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## ENFORCE OCCUPATIONAL CODE

House Bill 4787 (Substitute H-2)  
House Bill 4788 (Substitute H-3)  
First Analysis (10-6-93)

Sponsor: Rep. Joseph Young, Jr.  
Committee: State Affairs

### ***THE APPARENT PROBLEM:***

Article 20 of the Occupational Code (Public Act 299 of 1980) regulates architects, professional engineers, and professional surveyors and subjects them to certain penalties (listed in Article 6 of the code) for committing certain actions (such as using certain titles without being licensed under the code, using another licensee's license or seal -- or an expired, suspended, or revoked license -- or using certain terms in a firm's name without proper authorization by the appropriate board).

The Professional Practices Committee of the Detroit Chapter of the American Institute of Architecture has filed numerous complaints with the state about either violations of Article 20 of the Occupational Code (which governs architects, professional engineers, and professional surveyors) or about the unlicensed practice of architecture. Yet the state has been unable to respond in a timely manner (or even at all) to these complaints because of budgetary and other constraints. At the request of the architects, legislation has been introduced that would address these issues.

### ***THE CONTENT OF THE BILLS:***

House Bill 4787 would amend the Occupational Code (Public Act 299 of 1980, MCL 339.2012 et al.) to set up a procedure for investigating complaints against the unauthorized practice of architecture, professional engineering, or professional surveying. It also would make it a misdemeanor to practice architecture, professional engineering, or professional surveying without a license and would change the residential builder exemption in the code. House Bill 4788 would amend the State License Fee Act (Public Act 152 of 1979, MCL 338.2213) to create an "Article 20 Enforcement Fund" for these investigations and the enforcement of legal actions against people practicing these professions without a license or in violation of Article 20 of the code.

House Bill 4787 would make it a misdemeanor to practice (or attempt to practice) architecture, professional engineering, or professional surveying - or to use any of the titles protected in this part of the Occupational Code -- without being licensed for that profession or being exempted from the code's licensing requirements. (See below.) A first offense would be punishable by a fine of up to \$500 and imprisonment for up to 90 days. Second and subsequent offenses would be punishable by fine of up to \$1,000 and imprisonment for up to one year.

Exemptions to licensing requirements. The code exempts a number of people from its licensing requirements:

- (1) Professional engineers employed by railroads or other interstate corporations who are employed and practice only on the corporation's property;
- (2) Designers of manufactured products, if the manufacturer of the product assumes responsibility for the quality of the product;
- (3) Owners doing architectural, engineering, or surveying work on or in connection with constructing a building on the owner's property for his or her own use (and to which employees and the public don't generally have access);
- (4) Those licensed in other states while temporarily in Michigan to present a proposal for services; and
- (5) Anyone not licensed under the code who plans, designs, or directs the construction of "a residence building" no more than 3,500 square feet in calculated floor area. ("Calculated floor area" is defined as "that portion of the total gross area, measured to the outside surfaces of exterior walls intended to be habitable, including a heater or utility room, but not including a crawl space; an unfinished and nonhabitable portion of a basement

or attic; or a garage, open porch, balcony, terrace, or court.”)

The bill would change this last exemption by (1) changing the reference to “a residence building”; the bill would instead refer to a one- or two-family dwelling; (2) increasing the maximum square feet of calculated floor area by 700 square feet (i.e. from 3,500 to 4,200); (3) redefining “calculated floor area”; and (4) adding a new exemption regarding additions to existing one- or two-family dwellings where the calculated floor area of the existing dwelling wasn’t more than 4,200 square feet.

The new definition of “calculated floor area” would drop reference to the portion of the total gross area intended to be habitable, and would change the way basement and attic space would be figured into the 4,200 square feet of calculated floor area. The bill would define “calculated floor area” to mean:

- (1) “the total gross area measured at each story above grade to the outside surfaces of exterior walls”;
- (2) “the area of a basement measured by multiplying the exposed aggregate area of glass and glass block by 12, but in no case . . . greater than 60 percent of the basement’s gross area as measured to the outside face of the exterior walls”; and
- (3) the total net area of spaces intended for human occupancy above garages or within an attic measured to the inside surfaces at perimeter walls.”

