

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA BOARD OF PROFESSIONAL
ENGINEERS,

Petitioner,

vs.

Case No. 13-4046PL

OLIVER TURZAK, P.E.,

Respondent.

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings (DOAH), on January 9 and 10, 2014, by video teleconferencing at sites located in Tampa and Tallahassee, Florida.

APPEARANCES

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

For Respondent: David P. Rankin, Esquire
Law Office of David P. Rankin, P.A.
18540 North Dale Mabry Highway
Lutz, Florida 33548

STATEMENT OF THE ISSUE

The issue is whether Oliver J. Turzak violated statutes and rules governing the practice of engineering as charged in the

Amended Administrative Complaint filed with the Clerk of the Florida Board of Professional Engineers (the "Board") on October 4, 2012.

PRELIMINARY STATEMENT

Petitioner served an Administrative Complaint on Respondent alleging that Respondent had violated various provisions of chapter 471, Florida Statutes, and related rules. Respondent requested a hearing under sections 120.569 and 120.57(1), Florida Statutes. Petitioner forwarded the Answer and Administrative Complaint to DOAH and requested that an administrative law judge ("ALJ") be assigned to hear the case. The case was opened, assigned Case No. 13-1470PL, and a hearing was scheduled; however, prior to the hearing, the parties entered into settlement negotiations and mutually agreed to cancel the hearing. The ALJ entered an Order Closing File and Relinquishing Jurisdiction on July 11, 2013.

Settlement negotiations proved unsuccessful, and Petitioner moved DOAH to reopen the case on October 16, 2013. The ALJ subsequently entered an Order Reopening File on October 17, 2013, and assigned the current case number of 13-4046PL. A Joint Pre-hearing Stipulation was filed with DOAH on January 2, 2014.

The hearing was held on January 9 and 10, 2014. During the hearing, Petitioner offered 17 exhibits, all of which were admitted into evidence. Respondent offered 13 exhibits,

numbered 2 through 11, 13, 15, and 19, all of which were admitted into evidence. Petitioner called three witnesses: Roger Jeffery, P.E., accepted as an expert in structural engineering with expertise in the design and analysis of structures, which are subject to remediation and remediation plans; Matthew R. Depin, E.I., project engineer with Bracken Engineering, Inc.; and José C. Busquets, P.E., project engineer with Bracken Engineering, Inc. Respondent called two witnesses: Dr. Ahmed Said, accepted as an expert in structural engineering and professional engineering regarding the forensic analysis of sinkhole subsidence and remediation; and Michael Mosher, owner and president of Champion Foundation Repair.

A two-volume Transcript of the final hearing was filed on January 28, 2014. After the hearing, Respondent and Petitioner filed their proposed findings of fact and conclusions of law on February 24, 2014.

References to statutes are to Florida Statutes (2013) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is charged with regulating the practice of engineering pursuant to chapter 455, Florida Statutes. The Administrative Complaint at issue was filed by the Florida Engineers Management Corporation ("FEMC") on behalf of Petitioner. FEMC is charged with providing administrative,

investigative, and prosecutorial services to the Florida Board of Professional Engineers pursuant to section 471.038, Florida Statutes.

2. Respondent is, and at all times material to these proceedings has been, a licensed professional engineer in the State of Florida, having been issued license number PE 18230. Respondent's last known address is 5405 Water Street, New Port Richey, Florida 34652.

3. On April 20, 2008, Respondent signed, sealed, and dated a Settlement Stabilization Plan for the Fish Residence located at 11251 Knotty Pine Drive, New Port Richey, Florida ("Fish Residence Project").

4. On June 10, 2008, Respondent signed, sealed, and dated an engineering opinion letter ("Letter") which was addressed and sent to Champion Foundation Repair, the entity which was Respondent's client for the Fish Residence Project. The Letter stated in material part:

[Respondent], whose signature appears below, has verified placement of twenty-seven (27) exterior piers and twenty-five (25) interior jack pins as located on the drawings by the same job number. The piers all achieved sufficient load bearing characteristics to transfer the house weight to the piers and to close cracks substantially and stabilize the foundation. The remediation program was developed according to geological data supplied by Central Florida Testing Laboratories, Inc., dated November 2007.

Similar pier reports on numerous structures with similar problems have demonstrated long term success without additional settlement.

Therefore, it is the opinion of the [Respondent] that the location has been repaired and stabilized and, further, that there is no evidence of new sinkhole activity at the location.

In compliance with Florida Statute 627.707, the report and remediation program was prepared under the supervision of a Registered Professional, whose field of expertise is a Geo-Technical Engineer.

