

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE DEPARTMENT OF COMMERCE, COMMUNITY AND
ECONOMIC DEVELOPMENT**

In the Matter of:)	
)	
MIKE TAURIAINEN,)	
)	
Respondent.)	OAH Nos. 04-0239-AEL and 04-0240-AEL
_____)	Board Nos. 0102-03-003 and 0101-03-008

**REVERSAL OF TEMPORARY CEASE AND DESIST ORDER AND DENIAL OF
FINAL CEASE AND DESIST ORDER UNDER AS 08.01.087(b)(1).**

I. Introduction

This is a licensing case for the Department of Commerce, Community and Economic Development under AS 08.01.087(b), as it existed prior to its amendment in ch. 163, SLA 2004, in which the department issued a Temporary Cease and Desist Order against professional engineer Mike Tauriainen. The order contains allegations that Mr. Tauriainen violated AS 08.48.281, AS 08.48.321, and 12 AAC 36.185(a)(1) through his participation in reviewing, sealing and signing construction plans of an architectural nature for a commercial building project, without being licensed as a professional architect. Tauriainen challenged the validity of the temporary order and requested a hearing.¹ Under AS 08.01.090, the case is not subject to provisions of the Administrative Procedure Act (APA).² Based on the evidence from the hearing, the violations were not proven. The Temporary Cease and Desist Order is reversed in accordance with AS 08.01.087(b)(1).³

II. Facts

Alaska Christian College (ACC) decided to construct a new residential dormitory and dining hall facility on its campus in Soldotna, Alaska. The project consisted of three phases with

¹ The case was originally filed as an appeal to a Department of Commerce, Community and Economic Development (DCCED) hearing officer. The Office of Administrative Hearings (OAH) was created under AS 44.64.010 in 2004. A transitional provision transferred the hearing officer for DCCED to OAH. The Temporary Cease and Desist Order was issued August 8, 2003, and the case was referred to DCCED for a hearing on August 23, 2003.

² AS 44.62.330-.640.

³ “[A] temporary order remains in effect until a final order affirming, modifying, or reversing the temporary order is issued . . .” (emphasis added).

Phase # 1 providing for construction of the left wing of the facility, a two-story residential dormitory for 32 students. The construction drawings are dated January 12, 2003.

In October 2002, C. Richard Borgerson, a registered architect in Michigan, but not in Alaska, volunteered to work on the ACC project as a charitable donation. Mr. Borgerson initially prepared drawings that were used for fund raising. ACC subsequently asked him to prepare construction drawings for the project.⁴ The drawings identify C. Richard Borgerson Architect as the preparer, with his Muskegon, Michigan address. None of the drawings has an architect's stamp. Borgerson anticipated that an Alaska architect would approve and seal the drawings.⁵

Mike Tauriainen has been registered as a professional engineer in Alaska since 1973. He practices civil engineering with the firm Mike Tauriainen, P.E., Consulting Engineers, Inc., a firm he founded in 1978 that is located in Soldotna. He is a former member of Alaska's State Board of Registration for Architects, Engineers, and Land Surveyors, serving from 1991-1996. Tauriainen has never held an architect license.

Keith Hamilton, ACC's president, asked Tauriainen to provide a civil engineering review of drawings for the dormitory for the purpose of getting permission to begin construction.⁶ The Kenai Peninsula Borough does not require a permit to begin construction. Only permission from the state fire marshal is required.⁷

At some point on or before February 21, 2003, Borgerson e-mailed the completed architectural drawings to Rhonda Sykes, an employee of the Tauriainen firm. Borgerson's involvement with the dormitory project ended with this e-mail. Tauriainen never spoke with Borgerson.

At some point on or after February 21, 2003, Mr. Tauriainen entered into a written professional services agreement with ACC.⁸ Tauriainen testified that when he entered the contract, he was unaware that the architect providing the drawings (Borgerson) was not licensed in Alaska. Tauriainen "assumed that Bogerson was licensed in Alaska, but I didn't know that."

⁴ Exhibit 18.

⁵ Borgerson told the division of occupational licensing's investigator in this case by letter on June 17, 2004, that he advised ACC's president "I did not have a registration in the State of Alaska and the drawings could not be used for construction. This was not to be a problem since there was a local architect who would review redraw or do what was necessary to meet the requirements of the State of Alaska in order to place his or her registration seal on the drawings." Exhibit 18.

⁶ Cross-exam of Tauriainen. Plan submittals for ACC's Phase # 1 were made to the State Fire Marshal's Office for the Soldotna Area (State of Alaska Division of Fire Safety). Exhibit AC, Direct exam of Cuthbert.

⁷ Cross-exam of Tauriainen.

⁸ Exhibit U.

Tauriainen testified that had he known Borgerson was not licensed in Alaska, “I probably would have told Mr. Hamilton that he needs to get an architect licensed in the State of Alaska.”⁹

The contract consisted of two pages of form provisions with blanks filled in setting a price of \$2500. It referenced an attachment, a memorandum dated February 21, 2003, from Tauriainen’s firm to Hamilton stating scope and limitations for the firm’s review of the drawings:

Per your request and information provided by you, we propose to review and redline necessary changes to the drawings for the Phase 1, 32 bed dorm building. The building drawings were prepared by C. Richard Borgeson Architect and any changes/modifications required to the current drawings will be by them or others. Our scope of work will be the structural review and 2000 International Building Code (IBC) life and safety reviews. This does not include mechanical, electrical, or fire alarm system (if required).¹⁰

Subsequently, Mr. Tauriainen reviewed the following drawings for Phase # 1.

Sheet 1 (footing/foundation plan)¹¹

Sheet 1A (basement floor plan)¹²

Sheet 2 (first floor structural plan)¹³

Sheet 3 (first floor plan)¹⁴

Sheet 4 (second floor structural plan)¹⁵

Sheet 5 (second floor plan)¹⁶

Sheet 6 (roof structural plan)¹⁷

Sheet 7 (elevations)¹⁸

Sheet 8 (building section)¹⁹

Sheet 9 (sections A, B, C, D)²⁰

Tauriainen’s review was confined to structural and life safety systems. He reviewed the drawings and made structural engineering changes to sheets 1, 2, 4 and 6. His life safety review

⁹ Direct exam of Tauriainen.

¹⁰ Id.

¹¹ Exhibit 3.

¹² Exhibit 4.

¹³ Exhibit 5.

¹⁴ Exhibit 6.

¹⁵ Exhibit 7.

¹⁶ Exhibit 8.

¹⁷ Exhibit 9.

¹⁸ Exhibit 10.

¹⁹ Exhibit 11.

²⁰ Exhibit 12.

considered fire prevention assemblies including smoke dampers, draft stops, exit signs, fire extinguishers, smoke alarms, lighting, and exiting corridors to ensure that they were properly sized and located in accordance with the building code. Tauriainen noted some life safety deficiencies (emergency and exit lighting), making modifications to sheets 1A, 3, 5, 7, 8 and 9. On March 17, 2003, Tauriainen stamped his registered professional engineer (PE) seal on all the drawings he reviewed, and he signed inside each stamp. The following language of limitation was prominently displayed beneath each stamp on the drawings:

THIS DRAWING WAS PREPARED BY OTHERS AND HAS BEEN
REVIEWED AND MODIFIED BY US FOR LIMITED LIFE
SAFETY/STRUCTURAL REQUIREMENTS, FOR FIRE MARSHALL [sic]
REVIEW ONLY.

