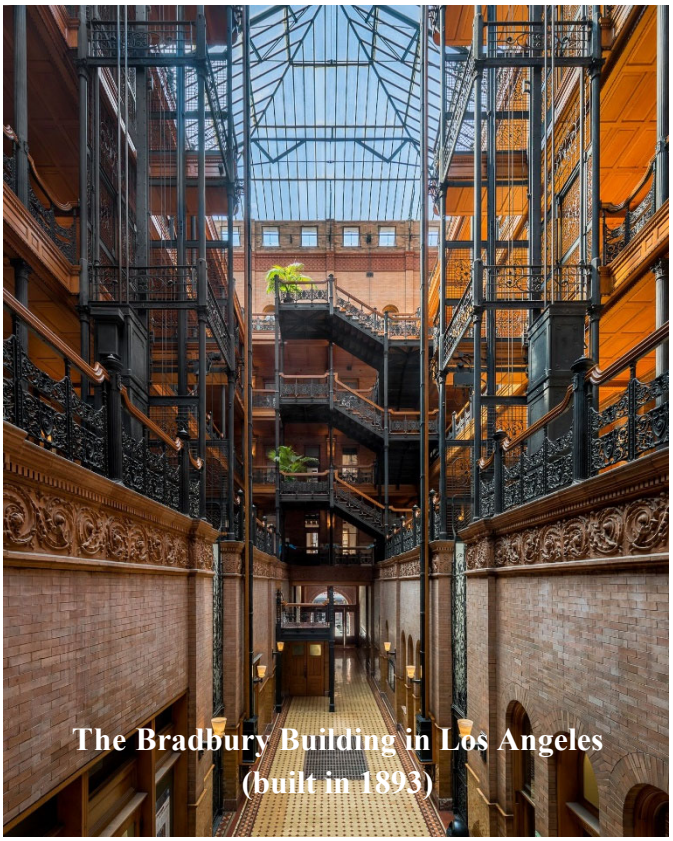
He moved to Los Angeles from the east coast not long after finishing law school, in hopes of finding work as an architect. "I had experience in architecture but not in law, so there was a lower barrier of entry. I had a California architecture license already (long story), so it made sense at the moment." Today, Alex enjoys his role as a code consultant, telling us that, "My work product is best when it is a precise combination of language and diagrams to illustrate a point or make and argument. It's always satisfying to find a design solution to fit the exception to an exemption in the code which makes a specific design intent permissible."

Outside the office, Alex enjoys many outdoor activities. "I am one of those people you see hiking and biking everywhere. Although the local hiking trails are all closed now, I have been walking the

Always up for a new experience, Alex reacts to a shock collar (made for large dogs) at the Burning Man Festival in Nevada. Ouch!

hillsides, using local architectural landmarks as destinations as motivation." But this COVID-19 isolation has been a fairly easy adjustment under state and local "stay-home" orders. As a single man without children he says, "It makes the quarantine simple, if a bit too quiet." He has enjoyed reconnecting with his many cousins who live all over the world. "The quarantine has reconnected us, through a WhatsApp group chat. It's nice to see how everyone is doing around the globe."

His favorite building is the Bradbury Building in Los Angeles, from 1893. "It adheres to none of the minimalist utilitarian design principles to which I ascribe, but it is wonderous each time I enter. I make excuses to be in its area, just to make a visit." (See photo, below). The Bradbury Building was comm-



The Bradbury Building in Los Angeles (built in 1893)

issioned by Los Angeles gold-mining millionaire Lewis L. Bradbury and constructed by draftsman George Wyman from the original design by Sumner P. Hunt. As to his favorite architect? Like many TJS members, he named Frank Lloyd Wright. "I am lucky live very near quite a few of his works, and also near those of his acolytes. What has become apparent to me is his consistency in maximizing the attributes of the site while still surprising you with beauty. And the works of his followers, who took aim at the same goals but rarely hitting the mark so exactly, show how difficult this is."

