

**STATE OF ALABAMA
BOARD OF LICENSURE FOR
PROFESSIONAL ENGINEERS AND
LAND SURVEYORS**

IN RE THE MATTER OF:

Case No. 09-303-B

GARY R. SMITH

FINAL ORDER

On January 26, 2010 at 12:00 noon, the Alabama Board of Licensure for Professional Engineers and Land Surveyors (hereinafter referred to as "Board") convened for an Administrative Hearing concerning the allegations filed against Mr. Gary R. Smith (hereinafter referred to as "Respondent"). The Board Members in attendance at the Hearing were: Mr. William C. Ulrich, Jr., Mr. Don T. Arkle, Mr. C. Michael Arnold, Mr. Al I. Reisz, Dr. Daniel S. Turner, and Mr. Phillip E. Santora. Mr. W. Gerald Wilbanks, as the Board Member assigned to the investigation was excluded from the Hearing. The Board was represented by Mr. Benjamin Albritton, Board Counsel. Administrative Law Judge Dana A. Billingsley presided over the Hearing. The Respondent was not present at the hearing.

After hearing the testimony of all the witnesses presented by the Board Investigative Committee and after considering all the evidence presented in the above-referenced case, Administrative Law Judge Dana H. Billingsley proposed the following Findings of Fact, Conclusions of Law, and Conclusion and Recommendation.

FINDINGS OF FACT

1. Respondent Gary R. Smith is a licensed Land Surveyor license number 13199, and the owner of GRS Surveying, and was so licensed at all times relevant to the matters stated herein. Respondent's license is current through December 31, 2010. Pursuant to a Consent Order signed by Respondent and accepted as the final order of the Board effective June 5, 2008.

Respondent's license to practice land surveying was suspended for violations of the Standard of Practice for Land Surveying in the State of Alabama ("Standards of Practice") until such time as Respondent completed a Standards of Practice course, to be followed by a two (2)-year probation effective on the termination of his suspension, and payment of a three thousand dollar (\$3,000.00) fine within thirty (30) days of the date of the final order. Following completion of the ordered Standards of Practice course, Respondent's license was reinstated to active status on July 3, 2008.

2. On May 13, 2009, the Board received a Complaint from Ms. Jane Killian (the Complainant) relative to a survey plat provided to Ms. Killian as part of a real estate sales transaction for property located at 117 Hanover Road, Homewood, Alabama, which Complaint alleged that the survey contained errors, omissions and violations of the Standards of Practice. Ms. Killian's Complaint was assigned Case No. 09-303-B by the Board.

3. By Notice dated December 11, 2009, Respondent was notified via Certified and First Class Mail of the place, date and time of a public hearing to be held concerning his alleged violations of the Standards of Practice, as provided under Ala. Code § 34-11-11(a) 2 (1975 as amended), violation of the rules of professional conduct or misconduct in the practice of land surveying; Ala. Admin. Code r. 330-X-14-.05(g) (2007), requirement to perform work in accordance with approved standards of practice; and Ala. Admin. Code r. 330-X-14-.06(a)1 (2007), violation of any provision of Alabama law or of the Board's Administrative Code regulating the practice of land surveying, which were specified in detail in the Board's Charges accompanying the Notice. The Board's Charges included nine (9) counts of violations of Ala. Code § 34-11-11(a) 2 (1975 as amended) and Ala. Admin. Code r. 330-X-14-.05(g) and -.06(a) (2007) by Respondent, as a direct result of the investigation of this Complaint. *Id.*

4. The Notice and Board's Charges complied in all respects with the requirements of Ala. Code § 41-22-12 (1975 as amended) and Ala. Admin. Code r. 330-X-16-.03 (2007) and sufficiently apprised Respondent of the nature of the charges against him and of the date, time

and place of the hearing. Service of the Notice and Board's Charges on Respondent by Certified Mail to his address of record on file with the Board in Bessemer, Alabama, was confirmed by a U.S. Postal Service tracking receipt, which showed service on December 19, 2009.

