

MARYLAND STATE BOARD FOR
PROFESSIONAL LAND SURVEYORS

v.

CLARENCE H. MILLER

Respondent

* * * * *

* BEFORE THE

* MARYLAND STATE BOARD

* FOR PROFESSIONAL

* LAND SURVEYORS

* COMPLAINT NO.: 08-LS-06

CONSENT ORDER

This matter comes before the Maryland State Board for Professional Land Surveyors (the "Board") based on a complaint opened by the Board against Clarence H. Miller (the "Respondent"). Based on the complaint and information obtained in an investigation, the Board determined that administrative charges against the Respondent were appropriate and that a hearing on those charges should be held.

The scheduled hearing was held on October 13, 2011 at the Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, Maryland, before the Hon. Harriet G. Helfand, an Administrative Law Judge. Peter Martin, Assistant Attorney General, appeared on behalf of the Board. Mr. Miller was not present for the hearing.

After review of the evidence presented at the hearing and the opportunity to see and hear the testimony of the witnesses presented at the hearing, the Administrative Law Judge issued a Recommended Decision (the "ALJ Recommended Decision") in which she concluded that the Respondent "is in violation of the Minimum Standards of Practice, and further, that the Respondent violated the Code of Ethics established for Land Surveyors," and that the Respondent "is in violation of sections 15-317(a)(iv) and 15-317(a)(v) of the Business Occupations Article." The Administrative Law Judge further found that the Respondent was subject to sanction by the Board under Section 15-317(a)(2) Business Occupations and Professions Article, Ann. Code of Maryland (2010) and recommended that "the license of the Respondent be revoked."

On December 28, 2011, the Board issued a Proposed Order in which the Board affirmed the Findings of Fact in the ALJ Recommended Decision, approved the Conclusions of Law set forth in the ALJ Recommended Decision, and adopted the Recommended Order stated in the ALJ Recommended Decision. As provided by the authority set forth in the Md. Code Ann., State Government Article, Section 10-216, and the Code of Maryland Regulations ("COMAR") 09.01.03.09, the Respondent filed timely exceptions to the Board's Proposed Order.

The Respondent alleged in his exceptions that he was unable to attend the hearing before the Administrative Law Judge because of health issues involving himself and his

wife, and that he attempted unsuccessfully to have the hearing postponed. Further, the Respondent alleged that he is 79 years old and has been licensed with the Board as a professional land surveyor since 1963, license no. 4011, and has no prior violation history. The Respondent requested that this case be remanded to allow his testimony and evidence to refute the finding that his conduct in providing the surveying document at issue was grossly negligent and should result in the revocation of his license.

The Respondent agrees to abide by Title 15 of the Business Occupations and Professions Article, Annotated Code of Maryland, which governs the licensure of professional land surveyors in the State of Maryland and enters this Consent Order freely and with the opportunity to consult with counsel.

Due to extenuating circumstances presented by the Respondent, the Board decided to impose a lesser penalty with regard to the Respondent's license.

THEREFORE, IT IS, on this 25th day of June, 2012, BY THE MARYLAND STATE BOARD FOR PROFESSIONAL LAND SURVEYORS,

ORDERED, that the Respondent violated Md. Code Ann., Bus. Occ. and Prof., Sections 15-317(a)(iv) and (v); and it is further

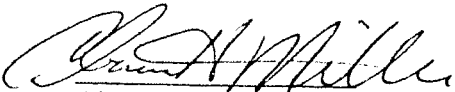
ORDERED, that the Respondent also violated the Code of Maryland Regulations 09.13.06 (Minimum Standards of Practice) and 09.13.01 (Code of Ethics);

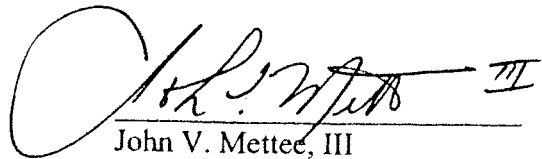
ORDERED, that the Respondent's license to engage in the practice of land surveying be suspended for a period of thirty (30) days which is to commence on Monday, June 25, 2012 and to continue up to and including Tuesday, July 24, 2012 ; and

ORDERED, that the Respondent will surrender his surveyor's seal to the Board on or before June 25, 2012, the beginning of the suspension period;

ORDERED, that the Board will return the Respondent's seal once the suspension period has been completed; and it is further

ORDERED, that the Board's records and publications shall reflect the terms of this Order.