Tauriainen did not intend the drawings he stamped to be used for issuance of final construction approval.²¹ According to him, “[w]e were limiting our work for review of life safety and structural for the purposes of a permit.” He further explained the above disclaimer by stating that the drawings

were prepared by someone else. We reviewed them, and we did make some modifications to the drawings to catch any life safety information that we saw that was obvious, that, once we had the electronic documents, it was just as easy for us to make those modifications showing location of fire alarms and fire extinguishers. And we did have to, we recommended making some fire assembly modifications, which we did.

He also explained his reference to the fire marshal, stating “[w]e prefer not to stamp anything except for final drawings, but the fire marshal has insisted that we sign drawings submitted to them, even though they may not be final drawings.” Tauriainen stated that he “didn’t want anyone to construct from [the drawings]” because they were “for fire marshal review only.”

The fire marshal reviews only for life safety, not structural matters. According to Deputy Fire Marshal Donald Cuthbert, the Alaska State Fire Marshal’s Office issues a “certificate of approval” after conducting a non-structural review for life safety. His review of plans for fire and life safety issues includes code compliance issues including fire detection with smoke detectors, fire alarms, fire sprinklers, fire prevention systems, and materials selection in these areas. As noted previously, the Kenai Peninsula Borough did not have a permit requirement for ACC’s project.

²¹ Mechanical, electrical, and plumbing drawings would have been necessary.

Mr. Tauriainen delivered the reviewed and stamped drawings to ACC.²² He advised Hamilton in writing and face to face that ACC would need to get architect stamps for the drawings.

Neither Mr. Hamilton nor Mr. Borgerson testified at the hearing. In addition, Mr. Cuthbert had no knowledge of Tauriainen's contractual arrangement with ACC (Mr. Hamilton), and Cuthbert had no knowledge of any advice Tauriainen may have received from Borgerson. All seven expert witnesses in the case agreed that Mr. Tauriainen was not legally responsible to obtain an architect stamp on the Phase # 1 drawings. The administrative law judge finds by a preponderance of the evidence that Hamilton (ACC) acted as the equivalent of the design coordinator for the ACC dormitory project (Phase # 1). The design coordinator on a construction project, although frequently an architect, need not be.²³

After Mr. Hamilton received the drawings from Mr. Tauriainen and, despite Tauriainen and Borgerson's direction to obtain architect approval, Hamilton submitted them to the fire marshal without an architect stamp on March 24, 2003,²⁴ receiving no further input from Tauriainen. Hamilton's application sought "overall approval" for the project, despite lacking electrical, mechanical and plumbing drawings.²⁵ Upon noticing that an architect (Borgerson) had prepared the drawings submitted but there was no architect stamp, the fire marshal rejected the plans. The Fire Marshal's Office sent Hamilton a letter "asking [him] for a set of documents with architect and/or engineer stamps" on the drawings.²⁶ Tauriainen was not contacted by the fire marshal concerning the drawings.

Surprisingly, given the central issues in this case, Mr. Cuthbert testified that the Fire Marshal's Office has no opinion on whether an architect or an engineer can perform life safety review. He testified that "normally we expect to see an architect stamp" on life safety drawings like sheets 1A, 3, 5, 7, 8, and 9, and "we didn't get involved how exactly the building held up,

²² Borgerson later provided Tauriainen with sheet T (title page, with building criteria and index)[exhibit 1] and sheet CP (concept plan with design drawing of exterior and top view in three phases)[exhibit 2]. These sheets were not stamped by Tauriainen and are not at issue in this case.

²³ Cross-exam of Jantz.

²⁴ According to Mr. Cuthbert, it is customary for the Fire Marshal's Office to stamp each plan sheet it receives. Cross-exam of Cuthbert. For the ACC project, only sheets T and 1 have a fire marshal stamp. Exhibits 1, 3.

²⁵ It is not unusual for partial drawings (e.g., lacking mechanical, electrical, plumbing) to be submitted to the Fire Marshal's Office "to hold a place in line" for review. Although ACC's "plans were submitted only in regard to phase 1," Hamilton sought overall approval. According to Cuthbert, "electrical and mechanical are also configured into our life safety review." Direct exam of Cuthbert. The Fire Marshal's Office does not review plumbing drawings.

²⁶ Direct and cross-exam of Cuthbert. The letter was not introduced as evidence. It is unclear if Borgerson was notified that his prior submissions lacked electrical and mechanical drawings.

but whether or not the building met designs within the building and fire mechanical codes for fire and life safety issues.”²⁷

Hamilton asked Mr. Tauriainen to identify an architect that he would recommend for hire, and Tauriainen gave him a list of architect names. ACC secured a registered Alaska architect for the project, obtained his review and appropriate stamps, and acquired fire marshal approval. Later in 2003, after the Fire Marshal’s Office had given preliminary approval for constructing footings and foundation for the ACC project, electrical and mechanical drawings were filed.²⁸ ACC proceeded to build the dormitory. Phase # 2 and Phase # 3 stages for the ACC project subsequently were sealed by Alaska licensed architect Phillip Thern. According to architect and former AELS board member Daphne Brown, “in the end, no harm” resulted as a consequence of the Phase # 1 drawings initially having been submitted to Mr. Cuthbert without an architect seal.

On August 8, 2003, the Department of Community and Economic Development had issued a Temporary Cease and Desist Order against Mike Tauriainen under AS 08.01.087(b)(1).²⁹ The order alleges that Tauriainen performed work as an architect on the ACC project and that he is not licensed as an architect. The order charges Tauriainen with violating AS 08.48.281, AS 08.48.341, and 12 AAC 36.185(a)(1). Tauriainen requested a hearing.

Prior to this case, Tauriainen’s engineering practice sometimes included life safety reviews. Tauriainen testified at the hearing that he has not performed life safety work since the Temporary Cease and Desist Order was issued.³⁰

A hearing took place over a period of five days. The hearing record consists of fourteen audiocassette tapes, with the vast majority comprised of testimony from architects and engineers who testified about scope of the practice of architecture and scope of the practice of engineering. Two attorneys represented Mr. Tauriainen, and an assistant attorney general represented the

²⁷ Direct exam of Cuthbert.

²⁸ Cuthbert testified on cross-exam that “electrical and mechanical are also configured into our life safety review.”

²⁹ A majority of AELS board members voted for issuance of the temporary order (2 were unavailable / 1 recused herself). Members of the board who voted for adopting the order were not presented with the drawings at issue and did not speak to Mr. Tauriainen or review his written response prior to voting. The response, a July 15, 2003 memorandum, explained that (1) the drawings were prepared by Borgerson, (2) ACC retained Tauriainen only to perform a limited life safety and structural review, (3) Tauriainen advised ACC that he had no authority under his license to perform any other professional services in his review, (4) his review and modifications to the drawings were limited to structural issues and minor life safety issues, (5) he placed a disclaimer immediately below his stamp on each page he reviewed and modified, and (6) he had not provided any unauthorized architectural services on the ACC project, because the minor life safety and structural work he performed on the drawings was within the scope of his engineering license. Exhibit L.

