



Avoiding Disaster: Municipal Liability for Building Collapse and Negligent Inspections

Theodore L. Senet, Esq.

Gibbs Giden Locher Turner Senet & Wittbrodt LLP

Building Official's Home Under Construction Tumbles



Someone had a choice:

Take timely action to prevent, mitigate and ensure against loss,
or
accept responsibility and the tragic consequence of ignoring obvious warnings of potentially avoidable problems to come.

Champlain Towers Condominium Collapse Surfside, Florida

June 24, 2021

Letter to the Homeowners 3 Months before Collapse



Dear Neighbors,

Many of the questions coming to the office ahead of next week's Special Meeting to discuss the proposed Special Assessment of \$15,000,000 are not specifically related to the Special Assessment. We have received questions pertaining to the need for the work, the Engineer's estimates, the 20% contingency, financial oversight of construction expenses, and the like. These are all good questions, and all of them have been discussed and presented over the past year - some many times.

Building Collapse is Usually the Result of Concurrent Causes



Lax Enforcement Let South Florida Towers Skirt Inspections for Years

“Florida’s high-rise building regulations have long been among the strictest in the nation. But after parts of Champlain Towers South tumbled down on June 24,, evidence has mounted that those rules have been enforced unevenly by local governments, and sometimes not at all.”

New York Times, July 26, 2021

Building Collapse is Usually the Result of Concurrent Causes



“We’re chasing like 50 different things and trying to understand them one at a time,” said Allyn Kilsheimer, the independent structural engineer that the town of Surfside hired to investigate the collapse.

Kilsheimer himself isn’t ready to rule anything out, including sea-rise impacts and possible undetected voids or sinkholes under the building. Among the many things he wants to assess are the effects of tides and full moons on the underground water table.

Building Collapse is Usually the Result of Concurrent Causes



He (Kilsheimer) will drill a hole near the north building (a few blocks from the south building) and insert a device called a piezometer, which measures groundwater levels. That, he said, is a challenge in an underground garage on a barrier island — one that also underlines the looming threat of sea-rise to South Florida.

“We can’t drill through the basement of the garage because it could create a geyser at high tide,” he said.

New York Times, July 26, 2021

Those that fail to learn from history are doomed to repeat it.



“In the course of his investigation, Kilsheimer found that two of nine other buildings he has inspected in Surfside required immediate shoring and bracing, and he recommended those associations hire engineers to complete further assessments.”

New York Times, July 26, 2021

Lax Enforcement Let South Florida Towers Skirt Inspections for Years



“Even if building auditors focus only on towers of 10 stories or more that were built in the 1970s and 1980s, the task would still be daunting. An analysis of property records by The New York Times shows that at least 270 such buildings dot the skylines of Miami-Dade County’s cities, villages and towns, with dozens more in the county’s unincorporated reaches.

New York Times, July 26, 2021

Lax Enforcement Let South Florida Towers Skirt Inspections for Years

“So far, eight buildings, many with hundreds of residents, have either had mandatory or voluntary evacuations over the last month. Many of the problem buildings are due for their 40 year recertification, which is why the issues were discovered.

Nexstar Media, July 28, 2021

The Lawsuits Begin



Plaintiffs' lawyers have filed some two dozen lawsuits following the collapse of the Champlain Towers South condo tower last month, seeking payouts for the 98 deaths and destruction of 136 apartments it caused. The lawyers say it would take \$1 billion to compensate everyone fairly.

