

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
BOARD OF PROFESSIONAL SURVEYORS )  
AND MAPPERS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 07-0680PL  
 )  
STEPHEN PHILLIPS KILMON, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on May 10, 2007, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Eric R. Hurst  
Charles F. Tunnicliff  
Assistants General Counsel  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

For Respondent: Stephen Phillips Kilmon, pro se  
2010 Northeast 122 Road  
North Miami, Florida 33181

STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent, Stephen Phillips Kilmon, committed the violations alleged in an Amended Administrative Complaint issued by the Petitioner Department of Business and Professional Regulation on January 25, 2007, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On January 25, 2007, Petitioner issued a 20-count Amended Administrative Complaint in Department of Business and Professional Regulation Case No. 2003-094756 against Respondent, alleging that Respondent had committed violations of Chapter 472, Florida Statutes, and rules adopted thereunder.

Respondent executed and filed an Election of Rights form requesting a formal hearing to contest the allegations of fact contained in the Amended Administrative Complaint.

Respondent's request for hearing was filed with the Division of Administrative Hearings on February 12, 2007, with a request that it be assigned to an administrative law judge. The request was designated DOAH Case number 07-0680PL and was assigned to the undersigned. The final hearing of this matter was scheduled for May 10, 2007, by Notice of Hearing March 5, 2007.

Prior to the commencement of the final hearing, the parties filed a Joint Stipulation of Facts. To the extent relevant,

those stipulated facts have been included in this Recommended Order.

At the final hearing, Petitioner presented the testimony of Stephen Kellogg and Arthur Albert Mastronicola, Jr. Both were accepted as experts in surveying and mapping. Petitioner's Exhibits numbered 1 through 7, were admitted. Respondent testified in his own behalf and presented the testimony of Harley C. Gilmore, an expert in surveying and mapping. Respondent offered and had one Exhibit admitted.

A Transcript of the final hearing was filed with the Division of Administrative Hearings on June 1, 2007. By Notice of Filing Transcript entered June 4, 2007, the parties were informed that their proposed recommended orders were to be filed on or before June 11, 2007. Both parties filed Proposed Recommended Orders on or before June 11, 2007. Their proposals have been fully considered in entering this Recommended Order.

All references to Florida Statutes and the Florida Administrative Code in this Recommended Order are to the versions applicable to this matter unless otherwise indicated.

#### FINDINGS OF FACT

##### A. The Parties.

1. Petitioner, the Department of Business and Professional Regulation, Board of Professional Surveyors and Mappers (hereinafter referred to as the "Department"), is the state

agency charged in Chapter 472, Florida Statutes, with the duty, among other things, of regulating the practice of land surveying and mapping.

2. At the times material to this proceeding, Stephen Phillips Kilmon, is and was a licensed Florida Surveyor and Mapper, having been issued license number LS 5439.

3. At the times material to this proceeding, Mr. Kilmon was doing business as ViaLink, Inc., a licensed surveyor business, having been issued license number LB 6648.

4. Mr. Kilmon's address is 2010 Northeast 122 Road, North Miami, Florida 33181.

5. Mr. Kilmon obtained his license in January 1995. Before obtaining his license and beginning in 1980, he obtained experience in surveying, mapping, civil engineering, computer aided design drafting, and information management systems, which ultimately led to his licensure.

B. The Fiddler's Creek Project.

6. 951 Land Holdings, Ltd. (hereinafter referred to as "951"), through Holes Montes & Associates (hereinafter referred to as "Holes Montes"), was engaged in the development of a housing/golf course project in Naples, Florida (hereinafter referred to as the "Fiddler's Creek Project").

7. A portion of the Fiddler's Creek Project was being constructed by Atlantic Civil, Inc. (hereinafter referred to as

"ACI"). Among other things, ACI was engaged in the excavation of several lakes and the creation of an upland golf course in a wetlands' area. ACI was, however, having difficulty completing the excavation of the lakes due to apparent back-fill which was preventing ACI from achieving the contracted depth of -18 feet National Geodetic Vertical Datum 1929. Mr. Kilmon described the problem as follows:

. . . each lake became mysteriously back-filled to a depth of -14 feet, National Geodetic Vertical Datum 1929 (NGVD29) virtually overnight not allowing ACI to achieve reaching their contract depth of -18 NGVD29 for the bottom of any lake. The analogy is like digging a small hole in the sand at the beach near the water only to watch it fill with more sand and water each time you scoop out the material. The result of ACI's futile efforts to achieve and maintain -18 NGVD29 for any lake caused an over-excavation in cubic yards per lake, long before ACI could finish cutting out the lake pattern or design template. . . . ACI filled its construction site limits to more than 110% of the cubic yards HMA [Holes Montes & Associates] designed for it, yet only completed 75% of the lakes final design template. ACI sought reasonable contract relief from 951 in achieving the unattainable contract required -18 NGVD29 lake bottom depth due to the natural back-fill of liquid sand conditions below the initial 4~6 feet of cap rock, and 951 refused. ACI's position then became that 951 was taking advantage of its contractor to force excessive extraction of "free" fill material for 951 at the unfair expense of ACI. . . . ACI then made the attempt hiring ViaLink to identify the approximate best known volume of excavated "fill" material placed onsite from the lakes, and to be paid

according to material type cubic yard unit cost, rather than by the contract method of lake dredge percent complete.

Petitioner's Exhibit 6.

C. Involvement of ViaLink, Inc. and Mr. Kilmon in the Fiddler's Creek Project.

8. As a result of the foregoing described problem, ACI hired ViaLink, Inc., and Mr. Kilmon to provide services described by Mr. Kilmon, in pertinent part, as follows:

My initial role as Surveyor/Mapper for ACI was to monitor the mysterious back-filing of sandy material during the dredging process after reaching -18 NGVD29. I performed numerous measurements immediately following the backhoe digging, and recorded depths reaching the -18 NGVD29. . . .

My second involvement came several months later. At this time I was requested by ACI to perform a survey which captures a topographic surface (*less the hydrographic surfaces of the lakes, surveyed by HMA*) in the form of a digital terrain model (DTM) of the contracted construction limits out to, and including the bordering lands matching to existing conditions beyond the ACI construction site limit for that moment in time. . . .

My third and next involvement on this project site came when ACI informed me that their informal negotiations with 951 felt [sic] through at trying to convey the understanding of the amount of material already placed onsite exceeding the contracted and design intended volume for the ACI construction site limits. . . . I was asked by ACI to contact HMA directly to compare my "ViaLink" DTM topographic surface

. . . to the HMA DTM surfaces maintained on their computer systems . . . .

From this point on legal counsel for both sides took over the control for resolution between ACI vs. 951, which sent everyone into court. . . .

Petitioner's Exhibit 6.

9. Ultimately, the parties turned to the courts to resolve their dispute. During this litigation process, Mr. Kilmon prepared what he titled a "Specific Purpose Survey Surveyor's Report" (hereinafter referred to as the "Surveyor's Report"). Petitioner's Exhibit 4. The Surveyor's Report was prepared in response to a subpoena from counsel for 951 and had to be prepared quickly:

MR. KILMON: Because it was an evolutionary process -- ever since we were first hired to go and work on the site, the Judge said, "Wrap it up." That was exactly what he said, "Wrap it up," and he said "Wrap it up" because the other counsel on the other side was seeing that this evolution here of survey work was actually producing something, that I was actually able to recreate this [Digital Terrain Model] that they were hiding. I was actually able to come up with it again and actually produce a number. They cut it, and they go the Judge to say, "Okay, let's produce what he has, let's see what he has" My client said, "Please, you've got to say something. They've drawn a line in the sand and we're not allowed to cross it anymore. We have to come up with something."

. . . .

MR. KILMON: That was the first piece I gave them because of that subpoena, and that was the May 30 disk. . . . And then I ended up submitting the final version of it that I ran out of time with, and well, here you go, it's the last version. So I complied is all I did. I complied. . . .

Transcript, Vol. II, Page 215, Lines 15-25, Page 216, Lines 1-4, and Page 217, Lines 6-12.

D. The Surveyor's Report.

10. The Surveyor's Report, dated July 10, 2002, and addressed to the president and CEO of ACI, states that it involves "Professional Forensic Surveying & Mapping Services; Earthwork Analysis" for the Fiddler's Creek Project.

