

1988

Brixon & Christopher Architects, a professional corporaton v. Roger H. Elton and John H. Laub : Brief of Respondent

Utah Court of Appeals

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IN THE SUPREME COURT
FOR THE STATE OF UTAH

<u>BRIXEN & CHRISTOPHER</u>	:	
<u>ARCHITECTS</u> , a professional	:	
corporation,	:	
	:	
Plaintiff-Respondent,	:	Case No. 860576
	:	
vs.	:	
	:	
<u>ROGER H. ELTON</u> and	:	
<u>JOHN H. LAUB</u> ,	:	Category No. 14(b)
	:	
Defendants-Appellants.	:	
	:	

BRIEF OF RESPONDENT BRIXEN & CHRISTOPHER ARCHITECTS

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE SCOTT DANIELS, JUDGE

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BRIEF OF RESPONDENT BRIXEN & CHRISTOPHER ARCHITECTS

PRELIMINARY STATEMENT

On August 4, 1987, appellant John H. Laub filed a federal bankruptcy petition and the parties may be subject in this action to the automatic stay of 11 U.S.C. § 362(a), which operates with respect to "the . . . continuation . . . of a judicial . . . proceeding against the debtor that was . . . commenced before the commencement of the [bankruptcy] case." Accordingly, the parties stipulated to stay the appeal of John H. Laub, and this brief is filed only as to appellant Elton.

STATEMENT OF JURISDICTION
AND NATURE OF PROCEEDINGS

Respondent Brixen & Christopher Architects (hereinafter "Brixen & Christopher") is satisfied with the statement of appellant Elton regarding jurisdiction and the nature of the proceedings below.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. The attempt by Elton to frame his first issue ("Whether the trial court was entitled to render judgment in favor of Respondents [sic] (. . . Brixen & Christopher) contrary to the written provisions of Brixen & Christopher's own letter and architectural form contract which combined documents the lower court specifically determined to be the contract between the parties.") wrongly assumes that the trial court judgment is contrary to the contract. In fact, the trial court judgment against Elton is in accordance with the contract.

B. Brixen & Christopher is satisfied with the second issue stated by Elton: "Whether the trial court incorrectly determined that Appellants . . . were estopped to deny that Brixen & Christopher's services were authorized." The trial court correctly ruled that Elton was so estopped.

STATEMENT OF THE CASE

Nature of the Case. This is respondent Brixen & Christopher's action to recover amounts owed to it for architectural services performed for appellants Roger H. Elton and John H. Laub, who were developing the "Wolf Creek Recreation Center" in Eden, Utah.

Course of Proceedings and Disposition in Court Below. After a 3-day trial on Brixen & Christopher's complaint, the Honorable Scott Daniels, sitting without jury, awarded Brixen & Christopher judgment against Elton and Laub in the amount of \$50,500 plus interest and costs.

The trial court found that Brixen & Christopher had provided architectural services as requested by Elton and Laub, that Brixen & Christopher kept Elton and Laub informed of progress with the design throughout the project, that Elton and Laub never objected to Brixen & Christopher's interim billings, and that, when Brixen & Christopher sought payment for the services based on which judgment was awarded, Elton told Brixen & Christopher that he was pleased with their work, agreed that payment was long overdue, and promised on more than one occasion that payment would be made.

Relief sought on appeal. Brixen & Christopher requests that this Court affirm the judgment of the trial court against Elton.

STATEMENT OF FACTS

The statement of facts by Elton relies on his side of conflicting evidence and ignores the findings of fact of the trial court while at the same time implicitly attacking them. The treatment of the findings by Elton is inconsistent with the standards established by this Court. This language of Redevelopment Agency v. Tanner, 740 P.2d 1296 (Utah 1987) applies with equal force here:

[A]ppellants' claims are predicated on our acceptance of their version of the events which occurred and how the trial courts should have perceived the circumstances as they existed. However, the facts appellants advance in support of their arguments are carefully chosen to the exclusion of other evidence in the records supporting the lower courts' decisions. Due to the trial court's advantaged position, the presumptions favor its judgment. Where there is dispute and disagreement in the evidence, we assume that the trial judge believed

those aspects and fairly drew the inferences to be derived therefrom which gave his decision support. To this end, neither trial judge found credible the evidence appellants marshalled.

Id. at 1301-02 (footnotes omitted).¹

The facts are appropriately set forth in the trial court's detailed findings of fact, R 52-57. Brixen & Christopher states those findings here with citations to the record supporting the findings and with footnotes showing that, contrary to the "facts" claimed by Elton, the facts found by the trial court are supported by the record:

FINDINGS OF FACT

1. In the period from March 1982 to January 1983, plaintiff Brixen & Christopher Architects, a Utah architectural professional corporation, ("Brixen & Christopher") performed architectural services for defendants Roger H. Elton and John H. Laub, who were developing the "Wolf Creek Recreation Center"

¹ See also Nupetco Associates v. Jenkins, 669 P.2d 877, 882 (Utah 1983) ("[T]he evidence and all of the inferences that can reasonably be drawn therefrom [are viewed] in the light most favorable to the findings and conclusions of the trial court"); Bennion v. Hansen, 699 P.2d 757, 759 (Utah 1985) ("On appeal, the findings of the trial court will not be disturbed unless there is no substantial record evidence to support them. . . . In reviewing the evidence, we view it in the light most favorable to the trial court."); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) ("To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in light most favorable to the court below, the evidence is insufficient to support the findings.") (citations omitted); 5A J. Moore & J. Lucas, Moore's Federal Practice § 52.06[1], at 52-151 and -152 (2d ed. 1986).

in Eden, Utah. [R 145, R 267-68, ex. 1]. The real property on which the recreation center was to be built was owned solely by Laub. [R 389-90, R 441].

2. Elton and Laub told James W. Christopher, a principal of Brixen & Christopher, that they were partners and at all times, by their words and conduct with respect to Brixen & Christopher, Elton and Laub acted as if they were partners. [R 148, R 290, R 389-90, R 458, ex. 1 (pages 98, 94-93, 88, 85-81, 79-76, 57, 54, 48-47, 46-45, 34-33, 3-1)].

3. Following the first meeting between Christopher, Elton, and Laub on March 3, 1982, Elton and Laub signed an initial letter agreement, dated March 4, 1982, whereby Brixen & Christopher agreed to provide preliminary architectural design services in connection with the planned Wolf Creek Recreation Center for a fee of \$7,500.00 (Exhibit "1"). [R 145-46, R 396-97, R 445-46, ex. 1 (pages 3-1)].

4. An attachment to the initial letter agreement indicated that the total architectural services would be in five phases: (1) programming and schematic design, (2) design development, (3) construction [or contract] documents, (4) bidding or negotiation, and (5) construction administration. The initial letter agreement covered the first phase only. The stated fee for the first phase was \$7,500.00 (Exhibit "1"). [Ex. 1, pages 3-1].

5. Brixen & Christopher proceeded with work on the project and held additional meetings both with Elton and Laub and with employees of Wolf Creek. [R 142-47, 151-52].

6. Several preliminary drawings were prepared. Changes were made to respond to concerns of Wolf Creek, particularly those of Laub. [R 155-59]. By July 28, 1982, the programming and schematic design phase, referred to in the initial letter agreement, had been completed. At a meeting that day, Elton and Laub authorized Brixen & Christopher to proceed with the balance of the architectural services in connection with the recreation center.² [R 165-66, R 315-18]. Christopher was told to prepare a contract to reflect this authorization [R 167-68] and that Elton would be his contact. [R 172].

7. On or about July 29, 1982, Brixen & Christopher issued to Elton and Laub a statement showing that the programming and schematic design phase had been completed, that the hourly fees on that phase had exceeded the agreed upon limit of \$7,500.00, and that the \$7,500.00 fee was then due. [R 278, R 286, ex. 1 (page 91)].

² Elton observes that at trial he and Laub "denied giving approval to proceed with the other phases" and "testified that Christopher said Brixen & Christopher wanted to continue working on first phase requirements." Brief of Elton and Laub at 4-5 (paras. 9-10; see also para. 11). But as Elton notes, Christopher testified that the approval was given, R 165-66, R 315-18, and he confirmed it by letter, ex. 1 (pages 34-30). The refinements discussed at the July 28, 1982 meeting were part of the second "design development" phase, not the first "schematic design" phase. R 313-17, R 370. (In any event, the refinements were completed shortly after the July 28, 1982 meeting. R 318.) Brixen & Christopher even sent Elton and Laub a bill for the completed schematic design phase. R 278, ex. 1 (page 91). Elton and Laub did not object to the letter and had orally agreed to the terms of the letter, R 53 (findings of fact, para. 8), R 168-69. Elton promised

(Footnote 2 continued on next page.)

8. On Monday, August 2, 1982, Christopher sent Elton and Laub a letter which confirmed Elton and Laub's decision to proceed with the architectural work on the recreation center and set forth the fee arrangement by which Brixen & Christopher Architects would be compensated for doing so. (Exhibits "1" [pages 34-30] & "42"). While the August 2, 1982 letter was never signed by Laub and Elton, they had orally agreed to its terms, and Brixen & Christopher proceeded with the authorized architectural work as set forth in the letter agreement with the full knowledge of Elton and Laub.³ [R 168-69, R 321].

9. Brixen & Christopher hired consultants to work on site design, as well as electrical, mechanical and structural

(Footnote 2 cont.)

that he and Laub would sign and return the letter. R 321. They even prepared a check, which Laub assumed was delivered, to pay the bill, R 54 (findings of fact, para. 12), R 461-62, ex. 45. Last, but not least, they admitted owing the money. R 56-57 (findings of fact, paras. 18, 23-25), R 266, R 273-76, R 279-81, ex. 1 (pages 98-97, 87-88, 85, 79). In light of overwhelming evidence, the trial court for good reason did not believe the denials and testimony of Elton and Laub.

³ Elton invites this Court to ignore this finding and the substantial evidence supporting it and instead believe the incredible trial testimony of Elton and Laub, which no writing supports, that they objected to the August 2, 1982 letter. See Brief of Elton and Laub at 5-6 (paras. 12-14). Elton claims in particular that, contrary to the letter, he and Laub placed an \$800,000 limit on the total cost of the project, including site development, but as to this claim also, he acknowledges evidence conflicting with his position. Brief of Elton and Laub at 3 & 5 (paras. 3 & 12). Christopher testified that the initial \$800,000 estimate was for the Recreation Center only, excluding site development. It is not reasonable to think that

engineering design.⁴ [R 174, R 177-78, R 205-10 (structural), R 222-28 (mechanical), R 239-42 (electrical), R 250-54 (site), R 285].

10. By August 31, 1982, requirements for a fall 1982 construction commitment were being reviewed. [R 180, ex. 1 (page 41)]. More meetings and correspondence occurred. [R 180-85, ex. 1 (pages 46-42)]. Brixen & Christopher assisted Wolf Creek in proceedings before the Weber County Planning Commission. [R 463, R 471].

