

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES, BOARD OF
PROFESSIONAL SURVEYORS AND
MAPPERS,

Petitioner,

vs.

Case No. 15-0087PL

WESLEY BRIAN HAAS,

Respondent.

_____/

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES, BOARD OF
PROFESSIONAL SURVEYORS AND
MAPPERS,

Petitioner,

vs.

Case No. 15-0089

EXACTA LAND SURVEYORS, INC.,

Respondent.

_____/

RECOMMENDED ORDER

On February 20, 2015, a duly-noticed hearing was held by video teleconference at locations in West Palm Beach and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patrick Francis Creehan, Esquire
Department of Agriculture and
Consumer Services
2005 Apalachee Parkway
Tallahassee, Florida 32301

For Respondents: Torben S. Madson, II, Esquire
512 Peterson Avenue South
Post Office Box 1041
Douglas, Georgia 31534

STATEMENT OF THE ISSUES

Whether Respondents failed to abide by various minimal technical standards applicable to the practice of surveying and mapping, in violation of Florida Administrative Code Rules 5J-17.051 and 5J-17.052, or were guilty of negligence in the practice of surveying and mapping, all in violation of section 472.0351, Florida Statutes (2012),^{1/} and if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On August 24, 2014, Petitioner, Department of Agriculture and Consumer Services (Petitioner or Department), filed an Administrative Complaint against Mr. Wesley Brian Haas with the Board of Professional Surveyors and Mappers (Board), alleging that Mr. Haas had not complied with several minimum technical standards applicable to the practice of surveying. On August 26, 2014, Petitioner filed an Administrative Complaint against Exacta Land Surveyors, Inc. (Exacta), Mr. Haas' employer,

alleging identical violations. Respondents disputed the allegations and requested a hearing pursuant to section 120.57(1), Florida Statutes. On January 8, 2015, the cases were referred to the Division of Administrative Hearings for assignment of an administrative law judge. The cases were consolidated on January 16, 2015, and set for final hearing on February 20, 2015.

At hearing, Petitioner presented the live testimony of Mr. Alvin T. Gloer, who was accepted, without objection, as an expert in surveying and mapping. Exhibits P-1 through P-3 were offered by Petitioner and admitted without objection. Respondents' counsel noted for the record that Mr. Haas asserted his right to remain silent and would not be present for the hearing. Respondents offered Exhibit R-1, which was admitted with the caveat that it contained hearsay. The Transcript was filed on March 12, 2015. Both parties timely filed proposed recommended orders, which have been considered.

FINDINGS OF FACT

1. The Department is the state entity charged with regulating the practice of land surveying and mapping, pursuant to chapter 472, Florida Statutes.

2. At all times material to this case, Mr. Haas was licensed as a professional surveyor and mapper in the state of Florida, with license number LS3708.

3. Mr. Haas was employed by Exacta, which holds license number LB7337.

4. A complaint was filed with the Department on January 27, 2014, by Mr. Charles B. Hatcher of Associated Surveyors, Inc., alleging numerous minimum technical standards errors on a survey prepared by Mr. Haas on September 25, 2012.

5. Petitioner has failed to prosecute Mr. Haas or Exacta for the violations alleged in the complaint made by Mr. Hatcher, on January 27, 2014.

6. Administrative complaints alleging identical counts were filed against Mr. Haas and Exacta. Count I alleges that some of the field data was not dated. Count I also alleges that the coordinates are not on the same datum as the survey, and thus, the survey map cannot be substantiated.

7. Page 12 of Exhibit P-1, a page of computation notes, does not contain the date the information was observed and collected. Further, it is clear that page 12 is not simply a continuation of pages 10 and 11 (which are two halves of the same document) but is instead a separate document that is undated.

8. Data shown in the raw data file and coordinates list differed from that reflected on the survey map. It appeared, however, that the data had been rotated and translated. Rotation and translation is an accepted survey technique which

allows modern instrumentation to record data based upon an assumed initial point and bearing, and then calculate all further points and bearings relative to that initial measurement. This information recorded by the instrument must then be rotated and translated back to match the actual points and bearings on a parcel. The Department failed to show that the survey map could not be substantiated. As Mr. Gloer testified during cross examination:

Q. My question is, wasn't it clear to you that the assumed bearing that Mr. Blackmon made, our party chief, on page 4 in his instrument--in his data collector between Points 1 and 2 of a bearing of north zero degrees, or an azimuth of north zero degrees--isn't it clear to you that then in order for it to make sense on this drawing and all the other lines too, that you would have to rotate that to get on the same bearing basis? Doesn't that jump out to you as an expert, having done over 2,000 surveys?

