



DRAFT
MEETING MINUTES
CALIFORNIA ARCHITECTS BOARD
REGULATORY AND ENFORCEMENT COMMITTEE

NOVEMBER 5, 2020
Teleconference Meeting

Committee Members Present

Robert C. Pearman, Jr., Chair
Sylvia Kwan, Vice Chair
Cheryl DeMarco
Robert Ho
Ronald A. Jones
Sheran Voigt

Committee Members Absent

Fred Cullum

Board Staff Present

Laura Zuniga, Executive Officer
Marccus Reinhardt, Program Manager Examinations/Licensing
Idris Ahmed, Enforcement Analyst
Jasmine Newman, Enforcement Analyst
Michael Sganga, Enforcement Analyst
Katie Wiley, Enforcement Analyst
Annamarie Fernandez, Enforcement Technician
Stacy Townsend, Enforcement Analyst, Landscape Architects Technical Committee
(LATC)
Robert Chase, Enforcement Architect Consultant

Guests

Aubrey Jacobson
Jon S. Wreschinsky, Committee Chair, LATC
Jacob Welhouse
Karen Halbo, LATC Regulations Council
Mark Christian, Director of Government Relations, The American Institute of Architects,
California (AIACC)
Mary Kathryn Cruz Jones
Maria Luy

A. Call to Order / Roll Call / Establishment of a Quorum

Regulatory and Enforcement Committee (REC) Chair Robert C. Pearman, Jr., called the meeting to order at 10:16 a.m.

Sylvia Kwan called the roll. There being six members present at the time of roll, a quorum was established.

B. Chair’s Procedural Remarks and Committee Member Introductory Comments

Mr. Pearman announced the meeting is being held by teleconference and pursuant to the provisions of Governor Gavin Newsom’s Executive Order N-29-20, dated March 17, 2020, a physical meeting location is not being provided.

Mr. Pearman welcomed everyone and requested members provide self-introductions. Mr. Pearman noted that Ronald A. Jones is a new member of the committee.

C. Public Comment on Items Not on the Agenda

Mr. Pearman opened the floor for public comment regarding items not specified on the meeting agenda. No comments were received.

D. Review and Possible Action on August 1, 2019 REC Meeting Minutes

Mr. Pearman asked if there were any questions, comments, or changes to the August 1, 2019 REC Meeting Minutes. There were none.

Sheran Voigt moved to approve the August 1, 2019 REC Meeting Minutes.

Cheryl DeMarco seconded the motion.

Members Kwan, DeMarco, Committee Chair Pearman and Voigt voted in favor of the motion. Members Ho and Jones abstained. The motion passed 4-2-0.

E. Enforcement Program Update

Michael Sganga provided the Enforcement Program update and highlighted the status items of interest to the REC. He gave an update on enforcement unit staffing, including recognition of Assistant Executive Officer Vickie Mayer’s retirement after 44 years of state service; the use of a collection agency to recover unpaid fines; publications including the *Building Official Information Guide* and *Disciplinary Guidelines*; the Subject Matter Expert pool; legislation including the fingerprinting

program for new applicants; qualifications for Continuing Education providers, and additions to Business and Professions Code (BPC) § 5536.22 written contract requirements; and outreach presentations for American Institute of Architects (AIA) and architecture schools.

Enforcement statistics for the fiscal year were discussed, including the fact that the number of complaints received is down, which could be attributed to COVID-19 and this being a non-renewal year. Closure rates and types of cases are comparable to previous years.

Case summaries were reviewed and included citations for unlicensed designers using prohibited business names and fake stamps; unlicensed practice cases involving fire victims, stealing pool designs (California Code of Regulations § 152), and unconventional framing; and disciplinary cases including, professional negligence, criminal conviction, aiding and abetting, and incompetence.

No action was requested.

