




Pafburn & the

AFTERBURN

an exclusive masterclass and panel discussion



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KREISSON
CONSTRUCTION AND ENGINEERING LAWYERS

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Part 4 of the DBP Act & Sections 5Q and 35 of the *Civil Liability Act 2002* (NSW)

Presented by:

David Weinberger | Junior Counsel



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Overview



Explain statutory duty of care reforms.



Practical impacts on builders, developers, contractors, lawyers.



Explore key sections: DBP Act Part 4, CLA Sections 5Q and 35.

DBPA – Why was Pt. 4 Introduced?



- Response to building defects crisis (e.g., Opal Tower).
- Addressed gaps left by Brookfield Multiplex.
- Enforces duty of care owed to owners and future owners.

Key Definitions (Section 36 DBP Act)



Construction work: Building, design, supply, supervision.



Building: Any structure under EPA Act.



Owner: Includes lot owners, owners corporations.



Broad duty catchment: Builders, developers, designers, suppliers.

The Statutory Duty of Care (Section 37)



Duty to exercise reasonable care to avoid economic loss.



Owed to current and future owners.



Duty applies regardless of contractual relationship.

Economic Loss for Owners Corporations (Section 38)



- Owners corporations are deemed to suffer economic loss.
- Recoverable costs include:
 - Defect rectification.
 - Alternative accommodation expenses.

Duty Cannot be Delegated or Excluded (Section 39)



Construction work: Building, design, supply, supervision.



Building: Any structure under EPA Act.



Owner: Includes lot owners, owners corporations.



Broad duty catchment: Builders, developers, designers, suppliers.

No Contracting Out (Sections 40)



- **Non-delegable duty:** Liability remains even if work is outsourced.
- **No contracting out:** Duty applies despite contractual terms.

Relationship with Other Duties of Care and Law (Section 41)



- Duty is in addition to other statutory warranties.
- Does not limit damages or other compensation that may be available

Section 5Q Civil Liability Act 2002 - Non-Delegable Duties



- Treated like **vicarious liability**.
- Duty-holder liable for negligence of subcontractors.
- Full responsibility for defective work, even if not personally performed.

Practical Impacts of Section 5Q



- Builders and developers **cannot blame subcontractors.**
- Plaintiffs recover full damages from duty-holder.
- Duty-holder can pursue subcontractors separately.

Section 35 Civil Liability Act - Proportionate Liability



- Each wrongdoer liable for their share only.
- Plaintiff must join all wrongdoers to maximize recovery.
- Not applicable to DBP Act duty claims after Pafburn case.

Case study: *Pafburn Pty Ltd v The Owners – Strata Plan No 84674* [2024] HCA 49

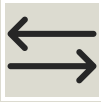


- Developer and builder held fully liable for defects.
- Non-delegable duty under DBP Act prevails.
- Proportionate liability does not apply.

Key Takeaways



Builders, developers, consultants owe broad, serious duties.



Cannot shift blame or avoid duty by contract.



Proper insurance, supervision, quality control essential.



Lawyers must tailor litigation strategy around non-delegable duties.

Practical Steps Forward



1

Builders/Developers:
Supervise subcontractors carefully, document compliance.

2

Contractors: Maintain high standards, ensure insurance coverage.

3

Lawyers: Frame pleadings to leverage DBP duty, avoid gaps in parties.

Pafburn Pty Limited v The Owners Strata Plan No 84674

Presented by:

George Zakos | Prominet Group – Construction Consultants



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Notable Impacts on the Industry



Personal liability for subcontracted work

- Builders to be fully responsible for economic loss caused by construction defects, regardless of subcontractors' involvement.

Proportionate Liability unavailable (Under the DBPA)

- A builder or developer who is responsible for a whole project, cannot apportion liability to subcontractors for breaches of Section 37, even for specialised work which is not within their experience.

Increased reliance on cross-claims.

- Builders and developers are left with filing cross-claims or commencing separate proceedings to transfer their liability for defective building work performed by subcontractors.