Clarence H. Miller


John V. Mettee, III
Chairman
State Board for Professional Land
Surveyors

MARYLAND DEPARTMENT OF
LABOR, LICENSING AND
REGULATION, STATE BOARD FOR
PROFESSIONAL LAND SURVEYORS

v.

CLARENCE H. MILLER,
RESPONDENT

* BEFORE HARRIET C. HELFAND,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS

*
* CASE NO: DLR-SUR-67-11-24370
*
* BOARD CASE NO.: 08-LS-06
*

* * * * *

RECOMMENDED DECISION

Statement of the Case
Issues
Summary of the Evidence
Findings of Fact
Discussion
Conclusions of Law
Recommended Order

STATEMENT OF THE CASE

On or about June 1, 2011, the Maryland Department of Labor, Licensing and Regulation (DLLR) State Board for Professional Land Surveyors (Board) ordered Clarence H. Miller (Respondent) to appear for an administrative hearing. The hearing was ordered to permit the Respondent to answer charges that he violated the Board's Code of Ethics and failed to comply with the Minimum Standards of Practice requirements.

On October 13, 2011, I conducted a hearing to consider the Board's allegations. The hearing was held at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 15-319 (2010).¹ Peter Martin, Assistant

¹ This volume of the Annotated Code will be referred to throughout this Decision as the "Business Occupations Article" and will refer to the 2010 replacement volume, unless otherwise specified.

Attorney General, represented DLLR. The Respondent failed to appear after receiving proper notice.²

Procedure in this case is governed by the provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2011), Code of Maryland Regulations (COMAR) 09.01.02 and 09.01.03, and the Rules of Procedure of the OAH, COMAR 28.02.01.

ISSUES

1. Did the Respondent commit gross negligence, incompetence or misconduct in the practice of land surveying in violation of section 15-317(a) of the Business Occupations Article?
2. Did the Respondent violate the Code of Ethics for the Practice of Professional Land Surveying and Property Line Surveying?
3. If so, is the Respondent subject to sanctions under section 15-317(a) of the Business Occupations Article?

² The hearing was scheduled for 9:30 a.m. Because of the distance between the Respondent's home and OAH, I waited more than the customary fifteen minutes to begin the hearing, in the event the Respondent was held up in traffic. At approximately 10:00 a.m., I was informed that on the prior day, someone purportedly on behalf of the Respondent called the OAH and stated that the Respondent would be requesting a postponement and would do so in writing, possibly by e-mail. OAH received no such request. No one at the hearing had knowledge of a request from the Respondent. Accordingly, I proceeded to conduct the hearing. On October 17, 2011, four days after the record closed, I was handed a copy of a postponement request presumably sent by the Respondent that was received by a DLLR office on October 12, 2011 and forwarded to the Board on October 14, 2011, one day after the hearing. Mr. Martin, the Assistant Attorney General for the Board, was not informed of the Respondent's postponement request until October 17, 2011. Obviously, because of the timing, OAH was unable to consider the Respondent's postponement request.

SUMMARY OF THE EVIDENCE

Exhibits

The Board submitted the following exhibits, which were admitted into evidence:

- Bd. #1 Notice of Hearing, dated August 31, 2011 and Statement of Charges and Order for Hearing, dated June 1, 2011
- Bd. #2 "Google Maps" Aerial Photograph of Subject Property
- Bd. #3 Certification of Respondent's Land Surveyor's License
- Bd. #4 True Test Copy of "Minor Subdivision Lot 1 Land of Larry and Barbara Nichols" Plat
- Bd. #5 Survey Plat of "A Portion of the Northerly Line of the Lands of Dennis D. Trice & Lynn P. Trice and A Portion of the Southerly Line of the Lands of Larry A. Nichols, Sr. & Barbara G. Nichols"
- Bd. #6 Transcript of Testimony of Dennis Trice, dated November 9, 2007
- Bd. #7 Transcript of Testimony of the Respondent, dated November 9, 2007
- Bd. #8 Transcript of Testimony of Brenda Stant, dated November 9, 2007
- Bd. #9 Transcript of Testimony of Barbara Nichols, dated November 9, 2007
- Bd. #10 Transcript of Testimony of Larry Nichols, dated November 9, 2007
- Bd. #11 Amended Final Judgment Issued by Judge John W. Sause, Jr., of the Circuit Court for Caroline County in Civil Case # 10971, dated July 23, 2009
- Bd. #12 Letter from Michael J. Jacobs, Esq., to Peter Martin, Assistant Attorney General, with attachments, dated March 23, 2011
- Bd. #13 Packet Containing Real Property Data Search from the Maryland Department of Assessments and Taxation and Copies of Recorded Deeds for the Trice and Nichols Property
- Bd. #14 Transcript of Testimony of William Craig, dated November 9, 2007
- Bd. #15 Letter from the Respondent to Michael J. Jacobs, Esq., with attachments, dated August 21, 2007
- Bd. #16 Letter from William C. Craig to the Board, dated November 12, 2007

No exhibits were offered into evidence on behalf of the Respondent.

Testimony

The Board presented testimony from Lynn Trice and William C. Craig, who was accepted as an expert in Land Surveying, including the standards of the Land Surveying profession.

No testimony was offered on behalf of the Respondent.

FINDINGS OF FACT

Having considered all of the evidence presented, I find the following by a preponderance of the evidence:

1. At all times relevant to these proceedings, the Respondent was licensed by the Board as a professional land surveyor under license number 4011. The Respondent has been continuously licensed as a professional land surveyor since June 17, 1983 and is currently licensed through June 14, 2013.
2. On or about September 7, 2004, the Respondent began work on a surveying project for Larry and Barbara Nichols. The Nichols' engaged the Respondent to prepare a plat (Nichols Plat) for a four acre parcel (Lot 1) they wanted to subdivide on their property to create a building lot for their son.³
3. The Nichols' property, located in Caroline County, does not front on Harmony Road (also known as Maryland Route 16). Property adjacent to the Nichols' property that does front on Harmony Road is owned by the Stant/Layton and Trice families.

³ The remainder of the Nichols' property after creating the subdivision was approximately 84.75 acres. The Nichols' primarily use their land for farming.

4. In order to obtain permission from the Caroline County Planning and Zoning Office (P & Z) for the subdivision, the Nichols had to show that Lot 1 was accessible to Harmony Road by a thirty foot right of way (R/W).
5. To substantiate a thirty foot R/W, the Nichols engaged the Respondent to prepare a plat of the proposed subdivision. Ms. Nichols told the Respondent that a thirty foot R/W existed from their property to Harmony Road. Nichols gave the Respondent a hand-drawn map purporting to show the location of the R/W. The R/W on Ms. Nichols' map is indicated by a solid line and a broken line leading from Harmony Road towards a fork dividing a curved path through a wooded area and a dirt lane leading to their property.
6. To prepare the Nichols Plat, the Respondent also viewed a copy of a plat recorded among the land records of Caroline County in Liber MCB 192, Folio 606 that was prepared in March 1976 (Trice Plat). The Trice Plat was drafted on behalf of the Trice family, who own the property fronting on Harmony Road that borders the Nichols' property and was attached to a deed (Trice Deed) conveying a 9.12 acre parcel from Richard Wayne Trice, Dennis Dale Trice, and William E. Trice to Dennis Dale Trice and Lynn P. Trice as tenants by the entireties. The Trice Plat shows a thirty foot R/W leading from Harmony Road on the edge of property owned by the Trice family. The Trice Deed also grants "privileges of ingress and egress over a 30 foot road bordering the Layton property and extending from Road 16 to land being conveyed, also that the above property is subject to the 30 foot road across property and bordering Line 1 of above description." The purpose of the thirty foot right-of-way on the Trice Plat was to give the 9.12 acre parcel

owned by Dennis and Lynn Trice access to Harmony Road. Although the 30 foot R/W exists on the Trice Plat, the Trices' access to Harmony Road consists of a twelve-foot gravel road sited approximately in the middle of the thirty foot R/W.