11. The Surveyor's Report contains the following "Mission Statement":

*Develop a stratum within a Digital Terrain Model (DTM) having two (2) surfaces for comparison; (a) compile an existing conditions surface (Surface 2[SRF2]) observed and recorded by Hole, Montes & Associates, Inc. (HMA) and their sub-consultants at the time Atlantic Civil, Inc. (ACI) began construction, and (b) compile a final surface (Surface 3 [Srf3]) observed hydrographically by HMA and topographically by ViaLink, Inc (ViaLink) at the time the ACI was terminated, less any areas even partially filled by others, though completed by ACI.*

*Perform a calculation within the DTM which determines the amount of "FILL" material placed on the Fiddler's Creek, Phase 2A, Stage 1 (the "Site") by Atlantic Civil, Inc. between Srf2 and Srf 3. Methods of volume calculations include "Average End Area" by*



*contract, and "Prismoidal" in support as a backup check calculation in verification.*

12. The Surveyor's Report also lists the data relied upon by Mr. Kilmon, many of the rules that govern the practice of surveyors and mappers, and information concerning the calculation of the amount of fill removed by ACI in its efforts to excavate the lakes made by Mr. Kilmon. The Surveyor's Report also included a compact disc (hereinafter referred to as the "CD"), which contained "AutoCAD drawing files depicting a Digital Terrain Model ('DTM')." The Digital Terrain Model (hereinafter referred to as the "DTM"), a digital representation of data, is, according to the Department, a "map." Petitioner's Exhibit 5. The CD contained "AutoCAD drawing files depicting a Digital Terrain Model (DTM)." A printed depiction of the Digital Terrain Model (hereinafter referred to as the "DTM"), contained on the CD was printed and admitted in evidence.

13. It was never Mr. Kilmon's intention to prepare a "quantity survey" as those terms are defined in Florida Administrative Code Rule 61G17-6.002(8)(h), or provide a "map" with his report. As to the type of report he intended to issue, Mr. Kilmon testified, in part, as follows:

I was left with a partial, if you will, quantity survey, and it's uncertified data, and I didn't want anyone to take off with an assumption, by just reading the title of my report, that there was some sort of real quantity surveying going on here. That's

why you have a specific purpose survey is when you have things that are really out of whack from what's normal for a survey type, slowing everything down. Making people take a look at the title, specific purpose survey, was my judgment call. I wanted to make everybody, including the public, know that right off the top of the bat, you're not going to see this as a quantity. You're going to have to break it down and understand what the data is that made the number.

Transcript, Vol. II, Page 220, Lines 16-25, and Page 221, Lines 1-5.

14. Mr. Kilmon recognized that to issuing a quantity survey or map was not appropriate for two reasons:

a. First, some of the data he had available to him was unverified data from Holes Montes; and

b. Second, he did not have all of the data necessary to complete an accurate quantity survey.

15. As Mr. Kilmon further explained his intention during his testimony at hearing, agreeing "in part" with a question as to whether he had concluded that a quantity survey was not appropriate because of inappropriate data he had:

. . . . The other part is that the end-all answer of what would be the quantity on that surface, because we didn't have enough data, not just uncertified, but we didn't have enough data to tell where every bit of fill was on that surface. There is no way to know that the end-all number would be. It's simply, as I put in my certification, the best-known number, and the reason is because we're just trying to determine

whether or not it's in the 700, 600, a thousand cubic yard range, or are we talking about the 400,000 cubic yard range that the contractor got paid for. Is it worth another look at reevaluating with better cooperation from the other surveyor to get certified data and maybe look at their actual DTM, you know, to get to the bottom of this?

Transcript, Vol. II, Page 218, Lines 22-25 and  
Page 219, Lines 1-12.

16. In addition to styling his report as a "Specific Purpose Survey Surveyor's Report," rather than a quantity survey, Mr. Kilmon warned the reader of the uncertainty of some of the data he had relied upon. On page 14 of the Surveyor's Report, under the heading "Reviewed Survey Data" he identifies the following "Surveyor's and Mappers providing surveying data for review" (see also, page 1):

(1) Hole Montes & Associates, Inc. (*HMA*), . . . as the surveying and mapping consultant or agent to the Fiddler's Creek Developer (*FCD*), including aerial photogrammetry sub-consultants employed, though their identities are not disclosed.

(2) *ViaLink*, Inc. (*ViaLink*) . . . as the surveyor and mapping consultant to ACI.