11. In addition to communicating progress on the project to Elton and Laub, Brixen & Christopher worked closely

(Footnote 3 cont.)

if the construction estimate had actually been 50%, or \$400,000, more than Elton and Laub planned to spend that Christopher would have totally ignored such an owner mandate and continued to work on the project based on substantially larger figures, see ex. 1 (pages 34 & 57), and that Elton and Laub would not have generated some document or at least some scrap of paper reflecting the alleged discrepancy. Even their deposition testimony conflicts with Elton's claims. Laub testified in his deposition that he tried to keep all communications through Elton, R 463-64, and that he never contacted Brixen & Christopher about the August 2 letter, R 459-60 (trial transcript in error refers to August 2 letter as August 26th letter). Elton testified in his deposition that he did not even recall the critical July 28, 1982 meeting on which the letter agreement was based, R 424, or an earlier March 10, 1982 meeting, R 421. Thus Elton's vivid "recollection" of these meetings at trial was unreliable, at least. As Christopher testified, at no time did Elton or Laub comment that the construction estimates were too high. R 329, R 478-79. The trial court was well within its province when it rejected the testimony of Elton and Laub and made its finding that the August 2, 1982 agreement was accepted and that Elton and Laub authorized Brixen and Christopher to proceed in accordance with it.

⁴ The schematic design phase provided for in the original contract did not continue into the fall, see, e.g., R 315-318,

with the Wolf Creek employees and with Great Basin Engineering, who had been hired by Wolf Creek for the master site planning of all resort facilities. [R 162-63, R 172, R 178-82, R 186-88, R 190-92, R 196-98, R 201-02, R 266, R 269.]

12. A check of Wolf Creek Resort to Brixen & Christopher for \$7,500.00, dated September 23, 1982, was signed by Laub. Although Laub assumed that it was delivered to Brixen & Christopher, it was not.⁵

(Footnote 4 cont.)

as Elton suggests. Brief of Elton and Laub at 8-9 (para. 28). When Christopher proposed the amendment to raise the total fee, he simply proportioned the \$8,000 total fee increase among all four phases, including the schematic design phase. R 363. The fee increase was due to increased engineering consultant fees, R 201, and part of the rationale for adding part to the schematic design phase was that some of the work responsible for the increased engineering consultant fees was "schematic design" in the eyes of the engineers. R 349. But as Christopher testified, "we had completed structural schematics in our initial work prior to the end of July. Then his [the engineer's] work starts, and he will call it schematics, but it's unrelated to what we do as part of our agreement under schematics." R 349. The assertion by Elton that the schematic design phase continued into the fall is disingenuous, because not only did he and Laub receive a bill in the summer for completion of the schematic design phase based on their approval, R 278, ex. 1 (page 91), but they even prepared a check in September 1982 to pay the bill. R 461-62, ex. 45.

⁵ From the time of his deposition to the time of trial, Laub went from assuming that the check had been delivered, R 460-62, to claiming that (1) the check had been purposely withheld "for delivery to Brixen & Christopher to pay for the first phase at the time it became acceptable," see Brief of Elton and Laub at 9 (para. 30), and (2) that he had told Christopher this, R 465. In light of Laub's conflicting deposition testimony and the contrary testimony of Christopher, R 474, the trial court properly made this finding in favor of Brixen & Christopher and further found that Elton and Laub

13. On about September 30, 1982, Brixen & Christopher: (1) issued a statement to Elton and Laub for a fee then due of \$10,000.00, \$7,500.00 of which represented the July 29, 1982 statement and \$2,500.00 of which represented the partial completion of design development and contract documents for the bid package for site excavation and preparation, and (2) sent Elton and Laub a letter updating them on progress on the project. [R 187, R 278, ex. 1 (pages 90, 48-47)].

14. On October 4, 1982, Christopher delivered a bid package, including drawings and specifications for site work, to Wolf Creek employees. These documents were distributed to contractors to invite bids. About October 11, 1982, bids were received by Wolf Creek for the site work, one of which was favorable in that it was below the estimate. [R 188-93, R 477, ex. 1 (page 97)].

15. By letter dated November 26, 1982, and pursuant to a prior telephone conversation between Elton and Christopher, Christopher sent Elton and Laub an amendment to the August 2 letter agreement to reflect increased architectural fees based on increased consulting fees required

(Footnote 5 cont.)

never objected to the statements for services billed by Brixen & Christopher. R 56 (findings of fact, para. 21).

for structural and mechanical engineering design.⁶ The letter requested review of the amendment and execution if the amendment was acceptable. Elton and Laub neither executed the amendment nor communicated their acceptance of the amendment⁷

⁶ The "note" of Elton about Brixen & Christopher's proposal for increased compensation, Brief of Elton and Laub at 6 (para. 18), is gratuitous because Brixen & Christopher has not appealed the trial court's ruling that the proposed amendment was not accepted. Elton is dead wrong in claiming that the judgment includes \$8,500.00 for the schematic design phase, \$1,000.00 more than the original \$7,500.00 fee based on the allocation proposed in the amendment. See Brief of Elton and Laub at 17. The court's ruling is crystal clear in excluding from the judgment "the additional \$8,000.00 fee" that was proposed by the amendment. R 503-04. What the court did in fact is award an amount based on allocating a total \$71,500.00 fee between on the one hand completion of the first and second phase and partial completion of the third phase and, on the other hand, the remainder of the third phase and all of the fourth phase. The precise basis for the trial court's calculation was not stated and defendants never objected or requested clarification in the trial court.

If anything, the trial court's allocation understated the amount to which Brixen and Christopher was entitled because, according to the allocation in the August 2 letter, Brixen and Christopher performed at least 69.4% ($(\$16,500.00 + \$25,500.00) / \$60,500.00$) of the work comprising the second, third and fourth phases. Since the amount attributable to the last three phases is \$64,000.00 ($\$71,500.00 - \$7,500.00$), the total award to Brixen & Christopher on a strictly proportionate basis for all work performed would be almost \$52,000.00 ($(69.4\% \text{ of } \$64,000.00) + \$7,500.00 = \$51,916.00$), about \$1,500 more than the \$50,500 awarded.

⁷ Elton misstates the testimony when he claims that "Christopher . . . admitted that everything was conditional" in November 1982. Brief of Elton and Laub at 8 (para. 26). Christopher merely agreed with counsel for Elton and Laub that the proposed amendment, which Christopher had discussed with Elton by telephone, was conditional, not that "everything" was

(Footnote 7 continued on next page.)

Enclosed with the letter was a statement dated November 26, 1982 for \$27,500.00, which represented compensation for completion of the programming and schematic design phase and the design development phase as revised by the amendment.⁸

[R 278-79, ex. 42.]

16. Architectural work on the project continued. On January 17, 1983, Brixen & Christopher issued a statement for \$57,500.00 in accordance with the August 2, 1986 letter

(Footnote 7 continued.)

conditional. R 344. As noted above, as the trial court found, the terms of the August 2 letter agreement already had been accepted even though Elton and Laub neglected to sign it as Elton had promised. R 53 (findings of fact, para. 8), R 321.

⁸ From this billing alone, Elton and Laub knew that Brixen & Christopher had completed the design development phase. The assertion of Elton that Brixen & Christopher did not properly provide cost estimates is unfounded. The contract does not require "a detailed breakdown of costs" in the first phase, see Brief of Elton and Laub at 7 (para. 21), but rather "a Statement of Probable Cost based on current area, volume or other unit costs." Ex. 1 (page 32) (emphasis added). This statement based on area was provided, inter alia, in the August 2 letter, which referred to the "construction estimate of \$897,750 (19,950 square feet at \$45.00) plus site development costs of \$295,000 as estimated by Maas & Grassli." Ex. 1 (page 34.) Elton acknowledges further that a "detailed breakdown of costs of the Project" was prepared in October 1982 and submitted to Elton and Laub, Brief of Elton and Laub at 7 (para. 21), which was in the second phase, "design development." Contrary to Elton's claim that "Christopher admitted that Elton was concerned about the cost estimate submitted in October, 1982," Brief of Elton and Laub at 7 (para. 22), Christopher testified that he did not believe that Elton ever expressed any concern about the cost estimate. R 329. As would be the case with any project, Christopher acknowledged only that there was a general concern throughout about keeping costs down. R 329.

agreement as amended by the November 26 amendment. The statement was based on the \$27,500.00 prior statement for the first two phases and \$30,000.00 for 85% completion of the third phase, the construction documents phase. By this time, Brixen & Christopher had completed the first two phases, 85% or more of the third phase and some work on the fourth phase in connection with the site work bid package.⁹ [R 266-69, ex. 1 (pages 92 & 79)].

17. Based on the August 2, 1982 letter agreement and the extent of the services performed, Brixen & Christopher is entitled to payment in the amount of \$50,500.00. [R 504-05; see supra note 6].

18. By telephone conversation with Elton on January 17, 1983, Christopher asked Elton for payment. Elton said that

⁹ Brixen & Christopher did not merely, as Elton states, "allegedly" perform work to this extent. Brief of Elton and Laub at 9 (para. 31). Brixen & Christopher proved at trial by substantial documentary and testimonial evidence, including dozens of drawings renderings, and prints, that it actually did work to this extent and the trial court accordingly so found. Elton's position that Brixen & Christopher was catering to every whim of Wolf Creek (Elton, Laub, and staff), spending over 2,000 hours of architectural staff time, and incurring expenses of over \$25,000 for engineering, R 284-88, ex. 10, in a never-ending effort to earn a mere \$7,500 gross fee is meritless. It is true that, as Elton points out, Brief of Elton and Laub at 9 (para. 31), they did not, despite their promises to do so, sign and return the August 2, 1982 agreement, R 321, or pay Brixen & Christopher, R 200-201, R 266, R 273-276. Brixen & Christopher can hardly be faulted for having believed that Elton and Laub would keep their word.

he was ill, but would try to facilitate payment. [R 266, ex. 1 (page 79)].