5. Respondent did not appear at the hearing. In accordance with Ala. Code § 41-22-12(d) (1975 as amended) of the Alabama Administrative Procedure Act ("AAPA"), based on a determination that Respondent received proper service of notice of the scheduled hearing, the undersigned Administrative Law Judge proceeded with the hearing in Respondent's absence. *Id.*

6. The Board solicited testimony from the following individuals at the hearing: Executive Director Regina Dinger; William R. Huett, Assistant Executive Director; Board Investigator Robert Herbert; Ms. Jane W. Killian, Complainant; Mr. Larry Weygand, registered Land Surveyor and Professional Engineer; and Mr. Joseph C. Hunt, Board Technical Advisor.

7. In August 2008, Respondent provided a survey to Complainant prior to her purchase of a house located at 117 Hanover Road in Homewood, Alabama, which survey Complainant alleged failed to establish and/or locate corners or determine angles of said lot; failed to verify that Lot 406, which adjoins Complainant's property to the north, had been subdivided, and that the properties shared a joint driveway easement; did not show the location of the driveway to the north, of which Complainant was unaware; and showed the property's eastern boundary to be a ten (10)-foot alley, rather than a named street (Bridge Lane). Complainant paid one hundred and fifty dollars (\$150.00) at the closing of said property on or about August 14, 2008, for the cost of the survey. Following the closing, Respondent returned in October 2008 at Complainant's request and provided a revised survey, identical to the original survey in all major respects, but with the addition of the joint driveway easement.

8. On October 7, 2008, Complainant requested that Mr. Larry Weygand resurvey the property, as she wanted to erect a fence and could not locate the corner stakes marking the lot

from Respondent's survey. Mr. Weygand resurveyed the property at an additional cost of three hundred and seventy-five dollars (\$375.00) to Complainant.

9. Mr. Weygand testified regarding the significant differences between his and Respondent's surveys. Specifically, Mr. Weygand stated that two (2) of the iron pins noted at the corners of the lot on Respondent's surveys could not be located. Mr. Weygand stated that when he performed his survey, he cut across the concrete driveway on the left-front corner of the lot and showed the Complainant where that corner would be - had Respondent done the same, Mr. Weygand stated that it would have helped his survey and shown Complainant the true location of her property line. As a part of the research he did in conjunction with his survey of Complainant's property, Mr. Weygand stated that he pulled the tax map of the property, which established that there was an easement on the recorded plat of the resurvey of the lot next door to Complainant's lot, which was not reflected on Respondent's initial survey. *Id.* This information was recorded on Mr. Weygand's survey as: "8' easement for private driveway as per instrument recorded in Vol. 2873, pg 434- Also recorded on M.B. 170, pg 87". Neither the easement nor the driveway was reflected on Respondent's initial survey, which was used to close the property.

10. Pursuant to the investigation of the Complaint, the Board's Assistant Executive Director, William R. Huett, testified that the investigative committee required the assistance of a Technical Advisor to review the surveys Respondent provided to the Complainant for compliance with the Standards of Practice. The committee selected Mr. Joseph C. Hunt as its Technical Advisor, who had also reviewed Respondent's surveys in the previous enforcement action taken by the Board against Respondent, which action led to the negotiated Consent Order of June 5, 2008. *Id.* Mr. Hunt sits on the professional practices committee for the Alabama Society for Professional Land Surveyors ("ASPLS"), which promulgates the Standards of Practice, is a licensed Professional Land Surveyor in good standing with the Board and was previously employed by the Board. Mr. Hunt does not receive compensation from the Board for his services as a Technical Advisor.

11. On May 20, 2009, the Board forwarded correspondence to Respondent, advising him of the Complaint and requesting a response thereto, including supporting documentation, by June 11, 2009. Respondent replied by letter dated June 8, 2009, and provided copies of a fax cover sheet requesting a copy of the subdivision plat, an invoice in the amount of one hundred and fifty dollars (\$150.00), Respondent's field notes respecting Complainant's property and his preliminary survey sketch.

12. Mr. Huett testified that, in view of the previous disciplinary action taken by the Board, Respondent's recent completion of a Standards of Practice course and his probationary status at the time he provided the initial survey to the Complainant, Respondent was asked to provide a list of clients for whom he had provided surveys between the time of reinstatement of his license on July 3, 2008, and that of the revised survey provided to Complainant on October 8, 2008. Respondent provided said information in correspondence dated June 20, 2009, listing the client contact, business name and address and date each survey was provided during that period.

