

# BUILDING BLOCKS

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## ARCHITECT'S OR ENGINEER'S CERTIFICATE & CONSENT

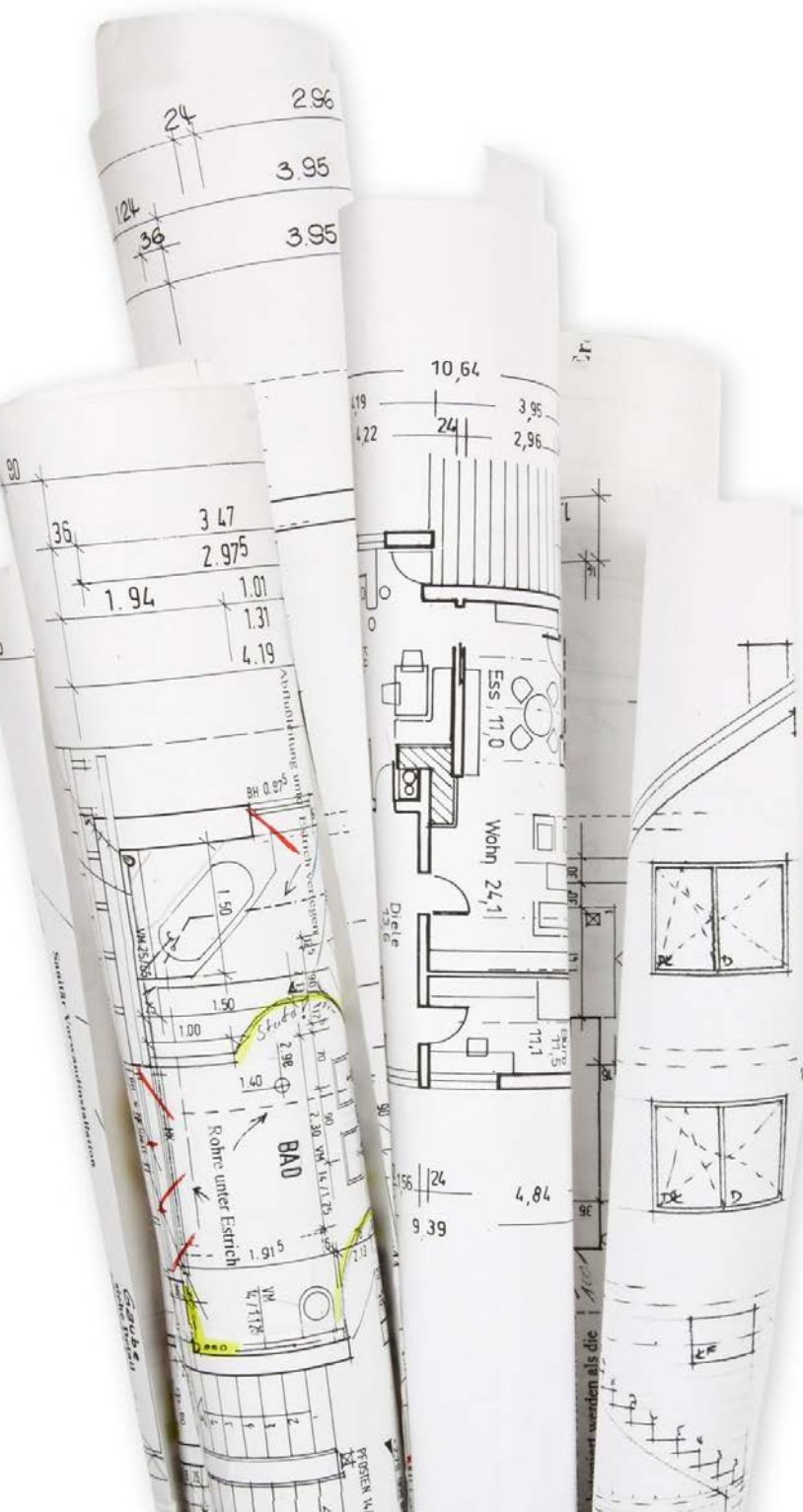
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It is common for architects' and engineers' privately funded clients (the Owner) to secure financing from a lender. For the loan closing, which usually occurs around the time of substantial completion of the project, the lender provides the Owner a document titled something like an "Architect's (or Engineer's) Certificate & Consent" to sign. Good risk management is to not blindly sign it, but rather have someone who has experience in reviewing such documents to make changes to the lender's boiler plate language.