On January 24, 2001 the undersigned Surveyor and Mapper formally made a request of HMA and the FCD through ACI for a copy of specific survey instruments, in digital and hardcopy formats, to expedite the review of the Fiddler's Creek Ste, as identified above. To date no signed and sealed, or certified field notes, survey maps, sketches, or surveyor's reports, of any kind

have been provided for evaluation. Further, HMA and the FCD insist all survey related information available from there [sic]file has been proffered for review. While originally requested of HMA and the FCD certain forms of helpful raw and finished survey product(s) developed by HMA (and/or it [sic] sub-consultants) and the FCD have if [sic] fact been withheld from this review. Examples being lawfully prepared certified plats of public record, their respective certified boundary surveys, and control surveys signed and sealed. Other examples of withheld survey information include all controlled aerial photogrammetry products observed at the time ACI was terminated.

Certified survey data contained in the attached DTM to date is limited to that portion of information provided by this firm, ViaLink, Inc. All other survey data provided for this DTM review is NOT certified, and does not meet the Minimum Technical Standards (MTS) of Chapter 61G17-6 of the Florida Administrative Code as required by Florida Law. The lack of certification does not invalidate the accuracy of the survey data, just its backing. (Emphasis added).

17. The Surveyor's Report, page 14, goes on to advise that there are "three(3) surfaces" contained within the CD's DTM and warns the following with regard to "Surface No. 1": "Surface No. 1 (*Srf1*) being simply the "Contract Surface" reportedly created by a mystery aerial photogrammetrist developing planimetrics and derived three-dimensional spot elevations as a sub-consultant to HMA in and about a Fiddler's Creek pre-construction Site. . . ."

18. Beginning at the bottom of page 14 and continuing on to page 15, the Surveyor's Report describes where more specific data concerning all three surfaces was obtained, the accuracy or lack thereof of the data, and whether the data is certified. Much of the data listed is acknowledged to be of "unknown" accuracy and to lack certification.

19. Finally, on pages 25 and 26, under the heading "Surveyor's & Mapper Notes," Mr. Kilmon noted the following concerning the inadequacy of data used in the report:

4.) This SPECIFIC PURPOSE SURVEY & MAP SURVEYOR'S REPORT is the direct result of geometric calculation, in large part due to the availability of qualified data provided by others, but without any certification of the responsible surveyor and mapper.

. . . .

8.) Under Florida Law, this firm, ViaLink, Inc., and the undersigned Surveyor & Mapper can not certify survey information provided by others when the survey is not conducted under the direct supervision of the undersigned Surveyor & Mapper. Therefore this firm, ViaLink, Inc., and the undersigned Surveyor & Mapper will not assuming [sic] any liability; for information provided by others used in this SPECIFIC PURPOSE SURVEY for Earthwork Analysis.

20. Mr. Kilmon goes on to make the following ultimate findings in the Surveyor's Report:

10.) It is this undersigned Surveyor & Mapper's certain opinion that the earthwork calculation which determined a FILL quantity

of 688,080 cubic yards of material reflects an extremely conservative volume of material placed onsite by ACI for the area known as Phase 2A, Stage 1. Additionally, extreme measures have been taken to exclude any and all areas of *Srf3* were even in part FILL was placed by others. These pocketed areas of partial FILL formerly reflected within SRF3 have been extensively sought out and totally removed by ACI personnel having direct personal knowledge of the site prior to any construction by ACI. Aerial photography taken by Aerophoto, Inc., on 07/15/1999 independently supports these efforts depicting the same identified regions of partial FILL. The result of this additional effort to meet and/or exceed the Mission Statement of this Surveyor's Report now actually benefits the FCD. Omitted partially filled regions by ACI and others are now not claimed by ACI in any way, but are instead 100% credited to the FCD.

11.) It is the undersigned Surveyor & Mapper's certain opinion that HMA conducted its surveying practices with the positive intension to reflect the actual conditions of Fiddler's Creek, Phase 2A, State 1 topographic and hydrographic surfaces, as no evidence was found to the contrary.

12.) The Average End Area computed total FILL quantity of 688,080 represents FILL to form higher uplands regions and placed in lakes, and may contain a variety of earth materials from rock to sand.

21. On the last page of the Surveyor's Report is the following note:

Not Valid without the signature and the original raised seal of a Florida licensed surveyor and mapper. Further this Surveyor's Report is not valid without the original CD-ROM displaying the original

signature of this same undersigned Surveyor  
& Mapper.

As noted, supra, a CD was provided by Mr. Kilmon with the  
Surveyor's Report.