(Above) Alex at the summit of Mt. Whitney in California, the tallest mountain in the contiguous United States and the Sierra Nevada, with an elevation of 14,505 feet. "Note the purple lips," Alex commented. (Below) Alex emerging from the Pacific in the Malibu Triathlon.

Alex is also involved in the local AIA's Building Performance and Regulations Committee. His simple advice for a young architect thinking about law school? "Take on no debt."

MEMBER PROFILE: JACQUELINE PONS-BONNEY

Weil & Drage, APC
Laguna Hills, CA

Jacqueline (or "Jacquie") Pons-Bunney realized growing up that she suffered from being right - and left-brained simultaneously. "I think of myself as analytical with a need for an artistic outlet. While there are probably many different outlets for this combination, architecture appealed to me," she said. She found a place to scratch her artistic itch in the architecture school at Cal Poly Pomona. "As I became more engaged in my college education, I really developed a respect for architectural history and the professional as a whole." Her first job out of architecture school was with a Peruvian architect who did small projects in Pasadena. "His local work was, frankly, uninspiring, and he struggled to make ends meet and secure projects that encouraged him. However, he was a partner at a large firm in Peru before moving to the U.S., and his projects with that firm were truly striking. He eventually moved back to Peru and picked up more interesting work. Importantly for me, he shared office space with a contractor, and they collaborated on projects." This allowed Jacquie to learn about contracting and design concurrently and first-hand, which helped put her on her eventual path.

Ironically, Jacquie then ultimately stumbled onto a job with an attorney (long story!), "which I hated (another long story!). However, the law in general intrigued me, and I was cheered on by my family and good friends to go to law school. I hesitated for a bit because I thought I was older than most law school students and cringed at the thought of enlisting in yet another arduous course of study for several years." With encouragement from her family and friends, she enrolled at the Univ. of La Verne College of Law in Ontario, California, east of LA, between Pomona and San Bernadino. "I continued working for that attorney while attending law school at night," she said. "While it sounds daunting to some, having earned a degree in architecture made law school seem much more manageable than it did to some of my law school classmates." (We can all relate to that!).

What intrigued her about combining the two studies? "I remember my structures professor during a lecture telling his students that, if they wanted to make money in architecture, they should go to law school. I had no idea what that would mean from a professional standpoint. And while that was not the impetus for ultimately pursuing a law degree, it made sense at some point in my law school career to join the two." So, she did.

(Above) A Spanish selfie! The family in Barcelona, Spain (Summer 2018); (Below) Jacquie and her sons in Madrid during that same vacation.

Jacquie's husband, Scott, is an architect. In her final year of law school, Scott attended a lunch-and-learn at his firm presented by a local lawyer. "He came home bursting at the seams, encouraging me to contact her for a job. He then asked his boss to set up an interview, which he graciously did. She and I hit it off immediately and I was hired as soon as I passed the California Bar Exam. That was twenty years ago." Today, that lawyer is Jacquie's law partner at Weil & Drage, APC, where Jacquie is the Managing Partner. The firm has offices in California, Nevada and Arizona, representing design and construction professionals in every project type and discipline.

Jacquie says that the best part of her job is learning something new every day from her clients. As to her administrative role, she adds: "As odd as this might sound, I also enjoy being Managing Partner because, putting head-aches aside, it allows me to stay connected with all of the people at the firm on a more personal level. Overall, having that connection makes my job much more rewarding."

She and Scott have been married for 27 years. Scott is a self-employed architect focused on residential projects. The couple has two sons – Elijah, 16 and Zachary, 15. Elijah is a Junior in high school, "a very organized young man who is passionate about baseball." Zachary is a Freshman in high school, "with a quick wit, intelligent, and has amazing determination. He will make him a terrific lawyer someday," his mother says. Jacquie also has two wonderful step-daughters and she has six (yes, six) grandsons. Her daughter Rachel is a teacher in San Diego, and Amanda is the Business Developer for an up-and-coming interior designer in Orange County.

