

# Risk Management of Code Compliance

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# Learning Objectives

- Gain a better understanding of building codes
- Examine the code compliance provisions in the industry standard form agreements
- Identify and manage risks arising from code compliance requirements in design contracts
- Negotiate reasonable contract terms regarding code compliance

# STATUTES, LAWS, ORDINANCES, CODES, RULES, REGULATIONS, STANDARDS



# Statutes, Laws, Ordinances, Codes, Rules, Regulations, Standards

Contract provisions requiring compliance with codes often require compliance with "statutes, laws, ordinances, codes, rules, regulations, standards."

# Statutes, Laws, Ordinances, Codes, Rules, Regulations, Standards

- **Standards:** The model building codes incorporate standards such as those developed by ASTM and ANSI by reference. It is not necessary to include a specific requirement to comply with these standards; requiring compliance with a code would require compliance with any referenced standards.

However, the word 'Standards' is also used to refer to specific regulations issued by a state or federal agency. An example would be the Department of Justice's 2010 ADA Standards for Accessible Design.

# CODE COMPLIANCE REQUIREMENTS OF INDUSTRY STANDARD FORM CONTRACTS



# Industry Standard Form Agreements

AIA B101, *Standard Form of Agreement Between Owner and Architect*

*§ 3.1.5 The Architect shall, at appropriate times, contact the governmental authorities required to approve the Construction Documents and the entities providing utility services to the Project. In designing the Project, the Architect shall respond to applicable design requirements imposed by such governmental authorities and by such entities providing utility services.*

*§ 3.2.1 The Architect shall review the program and other information furnished by the Owner, and shall review laws, codes and regulations applicable to the Architect's services.*

*§ 3.4.2 The Architect shall incorporate into the Construction Documents the design requirements of governmental authorities having jurisdiction over the Project.*



# Industry Standard Form Agreements

AIA C401, *Standard Form of Agreement Between Architect and Consultant*

There is no reference to legal requirements in AIA C401, however under §1.3, the requirements of the architect's contract with the owner would flow down to the consultant:

*§ 1.3 To the extent that the provisions of the Prime Agreement apply to This Portion of the Project ...the Consultant shall assume toward the Architect all obligations and responsibilities that the Architect assumes toward the Owner... the Consultant shall have the benefit of all rights, remedies and redress against the Architect that the Architect, under the Prime Agreement, has against the Owner. Where a provision of the Prime Agreement is inconsistent with a provision of this Agreement, this Agreement shall govern.*

The Standard of Care in C401 is the same as in B101



# Industry Standard Form Agreements

EJCDC 500, *Agreement Between Owner And Engineer For Professional Services*

## ARTICLE 6 – GENERAL CONSIDERATIONS

### 6.1 Standards of Performance

*E. Compliance with Laws and Regulations and Policies and Procedures:*

*1. Engineer and Owner shall comply with applicable Laws and regulations.*

### Article 17. Definitions

*7.1. A.15 Laws and Regulations; Laws or Regulations – Any and all applicable laws, rules, regulations, ordinances, codes and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.*



# Industry Standard Form Agreements

DBIA 540, *Standard Form of Agreement Between Design-Builder and Design Consultant*

## 1.2 Basic Definitions

*1.2.1.14 Legal Requirements are all applicable federal, state and local laws, codes, ordinances, rules, regulations, orders and decrees of any government or quasi-government entity having jurisdiction over the parties, the Project or Site, the practices involved in the Project or Site, or any Services.*

## 2.3 Legal Requirements

*2.3.1 Design Consultant agrees to perform the Services in accordance with all applicable Legal Requirements.*

# OVERVIEW OF BUILDING CODES

# Overview Of Building Codes

## The International Codes

The International Code Council (ICC) publishes the International Building Code which serves as the basis for all state and local building codes.