³⁰ Direct exam of Tauriainen.

division of occupational licensing. The following witnesses testified at the hearing under oath and subject to cross-examination in the sequence indicated:

1. John Clark
2. Daphne Brown, AIA
3. Merle Jantz, AIA
4. Donald Cuthbert
5. Nancy Hemenway
6. Steve Chronic, PE, PLS
7. George Weaver
8. William Nelson, PE
9. Nickolas K. Rodes, PE, SE
10. Steve Grand, PE
11. Phillip Thern
12. Mike Tauriainen, PE

The following exhibits were admitted as evidence in this proceeding.

Division's Exhibits

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 13A, 14, 15, 16, 17, 18, 19, 20, 21, 22

Respondent's Exhibits

A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X³¹, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AQ, AR

IV. Discussion

The Cease and Desist Order alleges violations of AS 08.48.281(a)(a person may not practice architecture unless they are registered), AS 08.48.321 (evidence of practice of architecture), and 12 AAC 36.185(a)(1)(a registrant may not seal a document dealing with professional services in which the individual is not qualified through education, experience and registration). The essence of the allegations in the order are that, notwithstanding Tauriainen's disclaimer beneath his seal on the sheets, he practiced architecture without a license when performing life safety review work on the Phase # 1 drawings. Only injunctive relief is sought. The department seeks to prohibit Tauriainen from "working or offering to work as an architect."³²

Of the three laws alleged to have been violated, AS 08.48.321 is not a basis for a separate violation. Rather, it addresses what constitutes the practice of architecture. Because AS 08.48.321 is germane to the central issue in this case – whether Tauriainen engaged in the

³¹ Admitted as evidence subject to stipulated revisions / redactions.

³² The order also references a criminal violation and civil fine. AS 08.48.291, AS 08.48.295. Those sanctions are not at issue in this case, as this is a civil proceeding and the division conceded it is not seeking any fines against Tauriainen.

practice of architecture – the statute will be addressed as necessary in the discussion regarding AS 08.48.281(a) and 12 AAC 36.185(a)(1).

Violations of both AS 08.48.281(a) and 12 AAC 36.185(a)(1) are premised on the allegation that Mr. Tauriainen was engaged in the practice of architecture through providing services on the ACC project. Tauriainen argued in his defense that (1) all of the work he performed on the drawings was engineering work, (2) he did not violate regulatory restrictions in signing/sealing the drawings because he placed an adequate disclaimer beneath his seal indicating that his work was limited to “life safety/structural,” (3) the doctrine of equitable estoppel precludes the agency from claiming that the work he performed on the drawings was not engineering work, and (4) no violations occurred because he was entitled to rely upon ACC to acquire any necessary architect review of the drawings before their submission to the fire marshal.

The discussion will first address the definition and scope of the practice of engineering and the practice of architecture as they relate to the professional services (life safety review) provided by Tauriainen in this case. The discussion then turns to the application of AS 08.48.281(a), the statute prohibiting the practice of architecture without a license, and 12 AAC 36.185(a)(1), the regulation prohibiting a registrant’s use of a seal beyond his “education, experience and registration.” Because the analysis of these statutes resolves the case, it is not necessary to reach Tauriainen’s equitable estoppel argument or Tauriainen’s defense to violations based on the claim that he was entitled to rely on ACC to obtain any necessary architectural seal.

A. Practice of Engineering and Practice of Architecture

The Board of Registration for Architects, Engineers, and Land Surveyors regulates architects and engineers. Mr. Tauriainen is a professional engineer and asserts that his services on the ACC project were engineering work; he is not an architect.

1. Statutes and Regulations

AS 08.48.341(12) defines the practice of engineering as follows:

“practice of engineering” means professional service or creative work, the adequate performance of which requires the specialized knowledge of applied mathematics and sciences, dealing with the design of structures, machines, equipment, utilities systems, materials, processes, works, or projects, public or private; the teaching of advanced engineering courses in institutions of higher learning; the direction of or the performance of engineering surveys, consultation, investigation, evaluation, planning, and professional observation of construction

of public and private structures, works, or projects and engineering review of drawings and specifications by regulatory agencies; “practice of engineering” may by regulation of the board include architectural building design of minor importance, but it does not include comprehensive architectural services.

The practice of architecture is defined at AS 08.48.341(11) as follows:

“practice of architecture” means professional service or creative work in the design of buildings, the teaching of advanced architectural courses in institutions of higher learning, consultation, investigation, evaluation, planning, design, and professional observation of construction of public or private buildings, works, or projects, and architectural review of drawings and specifications by regulatory agencies; “practice of architecture” may by regulation of the board include mechanical, electrical, or structural design of minor importance.

The board’s regulations appear in Title 12, Chapter 36 of the Alaska Administrative Code. The board has adopted no regulations addressing definitions for either the practice of architecture or the practice of engineering. The board also has not adopted a regulation addressing design work of “minor importance” as referenced in AS 08.48.341(12).

According to Merle Jantz, an architect who served on the AELS board with Tauriainen, a “continuing turf battle” in Alaska has been going on for many years between architects and engineers concerning the scope and interrelation of their practices.³³ Acknowledging this conflict, Daphne Brown testified that definitional “overlap” and what constitutes “minor importance” were discussed by the AELS board many times. Despite meeting to address these issues, the board could not reach a suitable resolution. It chose not to further define the areas.³⁴

2. Reference Manual

In 1996, the board adopted a Reference Manual for Building Officials.³⁵ The manual was revised and re-adopted in January 2003, shortly before Mr. Tauriainen became involved in the ACC project.³⁶

The Reference manual is not a duly promulgated and published regulation.³⁷ Accordingly, it does not establish a binding rule of law.³⁸ Although the board may take action consistent with the manual on the basis of its statutory authority and the facts of a particular case,

³³ Cross-exam of Jantz. See also Direct exam of Chronic (acknowledging “turf war” between architects and engineers in areas of commonality).

³⁴ Direct exam of Brown.

³⁵ Exhibit AG. Mr. Tauriainen was a board member at the time.

³⁶ Exhibit 17; Cross-exam of Hemenway.

³⁷ AS 44.62.190 establishes certain procedures that an agency must follow to adopt a valid regulation.

³⁸ Wickersham v. State, Commercial Fisheries Entry Commission, 680 P.2d 1135, 1140 (Alaska 1984); Flanigin v. State, Department of Revenue, Child Support Enforcement Division, 946 P.2d 446, 450 (Alaska 1997).

the board may not rely solely on the written policy as the legal basis for its actions.³⁹ Furthermore, although an interpretation of a statute expressed in a written policy that has not been promulgated as a regulation is entitled to some deference by the judicial courts,⁴⁰ it is likewise not definitive.