Notable Impacts on the Industry



Impact on Consultants

- No firm determination made regarding consultants' ability to plead proportionate liability defences, but it arguable they can for defective construction work that was not within their scope.
- [At the trial the Owners accepted that proportionate liability defences may still be available. If the Owners brought an action against the Certifier or other consultants' then the consultant could apportion liability against the Builder/Developer.]

Rising costs and risks

- Head contractors and developers should expect increased exposure to claims under Section 37 of the DBPA as the "buck stops with them", along with rising litigation costs and higher insurance premiums.

Insurance Position

- Insurers (and Builders) must assess and scrutinise the financial positions of their insureds and contracting counterparties to manage the risks posed by insolvencies.

The Decision



By majority judgment

4 (Gagler CJ, Gleeson, Jagot and Beech-Jones JJ)

3 (Gordon, Edelman and Steward JJ) – Dissenting

- Disagreed that the term ‘carrying out construction work’ under Section 37 should extend beyond the actual carrying out of construction work by a person or their agent to include strict liability for work carried out by subcontractors;
- Disagreed with the view that Section 39 of the DBPA which prohibits the delegation of the duty of care under Section 37, elevates that duty into a common law ‘non-delegable duty’. Instead, their Honours held that section 39 had a more limited purpose which was to ensure that a person cannot escape liability by assigning any part of the work that the person is carrying out to another person.



3 (Gordon, Edelman and Steward JJ) – Dissenting

Their Honours alluded to real-world challenges for practitioners, such as:

- Some head contractors who lack expertise in specialised trades, such a plumbing or electrical work, depend on carefully chosen subcontractors. Their Honours thought it would be an “odd result” if a head contractor who had carefully chosen a specialist subcontractor was held personally liable for any careless work that a specialist subcontractor performed.
- So, unless the field of a specialist sub-contractor work is written out of the builder’s scope of work, the builder’s inability to please proportionate liability defence exposes them to “significant increased risks, costs and insurance premiums”.

What does a DBPA Claim look like?



Home Building Act Claims

Section 18B Warranty Claims

From a consultants' position and without oversimplifying the issues:

- ▶ Did the building work comply with the contract documents?
- ▶ Did the building work comply with the NCC/Australian Standards?
- ▶ How does the building work fail to comply
- ▶ What did the builder “do wrong”?
- ▶ What is needed to make good the non-compliance.

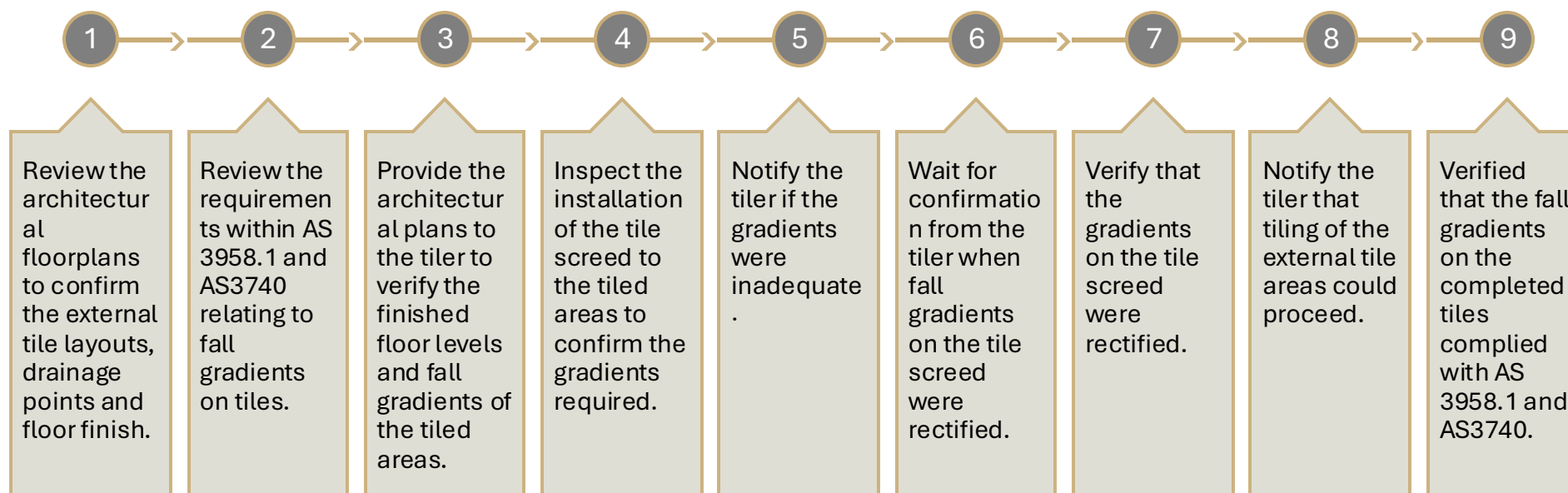
What does a DBPA Claim look like?



