Failure To Take Applicable Regulations into Account; Materially Altering the Scope or Objectives of a Project Without the Client's Consent

Summary

The National Ethics Council ("Council" or "NEC") dismissed a Complaint that alleged that an AIA Member violated Rules 3.101 and 3.103 of the Institute's 2007 Code of Ethics and Professional Conduct in connection with architectural services provided by the Member to the Complainant for the design of an addition to the Complainant's single-family residence. The Council dismissed the Complaint because the Complainant did not meet her burden to prove any of the alleged violations.

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

References

2007 *Code of Ethics and Professional Conduct, Canon III, Obligations to the Client*

Rule 3.101 In performing professional services, Members shall take into account applicable laws and regulations. Members may rely on the advice of other qualified persons as to the intent and meaning of such regulations.

Rule 3.103 Members shall not materially alter the scope or objectives of a project without the client's consent.

Findings of Fact

The Parties

The Complainant and her husband are homeowners at 123 Crestview Lane in the City of Sunnyvale. Their initial desire was to add no more than 600 square feet to their existing home to avoid having to obtain a design permit as would otherwise be required by the City.

The Respondent is the principal of his own architectural firm in a nearby town. In 2008, the Complainant retained the Respondent to design a 600 square foot addition to the Complainant's home. The scope was later revised to 1,100 square feet, including a second-story addition.

The Parties' Contracts

On January 27, 2008, the Complainant retained the architectural services of the Respondent for pre-design services for the addition of 600 square feet to the Complainant's residence. Both parties have stated that this project scope would not have required planning approval. The parties' initial agreement was for "preliminary research/pre-design to determine the scope of work."

On September 30, 2008, the Complainant and her husband entered into a percentage–fee contract with the Respondent for architectural services that would add 600 square feet to the Complainant's contemporary residence. The contract provisions included design phases, construction documents and construction administration, reimbursable expenses, and adjustment to archi-

tectural fees if there were an increase in the construction project cost, adjusted with each invoice. The parties assumed the construction cost would be $250,000.

Both before and after the contract was executed, the Complainant and her husband increased the size of the addition, changing the project scope from 600 square feet to 1,089 square feet to build down slope on a hillside, which would require a design permit from the City. The expanded project scope also included remodeling 1,344 square feet of the existing structure.

The Project Cost

The Complainant apparently expected that the change in scope of work would double the construction cost to $500,000. This was not empirical but based on an arbitrary concept that doubling the square footage would double the construction cost and would also double the Respondent's architectural fee. The increased size and scope of the Complainant's project now required planning approval, which the Complainant initially was trying to avoid.

In early October 2008, the Complainant and Respondent began discussing the possibility that the cost of the project would increase based on the revised scope of work. The Respondent recommended that a contractor visit the site and give an "indication of possible cost." By late October, the Respondent had received contractor input on the proposed scope that a "$600,000 construction estimate is reasonable" and informed the Complainant that the figure might be a "minimum" construction cost. Upon hearing this information, the Complainant replied that the planned construction cost should be "$500,000-600,000, but not 'min.'" In response, the Respondent invited the Complainant to consider changes during the schematic design phase to stay within the $600,000 budget or to "reduce the scope of work" in order to "get closer to $500,000." When the Complainant's husband replied in this e-mail correspondence, he stated his view that the project cost should be only "$600K total and $500K for the construction," but he did not want any changes to the project scope, stating: "please proceed to layout design as planned. If it happens to [be] over budget, we will cut the external budget in order to keep the project within the cap number."

On April 3, 2009, at the request of the Respondent, Ajax Construction and ABC Construction each provided an estimated construction cost of $700,000 for the project, a figure that excluded various costs. The Respondent forwarded this information to the Complainant via e-mail the same day. In response, the Complainant stated that she would not "change the plan now due to cost" and wanted to revisit the project cost after obtaining the design permit.

On May 3, 2009, the Respondent recommended that the Complainant hire an estimator to give them an estimate of the project cost. The Respondent was aware that the Complainant did not believe the cost estimates the Respondent had provided. For his part, the Respondent stated that the $500,000 estimate by the Complainant's contractor was "not realistic" and that he had not looked at the project plans.