- The ICC currently publishes 15 “I-Codes”
- All of the 2009, 2012 and 2015 I-Codes and a number of states codes can be viewed on-line for free at [codes.iccsafe.org](http://codes.iccsafe.org)

# Overview Of Building Codes

## The International Code Family

- International Building Code (IBC)
- International Residential Code (IRC)
- International Energy Conservation Code (IECC)
- International Mechanical Code (IMC)
- International Fuel Gas Code (IFGC)
- International Fire Code (IFC)
- International Plumbing Code (IPC)
- International Existing Building Code (IEBC)
- International Property Maintenance Code (IPMC)
- International Code Council Performance Code (ICCPC)
- International Green Construction Code (IgCC)
- International Private Sewage Disposal Code (IPSDC)
- International Swimming Pool and Spa Code (ISPSC)
- International Wildland Urban Interface Code (IWUIC)
- International Zoning Code (IZC)



# Overview Of Building Codes

## Adoption of a Model Code

- A model code does not become the law in any jurisdiction (state, county or city) until it is adopted by a vote of the designated adopting authority.
- When a jurisdiction adopts a model building code, it adopts a specific edition of the model code, for example, the *2015 International Building Code*.
  - When adopting a model code, the jurisdiction can add, delete or modify sections to address concerns specific to the jurisdiction. These additions, deletions and modifications are implemented through amendments to the model code.



# Overview Of Building Codes

## Model Codes State vs. Local Codes Adoption

- About two-thirds of the states adopt their building codes at the state level. These states typically have an agency that is charged with administering the building codes.
- The other one-third of the states adopt their building codes at the local (city or county) level.

# Overview Of Building Codes

## Adoption of a Model Code

- The I-Codes are updated on a three-year schedule
- A jurisdiction can choose to continue using an older version of a model code; some jurisdictions are slow to update. However, most jurisdictions update their codes regularly to avoid having to deal with design professionals seeking variances based on what is allowed by the newer edition of the model code.
- Nevertheless, there is always a lag between the release of a new edition of a model code and when a jurisdiction adopts it
  - The adopting authority must review the changes in the new edition, evaluate the effect on any amendments it has enacted, and ensure that its code inspectors are aware of the changes

# Overview Of Building Codes

## Codes Versus Standards

- While the building code sets the general requirements that designs must comply with, the specific requirements for materials, equipment and processes are typically found in standards that are incorporated by reference into the code.
  - Chapter 35 of the IBC lists the standards that are incorporated into the IBC.
- Many of the standards referenced by the IBC and other model codes are developed by organizations such as the American National Standards Institute (ANSI), ASTM International (ASTM) and Underwriters Laboratories (UL).
- Reference standards are also developed by:
  - Professional associations such as the American Society of Civil Engineers and the American Concrete Institute (ACI)
  - Trade associations such as the American Institute of Steel (AISC) and the Portland Cement Association (PCA)

# AMERICAN WITH DISABILITIES ACT (ADA)

42 U.S. Code § 12101

- The ADA is not a building code; it is a federal civil rights law that prohibits discrimination on the basis of disability. It is enforced by the U.S. Department of Justice; individuals may file complaints with the Attorney General who is authorized to bring lawsuits in cases of general public importance.
  - Many states and local jurisdictions have their own accessibility laws. Building code inspectors can determine compliance with local and state laws but cannot rule on compliance with the ADA.
- The ADA applies to both public and private commercial buildings. There is no grandfathering of buildings with respect to ADA compliance, and the ADA requirements can be subject to different interpretations, especially when an existing building is being renovated.
  - Accessibility requirements can often be a source of conflicts with code requirements.