F. Discuss and Possible Action on 2019-2021 Strategic Plan Objectives:

Agenda Item F.1: Responsible Control Within Design-Build and Development Firms

Mr. Sganga described an update to the Board's informational bulletin to include recent changes in written contract requirements and additional statutes and regulations that apply to relationships between architects and unlicensed designers. Two different case scenarios were presented as examples of such relationships. In the first, a small design firm owned by an unlicensed person advertises using the word architecture or offering non-exempt services. If the company uses a licensed architect to justify the advertising, the architect must be an employee, officer, or owner, file a Business Entity Report Form (BERF), and be in management control of the company and responsible control over all design services. In the second example, a developer contracts to provide architectural services, then sub-contracts out the designs to an independent architectural firm. The architectural firm affiliated with the development firm is then responsible for ensuring that written contract requirements are fulfilled.

The updated informational bulletin is being used in conjunction with the Board's *Design Limitations* publication to explain to unlicensed people what they can design and explains to architects their responsibilities when they are in such business relationships.

No action was required, but feedback was requested. Ron Jones asked how the relationship should be presented in a situation where the architect is working on a master plan and does not have direct contact with the customer. Mr. Sganga discussed the importance of providing enough information to the consumer through the contract documents so they can identify the architect of a project if they want to file a complaint with the Board. There is no exception under the written contract requirements for providing services through a developer. Mr. Jones added that, in his experience, developers do not want the customer to have direct contact with the architect because then they will want individual customized service. Ms. Kwan observed that the homeowner is often a third party to the contract and would not have the ability to make a claim against the architect directly. Mr. Jones recognized that the consumer is the most vulnerable in this scenario and it is important to find a way to offer them protection.

Agenda Item F.2: Management Control Within the Design-Build Model

Jasmine Newman presented this agenda item and explained that it had come to the Board's attention that compliance issues were hindering the Board's enforcement of the Architects Practice Act (Act). The CCR § 134 (Use of the Term Architect; Responsible Control within Business Entity) prohibits the use of the word architect in a business name or description of services unless there is a licensed architect on staff in management control of all design projects. CCR § 134(c)(2) defines "management control" as meaning "general oversight of the professional services offered and provided by the business entity." Ms. Newman explained that issues arise because the Board has no way of tracking or requesting that a firm file the name of the architect in management control of the professional services they provide, and the Act does not include a requirement for licensees to inform the Board if they are in management control of a firm's professional services.

Ms. Newman explained that the Board's Enforcement Unit commonly discovers practicing licensed architects that do not have a BERF filed with the Board.

Ms. Newman presented statistics on compliance with BPC § 5558. According to a report of Board records from July 2020, the Board had 21,934 current licensees, but only had 15,602 BERFs filed. Out of selection of 100 random current licensees, 31 out of 100 (31%), did not have current BERFs on file. According to an internet search of the 31 licensees without a BERF on file, 23 appeared to currently be providing architectural services in the State of California. If 23% of all licensees were not compliant with BPC § 5558, 5,000 licensees would be practicing without a BERF on file.

Ms. Newman described another issue commonly seen in many unlicensed and advertising complaints is design or design-build firms that do not either employ or

have part-ownership with a California licensed architect advertise as having “architects” or offer “architectural” services. Upon being contacted by the Board as a result of the complaint, they will hire an architect on a consultant basis, and then have the architect submit a BERF to the Board thinking that is sufficient for the requirements of CCR § 134.

The final issue presented by Ms. Newman involved aiding and abetting by licensees. An architect who works as an independent contractor or consultant for a firm that advertises architectural services could be held liable for aiding and abetting because they do not have management control over all professional services offered by the firm, such as services on projects that are considered exempt under BPC § 5537, yet they allow them to use their licensed status to advertise architectural services.

Ms. Newman presented the Committee with the proposed revisions to the BERF, which included adding an option to disassociate from a single entity and the effective date; and adding a statement that signing the form declares under penalty of perjury that all representations on the form are true, correct, and contain no material omissions of fact. Ms. Newman also presented the Committee with an informational bulletin explaining the requirements of BPC § 5558 and the updates to the BERF, to be delivered to licensees through email and publication on the Board’s website.

Ms. Newman asked the Committee to consider the proposed revisions to the BERF and make a recommendation to the Board to address this Strategic Plan objective.

