



Edmund G. Brown Jr.
GOVERNOR

CALIFORNIA ARCHITECTS BOARD

PUBLIC PROTECTION THROUGH EXAMINATION, LICENSURE, AND REGULATION

SUMMARY REPORT

REGULATORY AND ENFORCEMENT COMMITTEE

April 25, 2013

Sacramento, California

Committee Members Present

Michael Merino, Chair
Fred Cullum
Robert De Pietro
Gary McGavin
Phyllis Newton, Esq.

Committee Members Excused

Robert Ho
Fermin Villegas
Sheran Voigt

Board Staff Present

Doug McCauley, Executive Officer
Vickie Mayer, Assistant Executive Officer
Hattie Johnson, Enforcement Officer
Bob Carter, Architect Consultant
Barry Williams, Architect Consultant
Peter Merdinger, Enforcement Analyst
Sonja Ruffin, Enforcement Analyst

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Guests

Kurt Cooknick, Director of Regulation and Practice, The American Institute of Architects, California Council (AIACC)

A. Welcome and Introductions

Regulatory and Enforcement Committee (REC) Chair, Michael Merino called the meeting to order at 10:00 a.m. He welcomed the REC and staff, and requested self-introductions. Members, staff, and guests introduced themselves.

Mr. Merino explained that his background was local government and noted that the meeting would be guided by Robert's Rules of Order. He indicated that staff would present each agenda item and up to five minutes of public comments would be allowed for each member of the public. He noted this will be followed by Committee motion, discussion of the motion, and final vote. He requested that Committee members raise their hand to be recognized by the chair, if they wish to make a comment. He added that in the future, staff recommendations will be included in meeting agenda packages to assist in framing motions.

B. Roll Call

Hattie Johnson initiated roll call and indicated Robert Ho, Fermin Villegas, and Sheran Voigt were excused. A quorum was present.

C. Public Comments

Mr. Merino opened the floor for public comments. No comments were received.

D. Consent Agenda (Review and Approve October 11, 2012 REC Summary Report)

Mr. Merino asked for a motion to approve the Consent Agenda.

A motion was made by Fred Cullum and seconded by Robert De Pietro to approve the Consent Agenda. The motion passed 3-0-2 (Michael Merino and Gary McGavin abstained).

E. Enforcement Program Update

Ms. Johnson announced the Department of Consumer Affairs' (DCA) intention to award Bob Carter with a new contract as one of the Board's architect consultants. She stated the next meetings for the Board are scheduled for June 13, 2013 in Sacramento, September 12, 2013 in Southern California, and December 12 and 13, 2013 at a place to be determined. Ms. Johnson noted the number of complaint cases pending in March were 83. She indicated that a few years ago the number of pending complaint cases was over 300. Doug McCauley added this substantial decrease took effect under the State mandated furloughs, sunset review, and a wide range of other restrictions.

Mr. McCauley noted Assembly Bill (AB) 186 (Maienschein) relates to spouses, domestic partners, and other legal unions of active duty members in the armed forces providing for criteria of issuance of a conditional license. He indicated the legislation was amended to include a requirement that candidates meet specific preconditions for licensure.

Mr. McCauley stated the initial vote of the Board was to support this bill with caveats; however, based upon new information from legal counsel, the Board may re-evaluate this issue.

Mr. De Pietro questioned the affect of this bill on other boards and bureaus within DCA. Mr. McCauley responded that this bill affects licensure for other boards and bureaus. Mr. De Pietro questioned whether the individuals meeting this requirement would be provided with special treatment. Mr. McCauley stated it was his understanding that the persons meeting this criteria would receive an expedited temporary license if the person was licensed in another state. Mr. Merino noted that the Board supported the initial intent of this, bill but it may have to review all affects of the provisional licensure.

Mr. McCauley stated AIACC is sponsoring AB 630 (Holden), which concerns architect's instruments of service, and the use of those instruments by subsequent parties. He indicated that the Board voted to support this bill with caveats. Mr. McCauley noted there could be potential for concern in the event of early termination of the contract, even if the architect has been paid, and the client would be forced to renegotiate for use of the plans. He added that another concern the Board had was whether this legislation should be included in the Architects Practice Act.

