

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA BOARD OF PROFESSIONAL )  
ENGINEERS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-5348PL  
 )  
ROBERT WOOD, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 25, 2012 and June 26, 2012, in Jacksonville, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John J. Rimes, III, Esquire  
Florida Engineers Management Corporation  
2639 North Monroe Street, Suite B-112  
Tallahassee, Florida 32303

For Respondent: Michael J. McCabe, Esquire  
Nicholas Martino, Esquire  
McCabe Law Group, P.A.  
1400 Prudential Drive, Suite 5  
Jacksonville, Florida 32207

and

Philip J. Stoddard,  
Qualified Representative  
North Star Associates, LLC  
320 High Tide Drive  
St. Augustine, Florida 32080

STATEMENT OF THE ISSUE

Whether Respondent failed to comply with specified provisions of section 471.033(1)(g), Florida Statutes, and Florida Administrative Code Rules 61G15-30.001(4), 61G15-30.002(5), and 61G15-30.003(1), as alleged in the Administrative Complaint and, if so, the nature of the sanctions to be imposed.

PRELIMINARY STATEMENT

On July 25, 2011, the Florida Board of Professional Engineers (Board or Petitioner) filed an Administrative Complaint against Robert Wood, P.E. (Respondent), which alleged that Respondent prepared and certified plans for aluminum structures at two locations that failed to meet the standards imposed by the Florida Building Code (FBC), thus constituting negligence in the practice of engineering. The Administrative Complaint was served on July 29, 2011.

On August 23, 2011, Respondent filed a Request for Administrative Hearing Involving Disputed Issues of Material Fact (Petition) by which he disputed the facts alleged in the Administrative Complaint, and requested a formal administrative hearing. Respondent alleged that the Petition was timely filed, which Petitioner has not denied.

On October 18, 2011, Petitioner referred the petition to the Division of Administrative Hearings.

On October 19, 2011, Respondent filed an Amended Answer and Statement of Affirmative Defenses, in which Respondent raised four affirmative defenses.

On October 27, 2011, the case was transferred to Judge Lisa Shearer Nelson, and the final hearing was scheduled for December 22, 2011.

On December 14, 2011, Respondent filed a Motion to Cancel and Reschedule Final Hearing, which motion was not opposed. The Motion was granted, and the December 22, 2011 hearing was cancelled, and subsequently rescheduled for April 25-27, 2012.

On January 30, 2012, Respondent filed a Motion for Leave to Amend, along with his Second Amended Answer and Statement of Affirmative Defenses, in which Respondent raised a fifth affirmative defense.

On February 27, 2012, Respondent filed another Motion for Leave to Amend, along with his Third Amended Answer and Statement of Affirmative Defenses, in which Respondent raised his sixth and seventh affirmative defenses.

On March 7, 2012, this case was transferred to the undersigned.

On March 8, 2012, the Motion for Leave to File the Third Amended Answer and Affirmative Defenses was granted, and the Motion for Leave to File the Second Amended Answer and Statement of Affirmative Defenses was denied as moot.

On April 17, 2012, a Prehearing Stipulation was filed in which the parties agreed that one day would be sufficient for the final hearing. Based on that representation, the hearing was rescheduled for April 25, 2012.

From almost the date that the petition was filed with the Division of Administrative Hearings through and beyond the commencement of the final hearing, numerous motions were filed and disposed of by separately issued Orders. Those motions, and their disposition, may be determined by reference to the docket of this case.

The hearing was held on April 25, 2012, as scheduled. The hearing was not concluded on that date. The remainder of the hearing was rescheduled for June 26, 2012, and was concluded as noticed.

At the final hearing, Petitioner presented the testimony of Joseph Berryman, a professional engineer, who was accepted as an expert in structural engineering. Petitioner's Exhibits 1 and 3-8 were received into evidence.

Respondent presented the testimony of Joe Martin, a professional engineer, who was accepted as an expert in structural engineering. Respondent's Exhibits 15 through 17 were received into evidence.

A four-volume Transcript of the proceedings was filed. By agreement of the parties, the length of the proposed recommended

orders was set at a maximum of 60 pages, with a filing date of August 1, 2012. Pursuant to motion, the filing date was extended to August 15, 2012. Both parties timely filed Proposed Recommended Orders which have been duly considered by the undersigned in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner, the Florida Board of Professional Engineers, regulates the practice of engineering pursuant to chapters 455 and 471, Florida Statutes. Petitioner is a board within the Department of Business and Professional Regulation (Department), created pursuant to section 20.165, Florida Statutes.

2. The Florida Engineers Management Corporation (FEMC) is charged with providing administrative, investigative, and prosecutorial services to the Florida Board of Professional Engineers pursuant to subsection 471.038(4), Florida Statutes.

3. At all times material to the allegations in the Administrative Complaint, Respondent was a licensed professional engineer, holding License No. PE 31542.

4. Engineering involves analysis and design. Analysis is the process of applying load to a structure and using engineering principles to determine the resulting forces or stresses in the elements of that structure. In design, an engineer applies the forces or stresses to the materials and

elements used in the structure to determine whether the material and connections are capable of withstanding the load.

5. The intent of an engineer is determined by his or her drawings. It is those drawings that establish what the contractor has to build in the field.

6. Two engineers can review a set of engineering drawings, make different assumptions, arrive at different conclusions, and have both conclusions meet engineering standards.

7. It is well established that different engineers make different assumptions about connectivity of the members of a structure that materially affect how the structure will react, and that engineers do not design structures in the same way.

8. This case involves an Administrative Complaint filed by Petitioner alleging that Respondent prepared and certified plans for two aluminum structures that failed to meet the standards imposed by the FBC, thus constituting negligence in the practice of engineering.

9. In general, engineering principles are not dependant on the materials used to build a structure. Although aluminum members used in construction are typically of a thinner gauge than, for example, steel members, the structural engineering principles and designs are not unique.

10. In 2009, Petitioner and Respondent settled a disciplinary action involving Respondent by entry of a

settlement stipulation. Pursuant to the stipulation, which was incorporated in a Final Order, Respondent agreed to periodically submit a detailed list of all completed projects that were signed, sealed, and dated by Respondent. From that list, two projects were to be selected for review by the FEMC. The Final Order was not appealed.

11. Respondent submitted the list of projects from which the FEMC selected two for further review. Those two projects form the basis for the Administrative Complaint.

12. Respondent was the engineer of record, as that term is used in Florida Administrative Code Rule 61G15-31, and signed and sealed the last iteration of the structural engineering plans for the two projects. Those projects are:

a. The Shank Residence Project, an aluminum-framed, composite roof patio project; and

b. The Emilion Court Residence Project, an aluminum-framed screen pool enclosure.

13. The plans were filed with the building department for St. Johns County, Florida, as part of the application for a building permit. The plans were reviewed by a county plans examiner, and a building permit was issued. The issuance of the building permit demonstrates that St. Johns County found that the proposed project did not violate the FBC. The Certificate of Completion for the Shank Residence project was issued on

January 14, 2010. The Certificate of Completion for the Emilion Court Residence project was issued on March 30, 2010.

