

WELCOME TO  
**HALL & COMPANY**  
Serving Architects, Engineers and Environmental Consultants

AE RESOURCES WEBINAR

**PHOENIX RISING**  
 Resurrecting the Suspended Project

Presented by:  
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**AIA Continuing Education**

*Hall & Company is a Registered Provider with the American Institute of Architects Continuing Education Systems. Credit earned based on the completion of this program will be reported to AIA/CES for AIA Members. Please send your AIA member number to [kbernal@hallandcompany.com](mailto:kbernal@hallandcompany.com) after the presentation for reporting.*

*This program is registered with the AIA/CES for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement for the AIA of any material of construction or any method or manner of handling, using, distributing, or dealing in any material or product. Questions related to the specific materials, methods, and services will be addressed at the conclusion of this presentation.*




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**Real World Realities**  
**Ritz Carlton in Rancho Mirage**



- 224 Unit Luxury Hotel & Spa
- Financed by Goldman Sachs
- Suspended in 2008 at 70% complete - \$60M to go
- Public Private Partnership
- Bought in foreclosure in 2010
- Resumed construction in 2012
- Scheduled for opening in 2013

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### The Rancho Mirage Worries

- New Owner/New Objectives
- New Codes/Requirements
- Integrity of Existing Design
  - Technology
  - Products
  - Standards
- Status of Abandoned Work
- New Financing Model

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### The Public Extension of Suspension

December 2008 State of California suspended 2,000+ infrastructure projects already underway

- Roads- Schools
- Housing- Levees
- Bridges- Water treatment

Now we have the “fiscal cliffs” & “sequestration”



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### Agenda

- Realities & Dynamics of Suspended Projects
- Roles & Risks for Design Professionals in Resurrected Projects
- Core Concerns for Project Suspension & Restarts
- Role-Specific Issues, Strategies, & Tools for Success in Resumption of Project

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### Learning Objectives

- Understand the Frequency & Dynamics of Project Suspensions and Restarts
- Identify the Core Concerns for Any Design Professional on Any Project Restart
- Distinguish the Three Common Roles for Design Professionals in Project Restarts
- Develop the Strategies & Tools to Manage Risk & Succeed in a Project Restart

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### The Suspended Surveys

- AIA Study of 2011
- 70% of Firms have One or More Suspended Projects
- 60% of Suspensions Due to Financing
- Half in Projects Below \$5M
- Two-thirds New Construction
- Through 2011, 40% “resumed” within three years (McGraw Hill)

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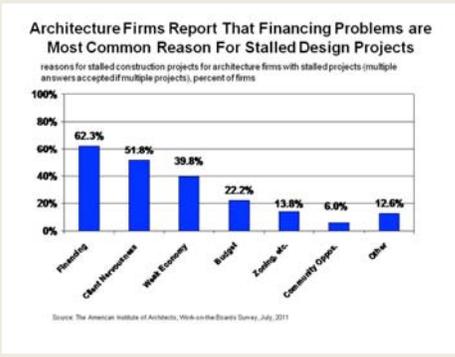
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### Cause & Effect




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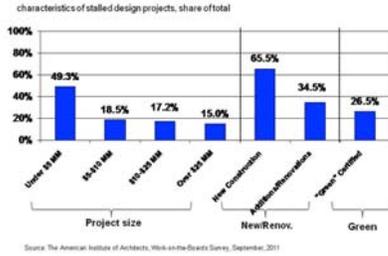
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## Size & Type

A High Proportion of Stalled Design Projects are Smaller, Focused on Existing Facilities, and Expect Green Certification




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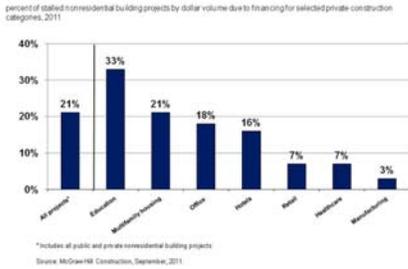
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## Sector

Financing Problems Account for a Higher Share of Stalled Projects in the Education and Multifamily Sectors




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## Lessons from the Data

- At best, only 50% of projects likely to restart
- Impacts a wide range of project sizes and types
- Those projects that do restart, often do so with different:
  - Parties
  - Programs
  - Priorities

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### Roles, Risks, & Responsibilities

- Suspended
- Departing
- Resuming
- Succeeding



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### Suspension Issues & Risks

