

LEGISLATIVE COMMITTEE UPDATE

Welcome!

We trust you had a wonderful Thanksgiving and are ready to start the Christmas season!

Some sad news to report from the Inland Empire – former State Senator, past-SCCA Legislator of the Year and current Riverside County Supervisor John Benoit announced this week that he has advanced pancreatic cancer and will begin an aggressive treatment regimen. Supervisor Benoit authored legislation sponsored by SCCA in 2003 that fixed a Dig Alert problem with rental equipment. Utility companies were forcing companies that rent out equipment to call 811 even though the companies did not have specific information on where the excavations would occur. Then-Assemblyman Benoit authored AB 1264 which was ultimately signed by Governor Schwarzenegger. Please keep Supervisor Benoit in your thoughts and prayers.



Todd Bloomstine

Bill Roundup: SB 661

SB 661 by Senator Jerry Hill represents the culmination of several years of meetings, negotiations, and attempts to improve the “*Call Before You Dig Law*.” This program is designed as a free service for contractors and others that excavate around underground utilities.

Specifically, SB 661 augments the “*Call Before You Dig Law*” by creating an oversight board that is charged with reaching out and educating stakeholders on safe excavation practices, develop standards to create uniform excavation practices, and investigate possible violations of the law. The board will consist of 9 members who will serve four-year terms. Two ex-officio, non-voting members, may be invited by the appointed members of the board. The Governor will appoint seven members of the board, with the Speaker of the Assembly and the Senate Committee on Rules each appointing one member.

A Look In This Issue

Welcome!	Page 1
Bill Roundup: SB 661	Page 1
Transportation Funding Measures	Page 2
Consequential Damages	Page 2
2017-2018 Fiscal Outlook	Page 3
Legislature Demographics	Page 3

The construction industry and property owners will have a majority membership with 4 members. Utility companies will have a total of three.

Three members are required to have “knowledge and expertise in the operation of subsurface installations” with one member representing a municipal utility and one member with experience in high priority subsurface installations.

Three members “shall have knowledge and experience in contract excavation for employers who are not operators of subsurface installations.” Of these members, one shall be a general engineering contractor, one member shall be a general building contractor, and one shall be a specialty contractor.

One member of the board will have knowledge and expertise in performing or managing agricultural operations in the vicinity of subsurface installations. The Board member appointed by the Speaker of the Assembly “shall have knowledge and expertise in representing in safety matters the workers employed by contract excavators.”

Finally, the member appointed by the Senate Committee on Rules will be knowledgeable in subsurface location and marking, and “shall not be under the direct employment of an operator.” We count this as a pro-utility member.

SB 661 also prohibits an excavator who damages a subsurface installation due to an inaccurate field mark by an operator from being liable for damages made to the utility. It also authorizes contractor to recover liquidated damages for utilities that violate the law, including damages for late markings.

SB 661 represents at least four years of work. We look forward to helping with its implementation.

Local Transportation Funding Measures Approved Overwhelmingly

This November cities and counties throughout the nation approved more than \$150 Billion in local bonds to finance transportation infrastructure projects. This includes numerous local bonds throughout California.

Voters elected to tax themselves to address needed road repairs and public transportation needs in their local communities. For example, 70% of voters in Los Angeles passed a ½-cent sales tax in perpetuity.

Monterey County successfully passes Measure X in November, set to raise \$600 million over the next 30 years through a 3/8-of-a-cent sales tax increase. This measure passed with 67.3% of voters in support.

This is just the latest in a long line of counties taking control of

their local transportation funding. With transportation funding at the state level inconsistent and inadequate (as you well know) many local governments are turning to the ballot to ask for help from their local citizens.

MacGregor Eddy in the Salinas Californian reports that after election results were more closely examined by the advocacy group Transportation for America, “The more specific and detailed the transportation measure was, the more likely it was to pass.” This is something we learned with the passage of Proposition 42 back in 2002.

Given our many conversations about transportation needs, funding overhaul, and the state’s reluctance to take clear action on the issue, it was only a matter of time before local leaders stepped up to address their community concerns.

Consequential Damages: What are they and why are they in a construction contract?