The troublesome terms drafted by the lender's legal counsel may revolve around an increase of the design professional's scope of services, and conditions that may provide risk management exposures. And, the document has legal consequences, which could run afoul of your professional liability insurance. The reason why this monthly risk management article is written is that if there is a dispute or claim on the project, the Certificate & Consent may be a minefield for the design professional who signed the document.

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## SCOPE OF PROFESSIONAL SERVICES

First, consider than a typical architect's scope of services is something like following:

**§ 3.1** The Architect's Basic Services consist of usual and customary structural, mechanical, and electrical engineering services. Services not set forth in this Article are Supplemental or Additional Services. *AIA B101 (2017), Standard Form of Agreement Between Owner & Architect*

And, consider that:

**§ 10.4** If the Owner requests the Architect to execute certificates, the proposed language of such certificates shall be submitted to the Architect for review **at least 14 days prior to the requested dates of execution**. If the Owner requests the Architect to execute consents reasonably required to facilitate assignment to a lender, the Architect shall execute all such consents that are consistent with this Agreement, provided the proposed consent is submitted to the Architect for review at least 14 days prior to execution. **The Architect shall not be required to execute certificates or consents that would require knowledge, services, or responsibilities beyond the scope of this Agreement. (Emphasis added).**

Many times the lender sends the certificate to the Owner, expecting it to be forwarded it to their design professional to sign immediately, because the loan closing is a busy time to complete all the paperwork for the project loan. As stated above, it is unwise for an architect or engineer to quickly sign the certificate in order to please their client (and to get the project loan finalized).

## EXAMPLE OF AN ARCHITECT'S OR ENGINEER'S CERTIFICATE

Copied below is an actual portion of such a lender document regarding the scope of the architect's or engineer's responsibility for the project, which has been sanitized, with no parties identified.

Architect (or Engineer) represents, consents, certifies and warrants that: (i) the Project, upon completion in accordance with the Final Plans, and its contemplated use will comply with all applicable building, environmental, landmark, health and handicap access, subdivision and zoning codes, laws, ordinances and regulations imposed by all governmental authorities having jurisdiction over the Project and the Premises, and will comply with all covenants, conditions, easements and deed restrictions affecting the Premises; (ii) all permits, licenses and other approvals (with the exception of certificates of occupancy) required for the construction and operation of the Project in accordance with the Final Plans have been obtained from all appropriate governmental and private authorities and agencies including but not limited to those described on Schedule "B" attached hereto, except for those described on Exhibit B as "Pending"; (iii) all electricity, gas, water, sewage disposal and other utilities required for the use and operation of the Project will be available upon completion of the Project in accordance with the Final Plans without the necessity of any off-site or on-site improvements other than those contained in the Final Plans; (iv) the construction loan budget set forth in the Loan Agreement, and the cost breakdowns and construction estimates set forth in the construction

contract identified in the Loan Agreement, are reasonable estimates for the work to be done in accordance with the Final Plans, and are adequate and realistic for satisfactory completion of the Project.



<https://www.needpix.com/photo/download/706765/minefield-mines-danger-explosive-warning-sign-deadly-beware-caution>

The above language is fraught with land mines that the architect or engineer should be wary of agreeing to. See some suggested edits (words in red should be deleted and words in green should be inserted).

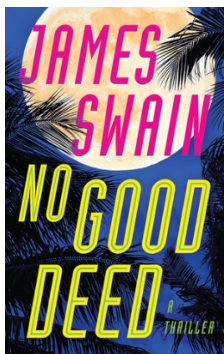
Architect (or Engineer) represents, consents, ~~certifies and warrants~~ **(1)** that: ~~(i) the Project was designed to take into account upon completion in accordance with the Final Plans, and its contemplated use will comply with all~~ **(2)** applicable building, ~~environmental, landmark, health and handicap access, subdivision and zoning codes, laws,~~ ordinances and regulations imposed by ~~all~~ governmental authorities having jurisdiction over the Project and the Premises, ~~and will comply with all covenants, conditions, easements and deed restrictions~~ **(3)** affecting the Premises; (ii) ~~all permits, licenses and other approvals~~ **(4)** ~~(with the exception of certificates of occupancy)~~ required for the construction and operation of the Project in accordance with the Final Plans have been obtained from all appropriate governmental and private authorities and agencies including but not limited to those described on ~~Schedule "B"~~ attached hereto, except for those described on Exhibit B as "Pending"; (iii) ~~all electricity, gas, water, sewage disposal and other utilities~~ **(5)** required for the use and operation of the Project will be available upon completion of the Project in accordance with the Final Plans without the necessity of any off-site or on-site improvements other than those contained in the Final Plans; (iv) the construction loan budget set forth in the Loan Agreement, and the cost breakdowns and construction estimates set forth in the construction contract identified in the Loan Agreement, are ~~reasonable estimates~~ **(6)** for the work to be done in accordance with the Final Plans, and are ~~adequate and realistic for satisfactory completion of the Project.~~