7. To prepare the Nichols Plat, the Respondent also viewed a plat prepared in October 1943 that shows a R/W leading from Harmony Road on the edge of property owned by the Trice family.
8. To prepare the Nichols Plat, the Respondent came to the property site, but did not perform a complete survey of the area, particularly of the area of the R/W.
9. The Respondent completed the Nichols Plat, termed 'Minor Subdivision Lot 1 Land of Larry & Barbara Nichols' in March 2005 and recorded it among the plat records of Caroline County in Liber FDM 10, folio 28, on October 7, 2005. The Surveyor's Certificate on the Nichols Plat, signed by the Respondent states "I hereby certify that the Final Plat as shown hereon is correct; that it is a subdivision of (part of or all of) the lands conveyed to Larry A. Sr. and Barbara G. Nichols by deed dated 1-20-04 and recorded in the land records of Caroline County in Liber FDM 524, folio 314 and that the requirements of the Caroline County Subdivision Regulations and the Annotated Code of Maryland, Real Property Article Section 3-108, as enacted or amended so far as they may concern the making of this plat and setting of monuments and markers have been complied with."
10. The Nichols Plat shows a thirty foot R/W leading from Harmony Road to Lot 1 of the Nichols Plat. The R/W is labeled "Existing 30' Right-of-Way."
11. The R/W shown on the Nichols Plat is not located in the same area as the thirty foot R/W granted to the Trice property. The R/W shown on the Nichols Plat cuts

through a wooded area, located partially in the Trice R/W and partially on property owned by the Layton/Slant family, located north of the Trice property. Part of the land on which the Respondent located the R/W is a wooded drainage area that could impact nontidal wetlands. The R/W shown on the Nichols Plat does not exist in fact.

12. Relying on the Respondent's certification of the accuracy of the Nichols Plat, the Nichols' began effectuating the subdivision of their property, building a house on Lot 1 of the subdivision. The Nichols' and the contractors they employed to subdivide the lot and build the house used the gravel road located in the Trice R/W for access from Harmony Road.
13. A dispute arose between the Trices and Nichols' over the use of the R/W located on the Trice Property, resulting in extensive legal action pursued by the Trices against the Nichols' in the Circuit Court for Caroline County. The case was resolved in favor of the Trices by the Circuit Court for Caroline County and affirmed by the Maryland Court of Special Appeals. The holding of both the Circuit Court for Caroline County and the Court of Special Appeals was that the Nichols' has a prescriptive easement over the gravel road⁴ between the Trice and Stant/Layton property to move farm equipment, but that the thirty-foot R/W drawn by the Respondent on the Nichols Plat does not exist. The Court cited the "falsity" of the Nichols Plat drafted by the Respondent that had "no factual or

⁴ The gravel road on the edge of the Trice property that leads to the Nichols' property is approximately twelve feet wide, far less than the thirty-foot R/W depicted on the Nichols Plat. Further, the thirty-foot R/W described in the Trice deed was granted expressly for the use of the Trice family when the 9.12 acre parcel was conveyed to Dennis and Lynn Trice. Although the Court found that the Nichols have a prescriptive right to use the gravel road for the purpose of transporting farm equipment to their property, this does not equate to the thirty-foot R/W manufactured by the Respondent in the Nichols Plat.

legal basis.” The Court further affirmed the finding of the Circuit Court that “[Nichols] knew full well that the easement [thirty-foot R/W] did not exist and their continuing defense to the contrary occurred in bad faith or without substantial justification.” (Bd. #12)

14. The Nichols cannot currently obtain an occupancy permit from P & Z for the residence it erected on Lot 1, but continue to use the Trices’ gravel road, which does not correspond to the R/W drawn by the Respondent in the Nichols Plat. However, P & Z continues to work with the Nichols to authorize a subdivision based on the falsified Nichols Plat, to the detriment of the Trices. Costly litigation between the Trices and the Nichols’ over the non-existent R/W and its effect on the parties’ respective property rights continues to date.

