

N C A R B

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## **Necessity of an Architect During Construction**

### **ABOUT NCARB**

The National Council of Architectural Registration Boards (NCARB) is a nonprofit corporation comprising the legally constituted architectural registration boards of the 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands as its members.

### **MISSION STATEMENT**

The National Council of Architectural Registration Boards protects the public health, safety, and welfare by leading the regulation of the practice of architecture through the development and application of standards for licensure and credentialing of architects.

#### *Necessity of an Architect During Construction*

National Council of Architectural Registration Boards  
1801 K Street NW, Suite 700K  
Washington, DC 20006-1310  
(202) 783-6500  
[www.ncarb.org](http://www.ncarb.org)

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## INTRODUCTION

The National Council of Architectural Registration Board's (NCARB) *Legislative Guidelines and Model Law* calls for a continued presence and participation by the registered architect during the construction phase of a project.

According to an NCARB survey of building code officials, the termination of the architect's involvement upon completion of the construction documents does not provide for the necessary professional administration during construction. This often results in buildings that do not meet code requirements that were specified in the documents. A decision to exclude the architect during construction administration can, in the end, diminish the project's overall quality, obstruct code compliance, and endanger the public—all developments that can negatively impact not only the public but also the owner, the architect, and the general contractor.

NCARB advocates that all state statutes require that a registered architect be engaged to perform construction administration services on all structures intended for human occupancy or habitation. This would, in turn, give state boards legal power to seek a remedy against an owner failing to meet the requirement. These services include conducting periodic site visits, reviewing shop drawings, and reporting to the owner and the building official any code violations or substantial deviations from the contract documents.

**I. Background**

In the spring of 1981, NCARB polled members of the Council of American Building Officials to ascertain the extent to which building officials relied on the presence of a registered architect to ensure that the public was protected. In response to a question concerning the architect’s role during construction, a substantial majority of the building officials stated that a design professional should be engaged during the construction phase to ensure a safe project.

At about the same time, national building codes were amended to strengthen requirements that either a registered architect or a registered engineer be engaged to review contractor submittals, to inspect critical construction components, and to report observed violations of the building code to the building official.<sup>1</sup> In addition, many progressive building departments were enacting special requirements beyond those set out in the national codes. Boston, for example, in response to a disaster on a high-rise residential project with no registered architects or engineers involved after the issuance of the building permit, requires an “affidavit architect,” who must visit the site at least once a week and notify the building department of any code violations, of any discrepancies between the construction documents (upon which the permit was issued) and the work in progress, and of any condition, observed by the architect, constituting a hazard.

<sup>1</sup> Some states have gone beyond the administrative procedures required by the model building codes when enacting their own building codes. For example, the Massachusetts State Building Code, which is based on the former BOCA National Building Code, included a provision setting forth the architect/engineer responsibilities during construction: “The registered architects and registered professional engineers who are responsible for the design, plans, calculations, and specifications, or their designee, shall perform the following tasks: 1. Review, for conformance to the design concept, shop drawings, samples and other submittals by the contractor in accordance with the requirements of the construction documents. 2. Review and approval of the quality control procedures for all code-required controlled materials. 3. Be present at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the work and to determine, in general, if the work is being performed in a manner consistent with the construction documents. The application of [sic] the permit shall not be deemed to be complete until all of the Construction Control Documents (as defined in 780 CMR 2.00 and 780 CMR 116.2.1) have been submitted (also see 780 CMR 110.0). Final documentation of the compliance of the work per the plans and specifications shall be provided, and, when required by the Building Official, at the completion of each phase of construction.” 780 CMR 116.2.2 (2008)

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In 1989, the Member Boards of NCARB adopted *Legislative Guideline VII*<sup>2</sup>, which effectively requires that a registered architect be engaged during the construction phase of any building intended for human occupancy or habitation by declaring that a building owner who begins construction without a registered architect is himself/herself engaged in the unlicensed practice of architecture and is, accordingly, subject to the fine and other sanctions set out in the statutes for unlicensed practice.

In 1999, NCARB commissioned an independent national polling firm to survey how building officials view the role of the architect in ensuring the safety of buildings. A total of 2,447 building officials responded. A little more than 87 percent of the respondents agreed that “[i]n order to protect adequately the health, safety, and welfare of the public, licensed architects and engineers should be required to conduct on-site observations of the construction of any substantial building.”