Outside of work, Jacquie enjoys reading all types of books, especially historical fiction. "I am also a prolific scrapbooker and have amazing Cricut skills!" she said. The family loves to travel, as can be seen from the photos. "The boys are great travelers and we are all foodies, which really helps when we jet set. Last year, we toured baseball fields in the Midwest – Milwaukee, Chicago, Cleveland and Pittsburgh (See photo, below). In November, we visited London over Thanksgiving break. The year prior, we visited Spain. This year, we have plans for Hawaii - - really hoping we will get there!"

(Above-left) Jacquie, Scott and the boys in Toledo, Spain (Summer 2018); (above-right) the family attending a Chicago Cubs game at Wrigley Field in 2019, when they toured major-league ballparks in the Midwest.

PENNSYLVANIA. TOWN CAN BE SUED FOR BAD FAITH BASED ON ARCHITECT-AGENT'S ACTIONS.

A town hired a contractor who provided a performance bond. The construction contract required work to be completed no later than May 13, 2016. When it was not finished on time, the town issued a letter declaring the contractor in default and terminating the contractor, calling on its surety to perform. A "takeover agreement" was signed which set forth a schedule for the completion of the remaining work and a schedule for payment by the town to the surety. On Dec. 23, 2016, the surety's construction manager submitted a report indicating the work was 100% complete and requesting payment. However, the town rejected the request for payment, claiming work was not completed. The General Conditions required final payment to be certified by the architect. However, neither the town nor the architect notified the contractor of any deficiencies in its work, nor did the architect issue a final certificate for payment. The town sued the surety for breach of contract, and the surety countersued the town for breach of contract, invoking the state Prompt Payment Act (the "Act"), 62 Pa. C.S.A. § 3901 et seq., alleging bad faith under the Act. The town then filed a motion to dismiss the counterclaim for failure to state a claim. In denying the town's motion, the federal trial court held that to bring a claim for payment under the Act, a contractor must show that: 1) it completed work for a government agency; 2) the parties entered into a covered contract for a value greater than $50,000; 3) the government agency entered the contract through a competitive bidding process; and 4) the agency failed to pay the contractor for its performance in accordance with the terms of the contract.

Under the Act, a government agency may only withhold payment from the contractor when the agency identifies "deficiency items" in the contractor's performance. However, the agency must still pay the contractor "for all other items which appear on the application for payment and [which] have been satisfactorily completed" by the contractor. If the government agency refuses to pay the contractor for its completed work, the Act provides a remedy, including penalty interest and attorney's fees, if payments were withheld from the contractor in bad faith and constituting "arbitrary or vexatious behavior." In order to ensure that contractors would not bring vexatious suits for violations of this Act, the contractor must plead facts that show arbitrary or vexatious behavior. Here, the surety alleged that the architect acted as the town's "agent," whose behavior constituted bad faith. The town denied that the architect was its agent. In rejecting that defense, the court noted that to establish an agency relationship, the "liability of a principal to third parties for the act of an agent must rest on: 1) express authority, or that which is directly granted; 2) implied authority, to do all that is proper, usual and necessary to the exercise of the authority actually granted; 3) apparent authority, as where the principal holds one out as agent by words or conduct; or 4) agency by estoppel. The surety claimed that the architect "possessed the sole authority under the Contract Documents to conduct the inspection [of its work], assess the status of the work and notify the Contractor of any items he determined needed to be addressed to bring the Project to final completion." The court found that the General Conditions represented "a granting of express authority to the architect — and such a finding entails Defendant's agency relationship allegation" sufficient to withstand a motion to dismiss at this early stage of the litigation." In addition, the court found that the surety satisfactorily demonstrated the town's decision to withhold payment constitutes "arbitrary or vexatious behavior" within the meaning of the Act because the town failed to notify the surety/contractor of the deficiency item within the time period specified in the contract or within 15 calendar days of the date that the application for payment is received, under the Act.

> "The architect's refusal to certify any amount for payment and his failure to indicate any reason for not approving the amounts listed in the payment application constitute a breach of contract."

In conclusion, the court held that, "The architect's refusal to certify any amount for payment and his failure to indicate any reason for not approving the amounts listed in the payment application constitute a breach of contract. If the architect thought any amount of payment should be withheld from Defendant, the architect was required to notify Defendant of such." The motion to dismiss was denied. *Charlestown Township v. United States Surety Co.,* 2020 WL 618552 (E.D.Pa. 2020).