13. Mr. Huett and the Board's investigator, Mr. Robert Herbert, selected from the client list, at random, two (2) surveys from the first and last part of each month between July and October 2008, for submittal to the Technical Advisor for his review, together with the two (2) surveys provided to the Complainant, for possible violations of the applicable Standards of Practice. By correspondence dated June 25, 2009, Investigator Herbert requested additional documentation from Respondent regarding the seven (7) additional surveys selected from the client list, to include drawings, field notes, calculations, work orders, invoices and contracts. Respondent replied via correspondence dated July 3, 2009, and enclosed the requested surveys and other work documents.

14. Respondent's July 3, 2009 letter outlined the normal process by which Respondent generated his surveys and essentially duplicated his previous correspondence of June 8, 2009. Respondent stated that he generally receives his survey orders by facsimile and that these

orders serve as a contract between himself and his client; he then checks files and searches courthouse records for "applicable record plats, deed recordings, tax maps, or other information;" conducts the field portion of the survey, utilizing a Leica TC-605 total station and "'radial location' from 'traverse points,'" and enters this information into a field book; and computes the survey using a HP-48GX calculator, which is "then plotted onto a 'work sheet', using 'radial stakeout' with points selected for use as 'base line points'." The final plat is then produced and provided to the client.

15. The additional records received from Respondent on July 3, 2009, and the Complainant's original survey and resurvey were then forwarded to the Technical Advisor on July 27, 2009, for his review. As in the prior enforcement action, Mr. Herbert and Mr. Huett testified that the records were "sanitized" to remove any information that would identify them to the Technical Advisor as having been produced by Respondent. This information was corroborated in separate testimony from the Technical Advisor, Mr. Hunt.

16. On August 26, 2009, Mr. Hunt provided the Board with a five (5)-page analysis of Respondent's surveys and work documents, which established that common violations of the Standards of Practice had occurred on multiple surveys. In particular, Mr. Hunt noted the following violations:

(a) Standard of Practice Rule 1.03, Boundary Survey for Field and Office (Map, Plat, and Drawing), paragraph 4., requires a reference to all bearings shown to be clearly stated on the drawing - e.g., whether to "True North", "Grid North" or "Assumed North." Although all of Respondent's surveys show a North arrow, there is no reference to the bearing used, and the surveys do not indicate if it was referenced to a well-established line.

(b) Rule 1.03.6.a. requires a reference to the source of information used in making the survey, such as the recorded deed description, a recorded plat or unrecorded plat with deed references. The deed reference is not shown on any of Respondent's surveys, although the map book and pages on recorded subdivisions is noted. The recorded easement should also

have been noted on Respondent's survey of Complainant's property, in accordance with this rule.

(c) Rule 1.03.8.b. requires a survey of a part of a lot in a recorded subdivision to reflect a comparison between the recorded distances and directions with field-measured directions and distances. Respondent used the plat distances and angles that were on the original subdivision plats, but failed to include the field measured distances, and did not locate any corners of the adjoining lots on his surveys.

(d) Rule 1.03.9.a. requires surveys of parcels described by metes and bounds to show the "location of the boundary that depicts the most definitive and defensible relationship ...between the record evidence ... and the physical evidence ". With regard to Exhibit 1-22A, Mr. Hunt surmised that this is a copy of an old survey and is not a lot survey, but rather, a metes and bounds survey. Mr. Hunt notes: "Looks like the property was taken from this old survey, but the plat does not show the part that this parcel was taken from. I could not read the notes to see if the Subject tied to the NE Corner of the NW y.; of the NE y.; or not. The Subject did not state what kind of monument he found at the NE Corner, if he went there."

(e) Rule 1.03.9.c. requires surveys of parcels described by metes and bounds to show a comparison between the recorded distances and directions with field measured directions and distances on the boundary when they vary. This was not done on Exhibit 1-22A.

(f) Rule 1.03.10 requires the surveyor to show "open and notorious evidence of the boundary lines, such as fences, walls, buildings or monuments ...together with dimensions sufficient to show the relationship to the boundary line. This was not shown on Exhibit 1-22A.