It seems the legislature has looked at an increasing number of legislation that deals with consequential damages. We take a look at exactly what they are below.

First, let’s review direct damages. These are the damages that flow naturally from a breach of contract and compensate for a loss that could have been foreseen. This could potentially be an unpaid portion of a contract, defective work, etc. There is a clear link between the unfulfilled portion of the contract and the awarded damages.

On the other hand, consequential damages are damages that “do not necessarily, but do directly, naturally, and proximately result from the injury for which compensation is sought,” as explained in the legal journal Lexology.

The author of the article, Charles B. Jimerson goes on to say, “In other words, they [consequential damages] are the result of special circumstances not usually predictable.” Jimerson goes on to clarify, “A common example of consequential damages is lost profit on collateral business arrangements. When it comes to construction contracts, contractors, owners, and even designers should be apprehensive about the prospect of consequential damages, because those damages can include lost bonding capacity, financing costs, and possibly extended overhead costs.”

It is important to note that there is a higher degree of proof for consequential damages. When proving damages, a clear breach



of contract is easily identified but consequential damages “must be pled with greater specificity. The plaintiff has the burden of proving that the damages are not only the proximate consequence of the breach, but that they were also “reasonably foreseeable” or within the “contemplation of the parties” at the time the parties entered into the contract.”

The idea behind proving foreseeability is that if a party could have foreseen the associated costs, then they should have adjusted the contract price to reasonably compensate for the risk assumed.

Various courts may have a higher standard of proof required in this type of case, but it is important to note that, “in order to recover damages caused by a breach, the non-breaching party must act reasonably and timely to mitigate its damages.”

While this is a complicated issue, there is a body of law that supports consequential damages and a process set for injured parties to seek compensation.

To read more about consequential damages, click [here](#).

Legislative Analyst's Office Announces Fiscal Outlook For 2017-2018 Budget Year

The recent fiscal outlook announced by the Legislative Analyst's office gives a very positive outlook for the 2017-2018 fiscal year. If current projections hold, without the state making any additional commitments, the Legislative Analyst's office reports ending the fiscal year with a total of \$11.5 Billion in reserves.

This total includes \$2.8 billion in discretionary reserves, and the required \$8.7 billion in reserves for future budget emergencies. The \$2.8 billion in discretionary reserve may be appropriated by the Legislature for any purpose they deem necessary. At this rate, should the state face an economic downturn, the Legislative Analyst's office projects that the state would be able to weather the downturn through the 2020-2021 fiscal year without cutting or increasing taxes.

New Legislature Demographics

The California Research Bureau took a closer look at the Demographics of the Legislature after the November election. They found several interesting facts:

- The Assembly contains a majority of ethnic minorities while the Senate is not. There were increases in Asian-Pacific Islander from 12 to 14 members and Latinos from 23 to 27.
- One seat changed political parties in the Senate, while three seats changed from Republican to Democrat in the Assembly.
- There was an increase in Asian Pacific Islander, African American, Latino and Multi-Racial Legislators from 46 to 53 members.
- The number of women in the Legislature decreased after the November election with only 27 women holding office. This is the lowest it has been since 1991-1992, except for 1997-1998 when it was equally low.

If you would like to learn more you can click [here](#) to read the report from the California Research Bureau at the California State Library.

With such a large budget surplus, it does make one question how and if those funds should be spent. Recent laws require the state to maintain a "rainy day fund," the above noted \$8.7 billion in required reserve. But, the Legislature is projected to have \$2.8 in discretionary funds – shouldn't the state be looking at returning those monies to citizens through a tax cut?

These are the funds that citizens and business owners are paying to the state in the form of income and business taxes. If there are any excess funds, don't they deserve to have their hard-earned money returned to them?

Rumor Has It...

There are rumblings in Sacramento about a special lame- duck session of the Legislature to address transportation funding.



Fact Check...Not Gonna Happen

The Special Session had to be called by November 30. Unfortunately, during the Thanksgiving week, Governor Brown and the two legislative leaders announced they would not call the legislature back into session. However, with the Democrats gaining two-thirds majorities in the Assembly and Senate, there could be an opportunity early in the 2017-18 to pass a plan...

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