The bill also would add exemptions for certain additions to one- or two-family dwellings that had less than 4,200 square feet of calculated floor area. People not licensed under Article 20 of the Occupational Code who planned, designed, or directed the construction of an addition to an existing one- or two-family dwelling, where the combined calculated floor area of the existing dwelling and the new addition did not exceed 4,200 square feet would be exempted. A self-supporting (that is, not structurally dependent on the existing dwelling) addition did not exceed 800 square feet of calculated floor area also would be exempt from the act’s licensing requirements, regardless of the existing dwelling’s size. However, additions that were structurally supported by the existing one- or two-family dwelling and that caused the total calculated floor area to exceed 4,200 square feet

would not be exempt from the act’s licensing requirements.

Complaint procedure and investigations. When the Department of Licensing and Regulation\* received a complaint, it would be required to “immediately” begin an investigation against the licensee or unlicensed person and would open a “correspondence file.” Within 30 days after a complaint was made, the department would have to acknowledge it in writing and select not more than three architects, professional engineers, or professional surveyors (from a list established by the appropriate boards) who had contracted with the department to conduct investigations. A majority of the investigators would have to belong to the profession in question. Investigators would be compensated and reimbursed by the department for their expenses from the “Article 20 Enforcement Fund” established under House Bill 4788. Both the investigators and any licensed architect, professional engineer, or professional surveyor making a complaint (“or any other individual”) would be immune from civil liability except for intentional harm or gross negligence. \*(Note: The Department of Licensing and Regulation was abolished by executive order in 1991 and its functions transferred to the Department of Commerce.)

Investigations would have to be completed within 90 days (“not more than 60 days after the 30-day period” described above) after a complaint was made, and the investigating licensees would have to issue a written report on the results of the investigation to the director and the attorney general. For good cause shown, the director of the department could grant an extension (of up to 60 days) to the 60-day limit on an investigation.

Investigation reports and case dispositions. If an investigatory report didn’t show that a violation (of the act or a rule or order issued under the act) had occurred, the department would close the complaint and forward the reasons for closing the complaint to both the accused person and to the person making the complaint.

If a report did show a violation, the department or the attorney general could take one of a number of possible actions against the accused: a formal complaint, a cease and desist order, a notice of summary suspension, or a citation.

**Cease and desist orders.** Someone ordered to cease and desist after an investigation would be entitled to a hearing before the department if he or she filed a written request for a hearing within 30 days after the effective date of the order. If someone violated a cease and desist order, the attorney general could ask a court to restrain and enjoin (temporarily or permanently, or both) the person from violating the cease and desist order.

The attorney general (or his or her designee) would represent the department at cease and desist hearings, and could appoint special assistant attorneys general to perform the legal services required by the bill. Payment for the legal services also would be made from the "Article 20" Enforcement Fund.

**Civil actions.** In addition to any actions brought by the department, individuals could bring civil actions to enjoin the unauthorized practice of architecture, professional engineering, or professional surveying. Someone who won such a civil action would be awarded by the court the costs and actual attorney fees incurred in pursuing the action.

**House Bill 4788** would amend the State License Fee Act to establish an "Article 20 Enforcement Fund" in the Department of Commerce to be used only for investigation and enforcement activities conducted under Article 20 of the Occupational Code (which regulates architects, professional engineers, and professional surveyors). Revenue for the fund would come from assessments charged to applicants for licensure or relicensure under Article 20. The amount of the additional fee would be established by the licensing boards for deposit into the fund.

**Additional assessments.** If, on July 1 of any year, the balance of the fund was less than \$125,000, the director of the Department of Commerce would require an additional assessment or payment of up to \$50 from each licensee unless, within 30 days, the boards of architecture, professional engineering, and professional surveying adopted a resolution ("acting jointly and by a majority vote of the members appointed and serving by record roll call") to prohibit the additional assessment. If the boards did not adopt such a resolution, the legislature, within 30 legislative days, also could prohibit the additional assessment by adopting a concurrent resolution (by a record roll call vote) to that effect.

**Departmental responsibilities.** The director of the Department of Commerce would manage the fund and annually publish a detailed financial statement on the condition of the fund. The fund would be subject to an annual audit by the auditor general, and its findings would be made public. The usual provisions would apply to the fund: the treasurer would deposit or invest money from the fund ("in the same manner and subject to all provisions of law with respect to the deposit or investment of state funds by the state treasurer") and interest earned from investments would be credited to the fund. The unexpended fund balance would carry forward to the new fiscal year at the end of each fiscal year.