A member of the public, Mr. Jacob Welhouse, asked about the BERF having no way to indicate the licensee is in management control. He commented that he thought it was very important, and a gray area for a lot of companies not owned by architects. He felt that the burden of establishing who is in management control is placed on the employees, who frequently do not have the “teeth” to establish control over how the firm does business. Ms. Newman explained that the Act currently contains no requirement for licensees to file with the Board if they are in management control of services provided to a firm, so it was determined that the Board cannot include that option on the BERF form. She commented that the Board may consider adding such a requirement to the Act in the future.

Mr. Pearman asked that if the Act does not specifically say the Board can include something on the form, that means it cannot be added. Ms. Newman explained that Board counsel recommended the Board only include what was required by the Act on the form.

Mr. Jones commented that adding such an option would resolve Mr. Welhouse’s concern and allow an employee architect who does not have management control to communicate to the Board that it’s their understanding they lack that control. This would be helpful to the Board if a complaint arises. Ms. Newman explained that the

Board agreed with that reasoning but could only include what was required by the Act on the form.

Ms. Kwan asked Mr. Pearman if the REC could make the recommendation for the change to the Board.

Laura Zuniga explained that the reason the Board could not add the management control option to the BERF was because the Act does not require architects report this information, so it would require a statutory change. She commented that if the REC wanted to recommend this item to the Board, it would be for the Board to sponsor legislation.

Mr. Pearman suggested the Board discuss the issue and why it would require a statutory change.

Ms. Kwan suggested the Board speak with counsel, and Ms. Zuniga agreed to add the item to the December Board meeting and have staff work with Board counsel on developing the item.

Ms. Voigt commented that the recommendation from counsel was not to include it on the form, and recommended the Board ask counsel if they can find a way to make the option correct to be on the form.

Mr. Pearman called the question of whether the revised BERF should be approved as discussed.

Sheran Voigt made a motion to approve the revisions to the BERF, but with the caveat that the REC would like to see the inclusion of the person in management control on the form.

Sylvia Kwan seconded the motion.

Members Kwan, DeMarco, Ho, Jones, Voigt, and Committee Chair Pearman, voted in favor of the motion. The motion passed 6-0.

Agenda Item F.3: Restricting Advertisement of Architectural Services by Unlicensed Entities: Proposed Adoption of California Code of Regulations (CCR), Title 16, Division 2, Article 5, § 135 to Require Architect License Number in Advertising

Idris Ahmed presented this agenda item and explained that the Board's 2019-2021 Strategic Plan contained an objective assigned to the REC to collaborate with websites to restrict unlicensed advertisements.

BPC § 5536(a) prevents unlicensed individuals from advertising architectural services or themselves as architects, and is one of the most common complaints the Board receives. Most violations occur online.

Mr. Ahmed explained the process that staff use to handle unlicensed advertising, shared that staff developed the idea of requiring a license number on advertisement to easily distinguish between licensed architects and unlicensed individuals. Other California entities with license number requirements include the Contractors State License Board (CSLB), Department of Real Estate, Board of Behavioral Science, and the pending regulation the Board approved for Landscape Architects.

Staff sent a survey to architects for input and of the 1,500 responses, 66% reacted positively. Concerns expressed in the survey related to large firms, license number fraud, and impact of regulation.

The REC had previously sent this issue to the Board during the February 2020 meeting and the Board expressed concerns regarding how the regulation would be implemented and whether it would protect consumers. The Board asked that the concerns be addressed by the REC and research conducted about how such a regulation would increase consumer protection.

Board staff was unable to find conclusive data. Mr. Ahmed presented information regarding the Landscape Architect Technical Committee (LATC), Board of Professional Engineers, Land Surveyors, Geologists (BPELSG), and CSLB. BPELSG did not have "Engineer" as a protected term, but instead had specific terms like "Registered Engineer." CSLB stated the license number was beneficial for consumers to determine if a contractor was licensed.

Mr. Ahmed presented a sample advertisement to show the difference between an architect and unlawful advertisement. Mr. Ahmed explained the regulation would not be used to punish architects and they would be provided advisements for initial violations.