22. The DTM contains a large "N" with an arrow at the  
bottom. Under this symbol is the following identifying  
information:

Specific Purpose Survey  
Fiddler's Creek, Phase 2A, Stage 1  
(NAD 83/99 FL E. 901 & NGVD 29)

23. Mr. Kilmon did not intend for the DTM to be a "map."  
Toward this end, he notes the following in the Surveyor's Report  
on page 26 under the heading "Surveyor's & Mapper Notes": "This  
is NOT a BOUNDARY SURVEY."

24. Consistent with his intent to only prepare a "report"  
and not a "report and map", Mr. Kilmon consistently refers to  
the Surveyor's Report throughout the report (except for what  
appears to be typographical error), as a "Specific Purpose  
Survey & Map Surveyor's Report." He does not refer to the  
report as a "Specific Purpose Survey and Map."

25. To the extent that it is considered a "map," the DTM  
does not contain the information required by Florida  
Administrative Code Rule 61G17-6.003 alleged to be missing in  
the Amended Administrative Complaint.

26. Mr. Kilmon signed and sealed the Surveyor's Report under the following "Surveyor's Certification:"

THIS IS TO CERTIFY that this SPECIFIC PURPOSE SURVEY & MAP SURVEYOR'S REPORT is the result of compiled topographic and hydrographic data in part provided by others for the limited purpose of calculating best known "FILL" quantities as mentioned in the Mission Statement herein. I FURTHER CERTIFY that this SPECIFIC PURPOSE SURVEY & MAP SURVEYOR'S REPORT meets or exceeds the evaluation, analysis, and result finding accuracies established by the Minimum Technical Standards as set forth by the Florida Board of Surveyors and Mappers in Chapter 61G17-6.0052, Florida Administrative Code, pursuant to Chapter 472.027 of the Florida Statutes.

E. Summary Findings.

27. The ultimate issues of fact in this case are whether the Surveyor's Report constitutes a "quantity survey" and whether the DTM is a "Map." Credible expert witnesses for the Department and Mr. Kilmon gave inconsistent testimony on these issues.

28. Ultimately, as to the first question, whether the Surveyor's Report constitutes a "quantity survey," the testimony of the Department's expert witnesses was more convincing. It is concluded that the Surveyor's Report, regardless of what Mr. Kilmon named it, is a quantity survey, which is defined in Florida Administrative Code Rule 61G17-6.002(8)(h) and (j), as



"a survey to obtain measurements of quantity." The Surveyor's Report comes within this definition:

a. First, the Surveyor's Report is a "survey", which is defined in Florida Administrative Code Rule 61G17-6.003(8) as "the orderly process of determining facts of size, shape, identity, geodetic location, or legal location by viewing and applying direct measurement of features on or near the earth's surface using field or image methods. . . ."; and

b. Second, the survey, by admission of Mr. Kilmon at hearing and on the face of the Surveyor's Report, was intended to obtain and report a measurement of quantity even if only a rough estimate thereof. While Mr. Kilmon did qualify his calculations and openly disclosed the shortcomings of the data relied upon, the bottom line is Mr. Kilmon concluded that "[i]t is this undersigned Surveyor & Mapper's certain opinion that the earthwork calculation which determined a FILL quantity of 688,080 cubic yards of material reflects an extremely conservative volume of material placed onsite by ACI for the area known as Phase 2A, Stage 1."

29. The second issue, as to the proper characterization of the DTM, is more difficult to resolve. The Department's experts unequivocally characterized the DTM as a map. Mr. Kilmon's expert testimony emphasized the issue of whether a map was required rather than whether the DTM was a map.

30. While it seems that the DTM is nothing more than a depiction of data during an intermediate step in the process of manipulating that data, it would not be reasonable to reject the testimony of the Department's experts. It is, therefore, found that the DTM is a map. The Department's witnesses did not, however, prove clearly and convincingly that the DTM is the type of map for which the information specified in Florida Administrative Code Rule 61G17-6.003 is required. Mr. Kilmon's expert, on the other hand, testified convincingly that the DTM is not a map to which the standards and requirements of Florida Administrative Code Rule 61G17-6.003(3) apply.