14. The purpose of Petitioner's review was to review what Respondent did, with the review of documents similar to that conducted if Respondent were seeking a permit. The purpose was not to find an alternative analysis.

15. The files were originally assigned to Michael E. Driscoll, a professional engineer assigned by FEMC to review the plans and documents submitted for the two projects. On August 13, 2010, Mr. Driscoll, through his firm, Driscoll Engineering, issued a Project Review Report for the two projects. On January 27, 2011, Mr. Driscoll issued a Supplemental Structural Report.

16. Respondent filed a response and objections to Mr. Driscoll's report. In order to avoid Respondent's objections from becoming an issue, the FEMC reassigned the review to Joseph Berryman, a professional engineer who is frequently retained by the FEMC for such purposes. Mr. Berryman reviewed and responded to many of Mr. Driscoll's conclusions, but provided his own independent analysis as to whether the plans for the two projects complied with sound engineering principles.

17. Mr. Berryman prepared a report, dated June 7, 2011, in which he concluded that Respondent "failed to utilize due care



in performing in an engineering capacity and has failed to have due regard for acceptable standards of engineering principles" with respect to the plans for the Shank Residence and Emilion Court Residence, and as a result was negligent within the meaning of section 471.033(1)(g) and rule 61G15-19.001(4).

18. Neither Mr. Driscoll nor Mr. Berryman performed a failure analysis on the Shank or Emilion structures.

19. Mr. Berryman testified that, in his opinion, whether an engineer's signed and sealed plans have been approved by a local building official does not affect an analysis of whether those plans meet the standards for the practice of engineering established by the Board of Professional Engineers.

20. The FEMC presented its findings to a Probable Cause Panel convened by Petitioner to hear cases involving alleged violations of chapter 471 and the rules promulgated thereunder. The panel found probable cause to proceed against Respondent.

21. On July 25, 2011, Petitioner issued the Administrative Complaint that forms the basis for this case. The Administrative Complaint alleges that Respondent's structural engineering plans for each project were deficient and failed to comply with acceptable standards of engineering practice.

#### Shank Residence Project

22. The Administrative Complaint alleged five separate counts related to alleged deficiencies in the Shank Residence

Project. The deficiencies were limited to whether required information was shown on the plans sufficient to allow a contractor to construct the project, and not to whether elements of the project were overstressed or otherwise failed to meet safety standards. The Counts were identified as Counts 6.A. through 6.E.

Count 6.A.

23. Count 6.A. alleged that Respondent failed to indicate the roof design live load, the enclosure classification, and internal pressure coefficient.

24. Both Mr. Berryman and Mr. Martin agreed that the FBC requires that roof design live load, the enclosure classification, and internal pressure coefficient be shown on building plans. Both Mr. Berryman and Mr. Martin agreed that the information was not on the design document for the Shank project. Thus, Petitioner proved, by clear and convincing evidence, the elements of Count 6.A.

Count 6.B.

25. Count 6.B. alleged that Respondent failed to indicate the column spacing at the fourth wall, the overall dimension of the canopy at the fourth wall, the column spacing at the intermediate roof beam, and the dimensions of the knee brace elements.

26. As to the column spacing at the fourth wall and the intermediate roof beam, Mr. Berryman opined that the drawing did not contain sufficient information regarding those elements of the plans.

27. Mr. Martin indicated that column spacing was on the plan front view, but because the columns were in alignment, the front measurement was sufficient to convey the information as to column spacing at the fourth wall to the local building officials and the contractor. However, Mr. Martin admitted that the drawings contained no information regarding the spacing of one non-aligned beam at the fourth wall.

28. Although the full side span length from the fourth wall to the front of the patio structure is provided, the spacing of the intermediate beam is not.<sup>1/</sup> Thus, Petitioner proved, by clear and convincing evidence, the elements of Count 6.B. regarding Respondent's failure to indicate the non-aligned column spacing at the fourth wall and the spacing of the intermediate roof beam.

29. As to the dimensions of the canopy at the fourth wall, while the dimension of the canopy is not written in at the fourth wall overhead view, it is depicted in the front view. There was no evidence that a front view measurement is contrary to FBC requirements. Mr. Martin testified that such a measurement provided sufficient information to the local

building officials and the contractor, and was therefore acceptable. Thus, Petitioner failed to prove, by clear and convincing evidence, the elements of Count 6.B. regarding Respondent's failure to indicate the dimensions of the canopy at the fourth wall.

30. The posts and beams on the Shank project were buttressed with knee braces. The effect of the knee braces is to shorten the span length between posts, which reduces the stresses on the beams. The locations of the braces were depicted on the drawing. The detail for the 2x3 knee braces was included in a detail sheet that accompanied the drawings.

31. Petitioner discounted the detail sheet due to a statement at the bottom of the sheet that "[c]ertification extends only for the span tables specified for the structural shapes listed." Petitioner asserted that language had the effect of nullifying any reliance on the information contained in the detail sheet, a position that the undersigned finds to be unreasonably and unnecessarily restrictive. In addition, such a construction would also nullify the remaining language along the border of the detail sheet that "[d]rawing valid with raised impression engineer seal."

32. The drawings provided by Respondent, read in conjunction with the details, establish the dimensions of the knee brace elements on the drawings. Thus, Petitioner failed to

prove, by clear and convincing evidence, the elements of Count 6.B. regarding Respondent's failure to indicate the dimensions of the knee brace elements.

Count 6.C.

33. Count 6.C. alleged that Respondent failed to detail the anchorage of the patio cover posts at the fourth wall and other locations where the posts do not align with an existing 4x4 railing post, and therefore neglected to provide a complete load path capable of transferring loads from their point of origin to the load resisting elements.

34. Mr. Berryman noted that the detail provided regarding the connection of the posts to an existing rail would not apply to the fourth wall since there is no rail at that location. The drawings confirm Mr. Berryman's testimony as to the existence of a railing at the fourth wall.

35. Mr. Martin testified that he was "interpreting that to be a connection to the existing wood rail structure that's back here at the fourth wall." Mr. Martin's testimony on that point is not accepted, since the detail clearly depicts the post and rail structure at the front of the existing deck, and not at the point at which it connects to the building.

36. Petitioner proved, by clear and convincing evidence, the elements of Count 6.C. regarding Respondent's failure to detail the anchorage of the patio cover posts at the fourth wall

to provide a complete load path capable of transferring loads from that point to the building.

37. Mr. Berryman also noted locations where the supporting column did not align with an existing deck post, thereby providing no direct pathway of the load of the structure to the foundation element. His testimony finds support in the drawing.

38. Mr. Martin agreed that the FBC requires a direct load path from the point of application of the load to the ground. He noted that the detail provided a load path to the posts, "provided they align." Where the column and post did not align, one cannot ascertain the attachment point for the column. The drawings, including the attached detail sheets, are insufficient to demonstrate that the columns and the deck posts align to provide the load-to-ground pathway and, in fact, demonstrate the opposite.

39. Petitioner proved, by clear and convincing evidence, the elements of Count 6.C. regarding Respondent's failure to provide a complete load path capable of transferring load to the foundation elements of the structure.

Count 6.D.

40. Count 6.D. alleged that Respondent failed to set forth the material thickness/section and alloy for the 3x3 fluted posts and beams.