Mr. Ahmed explained that large firms would use the person in management control on advertisements. Staff would evaluate cases with the perspective that the regulation is to benefit consumers and architects by identifying unlawful advertising online. Mr. Ahmed pointed out that the regulation was updated to remove building signs.

Mr. Ahmed remarked that the Engineers Practice Act has specific terms that an engineer can use but did not know why it was less restrictive.

Sheran Voigt added licensed individuals in real estate must have their license number on advertisements after a new rule was made. Although challenging at first, it is beneficial, and she thought it was a good idea.

Cheryl DeMarco stated that she thought it was important to implement the regulation. She said there was confusion that consumers deal with unlicensed persons who use architectural in their name. Ms. DeMarco said that license numbers can always be stolen and there is currently that risk because license numbers are available online.

During public comment, Mark Christian with AIACC, stated that they have no position on the matter and appreciate that it is not intended to penalize architects. Mr. Christian expressed concern about how large firms in multiple states would advertise in California and how the Board would deal with such an issue.

Mr. Pearman thought the regulation would be beneficial and asked for a vote.

Sylvia Kwan moved to approve the proposed language to adopt the proposed regulation of California Code of Regulations (CCR), Title 16, Division 2, Article 5, Section 135 and recommend to the Board that it approve the regulation and delegate authority to the Executive Officer to adopt the regulation.

Cheryl Demarco seconded the motion.

Members DeMarco, Ho, Jones, Kwan, Committee Chair Pearman, and Voigt voted in favor of the motion. The motion passed 6-0.

G. Discuss and Possible Action on Proposed Amendments to Regulations

Agenda Item G.1: CCR, Title 16, Division 2, Article 8, Section 152, Citations

Katie Wiley presented this agenda item and explained that CCR § 152 was adopted in November 1986 and was later changed in September 2005 when BPC § 152(c)(1) was amended to allow issuance of a citation when the Executive Officer determines that the violations involve an unlicensed person who has violated any provision of BPC § 5536 Practice Without License or Holding Self Out as Architect.

A large number of complaints received by the Board are related to unlicensed practice. Roughly 25% of complaints are regarding advertising. Currently, CCR §152 does not allow the Board to cite unlicensed individuals directly for violations of:

- BPC § 5536.1--Signature and Stamp on Plans and Documents; Unauthorized Practice; Misdemeanor
- BPC § 5536.4 Instruments of Service—Consent
- BPC § 5536.5 State of Emergency; Practice Without License or Holding Self Out as Architect; Penalty
- CCR § 134 Use of the Term Architect; Responsible Control within Business Entity

There is little incentive for unlicensed individuals to pay the fines associated with the citations they have been issued. The changes to CCR § 152 will allow the citations to be more accurate and include multiple section violations in the citation. The citation will include all the possible violations of the Act and be more inclusive of the violations when displayed on the Enforcement Actions summary online. This will assist in sharing the information with consumers to protect them from potential future harm. It will also distinguish a pattern of behavior if an unlicensed individual continues to display the same actions in the future. Additionally, it would make the Board's case stronger if it needed to be referred to the District Attorney's office for further criminal charges.

Ms. DeMarco questioned the timeframe to respond to an issued citation. Ms. Wiley verified that a Respondent has 30 days to appeal a citation and request an informal or formal administrative hearing. Ms. DeMarco wondered if it was difficult to serve citations to unlicensed individuals with an unconfirmed address. Ms. Wiley responded that the Board has procedures in place to ensure it has accurate mailing addresses and unlicensed individuals are notified of citations properly.

Ms. Kwan commented that this change to the language is a good idea and she supports the language.

Sheran Voigt moved to approve the proposed language to amend CCR § 152 and recommend to the Board that it approve the regulation and delegate authority to the Executive Officer to adopt the regulation.

Ronald A. Jones seconded the motion.

Members DeMarco, Ho, Jones, Kwan, Committee Chair Pearman and Voigt voted in favor of the motion.

The motion passed 6-0.