#### CONCLUSIONS OF LAW

##### A. Jurisdiction.

31. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

##### B. The Burden and Standard of Proof.

32. In the Administrative Complaint, the Department seeks to impose penalties against Mr. Kilmon, including suspension or revocation of his license and/or the imposition of an administrative fine. The Department, therefore, has the burden of proving the allegations of the Amended Administrative Complaint by clear and convincing evidence. Department of

Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Nair v. Department of Business & Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

33. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court defined "clear and convincing evidence" as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

C. The Charges Against Mr. Kilmon.

34. Section 472.033, Florida Statutes, provides that disciplinary action may be taken against the license of a surveyor and mapper if it is found that the licensee has committed certain enumerated offenses. In this matter, it has been alleged that Mr. Kilmon committed the offenses described in Section 472.033(1)(g) and (h), Florida Statutes, which provides:

(g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of surveying and mapping;

(h) Failing to perform any statutory or legal obligation placed upon a licensed surveyor and mapper; violating any provision of this chapter, a rule of the board or department, or a lawful order of the board or department previously entered in a disciplinary hearing; or failing to comply with a lawfully issued subpoena of the department;

35. As to the alleged violation of Section 472.033(1)(h), Florida Statutes, it has been alleged that Mr. Kilmon violated 19 provisions found in the "Minimum Technical Standards" of Florida Administrative Code Rules 61G17-6.003 and 61G17-6.004. These alleged violations fall into three general categories: the type of report issued (Count IV); the adequacy of the data relied upon in the report (Counts I, II, and III); and the adequacy of the DTM (Counts V through XIX).

36. Being penal in nature, Section 472.033, Florida Statutes, "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

D. Count XX; Section 472.033(1)(g), Florida Statutes.

37. Given Mr. Kilmon's explanation as to what his intentions were in issuing the Surveyor's Report, it is found

that the evidence failed to prove clearly and convincingly that his conduct was fraudulent, deceitful, negligent, incompetent or constituted misconduct in the practice of surveying and mapping.

38. Mr. Kilmon was not shown to be guilty of, as suggested in Petitioner's Proposed Recommended Order, "disregarding the minimum technical standards applicable to licensed surveyors and mappers." At most, Mr. Kilmon may have misapplied the minimum technical standards, but he did not disregard them.

E. Count IV; Adequacy of the Type of Report Elected By Mr. Kilmon.

39. In Count IV, it is alleged that Mr. Kilmon violated Florida Administrative Code Rule 61G17-6.003(3)(b) "by failing to state the type of survey the report depicts consistent with the types of surveys defined in Rule 61G17-6.002(10)(a)-(k), Florida Administrative Code."

40. Florida Administrative Code Rule 61G17-6.003(3)(b) provides:

Each survey map and report shall state the type of survey it depicts consistent with the types of surveys defined in Rule 61G17-6.002(8)(a)-(k), F.A.C. The purpose of the survey, as set out in Rule 61G17-6.002(8)(a)-(1), F.A.C. [sic], dictates the type of survey to be performed and depicted, and a licensee may not avoid the minimum standards required by rule of a particular survey type merely by changing the name of the survey type to conform with what standards or lack of them the licensee chooses to follow.

41. Relevant to this case, are the two types of surveys authorized in Florida Administrative Code Rule 61G17-6.002(8)(h) and (j):

(h) Quantity Survey: a survey to obtain measurements of quantity.

. . . .

(j) Specific or Special Purpose Survey: a survey performed for a purpose other than the purposes detailed in (8)(a)-(j) or (k) of this rule.

42. The evidence proved clearly and convincingly that the Surveyor's Report was "a survey to obtain measurements of quantity":

a. First, the Surveyor's Report was clearly proved to be a "survey", within the definition of Florida Administrative Code Rule 61G17-6.003(8); and

b. Second, the Surveyor's Report was used to obtain a measurement of quantity even if only a rough estimate thereof.

43. While Mr. Kilmon clearly attempted to avoid the characterization by any reader of the Surveyor's Report as a quantity survey, his reliance upon Florida Administrative Code Rule 61G17-6.0052 to call it a "Specific or Special Purpose Survey" was not consistent with the intent of the rules. That type of survey is only available where one of the other types of surveys are not being performed.

44. Florida Administrative Code Rule 61G17-6.0052, while allowing a surveyor and mapper to issue a report not listed in Florida Administrative Code 61G17-6.002(8)(a)-(j) or (k), does so only if the types of surveys, including a quantity survey, listed in those portions of the rules are "impossible" to perform:

Surveys which are performed for a purpose other than the purposes encompassed by the definitions in Rule 61G17-6.002(8)(a)-(j) or (k), F.A.C., shall be permitted only where unusual conditions make impracticable or impossible the performance of one of the types of surveys defined in Rule 61G17-6.008(a)-(j) or (k), F.A.C. Such purposes and conditions shall be clearly shown upon the survey map or in the survey report.