19. By letter dated February 23, 1983, Elton authorized a change to an alternative mechanical system design after being informed of estimated costs and benefits of the proposed alternative system. [R 272-73, ex. 1 (pages 84-80)].¹⁰

20. Due to lack of payment, architectural work on the project gradually came to a halt. [R 273, ex. 10].

¹⁰ This letter is one example of communications of Elton that refute the groundless conclusion that "[a]ll of Elton's communications after August 2, 1982 to Brixen & Christopher . . . were consistent with Elton and Laub's understanding that Brixen & Christopher was allegedly trying to provide an acceptable [schematic] design." Brief of Elton and Laub at 9-10 (para. 32). In the letter, Elton shows awareness that the project would soon be entering the fourth phase, the bidding and negotiation phase, when he states in his February 23, 1983 letter: "When Wolf Creek goes to bid on the Recreation Center, we should have incorporated the mechanical systems change you discussed with Scott." Ex. 1 (page 84) (emphasis added). Elton hardly could have thought otherwise because (1) the February 8, 1983 letter of Christopher, to which Elton was responding, informed Elton that changing the mechanical system would require \$4,380 in "redesign fees", ex. 1 (page 83-82) (emphasis added); (2) Elton had received the January 17, 1983 bill that indicated the contract or construction documents were 85% complete or, in other words, that the first and second phases were complete and the third phase was nearly complete, R 268, ex. 1 (page 92); (3) Elton had been told when Christopher gave him a status report on January 17, 1983 that the contract documents were nearly complete and ready for bidding, R 266, ex. 1 (page 79); (4) Elton had known at least since receiving Brixen & Christopher's November 26, 1983 statement that, as the statement indicated, the second phase was complete, R 278-79, ex. 42; (5) Elton had been informed by Christopher's November 26, 1983 letter that the statement covered "services to date through completion of Design Development." Ex. 1 (page 77); ex. 42. Like Elton's February 23, 1983 letter, his other letters belie his claims. On October 11, 1982, Elton wrote Laub:

21. Throughout the project, Brixen & Christopher kept Elton and Laub informed of progress with the design and was never told in substance that (1) its work was going too far, or (2) its statements for services were not acceptable. [R 266, R 269, R 273, R 276, R 278-89, R 464].

(Footnote 10 continued.)

Enclosed are two copies of the Christopher Recreation Center proposal he would like to have signed.

Please advise if you have questions.

R 426-27, ex. 43. The next day, October 12, 1982, Elton again wrote Laub:

Jim Christopher called concerning the whereabouts of his contractual agreement and payment of services.

He has not paid Grassli because he has not received monies from us.

R 426-27, ex. 44. There is no hint in the letters of any objection being expressed to Christopher that he should not expect the agreement to be signed and returned or the payment to be made. Christopher's request for the agreement and payment and Elton's acquiescence in early October also casts grave doubt on Laub's "memory" at trial, contrary to his deposition testimony, R 463-64, that he told Christopher just days before that the agreement would not be signed and payment would not be made.

Elton's December 1, 1986 letter to Laub serves to further impeach the testimony of Elton. In the letter he states:

Enclosed, for your information, is the Recreation Center architectural contract on Wolf Creek, together with a change order. I am not sure the change order

(Footnote 10 continued on next page.)

22. There was no term of the parties' agreement that provided that the agreement was not to be performed within one year from the making of the agreement. In other words, the agreement could have been performed in one year. Also, Brixen & Christopher had partially performed the agreement.

23. On March 2, 1983, after receiving Elton's February 23 letter, Christopher spoke to Elton by telephone. Elton agreed that payment to Brixen & Christopher was long overdue. Elton told Christopher that he and Laub were expecting a \$500,000.00 cash investment. Christopher said the payment was needed that week. Elton said that he would call Laub and then call Christopher back. [R 273, ex. 1 (page 85)].

24. On March 4, 1983, Elton called Christopher back. He told Christopher that the extra \$500,00.00 cash was coming soon and that the money should be in First Security Bank by the middle of next week. Elton promised the payment would be made

(Footnote 10 continued.)

is justified. Could you have Clair [Cox] or Scott [Allen] [Wolf Creek employees] make a determination?

Ex. 42 (emphasis added). Elton had a question only about the change order, which the trial court found was ultimately not accepted, not about "the Recreation Center architectural contract," which the trial court found, based on abundant evidence, was accepted. Similarly, Elton enclosed with the letter a copy of Christopher's November 26 letter and the accompanying bill without taking any exception to the fact that they reflected that the design development phase had been completed.

immediately, no later than March 14 or 15. [R 273-74, ex. 1 (page 85)].

25. On April 16, 1983, Christopher visited Elton in Reno. Elton told Christopher that financing was close and that interest would be paid on the amount outstanding. Elton also told Christopher that he was pleased with the work of Brixen & Christopher.¹¹ [R 275-76, ex. 1 (page 88)].

26. No payment was ever made to Brixen & Christopher's for the architectural work it performed on the Wolf Creek Recreation Center. [R 274].

SUMMARY OF ARGUMENT

POINT I. THE TRIAL COURT PROPERLY AWARDED BRIXEN & CHRISTOPHER JUDGMENT BASED ON THE AUGUST 2, 1982 LETTER AGREEMENT.

The trial court judgment is consistent with the parties' contract. The transcript of the court's ruling and its findings and conclusions reflect a cogent application of the August 2 letter agreement and lend no support to the

¹¹ Even after Laub had answered the complaint in March 1984 and denied "that defendents Laub or Elton entered into an agreement or employment contract with plaintiff [Brixen & Christopher]," R 13, Laub met regarding payment with Christopher and the other firm principal, Martin Brixen, on July 27, 1984 at the offices of Brixen & Christopher. R 279-81, R 476-77. As reflected in Christopher's two pages of notes, ex. 1, pages 98-97, Laub said he was in financial trouble but did not deny that the money was due Brixen & Christopher. R 280-81. Laub did not contradict Christopher's testimony about this meeting.

rhetorical charge of Elton that the trial court sought to "ignore" or "remake" the contract. Brixen & Christopher did everything necessary to earn the amounts awarded by the trial court. As found by the trial court, Elton and Laub were completely aware of the extent of work being performed by Brixen & Christopher, authorized the work to the full extent that it was performed, and admitted to Brixen & Christopher their liability for services performed.

POINT II. ELTON IS ESTOPPED TO DENY THAT BRIXEN & CHRISTOPHER'S SERVICES WERE AUTHORIZED.

In light of Brixen & Christopher's dutiful communication of progress throughout the project and the complete absence of any objection by Elton and Laub to Brixen & Christopher's statements about the extent to which the work had been performed and the extent to which compensation had been earned, Elton's attempt to raise the technical objection that approval lacked sufficient formality is unwarranted. Elton and Laub urged Brixen & Christopher onward, and silently accepted Brixen & Christopher's reports and billings throughout the project as Brixen & Christopher performed. To permit Elton to escape liability would be grossly unfair.

ARGUMENT

POINT I. THE TRIAL COURT PROPERLY AWARDED BRIXEN & CHRISTOPHER JUDGMENT BASED ON THE AUGUST 2, 1982 LETTER AGREEMENT.

The trial court did not "remake" or "ignore" the parties' contract, as Elton asserts, and it would have had to have done so in order to absolve Elton of his responsibility to pay Brixen & Christopher for its architectural services. Brixen & Christopher was retained for the first "schematic design" phase in March 1982. Brixen & Christopher documented this in writing to Elton and Laub. This phase was completed and approved at the end of July 1982. Brixen & Christopher documented this in writing to Elton & Laub and billed for the completion of the schematic design phase. Ex. 1 (pages 34-33).

Next, Brixen & Christopher proceeded with the second "design development" phase. Working closely with the Wolf Creek staff as instructed, and keeping Elton and Laub informed every step of the way, Brixen & Christopher billed Elton and Laub for progress on the design development phase at the end of September 1982. Ex. 1 (page 90). Elton and Laub also had to know that design development was in progress at this point because of the involvement of the engineering consultants. R 362, ex. 1 (page 32, paragraph 1.2.1, see sections 1.1 and 1.2 and pages 48-45). The design development documents were completed and approved in November 1982. Brixen & Christopher documented this in writing to Elton and Laub and billed for

services rendered through the completion of the design development phase. Exs. 1 (page 77) & 42. When the project finally ground to a halt because Elton and Laub failed to pay the amounts outstanding, the third "construction documents" phase was nearly complete and Brixen & Christopher had incurred expenses of over \$25,000 for the work of engineering consultants. The trial court awarded Brixen & Christopher the amounts that it had earned based on services to the extent that they were rendered.

Time and again, over and over, by letters, documented telephone calls, meetings, and billings, Elton and Laub were told every step of the way what was happening and what had been accomplished. Elton and Laub regularly not only observed the progress but pushed Brixen & Christopher to move ahead. In addition, they were continually involved in the project through the Wolf Creek staff. Never did Elton and Laub object to the work of Brixen & Christopher; on the contrary, they praised the work. Never did Elton and Laub object to the billings; on the contrary, they promised to pay and expressed embarrassment over the lack of payment. It is readily apparent from the portions of the record cited above in support of the trial court's findings of fact that the judgment in favor of Brixen & Christopher is well-grounded in the evidence. The mystery is not why the trial court decided in favor of Brixen & Christopher, but how Elton could have expected otherwise.

Elton's argument is mostly surplusage. First, Elton argues that the court must enforce the contract as made. Unfortunately for Elton, the trial court did exactly that.

Second, Elton's claims about Brixen & Christopher's alleged failure to obtain approvals is wholly lacking in substance. With regard to the schematic design phase, Elton merely expresses disappointment with the trial court's determination that the schematic design phase was approved at the meeting on July 28, 1982, but he grudgingly admits that the trial court could properly so find on "disputed evidence." See Brief of Elton and Laub at 15. Elton's observation that the third "construction documents" phase was never approved adds nothing. First, it is not quite true. Not only did Wolf Creek approve of the construction documents for the site work, but it put the job out for bid based on those construction documents. Second, the rest of the construction documents were not approved because, due to Elton and Laub's failure to pay, they were never completed. Accordingly, the trial court awarded compensation to Brixen & Christopher based on 85%, rather than 100%, completion of the third phase.

In maintaining that the second "design development" phase was not approved, Elton quotes part of an answer but, without any indication of the omission, deletes the part of the answer that undercuts his claim. Compare Brief of Elton and Laub at 16 with R 365 (lines 1-3). Christopher's testimony was, in substance, that no "formal" approval was obtained, but

design and development documents were submitted, see R 364, and the approval came in the form of "a second of what we were doing," R 365. As Christopher explained:

 this is the way projects work. It's a normal flow of information. And your approvals came by having meetings. And you keep going -- you say, "yes, that's fine, keep going." And we had numerous meetings in this case as we do in all cases, just a normal flow of corroboration and information between architects and client representatives.

R 369-70. William Browning, an architect and expert witness, explained that in practice approvals may come in such simple discussions. R 384. The contract required nothing more and did not impose any restrictions on the manner in which the approval could be given. The contract did require Elton and Laub to notify Brixen & Christopher in writing of any fault in the project. Ex. 1 (pages 31-30, section 2.9). Elton and Laub never notified Brixen & Christopher, in writing or otherwise, that it was going too far or that any of Brixen & Christopher's many writings were incorrect. If Elton and Laub in fact believed there was some further technical requirement to approval and that they were not approving the design development phase, events would not have transpired as they did. Elton and Laub would not have passively stood by without objection when Christopher referred to the completion of the design development phase in his November 26, 1987 letter and included with the letter a statement for services rendered through completion of the second "design development" phase.