The department would contract with investigators and employ any necessary administrative help. In addition, the attorney general could appoint special assistant attorneys general to adequately enforce licensure actions against people practicing architecture, professional engineering, or professional surveying without a license or in violation of Article 20.

**Operation of the fund.** All administrative expenses necessary for operating the fund (including the cost of investigators and legal counsel) would be charged to and paid from the fund. For the first two years after the bill took effect, administrative expenses couldn't be more than 20 percent of the balance of the fund. After two years, administrative costs couldn't be more than 20 percent of the balance of the fund in the fiscal year ending two fiscal years before the current fiscal year.

**Payments from the fund.** Except for payments from the fund, no state officers or employees administering the bill (nor the state itself) would be personally liable for any money owed for services rendered under contract. If the Department of Commerce made payments from the fund for enforcing Article 20, the department could sue someone for whom a final administrative or court order had been rendered and applied, with proceeds from administrative fines to be deposited into the fund.

**Tie-bar.** The bills are tie-barred to each other.

## **BACKGROUND INFORMATION:**

**"Habitable" space.** The Michigan Bureau of Construction Codes Technical Bulletin (Publication

number 3, dated 12-1-90) says that both the Michigan Occupational Code and the State Construction Code provide an exemption for sealed plans for single family dwellings, specifically those containing not more than 3,500 square feet of area.

The bulletin notes that the Michigan Occupational Code exempts from this "calculated floor area" certain areas of the structure defined as non-habitable, but does not provide guidance on the term "habitable." The Occupational Code does exempt basements from the calculated floor area that are unfinished or nonhabitable.

The Michigan Building Code does define "habitable space" as a "space in a structure for living, sleeping, eating, or cooking. Bathrooms, toilet compartments, closets, halls, storage or utility spaces and similar areas are not considered habitable spaces." The Construction Code Commission also reviewed and rendered a decision on what constitutes a habitable basement (Edward Rose v Ypsilanti Twp, Appeal Docket No. CCC 79-01). The commission determined that in order to qualify as a habitable space, a basement would have to meet all code criteria for a habitable space, including the provisions for height, means of egress, light and ventilation, and interior finishes.

Practice of architecture and of engineering. The Michigan Occupational Code defines "the practice of architecture" as "professional services, such as consultation, investigation, evaluation, planning, design, or review of material and completed phases of work in construction, alteration, or repair in connection with a public or private structure, building, equipment, works, or project when the professional service requires the application of a principle of architecture or architectural design." An "architect" is "a person who, by reason of knowledge of mathematics, the physical sciences, and the principles of architectural design, acquired by professional education and practical experience, is qualified to engage in the practice of architecture." In order to take the examination required to be licensed as an architect, an applicant must have at least eight years of professional experience in architectural work, including not more than six years of education, plus a "first" (or "further") professional degree in architecture.

The definition of "the practice of engineering" is almost identical to that of the practice of architecture, except that professional engineering

services are in connection with a public or private utility, machine, process, or work, in addition to a structure, building, equipment, work, or project (the definition of the practice of architecture refers to "works" instead of "work," and does not include utilities, machines, or processes). The professional services of an engineer also must require the application of engineering principles or data (where those of an architect require the application of "a principle of architecture or architectural design"). Like architects, applicants for an engineer's licensure examination must, among other things, have a baccalaureate degree in engineering and at least eight years of professional experience in engineering work, including not more than six years of education.

Residential builders. Article 24 of the Michigan Occupational Code defines and regulates residential builders (and residential maintenance and alteration contractors). The code requires residential builders to be licensed, but does not limit the size of the residential building that they are allowed to construct. (The definition of "residential builder" does not mention design work. Basically, a residential builder is defined as someone who "engages in the construction of" a residential building or a combination residential and commercial structure. "Construction" includes erecting, constructing, replacing, repairing, altering, or adding to, subtracting from, improving, moving, wrecking, or demolishing a residential structure or combination residential and commercial structure.) In order to qualify for a residential builder's license, a person must, among other things, pass an examination "establishing that that applicant has a fair knowledge of the obligation of a residential builder . . . to the public and the applicant's principal, and the statutes relating to the applicant's licensure." (Note: Senate Bill 330 of 1993 would add as an exemption to the licensing requirements of Article 20 of the Occupational Code "a person not licensed under this article who is planning, designing, or directing the construction of a single-family residential building that [was] to be built under a permit issued to a licensed residential builder as that term is defined in section 2401.")