45. While it is true that the unusual circumstances of this matter may have caused Mr. Kilmon to conclude that it was not possible to prepare an accurate quantity survey, those circumstances did not justify his conducting a quantity survey and then calling it something else. Had Mr. Kilmon not made any calculation of quantity, then a special or specific purpose survey might have been appropriate. The evidence, however, proved that a calculation of quantity was made. Just because the calculation of quantity was not as reliable as Mr. Kilmon should have realized is required when a surveyor and mapper place their seal and signature to a report, does not mean he did not measure a quantity requiring a quantity report.

46. While the evidence proved clearly and convincingly that Mr. Kilmon violated Section 472.0331(1)(h), Florida Statutes, by violating Florida Administrative Code Rule 61G17-6.003(3)(b), it was also clearly and convincingly proved that Mr. Kilmon attempted in good faith to comply with his understanding of the rules governing his report; he believed that, by disclosing as precisely as he could the shortcomings of the data he had available and the limitations on his task, his Surveyor's Report would be consistent with the minimum technical standards.

F. Counts I through III; Adequacy of the Data.

47. In Counts I through III, it is alleged that Mr. Kilmon violated Florida Administrative Code Rule 61G17-6.003(1) "by failing to assume responsibility for certain data provided by others, which Respondent did not verify, but nevertheless used in preparing the survey" (Count I); Florida Administrative Code Rule 61G17-6.003(1)(a) "by failing to meet the accuracy standard required by this rule, since some calculations were between a surveyed, verified surface and an unverified surface" (Count II); and Florida Administrative Code Rule 61G17-6.003(3)(a) "by failing to create a reliable survey, given that Respondent disclaims responsibility for data provided by others, yet bases his calculations on this same data" (Count III).



48. Florida Administrative Code Rule 61G17-6.003(1) and (3)(a), provide, in pertinent part:

(1) Survey and Map Accuracy

(a) REGULATIONAL OBJECTIVE: The public must be able to rely on the accuracy of measurements and maps produced by a surveyor and mapper. In meeting this objective, surveyors and mappers must achieve the following minimum standards of accuracy, completeness, and quality:

(b) The accuracy of the survey measurements shall be premised upon the type of survey and the expected use of the survey and map. All measurements must be in accordance with the United States standard, using either feet or meters. Records of these measurements shall be maintained for each survey by either the individual surveyor and mapper or the surveying and mapping business entity. Measurement and computation records must be dated and must contain sufficient data to substantiate the survey map and insure that the accuracy portion of these standards has been met.

. . . .

(3) Other Standards and/or Requirements that Apply to All Surveys, Maps, and/or Survey Products:

(a) In order to avoid misuse of a survey and map, the surveyor and mapper must adequately communicate the survey results to the public through a map, report, or report with an attached map. Any survey map or report must identify the responsible surveyor and mapper and contain standard content. . . .

49. While the evidence proved that not all data relied upon in the Surveyor's Report was reliable because it was not

certified or had not been verified by Mr. Kilmon, Mr. Kilmon thoroughly disclosed the type of data relied upon and the shortcomings of that data. He also adequately described the limited purposes of the task he was performing (coming up with a rough estimate of fill) and put the public on notice of the shortcomings of that estimate.

50. Because of the disclosures contained in the Surveyor's Report, it is concluded that the public was informed that the calculations were only being performed for a preliminary and limited purpose and the extent to which the data relied upon was reliable or, more importantly, unreliable.

51. It is also concluded that, given the "type of survey and the expected use of the survey" as disclosed in the Surveyor's Report, the accuracy of the survey measurements is adequately premised.

52. Finally, given the full disclosure of the Surveyor's Report, Mr. Kilmon "adequately communicate[d] the survey results to the public through a . . . report . . . ."

53. Based upon the foregoing, it is concluded that the Department did not prove clearly and convincingly that Mr. Kilmon committed the violations alleged in Counts I through III.