The 2003 manual includes the following statements in the introduction:

- This manual has been published by the State Board of Registration for Architects, Engineers and Land Surveyors (AELS) to aid government, building officials, and design professionals in understanding the laws governing architecture, engineering, land surveying and landscape architecture in the State of Alaska.
- This manual is a guideline intended as a source of basic information.
- While some items identified herein are taken from Alaska Statutes, other items are recommended minimum practices or Board policies.⁴¹

The manual recognizes the State Fire Marshal as the designated state building official.⁴²

A section of the manual is entitled “Common Services Provided by Architect, Engineers, Land Surveyors and Landscape Architects” (emphasis added). These professions regulated by the board are addressed on separate pages. Introductory paragraphs for both architect and engineer pages in this section contain substantially the same language as follows:

Presented in this section are descriptions of the general areas of responsibility of professional engineers that elaborate on the statutory definition of engineering mentioned above. The descriptions are not all-inclusive, but are intended to give general guidance on the practice of engineering.⁴³

Presented in this section is a description of the general areas of responsibility for architects that elaborate on the statutory definitions of architecture mentioned above. The descriptions are not all-inclusive, but are intended to give general guidance on the definition of the practice of architecture.⁴⁴

According to the manual, professional engineer general areas of responsibility include the following:

³⁹ See, e.g., Jerrel v. State, Department of Natural Resources, 999 P.2d 138 (Alaska 2000); Gilbert v. State, Department of Fish and Game, Board of Fisheries, 803 P.2d 391, 397 (Alaska 1990), citing Kenai Peninsula Fisherman’s Coop. v. State, 628 P.2d 897, 906 (Alaska 1981). In Gilbert and Kenai Peninsula, the court affirmed agency action consistent with an invalid regulation that was authorized by law and the facts of the particular case.

⁴⁰ Flanigin v. State, Department of Revenue, Child Support Enforcement Division, *supra* n. 39.

⁴¹ Exhibit 17, p. 3 (emphasis original). Architect Merle Jantz testified that he “would consider [the manual] a policy.” Cross-exam of Jantz.

⁴² Exhibit 17, p. 3-4.

⁴³ Exhibit 17, p. 16 (emphasis added).

⁴⁴ Id. at 15 (emphasis added).

6. Fire protection Systems: Fire suppression using water and non-water systems; fire detection and alarms; fire prevention; and water supply and risk analysis.

* * *

8. Miscellaneous: . . . safety . . .

* * *

According to the manual, architect general areas of responsibility include the following:

6. Fire safety considerations:
 - a. fire ratings, fire walls, separations, requirements for sprinklers, fire alarms, smoke control, penetration control, product and material specifications, and damper types and locations.
 - b. consideration of the use and storage of hazardous materials (e.g., toxics, flammables, corrosives).

The manual reflects that there is overlap between the practice of architecture and the practice of engineering in the area of life safety. Nick Rodes, P.E. is a fire protection engineer and he testified for Tauriainen at the hearing. Rodes is a member of the Society of Fire Protection Engineers. He has provided testimony to the AELS board in the past concerning licensure of fire protection engineers as a separate discipline in Alaska. According to Rodes, one of the largest areas of overlap in the board’s manual between general areas of responsibility for architects and engineers is the area of fire protection, and the category is broader for an engineer than an architect.⁴⁵ Other witnesses at the hearing, including the division’s experts, agreed that it was reasonable for Mr. Tauriainen to rely on the board’s manual for guidance to determine the scope of the practice of engineering.⁴⁶

3. Historical Roots of Definitional Conflict Between the Professions

The general issue of overlapping definitions for practice of architecture and practice of engineering has historical roots nationally. Cases from jurisdictions outside Alaska, while not binding on this board, reflect the long-time tension between these two professions regarding scope of practice. A few cases are instructive.

In the California case Ponderosa Center Partners v. McClellan/Cruz/Gaylord & Associates, a case involving a contract to provide architect and engineering services, the court noted “[a]rchitectural services and engineering services frequently overlap and may be rendered by a licensed architect or a registered engineer,” California law provides that “a licensed

⁴⁵ Direct exam of Rodes, Exhibit AC.

⁴⁶ Direct and cross-exam of Brown, Direct exam of Chronic. In contrast, architect Merle Jantz testified that it is “not reasonable” for a licensee to rely on the AELS manual. However, based on the manual, it appeared to Jantz that Tauriainen could perform the life safety work at issue. Cross-exam of Jantz.

architect may perform many services that are considered as the practice of civil engineering.” “To the extent that architectural services and civil engineering services overlap, they may be rendered either by a licensed architect or by a registered engineer . . . To attempt to precisely define and delineate the practice of architecture as distinguished from the practice of engineering would be of doubtful assistance.”⁴⁷

In Verich v. Florida State Bd. of Architecture, a Florida court rejected the board’s enjoinder of a professional engineer, and held that although the engineer cannot represent himself as being an architect nor can an architect represent himself as a professional engineer, under statutes defining the practice of these professions, “a registered architect can plan and design and supervise construction of a building as the practice of architecture and a registered professional engineer can plan and design and supervise construction of a building as a professional engineer.”⁴⁸

Rosen v. Bureau of Professional and Occupational Affairs, State Architects Licensure Bd. is a Pennsylvania case where the court rejected board discipline and an injunction against an engineer for the “practice of architecture.” The court recognized “an ongoing turf war between these two learned professions over the application of their professional disciplines to the design of buildings, and to the construction and renovation of buildings and structures within the Commonwealth of Pennsylvania.”⁴⁹

As discussed in the next section, no Alaska court cases address the interplay of definitions for the practices of architecture and engineering, with the exception of Rudisel v. State of Alaska.⁵⁰

5. Rudisel v. State of Alaska

The practice of architecture and the practice of engineering are not addressed by any published case in Alaska. A recent unpublished decision in superior court is noteworthy, however, as it directly addresses definitions for these concepts in an appeal of a Cease and Desist Order against an architect. In Rudisel v. State of Alaska, the Superior Court affirmed a Temporary Cease and Desist Order by the Commissioner of the Department of Commerce and Economic Development under AS 08.01.087(b)(1) that enjoined an architect from performing

⁴⁷ Ponderosa Center Partners v. McClellan/Cruz/Gaylord & Associates 53 Cal. Rptr.2d 64, ___, 45 Cal. App. 4th 913, 916 (1996).

⁴⁸ Verich v. Florida State Bd. of Architecture 239 So.2d 29, 31 (Ct. App. Fla. 1970).

⁴⁹ Rosen v. Bureau of Professional and Occupational Affairs, State Architects Licensure Bd., 763 A.2d 962, 965 (Pa. 2000).

⁵⁰ Case No. 2NO-04-84 CI (9/9/05 Decision on Appeal).

engineering work (based on designing and sealing plans for a commercial building project) without being registered as a professional engineer.⁵¹ Judge Esch’s decision addressed “the alleged overlap between the statutory definitions of the practice of architecture and engineering” in the context of an architect who designed heating/ventilation systems and foundation systems. The court noted that the AELS board had not adopted regulations to further define the “practice of architecture” beyond AS 08.48.341(11), and concluded that the statute indicates “the practice of architecture was necessarily exclusive of mechanical, electrical or structural design.” The court did not address the AELS Board’s 2003 manual. The licensee, Rudisel, did not argue that his work on the project included only “minor engineering work.”⁵² Life safety work in the fire protection / fire prevention context was not at issue in Rudisel.