DISCUSSION

This case presents a question of whether the Respondent’s actions in the preparation of the Nichols Plat in March 2005 were sufficiently egregious to justify the Board’s disciplinary action regarding his license. For the reasons that follow, I find that the Respondent performed land surveyor activity in a manner which did not comply with the minimum standards of practice. I further find that the Respondent violated provisions of the Board’s code of ethics and that he is guilty of gross negligence, incompetence and misconduct while practicing land surveying

Because the Respondent’s actions occurred prior to some of the current published versions of some of the relevant statutes and regulations, I have included both the current and prior versions, when applicable. Accordingly, the following statutes and regulations apply.

Section 15-317 of the Business Occupations Article provides the grounds for discipline and penalties for land surveyors who violate the Board's code of ethics. This section provides (and provided), in pertinent part:

§ 15-317. Denials, reprimands, suspensions, and revocations—

Grounds; alternative penalties.

(a) *Grounds.*—(1) Subject to the hearing provisions of § 15-319 of this subtitle, the Board, on the affirmative vote of a majority of its members then serving, may deny a license to any applicant, reprimand any licensee or suspend or revoke a license if:

...

(iv) the applicant or licensee is guilty of gross negligence, incompetence, or misconduct while practicing land surveying or property line surveying;

(v) the applicant or licensee knowingly violates any provision of the code of ethics adopted by the Board;

(2) (i) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this subsection, the Board may impose a penalty not exceeding \$5,000 for each violation.

Md. Code Ann., Bus. Occ. & Prof. § 15-317(a) (2010).

§ 15-317. Denials, reprimands, suspensions, and revocations—

Grounds; alternative penalties. [Effective 10/1/05]

(a) *Grounds.*— (1) Subject to the hearing provisions of § 15-319 of this subtitle, the Board, on the affirmative vote of a majority of its members then serving, may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license if:

...

(iv) the applicant or licensee is guilty of gross negligence, incompetence, or misconduct while practicing land surveying or property line surveying;

(v) the applicant or licensee violates any regulation adopted by the Board;

...

(2) (i) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this

subsection, the Board may impose a penalty not exceeding \$5,000 for each violation.

Md. Code Ann., Bus. Occ. & Prof. § 15-317 (a) (Supp. 2005)

The pertinent regulations comprising the Code of Ethics for professional land surveyors are as follows:

COMAR 09.13.01

Chapter 01 Code of Ethics for the Practice of Professional Land Surveying and Property Line Surveying

.02 Responsibility to the Public.

In the performance of his professional duties, a registrant shall make every reasonable effort to protect the safety, health, property, and welfare of the public. If the registrant's professional judgment is overruled under circumstances in which the safety, health, property, or welfare of the public is endangered, the registrant shall inform his employer or client of the possible consequences.

Chapter 04 Disciplinary Actions

01. Definitions

...

B. Terms Defined.

(1) Gross Negligence.

(a) "Gross negligence" means a wrongful act or omission, more culpable in nature than simple inadvertence or mistake, characterized by disregard of the property rights of others. It is conduct which constitutes substantial departure from the standard of care required of professional land surveyors or property line surveyors.

(b) "Gross negligence" includes but is not limited to:

(i) Knowingly or recklessly preparing a plat or other survey document which fails to protect the rights of interested parties where the surveyor knew those rights existed;

...

(iii) Knowingly or recklessly preparing a plat or other survey document which, if properly relied upon, could lead to serious injury to persons or property.

(2) "*Incompetence*" means

...
(a) Engaging in conduct which evidences a lack of proficiency, learning, ability, skill, or fitness necessary to perform regular duties, tasks, and functions of a professional land surveyor or property line surveyor in a reasonably effective, professional, and competent manner.

(3) *Misconduct*

(a) "Misconduct" means conduct by a professional land surveyor or property line surveyor which violates the standards of integrity of the profession.

(b) "Misconduct" includes but is not limited to:

(i) Violating the Code of Ethics set out in COMAR 09.13.01;

...

(iii) Being untruthful, deceptive, or misleading in any professional report, statement, or testimony whether under oath, or omitting relevant and pertinent information from the report, statement, or testimony when the result of an omission would or reasonably could lead to a fallacious conclusion on the part of the client or the general public;

Chapter 06 Minimum Standards of Practice

.03 Boundary Survey

...