(g) Rule 1.03.11 requires visible encroachments onto or from adjoining property or abutting streets to be indicated on the survey drawing. Neither the driveway encroachment nor the fence was shown on Complainant's original survey. No encroachments were shown on Exhibit 1-22A.

(h) Rule 1.03.12 requires visible evidence of easements or right-of –ways to be located or noted and shown on the drawing. None were shown on Exhibit 1-22A.

(i) Rule 1.03.13 requires the location of fixed improvements within the boundary to be shown, with their positions dimensioned and referenced to the boundaries, either directly or by offset lines. Although Respondent showed improvements on his surveys, the building south of the house on Exhibit 1-22A did not have any offsets shown.

(j) Rule 1.03.15 requires the size and type of monuments to be reflected on the survey. Respondent only noted an iron pin (IP) in his drawings and did not note whether the iron pins were half-inch rebar, half-inch pipe, etc. The size and type of monument found was not noted on any of Respondent's surveys.

(k) Rule 1.03.16 describes the type of typical boundary monument or witness monument required to be set by the surveyor. None of Respondent's surveys reflects that he placed any monuments.

(l) Rule 1.03.17 requires the relative error of closure for angles and lines to be stated on the survey. None was stated on any of Respondent's surveys.

(m) Rule 1.07 Miscellaneous, at paragraph 3 requires the surveyor to set corners if they are not found on the point of curve or point of tangent. Respondent did not set the point of curve or point of tangent monuments on Exhibit 1-17 A, showing only the four (4) corners, instead. The Technical Advisor testified that he considered the violations to be major because they are so numerous and appear consistently throughout Respondent's surveys.

17. On August 31 , 2009, Investigator Herbert forwarded a sanitized version of the Technical Advisor's report to Respondent for his review and comments to which Respondent replied by correspondence dated September 19, 2009. Respondent further supplemented his initial response with another letter dated September 23, 2009, which responded specifically to each Standard of Practice Rule cited in the Technical Advisor's response.

18. Respondent's comments dated September 19, 2009, regarding the Technical Advisor's review may be summarized as follows: As in his previous correspondence of June 8, 2009 and July 3, 2009, Respondent again summarized his general method of operation, as reflected in Paragraph 14 above. Respondent stated that he was not required to meet the degree of precision derived "by physically occupying each and every angle point and by computing closure on the resulting traverse" because he performs his surveys "'radially' or by placing side shots on to corners that cannot be occupied (due to fencing or other obstructions)." He stated further that it is rare that "even one of the monuments set to mark a property can be occupied" and that his field notes, "while admittedly sketchy, serve admirably for the purpose they were intended, as an aid to memory." With regard to the Complainant, Respondent stated that he met with her at the time of the resurvey in October 2008 and "determined that the left front corner was located within the concrete of the drive to the left of the property" and marked that corner with a paint dot.

19. Respondent's further letter dated September 23, 2009, responded to each Standard of Practice Rule cited by the Technical Advisor, as follows:

(a) Rule 1.03.4 - Respondent stated that the basis for his bearing, as indicated by the North arrow, "is determined using the bearings called out on the recorded map or in the wording of the applicable deeds. 'North' is designated on the plat by reference to established lines (the property lines on the record map) and their angular relation to plotted North or a stated bearing". The reference bearing is stated in Respondent's certification on each survey.

(b) Rule 1.03.6.a - Respondent stated that deed references are usually provided by the agent requesting the survey. If Respondent furnishes or locates the deed himself, he "usually" includes references to the recorded deed particularly when there is a significant difference between measured and recorded dimensions. Respondent stated that he does not perform ALTA surveys or conduct title searches.

(c) Rule 1.03.8.b - Respondent stated that he attempts to place corners at the "record" locations using "neighbor" corners or established lines in instances where only one (1) iron is found on the property.

(d) Rules 1.03.9.a, b and c - Respondent stated that comparisons were not required with respect to Exhibit 1-22A, since the client requested a parcel to be cut out of an existing parcel; that he placed iron pins "at the internal corners of the 'created' parcel" and assumed that the relationship to the government corners was "assumed" as stated in the old description furnished by the client;" and that the fencing was determined to be outside the surveyed parcel and was therefore not reflected as an encroachment.