This overwhelming endorsement by those on the front line underscores the importance of *NCARB Legislative Guideline VII* and the critical need to implement its recommendations.

### II. The Nature of the Problem

The public safety is protected by a registered architect taking responsibility for the preparation of technical submissions and by a competent building official reviewing the technical submissions to ensure that they conform to applicable codes. But that process gives no assurance that the project will be built as described in the technical submissions.

Moreover, many components of a project critical to the public safety are not designed or specified until construction has begun. Structural steel connections (the inadequacy of which caused the infamous 1981 Hyatt Regency Hotel disaster in Kansas City, MO) are only one of the components customarily

<sup>2</sup> *NCARB Legislative Guideline VII* — Requiring that an Architect be Engaged During the Construction of a Project

- A. An owner who proceeds to have constructed a project having as its principal purpose human occupancy or habitation and not exempted under Section VI shall be deemed to be engaged himself/herself in the practice of architecture unless he/she has employed an architect to perform at least minimum construction contract administration services, including (i) periodic site visits, (ii) shop drawing review, and (iii) reporting to the owner and building official any violations of codes or substantial deviations from the contract documents which the architect observed.
- B. It shall be the project design architect’s obligation to report to the state board and to the building official if he/she is not engaged to provide construction contract administration services described in Paragraph A.
- C. A state board may waive these requirements with respect to a particular project or class of projects if it determines that the public is adequately protected without the necessity of an architect performing the services described in Paragraph A.

designed during construction. Many elements are installed by contractors on the basis of performance specifications rather than prescriptive specifications. Many elements are “design/build” during the construction phase. Even on an old-fashioned, simple project where none of the foregoing exists, technical submissions are adapted to actual site conditions and revised as necessary—indeed, these practices occur on almost every building project.

Why then do developers often terminate the architect after the completion of construction documents? To save money. The building permit has been issued; many developers see the retention of an architect thereafter as a “need-less expense” and often a nuisance because the architect may be uncompromising in insisting that the safety and quality of the project not be diluted.

But doesn't the developer's interest in the long-term safety and durability of the building persuade him/her to retain the architect during construction? Consider who the “developer” has become in the last 50 years. Developers no longer build to create a long-term asset to hold, but more typically now build to sell the building to condominium purchasers, to lease to long-term tenants, to syndicate ownership, or to sell to other investors. In short, many developers seldom have a long-term interest greater than the short-term goal of saving money. When either the building code or the construction lenders require an architect during construction, many developers consider this a burden imposed on them as part of the cost of doing business.

Architects need not fear additional liability on account of observing construction. In 1996, Victor O. Schinnerer & Company, Inc., a major errors and omissions underwriter for design professionals, commissioned Professor David Haviland to study risk management by design professionals. He produced a list of the Top 20 Claim Preventors and the Top 20 Claim Starters. Number 3 on the list of Claim Preventors was “construction administration services are in the contract.” Number 6 and Number 12 on the list of Claim Starters were “infrequent site observation” and “construction administration services not in contract,” respectively. In short, Professor Haviland's study demonstrated that there were fewer claims and less liability when the architect's services were not terminated after the design phases.

The advice from The Design Professional group of the XL Insurance companies (formerly DPIC) is entirely consonant with that of Professor Haviland. Authors Crowell and Dixon write:

“[I]f you are not performing construction observation because you think it will increase your exposure to risk, think again. True, when you visit a jobsite, you may have an increased risk for claims of site safety. But that risk (which is largely manageable) should be weighed against another—and bigger—issue. When you design a project, you assume the associated liability, whether or not you visit the project. In avoiding observation, you forfeit the opportunity to satisfy yourself that construction is proceeding as it should. No matter how detailed or near perfect your plans are, even the best contractor can't build from them without some degree of interpretation. It is far better to protect your interests and those of your client by being there to provide clarification and interpretation.” (From *The XL Insurance Contract Guide for Design Professionals, A Risk Management Handbook for Architectural, Engineering and Environmental Professionals*, 124, 2007.)

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### III. Doesn't NCARB's Broad Definition of Architectural Practice Cover the Problem?