Agenda Item G.2: CCR, Title 16, Division 2, Article 9, § 160, Rules of Professional Conduct

Ms. Wiley presented this agenda item and reminded the REC that CCR § 160 became effective in 1998 when BPC § 5526 was amended to adopt rules for professional conduct for architects. The REC was asked to review and discuss the proposed regulation to amend CCR § 160 to clarify negligence and willful misconduct.

Ms. Wiley highlighted the key problems with the language. The current language does not define the standard of care. Articles a, c, d, e, and f are all elements correctly describing actions by an architect. However, the title of CCR § 160(b) is a description of a violation, not an action. CCR § 160(b)(1) should be article 3 under Standard of Care and find a better description for what is currently 160(b)(2). The proposed changes to the language would also provide clarification by reorganizing the language.

The benefits of these changes are similar to CCR § 152 regarding consumer protection, but it will also promote clarity to licensees on the rules of professional conduct and allow the Board to clearly cite for specific violations of the regulation.

Mr. Pearman requested that the titles for “Standard of Care” and “Competence” be switched so that (a) would be Competence and (b) would be Standard of Care. Mr. Christian agreed with this suggestion and stated § (b) is a close definition of the standard of care as defined for the judicial council for juries.

Mr. Christian also expressed concerns about the proposed language and wanted to verify if the sentence, “A breach of the duty of care is determined by reference to whether the individual departed from the standard practice, the custom of the profession, or a statute which establishes a particular standard” is a definition for the duty of care. Ms. Wiley responded that standard of care and duty of care are

interchangeable and explained that the REC could make changes to the proposed language. Ms. Kwan interjected and suggested using the term standard of care for consistency and Ms. Voigt agreed.

Mr. Christian further asked if the proposed language “a failure to fulfill the duty of care is negligence” is needed to clearly establish the standard of care definition. Mr. Christian indicated that standards for courts consists of four items that case law allows in court: injury, actual loss or damage resulting from professional negligence.

Mr. Christian is fearful that establishing a line like this when no damage or harm is done is going a bit too far. A single error where there is no harm and no loss according to this would rise to a level of negligence. He questions if negligence is the appropriate word to call it.

Mr. Pearman explained that this language could be referred to legal counsel for review where it can be stricken or changed. In court, you must show the standard has been violated and then you must show causation, and then show damages. We are just trying to show the licensee breached the duty.

Robert Chase commented that the standard of care indicates an act that another architect in similar circumstances would not commit; where no other architect would likely perform that way could lead to negligence.

Mr. Christian asked if the Board has the authority to determine negligence. Mr. Chase said that that Board can determine violations of negligence but deferred to Mr. Sganga who confirmed that BPC § 5584 gives the Board jurisdiction to cite or discipline for negligence. Negligence itself is not defined, but we are trying to make a clearer definition of the standard of care.

Jon Wreschinsky questioned if the LATC should amend their professional conduct language to mirror the Board and provide consistency among the profession. Ms. Zuniga commented that this was something that could be evaluated.

Sylvia Kwan moved to approve the proposed language with the suggested edits to amend CCR § 160 and recommend to the Board that it approve the regulation and delegate authority to the Executive Officer to adopt the regulation.

[The proposed language for the title of subsection (a) would read “Competence” and title for subsection (b) would read “Standard of Care.”

The REC would like legal counsel to review the sentence that reads: “A failure to fulfill the duty of care is negligence.”]

Robert Ho seconded the motion.

Members DeMarco, Ho, Jones, Kwan, Committee Chair Pearman, and Voigt voted in favor of the motion.

The motion passed 6-0.

H. Update on the California Secretary of State Requirements for Naming Professional and General Stock Corporations

Mr. Sganga explained that the Enforcement Unit regularly receives questions from professionals about setting up an architectural firm and the naming conventions that apply. The Board only has jurisdiction over the formation of Professional Corporations, and the Secretary of State has enforced these naming rules differently over the years.

Mr. Christian commented on the current position of the Secretary of State, which is that businesses cannot use the word Architects in their name unless they are a Professional Corporation. AIA has made efforts to get them to reverse their position.

No action was requested. Ms. Kwan asked that the Board be updated regarding any legislation involving this issue during 2021.

I. Adjournment

The meeting adjourned at 1:09 p.m.