



THE PROBLEM WITH “COMPLYING WITH ALL CODES”

A large number of laws apply to design and construction. These laws govern life safety (national model building codes as well as local variations), fire protection, accessibility (ADA as well as local requirements), zoning, occupant safety (e.g., OSHA), sustainable design, wetlands preservation, public health, historic preservation, employment (federal, state, and local), and others.

In fact, it may be impossible to comply with all laws that apply, because those laws may have contradictory provisions. To illustrate this point, the Advisory Legal Opinion – AGO 93-40 from the Florida Office of the Attorney General, on the subject of “conflict between building code & fire-safety code,” states that:

when the provisions of the applicable minimum building code and the applicable minimum fire safety-code conflict ... the local building code enforcement official and the local fire code enforcement official [shall] resolve the conflict by agreement in favor of the requirement of the code which provides the greatest degree of life-safety or alternatives which would provide an equivalent degree of life-safety and an equivalent method of construction.

Similarly, the General Services Administration’s (GSA) Codes and Standards states that:

[s]hould a conflict exist between GSA requirements and the GSA adopted nationally recognized codes, the GSA requirement shall prevail. All code conflicts shall be brought to the attention of the GSA project manager for resolution.

Further, the Department of Public Safety, Bureau of Building Codes & Standards, State of Maine, states that when conflicts between codes arise the Bureau will make changes. But until such changes are made, an A/E may not be able to comply with all laws.

Even national model codes can conflict with each other:

Since the creation of the Technical Standards and Codes Board in 2009, the Board has reviewed several conflicts between the ICC Codes adopted and the NFPA Code. They have also made several amendments to the Code that was originally adopted. All of these changes should be reflected in the latest set of Chapters 1-6 that were done through Rule-making in the 126th Legislature ...

And when an A/E agrees to “comply with all laws, rules, and regulations,” in either a modified professional association document or a client’s customized contract, they may be agreeing to perform services beyond their expertise and normal responsibility. If “all laws, rules, and regulations” is construed to mean, for example, job-site safety, then OSHA regulations could apply, making an A/E responsible for work that is not covered under their professional liability insurance.

THE A/E'S STANDARD OF CARE

There is a bewildering number of laws and codes related to design and construction. The standard of care for an A/E relative to code compliance is how other A/Es under similar circumstances, in the same time frame, and in the same locale, would be expected to perform. Agreeing to a “comply with all”-type clause elevates an A/E's professional standard of care beyond what is typically insurable, and should be replaced with words such as “take into account” or “review.” There is considerable authority for this position, with one exception noted below.

The Ohio Board of Professional Engineers and Surveyors A.C. Section 4733-35-01 Preamble of the Code of Ethics does not require compliance, and states that:

The engineer or surveyor, who holds a certificate of registration from the Ohio state board of registration for professional engineers and surveyors, is charged with having knowledge of the existence of the reasonable rules and regulations hereinafter provided for his or her professional conduct as an engineer or surveyor, and also shall be deemed to be familiar with their several provisions and to understand them.

The 2017 AIA Code of Ethics & Professional Conduct addresses this:

R.C. 3.101 In performing professional services, members shall take into account applicable laws and regulations. Members may rely on the advice of other qualified persons as to the intent and meaning of such regulations.

The AIA B101 (2017) Article 201 states that:

Art. 3.2.1 [t]he Architect shall review the program and other information furnished by the Owner, and shall review laws, codes, and regulations applicable to the Architect's services.

NCARB's Rules of Conduct are recommended for Member Boards having the authority to promulgate and enforce rules of conduct. NCARB's Rules state that:

[i]n designing a project, an architect shall take into account all applicable state and municipal building laws and regulations. While an architect may rely on the advice of other professionals (e.g., attorneys, engineers, and other qualified persons) as to the intent and meaning of such laws and regulations, once having obtained such advice, an architect shall not knowingly design a project in violation of such laws and regulations.

Many states follow NCARB's view. For example, the Ohio Administrative Code (OAC) 4703-3-07 (A)(2) requires that architects “take into account” all laws when performing their services. It does not require an architect to be perfect and “comply with all laws.” The lesson to be learned from NCARB and states like Ohio is that architects do not have to agree to such a clause, and that an architect who does could find it difficult or impossible to perform in accordance with the contract.

Unfortunately, there is an exception, and if an engineer is using the Engineers Joint Contract Documents Committee (EJCDC) Agreement Between Owner and Engineer for Professional Services (2014), consider modifying the following model language. EJCDC E-500 Article 6.01 Standards of Performance (E.1) states that:

Engineer and Owner shall comply with applicable Laws and regulations.

CERTIFICATIONS INCLUDING “COMPLIANCE WITH ALL LAWS”

On some projects, the A/E may be presented with the client’s lending institution’s Certificate of Consent of Assignment. This document may state that in order for the client’s loan to be finalized for the project, the A/E must certify that the project was designed and built in compliance with all laws, rules and regulations, so that the A/E’s agreement can be assigned to the lender if the client defaults on the loan. Unfortunately, sometimes this certificate lists every conceivable law or rule, which may be well beyond the scope of the A/E’s services.

If you find yourself in the situation where your client is requiring you as an A/E to certify that something is true, complete, and correct, and that the design “complies with all laws,” push back. If that doesn’t work, consistent with the Ohio Board of Professional Engineers and Surveyors A.C. Section 4733-35-04, then at least define what is meant by “certify”:

As used herein, the word certify shall mean an expression of the A/E’s professional opinion to the best of its information, knowledge, and belief, and does not constitute a warranty or guarantee by the A/E.

AVOID THE “COMPLY WITH ALL LAWS” TRAP

In summary, an A/E should explain to their clients why the “comply with all” language is problematic. First, there are so many laws, rules, and regulations affecting the building industry that they may at times conflict, and it simply is not possible for an A/E to know them all. Second, laws are constantly evolving, sometimes even during the course of a project, making it impossible to comply with a moving target. And third, laws are subject to human interpretation. One code official’s interpretation of a regulation may be different from another’s, and code officials may change during the course of a project.

About the Author

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