(e) Rules 1.03.11, 12 and 13 - Respondent stated that there were no encroachments "on the subject property" and that Exhibit 1-22A was agricultural land with no streets, easements or rights-of-way. Respondent stated that he normally shows offsets to and from occupied buildings, but the structure in Exhibit 1-22A was a barn/storage facility.

(f) Rule 1.03.15 - Unless otherwise stated, Respondent considers IP monuments to be bars or crimps.

(g) Rule 1.03.17 - Respondent reiterated his previous opinion regarding the degree of precision required , stating that "points on the perimeter of a radially-located parcel, if used as (virtual) transverse points, will yield a precision and/or accuracy approaching infinity .. ."

(h) Rule 1.07.3 - Respondent stated that he relied on record distances and curve information with regard to Exhibit 1-17A, since points on curves "are only rarely set in the course of layout, and even more rarely located in the course of property surveys".

20. Respondent's written comments were then sanitized and forwarded to the Technical Advisor for his further comment, which the Technical Advisor faxed and mailed to the Board on or about October 5, 2009. In response thereto, the Technical Advisor noted that the Standards of Practice supersede any other documentation cited by Respondent which, he opined, Respondent had included in his response in an attempt to support his own interpretation of the

rules in lieu of simply applying the rules as stated. Although Mr. Hunt stated that the surveying equipment and techniques Respondent used to generate his surveys are acceptable, they are also likely outdated. Respondent's field notes are too sketchy to provide sufficient detail to recreate a survey and are less accurate than data collectors used today by most surveyors. On balance, Mr. Hunt maintained that Respondent's failure to locate the left-hand corner of Complainant's property within the concrete of the neighboring driveway during the first survey generated an inaccurate survey that was costly to the Complainant and led him to question whether an instrument was used at all on the initial survey. Mr. Hunt maintained that the nine (9) surveys he reviewed contained numerous and significant violations of the Standards of Practice.

21. Following numerous attempts to interview Respondent over a period of approximately five (5) months, Investigator Herbert conducted an interview with Respondent on October 6, 2009, in which Respondent advised the Investigator of some personal problems he experienced during the course of the investigation and reiterated the same points provided in his previous correspondence to the Board. Investigator Herbert testified that Respondent maintained that his work was in compliance with the Standards of Practice and that he had been performing his land surveying responsibilities acceptably

CONCLUSIONS OF LAW

1. The Alabama Legislature has created the State Board of licensure for Professional Engineers and Land Surveyors for the purpose of safeguarding life, health and property and promoting the public welfare with regard to the practice of engineering and land surveying within the state. Ala. Code §§ 34-11 -2(b) and (c) (1975 as amended).

2. In accordance with this legislative mandate and Ala. Code § 34-11-8(a)(2) (1975 as amended), the Board requires continuing professional competency for its licensees for the purpose of developing new and relevant skills and knowledge essential to the practice of land

surveying within the state. See Ala. Admin. Code r.330-X-13-.02(2) (2007). Licensed Land Surveyors are required to perform their work in accordance with approved standards of practice, including being guided by recommended guidelines which set forth standards generally accepted in the profession, such as the Alabama Society of Land Surveyors' Standards of Practice for Surveying in the State of Alabama, dated May 7, 2002. Ala. Admin. Code r. 330-X-14-.05(g) (2007). Licensed Land Surveyors are also required to take a Standards of Practice course every four (4) years as part of their renewal requirements. Ala. Admin. Code r. 330-X-13-.02(4)(c) (2007).

3. The Board is empowered to reprimand, censure, fine or place on probation any licensed land surveyor or to suspend, refuse to renew or revoke the certificate of any licensee for any gross negligence, incompetency, or violation of the rules of professional conduct or misconduct in the practice of land surveying. Ala. Code § 34-11-11 (a) (2) (1975 as amended); Ala. Admin. Code r. 330-X-14-.06(a) 1 (2007).

4. Respondent's Consent Order, as approved by the Board on June 5, 2008, suspended Respondent's license for violations of the Standards of Practice until such time as he completed a Standards of Practice course, to be followed by a two (2)-year probation effective on the termination of his suspension. Respondent completed the required Standards of Practice course and was subsequently reinstated to active status on July 3, 2008, but remained on probation at all times relevant to the matters surrounding the Complaint.