When Christopher sought payment because the construction documents were nearly complete, Elton would not have said he would facilitate payment. When Christopher persisted in seeking payment, Elton would not have promised to pay interest.

Elton states that Christopher admitted that Laub objected to the schematic design submitted on July 28, 1982 and that Laub was concerned about costs exceeding a limitation established in March 1982. Both claims are wrong. Christopher testified that, even though Laub requested certain refinements, the design was approved and Brixen & Christopher was instructed to proceed. Christopher also testified that the design presented at the July 28, 1982 meeting already had undergone much client review and refinement, "which was really beyond schematic." R 313. Likewise, Christopher testified that the projected costs were in line with the budget that had been established by Laub, and further that neither Elton nor Laub objected to the cost estimates. R 328-30, R 478-79.

Elton is also wrong when he states that Christopher's testimony was that the change in the mechanical system was part of design development. As the mechanical engineer testified, construction design of the mechanical system was complete and ready to bid, R 224-25, when the Wolf Creek staff decided to consider changing to a substantially different type of mechanical system utilizing heat pumps. R 269-73. Thus, the mechanical system was not only past the second "design development" phase, but the work for the third "construction

document" phase had been completed so far as the mechanical system was concerned. The fallacy in Elton's reasoning is that he assumes that the fact a change is being made is indicative of the phase of the project being worked on. To the contrary, changes can be made at any time, whether in the schematic design phase, the design development phase, the construction document phase, or after the project has been bid and the construction has begun. See R 158, R 316-17, ex. 1 (pages 32-31, para. 1.5.14 & section 1.7, paras. 1.7.12 & .13) (change orders during final "construction administration" phase). Elton had been told that the construction documents were nearly complete on January 17, 1983, and Brixen & Christopher had then billed based on 85% completion of the construction documents. Thus, Elton had no reason to be surprised that changing the mechanical system would require additional redesign fees, ex. 1 (page 83), and he implicitly accepted the cost of those fees and seemed to acknowledge that construction documents were about ready for bid when he wrote Christopher on February 23, 1983: "When Wolf Creek goes to bid on the Recreation Center, we should have incorporated the mechanical systems change you discussed with Scott." Ex. 1 (page 84).

Brixen & Christopher kept its side of the bargain but finally pulled off the project when it became clear that Elton and Laub were not making good on their promises to pay for the services rendered. The trial court properly awarded judgment for the work performed.

POINT II. ELTON IS ESTOPPED TO DENY THAT BRIXEN & CHRISTOPHER'S SERVICES WERE AUTHORIZED.

Elton and Laub not only were informed of the progress on the project every step of the way, but they urged Brixen & Christopher on. This case presents a textbook example of circumstances appropriate for application of equitable estoppel. "The elements of equitable estoppel are: 'conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct.' United American Life Insurance Co. v. Zions First National Bank, Utah, 641 P.2d 158, 161 (1982) (footnote omitted)." Blackhurst v. Transamerica Insurance Co., 699 P.2d 688, 691 (Utah 1985). Estoppel may be based on a party's "silence when he ought to speak." Leaver v. Grose, 610 P.2d 1262, 1264 (Utah 1980). Even if, contrary to the findings of the trial court, Brixen & Christopher had not obtained approvals and did not have authority to proceed as it did, Elton is estopped due to the utter failure of Elton and Laub to do anything at all to communicate to Brixen & Christopher their alleged dispute with (1) the July 1982 statement for services; (2) the August 2, 1982 letter of Christopher; (3) the September 30, 1982 statement for services; (4) the October 4, 1982 bid package for grading and site work; (5) the November 2, 1982 letter of Christopher; (6) the November 26, 1982 letter of Christopher;

(7) the November 26, 1982 statement for services; (8) the January 17, 1983 statement for services.¹²

For over six months after the July 28, 1982 meeting when Brixen & Christopher was given authorization to go forward with the project, Elton and Laub let Brixen & Christopher proceed full speed ahead. Far from holding back work on the recreation center, Elton and Laub were anxious for the work to go forward so they could use progress on the recreation center as a selling point for marketing condominiums in the Wolf Creek development. R 166, R 172-73. As recorded in Christopher's August 2, 1982 letter, Elton and Laub planned "to initiate construction as soon as possible." Ex. 1 (pages 34-33). In his September 20, 1982 letter, Christopher recognized their "desire for an early construction start," but recommended that fall construction include only grading and site work based on recent soils reports and discussions with the structural engineer and the soils engineer. Ex. 1 (pages 46-45). And far from disapproving in any way the design that had been submitted, Wolf Creek used artistic renderings of the design to promote sales of condominium units. R 167, R 170-71, R 175, R 475-76.

¹² Although waiver is a concept distinct from estoppel, Hunter v. Hunter, 669 P.2d 430, 432 (Utah 1983), the estoppel here encompasses waiver also because even if the contract had required more in the way of approval, Elton waived the condition "by receiving further performance from the other

Wolf Creek's conduct when the final plans and specifications for the site work were delivered was also inconsistent with the position Elton now takes.¹³ Laub was at Wolf Creek on October 4, 1982 when the package was hand-delivered by Christopher. After meeting with the Wolf Creek staff, Christopher told Laub that he had delivered the package and talked to Laub about whether Laub wanted to go ahead with the site work that fall. The bid package was not only accepted, but it was let out for bid and a favorable bid was obtained from a firm called Terra Ferma.¹⁴ R 192-93.

Elton cannot rely on the rule that a party acting with knowledge may not claim estoppel. Nothing is more apparent from the record in this case than that Brixen & Christopher believed based on the conduct of Elton and Laub that it was

(Footnote 12 continued.)

party, with knowledge that the condition ha[d] not been performed." 3A A. Corbin, Corbin on Contracts § 755 at 497 (1960) (footnote omitted). The reliance of Brixen & Christopher "justifies the added description of estoppel." Id. § 752 at 481 (footnote omitted).

¹³ As reflected in the August 2, 1982 letter agreement, the work was to include three bidding packages: (1) site preparation and excavation; (2) reinforced concrete; and (3) general architectural, mechanical, electrical, and site development. (Ex. 1 (page 33)).

¹⁴ Laub denied at trial that he knew that the package had been bid, but he recalled it being bid and who the low bidder was when he met with Brixen & Christopher on July 27, 1983, as Christopher's notes of that meeting reflect. R 476-77, ex. 1 (pages 98-97).

authorized to proceed as it did. On appeal, Elton has dropped his erroneous claim made and rejected in the trial court, that the parties' contract violated the statute of frauds, but has recast the claim in a new form. He contends that the attempts of Brixen & Christopher to get he and Laub to sign the contract that had been agreed to orally and acted upon indicates that Brixen & Christopher believed that work past the first "schematic design" phase was not authorized. On the contrary, it merely shows that Brixen & Christopher wanted the agreement that had been reached to be evidenced by a writing signed by Elton and Laub. The mistake in Elton's logic is convincingly shown, to take one example, by the fact that he claims Christopher's September 30 and November 26, 1982 letters show that Brixen & Christopher knew the first "schematic design" phase was not approved when the letters actually show that progress on the job had progressed beyond the mere initial outline stage and statements for services beyond the schematic design phase accompanied both letters.

At all times, Elton, Laub, and their Wolf Creek staff did nothing but give Brixen & Christopher the green light. Based on the statements and conduct of Elton and Laub, which Brixen & Christopher confirmed in writing many times, Brixen & Christopher expended over 2,000 hours of architectural staff time and incurred expense of over \$25,000 for work by consulting engineers. It is unfair for Elton to try now to

repudiate his agreement to compensate Brixen & Christopher and to repudiate their actions that led Brixen & Christopher to spend its time and money to provide extensive, substantially complete architectural design services.

CONCLUSION

This brief is filed only as to appellant Elton as appellant Laub has filed bankruptcy. The trial court correctly concluded that Elton agreed to pay for all of the services performed by Brixen & Christopher and, alternatively, that it would be inequitable to permit Elton to escape liability by repudiating their conduct in acquiescing in and contributing to the continuous work on the architectural design. The trial court judgment against Elton should be affirmed.

DATED: October 8, 1987.

MOYLE & DRAPER, P.C.

By

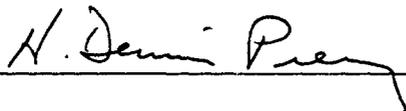


Hardin A. Whitney
H. Dennis Piercey
Attorneys for Plaintiff-
Respondent

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 1987, a copy of the Brief of Respondent Brixen & Christopher Architects was mailed to:

Walter P. Faber, Jr.
2102 East 3300 South
Salt Lake City, UT 84019
Attorney for Defendants-Appellants



ADDENDUM

Document No.

- 1 March 4, 1982 letter from Christopher to Elton and Laub. Ex. 1 (pages 3-1).
- 2 July 29, 1982 statement from Brixen & Christopher to Elton and Laub. Ex. 1 (page 91).
- 3 August 2, 1982 letter from Christopher to Elton and Laub. Ex. 1 (pages 34-30).
- 4 September 23, 1982 check to Brixen & Christopher from Wolf Creek Properties. Ex. 45.
- 5 September 30, 1982 letter from Christopher to Elton and Laub. Ex. 1 (pages 48-47).
- 6 September 30, 1982 statement from Brixen & Christopher to Elton and Laub. Ex. 1 (page 90).
- 7 October 4, 1982 transmittal from Brixen & Christopher to Clair Cox of Wolf Creek Country Club Resort. Ex. 1 (page 50).
- 8 October 4, 1982 notes of Christopher. Ex. 1 (page 49).
- 9 December 1, 1982 letter from Elton to Laub enclosing:
 - (1) November 26, 1982 letter from Christopher to Elton; and
 - (2) November 26, 1982 statement from Brixen & Christopher to Elton. Ex. 42 (first 3 pages).
- 10 January 17, 1983 statement from Brixen & Christopher to Elton. Ex. 1 (page 92).
- 11 January 17, 1983 notes of Christopher. Ex. 1 (page 79).
- 12 February 18, 1983 letter from Christopher to Elton. Ex. 1 (page 83-82).

- 13 February 23, 1983 letter from Elton to Christopher. Ex. 1 (page 84).
- 14 March 2 & 4, 1983 notes of Christopher.
- 15 April 16, 1983 notes of Christopher.
- 16 October 17, 1983 notes of Christopher.

MAR 4 1982

CHRISTOPHER

252 SOUTH SECOND EAST SALT LAKE CITY UTAH 84111

March 4, 1982

RECEIVED

MAR 12 1982

BRIXEN & CHRISTOPHER ARCHITECTS

Messrs. Roger H. Elton and
John H. Laub
Attorneys at Law
3900 North Wolf Creek Drive
Eden, Utah 84310

Gentlemen:

We enjoyed meeting with you yesterday to discuss your planned recreational building at Wolf Creek Country Club Resort, Eden, Utah.