41. Both Mr. Berryman and Mr. Martin agreed that the FBC requires the material thickness, section, and alloy for structural members to be set forth in the construction documents. Both Mr. Berryman and Mr. Martin agreed that the drawings gave the general dimensions of the posts and beams, but provided no information as to the gauge, thickness, or alloy of those structural members. Thus, Petitioner proved, by clear and convincing evidence, the elements of Count 6.D. regarding Respondent's failure to set forth the material thickness and alloy for the 3x3 fluted posts and beams.

Count 6.E.

42. Count 6.E. alleged that Respondent failed to describe and define required roof panel components.

43. Mr. Berryman indicated that the identification of "generic" roof panels, without information as to the thickness of the aluminum cladding, did not provide sufficient information that the panels met the FBC strength requirements. Mr. Martin agreed that Respondent did not identify a particular product, that the drawings provided no other information as to the thickness of the aluminum sheets that covered the foam core, and that the information provided regarding the roof panels was therefore "incomplete." In the absence of a specific product, an engineer "should specify what the thickness of that skin is." No such specificity as to the thickness of the aluminum skin, or

of the brand name of the product used was provided with the plans for the Shank project. Thus, Petitioner proved, by clear and convincing evidence, the elements of Count 6.E. regarding Respondent's failure to describe and define required roof panel components.

44. In general, Mr. Martin's description of Respondent's plans for the Shank project as "sloppy" understated the lack of information provided. A covered patio structure may not rank among the most complex or difficult structures for an engineer, but the simplicity of the project does not excuse a lack of care and precision that is required to ensure that projects meet applicable standards. In the case of the Shank Residence project, Respondent failed to exercise that requisite degree of care and precision.

#### Emilion Court Residence Project

45. The Administrative Complaint alleged 11 separate counts related to alleged deficiencies in the Emilion Court Project. The Counts were identified as Counts 7.A. through 7.K.

#### Count 7.A.

46. Count 7.A. alleged that Respondent failed to adequately dimension his permit drawings.

47. Mr. Berryman testified that the deficiency that formed the basis for Count 7.A. was related to a failure to establish



the "overhang" of the existing structure, inasmuch as the aluminum pool enclosure was to be attached to that overhang.

48. The drawings submitted indicate that the structure was to be attached to the host structure at the "super gutter." The super gutter is depicted on the structure specific plans, and the attachment details are provided on that section of the detail sheet entitled "Typical Super Gutter Attachment Schematic Plan and Detail."

49. Mr. Martin indicated that he was able to determine the dimensions of the structure with the exception of a 2x2-inch "girt 1" which was akin to a chair rail around the enclosure. However, the location of "girt 1" was not identified as a basis for the allegations in Count 7.A.

50. The drawings provided by Respondent, read in conjunction with the details, establish that Respondent adequately dimensioned his drawings. Thus, Petitioner failed to prove, by clear and convincing evidence, the elements of Count 7.A. that Respondent failed to adequately dimension his permit drawings.

Count 7.B.

51. Count 7.B. alleged that Respondent failed to show the size, section, and location of the framing elements and to define and detail the connections of the transom wall.

52. Mr. Martin testified that that he had no difficulty in determining the dimensions of any of the columns or beams that made up the pool enclosure. He had one question regarding the dimension of an eave gutter at the point at which the structure would attach to the host, but it was a question of a few inches difference.

53. Mr. Berryman's testimony was limited to the lack of detail regarding the transom wall, not to other framing elements for the pool enclosure. Thus, Petitioner failed to prove, by clear and convincing evidence, the elements of Count 7.B. that Respondent failed to show the size, section, and location of the framing elements.

54. Occasionally, a structure like a pool enclosure is higher than the eave of the host structure. A transom wall is a short wall that extends from the eave of the host structure to the framing members to support the spans from the screen pool enclosure. The evidence in this case demonstrates that Respondent did not include a transom wall in his design.

55. Petitioner's expert assumed the existence of a transom wall because the pool enclosure extended to a height greater than that of the connection to the house. The side view of the structure shows a vertical element extending up from the eave of the house at the nine-foot elevation, but provides no direct

information of any structure associated with that vertical element.

56. Respondent argued that the transom wall was, in essence, a structure that was made up by Mr. Driscoll, and that since it did not appear as part of Respondent's drawings, it could not form the basis for a violation. Mr. Martin stated that the drawings included no transom wall, whereupon he assumed that the vertical line on the "side view" drawing depicted a sloping gabled roof or some other unspecified feature of the host structure that was not clearly depicted. Mr. Martin further testified that the drawings did not provide the details for attaching that portion of the structure to the host structure, regardless of whether it was being attached to a gabled roof or to a transom wall.

57. Contrary to Respondent's assertion that there was no transom wall was his reply to the Project Review Report prepared by Driscoll Engineering, Inc. In his report, Mr. Driscoll noted the plans prepared by Respondent:

Do not establish or define the height of the connection between the screen enclosure roof and the host roof perimeter (eave). A note on the Plan View (Exhibit B-1) suggests that "2X4 SMB Vert." are present along one fascia segment, but their height is not shown, nor does Sheet 2 (B-3) depict an elevation of this assumed transom wall." (emphasis added).

In his response, Respondent, through his authorized agent, did not deny the existence of a transom wall, and made no suggestion that the structure tied into the existing host structure, but rather stated that "the transom wall is not shown; however [Respondent] assisted in the field with the installation of the transom wall." Thus, by virtue of Respondent's admission, the evidence is clear and convincing that a transom wall was part of the required design of the pool enclosure as constructed.

58. During the course of the hearing, a suggestion was made that Respondent went back to the project site, after-the-fact, and constructed a completely unnecessary transom wall "in good faith to try to participate in this process." That explanation is neither supported by the record, nor is it a reasonable or logical explanation for a transom wall having been constructed and attached to the host structure.

59. Regardless of whether the vertical line depicted the host structure or a transom wall, the drawings failed to define and detail the connections of the structure to the host structure. Thus, Petitioner proved, by clear and convincing evidence, the elements of Count 7.B. that Respondent failed to detail the connections of the transom wall, or other such framing element necessary to connect the pool enclosure to the Emilion Court residence.

Count 7.C.

60. Count 7.C. alleged that Respondent failed to show the section and therefore to define and detail the "2x3 Special" eave rail.

61. A "special" structural component is one that does not have four 90-degree corners. Rather, one or more of the corners may be something other than 90 degrees. Both Mr. Berryman and Mr. Martin agreed that the section of the special eave rail was not shown in the plans. Mr. Martin acknowledged that the section of the eave rail should have been on the plans.

Mr. Berryman indicated that by not specifying the section, the contractor may "interpret the plan, and put whatever he wants." Though not a "major issue," Petitioner proved, by clear and convincing evidence, the elements of Count 7.C. that Respondent failed to show the section and therefore to define and detail the "2x3 Special" eave rail.

Count 7.D.

62. Count 7.D. alleged that the 2x6 SMB post element and the 2x7 SMB beam element of Frame A are overstressed at code-prescribed design loading, and that the 2x6 SMB post element of Frame B is overstressed, and that Respondent therefore failed to proportion the subject framing elements in compliance with FBC strength standards.