5. The Board has adopted Responsibility Rules of Professional Engineers ("Responsibility Rules"). These rules are contained in Florida Administrative Code Chapters 61G15-30 through 61G15-35. Professional engineers, who perform services covered by the Responsibility Rules, are required to comply with those rules.

6. Rule 61G15-30.002(1) mandates that Respondent, as the structural engineer of record, is professionally responsible for the documents prepared for the Fish Residence Project. As such, Respondent is responsible for producing a document that complies with the applicable portions of the Responsibility Rules.

7. Respondent acted as Engineer of Record of the Structure for the Fish Residence Project as that term is defined in rules 61G15-31.002(1) and 61G15-31.003(1). As such, all structural documents prepared, signed, sealed, and dated by Respondent must contain the information set out in rule 61G15-31.002(5), as

mandated by rule 61G15-31.001, setting out the General Responsibility standards for engineers designing structures.

8. Section 471.033(1)(g), Florida Statutes, provides that an engineer is subject to discipline for engaging in negligence in the practice of engineering. Florida Administrative Code Rule 61G15-19.001(4) provides that negligence constitutes "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."

9. Rule 61G15-19.001(4) also provides that:

[F]ailure 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.

10. Respondent's June 10, 2008, Letter is an engineering "certification" as that term is defined in Florida Administrative Code Rule 61G15-18.011(4):

[A] statement signed and sealed by a professional engineer representing that the engineering services addressed therein, as defined in section 471.005(6), F.S., have been performed by the professional engineer, and based upon the professional engineer's knowledge, information and belief, and in accordance with commonly accepted procedures consistent with applicable standards of practice,

"Certifications" are subject to the standards set out in Florida Administrative Code Rule 61G15-29.001, which require that if an engineer is presented with a "certification" that "involve[s] matters which are beyond the engineer's scope of services actually provided" that the engineer must "decline to sign . . . such certification."

11. Section 471.033(1) (a) provides that an engineer is subject to discipline for "[v]iolating . . . [a] rule of the [B]oard."

12. Section 471.033(1) (e) provides, in material part, that a professional engineer is subject to discipline for "[m]aking or filing a report or record that the licensee knows to be false" when the report is "signed in the capacity of a licensed engineer."

13. Rule 61G15-19.001(6) provides that:

A professional engineer shall not commit misconduct in the practice of engineering. Misconduct in the practice of engineering as set forth in Section 471.033(1) (g), F.S., shall include, but not be limited to:

* * *

(b) Being untruthful, deceptive, or misleading in any professional report, statement, or testimony whether or not under oath or omitting relevant and pertinent information from such report, statement or testimony when the result of such omission would or reasonably could lead to a fallacious conclusion on the part of the

client, employer or the general public;

The Fish Residence

14. In 2007, the residence located at 11251 Knotty Pine Drive in New Port Richey, Florida (the "Fish Residence"), experienced structural damage from subsidence in the ground underlying the home. As a result, a claim was made to Fish's insurance company, and an investigation was commenced. Central Florida Testing Laboratories, Inc. ("CFTL"), a geotechnical engineering firm, performed an in-depth analysis and found, in a signed, sealed, and dated engineering report issued on November 20, 2007, that the subsidence was likely caused by a number of factors, including sinkhole activity.

15. As a result, the Fishes hired a contractor, Champion Foundation Repair ("Champion") to remediate the damage. Champion hired Respondent to perform the engineering services necessary to obtain a permit for the remediation, inspect the construction, and complete a report certifying the adequate completion of the work.

16. Respondent had a long history of providing similar services to Champion in the past, having performed engineering services in over 200 projects for Champion. Respondent created, signed, sealed, and dated on April 20, 2008, a Settlement

Stabilization Plan ("Plan"), which formed the design basis for the work Champion carried out.

17. Well into the project, the Fishes became dissatisfied with the work done by Champion. Champion was terminated as the contractor before the work was finalized and before Respondent was able to perform a final inspection of the property.

Litigation was commenced and Bracken Engineering ("Bracken"), a forensic structural/civil engineering firm was engaged to perform an investigation of the work performed by Champion and Respondent for the pending litigation.

18. Bracken issued a lengthy engineering report ("Bracken Report"), under engineering seal, on June 20, 2011. The Bracken Report found Respondent's Plan deficient, that Respondent was not adequately knowledgeable about the site, that Champion's implementation of the Plan, and Champion's construction work as a whole was flawed and inadequate. Subsequent to the issuance of the Bracken Report, a complaint was filed with the Board, and these proceedings were initiated.