DBPA Claims.

A wet area claim for insufficient fall to the tiles floor could be fashioned this manner:

Considering the Builder's Responsibility, the process that a reasonable builder would undertake in conjunction with the project management team in relation to this type of work could be that the builder failed to:



Where to from here?



While there is still a vast amount of clarity required about the ramifications of the Pafburn decision the following actions could be considered by Developers and Builders:

- Head contractors and developers retain vicarious liability for the work of their subcontractors.
- Need to consider filing cross-claims or commencing separate proceedings to pass on liability for defective work.
- Consultants may wish to adopt the same approach until the court clarifies the extent of proportionate liability defenses' may be available.
- Head Contractors defining clearly the scope of work they are willing to take liability for under a contract, be it a building or design contract with other consultants.
- Obtaining advice from other consultants on design, documents and the like.
- Implement on site strategies for controlling the quality of construction work. (the Clerk of works) .
- Undertake robust financial security of all subcontractors.

Preparing your customers for success in the new now

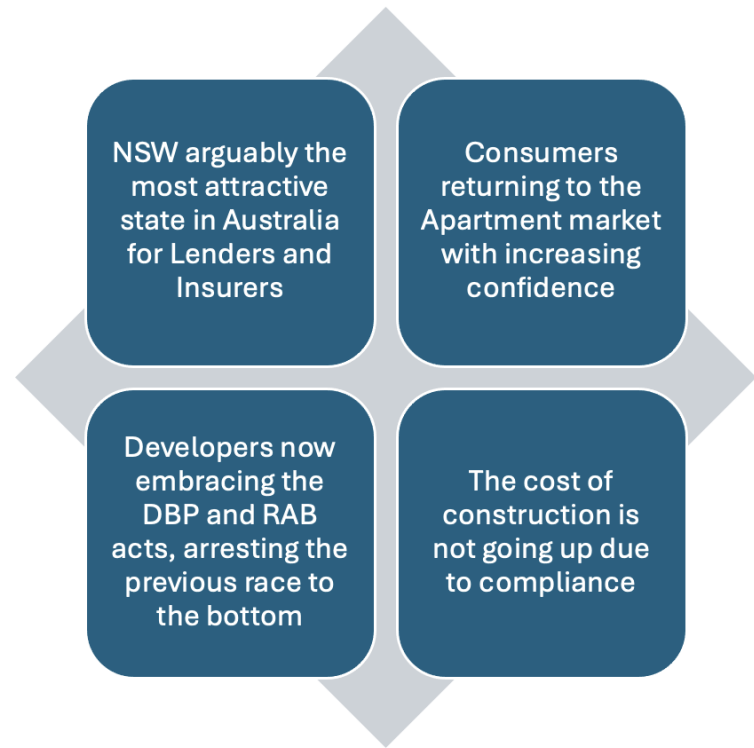
Presented by:

David Chandler | Construction Industry
Advisory, Former NSW Building
Commissioner



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Reflecting 5 – years of NSW Building Reforms