Wall Street Journal, July 30, 2021

Collapsed Surfside Towers “Broke” Building Codes



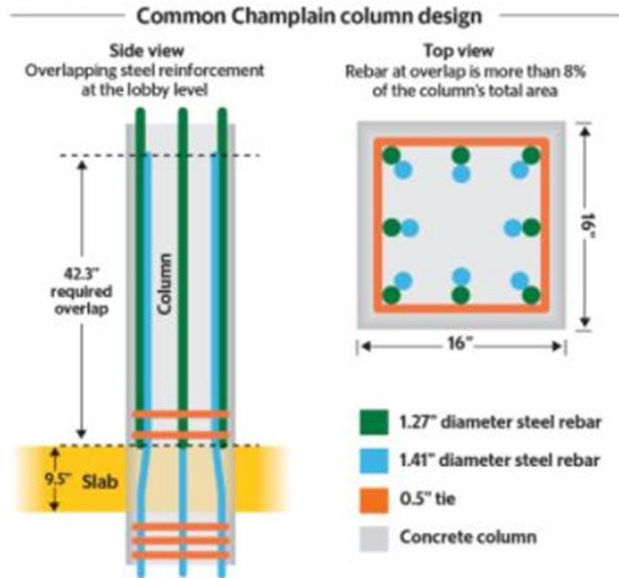
A report in the Miami Herald ... has pinned the cause on multiple, extensive structural flaws that existed in the building for 40 years.

New York Times, August 9, 2021

Defects in Design – Concrete Deterioration

Overcrowded, noncompliant column design

The American Concrete Institute's 1977 code required a rebar-to-concrete ratio of no more than 8% to prevent overcrowding, which can make the column difficult to properly construct and reduce its overall strength. All but two column types in the Champlain Towers South plans were noncompliant where rebar overlaps in the basement and lobby levels. The overcrowded columns were clustered under the north portion of the condo that collapsed on June 24, 2021.



SOURCE: REBAR AND COLUMN DIMENSIONS IN 1979 STRUCTURAL DRAWINGS PROVIDED BY THE TOWN OF SURFSIDE; REINFORCEMENT RATIO COMES FROM ACI 318-77. MARCO A. RUIZ | SPECIAL TO THE HERALD AND SARAH BLASKEY | MIAMI HERALD

“While original design flaws alone were unlikely to have initiated the collapse that happened 40 years after construction, engineers consulted by the Herald said the deficiencies, in combination with concrete deterioration, could have been the difference between a single floor caving in and the kind of progressive collapse that killed 98 people.”

Concrete Deterioration and Sea-Level Rise



“And although few of the condo towers that line Miami Beach are likely to have the same engineering flaws, they will all be forced to confront a near future of demolition or abandonment amid “irreversible” sea-level rise, according to today’s IPCC report.”
New York Times, August 9, 2021

“Surfside condo collapse: Town leaders fuming at obstacles to investigation, aim to sue county.”



Almost two months later, Surfside officials are livid at the lack of progress to investigate why the 12-story, 136-unit oceanfront condominium complex collapsed in the middle of the night June 24, killing 98 people.

USA Today, August 12, 2021

Berkeley Balcony Collapse

2015

Berkeley Balcony Collapse 2015



Six people died and seven were injured in 2015 when a balcony collapsed in Berkeley.

Overview: State Building Laws



California Building Standards Law:

The portion of state law within the Health & Safety Code, Division 13, Part 2.5, commencing with Section 18901.

Overview: Health and Safety Code (HSC)

California Building Standards Law also mandates that the California Building Standards Code, Title 24, California Code of Regulations, applies to all building occupancies throughout the state.



State Housing Law

- State Housing Law: The portion of state law within HSC, Division 13, Part 1.5, commencing with Section 17910.
- It also mandates enforcement of the State Housing Law provisions, and the building standards adopted pursuant to the State Housing Law, by every city, county, or city and county within this state.

California Building Standards Code

- The building standards are in the 13 parts of Title 24 published by the California Building Standards Commission (CBSC). Although developed by state agencies, building standards are usually enforced by local government entities.



State Historical Building Code



- **State Historical Building Code** is in HSC Division 13, Part 2.7, commencing with Section 18950 provide means for the preservation of historical buildings while providing reasonable safety from fire and seismic forces, and availability and usability by persons with disabilities. The standards are found in Part 8 of Title 24, which is named the California Historical Building Code.