G. Counts V through XIX; The DTM/Map.

54. In Counts V through XIX, it is alleged that Mr. Kilmon violated Florida Administrative Code Rules 61G17-6.003(3)(c) (Count V), 61G17-6.003(3)(d) (Count VI), 61G17-6.003(3)(e) (Count VII), 61G17-6.003(3)(k) (Count VIII), 61G17-6.003(o)2. (Count IX), 61G17-6.004(12)(a) (Count X), 61G17-6.003(3)(j) (Count XI), 61G17-6.003(3)(l) (Count XII), 61G17-6.004(2)(a)8.a. (Count XIII), 61G17-6.004(2)(a)8.c. (Count XIV), 61G17-6.004(2)(b)3.d. (Count XV), 61G17-6.004(2)(b)4. (Count XVI), 61G17-6.004(2)(c)3. (Count XVII), 61G17-6.004(2)(c)4. (Count XVIII), and 61G17-6.004(2)(d)4. (Count XIX). All of these provisions provide requirements concerning what must be contained on any surveyor's map.

55. There is no dispute that the information required in the rule provision cited in Counts V through XIX to be contained on a surveyor's map was not contained on the DTM prepared by Mr. Kilmon.

56. At first blush, it would appear that the only real issue is whether Mr. Kilmon, by including the DTM with the Surveyor's Report and his minimal references thereto, has unintentionally included a map. Looking only at the DTM, either electronically on the CD or the print-out of the information contained in the CD, an individual could easily conclude that the DTM is indeed a map. Given the essentially un rebutted

testimony of the Department's experts, it has been found that the DTM is indeed a map.

57. The foregoing conclusions and findings do not, however, resolve the issue in this case. Still to be resolved is the question of whether Mr. Kilmon's "map" is the type for which the specific information specified in Florida Administrative Code Rule 61G17-6.003 is required.

58. While Florida Administrative Code Rule 61G17-6.003(3) is titled "[o]ther Standards and/or Requirements that Apply to All Surveys, Maps, and/or Survey Products" the specific requirements listed thereafter at issue in this case are only required for a "survey map." The terms "survey map" are defined in Florida Administrative Code Rule 61G17-6.002(4):

Map of Survey (or Survey Map): a graphical or digital depiction of the facts of size, shape, identify, geodetic location, or legal location determined by a survey. The term "Map of Survey" (Survey Map) includes the terms: Sketch of Survey, Plat of Survey, or other similar titles. "Map of Survey" or "Survey Map" may also be referred to as "a map" or "the map." (Emphasis added).

59. While the Department's expert witnesses clearly and convincingly testified that the DTM is a map, they did not clearly explain how the map comes within the definition of a "Map of Survey" or "Survey Map." Mr. Kilmon's expert, on the other hand, testified convincingly that the DTM is not a map to

which the standards and requirements of Florida Administrative Code Rule 61G17-6.003(3) apply.

60. It is therefore concluded that the Department failed to prove clearly and convincingly that Mr. Kilmon committed the violations alleged in Counts V through XIX.

H. The Appropriate Penalty.

61. Section 472.033(2), Florida Statutes, authorizes the Board to impose punishment on a licensee for a violation of Section 472.033(1), Florida Statutes, including revocation or suspension of a license, the imposition of a fine not to exceed \$1,000.00 for each count or separate offense, a reprimand, placing a licensee on probation, and restricting the scope of the licensee's practice. The Department has not cited any rule establishing guidelines for the imposition of discipline.

61. The Department in its Proposed Recommended Order has suggested that Mr. Kilmon be required to pay a fine and that his license be placed on probation, with several specified conditions.

62. Mr. Kilmon fully disclosed what he was attempting to do (produce an estimate of fill even though he did not have all the necessary data) and he fully disclosed the shortcomings of the data he used. Therefore, it is recommended that Mr. Kilmon be given a written reprimand and be required to pay a fine of \$500.00 within 30 days of the entry of the final order.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Board enter a final order finding that Stephen Phillips Kilmon committed the violation described in this Recommended Order, issuing a written reprimand, and requiring that he pay a fine of \$500.00 within 30 days of the entry of the final order.

DONE AND ENTERED this 19th day of July, 2006, in Tallahassee, Leon County, Florida.



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LARRY J. SARTIN  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of July, 2006.

COPIES FURNISHED:

Eric R. Hurst  
Charles F. Tunnicliff  
Assistants General Counsel  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

Stephen Phillips Kilmon  
2010 Northeast 122 Road  
North Miami, Florida 33181

Ned Luczynski, General Counsel  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

Richard Morrison, Executive Director  
Board of Professional Land Surveyors  
And Mappers  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.