- Building Designers and Practitioners now delivering fit for purpose design and buildings
- Building Certifiers no longer seen as the root cause of bad building outcomes (Private and LGA)
- A respected, proactive Building Regulator now works to lift industry capability and capacity while holding those who don't do the right thing, accountable

Today's Construction Industry



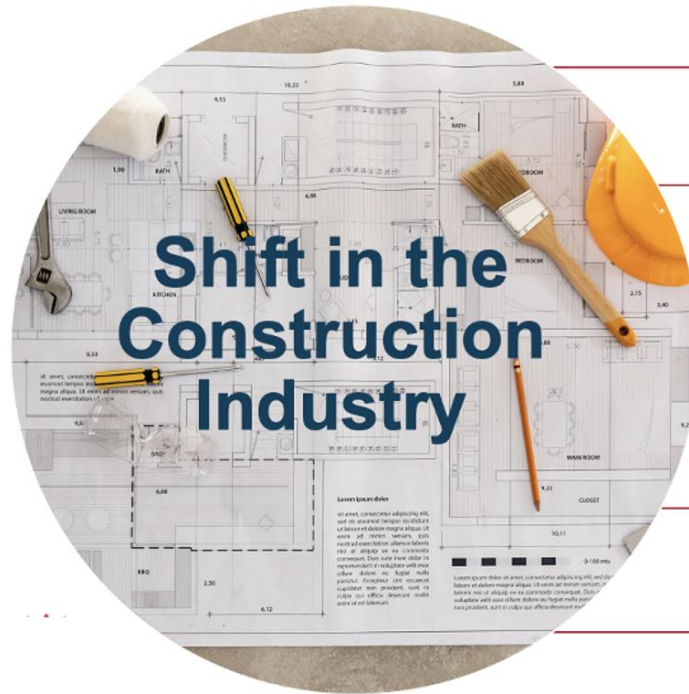
Today's construction industry continues to see itself as victims of change or political indifference.

Its wake-up time.

- The rules of the construction business were written for different times.
- The system has baked in expectations that nothing has or should change.
- Construction is now a global business involving many jurisdictions.
- Accountabilities to build trustworthy buildings will always focus on the sponsor.

Character of Construction Harms in the 21st Century

Modern regulators need to think about new harms as previous harms are being mitigated.



Global Jurisdiction

The industry is no longer a single jurisdiction, considering today global sourcing of all construction services and inputs.



Modern Practices

Zero net embodied carbon, growing momentum toward offsite manufactured construction and services by rethinking traditional payment models for the supply chain.



Smarter Buildings

Buildings are getting smarter with components integration as a central factor for harm minimization and decision making.



Single Asset Resilience & Risk Pricing

The insurance industry is moving to single asset risk pricing as opposed to asset class pricing.



Market Led Governance

Regulators need to progressively relieve the burden of sole public governance in collaboration with the industry.

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Accountability for a building made today may involve an end-to-end time span of at least 15-years, irrespective of it being for BTS or BTR use.

- Sponsors (and syndicates) will need to prefer dealing with durable players.
- Buildings are already being procured and assembled differently and off-shore.
- The roles of regulators will not solve for the transactional changes that are occurring.