Settlement Stabilization Plan for the Fish Residence

19. Roger Jeffery opined that the Plan failed to meet required engineering standards. The parties agree that when a structure, such as the Fish Residence Project, is initially built, the loads are directly transferred to the foundation,

which then transfers the loads directly and uniformly as a continuously supported structure to the underlying soil.

20. However, when, as occurred in this case, the structure's loads are no longer transferred directly and uniformly to the ground through the foundation, but are transferred through pins which underlie the foundation, the foundation itself now acts as a beam or beams and is subject to the stresses applied to the beams.

21. Respondent asserted that the foundation load would remain continuous, and therefore stable, since grouting had been poured under the Fish Residence to consolidate and stabilize the soils. However, Respondent's plan did not call for grouting to be used. Moreover, according to the Bracken Report, no grouting was ever placed under the Fish Residence, even though it was called for in the CFTL Report to stabilize the structure. Respondent's failure to perform a final inspection resulted in an inaccurate assumption and opinion.

22. Respondent's claim that grouting placed in the void under the structure reconstituted the original soil conditions is rejected, especially in light of the fact that Respondent also analyzed the pins and foundation in a beam configuration--a simple span beam. Further, Respondent's analysis must be discounted because the calculations justifying his conclusion that the structure was adequately supported was performed in

December 2013, well after these proceedings commenced and more than five years after the Plan had been created by Respondent.

23. As a result of the changed structural support system (from ground support to pins), the position of the pins is critical to the stability of the structure. If the pins are too far apart for the strength of the foundation's materials to accommodate the foundation, now acting as a beam or beams, the foundation will be overstressed. Cracking, at a minimum, or collapse, at a maximum, can occur.

24. Cracking or collapse can occur because the concrete slab foundation used at the Fish Residence does not have any existing top reinforcing steel in it. When asked if perhaps reinforcing steel might have been placed within the slab itself, Mr. Jeffery stated he had never seen such use of steel in over 40 years. No evidence to support the steel within the slab theory was presented.

25. When the newly installed pins become the structural support, a negative bending moment is introduced to the top of the foundation, now acting as a beam. The top of the foundation is made only of concrete, which has little ability to resist the induced negative moment. As a result, deflection, racking, and ultimate failure will be the result if the pin placement and the spans created by the placement are inadequately designed.

Respondent's after-the-fact calculations do not address this issue.

26. Using a continuous beam analysis, the preferred method to evaluate the beam/pin assemblage design in structures like the Fish Residence, the spacing of the pins (usually ten feet apart) designed by Respondent coupled with the loads generated by the foundation and the lack of reinforcing steel in the top portion of the foundation would result in stress that would exceed the strength of the concrete and, at a minimum, the concrete would eventually crack. Dr. Ahmed Said, Respondent's expert, agreed with this conclusion. Even using a simple beam analysis, the design method Respondent testified he used and that Dr. Said agreed was commonly used, movement, resulting in cracks at the foundation slab, would occur. Again, since no reinforcing steel exists at the top of the slab, as a matter of simple physics, the concrete would have to respond to the deflection that would occur at the bottom of the foundation and, concrete being weak, would likely crack or worse at the top.

27. Respondent provided no persuasive rebuttal to Mr. Jeffery's analysis. First, Respondent claimed that elevations taken at the site in 2013 showed minimal deflective movement, proving the Plan design was sufficient. However, Mr. Jeffery noted that subsequent elevations taken at the completed structure would have little meaning regarding the

adequacy of the design since: the design stands alone and is not affected by how the contractor implemented it; and no one could know whether the design, as constructed, would withstand the required stresses until it was subjected to full design loading, which would have to include the full wind loads to which the structure was designed. There is no evidence the structure was ever subjected to such stress in the period between its construction in 2008 and the later recorded elevations.

28. Next, Respondent claimed the 3-foot "spreaders" attached to the pins would reduce the span of the foundation acting as a beam and thus would overcome the lack of reinforcing steel in the top of the foundation and the resulting overstress. The problem with this assertion is that the Plan does not call for "spreaders" to be placed in the design by any notations that are readily and universally cognizable. Respondent admitted that the symbol regarding the use of the spreaders was agreed to only between Champion and him, and was not included in the Plan. However, even if the notations used by Respondent could be interpreted as calling for the use of the "spreaders," the "spreaders" would not materially impact the fact that the foundation, acting as a beam, would be overstressed, since a negative moment would still exist due to the lack of reinforcing steel at the top of the foundation.