We are very pleased that we will be working with you on the project, and have included as Attachment "A" to the letter, the Scope of Services that we will perform as outlined in the February 24, 1982 letter to you from Maas Grassli and Associates. We understand that this initial agreement will be to perform Programming and Schematic Design services only, until authorized by you to continue with the project.

Our fee for complete basic architectural services would be based upon 6% of the construction cost of the work designed or specified by our firm, or our fee could be by another negotiated procedure (hourly, fixed fee, etc.) if you so preferred.

We feel that this is a very important project for the Wold Creek Resort and we are certain that we will be able to develop an outstanding solution.

Messrs. Roger H. Elton and
John H. Laub

Page 2

Your signatures of approval below will serve as our notice to proceed with Programming and Schematic Design. Please return one of these three signed letters of agreement to us for our records, the other two being for each of you.

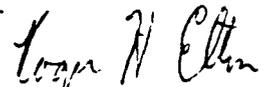
Sincerely,



James W. Christopher, FAIA

JWC/je
Encl.

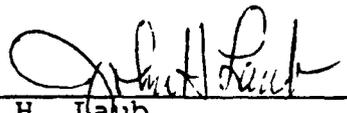
Approved:



Roger H. Elton

3/10/82

Date



John H. Laub

3/10/82

Date

RECEIVED

MAR 13 1982

LAIXEN & CHRISTOPHER
ARCHITECTS

SCOPE OF SERVICES

I. Programming and Schematic Design Phase:

Program requirements are reviewed/developed with the client to insure an accurate statement of needs and budget. Site design and architectural studies are prepared to indicate possible solutions to the problem and then, with the approval of the Owner, a design is established for development. Schematic drawings are prepared showing the design, including site plan, floor plans, sections, elevations, and perspective.

Our fee requirements for Phase I, Programming and Schematic Design, would be on an hourly basis as follows:

B & C Principals	\$ 50.00 Per Hour
MGA Principals	\$ 40.00 Per Hour
Associates	\$ 35.00 Per Hour
Professionals	\$ 30.00 Per Hour
Staff	\$ 15.00 Per Hour

A limit or maximum fee for this phase of work would be \$7,500.00.

II. Design Development Phase:

4-6 week project

Based upon the approved Schematic Design, detailed drawings are developed, indicating materials, architectural, structural, mechanical and electrical systems. At this time, a more precise statement of probable construction cost is developed.

III. Construction Documents Phase:

Contract documents consisting of drawings and specifications are prepared during this phase, setting forth, in detail, the requirements for the construction of the project.

IV. Bidding or Negotiation Phase:

Bids or negotiated proposals are received and the construction contract is prepared and awarded to the successful contractor.

V. Construction Administration Phase:

The project is visited during the construction phase to track the progress and quality of the work. Payment requests are reviewed and approved, change orders initiated, shop drawings reviewed, and other administrative matters attended to as required.

ATTACHMENT "A"

100

Messrs Roger H. Elton and
John H. Laub
100 North Wolf Creek Drive
Alpen, Utah 84310

STATEMENT

July 29, 1982

Completion of Programming and Schematic Design Phase
(Phase I) for the design of the Wolf Creek Recreation
Center per Letter of Agreement dated March 4, 1982.

(Hourly fees exceeded agreed upon limit of \$7,500.00)

AMOUNT DUE:

\$7,500.00

August 2, 1982

Messrs. Roger H. Elton and
John H. Laub
Attorneys at Law
3900 North Wolf Creek Drive
Eden, Utah 84310

Gentlemen:

We are pleased that you have elected to proceed with the architectural work on the Wolf Creek Recreation Center in anticipation of an early construction start.

This letter, which is in accordance with our former agreement of March 4, 1982 will serve as a Letter of Agreement between you and our firm for architectural services for the project.

Our fixed fee for basic architectural services will be \$71,500 based upon our construction estimate of \$897,750 (19,950 square feet at \$45.00) plus site development costs of \$295,000 as estimated by Maas & Grassli.

Payments for architectural services will be phased according to Attachment "A" of our March 4th agreement in the following breakdown:

Phase I	- Schematic Design	\$ 7,500.
Phase II	- Design Development	\$16,500.
Phase III	- Construction Documents	\$30,000.
Phase IV	- Construction Administration	\$14,000.

We will issue statements to you monthly as our work progresses.

00034

In an effort to initiate construction as soon as possible, we plan to issue our contract documents in bidding packages as follows:

1. Site preparation and excavation
2. Reinforced concrete
3. General architectural, mechanical, electrical, and site development

It is our intent to bid the first two packages in time for this work to be accomplished in the fall of 1982. We will plan to issue the third bid package before the end of December.

Attached to this letter, and as a part of this Agreement, are the normal "Terms and Conditions of Agreement Between Owner and Architect" from AIA Document B141. These articles describe the services and responsibilities of the Owner and Architect during the course of the project.

A signed copy of this letter will verify your approval of this Agreement and serve as our notice to proceed with the Design Development Phase.

Sincerely,

James W. Christopher, FAIA

JWC/je

Approval:

Roger H. Elton

John H. Laub

TERMS AND CONDITIONS OF AGREEMENT BETWEEN OWNER AND ARCHITECT

ARTICLE 1

ARCHITECT'S SERVICES AND RESPONSIBILITIES

BASIC SERVICES

The Architect's Basic Services consist of the five phases described in Paragraphs 1.1 through 1.5 and include normal structural, mechanical and electrical engineering services and any other services included in Article 15 as part of Basic Services.

1.1 SCHEMATIC DESIGN PHASE

1.1.1 The Architect shall review the program furnished by the Owner to ascertain the requirements of the Project and shall review the understanding of such requirements with the Owner.

1.1.2 The Architect shall provide a preliminary evaluation of the program and the Project budget requirements, each in terms of the other, subject to the limitations set forth in Subparagraph 3.2.1.

1.1.3 The Architect shall review with the Owner alternative approaches to design and construction of the Project.

1.1.4 Based on the mutually agreed upon program and Project budget requirements, the Architect shall prepare, for approval by the Owner, Schematic Design Documents consisting of drawings and other documents illustrating the scale and relationship of Project components.

1.1.5 The Architect shall submit to the Owner a Statement of Probable Construction Cost based on current area, volume or other unit costs.

1.2 DESIGN DEVELOPMENT PHASE

1.2.1 Based on the approved Schematic Design Documents and any adjustments authorized by the Owner in the program or Project budget, the Architect shall prepare, for approval by the Owner, Design Development Documents consisting of drawings and other documents to fix and describe the size and character of the entire Project as to architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate.

1.2.2 The Architect shall submit to the Owner a further Statement of Probable Construction Cost.

1.3 CONSTRUCTION DOCUMENTS PHASE

1.3.1 Based on the approved Design Development Documents and any further adjustments in the scope or quality of the Project or in the Project budget authorized by the Owner, the Architect shall prepare, for approval by the Owner, Construction Documents consisting of Drawings and Specifications setting forth in detail the requirements for the construction of the Project.

1.3.2 The Architect shall assist the Owner in the preparation of the necessary bidding information, bidding forms, the Conditions of the Contract, and the form of Agreement between the Owner and the Contractor.

1.3.3 The Architect shall advise the Owner of any adjust-

ments to previous Statements of Probable Construction Cost indicated by changes in requirements or general market conditions.

1.3.4 The Architect shall assist the Owner in connection with the Owner's responsibility for filing documents required for the approval of governmental authorities having jurisdiction over the Project.

1.4 BIDDING OR NEGOTIATION PHASE

1.4.1 The Architect, following the Owner's approval of the Construction Documents and of the latest Statement of Probable Construction Cost, shall assist the Owner in obtaining bids or negotiated proposals, and assist in awarding and preparing contracts for construction.

1.5 CONSTRUCTION PHASE—ADMINISTRATION OF THE CONSTRUCTION CONTRACT

1.5.1 The Construction Phase will commence with the award of the Contract for Construction and, together with the Architect's obligation to provide Basic Services under this Agreement, will terminate when final payment to the Contractor is due, or in the absence of a final Certificate for Payment or of such due date, sixty days after the Date of Substantial Completion of the Work, whichever occurs first.

1.5.2 Unless otherwise provided in this Agreement and incorporated in the Contract Documents, the Architect shall provide administration of the Contract for Construction as set forth below and in the edition of AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement.

1.5.3 The Architect shall be a representative of the Owner during the Construction Phase, and shall advise and consult with the Owner. Instructions to the Contractor shall be forwarded through the Architect. The Architect shall have authority to act on behalf of the Owner only to the extent provided in the Contract Documents unless otherwise modified by written instrument in accordance with Subparagraph 1.5.16.

1.5.4 The Architect shall visit the site at intervals appropriate to the stage of construction or as otherwise agreed by the Architect in writing to become generally familiar with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of such on-site observations as an architect, the Architect shall keep the Owner informed of the progress and quality of the Work, and shall endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor.

1.5.5 The Architect shall not have control or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, for the acts or omissions of the Contractor, Sub-

Contractors or any other persons performing any of the Work, or for the failure of any of them to carry out the Work in accordance with the Contract Documents.

5.6 The Architect shall at all times have access to the Work wherever it is in preparation or progress.

5.7 The Architect shall determine the amounts owing to the Contractor based on observations at the site and on evaluations of the Contractor's Applications for Payment, and shall issue Certificates for Payment in such amounts, as provided in the Contract Documents.

5.8 The issuance of a Certificate for Payment shall constitute a representation by the Architect to the Owner, based on the Architect's observations at the site as provided in Subparagraph 1.5.4 and on the data comprising the Contractor's Application for Payment, that the Work as progressed to the point indicated; that, to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents (subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to the results of any subsequent tests required by or performed under the Contract Documents, or minor deviations from the Contract Documents correctable prior to completion, and to any specific qualifications stated in the Certificate for Payment); and that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment shall not be a representation that the Architect has made any examination to ascertain how and for what purpose the Contractor has used the moneys paid on account of the Contract Sum.

1.5.9 The Architect shall be the interpreter of the requirements of the Contract Documents and the judge of the performance thereunder by both the Owner and Contractor. The Architect shall render interpretations necessary for the proper execution or progress of the Work with reasonable promptness on written request of either the Owner or the Contractor, and shall render written decisions, within a reasonable time, on all claims, disputes and other matters in question between the Owner and the Contractor relating to the execution or progress of the Work or the interpretation of the Contract Documents.

1.5.10 Interpretations and decisions of the Architect shall be consistent with the intent of and reasonably inferable from the Contract Documents and shall be in written or graphic form. In the capacity of interpreter and judge, the Architect shall endeavor to secure faithful performance by both the Owner and the Contractor, shall not show partiality to either, and shall not be liable for the result of any interpretation or decision rendered in good faith in such capacity.

