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BEFORE THE
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **ERWIN JEREMIAH O'TOOLE** **331 Moultrie Street** **San Francisco, CA 94110** **Civil Engineer License No. C 80734** Respondent.	Case No. 1243-A **ACCUSATION**

PARTIES

1. Richard B. Moore, PLS (Complainant) brings this Accusation solely in his official capacity as the Executive Officer of the Board for Professional Engineers, Land Surveyors, and Geologists, Department of Consumer Affairs.

2. On or about December 21, 2012, the Board for Professional Engineers, Land Surveyors, and Geologists issued Civil Engineer License Number C 80734 to Erwin Jeremiah O'Toole (Respondent). The Civil Engineer License was in full force and effect at all times relevant to the charges brought in this Accusation and will expire on March 31, 2021, unless renewed.

JURISDICTION

3. This Accusation is brought before the Board for Professional Engineers, Land Surveyors, and Geologists (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

4. Section 118, subdivision (b), of the Code provides that the suspension/expiration/surrender/cancellation of a license shall not deprive the Board/Registrar/Director of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

STATUTORY PROVISIONS

5. Section 6749 of the Code provides, in pertinent part:

> (a) A professional engineer shall use a written contract when contracting to provide professional engineering services to a client pursuant to this chapter. The written contract shall be executed by the professional engineer and the client or the client's representative prior to the professional engineer commencing work, unless the client knowingly states in writing that work may be commenced before the contract is executed. The written contract shall include, but not be limited to, all of the following:
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> (1) A description of the services to be provided to the client by the professional engineer.
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> (2) A description of any basis of compensation applicable to the contract, and the method of payment agreed upon by the parties.
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> (3) The name, address, and license or certificate number of the professional engineer, and the name and address of the client.
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> (4) A description of the procedure that the professional engineer and the client will use to accommodate additional services.
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> (5) A description of the procedure to be used by both parties to terminate the contract.

6. Section 6775 of the Code states, in pertinent part, that:

> [T]he board may publicly reprove, suspend for a period not to exceed two years, or revoke the certificate of any professional engineer licensed under this chapter on any of the following grounds:
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> . . .
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> (c) Any negligence or incompetence in his or her practice.

. . .

(h) A violation of any provision of this chapter or any other law relating to or involving the practice of professional engineering.

REGULATORY PROVISIONS

7. Section 419 of the Title 16, California Code of Regulations states, in pertinent part that:

For violations of Business and Professions Code sections 6775 and/or 8780 which result in an order issued in accordance with Chapters 4.5 and 5 of Part 1 of Division 3 of Title 2 of the Government Code against a professional engineering and/or a professional land surveying license, the following provisions shall apply to disciplinary orders contained in decisions of the Board:

(a) The minimum disciplinary order shall be reproval. The maximum disciplinary order shall be revocation of the license.

(b) If warranted by extenuating and/or mitigating factors in the matter, the disciplinary order may be stayed by an express condition that the respondent comply with probationary conditions. The minimum time period in which the respondent shall have to comply with the conditions shall be two years. For purposes of this section, this time period shall be known as the period of probation.

8. Section 404 of the Title 16, California Code of Regulations states:

For the purpose of the rules and regulations contained in this chapter, the following terms are defined. No definition contained herein authorizes the practice of engineering as defined in the Professional Engineers Act.

(u) For the sole purpose of investigating complaints and making findings thereon under Sections 6775 and 8780 of the Code, 'incompetence' as used in Sections 6775 and 8780 of the Code is defined as the lack of knowledge or ability in discharging professional obligations as a professional engineer or land surveyor.

. . .

(dd) For the sole purpose of investigating complaints and making findings thereon under Sections 6775 and 8780 of the Code, 'negligence' as used in Sections 6775 and 8780 of the Code is defined as the failure of a licensee, in the practice of professional engineering or land surveying, to use the care ordinarily exercised in like cases by duly licensed professional engineers and land surveyors in good standing.

COST RECOVERY

9. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case, with failure of the licensee to comply subjecting the license to not being

renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be included in a stipulated settlement.

FACTUAL ALLEGATIONS

10. In approximately 2012, WW purchased a property in San Francisco, California. WW planned to demolish the existing one-story structure, build a three-story home with a basement, and re-grade the new structure (San Francisco Project). WW's plan required excavating the site's sloping terrain and then shoring and underpinning the site's boundaries in order to maintain slope stability, site safety, and prevent adjacent buildings from ground sliding and settling.