29. Finally, Respondent asserted that Mr. Jeffery's analysis was flawed since Mr. Jeffery had assumed the Fish Residence was a masonry structure whereas Respondent claimed the structure was a wood frame covered with a stucco exterior. This issue is confused by the fact that both the CFTL and Bracken Reports, upon which Mr. Jeffery relied, both stated the Fish Residence was a masonry structure, although the CFTL Report notes the structure was initially constructed as wood frame. In any event, Mr. Jeffery testified that regardless of the masonry versus wood frame question, the structure would still be overstressed. Changing the construction from masonry to wood frame/stucco veneer might lessen the overstress, but not materially.

30. In addition to the overstress created by failing to address the induced negative moment at the top of the foundation, Respondent's design also resulted in a shear load which exceeded the maximum allowable under the American Concrete Institute 318 Concrete Code; and, since that code is incorporated into the Florida Building Code ("FBC"), the requirements of the FBC as well. The shear load factor is especially relevant since Respondent did not assure that the pins would not be placed under windows and doors where this issue is critical. Respondent did not address the shear issue as it applied to windows and doors in his after-the-fact calculations.

31. The Plan is also deficient since it did not indicate the placement of windows and doors in the Fish Residence Project. By not doing so, the pins, when put in the ground, could be placed underneath these internal spaces which do not then form a continuous roof/wall/foundation assembly. If that occurred, and it apparently did in the Fish Residence on four occasions, the shear problem described above is exacerbated, since at either side of a door or window a point load is created and the shear stress increased.

32. The Plan also fails to include required information. While the Plan calls for the use of a "FastSteel" product, the Plan does not include any product specification number or the strength of the material to be used. Although Respondent stated that the contractor, based upon its experience, knew what was intended, ultimately Respondent admitted that the required information was not in the Plan. Similarly, the Plan did not include the design loads and criteria used in the design and provided no building codes and standards. Respondent admitted the Plan lacked this required information.

33. The missing information is important. Only by including such information on design documents can the engineer adequately communicate to the reviewing building code plans examiner or a contractor what the design engineer intended. By not including this required information, the reviewer can be

uncertain as to whether the engineer used the correct loadings or designed the structure in accordance with the correct edition of the building code. Similarly, failing to provide sufficient information concerning the products to be used may lead a contractor to utilize the wrong product during construction.

34. The Plan was submitted to Pasco County for issuance of a permit. The county building department issued a permit for the work to be performed. Mike Mosher of Champion believed the Plan included all the specifications he needed to identify the components to be used and the manner in which the work was to be performed. He also testified the work was completed consistent with the Plan.

The June 10, 2008, Certification Letter

35. Respondent issued the June 10, 2008 Certification Letter ("Letter") under seal to his client before he completed the inspections necessary for the conclusions in the Letter to accurately reflect the opinions contained in it. Both Respondent and his client, Champion, agree that since the client had been denied access to the Fish Residence Project, no final inspection of the site by Respondent ever occurred. As a result, Respondent admitted that, when he signed, sealed, and issued the Letter, the engineering services, upon which the certification in the Letter was based, had not yet occurred.

36. The evidence proved that Respondent's last appearance at the Fish Residence Project occurred on or about May 5, 2008, and that most of the work done at the site occurred after that date with the final construction finishing on or about May 30, 2008. As a result, the conclusions and opinions contained in the Letter were not based upon accurate and contemporaneous engineering analysis. Since the Letter purports to be grounded in engineering inspections, the statements in the Letter were not fully based upon the services Respondent actually provided.

37. While not entirely clear from the evidence and testimony, had Respondent had the ability to perform a final inspection, he would have had the opportunity to discover several deficiencies in the construction. The Bracken Report detailed several deficiencies and non-conformances with the Remediation Plan. These deficiencies included: 1) failure to drive 5/6ths of the pilings to the depth prescribed by the notes to the Plan; 2) a large number of pins found beneath door and window openings; 3) mis-installation of pins and pin assemblages; and 4) no grouting placed in the ground although Respondent intended that grouting be used. Respondent agreed that at least some of the Bracken Report conclusions were warranted.

38. Respondent asserts that, although the Letter was issued prematurely, Respondent should not be held accountable since the Letter "never went public." This contention is rejected. The

Letter was a final engineering report/certification and, upon issuance to Respondent's client, Champion, was fully subject to all engineering standards, rules, and statutes. Since the Letter contained conclusions that were inaccurate and based upon information that was not collected under Respondent's direct supervision, issuance of the Letter constituted negligence and misconduct in the practice of engineering.

