DRA Perspective: Code Compliance & the Standard of Care

The *Tang* & *Broward County* cases illustrate some basic principles of loss prevention for AEE firms. Most consultants are aware of the fact that designing to code is not a complete defense from liability. As the *Tang* case held, code compliance can be a minimum requirement but sometimes special circumstances will require you to go further and include safeguards above and beyond what is required by law. This is particularly true when the issues involve life safety and risk of great bodily harm. The lesson of *Tang* is to not only always comply with legal requirements but also be on the lookout for situations where even more caution is needed.

The *Broward County* case gives rise to a different but related issue. In some cases the standard of care may allow for services which are not 100% compliant with all laws so be careful not to assume contractual obligations to *"comply with all laws".* Keep in mind that in California violations of code can result in *"negligence per se";* in other words one need only show that the design violated a code in order to establish professional negligence. However there are plenty of other legal requirements where this is not the case. In addition, some clients will add language to their agreements mandating compliance with other requirements, some of them being very general such as *"owner requirements"* or those of the client's landlord, insurance companies, etc. In many cases these *"standards"* may not even be defined let alone something you can actually comply with in all cases. This clearly needs to be avoided.

One way to approach such provisions is to reduce your obligation to whatever is required by the standard of care applicable to the project. You may decide to agree to "*exercise due professional care* to comply with *applicable* laws" for example. Another approach is to include an appropriate definition of the Standard of Care to which you will be held along with a statement to the effect that nothing in the agreement will require you to perform to any higher standard. For example:

> *"In providing services under this agreement, the Consultant shall exercise skill and care consistent with, but limited to that degree ordinarily used by other reputable members of Consultants profession, practicing in the same or similar locality and under similar circumstances. Nothing in this agreement shall be interpreted to require Consultant to meet any higher standard or have any obligation in excess of what is required by said standard and this paragraph shall control over any such contrary provision."*

For Public Projects, another approach to consider is the "Completed & Accepted" Doctrine. Traditionally a Contractor procedure the Completed & Accepted Doctrine allows a Contractor to have their work accepted by the owner and relieve them of liability from injured third parties as a result of a condition of the work, even if the Contractor was negligent in performance of the contract, unless the defect was latent or concealed. The Completed & Accepted Doctrine was recently expanded to AEE's for projects involving public spaces *(Neiman v. Leo A. Daly Company, California 2012*). Interested in hearing more about the Completed & Accepted Doctrine and how it could help your firm, please contact Dealey, Renton & Associates today.

The key lessons to take from these cases is that you should never perform any services that do not meet the legally required standard of care, which may exceed actual legal requirements, and you will never want to agree to perform in excess of what is required by the legally mandated standard of care.