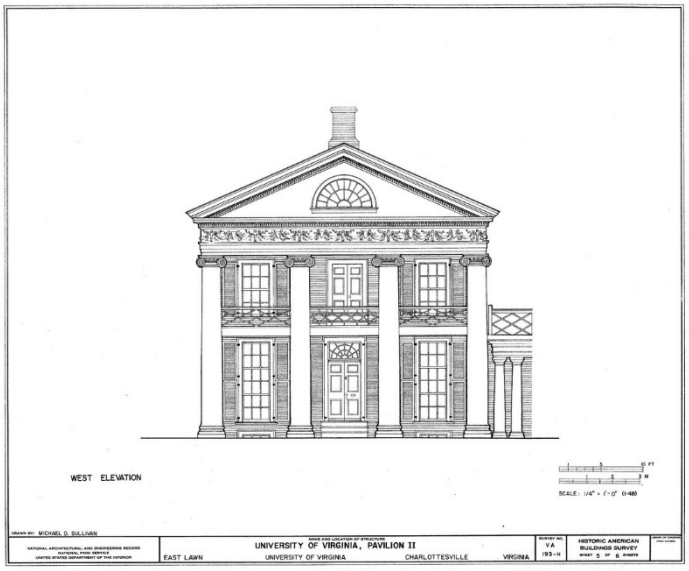
MINNESOTA. TWO CONDO BUILDINGS HAD SEPARATE COMPLETION DATES FOR PURPOSES OF STATUTE OF REPOSE, DESPITE BEING A SINGLE PROJECT.

A condominium association sued the developer, architect, contractor, and three subcontractors, alleging breach of statutory warranties after defects were discovered in two multi-unit condo buildings. The trial court granted summary judgment to the defendants and the association appealed. The court of appeals affirmed in part and reversed in part, and the developer and contractor sought review before the state supreme court, which was granted. Under Minn. Stat. § 327A.01(8), the warranty date for a condominium building is the date on which the first buyer occupies or takes legal or equitable title to any unit in the building. A building or project is a separate improvement that triggers the repose period of Minn. Stat. § 541.051 when the building or project is sufficiently complete so that the improvement may be turned over to the person who hired the construction entities to use it for the purpose for which it was intended. The core issue in this case was how the statute of repose applied to a condominium complex consisting of two buildings. The first question was whether each unit within a condo building had its own warranty date; or whether a single warranty date applies to the entire building. The state supreme court held that a single warranty date applies to an entire condominium building. However, since there were two buildings, the court had to decide how the period of repose applies to a development that includes two buildings, i.e., whether the buildings constitute one single improvement or two separate improvements. The court concluded that a building or project is a separate improvement that triggers the repose period. Accordingly, under the circumstances of this case, the two buildings were separate improvements for purposes of applying the repose period to defective or unsafe-condition claims.

In a very lengthy opinion, the state supreme court ruled that "each building unquestionably meets our definition of an improvement." Because Buildings A and B were separate improvements for the purpose of the statute of repose, the court found that the plaintiff's common-law claims for damages related to the leaking pipes were properly dismissed by the district court. Summary judgment was affirmed. *Village Lofts at St. Anthony Falls Association v. Housing Partners III-Lofts, LLC*, 937 N.W.2d 430 (Minn. 2020).

LOUISIANA. ENGINEER/CM OWED NO DUTY TO INJURED WORKER.

This case arose out of an accident at a construction site at a high school in Louisiana, when a worker was injured when the walls of a trench collapsed as he was laying drainage pipe. A representative of the engineer/CM was present when the cave-in occurred and assisted in the crew's efforts to free the worker. The worker sued both his employer and the firm hired by the school board to provide engineering and construction management services to the project. The trial court granted summary judgment in favor of the engineer/CM based on the contract scope, and the worker appealed. The plaintiff argued that the engineer/CM clearly had both the right and a duty under its contract for his safety, and breached those duties by failing to stop the work prior to the trench collapse when the evidence showed that its employees observed the dangerous conditions.