1.5.11 The Architect's decisions in matters relating to artistic effect shall be final if consistent with the intent of the Contract Documents. The Architect's decisions on any other claims, disputes or other matters, including those in question between the Owner and the Contractor, shall be subject to arbitration as provided in this Agreement and in the Contract Documents.

1.5.12 The Architect shall have authority to reject Work which does not conform to the Contract Documents. Whenever, in the Architect's reasonable opinion, it is

necessary or advisable for the implementation of the intent of the Contract Documents, the Architect will have authority to require special inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work be then fabricated, installed or completed.

1.5.13 The Architect shall review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for conformance with the design concept of the Work and with the information given in the Contract Documents. Such action shall be taken with reasonable promptness so as to cause no delay. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

1.5.14 The Architect shall prepare Change Orders for the Owner's approval and execution in accordance with the Contract Documents, and shall have authority to order minor changes in the Work not involving an adjustment in the Contract Sum or an extension of the Contract Time which are not inconsistent with the intent of the Contract Documents.

1.5.15 The Architect shall conduct inspections to determine the Dates of Substantial Completion and final completion, shall receive and forward to the Owner for the Owner's review written warranties and related documents required by the Contract Documents and assembled by the Contractor, and shall issue a final Certificate for Payment.

1.5.16 The extent of the duties, responsibilities and limitations of authority of the Architect as the Owner's representative during construction shall not be modified or extended without written consent of the Owner, the Contractor and the Architect.

1.6 PROJECT REPRESENTATION BEYOND BASIC SERVICES

1.6.1 If the Owner and Architect agree that more extensive representation at the site than is described in Paragraph 1.5 shall be provided, the Architect shall provide one or more Project Representatives to assist the Architect in carrying out such responsibilities at the site.

1.6.2 Such Project Representatives shall be selected, employed and directed by the Architect, and the Architect shall be compensated therefor as mutually agreed between the Owner and the Architect as set forth in an exhibit appended to this Agreement, which shall describe the duties, responsibilities and limitations of authority of such Project Representatives.

1.6.3 Through the observations by such Project Representatives, the Architect shall endeavor to provide further protection for the Owner against defects and deficiencies in the Work, but the furnishing of such project representation shall not modify the rights, responsibilities or obligations of the Architect as described in Paragraph 1.5.

1.7 ADDITIONAL SERVICES

The following Services are not included in Basic Services unless so identified in Article 15. They shall be provided if authorized or confirmed in writing by the Owner, and they shall be paid for by the Owner as provided in this Agreement, in addition to the compensation for Basic Services.

N
~~1.7.1 Providing analyses of the Owner's needs and programming the requirements of the Project.~~

1.7.2 Providing financial feasibility or other special studies.

1.7.3 Providing planning surveys, site evaluations, environmental studies or comparative studies of prospective sites, and preparing special surveys, studies and submissions required for approvals of governmental authorities or others having jurisdiction over the Project.

1.7.4 Providing services relative to future facilities, systems and equipment which are not intended to be constructed during the Construction Phase.

1.7.5 Providing services to investigate existing conditions or facilities or to make measured drawings thereof, or to verify the accuracy of drawings or other information furnished by the Owner.

1.7.6 Preparing documents of alternate, separate or sequential bids or providing extra services in connection with bidding, negotiation or construction prior to the completion of the Construction Documents Phase, when requested by the Owner.

1.7.7 Providing coordination of Work performed by separate contractors or by the Owner's own forces

1.7.8 Providing services in connection with the work of a construction manager or separate consultants retained by the Owner.

1.7.9 Providing Detailed Estimates of Construction Cost, analyses of owning and operating costs, or detailed quantity surveys or inventories of material, equipment and labor.

1.7.10 Providing interior design and other similar services required for or in connection with the selection, procurement or installation of furniture, furnishings and related equipment.

1.7.11 Providing services for planning tenant or rental spaces.

1.7.12 Making revisions in Drawings, Specifications or other documents when such revisions are inconsistent with written approvals or instructions previously given, are required by the enactment or revision of codes, laws or regulations subsequent to the preparation of such documents or are due to other causes not solely within the control of the Architect.

1.7.13 Preparing Drawings, Specifications and supporting data and providing other services in connection with Change Orders to the extent that the adjustment in the Basic Compensation resulting from the adjusted Construction Cost is not commensurate with the services required of the Architect, provided such Change Orders are required by causes not solely within the control of the Architect.

1.7.14 Making investigations, surveys, valuations, inventories or detailed appraisals of existing facilities, and services required in connection with construction performed by the Owner.

1.7.15 Providing consultation concerning replacement of any Work damaged by fire or other cause during con-

struction, and furnishing services as may be required in connection with the replacement of such Work.

1.7.16 Providing services made necessary by the default of the Contractor, or by major defects or deficiencies in the Work of the Contractor, or by failure of performance of either the Owner or Contractor under the Contract for Construction.

1.7.17 Preparing a set of reproducible record drawings showing significant changes in the Work made during construction based on marked-up prints, drawings and other data furnished by the Contractor to the Architect.

1.7.18 Providing extensive assistance in the utilization of any equipment or system such as initial start-up or testing, adjusting and balancing, preparation of operation and maintenance manuals, training personnel for operation and maintenance, and consultation during operation.

1.7.19 Providing services after issuance to the Owner of the final Certificate for Payment, or in the absence of a final Certificate for Payment, more than sixty days after the Date of Substantial Completion of the Work.

1.7.20 Preparing to serve or serving as an expert witness in connection with any public hearing, arbitration proceeding or legal proceeding.

1.7.21 Providing services of consultants for other than the normal architectural, structural, mechanical and electrical engineering services for the Project.

1.7.22 Providing any other services not otherwise included in this Agreement or not customarily furnished in accordance with generally accepted architectural practice.

1.8 TIME

1.8.1 The Architect shall perform Basic and Additional Services as expeditiously as is consistent with professional skill and care and the orderly progress of the Work. Upon request of the Owner, the Architect shall submit for the Owner's approval, a schedule for the performance of the Architect's services which shall be adjusted as required as the Project proceeds, and shall include allowances for periods of time required for the Owner's review and approval of submissions and for approvals of authorities having jurisdiction over the Project. This schedule, when approved by the Owner, shall not, except for reasonable cause, be exceeded by the Architect.

ARTICLE 2

THE OWNER'S RESPONSIBILITIES

2.1 The Owner shall provide full information regarding requirements for the Project including a program, which shall set forth the Owner's design objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability, special equipment and systems and site requirements.

2.2 If the Owner provides a budget for the Project it shall include contingencies for bidding, changes in the Work during construction, and other costs which are the responsibility of the Owner, including those described in this Article 2 and in Subparagraph 3.1.2. The Owner shall, at the request of the Architect, provide a statement of funds available for the Project, and their source.

2.3 The Owner shall designate, when necessary, a representative authorized to act in the Owner's behalf with respect to the Project. The Owner or such authorized representative shall examine the documents submitted by the Architect and shall render decisions pertaining thereto promptly, to avoid unreasonable delay in the progress of the Architect's services.

2.4 The Owner shall furnish a legal description and a certified land survey of the site, giving, as applicable, grades and lines of streets, alleys, pavements and adjoining property; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and complete data pertaining to existing buildings, other improvements and trees; and full information concerning available service and utility lines both public and private, above and below grade, including inverts and depths.

2.5 The Owner shall furnish the services of soil engineers or other consultants when such services are deemed necessary by the Architect. Such services shall include test borings, test pits, soil bearing values, percolation tests, air and water pollution tests, ground corrosion and resistivity tests, including necessary operations for determining subsoil, air and water conditions, with reports and appropriate professional recommendations.

2.6 The Owner shall furnish structural, mechanical, chemical and other laboratory tests, inspections and reports as required by law or the Contract Documents.

2.7 The Owner shall furnish all legal, accounting and insurance counseling services as may be necessary at any time for the Project, including such auditing services as the Owner may require to verify the Contractor's Applications for Payment or to ascertain how or for what purposes the Contractor uses the moneys paid by or on behalf of the Owner.

2.8 The services, information, surveys and reports required by Paragraphs 2.4 through 2.7 inclusive shall be furnished at the Owner's expense, and the Architect shall be entitled to rely upon the accuracy and completeness thereof.

2.9 If the Owner observes or otherwise becomes aware of any fault or defect in the Project or nonconformance with the Contract Documents, prompt written notice thereof shall be given by the Owner to the Architect.

2.10 The Owner shall furnish required information and services and shall render approvals and decisions as expeditiously as necessary for the orderly progress of the Architect's services and of the Work.

ARTICLE 3

CONSTRUCTION COST

3.1 DEFINITION

3.1.1 The Construction Cost shall be the total cost or estimated cost to the Owner of all elements of the Project designed or specified by the Architect.

3.1.2 The Construction Cost shall include at current market rates, including a reasonable allowance for overhead and profit, the cost of labor and materials furnished by the Owner and any equipment which has been de-

signed, specified, selected or specially provided for by the Architect.

3.1.3 Construction Cost does not include the compensation of the Architect and the Architect's consultants, the cost of the land, rights-of-way, or other costs which are the responsibility of the Owner as provided in Article 2.

3.2 RESPONSIBILITY FOR CONSTRUCTION COST

3.2.1 Evaluations of the Owner's Project budget, Statements of Probable Construction Cost and Detailed Estimates of Construction Cost, if any, prepared by the Architect, represent the Architect's best judgment as a design professional familiar with the construction industry. It is recognized, however, that neither the Architect nor the Owner has control over the cost of labor, materials or equipment, over the Contractor's methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Project budget proposed, established or approved by the Owner, if any, or from any Statement of Probable Construction Cost or other cost estimate or evaluation prepared by the Architect.

3.2.2 No fixed limit of Construction Cost shall be established as a condition of this Agreement by the furnishing, proposal or establishment of a Project budget under Subparagraph 1.1.2 or Paragraph 2.2 or otherwise, unless such fixed limit has been agreed upon in writing and signed by the parties hereto. If such a fixed limit has been established, the Architect shall be permitted to include contingencies for design, bidding and price escalation, to determine what materials, equipment, component systems and types of construction are to be included in the Contract Documents, to make reasonable adjustments in the scope of the Project and to include in the Contract Documents alternate bids to adjust the Construction Cost to the fixed limit. Any such fixed limit shall be increased in the amount of any increase in the Contract Sum occurring after execution of the Contract for Construction.

3.2.3 If the Bidding or Negotiation Phase has not commenced within three months after the Architect submits the Construction Documents to the Owner, any Project budget or fixed limit of Construction Cost shall be adjusted to reflect any change in the general level of prices in the construction industry between the date of submission of the Construction Documents to the Owner and the date on which proposals are sought.