# AMERICAN WITH DISABILITIES ACT (ADA)

42 U.S. Code § 12101

If ADA compliance is anticipated to be an issue on the project, consider adding a provision such as the following:

*ADA COMPLIANCE. Consultant shall employ its professional expertise consistent with the Standard of Care in connection with the preparation of plans and specifications for the Project and shall follow the ADA Accessibility Guidelines (ADAAG) in connection with the preparation of the Work with the goal of the having the Work comply with the applicable provisions of the ADA. Notwithstanding the foregoing, Owner acknowledges and agrees that the ADA is not a detailed building code and that its requirements are subject to differing interpretations. In the event Consultant becomes aware of a conflict between any ADA requirement or interpretation, Consultant shall advise Owner of such conflict and absent direction from Owner to the contrary, Consultant shall use its judgment as to the appropriate course of action.*



# Leadership in Energy and Environmental Design (LEED®)

- LEED® is a private rating system developed by the United States Green Building Council. Compliance with LEED® or LEED® equivalence has been incorporated into some building codes.
- A contract which indicates a requirement for LEED® certification may be interpreted as imposing a heightened Standard of Care on the design professional.
- If LEED® certification is an element of the design, consider adding a provision such as the following:
  - *LEED® utilizes certain design and usability guidelines to promote an environmentally friendly and energy efficient facility. Because LEED® is subject to various and possibly contradictory interpretations and certification or decisions by third parties, compliance may involve factors beyond the control of Consultant including, but not limited to, the owner's use and operation of the completed project. Therefore, consultant cannot and does not warrant or represent that the project will achieve LEED® certification.*



# BUILDING CODE OFFICIALS



# Building Code Officials Are Not Responsible For Finding Errors In The Plans

The courts in most states hold that the plan checker does not owe the design professional any legal duty to find errors in the plans.

- The reason that plans are checked for compliance with the building code is the same reason that building codes are adopted – to ensure the safety and protection of the public at large.
- Because the duty to find errors in the plans is owed to the general public rather than the design professional, the design professional has no basis for a claim.
  - This holding – that a private individual cannot bring a negligence claim when the duty that was breached is owed to the general public – is known as the “*public duty doctrine*”.



# Building Code Officials Are Not Responsible For Finding Errors In The Plans

Even states that do not follow the public duty doctrine do not charge a plan checker with the responsibility of finding all of the errors in a set of drawings.

As the Minnesota Supreme Court stated in *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 293 Minn. 220 (1972), **building codes, permits, and inspections are designed to protect the public and are not meant to be an insurance policy by which the city guarantees that every building is built in compliance with the building and zoning codes.**

The court further noted that the fee charged for building permits was to offset the expenses incurred by the city in promoting the public interest; it was not an insurance premium that made the city liable for defective construction.



# MEETING CODE VS. MEETING THE STANDARD OF CARE



# Building Code Compliance – Sets Minimum Standard

The primary objective of building codes and standards is to protect public health, safety and general welfare as they relate to the construction and occupancy of buildings and other structures.

Chapter 1 of the International Building Code (IBC):

*101.3 Intent. The purpose of this code is to **establish the minimum requirements** to provide a reasonable level of safety, public health 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, and to provide safety to fire fighters and emergency responders during emergency operations.*

# Meeting code may not be a sufficient defense

- Compliance with all regulations and adherence to the generally accepted standards of engineering or architectural practice in a community may not be sufficient to avoid liability.
- This is particularly true where regulatory standards or practice in a community may be outdated.
- Reliance on industry standards does not mean that the design professional will not also be judged by whether his or her design was reasonable under the specific circumstances that should have been considered.

## Codes set minimum standards

Designers can be liable even if code met

- There are numerous court decisions imposing liability on project owners and design professionals due to their failure to provide a design sufficient for the safety of people that would use a facility – even though the designer satisfied the applicable building codes.
- As stated by Jay Wickersham, president of the Boston Society of Architects, the law is one of the foundations of the professional standard of care, but the law is “the floor, not the ceiling”.
  - “There can be circumstances in which design professionals know more protective measures beyond the building code and zone code and could be potentially held liable.”