*NCARB Legislative Guideline I* defines the practice of architecture as:

“consisting of providing or offering to provide certain services hereafter described, in connection with the design and construction, enlargement or alteration of a building or group of buildings and the space within and the site surrounding such buildings, which have as their principal purpose human occupancy or habitation. The services referred to include pre-design; programming; planning; providing designs, drawings, specifications, and other technical submissions; the administration of construction contracts; and the coordination of any elements of technical submissions prepared by others including, as appropriate and without limitation, consulting engineers and landscape architects.”

Many believe that since “the administration of construction contracts” is specifically identified as an architectural service, anyone else performing that service is engaged in unlicensed practice.

The simple answer, available to the developer who terminated the architect after a building permit was issued, is that no one administered the construction contract. There were no shop drawing submissions. The developer relied entirely on the contractor's agreement to build as prescribed in the construction documents.

A longer answer turns on the legal question of whether one who engages in construction contract administration is engaged in the practice of architecture.

In 1987, the Arizona Attorney General construed the Arizona statute<sup>3</sup> as requiring that “only qualified registrants can conduct construction observation services to determine conformance with contract documents and design insofar as such review involves the applications of architectural . . . analysis.” 1987 Ariz. Op. Atty. Gen. 31, No. 187-022, 1987 WL 121250 (Ariz. A.G.)

In 1995, the California Attorney General construed California law as barring an unlicensed person from performing construction management services on municipal or state projects. 78 Cal. Op. Atty. Gen. 48 (1995), 1995 WL 50540 (Cal. A.G.)

While a majority of decisions of attorneys general preclude an unlicensed person from engaging in construction contract administration services, that conclusion is not universal; there are remarks in various court opinions that “supervision of construction contracts” (again, using the old terminology) is not the exclusive province of architects. See, e.g., *Di Silvestri v. Golden Crest Motel Corp.*, 148 Conn. 121, 167 A.2d 857 (1961); *Gastaldi v. Reutermann*, 345 Ill. App. 510, 104 N.E.2d 115 (1952). Moreover, as noted at the outset of this section, the most common condition threatening the public safety is that no one is furnishing construction contract administration services. Therefore, more than NCARB's broad definition of the practice of architecture is required.

<sup>3</sup> The statute defines the practice of architecture as “the application of . . . the principles of architecture . . . to such professional services as . . . review of construction for conformance with contract documents and design. . . .” See A.R.S. § 32-101(B)(4).

#### IV. The Solution

*NCARB Legislative Guideline VII* is given concrete form in *NCARB Model Law* as Section 10A Construction Contract Administration Services Required. The basic principle is set out in Section 10A.1:

“The Owner of any real property who allows a Project to be constructed on such real property shall be engaged in the practice of architecture unless such Owner shall have employed or shall have caused others to have employed a registered architect to furnish Construction Contract Administration services with respect to such Project.”

In Section 10A.2(a), “Owner” is broadly defined to include every owner of more than 10 percent of the equity in the real property, as well the mortgagee, the record title owner, and, in appropriate circumstances, a long-term tenant.

In Section 10A.2(c), “Construction Contract Administration Services” are defined as comprising at least the following:

“(i) visiting the construction site on a regular basis as is necessary to determine that the work is proceeding generally in accordance with the technical submissions submitted to the building official at the time the building permit was issued; (ii) processing shop drawings, samples, and other submittals required of the contractor by the terms of construction contract documents; and (iii) notifying an Owner and the Building Official of any code violations; changes which affect code compliance; the use of any materials, assemblies, components, or equipment prohibited by a code, major or substantial changes between such technical submissions and the work in progress; or any deviation from the technical submissions which he/she identifies as constituting a hazard to the public, which he/she observes in the course of performing his/her duties.”

Two strong arguments support adoption of *Legislative Guideline VII* as good public policy. First, the public’s safety depends on professional review during the construction phase of a project. See Section II: The Nature of the Problem of this publication.

The second argument turns on the practicality of enforcement. With the definition of “owner” set out in the *Model Law*, no responsible mortgage lender will advance funds without ensuring that the record title owner has retained a registered architect during the construction phase of the building project. This lending practice soon will become as routine as ascertaining that there is insurance coverage for the project.