The next normal in construction

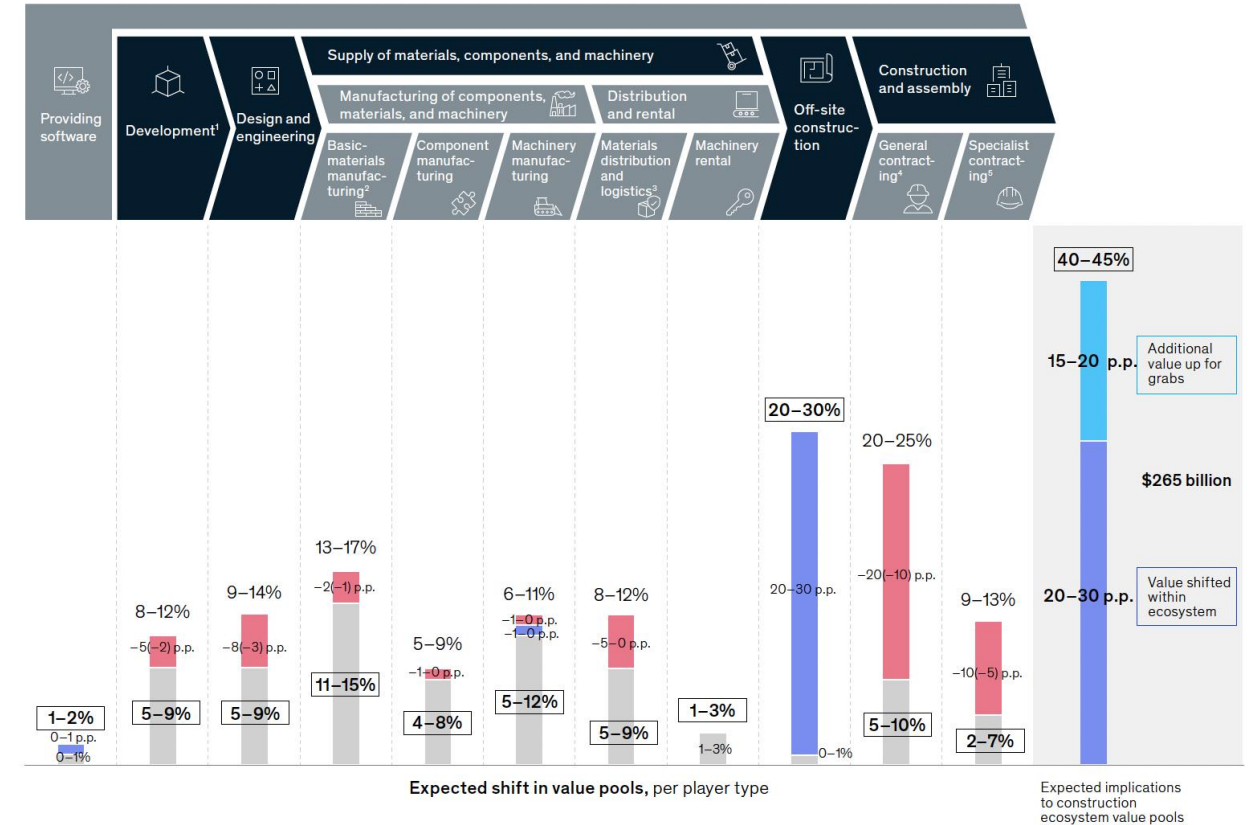
How disruption is reshaping the world's largest ecosystem

June 2020

Forty to 45 percent of value pools are expected to shift and impact all players along the value chain.

Example of fully productized value chain (eg, real estate new build), current and future value pools, p.p.

Value at risk Remaining value added Value shifted Value captured





Accountability for a building made today may involve an end-to-end time span of at least 15-years.