Respondent's Prior History of Discipline

39. Respondent has previously had discipline imposed. The instant case is the first in more than 40 years of Respondent practicing engineering that involved a subsidence remediation plan.

40. Respondent's first prior discipline was in FEMC Case No. 00-0086. In that case, Respondent was hired to correct building code issues identified by a county building department. The drawings he made violated the building code requirements, contained deficiencies, and were not in compliance with the standard practice of engineering. Respondent proceeded to hearing without benefit of legal counsel. A final order was entered by the Board reprimanding his license, fining him \$1,000, plus costs of \$302.93, placing him on probation for one year, and requiring he complete a course in professionalism and ethics while on probation.

41. Respondent's second prior discipline was in FEMC Case No. 01-0079. That matter was based upon drawings that were dated February 16, 2001. Respondent was not represented by counsel in that proceeding. In that proceeding, no proof was presented that the structure depicted in the plans by Respondent was ever built. Therefore, no direct risk of harm to the public was proven.

42. Respondent entered into a Settlement Stipulation in that matter which was approved by the Board of Professional Engineers. He agreed to pay a total administrative fine of \$7,000, plus \$316.67 in costs and receive a reprimand on his license. He also received a one-year suspension of his license, followed by two years' probation, and continuing education requirements.

43. The other instance of discipline imposed against Respondent was in FEMC Case No. 2004037005. That complaint arose from plans that were signed by Respondent in June 2004. He was charged with signing plans he had not personally prepared or were not prepared under his supervision.

44. Respondent entered into a Settlement Stipulation in that case that was approved by the Board. He paid a \$5,000 administrative fine and costs of \$750; received a reprimand on his license; received two years of probation; and was required to make detailed reporting to the FEMC during the probationary period.

45. No additional evidence of prior disciplinary matters was offered other than the three cases described above.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

47. Section 471.038(3), Florida Statutes, authorizes FEMC to provide administrative, investigative, and prosecutorial services to Petitioner.

48. Because administrative fines are penal in nature, Petitioner has the burden of proving by clear and convincing evidence the allegations of the Administrative Complaint. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

49. The "clear and convincing" standard requires:

[T]hat 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 Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

50. Statutes that authorize the imposition of penal sanctions are strictly construed. Any ambiguity in the law is construed in favor of Respondent. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990).

COUNT I: The Fish Residence Stabilization Plan

51. Count I of the Administrative Complaint in this matter charged Respondent with negligence in the practice of engineering as provided in section 471.033(1)(g) and rule 61G15-19.001(4).

52. The material portion of section 471.033(1)(g), which grants the Board the authority to discipline a professional engineer for negligence in the practice of engineering, reads as follows: "(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken: . . . (g) Engaging in . . . , negligence . . . in the practice of engineering."

53. Rule 61G15-19.001(4) further defines "negligence" as follows:

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.

54. As delineated in the Findings of Fact above, Respondent's Plan failed to adhere to accepted engineering standards and failed to comply with the requirements of the Board's Responsibility Rules.

55. Where, as here, a licensee is charged with a negligent violation of a specific standard of professional conduct, namely, the failure to exercise the degree of care reasonably expected of a professional, the agency must present expert testimony that proves the required professional conduct, as well as the deviation from that conduct. Purvis v. Dep't of Prof'l Reg., 461 So. 2d 134 (Fla. 1st DCA 1984).

56. The relevant provisions of the Responsibility Rules applicable to the charges in the Administrative Complaint include rule 61G15-30.002(1), which applies to Respondent's duties on the Fish Residence Project: "(1) Engineer of Record. 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.”

57. Rule 61G15-30.003(1) sets out general rules for all engineering projects and states:

(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. 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.

58. Rule 61G15-31.001 applies to structural design making it applicable to this issue. It states:

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. As noted herein the engineer of record may delegate responsibility for the design of a system or component part of the structure to a delegated engineer. In either case the 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. Both the Engineer of Record for the structure and the delegated engineer, if utilized, 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. The Engineer of Record for the Structural System(s) shall provide design requirements in writing to the delegated engineer if one is used and shall review the design documents of the delegated engineer for conformance with his written instructions in accordance with Rule 61G15-30.005, F.A.C. When information collected from the engineer or the engineer's authorized representative from a site visit is part of the engineer's deliverative [sic] process, the engineer is responsible for the accuracy of such information.

59. Rule 61G15-31.002(1) and (5) also applies to structural design and states:

(1) Engineer of Record. The Florida licensed professional engineer who develops the overall structural design and the structural design criteria for the structure,

and is responsible for the preparation of the structural engineering documents.