Building designers. According to a brochure by the American Institute of Building Design (AIBD), building designers may offer a variety of services in the planning, designing, and building of residential (both single and multi-unit), commercial, and industrial structures as permitted by the



architectural statutes of the building designer's state of residence or practice. The AIBD -- which was formed in 1950 and reportedly has members and societies in over 40 states and Canada -- certifies professional building designers (through a voluntary national certification program) and maintains a registry of certified professional building designers.

In order to hold a "professional builder membership" in the AIBD, a building designer must have at least six years of professional experience, of which at least half must be working in building design. Up to three of the six years may be in "related schooling," such as in architecture, engineering, architectural drafting, or design technology. A "building designer" membership requires at least four years of professional membership; up to two of these four years may be in related schooling.

According to the AIBD brochure, building designers may do any of the following, as allowed by state law:

- (1) during the initial planning stage, confer with the client to ascertain the type, size, and ultimate use of the proposed structure, and offer recommendations regarding the site, interior and exterior layout, materials to be used, the building designer's range of services, and possible architectural styles and exterior treatments;
- (2) provide estimates of the amount of time for, and the cost of, preparing drawings, specifications, and construction estimates;
- (3) when a client accepts the design concepts, present a contract specifying the services to be provided by the building designer, fees, and structural, mechanical, and electrical considerations;
- (4) furnish preliminary and detailed designs for the proposed structures, ranging from the initial concept to complete working drawings and specifications that comply with all applicable building codes and regulations; and
- (5) supply or arrange for additional services, such as preparing and publishing bid proposals for construction, interpreting and explaining bid proposals (along with any recommendations), selecting contractors and overseeing the actual construction of the structure (for example,

conducting on-site inspections of construction to ensure that all work met the recognized standards and protected the client's interests).

### **FISCAL IMPLICATIONS:**

Fiscal information is not available. (1-10-93)

### **ARGUMENTS:**

#### **For:**

Architecture involves matters that are critical to human safety and well being, and the Michigan Court of Appeals has said that the express purpose of the architectural licensing statute is to safeguard public life, health, and property. However, currently the state does not (and has not for several years) investigate complaints of the practice of architecture without a license, and its response to other violations of the architectural licensing law (Article 20 of the Occupational Code) is often slow and by people who are not qualified architects. This failure of the state to take meaningful action in response to complaints is the result both of the fact that the state has a tight budget and because it has no clear statutory mandate to investigate and punish unlicensed people.

For example, a letter from the Department of Licensing and Regulation dated June 21, 1991, to the chair of the Professional Practice Committee of the American Institute of Architects (Detroit Chapter) says that "unfortunately, due to budgetary constraints, it has been determined that the Department will discontinue investigating unlicensed activity complaints." It was followed by a letter dated June 28, 1991, suggesting that licensed architects "may wish to contact the local law enforcement agency or prosecutor where the alleged violation . . . occurred and file a criminal complaint." This position is reiterated in a letter from the Commercial Enforcement Division of the Department of Commerce (which took over the functions of the Department of Licensing and Regulation) dated March 30, 1993, which says, in part, "As we have discussed numerous times, the State is not pursuing complaints against unlicensed parties because the administrative penalties which we may assess in these cases cannot be readily enforced." The letter goes on to say, "We, therefore, encourage parties to pursue complaints against unlicensed parties with the local county prosecutor. The prosecutor can prosecute these cases as misdemeanors, with a maximum penalty of

a \$500 fine and/or 90 days in jail for a first offense which is enforceable through the regular court system."

Reportedly only 35 percent of the complaints regarding the practice of architecture are against licensed architects, with the remainder against people practicing architecture without a license. In some cases, complaints have involved the illegal practice of using the seal of a dead architect on drawings and the forging of the dead architect's signature next to the seal. The complaint roster of the Detroit Chapter of the American Institute of Architects includes a wide variety of projects undertaken by unlicensed people: commercial buildings, lease space, restaurants, residences, shopping plazas and centers, hospitals, churches, medical buildings, and office buildings. The people involved in these projects include individual "persons," interior designers, drafting firms (some consisting of architects, some of contractors, and some of engineers), engineers, construction managers, home builders, home designers, and unlicensed architects.