63. In general, the evidence elicited from the experts was contradictory, including evidence of the standard for measuring stresses; the assumptions relied upon for determining the manner in which structural elements were connected, and other elements of the analysis. The testimony of the witnesses, both of whom were credible, failed to establish a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Thus, except as set forth in the following paragraph, Petitioner failed to prove, by clear and convincing evidence, the elements of Count 7.D. that the structure elements were overstressed, and that Respondent failed to proportion the subject framing elements in compliance with FBC strength standards. This finding is not one that the elements identified in the allegation were actually compliant, but is one based on a failure of proof.

64. As to one connection at which the Frame A beam attached to the carrier beam, which was identified by Mr. Martin as ID 3028, the evidence was clear and convincing that the applied bending moment, assuming that all of the connections of Frame A were fixed, was 27,201.9 inch-pounds, which exceeded the allowable bending moment calculated by Mr. Driscoll. There was no evidence that the allowable bending moment used in that analysis was unsupported by sound engineering principles. Thus, at the ID 3028 location where the Frame A beam attached to the

carrier beam, Frame A was overstressed. Thus, Petitioner proved, by clear and convincing evidence, the elements of Count 7.D. that Frame A was overstressed at code-prescribed design loading and that Respondent therefore failed to proportion the subject framing elements in compliance with FBC strength standards.

Count 7.E.

65. Count 7.E. alleged that Respondent failed to provide a foundation plan for the specific construction proposed.

66. Mr. Martin testified that documents sealed and submitted by Respondent were sufficient to establish the foundation plan for the Emilion project. In Mr. Martin's opinion, the details, including the "Typical Post Base Detail" and "Typical Foundation Details," were adequate to enable a contractor to construct the project in accordance with the engineering design document.

67. Mr. Berryman did not agree that the foundation elements depicted in the detail sheet were sufficient to establish a foundation plan. However, his opinion in that regard was largely predicated on his presumption that the preprinted disclaimer that "certification extends only for the tabulated spans of the structural shapes listed" meant that the entire detail sheet was to be disregarded except for the span table.

68. In Mr. Martin's opinion, the limitation or "disclaimer" language related only to beam spans, and did not serve to disclaim Respondent's responsibility for the information contained in the certified detail sheets.

69. It is common for an engineer to incorporate standard details into a design when appropriate. When a document is sealed, whether an original drawing or a standardized detail sheet, that seal represents the certification that the engineer is taking responsibility for the document. As indicated previously, the construction of the disclaimer applied by Mr. Berryman has the effect of nullifying the detail sheet in its entirety, except for the span table. The undersigned finds that a more reasonable construction is that the limitation serves to ensure that the span table does not apply to shapes, sizes, and spans not set forth therein. By applying his seal to the detail sheet, the undersigned finds that Respondent incorporated those details into his plans, and took responsibility for the plans incorporating those details.

70. For the reasons set forth herein, the undersigned accepts that the detail sheet has been properly incorporated into Petitioner's plans for the Emilion Court project. That does not end the inquiry.

71. The section entitled "Typical Foundation Details" does not specify a particular foundation plan. As noted by



Mr. Berryman, the sheet provides detail for four different types of foundations. Petitioner failed to specify which foundation was applicable, and therefore gave the contractor no useful information as to which foundation type was appropriate for the project. Thus, Petitioner proved, by clear and convincing evidence, the elements of Count 7.E. that Respondent failed to specify a foundation plan for the Emilion Court project.

Count 7.F.

72. Count 7.F. alleged that Respondent failed to address the design of the structure's foundations and failed to verify that the foundations meet the FBC strength requirements.

73. The basis for Count 7.F. is generally the same as that given for Count 7.E. For the reasons set forth herein, the undersigned accepts that the foundation detail sheet has been properly incorporated into Petitioner's plans for the Emilion Court project.

74. As set forth in the analysis of Count 7.E., the typical foundation details do not specify a particular foundation plan. Petitioner failed to specify which foundation was applicable and, therefore failed to address the design of the structure's foundations and failed to verify that the project-specific foundation met the FBC strength requirements. Thus, Petitioner proved, by clear and convincing evidence, the elements of Count 7.F.

Count 7.G.

75. Count 7.G. alleged that Respondent failed to indicate the size, section, location, and configuration of the typical diagonal roof bracing and all wall-bracing components for a lateral bracing system.

76. As to the size, section, location, and configuration of the typical diagonal roof bracing, Mr. Martin testified that "I do not see any diagonal bracing whatsoever. It's all purlins and there's no diagonal bracing." However, Mr. Martin was not able to tell whether Respondent determined that diagonal bracing was not required in the roof section, and in that regard testified that "since this has an L-shaped plan to it and it has host walls in both directions to connect to, then the roof bracing may not be required."

77. Mr. Berryman's testimony as to the diagonal roof bracing was fairly conclusory, and failed to establish the fundamental element that diagonal roof bracing was necessary for the Emilion Court project.

78. Although the evidence was clear and convincing that Respondent failed to include roof-bracing details, the fact that it was not proven that roof bracing was necessary leads the undersigned to find that Petitioner failed to prove, by clear and convincing evidence, that the lack of roof-bracing detail in this case constitutes a violation as alleged in Count 7.G.

79. Mr. Berryman's testimony as to the deficiencies in the description of the cable wall-bracing system was predicated on his opinion, previously discussed herein, that the typical cable bracing details contained on the detail sheet submitted with the plans must be disregarded due to the "span table" limitation. For the reasons previously discussed, the undersigned finds the limitation does not serve to negate the detail, nor was that Respondent's intent. Furthermore, Respondent modified the detail in his drawings by specifying the use of 3/16" cable, rather than the standard 3/32" cable provided in the detail. Therefore, Respondent separately acknowledged and certified that detail.

80. Mr. Martin testified that the plans, when read in conjunction with the certified details, provide sufficient information as to the wall-bracing components. Thus, Petitioner failed to prove, by clear and convincing evidence, the elements of Count 7.G. that Respondent failed to indicate the size, section, location, and configuration of the wall-bracing components.

Count 7.H.

81. Count 7.H. alleged that Respondent failed to address the design of the structure's bracing elements and failed to verify that the structure's bracing elements meet the FBC strength requirements.

82. For the reasons set forth in the analysis of Count 7.G., Petitioner failed to prove, by clear and convincing evidence, the elements of Count 7.H. that Respondent failed to address the design of the structure's bracing elements and failed to verify that the structure's bracing elements meet the FBC strength requirements.

Count 7.I.

83. Count 7.I. alleged that in the column of the table for 5'0" Post Spacing and Exposure Category B in "Drawing 1 of", the 2x4 SMB, 2x5 SMB, 2x6 SMB, 2x7 SMB, 2x8 SMB, 2x9 SMB, and 2x10 SMB posts, and the 2x7 SMB beam element of Frame A are overstressed at the listed span and loading, and that in the column of the table for 7'0" Post Spacing and Exposure Category C, the 2x4 SMB, 2x5 SMB, 2x6 SMB, 2x7 SMB, 2x8 SMB, 2x9 SMB, and 2x10 SMB, posts are overstressed at the listed span and loading.

