



## ***Negligent Interpretation of Zoning Regulations; Misleading the Client***

### **Summary**

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A client who retained a member to design a residential addition makes three charges under the Code of Ethics: the member failed to demonstrate a consistent pattern of reasonable care and competence, failed to take into account applicable zoning regulations in the design of the addition, and intentionally or recklessly misled the client to believe that zoning questions had been resolved when they had not. By an evenly divided vote, the Council finds that the Code was not violated and dismisses the complaint.

**All initials, names, dates, places, and gender references in this decision have been changed.**

### **Reference**

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*Code of Ethics and Professional Conduct,  
Canon I, General Obligations*

Rule 1.101 In practicing architecture, members shall demonstrate a consistent pattern of reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing practicing in the same locality.

*Code of Ethics and Professional Conduct,  
Canon III, Obligations to the Client*

Rule 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.

Rule 3.301 Members shall not intentionally or recklessly mislead existing or prospective clients about the results that can be achieved through the use of the members' services, nor shall the members state that they can achieve results by means that violate applicable law or this Code.

### **Facts**

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The lengthy factual findings in the hearing report are presented here in summary form. The owner of a single family residence engaged a member to design an addition. The architect met with the owner, discussed his needs and desires, and received an as-built survey of the property. Based on this information, and having consulted the zoning code for the township, the member drew a schematic design for an addition to the house, which the owner approved.

The client agreed to a resurvey of the property to confirm the precise location of the house in relation to the property lines. In the course of his work, the surveyor told the architect that he did not believe the architect had correctly drawn building setback lines on the site plan. The surveyor explained what he thought was the correct setback but could not cite the controlling section of the zoning code. The architect consulted briefly with some other architects practicing in the area and with an attorney who had represented the owner in the purchase of the house, but did not get a clear answer to the correct setbacks for the owner's oddly shaped



corner lot. The architect called the township administrative office for clarification but was told that zoning would be decided only on a full permit application. An attempted meeting with the zoning officer did not occur, and a letter to the town manager asking for clarification was not answered.

Having failed to get definite clarification of the issue, the architect discussed with the client what to do. The nature of that discussion is unclear, but following it the architect proceeded to prepare full working drawings, which were submitted to the township with a permit application. The application was denied for substantial failure to conform to the setback requirements of the zoning code.

By this time the project had been delayed several months and the plans and drawings were unusable for their intended purpose. There were abortive discussions about whether the architect would redesign to the code and on what terms, but no agreement was reached. Ultimately the owner sued the architect for fees paid and recovered a judgement for breach of contract. The owner commenced this proceeding alleging incompetence by the architect, failure to take into account the zoning regulations and recklessly misleading the client.

### **Discussion**

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The hearing report recommends that the Council find the member not in violation of any of the cited rules of conduct. The Council members hold divided views as to whether or not to accept this recommendation. Our Rules of Procedure provide that when the Council is evenly divided on the question of whether a violation of the Code occurred, the complaint shall be dismissed. That is the action we take, and this decision will explain our opposing views on the issues.

Taking first the allegation that Rule 1.101 was violated, a majority of the Council believes the

evidence does not prove a violation. The rule focuses on maintaining a "consistent pattern of reasonable care and competence." The member did not act with reasonable care and competence in proceeding to prepare working drawings without a clear answer to the zoning question, but this was an isolated departure from the common law standard of care. There was evidence at the hearing that apart from this aspect of this project the member had a long record of careful and competent service to clients. This is sufficient to support a finding that this rule was not violated.

As to whether the member violated Rule 3.101 or Rule 3.301, the Council is evenly divided. The issue turns on whether the member's conduct in this case was reckless or only negligent. All are agreed that it was wrong for the member to prepare full working drawings for the permit application, for which the client was billed, when the zoning setback restrictions on the lot had not been definitely ascertained. All are agreed also that the member did not purposely or intentionally mislead the client. The dividing point is whether or not the member acted recklessly.

A finding of recklessness is explicitly required under Rule 3.301. Some of us believe that the member recklessly misled the client to believe that the proposed addition was achievable. The example in the commentary to Rule 3.301, "an architect who provides conceptual drawings . . . without regard for zoning laws," exactly describes what happened in this case, under this view, and requires that the member be disciplined. This view holds that zoning regulations are so much a part of architectural practice that a decision to proceed in the face of admitted uncertainty on that subject is unethical.

The opposing view is that the member took several steps to try to get an answer to the zoning question, but failed. The architect talked to the surveyor, to other architects, to an attorney who had represented the owner, and sought clarification from the township authorities. These actions, in this view, show that the member did



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not ignore the zoning regulations or the fact that there was an open question of interpretation as to the owner's lot. The architect did not get the right answer, but did barely enough to prevent a finding of recklessness.

Our opinions differ as to whether the member was reckless, but we are unanimous in stating that it was wrong, imprudent and careless not to get an answer to the zoning issue before completing the design documents. The member knew from early in the project that some special zoning rule applied to this lot. It is our experience that zoning officials usually will provide an answer on less than full working drawings if the architect is persistent enough. Here the member did not follow through with the township. When no answer was forthcoming, the member did talk with the client. We don't know what was said, as the evidence is in conflict on this point, but the member believed the client consented to going forward with a permit application. There is no documentation, not even a project note, of that conversation. When communicating with the client to obtain a decision that is significant in terms of dollars or the project schedule, as this decision surely was, the architect has a responsibility to ensure that the client understands the issue and makes an informed decision. The member failed in that responsibility here. The failure was clearly negligent. Some members of the Council would go further and find it reckless, but that is not a majority view, so the complaint is dismissed.

The question of recklessness versus negligence also arises under Rule 3.101. In relevant part, the rule requires members to "take into account applicable laws and regulations." Some on the Council believe that the member did not take into account applicable zoning regulations because working drawings were prepared and the permit application submitted without knowing the proper setback lines. The member read portions of the zoning code, but not the right section and therefore failed to take it into account. Others on the Council believe that the fact that the member consulted the zoning code on the question at issue indicates that the regulations were taken into

account as the rule requires. Of course, the member did not find the answer, and this was negligent and would not have happened if the member had exercised reasonable care and competence. In this view, however, members are not required always to be right in their interpretation of applicable laws and regulations so long as they are not reckless in failing to consider them. Since there is no majority in favor of finding recklessness here, the complaint is dismissed.

We note that the member here does not claim to have relied on the opinions of other qualified persons as Rule 3.101 permits. This case cries out for obtaining the definite written opinion of the zoning officer or a zoning attorney before completing the design. When a member reaches the limit of his or her own knowledge, it is time to reach out for help, and not in a half-hearted way as was done here.

## Conclusion

This is a case where the client suffered through no fault of his own, and naturally believes that the architect should be made to account for the mistakes that were made. As noted above, the architect was found liable to the client for professional fees paid. On the separate question of ethics that is before us, the member has avoided being held in violation of our Code of Ethics only because the mistakes were not egregious enough to persuade a majority of the Council that discipline is required. We would all hope that members would aspire to and achieve a level of performance that far exceeds what was displayed here.

The complaint is dismissed by an evenly divided vote of the Council.

Samuel A. Anderson, III, FAIA, Chair  
Harry Harmon, FAIA  
Glenn A. Buff, FAIA  
Robert V. M. Harrison, FAIA



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Kirk Miller, AIA

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*The hearing officer, A. Notley Alford, FAIA did not participate in the decision of this case as provided in the Rules of Procedure.*

**May 23, 1989**