* * *

(5) Structural Engineering Documents. 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.

60. At the hearing, Roger Jeffery, P.E., testified for Petitioner that the standard of conduct for a professional engineer charged with designing a structure requires the specifications and calculations accurately to reflect the design assumptions and conclusions. Moreover, under the standard of conduct for a P.E., those specifications and calculations must comply with code requirements and be free of material errors and admissions. The evidence is clear and convincing that Respondent did not meet these standards of conduct in Respondent's design documents.

61. As explained in the foregoing Findings of Fact, Respondent failed to account for the fact that the structural underpinnings of the foundation of the Fish Residence Project changed from a continuous load bearing structure to a beam/column structure when the soil became unstable and pins and piers were placed beneath the structure. At that point, Respondent should have taken account of the reconfigured stresses placed upon the foundation. However, as the expert testimony of Mr. Jeffery conclusively showed, Respondent did not adequately analyze, calculate, or account for the stresses that would now be imposed on the unreinforced top portion of the foundation, when Respondent formulated the Plan. As a result, the Plan, as designed, resulted in a foundation that was substantially overstressed and would likely be subject to cracking or worse when subject to expected design loads.

62. There is no dispute that the inclusion of adequate information in the design of a foundation stabilization plan is necessary. Mr. Jeffery's testimony, which is credited here, is that the design and specifications must be complete and internally coherent so that the contractor is adequately guided as to the methods by which the design is to be built. Based upon the facts identified by Petitioner's expert, Mr. Jeffery, the evidence is clear and convincing that Respondent's designs and

specifications for the Fish Residence Project fail to meet this standard.

63. The evidence supports a finding that Respondent failed to design the Fish Residence Project in accordance with the standards adopted by the Board and FBC, that the errors and omissions were material, and that Respondent failed to justify the lack of compliance with accepted engineering standards. This final omission is particularly telling in light of the fact that under rule 61G15-30.003(1)(a), all information contained on the design documents must derive from engineering calculations where, as here, such calculations were needed and were performed. Respondent provided no calculations that were performed before Respondent signed, sealed, and dated the Plan for the Fish Residence Project. All that Respondent produced were after-the-fact calculations produced well after these proceedings commenced. Such an after-the-fact hypothesis of what an engineer could have intended must be rejected in favor of what the evidence showed the professional engineer actually designed and calculated. See FEMC v. Plowfield, Case No. 04-4117PL (Fla. DOAH Aug. 8, 2005; Fla. DBPR Jan. 27, 2006) (failure to calculate loads is negligence).

64. It is the burden of Petitioner to show that Respondent was negligent in the practice of engineering. That burden is met by Petitioner proving by clear and convincing evidence that

Respondent "fail[ed] . . . to utilize due care in performing in an engineering capacity or fail[ed] to have due regard for acceptable standards of engineering principles." Fla. Admin. Code R. 61G15-19.001(4). Evidence of a professional engineer's failure to use due care in engineering performance and to have due regard for engineering standards can come from a professional engineer's failure to adhere to accepted engineering technical codes and mandated engineering design standards.

65. Florida law has long held that the failure on the part of an engineer to comply with mandatory adopted design standards constitutes prima facie evidence of negligence. Henry v. Britt, 220 So. 2d 917, 920 (Fla. 4th DCA 1969) (engineer's failure to design pool in accordance with building code constituted negligent failure to comply with minimum standard of design which could not be excused by evidence of practice in accordance with other professional standards); Holland v. Baguette, Inc., 540 So. 2d 197 (Fla. 3d DCA 1989) (building code constitutes standard of construction and failure to comply with the code's requirements constituted prima facie evidence of negligence).

66. Moreover, it has long been held that the failure of a design professional to comply with the applicable building code justifies a finding of professional negligence independent of any other remedy created by statute. See Seibert v. Bayport Beach & Tennis Club Ass'n, 573 So. 2d 889, 891 (Fla. 2d DCA 1990)

(statutory remedy and common law negligence theories each provided independent basis for finding liability deriving from architect's violating building code). Lack of compliance with the FBC (or other applicable technical codes) can provide a basis to determine that the engineer was guilty of negligence and therefore subject to discipline of the professional engineer's license. See, e.g., Fla. Bd. of Prof'l Engineers v. Yazji, Case No. 09-4296PL (Fla. DOAH Jan. 20, 2010; Fla. DBPR Mar. 23, 2010); Fla. Engineers Mgmt. Corp. v. Vermaas, Case No. 08-4422PL (Fla. DOAH Mar. 4, 2009); and Fla. Engineers Mgmt. Corp. v. Potts, Case No. 07-2862 (Fla. DOAH Sep. 26, 2007; Fla. DBPR Mar. 12, 2008).