A. At the time two years--well, it's been a year. A year ago when I did this original review, I based it on the data that was supplied to me. Now that you have explained it to me and I see that there is a note here that said they rotated it, yes, it's clear to me now, yes.

9. Count II alleges that the field notes that are dated show a date of 9/24/12, while the survey drawing shows a field work date of 9/25/12.

10. The parties stipulated as to the different dates shown on these documents.^{2/} The dated field notes show that field work

was performed on September 24, 2012. The clear and convincing evidence is that the date of data acquisition was September 24, 2012, while the date on the survey drawing is September 25, 2012.

11. Count III notes that the survey shows a found 3/4" iron rod at the point of beginning, notes that this appears to be the same corner shown on the coordinate list as point number 8, and states that the field notes do not show the setting or locating of the corner. The complaint concludes that this corner is not supported by accurate survey measurements.

12. The notation "P.O.B." is found at the lowest corner of the property on the survey map, and underneath the corner is found the note "3/4 FIR NO ID." According to the Surveyor's Legend found on page 2, this indicates that the point of beginning is marked by a 3/4 inch found iron rod without identification, as Mr. Gloer testified. While page 12 shows a point marked as "set #8 @ DEED Dist/Dist frm 5 & 152" on the lot corner, it indicates this monument was set, and does not indicate a found iron rod. Point "6" has no notation at all on page 12 and does not appear to be aligned on the southeast property line, but point 6 is reflected in the raw data file and the coordinates list. The measurements to point 6, and description of it, are consistent with and support the property corner marked as the P.O.B. on the survey map.

13. Count IV alleges that bearings shown on the survey as measured are not substantiated by the survey measurements in the raw data or coordinate list. Mr. Gloer testified that he inversed the data from the coordinates and that the bearings were different. However, as he admitted, he did not consider that the recorded survey measurements might reflect an assumed initial location and bearing and that they would therefore need to be rotated and translated to substantiate the bearings shown on the survey map. The Department failed to show by clear and convincing evidence that the bearings shown on the survey were not substantiated by measurements.

14. Count V alleges that the three points used to locate the improvements, monumentation, and control for the survey are not part of a closed traverse and are not based on redundant measurements. As Mr. Gloer testified, the distance between points 1 and 2 was verified by redundant measurements: once measuring the distance from point 1 to point 2, and once measuring the distance from point 2 back to point 1. However, the angle created between points 2, 1, and 150 was not similarly measured on more than one occasion or from the opposite direction.

15. Respondents argue that use of an instrument such as the robotic total station used here, which takes numerous measurements very quickly and then averages them, is, by

definition, taking redundant measurements. However, Mr. Gloer testified that in his expert opinion, "redundant" measurement has a more specific meaning. It requires that an "independent check" be made. He noted that if a rodman had the rod on his toe, all of the measurements almost instantaneously taken and averaged by an instrument would reflect the same incorrect information and so these multiple readings would not serve the purpose of revealing the mistake and preventing the error. Only an independent measure, like shooting the distance backwards, would likely reveal the error and thus meet the purpose of a "redundant" measurement. The angle created between points 2, 1, and 150 was not verified by redundant measurements.

16. Count VI alleges that the survey is based on found monumentation on the parcel being surveyed. No attempt was shown to find the point of commencement or boundary monumentation along the boundary of Beauclerc Gardens Replat, both of which are called for in the description.

17. The legal description provides in part, "commence at an iron pipe located in the northeasterly line of Section 40, Township and Range aforementioned, at a point where said line is intersected by the line dividing Sections 31 and 32." Mr. Gloer testified that to ensure that the position of the boundary of real property was determined in complete accord with this real property description, an attempt to find the point of

commencement and the boundary of Beauclerc Gardens Replat was required, and that there was no evidence that this was done. However, no evidence was presented to indicate that the survey as conducted was not in complete accord with the property description as attached to the survey map.