The suggestion that individual licensed architects go to their local prosecutors is unworkable, because local prosecutors focus on violent crimes and won't take on what they consider to be "minor" or relatively unimportant Occupational Code violations. Yet the issues at stake may involve the lives and wellbeing of hundreds or even thousands of people, as the Kansas City Hyatt Skywalk disaster proves. There always is the possibility of civil recourse -- civil injunctive relief -- through the courts, but most people who practice architecture without a license know that they're practicing illegally, and there are those who believe that civil injunctive orders just don't work.

The proposed bills are not about scope of practice but about enhancing the ability of the state to enforce current law by creating a fund allowing for "field workups" of complaints (currently it takes anywhere from 2 to 20 hours to do the background work necessary to even submit a complaint to the Department of Commerce).

#### ***Against:***

The misdemeanor provision in House Bill 4787 would seem to be unnecessary, since the Occupational Code (in Article 6, MCL 339.601) already prohibits people from engaging in or attempting to engage in the practice of an

occupation regulated under the code or use a title designated under the code unless he or she had a license or certification of registration issued by the department for that occupation.

#### ***Against:***

Licensing fees are regularly used for purposes other than regulating the licensed professions. What is to guarantee that the legislature won't simply appropriate the proposed new license fee assessments and use the revenue for some other purpose than the bills intend? Perhaps the bills should be amended to include some provision that if the state raids the proposed "Article 20 Enforcement Fund" that the fees revert to the three professions licensed under Article 20.

#### ***Against:***

Air conditioning and sheet metal contractors do design work for clients also, and the proposed investigation panels would include only architects, professional engineers, and professional surveyors. Other design professionals should be included on these investigatory panels if their particular design specialty is involved in a complaint.

#### ***Against:***

Building designers argue that the bill would result in unfair competition on the open market and would impose an unfair and unnecessary burden on home owners and legitimate building design businesses. They argue that, in effect, the bill would do for architects what they have been unable to achieve on the open market, namely, give architects a virtual monopoly on residential home building, whether of new construction or additions. Building designers concede that, at first glance, the increase in finished square footage -- from the existing maximum of 3,500 square feet to a proposed 4,200 square feet -- of a house that non-architects could design looks like an improvement. But they argue that the new formula defining calculated space makes it possible that an architect's seal would be required on much smaller homes than covered by existing law (mostly by tying in varying amounts of exposed basement).

Currently, architects and, in some cases, professional engineers, are the only ones legally allowed to design commercial, industrial, institutional, and multi-family projects in Michigan. But for the most part, building designers argue, architects have not been interested in the same projects as building designers, and in the cases in which they were, the architect's fees usually were

too expensive for the kinds of clients who use building designers. Building designers say that they represent the lions' share of residential design for construction in Michigan, but fear that passage of the bills would result in architects having a virtual monopoly on residential design. This, they believe, could result in an increased cost of doing business in the state and an increase in unemployment.

Building designers point out that their professional association has been in existence for over 40 years, that their test for national certification is prepared by the same testing facility as the registration examination for architects, and that their association has recently adopted mandatory continuing education -- something which, they say, the architects are not proposing to do until 1996. (Although Michigan law requires continuing education, reportedly this requirement is not being enforced.) They also point out that their professional association is recognized in approximately 40 states and by the federal government (though not yet, apparently, in Michigan), and that in other states qualified building design professionals are allowed to do all sizes of residential design. Some states even allow them to do multi-family and light frame commercial structures.

Building designers say that the major difference between them and architects is that building designers continue to put as much value on field experience as architects used to do. (They point out that under the bill, Frank Lloyd Wright would have been prohibited from designing his homes.) Building designers recognize that unqualified people are doing inferior design work in Michigan, but point out that some of that work is done by licensed architects as well as by some unqualified building designers. Both the building designers' and the architects' professional organizations exist, in part, to try to control the quality of work offered to the public. Rather than excluding a nationally recognized design professional group, as building designers believe the bills would do, building designers believe that they have -- and should be allowed to have -- a continuing role in the design of residential homes in the state.

### ***POSITIONS:***

A representative of the Michigan Society of Architects testified in support of the bills. (9-29-93)

A representative of the Michigan Association of Home Builders testified in support of the bills. (9-29-93)

The Bureau of Occupational and Professional Regulation has not yet taken a position on the bill. (10-1-93)

The American Institute of Building Designers, Michigan Society, opposes House Bill 4787 in its present form, but would support amendments to include "design professionals" in the regulatory framework. (10-4-93)