## Case example: Code compliance not a complete defense

- Even if code requirements are satisfied, the standard of care may render parties liable for not designing appropriate for conditions that could foreseeably lead to injury.
- In *Henry Tang v. NBBJ, LP*, court addressed liability where a two-year-old child fell to his death from the third floor of Staples Center in Los Angeles. He was standing on a concrete shelf/banister that ran along the front of the seats in the luxury sky box and had a glass barrier from 26 inches to 10 inches mounted on it.
  - *2014 WL 555163 (Cal. Appl. 2 Dist. (2014))*
- An expert testified that even if the glass partition was code compliant, it constituted a dangerous condition because the shelf invited patrons to sit or stand on it, and they often did so.



# COMMON CONTRACT LANGUAGE REQUIRING CODE COMPLIANCE

# Managing Risk of Code Compliance

- Responsibility to meet laws, codes and regulations is risky business.
  - What laws and codes are applicable, and how they are to be interpreted and applied may be subject to reasonable differences of opinion.
  - There can be obscure requirements that appear to contradict each other
  - Ultimate interpretation could be in the hands of a government employee such as a Fire Marshall or environmental regulator.

If contract doesn't explicitly require compliance with applicable codes, a DP will have a legal duty to exercise the professional standard of care to provide services/design consistent with the applicable requirements.



# Building Code Compliance

## Managing the Risks

- Code requirements are often susceptible to different interpretations (e.g., The building inspector may disagree with the plan checker)

## Problematic Contract Language

While the A/E has a duty to comply with applicable codes, the contract may impose a greater duty. The following is typical wording found in many Owner-drafted contracts:

*“Consultant agrees that its design will comply with all laws, regulations, rules, standards, codes and ordinances that apply to its services.”*

OR

*“Consultant shall comply with all laws, regulations, ordinances, codes and guidance documents.”*



# Common Contract Language Requiring Code Compliance

Compliance with codes and regulations should be tied to the professional standard of care, if possible. For example, revise the provision:

*Consultant agrees that its design will comply with all laws, regulations, rules, standards, codes and ordinances that apply to its services.*

to:

*Consultant agrees to exercise the Standard of Care so that its design will comply with applicable all laws, regulations, rules, standards, codes and ordinances that apply to its services.*

Alternative wording:

*The A/E shall exercise professional care and judgment to design in compliance with requirements of the authorities having jurisdiction over the project.*



# Common Contract Language

The Standard of Care

The definition of the Standard of Care should be similar to the one in AIA B101, Standard Form of Agreement Between Owner and Architect:

*§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.*



# Common Contract Language

## The Standard of Care

Some Clients will not agree to expressly tie code compliance with the Standard of Care, but will acknowledge that code compliance is subject to reasonable interpretation and that the DP does not warrant or guarantee compliance.

Example wording:

*Consultant agrees that its design shall comply with all applicable laws, regulations, rules, standards, codes and ordinances. This does not, however, constitute an absolute warranty or guarantee concerning the professional services.*



# Common Contract Language Requiring Code Compliance

In general, design professionals should avoid warranties or guarantees concerning the quality of professional services as they can be interpreted as uninsurable guarantees. Try to avoid even a warranty to perform in accordance with the Standard of Care.

*Consultant warrants that its design will comply with the laws, regulations, rules, standards, codes and ordinances (the "Legal Requirements") that apply to its services.*

Could be replaced with:

*Consultant ~~warrants~~ agrees that its design will comply with the laws, regulations, rules, standards, codes and ordinances (the "Legal Requirements") that apply to its services, in accordance with the Standard of Care.*



# Building Code Compliance

## Managing the Risks

### TAKE AWAY POINTS

1. Code compliance should be tied to the Standard of Care.
2. Do not agree to comply with “all codes, laws and standards that apply” unless this is qualified with the Standard of Care.
3. Do not agree to warrant any aspect of the quality of your professional services, including code compliance.
4. Complying with the code is not an absolute defense against negligence. Standard of Care may require more.
5. Building code officials owe no duty to DP to catch errors or omissions in the plans.

# CONTACT Information & DISCLAIMER

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**Disclaimer:** This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.



# Questions?

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