Hence, the Rudisel decision significantly differs from Mr. Tauriainen’s case as the court concluded there was no overlap of statutory definitions for the specific work the licensee performed, neither the 2003 manual nor the “minor importance” exception was raised by the parties, and life safety work was not at issue.

B. AS 08.48.281(a)

The first violation alleged in the Temporary Cease and Desist Order is AS 08.48.281(a). That statute provides in pertinent part:

(a) A person may not practice or offer to practice the profession of architecture . . . or use in connection with the person’s name or otherwise assume or advertise a title or description tending to convey the impression that the person is an architect . . . unless the person has been registered under the [provisions of this chapter or is a person to whom these provisions do not apply . . .

It is not disputed in this case that Mr. Tauriainen has never been licensed as an architect in Alaska. The central issue in this cease and desist action under AS 08.01.087(b) with regard to the prohibition of AS 08.48.281(a) is whether Tauriainen engaged in the practice of architecture during Phase # 1 of the ACC project.

⁵¹ Rudisel v. State of Alaska, Case No. 2NO-04-84 CI (9/9/05 Decision on Appeal). The Department of Commerce, Community and Economic Development is the successor name for the prior Department of Community and Economic Development.

⁵² The court also rejected the argument that AS 08.48.341(11)(practice of architecture) and AS 08.48.341(12) (practice of engineering) are impermissibly vague and therefore unconstitutional. Rudisel v. State of Alaska, Case No. 2NO-04-84 CI, at 10-11. See also Duncan v. Missouri Bd. for Architects, Professional Engineers and Land Surveyors, 744 S.W.2d 524, 531 (Mo. Ct. App. 1988)(board lacked jurisdiction to determine constitutionality of statutory enactments).

During the Phase # 1 review, Mr. Tauriainen and his employee, Rhonda Sykes,⁵³ only reviewed sheets 1, 1A, 2, 3, 4, 5, 6, 7, 8, and 9. These drawings consist of the division's exhibits 3 through 12. The drawings were reviewed for code compliance relating to the adequacy of the structure of the building and its ingress means, fire separation and extinguisher assemblies and equipment. The only changes Tauriainen made to the drawings were (a) limited structural modifications and additions to the drawings that involved structural loads and paths between the roof walls and foundation, and (b) minor life safety changes which included (i) the addition of fire extinguishers and exit signs, (ii) modifications to a stair exit to accommodate code egress requirements, and (iii) modifications for fire assemblies.

The division concedes that sheets 1, 2, 4 and 6 are structural in nature and, accordingly, the work performed by Mr. Tauriainen on these drawings needed to be sealed/signed by a licensed civil engineer, not an architect. Tauriainen's work on these sheets is not subject to the Temporary Cease and Desist Order. In addition, although the division argued that sheets T (title page)⁵⁴ and CP (concept plan)⁵⁵ lacked the necessary stamp by a registered Alaska architect, Tauriainen did not submit the sheets to the Fire Marshal's Office, and he did not stamp them with his seal. Consequently, he cannot be held responsible for violating any licensing law with regard to these sheets.⁵⁶

The work Mr. Tauriainen performed on sheets 1A, 3, 5, 7, 8 and 9 provide the focus for the remaining discussion. In defense of his work on these drawings, Tauriainen alternatively argued that (1) all of the work he performed was within the statutory definition of engineering work, (2) the only work that was arguably architectural work rather than engineering work was life safety work, and (3) the AELS Reference Manual for Building Officials permits both licensed architects and licensed engineers to perform all of the life safety work that Tauriainen performed on the ACC drawings.

The division argued that Tauriainen was practicing architecture outside the scope of his engineering license in violation of AS 08.48.281(a). The argument included reference to a complaint by the State Fire Marshal's Office that Tauriainen "was stamping architectural drawings." The division additionally argued that there is no overlap between the statutory definitions for the practice of architecture and practice of engineering, and that neither the

⁵³ Ms. Sykes is not a registered professional engineer in Alaska. All of her work was reviewed and supervised by Tauriainen.

⁵⁴ Exhibit 1.

⁵⁵ Exhibit 2.

⁵⁶ Exhibit 15.

legislature nor the Board of Registration for Architects, Engineers and Land Surveyors provides an exception to distinct separation between the scopes for these professions.

1. Tauriainen’s Life Safety Work Performed on Sheets 1A, 3, 5, 7, 8 and 9 Was Within the Practice of Engineering.

(a) Statutory Overlap

The statutory definition for “practice of engineering” in AS 08.48.341(12) includes “professional service or creative work . . . dealing with the design of structures . . .” The “practice of architecture” as defined in AS 08.48.341(11) includes “professional service or creative work in the design of buildings . . .” AS 08.48.341(20) defines “structure” as “a system of materials and components that resists horizontal and vertical loads.” AS 08.48.341(3) defines a “building” as a “structure used or intended for human occupancy.” Buildings therefore are a statutorily defined subset of structures. This conclusion allows an inference that there is overlap between the statutory definitions for “practice of architecture” and “practice of engineering.”⁵⁷

The administrative law judge rejects the division’s contention that “[a]ny overlap between the practice of architecture and the practice of engineering in Alaska is illusory.” The argument relies on the statutory language from definitional sections for these professions in AS 08.48.341(11) and (12) that the board “may by regulation” address tasks of “minor importance.” Although there is abundant evidence in the record that the board has struggled with defining “overlap,” “incidental practice” and “minor importance” issues over the years,⁵⁸ the fact remains that it has not adopted regulations addressing “minor importance” as authorized by AS 08.48.341(11) and (12). It can not be extrapolated from the board’s failure to exercise its prerogative in this area that no definitional overlap exists. Architect Brown conceded

We were trying to define whether an architect could do some engineering work of minor importance and whether an engineer could do some architecture work of minor importance. So by definition, maybe, you could say that is an overlap. . . . We did not come to any consensus.⁵⁹

The board’s February 19-20, 2004 Minutes more directly acknowledges overlap.

Comments from the minutes include:

- “The board stated that incidental practice of minor importance has not been defined.”
- “[Board member] Cyra-Korsgaard noted that there is overlap between professions.”

⁵⁷ Steve Chronic, PE/PLS, the division’s expert at the hearing, agreed that there are areas of “defined commonality” between the practice of architecture and the practice of engineering, and that a “building” is a subset of “structure.”

⁵⁸ E.g., Direct exam of Brown, Direct exam of Jantz, Direct and cross-exam of Hemenway, Direct exam of Tauriainen, Exhibit X (board minutes).

⁵⁹ Cross-exam of Brown.