Mandates for Local Government

The building department of every city, county, or city and county shall enforce the following:

- Specified provisions of the California Building Standards Law in Health and Safety Code, Division 13, Part 2.5, commencing with Section 18901, and the implementing of building standards in Title 24. Reference: HSC Sections 17960, 17961 & 18948.
- State Housing Law (HSC Division 13, Part 1.5), and regulations of Title 25, Chapter 1, pertaining to the erection, construction, reconstruction, movement, enlargement, conversion, alteration, repair, removal, demolition, or arrangement of hotels, motels, lodging houses, condominiums, apartment houses and dwellings. Reference: HSC 17960.
- Earthquake Protection Laws applicable to hazardous buildings, seismic retrofitting, seismic gas shutoff devices, water heater bracing, posting of buildings that are potentially dangerous during seismic motion, and more. Reference: HSC Division 13, Part 3, commencing with Section 19100, and Government Code, Title 2, Chapter 12.2, commencing with Section 8875.

Mandates for Local Government



The law also allows local government to enact local requirements, often called local amendments (also known as ordinances) to Title 24. These local amendments must be reasonably necessary based on local climatic, geological, topographic or environmental conditions. No local amendment is enforceable unless filed with CBSC.

Earthquake Protection Law

- There are two state laws that address buildings and their resistance to earthquakes:
- The first is the Earthquake Protection Law (Health and Safety Code in Division 13, Part 3, commencing with Section 19100). The law establishes the requirement that all buildings be designed to resist lateral forces from seismic motion. It allows local government to enact local requirements to mitigate the risk from existing buildings, such as unreinforced masonry buildings and others not designed in consideration of seismic motion.

Earthquake Protection Law



- The other state law regarding earthquake safety is in Government Code, Title 2, Chapter 12.2, commencing with Section 8875.
- This law requires cities and counties to identify potentially hazardous buildings, as defined, and establish a local mitigation program.
- Further, the owner of a building identified as a potentially hazardous building must post a written notice in a conspicuous location to warn the public as to the potential hazard during an earthquake.

California Exterior Elevated Elements (Balcony) Inspection Laws

SB 721 and SB 326

Emergency Building Standards



Six people died and seven were injured in 2015 when a balcony collapsed in Berkeley.

The adoption of emergency building standards imposes new construction requirements, such as building standards affecting exterior elevated elements that were implemented in response to the collapse of an exterior balcony in Berkeley, California. Emergency building standards are not common, however when implemented, immediate enforcement by building departments is often necessary.

Balcony Inspection Standards

- California SB 721 requires periodic inspections of wooden exterior elevated elements (“EEEs”) with load bearing components (decks, balconies, stairways and elevated walkways). The initial inspection must occur by January 1, 2025, and future inspections every 6 years.



Balcony Inspections- Emergency Repairs



- If the inspection reveals conditions that pose an immediate hazard, the inspection report must be delivered to the owner of the building within 15 days and emergency repairs be undertaken with notice given to the local enforcement agency.

Balcony Inspection Standards – Non-Emergency Repairs



- Non-emergency repairs must be completed within 120 days of a building permit unless an extension is granted by the local authorities. Owner must apply for permit on non-emergency repairs within 120 days of receipt of report.

New Inspection Standards for Condos



Under SB 326, for existing condominiums, the first inspection of Exterior Elevated Elements needs to be completed by January 1, 2025

Subsequent inspections need to be completed once every nine years in coordination with the reserve study inspection.

New Balcony Inspection Standards



Local enforcement agencies are authorized to recover enforcement costs and must send a 30-day corrective notice to the owner of the building if repairs are not completed on time.

Health & Safety Code §17973.

Ghost Ship Warehouse Fire Oakland, California

December 2, 2016

Duty to Enforce Codes

Health and Safety Code § 17960 provides:

The building department of every city or county shall enforce within its jurisdiction all the provisions published in the State Building Standards Code, the provisions of this part, and the other rules and regulations promulgated pursuant to the provisions of this part pertaining to the erection, construction, reconstruction, movement, enlargement, conversion, alteration, repair, removal, demolition, or arrangement of apartment houses, hotels, or dwellings.

Governmental Liability for Mandatory Duty

Government Code § 815.6 provides:

“Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.”

The statute contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting the statute as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered.