3.2.4 If a Project budget or fixed limit of Construction Cost (adjusted as provided in Subparagraph 3.2.3) is exceeded by the lowest bona fide bid or negotiated proposal, the Owner shall (1) give written approval of an increase in such fixed limit, (2) authorize rebidding or renegotiating of the Project within a reasonable time, (3) if the Project is abandoned, terminate in accordance with Paragraph 10.2, or (4) cooperate in revising the Project scope and quality as required to reduce the Construction Cost. In the case of (4), provided a fixed limit of Construction Cost has been established as a condition of this Agreement, the Architect, without additional charge, shall modify the Drawings and Specifications as necessary to comply

with the fixed limit. The providing of such service shall be the limit of the Architect's responsibility arising from the establishment of such fixed limit, and having done so, the Architect shall be entitled to compensation for all services performed, in accordance with this Agreement, whether or not the Construction Phase is commenced.

ARTICLE 4

DIRECT PERSONNEL EXPENSE

4.1 Direct Personnel Expense is defined as the direct salaries of all the Architect's personnel engaged on the Project, and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

ARTICLE 5

REIMBURSABLE EXPENSES

5.1 Reimbursable Expenses are in addition to the Compensation for Basic and Additional Services and include actual expenditures made by the Architect and the Architect's employees and consultants in the interest of the Project for the expenses listed in the following Subparagraphs:

5.1.1 Expense of transportation in connection with the Project; living expenses in connection with out-of-town travel; long distance communications, and fees paid for securing approval of authorities having jurisdiction over the Project.

5.1.2 Expense of reproductions, postage and handling of Drawings, Specifications and other documents, excluding reproductions for the office use of the Architect and the Architect's consultants.

5.1.3 Expense of data processing and photographic production techniques when used in connection with Additional Services.

5.1.4 If authorized in advance by the Owner, expense of overtime work requiring higher than regular rates.

5.1.5 Expense of renderings, models and mock-ups requested by the Owner.

5.1.6 Expense of any additional insurance coverage or limits, including professional liability insurance, requested by the Owner in excess of that normally carried by the Architect and the Architect's consultants.

ARTICLE 6

PAYMENTS TO THE ARCHITECT

6.1 PAYMENTS ON ACCOUNT OF BASIC SERVICES

~~6.1.1 An initial payment as set forth in Paragraph 14.1 is the minimum payment under this Agreement.~~

~~6.1.2 Subsequent payments for Basic Services shall be made monthly and shall be in proportion to services performed within each Phase of services, on the basis set forth in Article 14.~~

~~6.1.3 If and to the extent that the Contract Time initially established in the Contract for Construction is exceeded~~

~~or extended through no fault of the Architect, compensation for any Basic Services required for such extended period of Administration of the Construction Contract shall be computed as set forth in Paragraph 14.4 for Additional Services.~~

6.1.4 When compensation is based on a percentage of Construction Cost, and any portions of the Project are deleted or otherwise not constructed, compensation for such portions of the Project shall be payable to the extent services are performed on such portions, in accordance with the schedule set forth in Subparagraph 14.2.2, based on (1) the lowest bona fide bid or negotiated proposal or, (2) if no such bid or proposal is received, the most recent Statement of Probable Construction Cost or Detailed Estimate of Construction Cost for such portions of the Project.

6.2 PAYMENTS ON ACCOUNT OF ADDITIONAL SERVICES

6.2.1 Payments on account of the Architect's Additional Services as defined in Paragraph 1.7 and for Reimbursable Expenses as defined in Article 5 shall be made monthly upon presentation of the Architect's statement of services rendered or expenses incurred.

6.3 PAYMENTS WITHHELD

6.3.1 No deductions shall be made from the Architect's compensation on account of penalty, liquidated damages or other sums withheld from payments to contractors, or on account of the cost of changes in the Work other than those for which the Architect is held legally liable.

6.4 PROJECT SUSPENSION OR TERMINATION

6.4.1 If the Project is suspended or abandoned in whole or in part for more than three months, the Architect shall be compensated for all services performed prior to receipt of written notice from the Owner of such suspension or abandonment, together with Reimbursable Expenses then due and all Termination Expenses as defined in Paragraph 10.4. If the Project is resumed after being suspended for more than three months, the Architect's compensation shall be equitably adjusted.

ARTICLE 7

ARCHITECT'S ACCOUNTING RECORDS

7.1 Records of Reimbursable Expenses and expenses pertaining to Additional Services and services performed on the basis of a Multiple of Direct Personnel Expense shall be kept on the basis of generally accepted accounting principles and shall be available to the Owner or the Owner's authorized representative at mutually convenient times.

ARTICLE 8

OWNERSHIP AND USE OF DOCUMENTS

8.1 Drawings and Specifications as instruments of service are and shall remain the property of the Architect whether the Project for which they are made is executed or not. The Owner shall be permitted to retain copies, including reproducible copies, of Drawings and Specifications for information and reference in connection with the Owner's use and occupancy of the Project. The Drawings and Specifications shall not be used by the Owner on

er projects, for additions to this Project, or for completion of this Project by others provided the Architect is not in default under this Agreement, except by agreement in writing and with appropriate compensation to the Architect.

Submission or distribution to meet official regulatory requirements or for other purposes in connection with the Project is not to be construed as publication in derogation of the Architect's rights.

ARTICLE 9

ARBITRATION

All claims, disputes and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. No arbitration, arising out of or relating to this Agreement, shall include, by consolidation,inder or in any other manner, any additional person not party to this Agreement except by written consent containing a specific reference to this Agreement and signed by the Architect, the Owner, and any other person sought to be joined. Any consent to arbitration involving an additional person or persons shall not constitute consent to arbitration of any dispute not described therein or with any person not named or described therein. This Agreement to arbitrate and any agreement to arbitrate with an additional person or persons duly consented to by the parties to this Agreement shall be specifically enforceable under the prevailing arbitration law.

2 Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The demand shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

3 The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 10

TERMINATION OF AGREEMENT

10.1 This Agreement may be terminated by either party upon seven days' written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination.

10.2 This Agreement may be terminated by the Owner upon at least seven days' written notice to the Architect in the event that the Project is permanently abandoned.

10.3 In the event of termination not the fault of the Architect, the Architect shall be compensated for all services performed to termination date, together with Reimbursable Expenses then due and all Termination Expenses as defined in Paragraph 10.4.

10.4 Termination Expenses include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount computed as a percentage of the total Basic and Additional Compensation earned to the time of termination, as follows:

- .1 20 percent if termination occurs during the Schematic Design Phase; or
- .2 10 percent if termination occurs during the Design Development Phase; or
- .3 5 percent if termination occurs during any subsequent phase.

ARTICLE 11

MISCELLANEOUS PROVISIONS

11.1 Unless otherwise specified, this Agreement shall be governed by the law of the principal place of business of the Architect.

11.2 Terms in this Agreement shall have the same meaning as those in AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement.

11.3 As between the parties to this Agreement: as to all acts or failures to act by either party to this Agreement, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the relevant Date of Substantial Completion of the Work, and as to any acts or failures to act occurring after the relevant Date of Substantial Completion, not later than the date of issuance of the final Certificate for Payment.

11.4 The Owner and the Architect waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages covered by any property insurance during construction as set forth in the edition of AIA Document A201, General Conditions, current as of the date of this Agreement. The Owner and the Architect each shall require appropriate similar waivers from their contractors, consultants and agents.

ARTICLE 12

SUCCESSORS AND ASSIGNS

12.1 The Owner and the Architect, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such other party with respect to all covenants of this Agreement. Neither the Owner nor the Architect shall assign, sublet or transfer any interest in this Agreement without the written consent of the other.

ARTICLE 13

EXTENT OF AGREEMENT

13.1 This Agreement represents the entire and integrated agreement between the Owner and the Architect and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Architect.

2/27/85

Messrs Roger H. Elton and
John H. Laub
3900 North Wolf Creek Drive
Eden, Utah 84310

RECEIVED
SEP 23 1982
SALT LAKE CITY
UTAH

STATEMENT

July 29, 1982

Completion of Programming and Schematic Design Phase
(Phase I) for the design of the Wolf Creek Recreation
Center per Letter of Agreement dated March 4, 1982.

(Hourly fees exceeded agreed upon limit of \$7,500.00)

AMOUNT DUE:

\$7,500.00



WOLF CREEK PROPERTIES
P. O. BOX 633 745-3737
BRIGHAM CITY, UTAH 84302

1275

97-28/1243

23 September 1982

the *****BRIXEN & CHRISTOPHER ARCHITECTS*****
of

\$*7,500.00*

SEVEN THOUSAND FIVE HUNDRED and 00/100**

Dolla

BRIGHAM CITY OFFICE
First Security Bank of Utah
NATIONAL ASSOCIATION
MAIN & FOREST • BRIGHAM CITY, UTAH 84302

⑈001275⑈ ⑆124300288⑆039 00737 16⑈

PLAINTIFF'S
EXHIBIT
P-45

September 30, 1982

Messrs. Roger H. Elton and
John H. Laub
Attorneys at Law
3900 North Wolf Creek Drive
Eden, Utah 84310

Gentlemen:

I'm sorry that we were not able to meet today to go over our progress on the Wolf Creek Recreation Center.

I had a good meeting with Scott Allen last Friday at Wolf Creek to review our contract documents in progress. We identified some areas where refinements to the design could produce a better solution and have subsequently incorporated these into our drawings.

We have completed our work on the Phase One Bid Package and will deliver the package to Wolf Creek on Monday the 4th for issuance to bidders. The package includes all of the earthwork, a security fence and a construction sign.

Developing an estimate for the work on this bid package has been extremely difficult. We have received estimating information from two earthwork contractors that varies considerably. Our pricing information develops earthwork costs anywhere from \$33,000 to \$81,000. The huge discrepancy in these figures is due, largely, to unknowns in the quality of the fill material available. If we can use material at the sewer lagoon site, the cost may approach the low figure, provided that eliminating the large boulders is not cost prohibitive. If imported fill is purchased from a remote source, the cost may approach the high figure. We remain hopeful that the material at the lagoon will be satisfactory.

Fred, Scott and Clair were here this afternoon so we had a chance to review this bid package with them.

Messrs. Roger H. Elton and
John H. Laub

Page 2

Work on the other contract documents is progressing well,
with all of our consulting engineers in full gear in order
to meet our next deadline.

I would like very much to receive an executed copy of the
Owner/Architect Agreement so that I can execute agreements
with our consulting engineers.

Thanks very much.

Sincerely,

James W. Christopher, FAIA

JWC/je

Encl.

cc: Clair Cox

Messrs. Roger H. Elton and
John H. Laub
1900 North Wolf Creek Drive
Biden, Utah 84310

STATEMENT

September 30, 1982

Completion of design development and contract documents
for the Phase One Bid Package of site excavation and
preparation.