- “The chair agreed that there is a lot of overlap between disciplines, and the board is not interested in adopting regulations that will make it harder for engineers to practice.”⁶⁰

Mr. Tauriainen also relied on past practice by the board to support his position. In a 1975 letter submitted as evidence, the president of the AELS board that year notified all borough and city officials in the state of overlap in the practices of architecture and engineering. According to the board president, the definitions in AS 08.48.341 for these professions

permit architects to practice engineering when such engineering is of relatively minor importance to the project as a whole and also permits [sic] engineers to practice architecture when such architectural design is of minor importance to the project as a whole. Minor importance is interpreted by the board as having a construction cost less than 10% of the total construction cost of any single building involved.⁶¹

William Nelson, C.E., an expert witness for Tauriainen, testified under cross-exam that “there’s a tremendous overlap between the two professions.” Even expert witnesses for the division at the hearing acknowledged the existence of overlap between the professions.⁶²

Architect Daphne Brown testified on direct exam that from her experience on the AELS board, the body “was unable to come to a consensus” in order to develop a regulation addressing incidental practice. She also stated that the board was “unable to define” where architects and engineers could do overlapping work.⁶³

Nelson stated under direct exam that Tauriainen’s modification through the addition of stairways for exiting could be performed by either an architect or an engineer. Architects who testified tended to disagree, and they maintained that stairway exits could not be addressed by an engineer. The administrative law judge concludes that, because of overlapping definitions and the board’s manual and, in the absence of further definition by statute or regulation, engineers may modify stairs as Tauriainen did during his life safety review.

It is not necessary in this decision, however, to describe the exact parameters of definitional overlap for these professions in Alaska.⁶⁴ That is a matter within the prerogative of

⁶⁰ Exhibit X, p. 6.

⁶¹ Exhibit AH. Tauriainen also introduced a May 8, 1987 letter from the president of the AELS board addressing “broad areas of overlap” between disciplines including mechanical engineering, although it was unclear if architecture was involved. Exhibit W. This letter was given much less evidentiary weight than exhibit AH.

⁶² Cross-exam of Chronic, Direct and cross-exam of Brown.

⁶³ “We could not come to a consensus.” Cross-exam of Brown.

⁶⁴ Notably, under the board’s regulation at 12 AAC 36.185(a)(1), an architect or engineer may only sign or seal a plan or document (drawing) for professional services that the registrant is “qualified to sign or seal by virtue of education, experience and registration.”

the board, as it sees fit. The remaining discussion in this decision pertaining to overlap will be limited to the meaning and scope of life safety issues, consistent with Tauriainen’s limited review of sheets 1A, 3, 5, 7, 8 and 9, and with the division’s concession that structural work he performed on the sheets is not contested under the Temporary Cease and Desist Order.

(b) The Meaning of “Life Safety”

“Life safety” work is not defined or expressly referenced in either AS 08.48 or AELS board regulations. The board’s current Reference Manual for Building Officials (January 2003 ed.) similarly does not reference the term “life safety.”⁶⁵ Although not adopted in conformance with the Administrative Procedure Act and, therefore, not a regulation, the reference manual provides guidance in understanding the term.

The 2003 manual includes the following statement by the board in its introduction, which implies a predominant goal to protect life safety.

Building codes and professional registration laws are meant to work together. Building code jurisdictions and architectural, engineering, land surveying, and landscape architectural registration boards, such as the AELS board, each exist to protect the public against unsafe structures and site conditions.⁶⁶

The introduction further acknowledges that “Building officials [State Fire Marshal] promulgate and enforce building code requirements that protect the public’s health and safety.”

Uniform industry codes play an integral part in architectural and engineering work. Construction projects in Alaska that architects and engineers work on often must comply with uniform codes that are adopted to protect the public health, safety and welfare. Such codes include the International Building Code, the International Fire Code, the International Mechanical Code, the International Electrical Code, the International Plumbing Code, and the Barrier Free Code.⁶⁷ Specifically with regard to fire prevention and fire safety, Department of Public Safety regulations make numerous references to the International Building Code, the International Mechanical Code, the International Fire Code, and the National Fire Alarm Code. The 2003 Reference Manual for Building Officials provides that both architects and engineers may conduct Overall Project Management, which includes “application of federal, state, and

⁶⁵ Exhibit 17.

⁶⁶ Exhibit 17, p. 3 (emphasis added).

⁶⁷ 13 AAC 50.010 – .080. The board’s Reference Manual for Building Officials (January 2003 ed.) includes the fact that the International Building Code prohibits sealing or stamping work outside of expertise. Exhibit 17, p. 10. See also AS 08.48.331(a)(13)(as used in a paragraph addressing exemption from AS 08.48, “building codes” includes codes relating to building, mechanical, plumbing, electrical, and fire standards).

local codes.”⁶⁸

In addition to designating responsibility for applying codes, the 2003 manual also reflects the following elements in “Guidelines for Construction Drawings.”⁶⁹ The cover sheet or following sheet must identify “Fire sprinklers/standpipes.” Floor [Drawings] Plans must show “fire assemblies, area and occupancy separations, fire barriers, fire areas [*new terms in the International Building Code*] and draft stops.” Building Sections and Wall Sections must show “materials of construction, non-rated and fire-rated assemblies and fire-rated penetrations.” With the Mechanical System, “fire dampers” must be indicated. While some of the preceding life safety considerations are exclusively the responsibility of an architect or an engineer, authority between architects and engineers nonetheless overlaps in many areas of fire prevention and fire safety as indicated on the guidelines pages of the manual and the manual’s previously referenced “general areas of responsibility” for architects and engineers.⁷⁰

According to Deputy Fire Marshal Cuthbert, both architects and engineers prepare the code study page for drawings submitted to the Fire Marshal’s Office. For ACC’s Phase # 1, the code study page is on sheet 1.⁷¹ Mr. Cuthbert testified that both architects and engineers can prepare the code study page, and the Fire Marshal’s Office reviews for “fire and life safety issues.” As previously stated in this decision, however, the Fire Marshal’s Office has “no opinion whether architects or engineers can [should] do life safety.”⁷² This position by the Fire Marshal’s Office brings into question the evidentiary weight to be given the initial complaint to the division that Mr. Tauriainen “was stamping architectural drawings.”

The 1996 edition of the board’s manual (updated in 2003 before Tauriainen’s involvement in the ACC project) has no binding effect in this case. It nonetheless is notable for reference to the criterion that “Drawings and specifications submitted to the building official [by architects and engineers as design professionals] must be of sufficient nature to clearly show the project in its entirety with emphasis on . . . life safety assurance . . .”⁷³ No explanation was presented for why this language was not included in the board’s 2003 edition of the manual. The definitions of “practice of architecture” in AS 08.48.341(11) and “practice of engineering” in AS 08.48.341(12) have not changed since 1996 with regard to life safety or code issues.

⁶⁸ Exhibit 17, pp. 15-16.

⁶⁹ *Id.* pp. 11-20.

⁷⁰ Exhibit 17, pp. 15-16.

⁷¹ Exhibit 3.

⁷² Cross-exam of Cuthbert. *See also* footnote 25.

⁷³ Exhibit AG, p. 7 (May 1996 ed.)(emphasis added).

The term life safety also derives meaning from evidence presented by the parties at the hearing. Mr. Tauriainen's expert, Nick Rodes, P.E., S.E., explained the historical origin of "life safety," as used in the scope of engineering practice, as follows:

The phrase "life safety" appears to have originated about 1913, when the Committee on Safety to Life of the National Fire Prevention Association (CSL-NFPA) was appointed. The CSL-NFPA is responsible for production of the principal NFPA building code – now called "NFPA 101 – Life Safety Code." The following quotation from the 2000 edition of *NFPA 101 – Life Safety Code* provides a concise definition of the term "life safety:"

1.3.1 Code Purpose. The purpose of this Code is to provide minimum requirements, with due regard to function, for the design, operation, and maintenance of buildings and structures for safety to life from fire. Its provisions will also aid life safety in similar emergencies.⁷⁴

Mr. Rodes emphasized that the "main thrust" of the International Building Code is life safety. In his expert report, he quoted the following provision from the 2000 edition of the IBC.