Mr. McCauley stated Senate Bill 308 (Price) concerns the California Council of Interior Design Certification (CCIDC), which is a non-profit organization that certifies interior designers. He noted that in the interior design community there are two distinct groups; one which thinks the current system is effective and one which believes interior designers should be licensed under a state board. Mr. McCauley indicated one issue raised by this second group is that building departments will not accept interior designers' plans. He added that the proposed remedy would be to modify the building code's definition of a registered design professional to include engineer, architect, or certified interior designer and codify it in State law. Mr. Cullum noted non-life safety and non-structural plans may be designed by anyone. He added the question is what constitutes life safety. He advised that he accepted these types of plans in his role of building official; however, not all jurisdictions do. He noted that he felt the current definitions are acceptable.

Phyllis Newton stated that the statistics of the California Supplemental Examination (CSE), since the exam transitioned to the multiple-choice format, showed a 59% pass rate. She questioned how these statistics compared to the previous oral CSE format. Vickie Mayer stated the passing rate for the oral CSE was slightly lower than the new format. Mr. McGavin asked if there was an expectation of what pass rates should be. Mr. McCauley responded that there was not. He added the main requirement for a licensing occupational exam's success is abiding by the national standards to ensure that the exam development process is valid and results in an exam that tests for minimal competency. Ms. Newton noted The State Bar of California passage rate is approximately 50% and has been for decades. Mr. Merino indicated there is no specific percentage that can gauge a pass rate and any concerns would be directed to the Professional Qualifications Committee.

Ms. Newton stated the Board is doing an Occupational Analysis (OA) and asked whether the Strategic Plan objective concerning the definition of the practice of architecture could wait until the conclusion of the OA. Mr. Merino responded this will be discussed under Agenda Item F.1.

Kurt Cooknick asked if the Board has determined how consumers would be protected if an architect with a provisional 18 month license (pursuant to AB 186) contracts to provide services in the 17th month of this limited license for a project that will last longer than one month. Mr. Merino responded that the Board took a support position on this bill because of the intent; however, this issue needs to be revisited due to many factors including the CSE requirement. Mr. McCauley indicated that many of the other professional licensing boards have taken an opposing position on this issue.

Mr. Cooknick asked if the settlement cases closed under the statistics portion of the Enforcement Program Update could also include the outcome of how the cases were closed. Mr. Merino stated this issue will be responded to at the next meeting or at the Board level.

F. 2013 Strategic Plan Objectives

F.1 Discuss and Possible Action on Strategic Plan Objective to Examine Definition of the Practice of Architecture and Potentially Consider Creating a Definition of “Instruments of Service” for a Regulatory Proposal

Ms. Johnson stated this issue arose due to a question by the Certified Access Specialist Institute (CASI) which inquired whether the services performed by licensed California architects who are also Certified Access Specialists result in instruments of architectural service and covered under the Architects Practice Act. Ms. Johnson indicated the Board advised CASI that such work product would be considered instruments of services.

Ms. Johnson noted that the REC meeting packet, under Agenda Item F.1, contained two definitions of instruments of service: one from the Landscape Architects Practice Act and the other from The American Institute of Architects. She reminded members that Ms. Newton had researched case law concerning instruments of services and found two relevant cases from 1950 and 1955. She stated that the Board agreed with the REC’s recommendation that an analysis of the contemporary practice of architecture be performed to determine whether the definition contained in Business and Professions Code section (BPC) 5500.1 should be amended, followed by a further review of the definition of instruments of service.

Ms. Johnson stated that staff’s recommendation to the REC regarding this issue is that it recommend to the Board that the new OA [National Council of Architectural Registration Boards (NCARB) and CSE] be used as main research material for this objective and that AIACC provide background materials and additional evidence on the need to modify this statute. Mr. Merino opened this topic for public comment.

Mr. Cooknick stated the AIACC feels the timing for this topic should be tabled for now due to NCARB's practice analysis, which will not be published until July, followed by the Board's OA next year. He stated this information may be vital to this topic. He suggested tabling the issue until the OA has been reviewed and it is understood more clearly what the profession is experiencing. Mr. Merino stated that Mr. Cooknick's comment coincides with the staff recommendation.