18. Count VII alleges that the survey does not tie to an established identifiable real property corner.

19. As Mr. Gloer testified, the parcel being surveyed was described by metes and bounds. Nothing on the survey tied into any identified corner of Beauclerc Gardens. The survey did not tie into a real property corner of either lot 1 or 2 of Beauclerc Gardens, which were the closest lots. Instead, the survey was tied to a monument on the line south of Beauclerc Terrace on that right-of-way, identified on page 12 as point "151." That point was not an established identifiable real property corner of Beauclerc Gardens. As Mr. Gloer testified, the survey did not tie to an established identifiable real property corner.

20. Count VIII alleges that the field notes and raw data do not show either the fence corner or the water meter that supposedly made the two nearby corners inaccessible.

21. The computation notes at page 12 and the survey map on page 1 do not show a monument set at the most easterly corner of the lot, but they do show an offset point and reasonably

indicate that a water meter is at the corner. Similarly, neither the computation notes nor survey map show a monument set at the most westerly corner of the lot, but the survey map shows an offset monument and has an indication that there is a fence post at the corner. Mr. Gloer noted that neither the water meter nor the fence post, if they existed, had been positively located on the field notes or raw data as being at the corners.^{3/} Mr. Gloer noted that the coordinates list indicated that the location of the water meter was calculated.

22. Count IX alleges that there is a monument shown in the field notes, point number 6, but not shown on the survey.

23. As discussed earlier in connection with Count III, the field computation notes appear to show two monuments in fairly close proximity to the southernmost corner of the property. The survey map at page 1 shows only one monument at this corner, labeled "P.O.B." and described as "3/4 FIR NO ID" which, as noted above, refers to a 3/4 inch found iron rod without identification. This descriptive information appears to correlate with the side shot of point 6 found on page 6 of the raw data file and page 9 of the coordinates list. While the field notes are confusing, the Department did not show by clear and convincing evidence that point number 6 was not shown on the survey.

24. Count X alleges that all the monuments were tied by side shots without a redundancy of the measurements.

25. The raw data at page 4 indicate that the 1/2 inch found iron pipe and cap marked with "R. Miller," which is shown as the easternmost monument on the survey, was located by a side shot, a single measurement, and that Mr. Blackmon only turned one angle and one distance to that point. Similarly, the data at page 5 show that the 1/2 inch found iron pipe with no identification which is shown as the northernmost monument on the survey was located by a single side shot. Again, the data on page 6 show that the 3/4 inch found iron rod without identification which is shown as the southernmost monument and point of beginning on the survey was located by a side shot. The data sheets show no other ties to these points taken from another position, or otherwise demonstrate that redundant measurements were taken.

26. Count XI alleges that the survey dated September 25, 2012, was negligently prepared.

27. On this point, the Transcript records:

Q. And then one final question, Mr. Gloer. In your professional opinion, expert opinion, do you believe that these ten MTS violations that you have discovered, taken as a whole constitutes--of the minimum technical standards, taken as a whole, constitutes negligence in the practice of

surveying and mapping in the State of Florida?

A. I do.

This question and answer, predicated on considering ten other violations as a whole, offers no insight as to whether a fewer number of violations might constitute negligence, or whether some of the violations are so serious, or are of such a nature, that they might do so even standing alone.

28. No evidence was introduced at hearing to indicate that Mr. Haas' professional license has been previously disciplined. Exacta was the subject of five earlier administrative complaints alleging violations of Minimal Technical Standards, which were the subject of a Settlement Stipulation. Given the terms of the stipulation, there is no competent evidence showing that Exacta committed prior offenses. However, the Corrected Final Order Approving Settlement Stipulation constitutes prior disciplinary action against Exacta.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 472.033, 120.569, and 120.57(1), Florida Statutes (2014).

30. Petitioner seeks to take disciplinary action against the professional surveyor and mapper license of Respondent Haas

and the business certification of Respondent Exacta. A proceeding to impose discipline against a professional license is penal in nature, and Petitioner bears the burden to prove the allegations in the administrative complaints by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

31. Clear and convincing evidence has been said to require:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

32. Section 472.005 provides definitions of terms used in chapter 472, including, in relevant part:

(3) "Surveyor and mapper" includes the term "professional surveyor and mapper" and means a person who is registered to engage in the practice of surveying and mapping under ss. 472.001-472.037.