101.3 Intent. The purpose of this code is to establish the minimum requirements to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire and other hazards attributed to the built environment.⁷⁵

According to Mr. Rodes, all of the life safety review for construction design drawings in the Municipality of Anchorage is done by the Department of Public Safety.⁷⁶ In Rodes' experience, plan reviewers for the municipality accept life safety drawings containing either the stamp of an architect or engineer.⁷⁷ The municipality reportedly considers it the responsibility of the professional disciplines (AELS board) to establish requirements, if any, for drawings to delineate architect from engineering work in the life safety area.

One of the division's experts, architect Daphne Brown, acknowledged the need for life safety review. She used the term in reference to design for items including exiting, fire rating of walls, draft stopping and developing fire assemblies. Brown initially took the position that life

⁷⁴ Id., Exhibit AC (emphasis added).

⁷⁵ Direct exam of Rodes, Exhibit AC (emphasis added).

⁷⁶ The Fire Marshal's Office has authority throughout the state to conduct life safety review and building plan reviews, including building inspections. In the Municipality of Anchorage, the authority has been delegated to the Building Safety Division and the Fire Department. Direct exam of Rodes. To Rodes' knowledge, there has never been a written policy at the municipality regarding statements or separation of discipline responsibilities on drawings.

⁷⁷ Direct exam of Rodes. Mr. Rodes also conceded that some reviewers for the municipality who were not satisfied with an engineer's plans would require that the plans be "re-done by a different designer, and if it was life safety they would require that it be done under the stamp of an architect." Direct exam of Rodes.

safety items were strictly architectural in nature. Later, under cross-exam, she eventually conceded that engineers can practice in the areas involving fire protection systems, including fire detection and fire prevention.

Steve Chronic, an expert witness for the division, stated that “there is some commonality” between the professions in the area of life safety work.⁷⁸ Another division expert, architect Merle Jantz, testified that both architects and engineers can work on fire assemblies if they each have the required education, experience and registration. Jantz acknowledged there is overlap between the professions allowing both architects and engineers to locate fire extinguishers, draft stops and emergency lights (so long as conductivity is not shown). When Jantz was asked during cross-exam whether he knew of any laws that would prohibit Tauriainen from providing the Phase # 1 tasks he performed on fire alarms and fire assemblies, Jantz responded that he knew of nothing in the regulatory laws (AS 08.48) that specifically addressed the issue.

Tauriainen’s expert, William Nelson, C.E., testified under direct exam that life safety work is generally in the “statutory overlap” area. Civil engineer Steve Grand stated that the primary job of architects and engineers is to “protect public safety.” He further testified under direct exam that the life safety work Tauriainen performed on sheets 1A, 3, 5, 7, 8 and 9 could have been performed by either an architect or an engineer. Architect Phillip Thern, who completed the ACC project architectural work after Tauriainen’s involvement, testified that everything Tauriainen did on Phase # 1 was within the practice of engineering and authorized by the board’s Reference Manual for Building Officials.

As division witnesses were questioned about the life safety work that Tauriainen performed on sheets 1A, 3, 5, 7, 8 and 9, they often responded that the tasks were “customarily” or “typically” done by an architect. Daphne Brown stated that she was relying on her knowledge of general practice and could not cite a legal basis for some of her opinions on the authority to perform life safety work. Given the evidence in this case and the prior discussion in this decision addressing overlap between the practice of architecture and the practice of engineering, tradition, assuming it exists, is an insufficient basis for excluding engineers from life safety work. The division did not meet its legal burden to establish that the life safety work Mr. Tauriainen performed on the Phase # 1 drawings constituted the practice of architecture.

⁷⁸ Cross-exam of Chronic.

(c) Dual Stamping Option

Dual stamping of drawings by architects and engineers is an option for meeting the requirements of AS 08.48. AS 08.48.221 (Seals), previously quoted in this decision, implicitly allows the procedure.⁷⁹ Notably, no Alaska statute or regulation specifies the order in which an architect and engineer must seal / sign a drawing. The dual stamping option is not the same as “site adaption of design documents” under 12 AAC 36.195.

Witnesses at the hearing acknowledged the dual stamping option. Architect Brown testified during her cross-exam that “two professionals [architect and engineer] may stamp the same drawings.” She indicated that sheet 1 of Phase # 1 (exhibit 3) was an “ideal candidate” for having seals by both an architect and engineer. Another division expert, architect Merle Jantz, also testified that dual stamping is allowed. Although it is not common, he has seen drawings with both architect and engineer stamps. Tauriainen’s expert, Nick Rodes, additionally acknowledged that dual stamping occurs, although he characterized it as a “very small percentage” in his experience (“no more than ten” incidents). Civil engineer William Nelson stated that dual stamping is rare, but he has seen it.

In this case, Mr. Borgerson and Mr. Tauriainen both anticipated that dual stamping would occur for the Phase # 1 drawings. That it did not occur was attributable to Mr. Hamilton, not either of them. Cuthbert testified that he was not aware of Tauriainen’s contractual arrangement with Hamilton / ACC.

Architect Brown also explained that “final” drawings typically are submitted to the fire marshal for life safety review. Borgerson and Tauriainen both believed that the drawings for Phase # 1 were not yet final, and they were not intended to be submitted to the fire marshal as final drawings. The fact that the drawings were submitted was due to circumstances beyond Tauriainen’s control – construction procedures unique to the Soldotna area⁸⁰ as well as Mr. Hamilton’s apparent urgency in moving the project forward, to which Mr. Cuthbert indicated the Fire Marshal’s Office was amenable.

⁷⁹ Preparers of drawing sheets with both architecture and engineering work on them may use clouds (scallop lines) or bubbles to delineate work and provide explanations. Some individuals separate the work on the sheets down the middle. Mr. Cuthbert testified that the Fire Marshal’s Office has reviewed drawings stamped by both architects and engineers, and the lack of clouds or bubbles was acceptable in cases where work was separately delineated on other pages. The dual stamping option is not the same as site adaption of design documents under 12 AAC 36.195.

⁸⁰ According to Mr. Cuthbert, the Kenai Peninsula is a “deferred jurisdiction” where the Fire Marshal’s Office does not maintain an office. Daphne Brown testified that the Fire Marshal’s Office did not have authority to approve a construction permit for Phase # 1. Direct exam of Brown.

(d) Tauriainen's Disclaimer

Finally, Mr. Tauriainen's life safety work on the drawings was not outside the scope of engineering work he undertook because of the disclaimer he expressly made beneath his seal, consistent with 12 AAC 36.185(a)(1). Discussion of Tauriainen's use of the disclaimer is addressed in the next section, which addresses legal constraints that apply to a registrant's use of the professional engineering seal.