Governmental Liability for Mandatory Duty

Government Code § 810.6 defines “enactment” as:

“a constitutional provision, statute, charter provision, ordinance or regulation.”

The term “mandatory” refers to obligatory duty which a governmental entity is required to perform, as opposed to a permissive power which a governmental entity may exercise or not as it chooses. *Fox v. County of Fresno* (1985) 170 Cal. App. 3d 1238, 1242; *Tuthill v. City of San Buenaventura* (2014) 223 Cal. App. 4th 1081, 1090.

Governmental Immunity for Inspections

Government Code § 818.6 provides:

A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its property (as defined in subdivision (c) of Section 830), for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

Public Employee Immunity for Inspections

Government Code § 821.4 provides:

A public employee is not liable for injury caused by his failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than the property (as defined in subdivision (c) of Section 830) of the public entity employing the public employee, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

Gov. Immunity v. Liability for Breach of Mandatory Duty

With respect to inspections of buildings, immunities often trump liability for failure to perform mandatory duties per case law. In *Harshbarger v. City of Colton* (1988) 197 Cal. App. 3d 1335 [243 Cal. Rptr. 463], homeowners who had to reconstruct their home to bring it up to city code standards sued the city, alleging that city building inspectors, who had periodically inspected the home, had intentionally misrepresented and suppressed the fact that the home did not meet code standards. The court determined that the alleged interference with the homeowners' financial interests fell within the immunity provisions of Government Code section 818.8. (197 Cal. App. 3d at p. 1342.)

Ghost Ship Fire Chronology



Dec. 2, 2016

A fire breaks out at 11:20 p.m. during a concert at the Ghost Ship warehouse, a building that housed artists but was not permitted for housing or entertainment use. The fire began in the first floor and trapped party-goers in the second floor. It took firefighters five hours to extinguish the blaze.

36 people died in the blaze, the deadliest fire in Oakland history.

City Claims No Building Inspection



Dec. 7, 2016

City officials claim that building inspectors had not been inside the Ghost Ship warehouse in the past 30 years. Yet it was later revealed that weeks prior to the fire, an inspector for the Planning and Building Department went to the property after it received a complaint of debris. The inspector was not able to enter the building. The city issued a citation a few days later.

No Records of Complaints per NFPA Journal



“The Ghost Ship fire is the deadliest blaze in the United States since 100 people died in the Station nightclub fire in West Warwick, Rhode Island, in 2003, and the deadliest ever in Oakland. *** Oakland Fire Chief Teresa Deloach Reed, an NFPA board member, said her department has no records of complaints about the building, according to the San Francisco Chronicle. National Fire Protection Association Journal, January 3, 2017

NFPA Journal 2017



The fire department's assessment of the building "struck some people as odd, given that the Ghost Ship's Fruitvale district neighbors were well aware that people were coming and going from the building and that parties were a regular thing," the San Francisco Chronicle reported.

National Fire Protection Association Journal,
January 3, 2017"

No Records of Complaints per NFPA Journal



“It seemed even more odd that such activity went unnoticed by the fire station that’s located just a block away.”
National Fire Protection Association
Journal, January 3, 2017“

Public Records Show Otherwise



Feb. 8, 2017

Documents released by the City of Oakland show that several city agencies, including the police department, visited the Ghost Ship warehouse 35 times in the months and years leading up to the deadly fire.

ABC News Report, May 4, 2020

City Employees Knew of Problems



April 29, 2018

Oakland police bodycam video obtained by Bay Area News Group reveals that officers went inside the Ghost Ship a year before the fire and commented about the fire danger in the building and unsafe construction.

ABC News Report, May 4, 2020



"It's a huge fireplace in here," remarked Oakland police officer Moises Palanco during a 2015 visit to the Ghost Ship. In bodycam footage obtained by the Bay Area News Group, the officers commented on exposed electrical wires and poorly built stairs.

ABC News Report, May 4, 2020



\$33 Million Settlement



“Oakland paid \$13.4 million to outside law firms defending the city against the Ghost Ship warehouse fire civil lawsuit. The legal fees are on top of the \$33 million settlement.”