84. The calculation of whether a support member is overstressed varies greatly depending on the means by which the support members are fastened to one another. In general, measurements are taken at the base, at the shoulder, and at the carrier beam or other fixed structure to which a member is attached. If members are fastened by means of a single fastener, they are characterized as "pinned" connections. Pinned connections have greater stresses exerted by rotation and bending. If members are fastened together with multiple

fasteners, they are generally characterized as "fixed" connections, with the degree to which they are fixed somewhat dependant on the number of fasteners per connection.

85. Mr. Berryman determined that Respondent assumed that the mansard roof had pinned connections at the base, at the shoulder, and at the connection to the supporting structure. In making that determination, as with regard to other counts, Mr. Berryman disregarded the detail sheet that accompanied Respondent's drawings due to General Notes and Design Criteria, #12, that "[c]ertification extends only for the tabulated spans of the structural shapes listed. The engineer of record shall verify all other details including overall stability." Therefore, despite Respondent having included the detail sheet that clearly showed connections with multiple fasteners as part of his engineering package, Mr. Berryman opined that the disclaimer "specifically excluded all of the details in the project from his certification. Then there was nothing for me to consider regarding those details. They're not part of his work." As a result, Mr. Berryman concluded that Respondent "didn't design any connections. And actually, I found an issue with his work because he didn't design any connections."

86. The detail sheet provided demonstrates the typical post to beam connections by the dimensions of each of the structural members being connected. Each of the typical joints

called for multiple screws. Therefore, the joints were not pinned, as assumed by Mr. Berryman, but were closer to fixed joints. Thus, the assumption used by Mr. Berryman that joints were pinned -- an assumption that would be expected to materially affect the conclusions as to the stability and strength of the structure -- was incorrect.

87. In general, the evidence elicited from Mr. Berryman and Mr. Martin was contradictory, including evidence of the standard for measuring stresses, the assumptions relied upon for determining the manner in which structural elements were connected, and other elements of the analysis. The testimony of the witnesses, both of whom were credible, failed to establish a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Thus, Petitioner failed to prove, by clear and convincing evidence, the elements of Count 7.I. This finding is not one that the elements identified in the allegation were actually compliant, but is one based on a failure of proof.

Count 7.J.

88. Count 7.J. alleged that Respondent failed to address the design and verify the structure's connections, bracing and anchorage, and failed to verify that they meet the FBC strength requirements. The basis for the allegation is that the certification of the generic details and specifications is

limited to the tabular span data listed on the generic details and specifications drawings. Therefore, Count 7.J., on its face, requires that the details submitted by Respondent with his drawings be disregarded.

89. As discussed several times previously, Mr. Berryman has expressed his opinion that the detail sheets submitted with the plans must be disregarded due to the "span table" limitation. For the reasons previously discussed, the undersigned finds the limitation does not serve to negate the details, nor was that Respondent's intent. Thus, since Petitioner failed to demonstrate that the information conveyed in the details did not comply with the FBC, and for the reasons otherwise expressed with regard to other similar counts, Petitioner failed to prove, by clear and convincing evidence, the elements of Count 7.J.

Count 7.K.

90. Count 7.K. alleged that the beam span table in "Drawing 2", the 2x4, 2x5, 2x6, and 2x8 beam elements are overstressed at the listed span and loading in frame configurations allowed by the table, and that the 2x2 snap beam element is overstressed for all spans listed.

91. Mr. Berryman's opinion that the structure was overstressed is, again, largely predicated on his assumption

that the structure had pinned connections. The evidence is more persuasive that the connections were fixed.

92. For the reasons set forth in the analysis of Count 7.I., including the contradictory testimony of the two generally credible witnesses, the evidence failed to establish a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Thus, Petitioner failed to prove, by clear and convincing evidence, the elements of Count 7.K. This finding is not one that the elements identified in the allegation were actually compliant, but is one based on a failure of proof.

#### CONCLUSIONS OF LAW

##### A. Jurisdiction.

93. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).

##### B. Standards

94. Section 471.033, Florida Statutes, entitled Disciplinary Proceedings, provides, in pertinent part, that:

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

\* \* \*



(g) Engaging in fraud or deceit, negligence, incompetence, or misconduct, in the practice of engineering.

95. Rule 61G15-19.001, entitled Grounds for Disciplinary Proceedings, provides, in subsection (4), that:

(4) A professional engineer shall not be negligent in the practice of engineering. The term negligence set forth in Section 471.033(1)(g), F.S., is herein defined as the failure by a professional engineer to utilize due care in performing in an engineering capacity or failing to have due regard for acceptable standards of engineering principles. Professional engineers shall approve and seal only those documents that conform to acceptable engineering standards and safeguard the life, health, property and welfare of the public.

Failure to comply with the procedures set forth in the Responsibility Rules as adopted by the Board of Professional Engineers shall be considered as non-compliance with this section unless the deviation or departures therefrom are justified by the specific circumstances of the project in question and the sound professional judgment of the professional engineer.

96. Rule 61G15-30.003, entitled Minimum Requirements for Engineering Documents, provides, in subsection (1), that:

(1) Engineering Documents are prepared in the course of performing engineering services. When prepared for inclusion with an application for a general building permit, the Documents shall meet all Engineer's Responsibility Rules, set forth in Chapters 61G15-31, 61G15-32, 61G15-33, and 61G15-34, F.A.C., and be of sufficient clarity to indicate the location, nature and extent of the work proposed and show in

detail that it will conform to the provisions of the Florida Building Code, adopted in Section 553.73, F.S., and applicable laws, ordinances, rules and regulations, as determined by the AHJ [Authority Having Jurisdiction]. The Documents shall include:

(a) Information that provides material specifications required for the safe operation of the system that is a result of engineering calculations, knowledge, and experience.

(b) List Federal, State, Municipal, and County standards, codes, ordinances, laws, and rules, with their effective dates, that the Engineering Documents are intended to conform to.

(c) Information, as determined by the Engineer of Record, needed for the safe and efficient operation of the system.

(d) List engineering design criteria; reference project specific studies, reports, and delegated Engineering Documents.

(e) Identify clearly elements of the design that vary from the governing standards and depict/identify the alternate method used to ensure compliance with the stated purpose of these Responsibility Rules.

97. Rule 61G15-31.002(5) defines "Structural Engineering Documents" as follows:

The structural drawings, specifications and other documents setting forth the overall design and requirements for the construction, alteration, repair, removal, demolition, arrangement and/or use of the structure, prepared by and signed and sealed by the engineer of record for the structure. Structural engineering documents shall identify the project and specify design

criteria both for the overall structure and for structural components and structural systems. The drawings shall identify the nature, magnitude, and location of all design loads to be imposed on the structure. The structural engineering documents shall provide construction requirements to indicate the nature and character of the work and to describe, detail, label, and define the structure's components, systems, materials, assemblies, and equipment.

98. Rule 61G15-30.002(1) defines "Engineer of Record" as "[a] Florida professional engineer who is in responsible charge for the preparation, signing, dating, sealing, and issuing of any engineering document(s) for any engineering service or creative work."