B. Product.

(1) Unless otherwise directed by the party requesting the survey, sufficient monuments or reference control points which were used to determine the property lines shall be:

...

(b) Shown on a plat upon completion of the boundary survey so that the property lines can be determined or readily reestablished

C. Research and Investigation

...

- (2) The surveyor shall make a reasonable effort to identify, locate, and review private survey records that;
- (a) Are known to the surveyor to exist;
 - (b) Can be located in a reasonable time frame from a likely source;
 - (c) Are reasonably accessible to the surveyor upon request; and
 - (d) Are cited in the provided public records, or that a surveyor of ordinary prudence and skill may reasonably believe:
 - (i) May be material in locating the property's boundaries,
 - (ii) To have the potential for disclosing conflicting descriptions of the property's boundaries, or
 - (iii) May affect the location of the property's boundaries.

E. Field Procedures. Field Work shall be performed in accordance with the following standards:

...

- (2) Boundary evidence, including discrepancies, visible encroachments, and visible indications of rights that may be acquired by prescription or adverse possession shall be physically located; and
- (3) Evidence of servitudes that are visible shall be physically located.

F. Plats

...

(2) A plat shall be prepared in conformity with the following procedures

...

- (e) Relevant natural or artificial features located during the course of the survey, such as water courses, streets, visible utilities, and other relevant features shall be labeled, dimensioned, and referenced to the nearest property boundary line or represented by a symbol on the plat in its proper location, and each symbol shall clearly indicate what is represented or shall be labeled for identification either individually or in a separate key to symbols;

.09 Right-of-Way/Easement Surveys.

- A. *General.* A right-of-way/easement survey is a means of obtaining, reporting, or displaying, or all of these, the necessary data to establish or reestablish the location of the lines and the area of a strip or parcel of land designated on a tract of land for the specific use and benefit of others.
- B. *Product.* A right-of-way/easement survey shall result in the establishment of the location of lines, areas, if needed, and other relevant data. The surveyor is not required to set markers on a right-of-way/easement survey, unless required by a party requesting surveying services.
- C. *Compliance.* In performing the right-of-way/easement survey, the surveyor shall comply with all terms, conditions, standards, and procedures that are set forth in Regulation .03 of his chapter, except as may be otherwise modified by this regulation, or by the State, its instrumentalities, or any public or corporate body having the power of eminent domain.

Chapter 06 Minimum Standards of Practice [Effective 8/1/05]

.03 Boundary Surveys

B. Product.

(1) Unless otherwise directed by the party requesting the survey, sufficient monuments or reference control points which were used to determine the property lines shall be:

...

- (b) Shown on a plat upon completion of the boundary survey so that the property lines can be determined or readily established

...

D. Research and Investigation

...

(2) The surveyor shall make a reasonable effort to identify, locate, and review survey records which are cited in the provided public records and which may:

- (a) Be material in locating the property's boundaries
- (b) Have the potential for disclosing conflicting descriptions of the property's boundaries, or

(c) Affect the location of the property's boundaries.

E. *Field Procedures*

...

(2) Observable physical evidence, including boundary, possession, visible encroachments, and visible indication or rights, including evidence of recorded servitudes or those that may be acquired by prescription or adverse possession, shall be located.

F. *Plats*

...

(2) A plat shall be prepared in conformity with the following procedures

...

(b) Relevant natural or artificial visible features shall be labeled, dimensioned, and reference to the nearest property boundary line or represented by a symbol on the plat in its proper location, and each symbol shall clearly indicate what is represented or shall be labeled for identification either individually or in a separate key to symbols

...

(l) Each plat shall show the following

...

(i) A statement to the effect that a licensee either personally prepared a boundary survey or was in responsible charge over its preparation and the surveying work reflected in it, all in compliance with requirements set forth in Regulation .12 of this chapter.

.09 Right-of-Way/Easement Surveys.