67. The fact that a building official or department accepted the professional engineer's plans and issued a permit does not excuse the professional engineer from complying with professional standards of practice adopted by the Board. The acceptance of plans by a building official has never acted to preclude the imposition of Board discipline for negligent design upon a design professional. Fla. Bd. of Prof'l Engineers v. Wood, DOAH Case No. 11-5348PL (Fla. DOAH Nov. 6, 2012; Fla. DBPR Mar. 18, 2013), aff'd per curiam, 127 So. 3d 508 (Fla. 1st DCA 2013); Juhn v. Dep't of Prof'l Reg., 431 So. 2d 190, 192 (Fla. 1st DCA 1983) (even though design work was accepted as adequate by permitting officials, and no questions were raised as to basic deficiencies or inconsistencies by the permitting officials,

architect was subject to discipline by board for failing to meet the board's statutory and rule standards for acceptable design documents); see also, Bd. of Prof'l Engineers v. Evans, Case No. 98-1877 (Fla. DOAH Dec. 30 1998; Fla. DBPR Feb. 18, 1999).

COUNT II: The June 8, 2008, Letter

68. Count II of the Administrative Complaint charged Respondent with violating section 471.033(1)(g) and rule 61G15-19.001(6)(b) by engaging in misconduct in the practice of engineering by issuing an untruthful and misleading report; and with violating section 471.033(1)(e) by issuing a false report which was signed in the capacity of a professional engineer.

69. The material portion of section 471.033(1)(g), which grants the Board the authority to discipline a professional engineer for misconduct in the practice of engineering reads as follows: "(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken: . . . (g) Engaging in . . . misconduct . . . in the practice of engineering."

70. Rule 61G15-19.001(6)(b) states that it is "misconduct" if a Professional Engineer is:

Being untruthful, deceptive, or misleading in any professional report, statement, or testimony whether or not under oath or omitting relevant and pertinent information from such report, statement or testimony when

the result of such omission would or reasonably could lead to a fallacious conclusion on the part of the client, employer or the general public;

71. Section 471.033(1)(e) states, in material part:

"(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken: Making or filing a false report or record that the licensee knows to be false"

72. Rule 61G15-18.011(4), Definitions, states:

"Certification" shall mean a statement signed and sealed by a professional engineer representing that the engineering services addressed therein, as defined in Section 471.005(6), F.S., have been performed by the professional engineer, and based upon the professional engineer's knowledge, information and belief, and in accordance with commonly accepted procedures consistent with applicable standards of practice, and is not a guaranty or warranty, either expressed or implied.

73. Rule 61G15-29.001 provides:

(1) The term "Certification" as used herein shall be as set forth in Rule 61G15-18.011(4), F.A.C.

(2) When an engineer is presented with a certification to be signed, dated, and sealed, he or she shall carefully evaluate that certification to determine if any of the circumstances set forth in subsection (3) would apply. If any of these circumstances would apply, that engineer shall either:
(a) modify such certification to limit its scope to those matters which the engineer can properly sign, date, and seal, or (b) decline to sign, date and seal such certification.

(3) Engineers who sign, date and seal certifications which: (a) relate to matters which are beyond the engineer's technical competence, or (b) involve matters which are beyond the engineer's scope of services actually provided, or (c) relate to matters which were not prepared under engineer's responsible supervision, direction, or control; would be subject to discipline pursuant to subsection 61G15-19.001(6), F.A.C.

74. The act of signing and sealing an engineering document, including a certification report is "more than just a public acknowledgement that the engineer was the engineer of record. The engineer's signature and seal on the [document] represent that the [document is] suitable for . . . [the] purposes . . . [for] which it was issued." Fla. Engineers Mgmt. Corp. v. Hansen, Case Nos. 01-4397PL and 01-4439PL (Fla. DOAH Mar. 21, 2002; Fla. DBPR June 14, 2002). See also rule 61G15-23.002(7), which states:

A professional engineer shall not seal plans, reports or other documents which are not final documents unless the professional engineer clearly notes any limitations on the use of the documents or plans on the face of the documents or plans, by using terms such as "Preliminary," "For Review Only," "Not for Construction," or any other suitable statement which denotes that the documents are for limited use, are not final and are not intended for permit, construction, or bidding purposes.