Bay Areas News Group, March 16, 2021

Immunities v. Mandatory Duty



“Much of the money went to paying high-priced attorneys to sit in court watching the criminal case or filing motions in the civil case arguing unsuccessfully... that the city was not legally liable because of broad immunities afforded to public agencies for failure to inspect buildings. An Alameda Superior Court judge rejected the argument, finding that Oakland had a “mandatory duty” to ensure safety at the ill-fated warehouse....”

Bay Area News Group, March 16, 2021

Governmental Liability for Mandatory Duty

In over-ruling a demurrer, the trial court held, based on the facts alleged, that certain state codes and the City's own local ordinances placed mandatory duties on the City to act once the City had actual knowledge that a structure was legally substandard or a nuisance. The Second Amended Complaint in detail alleged that the Ghost Ship was legally substandard and a nuisance, which the City had actual knowledge of through years of employees being inside the building for reasons other than an inspection, and that this condition was open and obvious, requiring no specialized skill or judgment.

Governmental Liability for Mandatory Duty

The Second Amended Complaint alleged that the Ghost Ship was operating as an illegal cabaret business and that the City had mandatory duties when confronted with new businesses, but the City employees failed to comply with those duties.

Oakland Municipal Code §5.12.030 - Cabaret permit process.

- A. A business that conducts cabaret activity shall be allowed to conduct such activity under the following conditions:
- (a) The business applies for and is approved by the City Administrator for the cabaret permit;
 - (b) The business maintains the permit by paying the annual fee;
 - (c) The business successfully completes an annual inspection by the Fire Department;
 - (d) The business does not create a public nuisance, adversely affect the health, safety, and general welfare of the public, or negatively impact City resources. A determination of such public nuisance, adverse affect, or negative impact shall be made only after a public hearing conducted according to the requirements of Chapter 5.02.

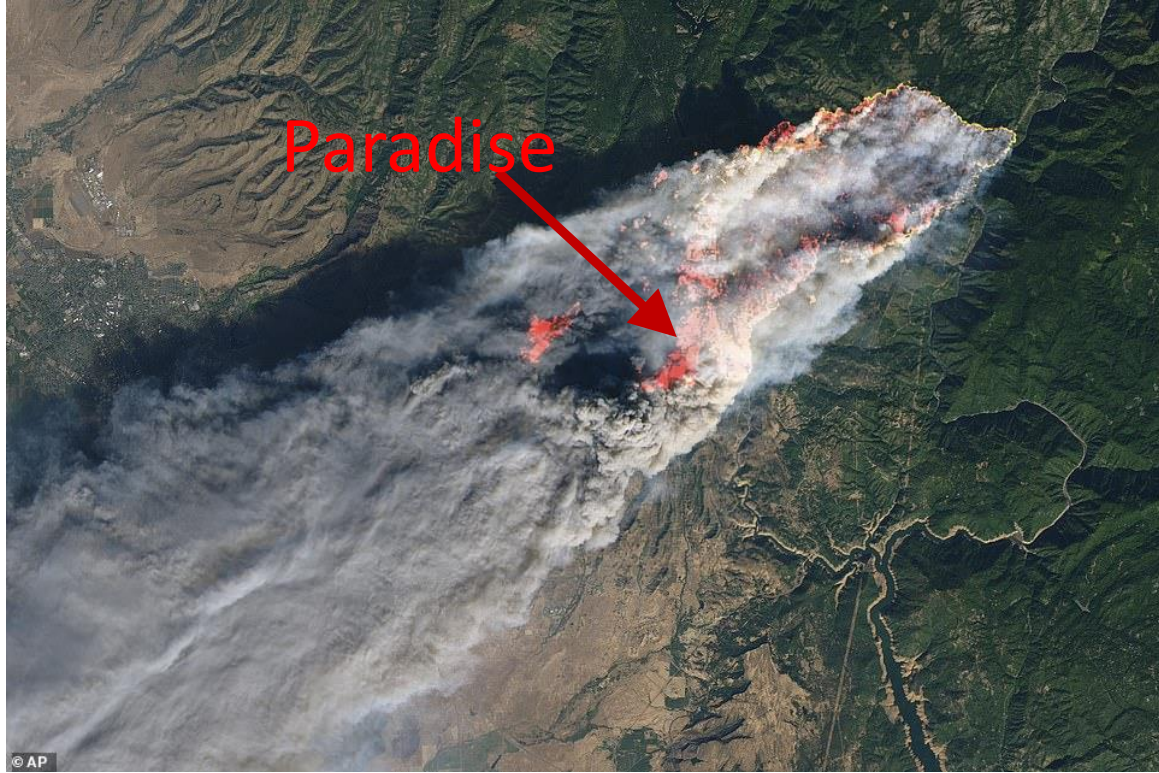
(Ord. No. 13116, § 1, 6-5-2012; Ord. No. 13006, § 4, 5-4-2010)