A. *General.* A right-of-way/easement survey is a means of obtaining, reporting, or displaying, or all of these, the necessary data to establish or reestablish the location of sufficient property lines of the affected tract of land to assure the accurate location of the strip or parcel of land being described for the use and benefit of others.

B. *Product.* A right-of-way/easement survey shall result in the establishment of the location of lines, areas, if needed, and other relevant data. The surveyor is not required to set markers on a right-of-way/easement survey, unless required by a party requesting surveying services.

- C. *Compliance.* In performing the right-of-way/easement survey, the surveyor shall comply with all terms, conditions, standards, and procedures that are set forth in Regulation .03 of this chapter, except as may be otherwise modified by this regulation, or by the State, its instrumentalities, or any public or corporate body having the power of eminent domain.

In the instant matter, the Respondent's actions clearly violated the code of ethics for land surveyors and subject him to sanction. At best, the Respondent's actions were sloppy; at worst, deceptive. By including a non-existent thirty foot R/W on the Nichols Plat, the Respondent, in effect, either wittingly or unwittingly, helped perpetrate a fraud.

In his deposition pursuant to the Trice's lawsuit against the Nichols', the Respondent effectively admitted his failure to properly perform a survey of the R/W. By simply basing the Nichols Plat on Ms. Nichols' assertion that a R/W existed, Ms. Nichols's crude drawing of the purported R/W and possibly observing a gravel lane in the vicinity, the Respondent failed to prepare a proper, reliable survey. When asked by the Trice's attorney "[d]idn't you as a licensed surveyor feel that you needed to determine to your satisfaction before you prepared a plat for the land records that the land records actually establish the thirty-foot right-of-way in favor of the Nichols' property," the Respondent answered, "No, I didn't feel I needed to go any further than what I did." The deposition further indicates that although the Respondent did not do a boundary survey and did not know what parts of the R/W were on whose property, he essentially created the plat and the R/W to satisfy the county's requirement that the Nichols' subdivision show a thirty-foot R/W to Harmony Road. This was a backward action—creating the R/W to fit the requirement for approval of the subdivision, rather than performing an actual survey to determine whether, in fact, a R/W existed.

The Respondent's actions fully encompassed the rationale for the sanctions listed in section 15-317 of the Business Occupations Article. While it is difficult to distinguish whether the Respondent's actions exclusively constituted gross negligence, incompetence, or misconduct, it is likely that all three misdeeds can be found. By failing to conduct a proper survey for the Nichols Plat, the Respondent clearly committed gross negligence. The Respondent either knowingly or recklessly prepared the Nichols Plat that seriously and negatively affected the rights of the neighboring Trice family, when he knew or should have known those rights existed. His defective Nichols Plat lead to serious financial and legal consequences for the Trices, who have spent many years and extensive resources trying to undo the detriment to their property rights created by the Respondent.

Although the Respondent has been engaged as a land surveyor for a number of years, it is yet possible that his depiction of the false R/W on the Nichols Plat was at least partially the result of incompetence. Surely, his failure to properly locate and depict an actual R/W on the Nichols Plat revealed a lack of fitness necessary to perform the regular duties, tasks, and functions of a professional land surveyor in a reasonably effective, professional and competent manner.

Moreover, the Nichols Plat produced by the Respondent was, in fact, deceptive and misleading. The Respondent's actions by either omitting or misrepresenting relevant and pertinent information led to a fallacious conclusion on the part of others, namely that the Nichols' possessed a thirty-foot R/W across property owned by the Trice and Stant/Latyon families that enabled the creation of Lot 1 and possibly other subdivisions on the Nichols property.

In other words, no methods used by the Respondent in preparation of the Nichols Plat conformed to the minimum standard of practice. He ignored observable physical evidence, such

as the location and extent of the gravel road and the wooded area bordering the Trice and Stant/Layton properties. The Respondent failed to make a reasonable effort to properly identify, locate and review relevant records; essentially he relied on the Nichols' assertions, ignoring their obvious interest in establishing a R/W independent of whether one actually existed. His certification included on the Nichols Plat is clearly erroneous and untrustworthy.