11. In approximately April of 2015, WW hired Respondent to provide foundational engineering calculations and plans for the project, including underpinning, temporary shoring, and observations. WW also hired Respondent to assist in preparing WW's "tie-back agreement" with his neighbor, LK, and to perform special inspections at the site. Respondent did not enter into a written contract with WW for any of the work he performed for WW.

12. WW began to excavate, underpin, and shore the San Francisco Project in fall of 2015. Shortly thereafter, there was evidence of damage to LK's property (WW's neighbor). LK reported the issues to the San Francisco Building Department, and the Department required WW to have an evaluation performed by a licensed professional. LK was not satisfied with the report produced by WW, and he hired his own licensed professional, MK, to perform an inspection. MK's findings were dramatically different from the findings of WW's licensed professional. MK attributed the damage to LK's property to three main factors at the San Francisco Project, including improper shoring, which was based on Respondent's engineering plan.

13. The Board's expert opined that Respondent demonstrated negligence and incompetence in his civil engineering practice with respect to the San Francisco Project, as discussed in further detail in paragraph 14 and each of its subparts, below.

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FIRST CAUSE FOR DISCIPLINE
(Negligence and/or Incompetence)

14. Respondent has subjected his civil engineering license to disciplinary action under Code section 6775, subdivision (c), in that Respondent was negligent and/or incompetent in his practice at the San Francisco Project as follows:

a. Respondent's foundation design was based upon a single, insufficient and exploratory test boring by another engineer.

b. Respondent performed insufficient advanced reconnaissance in creating his design.

c. Respondent's foundation drawings contained several deficiencies, as follows: (1) the drawings were sealed but not signed; (2) they were disjointed in lay-out, confusing to read, and difficult to decipher; (3) were generic and showed little attention to actual site conditions; (4) did not verify existing grades or conditions of existing buildings; (5) specified engineered Piers 3 to 8 (under LK's house), that seemed impractical or impossible to install; (6) provided overall guidance that was rudimentary and insufficient for the earthwork and construction contractors to follow; and (7) provided rudimentary, insufficient, and impractical protection measures to adjacent structures at neighboring properties.

d. Respondent performed rudimentary and insufficient foundation calculations. Specifically, Respondent's calculations were: (1) based upon assumptions that were not field-verified; (2) incomplete, difficult to decipher, and had no key plan; (3) contained rudimentary, insufficient, and incoherent engineering design for the underpinning at MK's house; (4) did not address the underpinning requirements along the other perimeter lines of WW's property; (5) contained a questionable shoring design that was completely reliant on computer software; (6) contained a generic analysis for lagging around WW's construction site that was copied and pasted from a manual; and (7) did not include design of structural connections for piers, shoring, underpinning, or lagging.

e. Respondent prepared two special inspection reports and three compliance reports related to the San Francisco Project. Respondent did not describe any of his procedures or include

any photographs, field notes, analysis, work papers, discussions, correspondence, or calculations to support his three inspections in April 2015, September 2015, or December 2017.

SECOND CAUSE FOR DISCIPLINE
(Failure to Use a Written Contract)

15. Respondent's has subjected his civil engineering license to disciplinary action under Code sections 6775, subdivision (h) and 6749, subdivision (a), in that Respondent did not use a written contract when contracting to provide professional engineering services to a client. The circumstances of Respondent's conduct are set forth above in paragraphs 10 through 13, above.

DISCIPLINARY CONSIDERATIONS

16. In determining the degree of discipline, if any, to impose on Respondent's Civil Engineer License, Complainant further alleges that on or about December 10, 2018, the Board issued Respondent Citation Order 10720-L, for violating Code section 8780.2, when he failed to respond to the Board's requests for information and documents related to the San Francisco Project. Citation Order 10720-L contained an order to provide a written response related to the investigation and included an order to pay an administrative fine. Respondent appealed the citation, and the Board modified the citation on May 7, 2019, following an informal conference. Respondent paid the reduced fine and provided the Board with the requested documents.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters alleged in this Accusation, and that following the hearing, the Board for Professional Engineers, Land Surveyors, and Geologists issue a decision:

1. Revoking or suspending Civil Engineer License Number C 80734, issued to Erwin Jeremiah O'Toole;

2. Ordering Erwin Jeremiah O'Toole to pay the Board for Professional Engineers, Land Surveyors, and Geologists the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and,

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3. Taking such other and further action as deemed necessary and proper.

DATED: 12/31/2020

Original Signed

RICHARD B. MOORE, PLS
Executive Officer
Board for Professional Engineers, Land Surveyors, and Geologists
Department of Consumer Affairs
State of California
Complainant

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