Mr. McGavin questioned if this issue is looking at the current definition of architecture or the big picture and what architecture could be someday. Mr. Merino stated NCARB is concerned about this as well and is looking at the future definition of architecture.

A motion was made by Phyllis Newton and seconded by Fred Cullum to approve the staff recommendation to recommend to the Board that the new occupational analyses (NCARB and CSE) be used as main research material for this objective and AIACC provide background materials and additional evidence on the need to modify this statute. The motion passed 5-0.

F.2 Discuss and Possible Action on Strategic Plan Objective to Review and Consider Adding Mediation to Reporting Requirements [Business and Professions Code (BPC) Section 5588]

Ms. Johnson stated the BPC 5588 requires architects and their professional liability insurance carriers to report to the Board any settlement or arbitration award in excess of \$5,000. She indicated that when the Board receives this information, a report is opened and the architect is requested to provide additional materials, which will be given to the Board's architect consultant to determine whether there are any potential violations of the Architects Practice Act. Ms. Johnson indicated that in 2004 the Board approved the REC recommendation that BPC 5588 be amended to require settlements precipitated by a legal action be reported if they alleged wrongful conduct. She stated the wording of this section states arbitration awards, settlements, and judgments but does not include the term mediation. She noted the question was whether mediation is an action required to be reported.

Ms. Johnson stated staff asked this question of the Board's Deputy Attorney General (DAG) Liaison who opined that court ordered mediation is required to be reported; however, if this mediation was not precipitated by a legal action, mediation is not reportable. She indicated that staff recommends that the REC recommend to the Board that the term mediation be added to BPC section 5588, with clarified language that mediation and the other actions currently specified in this statute are reportable only if precipitated by civil action.

Mr. McCauley advised that the intent of the staff recommendation is to make clear that each of the elements of this statute is only reportable if precipitated by legal action. He added that this is the result of meetings with insurance companies and attorneys in 2004 and 2005. He noted the intent was that they did not want the Board bombarded with reports that may be the result of change orders. Mr. Merino

agreed and recommended approving staff's recommendation to add mediation and clarify the language in BPC 5588, revise it, and bring it to the full Board for the next Board meeting.

Mr. Cooknick expressed his concern of an unintended consequence with revising this section. He asked what would occur if a project the architect designed has a problem, and the architect resolves the issue and agrees to be responsible for the costs. He wanted to ensure that this would not be considered a reportable mediation pursuant to BPC 5588. Mr. Merino clarified his view of the staff recommendation is to only add a requirement that court ordered mediation be added to the section. Mr. Merino requested that AIACC work with the staff in revising this statute. Mr. De Pietro expressed his concern that the revision of language be clear that mediation is court ordered. Ms. Newton expressed her concern on the effect of the use of mediation. She noted that if mediation is used as called for in the vast majority of contracts and a settlement of \$10,000 is reached, that mediation would not be reportable; however, if the contract calls for litigation and the court orders mediation, then it would be reportable. She indicated this may encourage architects to use mediation in their contracts and might it be a detriment to consumers. She recommended that this be further studied and brought back to the REC, and offered her assistance.

Ms. Mayer asked Mr. Merino whether the REC should approve the recommendation that mediation be included in BPC 5588 before staff recommends a clarification of the language. She added that this issue was included in the Board's Strategic Plan. Mr. Merino stated that the REC is a body that makes decisions, like the Board does. He asked if staff wanted a task force to review this and make a recommendation to the REC. He indicated this whole issue should not be discussed at the meeting. Mr. Merino asked for volunteers for the task force. Ms. Newton and Mr. McGavin volunteered.

A motion was made by Robert De Pietro and seconded by Phyllis Newton to establish a working group to explore the inclusion of mediation to BPC section 5588, and provide the specific language (if applicable) to be revised for the REC's consideration before presenting to the Board. In addition, AIACC would be invited to participate. The motion passed 5-0.