Paradise Lost

**Current Issues in Disaster
Risk Management
CAALAC Spring Retreat March 2019**







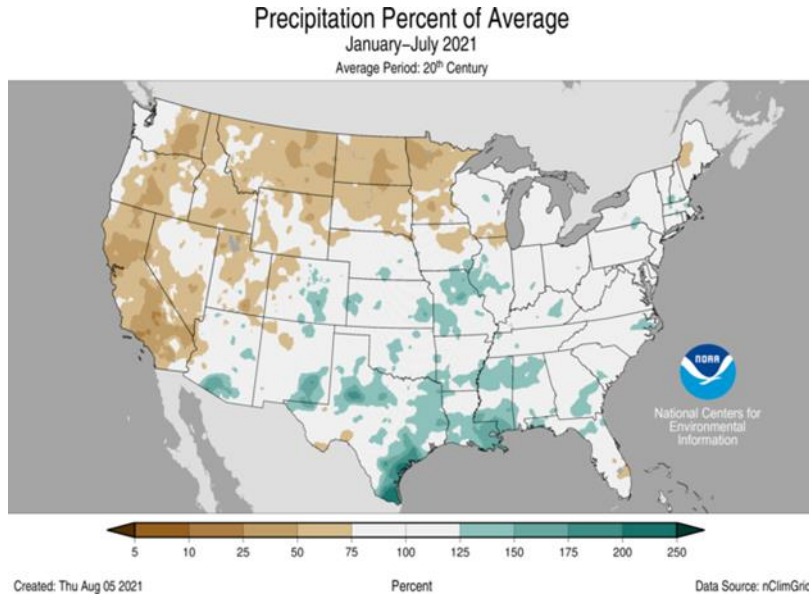
July 2021 was the World's Hottest Month Ever Recorded



“July is typically the world’s warmest month of the year, but July 2021 outdid itself as the hottest July and month ever recorded. This new record adds to the disturbing and disruptive path that climate change has set for the globe.”

NOAA Administrator Rick Spinrad, Ph.D.

July 2021 was the World's Hottest Month Ever Recorded



- Wildfire activity exploded across the drought-stricken portions of the West during July. As of July 31, 37,650 fires have burned through 2,982,960 acres.
- As of July 31, the largest fire across the U.S., the Bootleg Fire in Oregon, has consumed more than 413,000 acres and was 56 percent contained.
- The second largest fire in the U.S., the Dixie Fire, in northern California, burned more than 240,000 acres and was 24 percent contained.

Paradise Regained

**Avoiding Disaster -
Investment in Code Upgrades,
Resiliency and Regeneration**

National Benefit-Cost Ratio (BCR) Per Peril

**BCR numbers in this study have been rounded*

Beyond Code Requirements

Overall Hazard Benefit-Cost Ratio

\$4:1



Riverine Flood

\$5:1



Hurricane Surge

\$7:1



Wind

\$5:1



Earthquake

\$4:1



Wildland-Urban Interface Fire

\$4:1



Riverine Flood

\$5:1

Beyond Code
Requirements

Disaster resilience for floods in this study can be achieved by building new buildings higher above the 100-year flood elevation.



