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Periodic Review and Small Business Impact Review Report of Findings

Agency name	Board For Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects
Virginia Administrative Code (VAC) Chapter citation(s)	18 VAC10-20
VAC Chapter title(s)	Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects Regulations
Date this document prepared	October 25, 2023 (revised November 2, 2023)

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Acronyms and Definitions

Define all acronyms used in this Report, and any technical terms that are not also defined in the "Definitions" section of the regulation.

There are no acronyms or technical terms used in this report.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

The promulgating agency is the Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects (“the Board”).

Code of Virginia § 54.1-201(A)(1) gives the Board the power and duty to “establish the qualifications of applicants for certification or licensure by any such board, provided that all qualifications shall be necessary to ensure either competence or integrity to engage in such profession or occupation.”

Code of Virginia § 54.1-201(A)(5) gives authority to the Board to promulgate regulations. It states, in part, that the Board has the power and duty “[t]o promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners and to effectively administer the regulatory system administered by the regulatory board.”

Alternatives to Regulation

Describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.

No alternatives were considered as part of this periodic review. The regulation enables the Board to fulfill the statutory requirements established in Chapters 2 and 4 of Title 54.1 of the Code of Virginia. Further, the regulation is necessary to ensure that the Board’s statutory requirements are executed in the least burdensome and most efficient and cost-effective manner possible while protecting the health, safety, and welfare of the citizens of Virginia.

Public Comment

Summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency’s response. Be sure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. Indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

Committer	Comment	Agency response
George A. Chadwick, IV, on behalf of Lessard Design, Inc.	<p>Commenter requests the Board repeal or modify 18VAC10-20-740.F.</p> <p>Subsection F of 18VAC10-20-740 requires a regulant, such as an architect, to obtain the written consent of the creating architect to use or modify that architect’s work. This regulation establishes an administrative obligation that is redundant of protections in federal copyright law.</p> <p>The “protection” established in subsection F is “too broad.” Subsection F goes beyond protecting the original work of an</p>	<p>The Board thanks the commenter. The commenter’s comments will be provided to the Board’s regulatory review committee for consideration.</p>

	<p>architect, which is protected under copyright law, to protect “everything” including obvious, non-original, and functional elements by requiring consent before utilizing or modifying the work in any way. This makes it difficult for a client to change architects over the life of a project, because the subsequent architect may feel compelled to get the consent of the original architect, even when the subsequent architect is substantially redesigning the project. By requiring consent for non-copyrightable work of the original architect, it creates a <i>de facto</i> property right where none should exist.</p> <p>Subsection F makes it hard to change architects. Frequently, the original architect retains ownership of its work and grants a license that expressly allows for modification of the work with the involvement of another architect. The regulation does not account for this common practice. By requiring consent, even when the client already has consent to modify, it allows for the original architect to extract compensation for work for which it has already been compensated.</p> <p>Subsection F allows an original architect to act arbitrarily. The regulation does not require the original architect to act reasonably or promptly in providing consent. The original architect may withhold or delay consent even when changes to the work are minimal or the original architect is not capable of making the changes. The original architect could condition its consent on payment of a substantial unearned fee, deterring healthy competition in the market for architectural services.</p> <p>Subsection F’s remedies are extreme. An architect that violates the regulation is exposed to</p>	
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	<p>disciplinary action and sanctions by the Board, even when the original architect's work was not sufficiently original to enjoy copyright protection. The threat of sanctions under these circumstances is not reasonable, and converts a civil copyright violation into a licensing issue.</p> <p>The commenter recommends:</p> <p>(i) Narrowing the scope for consent to copyrighted works or works that enjoy other legally recognized protection, and only require consent to the extent the subsequent architect's use infringes on the original's work;</p> <p>(ii) Eliminating any requirement to obtain consent for non-original works, functional works, or elements in a work that are required by zoning codes, building codes, or other published design guidelines;</p> <p>(iii) Require the original architect to act promptly and reasonably in providing or withholding consent, and provide a procedure for the use of an original architect's work when the original architect is unavailable or cannot be located; and</p> <p>(iv) Allow a licensee or similar holder of rights in a copyrighted work to provide the required consent.</p>	
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Effectiveness

Pursuant to § 2.2-4017 of the Code of Virginia, indicate whether the regulation meets the criteria set out in the ORM procedures, including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.

The regulation meets the criteria set forth in the Office of Regulatory Management procedures. The regulation contains the requirements for obtaining a license or certification, renewal and reinstatement of licenses and certificates, standards of professional conduct, to ensure competence and integrity of all licensees and certificate holders, and administer the regulatory program in accordance with Chapters 2 and

4 of Title 54.1 of the Code of Virginia. The regulation is necessary for the protection of public health, safety, and welfare and is clearly written and understandable.

Decision

Explain the basis for the promulgating agency’s decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).

If the result of the periodic review is to retain the regulation as is, complete the ORM Economic Impact form.

On November 1, 2023, the Board voted to retain the regulation “as is” without any change, as explained further in the “Small Business Impact” section. In accordance with the Governor’s Executive Directive Number One (2022), the Board is currently undertaking a separate action to perform a comprehensive line-by-line review of this regulation.

Small Business Impact

As required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency’s consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency’s decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

Code of Virginia §§ 54.1-201(A)(1) and 54.1-201(A)(5) mandate the Board promulgate regulations. The continued need for the regulation is established in statute. Repeal of the regulation would remove the current public protections provided by the regulation. The Board provides protection to the safety and welfare of the citizens of the Commonwealth by ensuring that only those individuals that meet specific criteria set forth in the statutes and regulations are licensed or certified. The Board is also tasked with ensuring that its regulants meet standards of practice that are set forth in the regulations.

Based on the comment received during the public comment period, there does not appear to be a reason to repeal the regulation. There also does not appear to be a reason to amend the regulation at this time. The Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects Regulations are clearly written, easily understandable, and do not overlap, duplicate or conflict with federal or state law or regulation.

The most recent periodic review of the regulation occurred in 2019. Currently, the Board is conducting a comprehensive review of the regulation.