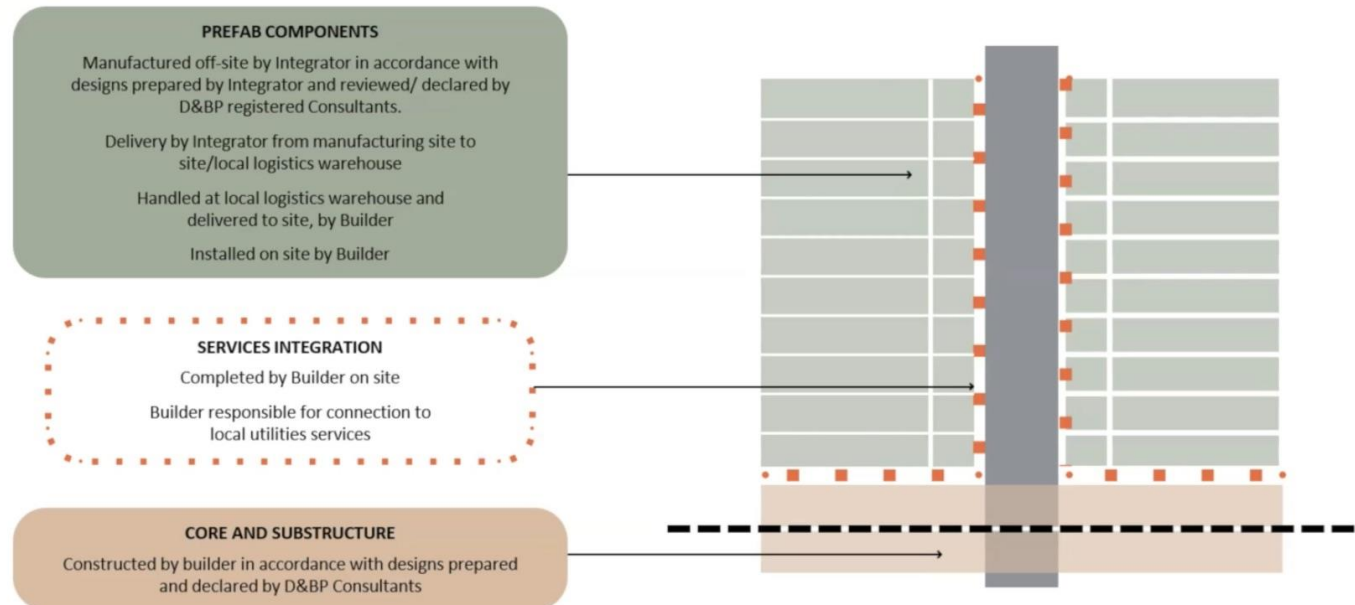
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MMC



The MMC conversation is not the centre of today's construction conversation. But it is relevant in the end-to-end accountability for building makers.

BUILDING COMPONENTS



SOURCE: David Chandler, Former Building Commissioner
NSW Offsite Presentation 2024

The DBPA



The DBP Act and related reforms set NSW up with a competitive advantage in navigating the end-to-end accountabilities now shaping today's construction world:

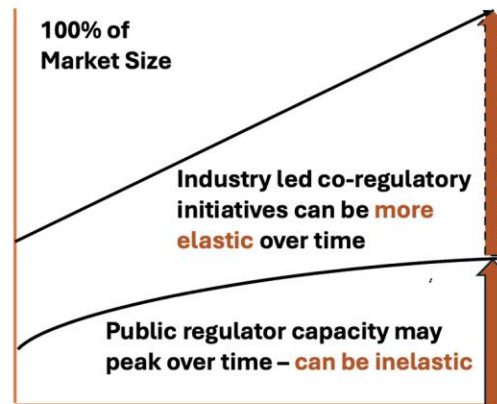
- Pafburn should not be a target for victims still in denial of the of today's construction realities.
- Pafburn may be leveraged for advantage for best practice development proponents.
- The public and industry needs to be informed of the changing shifts in regulatory emphasis (and be educated in what to look for).
- Academics need to refresh ancient course content and legacy Business as Usual (BaU).
- Australia's global competitors are unsentimental about what our industry does.
- Australia public and consumers are highly invested in the trustworthiness of our built-world. (As are the industry's financiers, lenders and regulators).

Regulators



Regulators must now focus on accountability for the standards that reflect what the public expects of trustworthy buildings – the transaction ball is not their problem.

Public regulator capacity is not always elastic



Industry initiatives can

- Target areas governments are not well equipped for
- Are more agile and sustainable
- Embrace new technologies faster
- Benefit from recurrent funding

Examples may include

- Player trustworthiness ratings e.g. iCIRT
- Building Assurance e.g. LDI/DLI
- Supply Chain Compliance tools
- CPD and Industry led Capability and Capacity building programs.

Beyond *Pafburn*



The objectives of today's masterclass is to discuss and **look beyond** Pafburn.

- Discussion may benefit from shifting from being victims to opportunists.
- Building in the processes needed to set project sponsors up for success.
- Being agile in the face of the multi-jurisdictional transactional impacts of making buildings in the new now.



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