* * *

(12) "Legal entity" means a corporation, partnership, association, or person practicing under a fictitious name who is certified under s. 472.021.

* * *

(16) "Licensee" means any person or business entity that has been issued, pursuant to this chapter, a registration, certificate, or license by the department.

33. Section 472.015(2) provides that the department shall license any applicant who the board certifies is qualified to practice surveying and mapping.

34. Section 472.021(1) provides for the certification of corporations or partnerships offering surveying and mapping services to the public.

35. Under chapter 472, certified business entities are licensees, but are not surveyors and mappers.

36. The common law doctrines of strict liability, vicarious liability, and respondeat superior are not applicable to licensure discipline cases. Rather, the extent of liability is governed by statute. All Saints Early Learning & Cmty. Care Ctr., Inc. v. Dep't of Child. & Fams., 145 So. 3d 974, 978 (Fla. 1st DCA 2014).

37. The statutory language must be examined to determine the duties imposed on a licensed business entity. Pic N Save Cent. Fla., Inc. v. Dep't of Bus. Reg., 601 So. 2d 245 (Fla. 5th DCA 1997) (employee's sale of liquor to under-age employee not

attributable to business license in absence of misconduct personal to licensee); All Saints Early Learning & Cmty. Care Ctr., Inc. v. Dep't of Child. & Fams., 145 So. 3d 974, 977 (Fla. 1st DCA 2014) (discipline against child care facility license appropriate for acts or omissions of employee where statute made clear that the facility was responsible for the care, protection, and supervision of the children).

38. The case of Federgo Discount Center v. Department of Professional Regulation, Board of Pharmacy, 452 So. 2d 1063 (Fla. 3d DCA 1984), is instructive. The applicable statute there provided that a community pharmacy permit could be revoked or suspended for, among other things, violation of "any of the requirements of this chapter or any of the rules of the Board of Pharmacy; of chapter 500, known as the 'Florida Food, Drug, and Cosmetic Law'; or of chapter 893" The court held that notwithstanding these broad references, only those incorporated provisions which actually applied to community pharmacies as strictly construed, and not provisions which applied to licensed pharmacists, provided a basis for discipline. See also Evans Packing Co. v. Dep't of Agric. & Consumer Servs., 550 So. 2d 112 (Fla. 1st DCA 1989) (not necessary to show that business entity knowingly violated law against sale of adulterated orange juice if circumstances support findings that entity either caused the adulteration or failed to exercise due diligence).

39. Section 472.021(5) provides that disciplinary action against a corporation or partnership shall be administered in the same manner and on the same grounds as disciplinary action against a registered surveyor and mapper.

40. Section 472.0351(1) (h) provides that disciplinary action may be taken against a licensee for:

Failing to perform a statutory or legal obligation placed upon a licensed surveyor and mapper; violating a provision of this chapter, a rule of the board or department, or a lawful order of the board or department; or failing to comply with a lawfully issued subpoena of the department; . . .

41. The Board of Professional Surveyors and Mappers has the responsibility to adopt rules establishing minimum technical standards to ensure the achievement of no less than minimum degrees of accuracy, completeness, and quality in the practice of surveying and mapping. §§ 472.008(1), 472.027, Fla. Stat.

42. The Board of Professional Surveyors and Mappers has adopted rule 5J-17.051, entitled "Minimum Technical Standards: General Survey, Map, and Report Content Requirements."

COUNT I

43. Rule 5J-17.051(2) (b) 3. provides:

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.

44. In support of Count I, Petitioner showed by clear and convincing evidence that page 12, a computation note, was not dated. Petitioner failed to prove a second allegation in this count by clear and convincing evidence, however, which charged that the measurement and computation records did not substantiate the survey map.

45. Petitioner proved by clear and convincing evidence that Respondents violated rule 5J-17.051(2)(b)3.

COUNT II

46. Rule 5J-17.051(3)(b)3. provides:

All survey maps must reflect a survey date, which is the date of data acquisition. When the graphics of a map are revised, but the survey date stays the same, the map must list dates for all revisions.

47. The date of data acquisition was September 24, 2012, while the date on the survey map was September 25, 2012.

48. Petitioner proved by clear and convincing evidence that Respondents violated rule 5J-17.051(3)(b)3. However, this was a minor violation.

COUNT III

49. Rule 5J-17.051(3)(b)7. provides:

All computed data or plotted features shown on survey maps must be supported by accurate survey measurements unless clearly stated otherwise.