75. As explained in the foregoing Findings of Fact, on June 10, 2008, Respondent issued a signed, sealed, and dated

certification report to Respondent's client, Champion, which verified that the Plan at the Fish Residence Project comprising the piers and pins set out in the Plan had been "verified" as having been accomplished. In fact, Respondent had never been able to "verify" any final information at the Fish Residence Project since no final inspection had ever occurred. Moreover, if Respondent had made a final inspection, it is likely he would have identified at least some of the omissions and errors in construction that were fully described in the Bracken Report, such as the fact that nearly all of the piers had not been driven to the depth required by Respondent's Plan.

76. Respondent's June 10, 2008, Letter was inaccurate and reflected a false certification, since the basis for the certification -- the final inspection -- had never occurred. Respondent's claim that the Letter did not represent the issuance of a final engineering report since it was not filed for public record is rejected. Section 471.025(1), Florida Statutes, requires that all "final drawings, specifications, plans, reports, or documents prepared or issued by the licensee and being filed for public record and all final documents provided to the owner or the owner's representative shall be signed by the licensee, dated, and sealed with said seal." When Respondent signed and sealed the Letter and issued it to Respondent's client, Respondent was then professionally responsible for the

engineering conclusions and findings in the Letter regardless of whether the client ultimately filed the Letter with a public entity.

Penalty

77. The Board's guidelines for penalties to be imposed against Respondent are set forth in rule 61G15-19.004.

Subsection (2) of that rule provides that for an initial offense, the following penalties may be imposed:

(2) The following disciplinary guidelines shall be followed by the Board in imposing disciplinary penalties upon licensees for violation of the below mentioned statutes and rules:

VIOLATION	PENALTY RANGE	
	FIRST VIOLATION	SECOND AND SUBSEQUENT VIOLATIONS
(a) Violating any provision of Section 455.227(1), 471.025 or 471.031, F.S., or any other provision of Chapter 471, F.S., or rule of the Board or Department (Sections 471.033(1)(a) and 455.227(1)(b), (q), F.S)	Reprimand and \$1,000 fine, to One (1) year suspension, two (2) years probation and \$5,000 fine	One (1) year suspension, two (2) years probation and \$5,000 fine to Revocation

* * *

2.a. Negligence (subsection 61G15-19.001(4), F.A.C.)	Reprimand, two (2) years probation and \$1,000 fine, to \$5,000 fine, five (5) year suspension and ten (10) years probation	Two (2) years probation and \$1,000 fine, to \$5,000 fine and Revocation
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* * *

4. Misconduct (subsection 61G15- 19.001(6), F.A.C.)	Reprimand and \$1,000 fine to one (1) year suspension	One (1) year suspension to Revocation and \$5,000 fine.
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* * *

b. Being untruthful, deceptive or misleading in any professional report, statement or testimony or omitting relevant and pertinent information from such report, statement or testimony when the result or such omission would or reasonably could lead to a fallacious conclusion (paragraph 61G15- 19.001(6) (b), F.A.C.)	Reprimand and \$1,000 fine to one (1) year suspension	One (1) year suspension to Revocation and \$5,000 fine
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78. As noted previously, this is not Respondent's initial offense. Respondent was disciplined by the Board in 2001, 2002, and 2008 in FEMC Case Nos. 00-0086, 01-0079, and 2004037005, respectively. As a result, the penalties imposed in this matter should be drawn from the upper (more severe) end of the applicable penalty ranges.

79. Respondent, Oliver Turzak, P.E., violated the following statutory and rule provisions:

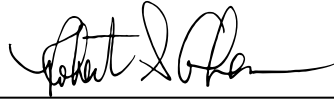
(A) Section 471.033(1)(g) and rule 61G15-19.001(4) by being negligent in the practice of engineering (Administrative Complaint Count I); and

(B) Section 471.033(1)(e) and rule 61G15-19.001(6)(b) by issuing a false, untruthful, or misleading report which was signed in the capacity of a professional engineer (Administrative Complaint Count II).

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent Oliver Turzak's Professional Engineer license be reprimanded, and that the license shall be suspended for a period of one year. Upon termination of the suspension, Respondent shall be reinstated under terms and conditions of reinstatement as the Board determines are appropriate, including two years of probation with terms the Board deems appropriate. Respondent shall also be fined \$1,000 per count (\$2,000 total fine). Finally, Petitioner shall be entitled to assess costs which are related to the investigation and prosecution of this case, other than costs or fees associated with an attorney's time, as provided in section 455.227(3), Florida Statutes.

DONE AND ENTERED this 6th day of May, 2014, in Tallahassee,
Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
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this 6th day of May, 2014.

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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.