99. Rule 61G15-31.001, entitled General Responsibility, provides, in pertinent part, that:

The Engineer of Record is responsible for all structural aspects of the design of the structure including the design of all of the structure's systems and components . . . . [T]he structural engineering documents shall address, as a minimum, the items noted in the following subsections covering specific structural systems or components. The Engineer of Record's structural engineering documents shall identify delegated systems and components. [T]he Engineer of Record for the structure . . . shall comply with the requirements of the general responsibility rules, Chapter 61G15-30, F.A.C., and with the requirements of the more specific structural responsibility rules contained herein. . . .

C. The Burden and Standard of Proof.

100. The Petitioner bears the burden of proving the specific allegations of fact that support the charges alleged in the Administrative Complaint by clear and convincing evidence. § 120.57(1)(j), Fla. Stat.; Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins. and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

101. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). The clear and convincing evidence level of proof

entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

102. Section 471.033 is penal in nature, and must be strictly construed, with any ambiguity construed against the Petitioner. Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden the application of such statutes. Elmariah v. Dep't of Bus. & Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); see also Beckett v. Dep't of Fin. Svcs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Whitaker v. Dep't of Ins., 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Dyer v. Dep't of Ins. & Treasurer, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

103. The charges against Respondent were based on allegations of his negligent violation of general standards of professional conduct and breach of a duty to follow sound engineering practices, and therefore "required evidentiary proof of some standard of professional conduct as well as deviation therefrom." Purvis v. Dep't of Prof'l Reg., 461 So. 2d 134, 136 (Fla. 1st DCA 1984); see also Gross v. Dep't of Health, 819 So.

2d 997, 1004-1005 (Fla. 5th DCA 2002); McDonald v. Dep't of Prof'l Reg., 582 So. 2d 660, 670-671 (Fla. 1st DCA 1991) (Zehmer, J., concurring); Cohn v. Dep't of Prof'l Reg., 477 So. 2d 1039, 1046 (Fla. 3rd DCA 1985).

Shank Residence Project

104. Given the admissible testimony and evidence presented at the final hearing, Petitioner proved, by clear and convincing evidence, that Respondent engaged in negligence in the practice of engineering for the Shank Residence project with regard to Count 6.A.; Count 6.B., regarding the column spacing at the fourth wall and the spacing of the intermediate roof beam; Count 6.C.; Count 6.D., and Count 6.E.; and in so doing proved, by clear and convincing evidence, that Respondent violated section 471.033 and Florida Administrative Code Rules 61G15-19.001(4) and 61G15-30.003 with regard to those counts.

105. Given the admissible testimony and evidence presented at the final hearing, Petitioner failed to prove, by clear and convincing evidence, that Respondent engaged in negligence in the practice of engineering for the Shank Residence project with regard to Count 6.B., regarding the dimensions of the canopy at the fourth wall and the dimensions of the knee brace elements; and in so doing failed to prove, by clear and convincing evidence, that Respondent violated section 471.033 and Florida

Administrative Code Rule 61G15-19.001(4) and Rule 61G15-30.003 with regard to that count.

Emilion Court Residence Project

106. Given the admissible testimony and evidence presented at the final hearing, Petitioner proved, by clear and convincing evidence, that Respondent engaged in negligence in the practice of engineering for the Emilion Court Residence project with regard to Count 7.B. regarding the details of the connection of the structure to the transom wall or other element of the Emilion Court residence; Count 7.C.; Count 7.D., regarding the overstressing of Frame A at ID 3028; Count 7.E.; and Count 7.F.; and in so doing proved, by clear and convincing evidence, that Respondent violated section 471.033 and Florida Administrative Code Rules 61G15-19.001(4) and 61G15-30.003 with regard to those counts.

107. Given the admissible testimony and evidence presented at the final hearing, Petitioner failed to prove, by clear and convincing evidence, that Respondent engaged in negligence in the practice of engineering for the Emilion Court Residence project with regard to Count 7.A.; 7.B. except for that regarding the point of attachment to the host structure; 7.D., except for the overstressing of Frame A at ID 3028; 7.G.; 7.H.; 7.I.; 7.J.; and 7.K.; and in so doing failed to prove, by clear and convincing evidence, that Respondent violated section

471.033 and Florida Administrative Code Rules 61G15-19.001(4) and 61G15-30.003 with regard to those counts.

AFFIRMATIVE DEFENSES

108. In addition to the foregoing elements of the Administrative Complaint, Respondent raised seven affirmative defenses to the Administrative Complaint. Respondent bears the burden of proving the facts that support each defense.

Ellingham v. Fla. Dep't of Child. & Fam. Servs., 896 So. 2d 926, 927 (Fla. 1st DCA 2005); Pub. Health Trust of Dade Cnty. v. Holmes, 646 So. 2d 266, 267 (Fla. 3d DCA 1994). The defenses are addressed as follows:

First Affirmative Defense

109. In his First Affirmative Defense, Respondent alleged that "the allegations, even if proven by clear and convincing evidence, would not justify imposing discipline." The defense is based on the "low 'importance rating'" of the structures, and that there was no "injury in fact" resulting from any deficiencies in the design.

110. Respondent failed to produce any evidence of a de minimis exception to the Board's disciplinary authority under section 471.033 and the rules promulgated thereunder.

111. Respondent failed to demonstrate that negligence in engineering as defined in rule 61G15-19.001 requires proof of actual injury and causation as is required for common law



negligence. Rule 61G15-19.001 defines negligence as applied to licenced professional engineers as "the failure by a professional engineer to utilize due care in performing in an engineering capacity or failing to have due regard for acceptable standards of engineering principles." The rule was not challenged. Thus, the fact that the structures have not actually failed does not mean that the plans from which the structures were built complied with relevant standards of engineering. Cf. Sheils v. Fla. Eng'rs Mgmt. Corp., 886 So. 2d 426, 429 (Fla. 4th DCA 2004).

112. Rule 61G15-19.001 establishes the grounds for disciplinary proceedings, and rule 61G15-19.004 establishes the disciplinary guidelines for violations of chapter 471 and the rules promulgated thereunder. Respondent did not challenge those rules.

113. Regarding the suggestion that the "low 'importance rating'" of the structures was a basis to forego discipline, rule 61G15-19.004(3)(b) establishes mitigating circumstances to lessen the Board's generally applicable disciplinary guidelines, which include "[i]n cases of negligence, the minor nature of the project in question and lack of danger to the public health, safety and welfare resulting from the licensee's misfeasance." The application of that rule addresses the issue raised in Respondent's First Affirmative Defense.

114. Respondent has failed to meet his burden of proof as to any "injury in fact" requirement that must be met in order for the Petitioner to commence a disciplinary proceeding, or of any de minimis exception other than that established by rule. Thus, Respondent's First Affirmative Defense is rejected.

Second Affirmative Defense

115. In his Second Affirmative Defense, Respondent alleged that "the reports of the peer reviewers, the sole basis for the initiation of this action, are materially erroneous and misleading."

116. The Second Affirmative Defense is a commentary on the evidentiary value of certain exhibits, and the appropriate weight that should be given to those exhibits by the undersigned. The allegations are not in the nature of "an avoidance or affirmative defense." See, e.g., Rule 1.110(d), Fla. R. Civ. P. Thus, Respondent's Second Affirmative Defense is rejected.