- Fee
- Intellectual Property Rights
- Lapses in Permits, Licenses, Entitlements
- Changes in Codes, Products, Pricing
- Expectations & Risk Exposure Assignment

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### The Suspended Design Professional

**Core Tools & Procedures**

- Fee
- Intellectual Property
- Document the Incomplete Status and Pending Issues

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### Suspension Strategies

- Fee
  - Affirmatively assert right to demand fee be brought current
  - Assess and implement any statutory lien or notice procedures
  - Simply waiting risks loss of rights by lien, statute of limitation, and financing

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### Suspension Strategies

#### Intellectual Property Rights

- Reassert copyright with explanation
- Consider revoking licenses
- Consider demand for return of work product
- Consider notification of permitting and reviewing agencies
- Internally identify external recipients of work product

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### Suspension Strategies

#### Non-payment precludes right to use documents

- **AIA B101 §7.3** Upon execution of this Agreement, the Architect grants to the Owner a *nonexclusive license* to use the Architect's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, *provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under this Agreement.*

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### Suspension Strategies

*If the Project is suspended for any reason outside the exclusive control of Consultant, Consultant shall have no liability to the Owner or any other party for any associated delay or damage caused the Owner or others because of such suspension of services, **and Owner shall release, indemnify, and hold harmless Consultant for any claims associated with such suspension.***

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### Suspension Strategies

**Communicate & Document the Project History, Status, and Potential Risks:**

- Potential Lapses in Permits, Licenses, Entitlements
- Potential Changes in Codes, Products, Pricing
- Potential Impact on Site/Construction
- Appropriate Expectations & Risk Exposure Assignment to Client

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### Core Resumption Issues & Risks

- Party/Participant Changes
- Programming, Purpose, and Priority Changes
- Integrity of Project Site or Incomplete Site Activities
- Lapses in Permits, Licenses, Entitlements
- Changes in Codes, Regulations, Statutes
- Changes in Products & Pricing

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**Core Resumption Strategies & Tools**

- **Parties & Participants**
  - Continuing Players (How have they changed)
    - Capacity:
      - Technical Qualifications
      - Availability
      - Financial
    - Re-establish/update contracts and duties
  - New Players
    - Capacity
    - Transfer and Documentation of Role & Responsibility (e.g., contract)
    - Knowledge Transfer Process

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**Core Resumption Strategies & Tools**

**Re-confirm & Update Purpose, Program, Priorities**

- Document
- Examine and Look for Impacts
- Confirm Realistic Expectations & Limitations
- Secure Appropriate Fee & Schedule

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**Core Resumption Strategies & Tools**

- **Project Site:**
  - Site changes
  - Associated changes in community/neighborhood
  - Secure third-party narrative with right of reliance
- **Code/Statute/Regulation/Entitlement**
  - Prior Status Assessment/Confirmation
  - Update Evaluation
  - Fee & Schedule of Accommodation

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**The Departing Design Professional**

- Evaluate and reconfirm the steps taken at time of suspension
- The discretionary tasks for suspension become “compulsory”:
  - Confirmation of status and lack of responsibility for past or future issues
  - Expanded to identify open/unresolved issues
  - Requirement that another A/E “of record” be retained and be responsible for all aspects of the project
  - Notification of agencies as to project departure
  - Steps to secure fee

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**The Departing Design Professional  
Risks & Leverage**

Key Risk Concerns:

- Loss of intellectual property/capital
- Loss of fees
- Lack of control over project, issues, corrections

Leverage Opportunities:

- Use of and transfer of rights to work product
- Liens

Solutions:  
Exchange for Executed Release & Indemnity

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**The Departing Design Professional:  
The Contract Preparation**

*Consultant’s commitments as set forth in this Agreement are based on the **expectation** that all of the services described in this Agreement will be provided. In the event Client later elects to reduce Consultant’s scope of services, Client agrees to **release, hold harmless, defend, and indemnify** Consultant from any and all claims, damages, losses, or costs **in any way associated with or arising out of such reduction in services.***

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### The Departing Design Professional: The Goodbye Letter

*You have chosen to proceed with the Project without Firm ABC. To proceed with the project in any way, you can, should, and must retain another consultant who shall have sole and complete responsibility for the Project. Accordingly, Firm ABC shall have no further responsibility for the Project or the interpretation, modification, or completion of any issue related to the Project, since such issues can and do change over time and as a project proceeds. All such issues shall be solely your responsibility going forward.*