Permitting of the Project

In March 2009, notwithstanding the debate over the project cost, the Respondent submitted the project application and drawings to the City Planning Department for a Hillside Development Permit. Additional information and materials were requested by the Planning Department by letter March 27, 2009, and the Respondent submitted them on April 30, 2009.

The Respondent's requested submittals were reviewed by the planning staff for completeness and, on May 16, 2009, the Respondent was notified that the application had been determined to be incomplete with a list of 11 requirements needing to be met within 120 days or a new application would have to be filed, including

fees, plans and other materials that are required for any project on the same site.

The Respondent made another submission in June and, on June 25, 2009, the Planning Department notified the Respondent that the application remained incomplete and identified three additional requirements. Item 1 of the new requirements references the planning staff's incidental calculation of the floor area ratio (FAR) for the project. The staff provided the Respondent a FAR calculation sheet that includes several handwritten notes: "property minus road easement" (38,330 SF) and "max size of house including garage" (4,322 SF). Item 1 also notes that the staff's calculation of the floor area of the first floor

> appears to be less than the number provided on the application. If the project needs to be revised to meet the FAR and NC requirements, please provide 8 sets of full sized drawings and four 11" x 17" reductions, in addition to the revisions on the application forms.

The Respondent made another submission in July and, on July 6, 2009, the Planning Department notified him that the application had been deemed complete for processing. The proposal for the Complainant's project was scheduled for an August 15, 2009 public hearing.

In the meantime, on July 30, 2009, the Respondent sent the Complainant an e-mail regarding payments due and proposing to amend their contract to reflect additional payments for particular services that had been performed. In response, the Complainant sent the Respondent a "Notice of Termination of Contract." The Complainant alleged that extra work was not involved in the Hillside Development permitting process, that the Respondent needed to attend the August 15 hearing, that the Respondent had been negligent in determining the road easement calculation required by the City, and that the Respondent was responsible for that "misinformation" and for the increase to the project cost estimate.

As considered at the August 15 hearing, the project total floor area for the Complainant's residence was 4,017 square feet, with a new 1,089 square foot second floor. The Respondent attended the hearing to respond to any issues or concerns of the City's hearing officer. The Respondent's submittal met the neighborhood compatibility standards of the Hillside Development ordinance and all other applicable development standards of the zoning code and the permit was approved. On August 17, 2009, the Planning Department issued its approval of the project.

Subsequent Events

Approximately two months later, the Complainant and her husband requested another architectural firm, XYZ Architects, review their house and proposed addition. That firm's "first guess" for the scope to remodel and the addition "would be in the range of 1.5 million dollars." The firm's letter went on to say that exact numbers were not possible "because of the amount of unknowns at this time," but "could be determined later, when the engineering and architectural details were completed."

The Complainant and Respondent had not resolved issues around termination of their contract and, on January 9, 2010, the Complainant by e-mail requested that the Respondent "release" the project drawings on file and approved by the City. The Respondent retained an attorney, and, on January 24, 2010, made an offer of settlement.

The offer included a "non-exclusive license to use the plans and related documents prepared by him" and "an authorization allowing [the Complainant] to discuss the plans and the remodeling of the Property with the City." The Complainant rejected the offer in a February 7, 2010 letter. As of the date of the ethics hearing, the parties' legal dispute remained unresolved.

At about the same time as the Complaint in this ethics case was filed, the Complainant filed a complaint against the Respondent with the State Architectural Licensing Board. That board notified the Respondent of its determinations in a September 5, 2010 letter and closed its case.

Conclusions

Burden of Proof

Under Section 5.13 of the NEC Rules of Procedure, the Complainant has the burden of proving the facts upon which a violation may be found. In the event the Complainant's evidence does not establish a violation, the Complaint is dismissed.

Rule 3.101

Rule 3.101 of the Code of Ethics states:

> In performing professional services, Members shall take into account applicable laws and regulations. Members may rely on the advice of other qualified persons as to the intent and meaning of such regulations.

The Code of Ethics does not provide commentary for Rule 3.101.