50. In support of Count III, Petitioner showed that page 12 of the computation notes was confusing, and some points were not clearly marked. However, Petitioner's conclusion that the notation "set #8 @ DEED Dist/Dist frm 5 & 152" represents the most southwesterly corner of the property was not proven. The corner is represented in the raw data file, as well as the coordinates list, as point 6, and there are accurate survey measurements to support the plotting of the southwesterly corner of the property, denoted as the P.O.B., on the survey map.

51. Petitioner failed to prove by clear and convincing evidence that Respondents violated rule 5J-17.051(3)(b)7.

COUNT IV

52. Rule 5J-17.051(3)(b)8. provides:

Bearings, distances, coordinates, and elevations shown on a survey map shall be substantiated by survey measurements unless clearly stated otherwise.

53. The allegation in Count IV that the bearings shown on the survey were not substantiated by the survey measurements did not take into account that the measurements might have been made based upon an assumed initial location and bearing and that they would therefore need to be rotated and translated to substantiate the bearings shown on the survey map.

54. Petitioner failed to prove by clear and convincing evidence that Respondents violated rule 5J-17.051(3)(b)8.

COUNT V

55. Rule 5J-17.051(3)(b)15.b.(II). provides:

The accuracy of control survey data shall be verified by redundant measurements or traverse closures. All control measurements shall achieve the following closures:

Commercial/High Risk Linear: 1 foot in 10,000 feet;

Suburban: Linear: 1 foot in 7,500 feet;

Rural: Linear: 1 foot in 5,000 feet;

56. With respect to Count V, no definition of "redundant measurement" was found in rule or law. While, as Respondents argued, the instrument taking the measurements of distance and angles took several measurements and averaged them, it is concluded that this alone does not constitute "redundant measurements" within the meaning of the rule. One definition of "redundant" is "serving as a duplicate for preventing failure of an entire system (as a spacecraft) upon failure of a single component." Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/redundant>. This definition is consistent with the thrust of Mr. Gloer's testimony. The Board's use of the term "redundant measurement" in the rule is interpreted to require something more than use of an instrument which averages measurements, because although multiple readings are taken, they are not capable of revealing errors in placement of the instrument, as Petitioner contends.

A measurement from another point or different direction, capable of revealing possible errors in the measurements taken from the initial siting, is required.

57. Petitioner proved by clear and convincing evidence that Respondents violated rule 5J-17.051(3)(b)15.b.(II).

COUNT VI

58. The Board has adopted rule 5J-17.052, entitled "Minimum Technical Standards: Specific Survey, Map, and Report Requirements." Rule 5J-17.052(2)(a)1. provides that with respect to a boundary survey, map, and report:

The surveyor and mapper shall make a determination of the position of the boundary of real property in complete accord with the real property description shown on or attached to the survey map or report.

59. In support of Count VI, Petitioner proved that Respondents did not tie the found monumentation on the parcel to either the point of commencement or the boundary monumentation of Beauclerc Gardens. However, the rule Respondents are charged with violating does not specifically require this. No evidence was presented to show the boundary determination in the survey in question was not in "complete accord" with the property description attached to the survey.

60. Petitioner failed to prove by clear and convincing evidence that Respondents violated rule 5J-17.052(2)(a)1.

COUNT VII

61. Rule 5J-17.052(2)(a)8. provides that surveys of parcels described by metes and bounds shall show the following upon the map:

- a. The relationship of the parcel(s) to at least one established identifiable real property corner;
- b. All information called for in the property description, such as point of commencement, course bearings and distances, and point of beginning;
- c. A comparison between recorded directions and distances and field measured directions and distances on the boundary when they vary;
- d. The most current abutting recorded instrument or recorded plat either known by the surveyor and mapper or furnished to the surveyor and mapper.

62. In support of Count VII, Petitioner showed that nothing on the survey "tied into" any established identifiable real property corner. The survey tied into a monument on the right of way line, not an established identifiable real property corner.

63. Petitioner proved by clear and convincing evidence that Respondents violated rule 5J-17.052(2)(a)8.

COUNT VIII

64. Rule 5J-17.052(2)(b)1. provides in part, with respect to boundary monuments:

The surveyor and mapper shall set monuments as defined herein, unless monuments already exist or cannot be set due to physical obstructions at such corners or unless a water boundary has been located in approximate position.