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### The Continuing Design Professional: The Core Concern

*You don't know what you don't know!*



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### The Continuing Design Professional: Key Strategies

- Follow the “core strategies” set forth above
- Document and communicate client information as to changed conditions & issues
- Clearly identify scope for investigation and update
- Establish adequate fee and schedule
- Establish right to rely and potential for change

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### The Continuing Design Professional By Contract Addendum or Notification

**Documented Disclaimers, Expectations & Rights:**

*Suspended projects may change in many ways due to the passage of time, changes in the site or environment, regulatory modifications, and other issues outside Consultant's control. Consultant is not and shall not be responsible for any such changes, except to the extent it has expressly assumed such responsibility or otherwise becomes aware of such issues. Consultant may rely on information received from client or others regarding such issues.*

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### Resumption Process & Actions

- Immediate Project Assessment
  - Client
  - Team
  - Building Officials
  - Site
- Project Status Plan of Action
- Report & Communicate in Writing w/ Caveats
- Project, Fee, and Schedule Modifications Amendment

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### The Successor Design Professional: The Key Concern

Reliance others and the client expectation of a seamless transition (translated: expense-free with no schedule impact). *This is not fair, realistic, or wise.*



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The Successor Design Professional:  
Pitfall Number One

Intellectual Property Rights in the Existing Design

- Responsibility for rights in the work product should be solely the client's responsibility and liability
- Confirm in contract
- Consider written notification to prior professional as to use, objections, and concerns

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The Successor Design Professional:  
Pitfall Number Two

Reliance on and Responsibility for the Existing Design

- Clearly establish and document point of transition
- Clearly establish right of reliance or responsibility for review
- Contact predecessor for identification of status & issues
- Review standards for licensing compliance, and establish process & documentation for compliance

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The Successor Design Professional:  
The Stamping Standard

*The architect has exercised the same judgment and responsibility in reviewing **all stages of the design documents and other phases of the work** as required by law, and **which would normally be exercised if he/she personally performed the required tasks.***  
 (California Code of Regulations, Title 16 CRC §151(2).)  
 (Emphasis added.)

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The Successor Design Professional:  
Strategies & Solutions

**CONTRACT:** Client represents that it has all rights and licenses necessary to proceed with the Project based on incorporating the work product of all design professionals and consultants at any time associated with the Project. In the event of any dispute or claim as to the right to use such work product or claims associated with alleged violations of copyright interests, Client shall defend, indemnify, and hold harmless Consultant from any and all such claims, losses, damages, or costs including, but not limited to, attorneys' fees.

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The Successor Design Professional:  
Strategies & Solutions

**CORRESPONDENCE:** We have been retained by Client ABC to provide services relative to the Beta Project. We are informed that you previously provided services on the Project. Our services may include review of or reliance on portions of your work previously provided on the Project. Please let us know if there are any concerns or unresolved issues with respect to the Project, your services, or the documents previously produced.

CC: To Client ABC

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The Successor Design Professional:  
Strategies & Solutions

**CONTRACT SCOPE OF WORK:** Consultant's services for the Project are intended to commence as of the effective date of this Agreement, and do not include any responsibility for the prior investigation and services relative to the Project except as expressly set forth herein. Client expressly acknowledges that Consultant will rely on, incorporate, or interpret such prior work product as it exists, and shall have no responsibility for such work product except to the extent any issue or concern comes to Consultant's actual knowledge and understanding.

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### The Ultimate Tool & Strategy: The Expanded Standard of Care

*Consultant's services shall be provided consistent with **and limited to** the standard of care applicable to such services, which is that Consultant shall provide its services consistent with the professional skill and care ordinarily provided by consultants practicing in the same or similar locality under the same or similar circumstances. **Such standard of care is not a warranty or guarantee and Consultant shall have no such obligation. Accordingly, Client should prepare and plan for clarifications and modifications which may impact both the cost and schedule of the Project.***

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### Questions & Answers

- To request a certificate of completion visit <http://projectrestarts.eventbrite.com>
- If you're currently a Hall & Company client, please email your request to [kbernal@hallandcompany.com](mailto:kbernal@hallandcompany.com)
- If you would like for us to report your attendance to AIA, please email your request to [kbernal@hallandcompany.com](mailto:kbernal@hallandcompany.com)

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THANK YOU

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