F.3 Discuss and Possible Action on Strategic Plan Objective to Review and Update CAB's Disciplinary Guidelines

Ms. Johnson stated the function of the disciplinary guidelines is to establish consistency in disciplinary penalties for similar offenses on a statewide basis. She stated they are designed for use by administrative law judges, attorneys, licensees, staff, and others involved in the disciplinary process. Ms. Johnson noted the guidelines were last revised in 2000. She explained that the guidelines were shared with the Board's DAG Liaison, Mike German, who made suggested revisions that are included with staff revisions in the REC meeting packet. She stated the DAG suggested the REC may want to consider using three years minimum probation as

opposed to the current five years for some of the less serious violations. She noted that the staff recommended that the REC accept the proposed changes to the disciplinary guidelines as presented in the packet or as modified by the REC and that the new language go to the Board for approval and adoption of the new guidelines.

Ms. Newton commented she was concerned about striking out “governing the practice of architecture in California” on page eight, under item one, Obey All Laws. She stated that the affect would be that the probationer would have to obey all federal, state and local laws without it relating to the practice of architecture. She noted that this section should be narrowed to include the practice of architecture. Mr. Merino stated it is his understanding that there is currently a statute that addresses a licensee violating a law related to the practice of architecture. He suggested that the language in statute already in effect be utilized in the disciplinary guidelines. Ms. Mayer stated this revision was provided by the DAG Liaison and staff will contact him for more information concerning his recommendation. Mr. McCauley theorized the Board may want to retain the authority and flexibility and rely on the professional discretion of the judges, attorneys general, and enforcement staff. He noted that ultimately, the final disciplinary decision will be made by the Board.

Mr. Merino suggested that staff note this is an item of concern, and then bring back to the REC. Ms. Mayer noted that the DAG Liaison had indicated that this was standard language in other boards’ disciplinary guidelines.

Mr. De Pietro commented that under item five on page nine, Tolling for Out-of-State Practice, it states, “non-practice is defined as any period of time exceeding thirty days.” He asked what if the architect did not have any work for 30 days through no fault of his own and whether this time limit should be expanded. Ms. Mayer explained the practice of architecture includes offering architectural services which the architect might do within that 30 days; however, this will be confirmed with the DAG Liaison.

A motion was made by Gary McGavin and seconded by Phyllis Newton to further modify the language with the input received from the Committee and be presented at the next REC meeting for approval to recommend to the Board. The motion passed 5-0.

F.4 Discuss and Possible Action on Strategic Plan Objective to Review and Consider Adding a Provision Regarding “Scope of Work” to the Written Contract Requirements (BPC Section 5536.22)

Mr. Carter noted the written contract requirements in statute define the consumer and architect relationship and has done much to improve it. He stated that in the course of investigating complaint cases, staff has discovered that not requiring the scope of work be included in a written agreement has caused miscommunications and confusion between architects and consumers. Mr. Carter opined that the scope of work should be included in the description of services in BPC 5536.22.

Mr. Carter stated another issue concerns architects filing a mechanics' lien for design services. He noted this is acceptable; however, there are two key requirements before a lien is filed. One requirement is to have an executed written agreement with the property owner, not necessarily with the client; and the other is that the architect needs to have furthered the work in some fashion. He noted BPC 5536.22 (a)(3) requires the name and address of all parties and suggested that the contract include the name and address of the property owner. He stated if an architect has a contract with a tenant and not the property owner, the architect cannot file a mechanics' lien because the contract is not with the property owner.

Mr. Carter noted BPC 5536.22 (a)(4) requires the description of the procedure the architect and client will use to accommodate additional services. He explained that California Code of Regulations section (CCR) 160 (f)(1) forbids an architect from altering the scope of work without first obtaining written permission from the client. He indicated that many times, staff has seen the scope expand without written consent from the client. He recommended that BPC 5536 (a)(4) be revised to include contract changes including changes in project scope. He noted there are instances where the architect does not know the scope of the work at the beginning of the project. He stated that if this occurs, the architect and client's contract should state they are exploring to determine a design scheme and determine a definition of the project, and specify an hourly fee.