Testimony presented by the Board from Mr. Craig and Ms. Trice clearly and in great detail explained the Respondent's failure to adhere to professional standards and the severe consequences of his actions. Ms. Trice persuasively and painstakingly described the protracted litigation that resulted from the faulty Nichols Plat. While she acknowledged that the Nichols were entitled to a prescriptive easement to use the gravel road to transport farm equipment, her concerns centered on the possibility that the Nichols' would continue to try and manipulate the land use process to create more lots on their property, which would further disturb the Trices' property rights. Ms. Trice noted that she and Mr. Trice had spent tens of thousands of dollars to pursue their case, which was ultimately resolved in their favor and affirmed by the Court of Special Appeals.

Mr. Craig, whose extensive credentials qualified him as an expert in land surveying, possessed intimate knowledge of the Respondent's substandard actions, having created his own plat of the area, using the proper survey methodology and research. Mr. Craig credibly and convincingly testified that, in his opinion, the Respondent was compromised by allowing the Nichols' to dictate the location of the R/W and not performing the actual work of verifying the R/W's viability and/or actual location. Mr. Craig confirmed that the Respondent committed gross negligence by not fully surveying the property and not knowing whose land his R/W actually encumbered. He noted that the Respondent, who has been licensed since 1983, should

have been aware of the proper standards, methods and obligations of surveying and the knowledge that property owners, not surveyors, create rights-of-way. Moreover, by issuing a certification on the Nichols Plat, the Respondent further misled any observer of the plat to believe its accuracy.

Having concluded that the Respondent's behavior constituted misconduct, incompetence, and gross negligence, the remaining issue is what is the appropriate sanction. The violations by the Respondent in this matter are extremely serious. Because of the Respondent's actions in preparing the Nichols Plat, the Board recommended that the Respondent's surveyor's license be revoked. Due to the severity of his actions and the extensive (and utterly foreseeable) litigation it precipitated, this recommendation is wholly reasonable.⁵ However, while the Respondent's actions were serious, caused harm, and created significant questions about his good faith, the Board presented no evidence of any prior breaches of the code of conduct by the Respondent. As such, I cannot find that the Respondent had a history of violations or previously engaged in unacceptable behavior, warranting the extra imposition of a monetary penalty. Accordingly, I find a revocation of the Respondent's land surveyor's license to be a reasonable sanction in this case.

⁵ I note that Mr. Martin, on behalf of the Board, declined to request a monetary penalty against the Respondent, acknowledging that a revocation of his surveyor's license was a sufficient sanction. The statute provides for additional or alternative monetary penalties, as follows: (b) Alternative penalties. – (1) Instead of or in addition to suspending or revoking a license, the Board may impose a penalty not exceeding \$1,000 for each violation.(2) To determine the amount of the penalty imposed under this subsection, the Board shall consider: (i) the seriousness of the violation; (ii) the harm caused by the violation; (iii) the good faith of the licensee; and (iv) any history of previous violations of the licensee. Md. Code Ann., Bus. Occ. & Prof. § 15-317(a)(2)(ii) (2010).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law, that the Respondent's actions constituted gross negligence, incompetence and misconduct. Md. Code Ann., Bus. Occ. & Prof. §15-317(a)(1) (2010);

I further conclude as a matter of law that the Respondent violated the Code of Ethics established for Land Surveyors. COMAR 09.13.01.02;

I further conclude that the Respondent's violations subject him to the sanctions. Md. Code Ann., Bus. Occ. & Prof. § 15-317(a)(2) (2010).

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact, Discussion and Conclusions of Law, I hereby **RECOMMEND** that the Board of Professional Land Surveyors, Department of Labor, Licensing and Regulation:

ORDER that the Respondent is in violation of sections 15-317(a)(iv) and 15-317(a)(v) of the Business Occupations Article; and that it further

ORDER that the Respondent is in violation of the Minimum Standards of Practice and the Code of Ethics and that it further

ORDER, that the license of the Respondent be **REVOKED** and that it further

ORDER, that the records and publications of the Maryland Department of Labor Licensee and Regulation, Board of Professional Land Surveyors, reflect this decision.

November 15, 2011
Date Decision Mailed

Harriet C. Helfand /HKS
Harriet C. Helfand
Administrative Law Judge

HCH/kkc
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