The following edits should be made (mainly deletions). The blue numbers are keys to explain why the deletions were made.

1. Certifications and warranties are excluded from the coverage of professional liability insurance policies.
2. Agreeing that the Final Plans comply with all codes is very unwise. Codes sometimes conflict with other codes, it is impossible for a design professional to know all possible codes, codes may change over time from project inception to completion, and codes have to be interpreted by code officials who may have different views on a how a code may be applied.
3. Knowing that legal title conditions of the Owner's property is certainly not within the scope of an architect's or engineer's scope of responsibility, such as easements and deed restrictions.
4. Knowing that all permits and other approvals for the Owner's property have been obtained is certainly not within the scope of an architect's or engineer's scope of responsibility.
5. Knowing that all required utilities are available upon completion of the Owner's project is certainly not within the scope of an architect's or engineer's scope of responsibility.
6. How does the design professional know that cost breakdowns and estimates in the Loan Agreement are reasonable and adequate, realistic and satisfactory for the Owner's project.

By contract, the Owner's responsibilities in typical Owner and Architect agreement include the following:

**§ 5.4** The Owner shall furnish surveys to describe physical characteristics, **legal limitations and utility locations** for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; designated wetlands; adjacent drainage; rights-of-way, **restrictions, easements, encroachments, zoning, deed restrictions**, boundaries and contours of the site; locations, dimensions, and other necessary data with respect to existing buildings, other improvements and trees; and information concerning **available utility services and lines, both public and private**, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark. **(Emphasis added.)**  
*AIA B101 (2017), Standard Form of Agreement Between Owner & Architect*



<https://www.goodreads.com/book/show/40525371-no-good-deed>

## IN SUMMARY

Design professional should be wary of signing a lender's Certificate & Consent, unless and until it is examined from a risk management perspective. They should not hastily agree to what may be onerous terms and conditions in effort to either please their client, or worse yet—

avoiding the situation where the Owner states that if their architect or engineer not will sign the document, they will not get paid for their services. The Engineers Joint Contract Documents Committee (EJCDC) has very good language regarding certifications. *Agreement Between Owner & Engineer for Professional Services, Article 6.01 Standards of Performance, E-505 (2014), Paragraph F.* states as follows:

Engineer shall not be required to sign any document, no matter by whom requested, that would result in Engineer having to certify, guarantee, or warrant the existence of conditions whose existence Engineer cannot ascertain within its services for that Specific Project. **Owner agrees not to make resolution of any dispute with Engineer or payment of any amount due to the Engineer in any way contingent upon Engineer signing any such document. (Emphasis added.)**

And a risk management approach, if the Owner and its lender absolutely insist that the design professional sign the Certificate & Consent with the word “certify,” is to add a definition of the word as follows:

The word “certify” shall mean the Architect’s (or Engineer’s) professional opinion is based upon the available information, knowledge and belief related to the Project, and does not constitute a warranty or guarantee by the Architect (or Engineer).

The bottom line is that documents such as agreements between owners and design professionals, a lender’s certificate & consent, etc. are a matter of negotiation. Architects and engineers have to know what their risk tolerance is, when they have to make a business decision to sign something presented to them.

#### **About the Author**

*Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for the last 15 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 33 years. As a Fellow of the American Institute of Architects and a member of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.*

*The above comments are based upon DesignPro Insurance Group’s experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.*

**Disclaimer:** *The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individual, group, or institution. This article is an expression by the author(s) to generate discussion and interest in this topic.*

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[CLICK HERE TO REGISTER](#)

October 15, 2021 – 1:00 – 2:00 p.m.



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The Alberta Association of Architects, Banff

Alberta, Canada

April 24, 2021



***“World Around Us Panel Discussion on the Environment”***

Nashville, TN

Rescheduled to spring 2021

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