\$ 2,500.00

Balance from 6/29/82 statement

7,500.00

TOTAL AMOUNT DUE:

\$10,000.00

100 90

D6

BOYEN &

CHRISTOPHER

MR. HITTLE,
52 SOUTH
SECOND FAS,
SALT LAKE
CITY, UTAH 84143

Mr. Clair Cox
Wolf Creek Country Club Resort
3900 North Wolf Creek Drive
Eden, Utah 84310

DATE October 4, 1982
PROJECT Wolf Creek, Phase One
ADDRESS Eden, Utah
SUBJECT Phase One Construction

TRANSMITTAL Transmitted herewith are five sets of drawings and specifications for Phase One Construction "Earthwork", for the Wolf Creek Resort Recreation Center.

BY **50**
James W. Christopher, FAIA

D7

WOLF CREEK

10/4/82

QUESTIONS, ETC.

SCOTT MURPHY
FRED
CLAIR COX

- CCMR - delivered 3 sets of specs & drawings
- go over schedule - bid opening
 - review documents (Scott, Clair, Fred)
 - - phone in list of bidders } to B & C
 - - " " any agenda items }
 - building permit? - Clair to check on it
 - number of specs/plans - " Clair
 - on job - supervision by Chen
 - Clair to coordinate

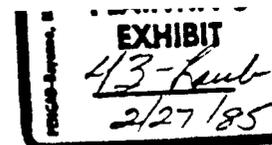
SCOTT

- tour of club facilities - 10/7/82 @ 10:30

JOHN WARD

- talked briefly about whether or not he wants to go ahead w/ site work this fall -
- JWC indicated that all of concrete work could not be accomplished this fall

ROGER H. ELTON, LTD.
ATTORNEYS AT LAW



PLEASE REPLY TO:

RENO OFFICE
777 WEST SECOND ST SUITE 220
RENO, NV 89503
MAILING ADDRESS
P O BOX 2278
RENO NV 89508
(702) 786-3886

LAS VEGAS OFFICE
NINTH FLOOR
VALLEY BANK CENTER
101 CONVENTION CENTER DRIV
LAS VEGAS, NV 89109

(702) 733-9996

December 1, 1982



John Laub, Esquire
Post Office Box 633
Brigham City, Utah 84302

Dear John:

Enclosed, for your information, is the Recreation Center architectural contract on Wolf Creek, together with a change order. I am not sure the change order is justified. Could you have Clair or Scott make a determination?

Yours truly,

A handwritten signature in cursive script, appearing to read "R. Elton".

Roger H. Elton

RHE: mh

Enclosures

BRIEN 4

L. CHRISTOPHER

ARCHITECTS
235 SOUTH
SECOND EAST
SALT LAKE CITY
UTAH 84111
(801) 363-4147

November 26, 1982

Mr. Roger H. Elton
Attorney at Law
P. O. Box 2878
Reno, Nevada 89505

Dear Roger:

Pursuant to our telephone conversation of last Wednesday, I have prepared an amendment to our Letter of Agreement dated August 2, 1982 for architectural services for the Wolf Creek Recreation Center.

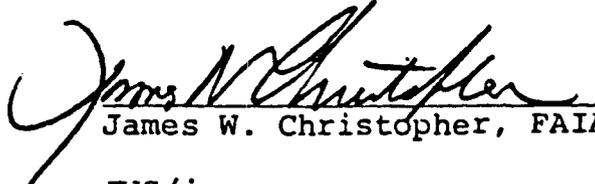
Since the date of the original Agreement, the scope of the project has been more closely defined (and expanded). Extra consulting fees will be required for structural design of the foundation system and retaining walls due to specialized sub-surface conditions as well as in mechanical design for a more complex mechanical system based upon our life cycle cost analysis. These additional consulting fees total an extra \$8,000.

Since the Agreement dated August 2, 1982 has not yet been signed by you, I am including two copies of it with the amendment for your signature. I've also included a statement for services to date through completion of Design Development, based upon the amended Agreement.

As you know, we are very anxious to have this Agreement signed and returned since we are well into the project and still have not been able to execute agreements with our consulting engineers.

Thanks very much for your prompt attention to this request.

Sincerely,


James W. Christopher, FAIA

JWC/je
Encl.

Mr. Roger H. Elton
Roger H. Elton, Ltd.
P. O. Box 2878
Reno, Nevada 89505

BANKEN &

CHRISTOPHER

ARCHITECTS
232 SOUTH
SECOND EAST
SALT LAKE CITY
UTAH 84111

STATEMENT

November 26, 1982

Completion of Design Development documents for the
Wolf Creek Recreation Center in accordance with payment
schedule outlined in Amendment No. 1 to Architect/
Owner Agreement of August 2, 1982.

<u>Work Completed</u>	<u>Fee</u>
Phase I - Schematic Design	\$ 8,500.
Phase II - Design Development	19,000.
Total Fee Earned:	<u>\$27,500.</u>
Amount Paid To Date:	-0-

TOTAL AMOUNT DUE:

\$27,500.

Mr. Roger H. Elton
Roger H. Elton, Ltd.
P. O. Box 2878
Reno, Nevada 89505

STATEMENT

January 17, 1983

Progress billing for architectural services for the
Wolf Creek Recreation Center in accordance with pay-
ment schedule outlined in Amendment No. 1 to Architect/
Owner Agreement of August 2, 1982.

<u>Work Completed</u>	<u>Amount</u>
Phase I - Schematic Design	\$ 8,500.
Phase II - Design Development	19,000.
Phase III - Construction Documents 85% complete	30,000.
Total Fee Earned:	<u>\$57,500.</u>
Amount Paid to Date:	-0-
TOTAL AMOUNT DUE:	\$57,500.

cc: John Laub

92
D10

WOLFENBACH

1/17/83

3:30 PM

→ ROGER ELTON
PHONE CALL

JWC CALLED ROGER ELTON & GAVE HIM
STATUS REPORT ON PROJECT.

- CONTRACT DOCS. NEARLY COMPLETE
- NEED STRUCT COORDINATION & CABINET WORK
" SNACK BAR
(SNACK BAR CAN NOT HAVE GRINDS)

B & C TO CONTACT SCOTT ALLEN THIS WEEK
FOR FURTHER COORDINATION

ROGER HAS BEEN ILL, BUT WILL TRY TO
FACILITATE PAYMENT TO US.

NEW STATEMENT MAILED TO ROGER W/ COPY
TO JOHN LAMB 1/17/83

February 18, 1983

Mr. Roger H. Elton
Attorney at Law
P. O. Box 2878
Reno, Nevada 89505

Dear Roger:

This morning we met to discuss the change in mechanical systems for the Wolf Creek Recreation Center. In attendance were representatives from our office, Olsen & Peterson (our consulting mechanical engineer), Wolf Creek (Scott Allen), and Energy Control Systems (manufacturers of the heat pump system).

The study conducted by our office and Olsen & Peterson yielded the following results.

1. Initial Costs

a) Mechanical System	- \$12,488
b) Electrical System	+ 2,500
c) Architectural System	+ 3,500
	<hr/>
Total Savings:	- \$ 6,500

2. Operating Costs

a) Savings per year	- \$ 2,000
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3. Additional mechanical, electrical,
and architectural redesign fees + \$ 4,380

The figures look good to us, and our engineers are very comfortable with the heat pump system. Other advantages include reduced moisture in the building, no propane tank requirements, and no rooftop equipment.

80083

D12

Scott Allen seems very pleased with the way that the same system is performing in the Time Share units and is willing to sacrifice the additional space required for the units within the building. His recommendation is to design and install the heat pump system.

Scott suggested that I transmit this information to you for your consideration, but not to initiate any further work until we receive direction from you.

Sincerely,

James W. Christopher, FAIA

JWC/jse

cc: John H. Laub
Scott Allen

ROGER H. ELTON, LTD.
ATTORNEYS AT LAW

PLEASE REPLY TO:

Reno

RENO OFFICE
WEST SECOND ST. SUITE 220
RENO, NV 89503
MAILING ADDRESS
P O BOX 2878
RENO, NV 89505
(702) 786-3880

LAS VEGAS OFFICE
NINTH FLOOR
VALLEY BANK CENTER
101 CONVENTION CENTER DRIVE
LAS VEGAS, NV 89109

(702) 733-9886

February 23, 1983

James W. Christopher, FAIA
Brixen & Christopher Architects
252 South Second East
Salt Lake City, Utah 84111

Dear Jim:

When Wolf Creek goes to bid on the Recreation Center,
we should have incorporated the mechanical systems change
you discussed with Scott.

Yours truly,


Roger H. Elton

RHE/mk

cc Scott Allen
John Laub

84
D13

WOLF CREEK

3/2/83
10:00 am

call to ROGER ELTON

1. - CONFIRMED RECEIPT OF LETTER FROM HIM REGARDING MECHANICAL SYSTEM

2. ASKED ABOUT PAYMENT

- they are expecting \$500,000 cash from a new investor
- Roger agrees that payment is long overdue JWC said payment is needed this week

Roger will call JOHN LOAN & call me back

3/4/83 pm

call from ROGER ELTON

1. EXTRA \$500,000 CASH IS COMING SOON - SHOULD BE IN FIST. SEC. BANK BY MID-NEXT WEEK

2. PAYMENT WILL BE MADE IMMEDIATELY - BUT NO LATER THAN 3/14/83 ~ 3/15/83

3. ROGER & JWC WILL BE IN TOUCH DURING WEEK OF 7 MARCH 1983

WOLFENBUTEL

4/14/83
ROGER ELTON
- REND

1. MET W/ DOGER IN HIS OFFICE
2. DOGER FELT THAT FINANCING WAS VERY CLOSE ON THE DEC. CENTER - SO WE COULD EXPECT PAYMENT IN NEAR FUTURE
3. DOGER AGREED TO PAY INTEREST ON THE MONEY OWED TO US
4. HE WAS VERY PLEASED W/ OUR WORK AND EMBARRASSED THAT WE HAD NOT BEEN PAID PROMPTLY

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DIS

10/17/83

WOLFCREEK

ROGER ELTON

- JWC ASKED ROGER FOR STATUS OF PROJECT AND WHEN B & C COULD EXPECT PAYMENT
- ROGER WAS NOT SURE AND ASKED ME TO TALK TO WILBUR BARNETT, © 1ST SEC. IN ORDER (1.621.0700)
- ROGER WAS TO TALK TO JOHN LAUB ALL

(WILBUR BARNETT OUT OF TOWN FOR ENTIRE WEEK) - TRY CRAIG DAY

11/1/83

JWC TALKED TO WILBUR BARNETT

- HE REFERRED ME TO

500
7186 ← BILL STARKWEATHER in SLR
REGARDING FINANCING OF
THE PROJECT
(SPECIAL LOAN COMMITTEE)

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