The AIA contract, Section 4.2.2, stated that the engineer will not have "control over, charge of, or responsibility for ... safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities." The trial court ruled that, "It is apparent that the parties intended to hold only one party, [the contractor], liable for safety precautions. Indeed, the same contract provided that the contractor was "solely responsible" for all instrumentalities of the construction job. On appeal, plaintiff claimed that the engineer/CM owed him a "moral duty" for his safety. The court of appeals ruled that, "In determining the duty owed to an employee of a contractor by an engineering firm also involved in the project, the court must consider the express provisions

of the contract between the parties." Plaintiff contended that reading the contract provisions in conjunction with one another leads to the legal conclusion that the engineer/CM had a duty to stop the work upon observing a dangerous condition. The court disagreed, finding that the provisions relied upon by the plaintiff did not pertain to safety, but rather pertain to the pace of the work and provide the owner with remedies in the event the work does not proceed timely. As a result, summary judgment was properly granted.

As to the issue of whether the engineer/CM owed the worker a "moral duty," *i.e.*, a duty not arising out of the contract provisions, to stop the work if it observed a dangerous working condition, the plaintiff argued that the engineer/CM was aware of the dangerous condition of the trench – which created a duty. The court of appeals disagreed, stating that a thorough search of cases failed to uncover any Louisiana court creating or recognizing a moral or tort duty to a contractor's employee on behalf of an engineering firm "contrary to the established body of case law holding that specific contractual provisions govern the duties and responsibilities of the parties." The engineer's project manager testified that if he "saw something that was imminently a threat to life, limb, or eyesight, absolutely, we have a moral obligation to stop it." However, he also testified that he did not observe any condition that he believe reached that threshold. The court ruled that there was no showing that the engineer/CM assumed any duty towards plaintiff. Summary judgment was affirmed in favor of the engineer/CM. *Nijel Young v. Hard Rock Constr., LLC, et al.*, 2020 WL 1270962 (La. App. 5 Cir. 2020).

NEW YORK. A RARE CASE – A CLAIM FOR COPYRIGHT INFRINGEMENT OF A COMMERCIAL BUILDING.

Almost all the architectural copyright cases seem to deal with residential construction, where some designer or homebuilder rips off another party's design. Not so in this case, where the project in dispute was the renovation of two existing five-story buildings and a sixth-story addition to the buildings. The plaintiff-architect sued a New York City developer under the Copyright Act, the Lanham Act), and the Digital Millennium Copyright Act, or "DMCA"). The defendant filed a motion to dismiss, which was granted in part. For the gory details, the plaintiff previously provided architectural services to the developer in connection with the project, creating two sets of architectural drawings, which it registered with the Copyright Office in 2016. Plaintiff claimed it was the author and owner of the copyrights, alleging that in approximately 2017, the developer copied plaintiff's designs without receiving prior approval, submitting "illegal copies" of plaintiff's designs to the city, and even removing the plaintiff's name and copyright notice from the drawings. The developer filed a motion to dismiss. The court began noting that "In order to make out a claim of copyright infringement for an architectural work—or any work—a plaintiff must establish three things: 1) that his work is protected by a valid copyright, 2) that the defendant copied his work, and 3) that the copying was wrongful. When a substantial similarity exists between the defendant's work and the protectable elements of plaintiff's, copying is wrongful." As to the test for substantial similarity between two items, the court said the key is whether "an ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal as the same." With respect to the façade of the buildings, an ordinary observer could determine that the two designs embody the same "total concept and overall feel," as they were close to identical. The defendant argued that these similarities were attributable to the code of the Landmark Preservation Commission, and thus are unprotectable. The court said that while this argument may ultimately succeed, it must be reserved for summary judgment on what constraints existed because of the codes and what features of the plans those codes dictated. The court also found that an "ordinary observer" could also conclude that plaintiff's and defendant's designs for the roof garden embody a similar "total concept and overall feel." The developer argued that because of the shape of the roof and the placement of the elevator and stairs, there was "little room for creativity" with respect to the garden's shape. However, the court rejected that, finding, again, that such questions should be reserved for summary judgment, not a motion to dismiss. Plaintiff's claim for false designation of origin under the Lanham Act was dismissed, however. As the DMCA claim, the court noted that at this early stage of the litigation, and drawing all inferences in favor of plaintiff, the suit has stated a claim for removal of copyright management information (or CMI), "albeit barely." Thus, the motion to dismiss was only granted in part on the Lanham Act, but denied on the copyright and DMCA claims. *Pilla v. Gilat*, 2020 WL 1309086 (S.D.N.Y. 2020).