Third Affirmative Defense

117. In his Third Affirmative Defense, Respondent alleged that "the peer review reports, the sole basis for the initiation of this action, show that the prosecution experts are so biased as to establish a clear violation of Respondent's fundamental right to due process of law."

118. The undersigned finds that the peer review reports do not constitute evidence of bias on the part of the experts, the FEMC, or Petitioner.

119. Disciplinary proceedings are de novo in nature. The proposed agency action as reflected by the Administrative Complaint has no dispositive effect on the undersigned's consideration of the merits of the case, and the burden remains on the Petitioner to prove each element of its case by clear and convincing evidence.

120. There was no competent, substantial evidence adduced at the hearing in this proceeding to substantiate that Respondent's fundamental right to due process of law was infringed upon in any way by Petitioner in the course of this proceeding.

121. Respondent has failed to meet his burden of proof, as no evidence was adduced to support the allegation that the prosecution experts were so biased as to establish a clear violation of Respondent's fundamental right to due process of law. Thus, Respondent's Third Affirmative Defense is rejected.

#### Fourth Affirmative Defense

122. In his Fourth Affirmative Defense, Respondent alleged that "the agency's peer review/project review procedures, pursuant to which Petitioner filed this 'violation of probation'

action constitute an invalid unadopted rule within the contemplation of sec. 120.57(1)(e)."

123. An "unadopted rule" is defined as "an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54." § 120.52(20), Fla. Stat. A "rule" is defined, in pertinent part, as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." § 120.52(16), Fla. Stat.

124. Respondent did not introduce evidence sufficient to establish Petitioner's peer review/project review procedures. The only evidence of any "procedure" in this case was that agreed upon by the stipulation of the parties and incorporated in the Final Order in Case Nos. 2007062474 and 2008062082. Furthermore, Respondent introduced no evidence that the methodology implemented by Petitioner to determine whether sufficient evidence existed to proceed with the issuance of an Administrative Complaint was a statement "of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an

agency." Respondent failed to meet his burden of proof, thus, Respondent's Fourth Affirmative Defense is rejected.

Fifth Affirmative Defense

125. In his Fifth Affirmative Defense, Respondent alleged that "the agency failed to follow the proper rules for commencing a disciplinary action." The basis for the defense was the allegation that the "Explanation of Rights" and "Election of Rights" forms that accompanied the Administrative Complaint referenced rule 28-106.201 as establishing the procedure for filing a petition to challenge the proposed agency action, rather than rule 28-106.2015, which applies specifically to petitions to challenge proposed disciplinary or enforcement actions.

126. The issue raised by Respondent was unsupported by any evidence that the misidentification of the uniform rule of procedure applicable to challenges of proposed agency action in a disciplinary proceeding impaired the fairness of the proceedings, or prejudiced the rights or remedies available to Respondent in any way.

127. Respondent received a full hearing in which he was able to exercise his due process rights, and mount a vigorous defense to the Administrative Complaint. Carter v. Dep't of Prof'l Reg., Bd. of Optometry, 633 So. 2d 3, 5-6 (Fla. 1994); Ames v. Dist. Bd. of Trs., 908 So. 2d 1142, 1144 (Fla. 1st DCA

2005). Thus, Respondent's Fifth Affirmative Defense is rejected.

Sixth Affirmative Defense

128. In his Sixth Affirmative Defense, Respondent alleged a "violation of sec. 455.221(2), Fla. Stat." related to the appearance of counsel for the FEMC as prosecutor at the meeting of the Board's Probable Cause Panel at which the decision to proceed with the issuance of an Administrative Complaint against Respondent was made.

129. Section 455.221 provides, in pertinent part, that:

(1) The department shall provide board counsel for boards within the department by contracting with the Department of Legal Affairs, by retaining private counsel pursuant to s. 287.059, or by providing department staff counsel. The primary responsibility of board counsel shall be to represent the interests of the citizens of the state . . . .

(2) The Department of Business and Professional Regulation may employ or utilize the legal services of outside counsel and the investigative services of outside personnel. However, no attorney employed or used by the department shall prosecute a matter and provide legal services to the board with respect to the same matter. (emphasis added).

130. Section 471.038 provides, in pertinent part, that:

(3) The Florida Engineers Management Corporation is created to provide administrative, investigative, and prosecutorial services to the board in accordance with the provisions of chapter

455 and this chapter. The management corporation may hire staff as necessary to carry out its functions . . . . The management corporation shall:

\* \* \*

(b) Provide administrative, investigative, and prosecutorial services to the board in accordance with the provisions of chapter 455, this chapter, and the contract required by this section.

\* \* \*

(d) Be approved by the board, and the department, to operate for the benefit of the board and in the best interest of the state.

(4) The management corporation may not exercise any authority specifically assigned to the board under chapter 455 or this chapter, including determining probable cause to pursue disciplinary action against a licensee, taking final action on license applications or in disciplinary cases, or adopting administrative rules under chapter 120.

(5) Notwithstanding ss. 455.228 and 455.2281, the duties and authority of the department to receive complaints and to investigate and deter the unlicensed practice of engineering are delegated to the board. The board may use funds of the Board of Professional Engineers in the unlicensed activity account established under s. 455.2281 to perform the duties relating to unlicensed activity.

(6) The department shall retain the independent authority to open or investigate any cases or complaints, as necessary to protect the public health, safety, or welfare. In addition, the department may request that the management corporation prosecute such cases and shall retain sole

authority to issue emergency suspension or restriction orders pursuant to s. 120.60.

131. The record in this case suggests that the Board was represented by counsel provided by the Department at the July 11, 2011 meeting of the Probable Cause Panel, which counsel provided legal advice to the panel. When Respondent's case came up on the agenda for consideration, counsel for the FEMC appeared, as prosecutor, to present the Administrative Complaint for consideration.

132. There was no evidence submitted that counsel for the FEMC provided legal services or advice to the Probable Cause Panel, or provided anything other than the prosecutorial services specifically authorized by section 471.038.

133. The undersigned is cognitive of the Recommended Order entered in Dep't of Prof'l Reg., Bd. of Dentistry v. LeBaron, DOAH Case No. 82-1863 (Fla. DOAH Dec. 8, 1982; Fla. DPR F.O. not available)<sup>2/</sup>, in which the prosecuting attorney "stated to the panel that the Department's present position was to prosecute first offenses of incompetency on the part of licensees." In dismissing the Administrative Complaint, the hearing officer concluded that "the proceedings were tainted by the presence and advice rendered by the prosecutor, and it is unnecessary to determine the extent to which his statements to the panel may or



may not have influenced their ultimate determination."

(emphasis added).

134. The undersigned believes the Recommended Order in LeBaron is limited to its narrow facts in which the prosecutor provided clear legal advice to the Probable Cause Panel regarding issues of departmental policy that drove the panel's decision. Such facts have not been shown in this case.

135. In Dept. of Prof'l Reg., Bd. of Dentistry v. Beckum, DOAH Case No. 83-0527 (Fla. DOAH Aug. 19, 1983; Fla. DPR F.O. Sept. 28, 1983); aff'd 461 So. 2d 943 (Fla. 1st DCA 1984), the hearing officer found that:

The attorney who prosecuted this matter on behalf of the Department of Professional Regulation appeared at the probable cause panel meeting. The attorney made recommendations to the panel, some of which were followed. It does not appear that the attorney was providing legal services to the probable cause panel, but rather that he was making recommendations as a prosecutor.