Mr. Cooknick stated that one missing element in this contract requirement is the timeframe to complete a project. He noted that there are many reasons a project would take time. Mr. Carter responded that another issue is budget or cost. He indicated that the AIA Manual of Practice describes scope as size, shape, cost, and time. Mr. Merino opined that there is some responsibility on the architect to ensure he is writing a competent contract. He stated he was concerned about mitigating every possibility of a conflict by a consumer and an architect. He questioned if this statute should include every possibility of a conflict and ultimately over-regulate the profession. He wondered whether these concerns are generated by a consumer issue.

Mr. Carter stated it is his belief there is an educational aspect for the profession as well as the consumer. He noted that the Board's *Consumer's Guide to Hiring an Architect* contains many elements that may be included in a contract which would make it strong. He indicated that if the scope of work were required to be included in the contract, the contract would be clearer.

Mr. Merino concurred with this, but wondered if this recommendation is moving from consumer protection to trying to fix the issues with the profession.

Ms. Newton stated she appreciated the concern for over-regulation and what staff was proposing. She added that asking for a distinction between the scope of the project and scope of services would be very confusing. She noted that she also appreciates the effort to address mechanics' lien, but a requirement that the lender be identified is needed. Mr. Merino noted that adding information to assist in

mechanics' liens was not consumer protection. He suggested that this be reviewed by the working group discussed previously, to determine what should be included as the minimum requirements for a contract.

Mr. McCauley stated that he felt the intent when this statute was created was to take a minimalist approach; however, the scope of the project is not something an individual would want missing in a contract. Mr. Merino questioned if any collaboration was made with AIACC and suggested there be greater dialog between the Board and the profession to clarify the topic.

Mr. Merino proposed more input from staff to take to the profession and bring it back to the Committee or perhaps refer it to the working group. Ms. Newton asked for staff preference. Mr. Carter suggested the working group formed under Agenda Item F.2 with Ms. Newton and Mr. McGavin also look at this item to ferret any further issues that may arise. Ms. Newton supported this decision and noted the practicality of referring it to the working group.

A motion was made by Fred Cullum and seconded by Robert De Pietro to refer the proposed revision of BPC 5536.22 to the working group consisting of Phyllis Newton and Gary McGavin for review, in collaboration with the AIACC. The motion passed 5-0.

E.* Enforcement Program Update (Continued)

The Committee returned to this Agenda Item so that Mr. McCauley could advise the REC about AB 834 (Williams). He noted that the bill empowers the California Energy Commission (CEC) to have a regulatory authority and a citation program much like the Board. He noted the redundancy of a non-licensing agency having the authority to issue citations for violations.

Mr. Merino quoted AB 834, "In assessing the amount of an administrative penalty, the commission shall consider all the following factors: the nature and seriousness of the violation; the number of violations; the persistence of the violation; the length of the violation; and the willfulness of the violation..." He further stated the bill goes on to two areas that cause him concern: "the violator's assets, liabilities, and net worth; and the harm to consumers and to the state that resulted from the amount of energy wasted due to the violation." Mr. Merino questioned who would determine wasted energy and noted that rights of privacy may be violated.

Mr. Cooknick stated the AIACC has an oppose position to the bill. He added it would be heard in the Legislature on April 29, 2013. Mr. McCauley indicated that he will present the bill to the Board President under the Board's emergency provision in the Board Member Administrative Procedure Manual. Mr. Merino stated that the REC felt this was an urgent matter. Mr. De Pietro stated the level of fine should not be based on an individual's net worth. Mr. Merino noted the other issue is that another agency has the potential to cite an architect, when architects are under the authority of the Board. He

stated the CEC should bring the complaint to the Board to investigate and issue a citation, if warranted.

Mr. Merino stated because the Board is a consumer protection agency, it needs to ensure there is appropriate jurisdictional efficacy to protect the consumer. He stated this potential conflict could do harm to the consumer if it is unclear on the appropriate authority for regulation of architects. Mr. Cooknick noted architects may not have construction administration as part of the agreement and should not be held responsible for installation they did not supervise.

G. Adjournment

The meeting adjourned at 12:45 p.m.

** Agenda Item continued to report on additional information.*