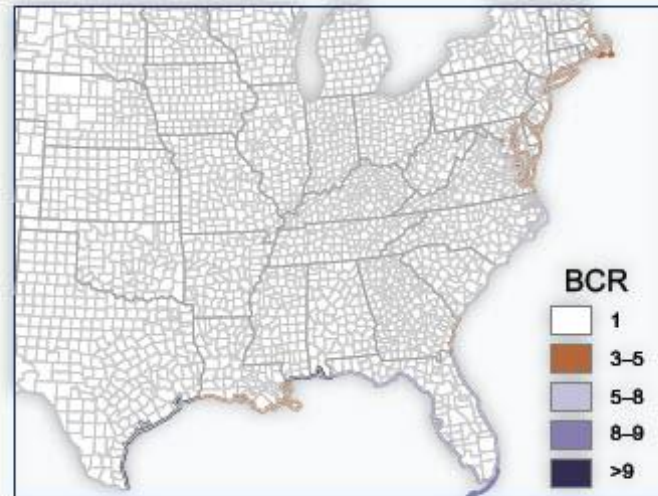


Hurricane Surge

\$7:1

Beyond Code
Requirements

Disaster resilience for floods in this study can be achieved by building new buildings higher above the 100-year flood elevation.





Wind

\$5:1

Beyond Code
Requirements

For wind, designing for disaster resilience in this study can be achieved by adding hurricane shutters, stronger roofing, and better connections.



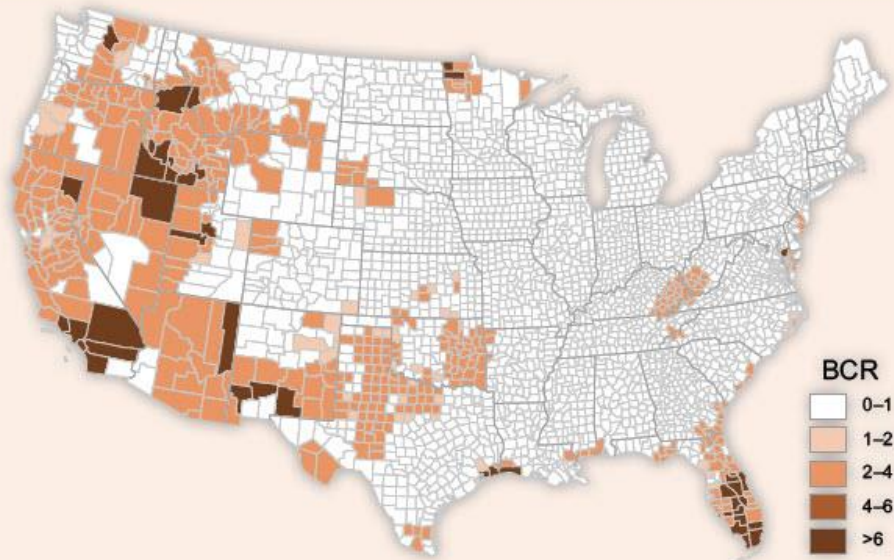


Wildland-Urban Interface Fire

\$4:1

Beyond Code
Requirements

The International WUI Code is intended as a supplement for fire and building codes. Its objective is establishing minimum regulations for safeguarding life and property caused by wildland fire exposures. The study includes using fire-resistant roofing, trimming brush around houses, and ensuring fire department access.