SUPREME COURT ADMISSION DAY: NOV. 16, 2020.

We have reserved space with the U.S. Supreme Court for a group of *twenty-five Jefferson Society members* to be admitted in a ceremony on Nov. 16, 2020. If you would like to join the group, please let us know as soon as possible by emailing Jessyca Henderson AIA, Esq. at jessyca.henderson@gmail.com. Each applicant is permitted to bring one guest. Please let Jessyca know of your guest. If you are not taking a guest, please indicate "None," so that we will be able to allocate that spot to someone who may want to bring two guests. Required items for application submission:

1. A Completed Application, which includes:

a. A typed first and second page of the application which can be obtained from the SCOTUS website, at www.supremecourt.gov under the "Rules and Guidance" tab. The application must be filled out online, printed, and then signed.

b. All signatures on the second page of the application – both applicant and sponsors, which must be original, and on the same page. We have several TJS Members who may act as your sponsor having already been admitted. It is suggested that you contact two, and prepare addressed, stamped envelopes so that the first sponsor can send along the materials to the second sponsor, who will sign and send the completed application back to you. Only the Certification, Statement of Sponsors, and Oath of Admission sections need to be signed for group admissions.

2. A Certificate of Good Standing:

a. You should request a certificate from the Supreme Court of the State where you have been practicing for the past three years. Certificates are usually valid for one year. Make your request after Dec. 1, 2019 so that you know the certificate will be valid at the time the application is submitted.

3. The Application Fee:

a. Prepare a $200 check payable to "The Jefferson Society." The Jefferson Society will prepare one check for the group.

4. Final Steps:

a. Once you have received your application back from your second sponsor, send your signed application, your certificate, and your application fee check to the Jefferson Society, c/o Jessica Hardy at the address below. She will collect all the applications, look through them, check all the signatures, and will call if anything is missing. The Clerk will send information at a later date on the required arrival time at the court.

The Big Day Schedule.

As in the past, we would like to include a catered breakfast, which will be an additional charge per person, and will move arrival to an earlier time, likely between 8 and 8:30 a.m. When the applications are submitted, a letter will be sent to the Chief Justice and Associate Justices introducing the Jefferson Society and inviting them to join us in the room where the breakfast is served. Court will gavel in at 10 am and admissions will be the first item of business.

If you have any questions, please do not hesitate to contact Jessyca Henderson, or Jessica Hardy. They will keep you updated as we get closer to the date.

For general questions, and swearing-in day logistics:

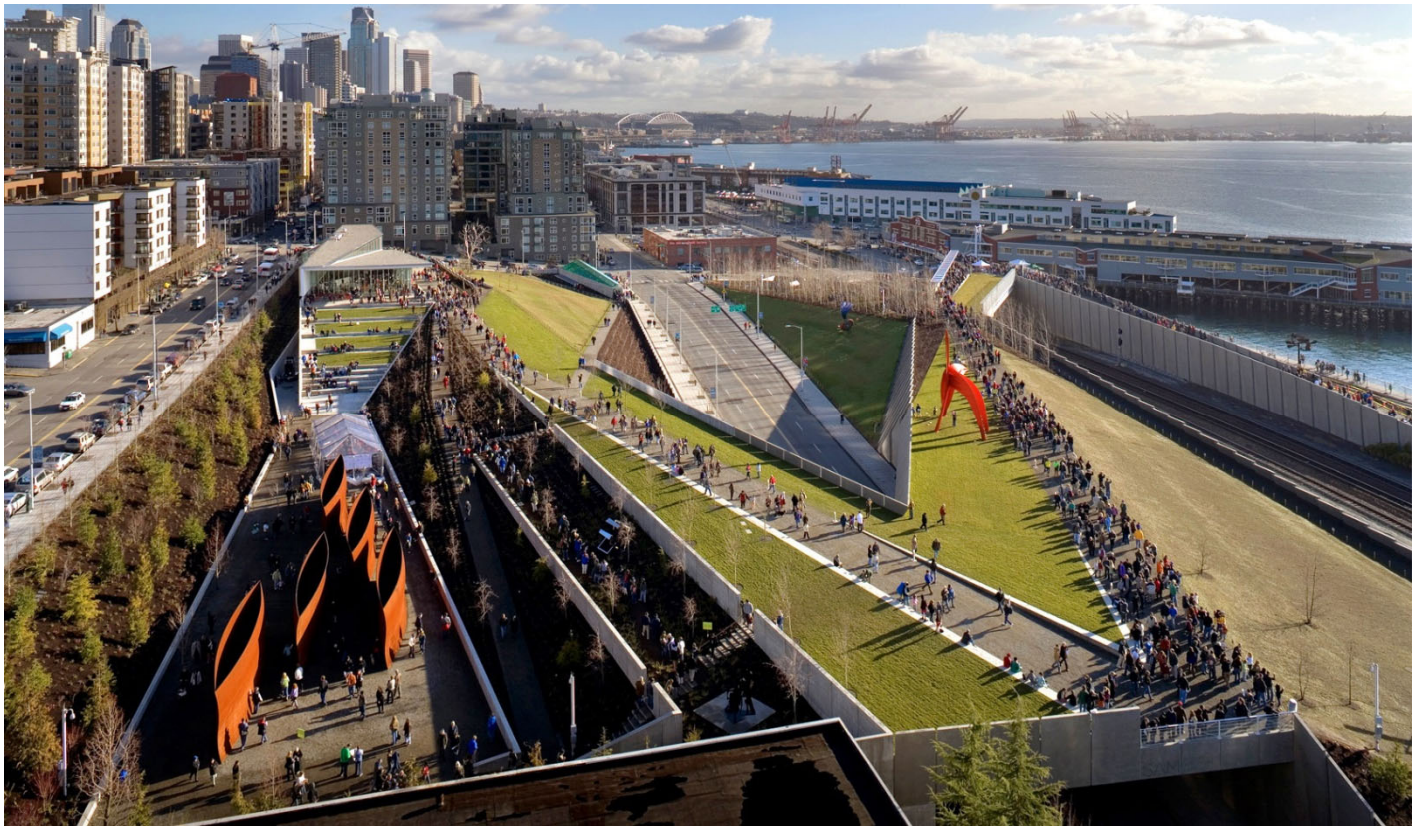
Jessyca Henderson AIA, Esq.
118 Forest Drive,
Catonsville, MD, 21228
jessyca.henderson@gmail.com
Cell: (410) 292-3085

Send application materials to:

Jessica Hardy Assoc. AIA, Esq.
1717 Dowling Drive
Irving, TX 75038
Cell: (469) 610-0792

WEISS/MANFREDI RECEIVES 2020 THOMAS JEFFERSON FOUNDATION MEDAL.

On April 2, it was announced that the architectural firm of Weiss/Manfredi was awarded the 2020 Thomas Jefferson Foundation Medal in Architecture by the Univ. of Virginia and the Thomas Jefferson Foundation. The medal is one of four honors recognizing achievements in architecture, citizen leaderships, global innovation, and law. Marion Weiss and Michael Manfredi are the co-founders of their firm, which is known for redefining the relationships between landscape, architecture, infrastructure and art through their award-winning projects. Due to the spread of coronavirus, this year's award ceremony was cancelled and the medal will be given in absentia. The firm is known for the Seattle Art Museum: Olympic Sculpture Park, pictured below, in addition to numerous other projects.



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