The Complainant argues that the Respondent "overlooked the City Ordinance requirement" as a violation of Rule 3.101. Complying with the ordinance resulted in the Complainant having to retain additional services for the topographical surveyor to recalculate the slope ratio for more permissible footage, and the Complainant made changes to cut back some footage to get the permit approval.

The general public and many clients are not familiar with the process necessary to bring a building to fruition. This present case is no exception. The parties' contract provided that the architect would not be responsible for any discovered unforeseeable conditions.

At issue was the site area used for the FAR calculation. Certain easements were to be excluded from the calculations. The survey dated April 7, 2009 does not show an easement for a driveway to a neighboring property. The easement was not recorded and was not referenced in the property title report received by the Respondent from the Complainant's husband. It also was not mentioned by the Planning Department at the City when the Respondent received instruction for preparing the project submittals and the property calculations. The unrecorded easement, which should have been excluded from the FAR calculation, was an unforeseen condition. Once the Respondent was notified of the unrecorded easement, the surveyor revised and corrected the slope calculations and the Respondent resubmitted the FAR to the Planning Department for permit approval.

Although the Respondent was terminated by the Complainant prior to the project permit approval, the Respondent was actively engaged in the planning process. Planning approval was granted August 15, 2009.

The National Ethics Council concludes that the Complainant has not met her burden to prove that the Respondent violated Rule 3.101 because the Respondent followed all the requirements of the City Planning Department by obtaining approval of the Complainant's project permit under unforeseen and trying conditions.

Rule 3.103

Rule 3.103 of the Code of Ethics states:

> Members shall not materially alter the scope or objectives of a project without the client's consent.

The Code of Ethics does not contain commentary for Rule 3.103.

The Complainant alleges as a violation of Rule 3.103 that the Respondent arbitrarily inflated the estimated construction cost to get higher fees in disregard of her client's budget.

In early October 2008, the Complainant and the Respondent had discussions that the agreed-on project scope may increase the project cost. The Respondent invited the Complainant to consider changes during the schematic design phase to stay within the Complainant's conceptual budget of $600,000. However, on October 25, 2008, the Complainant's husband directed the Respondent not to make any changes to the project scope.

In April and May 2009, the Respondent in various e-mails advised the Complainant that the project cost would increase beyond the Complainant's $500,000 to $600,000 conceptual estimate. In April 2009, the Respondent verified the expected cost of the project with two contractors, Ajax Construction and ABC Construction. Their estimates were over $700,000. Again, the Respondent invited the Complainant to revise the project scope to reduce the cost estimate if necessary.

The Complainant in response to the estimate provided stated that she did not agree and she did not trust the numbers provided by the contractors. In May 2009, the Respondent then recommended that the Complainant hire an estimator to obtain a realistic cost estimate because, in the Respondent's words, the Complainant's estimate of $500,000 "will not make it."

In November 2009, after the Respondent was no longer involved, the Complainant sought the services of another architectural firm, XYZ Architects, to review the project. Their evaluation of the expected cost was:

> My first guess would be that the remodeling and addition would be in the range in excess of $1.5 million dollars. Exact numbers could not be gotten because the amount of unknowns at this time.

The Complainant did not agree with that firm's assessment of the Project cost either, stating in a follow-up letter, "Your conduct is unprofessional, irresponsible, and frankly disgusting."

The National Ethics Council concludes that the Complainant has not met her burden to prove that the Respondent violated Rule 3.103 because the Respondent performed her services as described by the parties' contracts. The Respondent performed due diligence as a professional in the face of the Complainant not wanting to understand that the expanded project scope that she had requested exceeded the preliminary project budget. The allegations of unethical practices under Rule 3.103 are without merit.

Summary

Having not found a violation of Rule 3.101 or Rule 3.103 of the Code of Ethics by the Respondent, the National Ethics Council has dismissed the Complaint.

Members of the National Ethics Council

Victoria Beach, AIA, Chair
Paul Davis Boney, FAIA
Tricia Dickson, AIA
Cornelius DuBois, FAIA
Bradford C. Walker, AIA

The Hearing Officer, Clyde Porter, FAIA, did not participate in the decision of this case, as provided in the Rules of Procedure. Benjamin Vargas, FAIA a member of the Council, also did not participate in the decision.

July 13, 2012