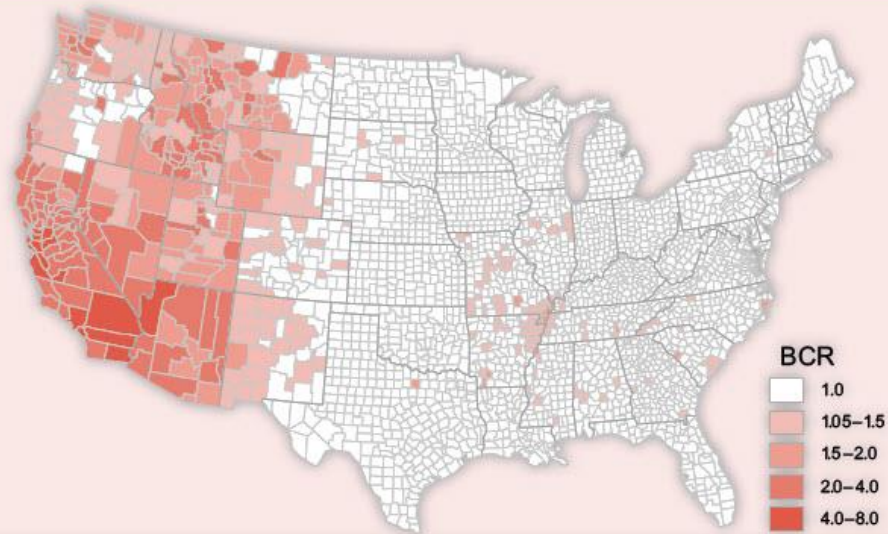


Earthquake

\$4:1

Beyond Code
Requirements

For earthquakes, designing for disaster resilience in this study can be achieved by making new buildings stronger and stiffer than the code requires.



Lessons from the Northridge Earthquake – Jan. 17, 1994



The death toll was 60, with more than 9,000 injured. In addition, property damage was estimated to be \$13–50 billion (equivalent to \$23–87 billion in 2020), making it one of the costliest natural disasters in U.S. history.

Our communities responded with action. We build back better.

Soft Story Buildings



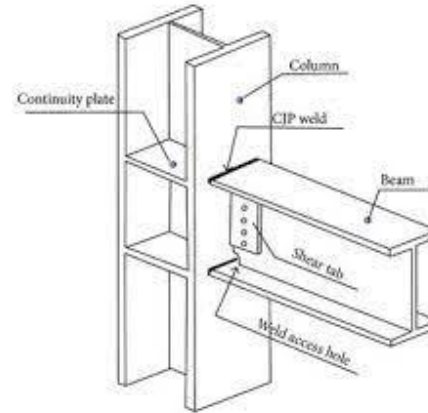
Panelized Roof Construction



Unreinforced Masonry



Steel Framed Buildings



As a result of the Northridge Earthquake, California took prompt action to improve its seismic building codes, which will better enable the state to avoid loss of life and catastrophic property damage

Avoiding Coastal Disasters



Buildings in coastal cities were constructed before folks realized that the sea was rising. Recent experience: Katrina, Sandy, Harvey and in 2021 - Europe and the US East Coast. 100-year events are happening annually per the NOAA website.

“The time for half measures and outdated timelines is over if we are to prevent irreparable destruction of our cities, towns, and natural environments. *** Buildings alone account for about 40% of total annual global CO2 emissions, and with building interiors, sitework, landscapes, cityscapes, and infrastructure, that percentage is much, much greater. If the world is to meet the 1.5°C carbon budget set out in the Paris Agreement, our community must provide the leadership necessary and reduce CO2 emissions in the entire built environment by 65% by 2030 and to zero by 2040.”

Edward Mazria, FAIA, *Architectural Record*, August 23, 2021



Theodore L. Senet, Esq.

tsetnet@gibbsgiden.com



1880 Century Park East, 12th Floor

Los Angeles, CA 90067

(310) 552-3400 Ext. 321

Los Angeles | Irvine | Westlake Village | San Jose | Las Vegas

www.gibbsgiden.com

Mr. Senet is a partner of Gibbs Giden Locher Turner Senet & Wittbrodt LLP and is one of the few attorneys in California accredited by the US Green Building Counsel as a LEED professional with a current specialty in Building Design and Construction (LEED AP BD+C). Mr. Senet's areas of practice have been environmental, construction, insurance, and real property law. Mr. Senet has been involved in the construction of high-rise buildings, stadiums, power plants, hospitals, airports, prisons, police and fire stations, universities, colleges, schools, roadways, pipelines, refineries, and major commercial and residential developments. Mr. Senet is currently an adjunct professor at Loyola Law School in Los Angeles, where he teaches Insurance Law, Construction Law and Sustainable Development.