5. Mr. Larry Weygand, a registered Land Surveyor and Professional Engineer in the state, testified credibly regarding the differences between his and Respondent's surveys of Complainant's property. Both Mr. Weygand's testimony and work product also compared favorably with the applicable Standards of Practice cited in the testimony of the Board's Technical Advisor, in contrast to the surveys produced by Respondent. In addition, although Respondent was placed on notice of a possible encroachment on Complainant's property in the closing attorney's request for Respondent's services, he still obviously missed the records noted

on Mr. Weygand's survey regarding the driveway easement, as described in Paragraph 9 herein, and omitted the encroaching driveway from his initial survey, which was used to close the property.

6. The Board's Technical Advisor, Mr. Hunt, was well-qualified to opine regarding Respondent's compliance with the applicable Standards of Practice, as a member of the professional practices committee for the ASPLS, which promulgated those standards. Overall, the undersigned found Mr. Hunt's review to be evenhanded, noting those standards with which Respondent both complied and failed to comply. However, the undersigned agrees with Mr. Hunt that Respondent's failure to locate the left-hand corner of Complainant's property within the concrete of the neighboring driveway during the first survey was not only in violation of the Standards of Practice, but was costly to Complainant. The undersigned also agrees with Mr. Hunt's conclusions that the nine (9) surveys he reviewed, produced by Respondent over a four-month period immediately following his completion of a Standards of Practice course, contained numerous and significant violations of the Standards of Practice (Tr. 149-50, 164), as stated in greater detail herein and as evidenced in the exhibits of record.

7. Respondent maintained in his June 8, 2009 and July 3, 2009 correspondence to the Board, his September 19 and 23, 2009 written responses to the Technical Advisor's review and his October 6, 2009 interview with the Board's Investigator that his work was performed in compliance with all applicable Standards of Practice.

CONCLUSION AND RECOMMENDATION

Accordingly, it is hereby recommended that Respondent be assessed a fine in the amount of Five Hundred Dollars (\$500.00) for violation of Ala. Admin. Code r.330-X-14-.05(g) (2007) in each of the nine (9) Counts of the Complaint, for a total of Four Thousand Five Hundred Dollars (\$4,500.00), and a fine of Two Thousand Five Hundred Dollars (\$2,500.00) for violation of Ala. Code §§ 34- 11 -11 (a)(2) (1975 as amended), for a total fine of Seven

Thousand Dollars (\$7,000.00), and that Respondent's license to practice the profession of land surveying in the state be revoked, in accordance with the provisions of Ala. Code § 34-11-11 (1975 as amended) and Ala. Admin. Code r. 330-X-16-.06 (1) (2007).

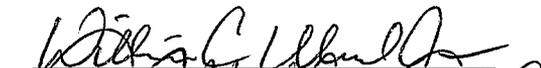
THE BOARD, after deliberation and review, agrees with and adopts as final these Findings of Facts, Conclusions of Law and Conclusions and Recommendations proposed by Administrative Law Judge, Dana H. Billingsley. The Board hereby finds Respondent **GUILTY** of the allegations made against him.

In accordance with the Code of Alabama 1975 § 34-11-11(m) which states the Board has the power to impose any and all disciplinary penalties and the licensee shall be responsible for the cost of such action if found guilty the Board respectfully modifies Administrative Law Judge, Dana H. Billingsley's proposed recommendation for disciplinary action to include payment of the cost of the hearing relative to this cause.

The **BOARD** hereby **ORDERS** as follows:

1. Respondent's license to practice land surveying is **REVOKED** and he shall cease and desist the offer to practice or the practice of land surveying in the State of Alabama.
2. Respondent shall pay a \$7,000.00 fine to the Board.
3. Respondent shall pay \$3,446.97 to the Board for the cost of the hearing.

Done this the 26th day of March, 2010


Mr. William C. Ulrich, Jr.

Mr. C. Michael Arnold


Mr. Al I. Reisz


Mr. Phillip E. Santora


Mr. Don T. Arkle


Mr. W. Gerald Wilbanks

RECUSED


Dr. Daniel S. Tuner