He then concluded that:

While it does appear that the attorney employed to prosecute this matter made recommendations to the probable cause panel, it does not appear that he provided legal services. To the extent that he did, it does not appear that the fairness of the proceeding or the correctness of the action taken by the panel was impaired. Dismissing the complaint would therefore be inappropriate.

136. The undersigned agrees with the hearing officer in Beckum that some impairment of the fairness of the proceeding or the correctness of the action must be shown to justify the imposition of the sanction of dismissal of the Administrative Complaint. As did the Court in Sternberg v. Dept of Prof'l Reg., Bd. of Medicine, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985), the undersigned finds in this case "no impropriety on the Board's part such as to deprive [Respondent] of a fair hearing before an impartial tribunal." See also Carter v. Dep't of Prof'l Reg., 633 So. 2d at 6, ("courts have consistently applied the harmless error rule when reviewing agency action resulting from a procedural error").

137. For the reasons set forth herein, Respondent's Sixth Affirmative Defense is rejected.

Seventh Affirmative Defense

138. In his Seventh Affirmative Defense, Respondent alleged a "lack of subject matter jurisdiction" based on the authority of local jurisdictions to enforce violations of the FBC, including the imposition of monetary penalties against regulated professionals, including engineers, pursuant to sections 553.781 and 553.80, Florida Statutes. Respondent's defense is essentially one of preemption.

139. Chapter 553, Part IV establishes the FBC, and authorizes local jurisdictions to enforce violations of the FBC. Section 553.781(2) provides that:

(2)(a) Upon a determination by a local jurisdiction that a licensee, certificateholder, or registrant licensed under chapter 455, chapter 471, chapter 481, or chapter 489 has committed a material violation of the Florida Building Code and failed to correct the violation within a reasonable time, such local jurisdiction shall impose a fine of no less than \$500 and no more than \$5,000 per material violation.

(b) If the licensee, certificateholder, or registrant disputes the violation within 30 days following notification by the local jurisdiction, the fine is abated and the local jurisdiction shall report the dispute to the Department of Business and Professional Regulation or the appropriate professional licensing board for disciplinary investigation and final disposition. If an administrative complaint is filed by the department or the professional licensing board against the certificateholder or registrant, the commission may intervene in such proceeding. Any fine imposed by the department or the professional licensing board, pursuant to matters reported by the local jurisdiction to the department or the professional licensing board, shall be divided equally between the board and the local jurisdiction which reported the violation.

140. Based on the foregoing, both the Department and the local jurisdictions have a role in enforcing violations of the FBC.

141. Though a determination of compliance with the FBC by local building officials under chapter 553 is not dispositive of whether an engineer was negligent under chapter 471, it does go to the issue of whether Respondent exercised due care in the performance of his engineering duties. See Seibert v. Bayport Beach & Tennis Club Ass'n, 573 So. 2d 889, 892 (Fla. 2d DCA 1990).

142. Where Respondent's argument fails is that it does not recognize the independent disciplinary authority conferred by the Legislature upon the Petitioner under chapters 455 and 471, based not on whether there has been a specific violation of the FBC, but on whether an engineer has failed to perform services in conformance with sound engineering practices.

143. There has been no suggestion that this action was brought without meeting the general procedural requirements of section 455.225 and section 471.033.

144. Though the grounds for discipline under chapter 553 may be related to, and in some respects overlap those under chapters 455 and 471, they are not mutually exclusive, and there is no indication of any intent by the legislature that one is to preempt the other. Thus, Respondent's Seventh Affirmative Defense is rejected.

## PENALTIES

145. Section 455.2273 requires each board within the Department to adopt, by rule, disciplinary guidelines applicable to each ground for disciplinary action that may be imposed by the board. Petitioner adopted Florida Administrative Code Rule 61G15-19.004 to establish the Board of Professional Engineers' disciplinary guidelines, which guidelines include penalty ranges and aggravating and mitigating circumstances.

146. The violations established in this proceeding constitute a second violation for purposes of Respondent's disciplinary guidelines.

147. The penalties established for a second offense of negligence in violation of section 471.033(1)(g) range from two years' probation and a \$1,000 fine, to a \$5,000 fine and revocation of the license. Fla. Admin. Code R. 61G15-19.004(2)(g)2.

148. Section 455.227(3) provides that "[i]n addition to . . . discipline imposed for a violation of any practice act, the board . . . may assess costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time."

149. Petitioner has requested that Respondent be reprimanded, that he be placed on probation for two years, that his license be restricted from practicing structural engineering

involving the design of aluminum structures until such time as he passes the NCEES Structural Engineering Examination, that he be fined \$5,000, and that costs related to the investigation and prosecution of this case be assessed against him.

150. Petitioner's penalty request was based upon Respondent being found to have violated each of the counts brought against him.

151. Among the aggravating circumstances established by rule that could justify an enhancement of the applicable penalty beyond the maximum is a "[h]istory of previous violations of the practice act and the rules promulgated thereto." That aggravating circumstance applies in this case.

152. Among the mitigating circumstances established by rule that could justify a reduction of the applicable penalty below the minimum is "in cases of negligence, the minor nature of the project in question and lack of danger to the public health, safety and welfare resulting from the licensee's misfeasance." The evidence in this case demonstrates the applicability of that mitigating circumstance in this case.

153. The undersigned finds that the aggravating and mitigating circumstances cancel each other out, and therefore neither has been considered in the assessment of an appropriate penalty in this case.

154. Given that several of the counts against Respondent were not proven, a penalty less than that requested by Respondent is appropriate.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED that the Florida Board of Professional Engineers enter a Final Order finding that Respondent is guilty of violating section 471.033(1)(g), Florida Statutes, and Florida Administrative Code Rule 61G15-19.001 for the counts identified herein. It is further recommended that Respondent be reprimanded, that he be placed on probation for two years, that his license be restricted from practicing structural engineering involving the design of aluminum structures until such time as he passes and submits proof of passing the NCEES Structural Engineering Examination, that he be fined \$2,000, and that costs related to the investigation and prosecution of this case be assessed against him.

DONE AND ENTERED this 6th day of November, 2012, in  
Tallahassee, Leon County, Florida.



---

E. GARY EARLY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of November, 2012.

ENDNOTES

<sup>1/</sup> There was significant discussion as to whether the intermediate beam was necessary to account for the load exerted by the composite roof structure. Count 6.B. did not allege that the intermediate beam was overstressed or that it was not capable of handling the loads and stresses applied by the patio structure. Rather, the allegation was that the drawings failed to provide sufficient information for a building contractor to be able to construct the structure in accordance with the plans. Therefore, the information as to loading and deflection is not relevant to the essential elements of Count 6.B.

<sup>2/</sup> The Department did not enter a final order, but rather unsuccessfully attempted to take a direct appeal of the recommended order. Dep't of Prof'l Reg. v. LeBaron, 443 So. 2d 225 (Fla. 1st DCA 1983).



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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.