C. 12 AAC 36.185(a)(1)

The division argued that Tauriainen violated 12 AAC 36.185 as alleged in the Temporary Cease and Desist Order. This board regulation is entitled **Use of Seals**.⁸¹ Subsection (a)(1) provides "(a) A registrant may (1) not sign or seal a plan or document dealing with professional services in which the registrant is not qualified to sign or seal by virtue of education, experience and registration." Sheets 1A, 3, 5, 7, 8 and 9 for Phase # 1 of the ACC project– the focus of the Temporary Cease and Desist Order – all bear Mr. Tauriainen's seal and signature with the accompanying disclaimer:

THIS DRAWING WAS PREPARED BY OTHERS AND HAS BEEN
REVIEWED AND MODIFIED BY US FOR LIMITED LIFE
SAFETY/STRUCTURAL REQUIREMENTS FOR FIRE MARSHALL [sic]
REVIEW ONLY.⁸²

Although no Alaska case law addresses the seal requirement, other states have recognized that the provision regarding use of a professional seal imposes upon an engineer a non-delegable duty of legal responsibility for projects to which he affixes his seal.⁸³

In applying the allegation from the order that Tauriainen violated 12 AAC 36.185(a)(1), the issue with regard to sheets 1A, 3, 5, 7, 8 and 9 is whether he is qualified to do life safety work based on his "education, experience and registration" under the regulation. Daphne Brown testified that although she knew that Tauriainen was a C.E., she had no knowledge of his experience and where his areas of expertise were. The evidence in this case supports Mr. Tauriainen's statement that he has experience through performing limited life safety reviews many times in the past.

Tauriainen did not engage in the practice of architecture as alleged in the Temporary Cease and Desist Order. For the reasons previously stated, he was engaged in the practice of

⁸¹ AS 08.48.221 (Seals) authorizes professional engineers (and architects) to obtain and use seals. The statute requires the board to adopt regulations governing the use of seals. The Temporary Cease and Desist Order in this case does not reference AS 08.48.221.

⁸² Exhibits 4, 6, 8, 10, 11, 12 (emphasis added).

engineering.⁸⁴ His education, experience and registration allowed him to perform the life safety work he performed on Phase # 1 of the ACC project. To summarize, the division did not meet its burden to establish that Tauriainen was acting outside his “education, experience and registration.”

The division’s arguments in this case contain the implication that Mr. Tauriainen was attempting to circumvent licensing requirements for education, experience and registration through improperly using his seal. The implication is rejected based on overwhelming evidence. Tauriainen was working for ACC, not Borgerson. His professional services agreement with the college expressly limited the scope of work to “structural review and 2000 International Building Code (IBC) life and safety reviews. This does not include mechanical, electrical, or fire alarm system if required.”⁸⁵ Tauriainen advised Hamilton of his review limitation and of the need for ACC to get a local architect stamp. Architect Phillip Thern confirmed this. Neither Messers. Hamilton nor Borgerson testified at the hearing.

Although Mr. Tauriainen need not have relied on the disclaimer as defense to this action – due to his performing only engineering work – the disclaimer he used on the sheets beneath each seal is allowed by the board’s regulation at 12 AAC 36.185(b). Mr. Cuthbert testified under cross-exam that when he reviewed the drawings for the Fire Marshal’s Office, Tauriainen’s disclaimer under the seal advised him that Tauriainen “was taking responsibility for everything that [the fire marshal] would be reviewing for – fire and life safety issues.”

Tauriainen’s disclaimer also was effective because it conformed with AS 08.48.221. The statute, which was not referenced in the Temporary Cease and Desist Order, expressly provides for the possibility of disclaimer by a professional architect or engineer. It provides in part:

The registrant, by affixing the registrant’s seal to final drawings, specifications, surveys, plats, plates, reports and other similar documents, and signing them, certifies that these documents were prepared by or under the registrant’s direct supervision, unless the registrant certifies on the face of the document to the extent of the registrant’s responsibility.

In summary, Mr. Tauriainen did not violate 12 AAC 36.185 (Use of Seals) as alleged in the Temporary Cease and Desist Order.

⁸³ Duncan v. Missouri Bd. for Architects, Professional Engineers and Land Surveyors, 744 S.W.2d at 537 (citing cases in Mississippi and Oregon).

⁸⁴ The Temporary Cease and Desist Order does not allege that Tauriainen violated 12 AAC 36.185(a)(2) (“A registrant may . . . approve and seal only design documents and surveys that are safe for public health, property, and welfare in conformity with accepted architecture, engineering, land surveying, and landscape architecture standards in Alaska.” [emphasis added]). The division’s reference to 12 AAC 36.185(a)(2) in its hearing brief suffers from this procedural infirmity as well as lacking merit given the prior rulings in this decision.

D. Equitable Estoppel

Tauriainen raised the doctrine of equitable estoppel as a bar against the division seeking injunctive relief under AS 08.01.087(b). Equitable estoppel may be invoked against a state entity upon a showing that (1) the governmental body asserted a position by conduct or words; (2) the private party acted in reasonable reliance thereon; (3) the private party suffered resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.⁸⁶ In this case the basis for the estoppel would be, primarily, the board's manual. The discussion need not address this doctrine since, as a matter of law, Tauriainen was not practicing architecture and he was not in violation of laws regulating the practice of engineering.

E. Reliance on ACC to obtain any necessary architectural seal

Mr. Tauriainen also argued as a defense that he was entitled to rely on ACC to obtain any necessary architectural seal required for Phase # 1 of the ACC project. Given the prior rulings in this decision, this issue need not be addressed further.

F. Vacation of Temporary Cease and Desist Order

Tauriainen requests that the final order in this case vacate with prejudice the temporary order. The relief is unnecessary. By the terms of AS 08.087(b)(1), "a temporary order remains in effect until a final order affirming, modifying, or reversing the temporary order is issued . . ." (emphasis added). Because the temporary order is reversed, there is no need for further action with regard to it.

V. Conclusion

Mike Tauriainen did not violate AS 08.48.281, AS 08.48.321, and 12 AAC 36.185(a)(1) as alleged in the Temporary Cease and Desist Order. Under AS 08.01.087(b)(1), the Temporary Cease and Desist Order is reversed. Based on a preponderance of the evidence, there is no basis for injunctive relief against Tauriainen through a final order under AS 08.01.087(b), as it existed prior to its amendment in ch. 163, SLA 2004.

DATED this 8th day of June, 2006.

Signed _____

David G. Stebing
Administrative Law Judge

⁸⁵ Direct exam of Tauriainen, Exhibit U.

⁸⁶ Boyd v. State of Alaska, 977 P.2d 113, 116-17 (Alaska 1999).

COMMISSIONER ACTION
ON REVERSAL OF TEMPORARY CEASE AND DESIST ORDER
AND DENIAL OF FINAL CEASE AND DESIST ORDER UNDER AS 08.01.087(b)(1)

The Commissioner has reviewed the Reversal of Temporary Cease and Desist Order and Denial of Final Cease and Desist Order Under AS 08.01.087(b)(1) by the administrative law judge in: The Matter of **Mike Tauriainen**, OAH Case Nos. 04-0239-AEL and 04-0240-AEL. The Commissioner hereby:

Option 1: adopts the proposed decision in its entirety.

Date: June 12, 2006

By: Signed
Commissioner Noll
Department of Commerce, Community
and Economic Development

[This document has been modified to conform to the technical standards for publication.]