65. In support of Count VIII, Petitioner showed that neither the water meter nor the fence post had been positively located on the field notes or raw data as being at the corners and that the coordinates list indicated that the location of the water meter was calculated. Petitioners did not show a violation of the specific requirement of this rule, however, which is that monuments shall be set unless they already exist or cannot be set due to physical obstructions. The survey map indicates that obstructions--a fence post and a water meter--exist at the corners of the property. Petitioner offered no evidence that this was not the case, and so did not show a violation of the specific requirement of this rule.

66. Petitioner failed to prove by clear and convincing evidence that Respondents violated rule 5J-17.052(2)(b)1.

COUNT IX

67. Rule 5J-17.052(2)(b)3. provides:

All monuments, found or placed, must be described on the survey map. The corner

descriptions shall state the size, material, and cap identification of the monument as well as whether the monument was found or set.

68. In Count IX, Petitioner alleges that point 6 is shown in the field notes, but not the survey. This was not shown by clear and convincing evidence. The survey map at page 1 shows a monument at the southwest corner of the property, labeled "P.O.B." and described as "3/4 FIR NO ID" which correlates with the side shot of point 6 found on page 6 of the raw data file and page 9 of the coordinates list. Under these circumstances, Mr. Gloer's correct observation that two monuments are shown in this vicinity on the field notes, but only one is plotted, is not sufficient to prove that point 6 was not plotted on the survey map.^{4/}

69. Petitioner failed to prove by clear and convincing evidence that Respondents violated rule 5J-17.052(2)(b)3.

COUNT X

70. Rule 5J-17.052(2)(b)7. provides:

Side ties to locate or set monuments shall be substantiated by a redundancy of measurements.

71. Count X alleges that all of the monuments were tied by side shots without a redundancy of measurements. Respondents maintain that side shots made with a robotic total station are

automatically redundant. Consistent with the conclusion as to Count V above, this contention is rejected.

72. Petitioner proved by clear and convincing evidence that Respondents violated rule 5J-17.052(2)(b)7.

COUNT XI

73. Section 472.0351(1)(g) provides:

(1) The following acts constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

(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; . . .

74. Count XI alleges that Respondents negligently prepared the survey. The date "record-keeping" violations of Counts I and II are very minor in nature. The violation of Count VII, failure to tie the survey to an established real property corner is more serious, but there is no evidence to suggest that in fact any of the boundary determinations themselves are not correct. Finally, the remaining two violations, Count V and Count X, do not appear to constitute negligence, but rather reflect a misunderstanding of the rule requirement for redundant measurements. Considered as a whole, the violations do not cast doubt on the measurements taken, the calculations made, or the basic accuracy of the survey. While Respondents need to pay

more attention to minimum technical requirements, the evidence does not show by clear and convincing evidence that Respondents are guilty of negligence in the practice of surveying.

75. Petitioner failed to prove by clear and convincing evidence that Respondents violated section 472.0351(1)(g).

76. After its listing of grounds of discipline, section 472.0351 also sets forth possible penalties which may be imposed by the Board, including, among others: imposition of fines; suspension of a license; probation; and revocation of a license.

77. Section 472.0351(4)(a) goes on to provide: "In addition to any other discipline imposed pursuant to this section, the board may assess costs and attorney fees related to the investigation and prosecution of the case." (Emphasis added.)

78. Section 472.0355, entitled Disciplinary Guidelines, provides in part:

(1) The board by rule shall adopt and periodically review the disciplinary guidelines applicable to each ground for disciplinary action which may be imposed by the board pursuant to this chapter and any rule of the board or department.

79. The Board has established disciplinary guidelines in rule 5J-17.011(2), which provides in pertinent part:

(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; (Section 472.0351(1)(h), F.S.)

	MINIMUM	MAXIMUM
FIRST OFFENSE	\$250 fine, probation, and compliance with legal obligation	\$500 fine and probation or suspension until compliance with legal obligation
SECOND OFFENSE	\$500 fine and probation or suspension until compliance with legal obligation	\$750 fine and probation or suspension until compliance with legal obligation plus extended probation
THIRD OFFENSE	\$750 fine and probation or suspension until compliance with legal obligation plus extended probation	\$1000 fine and revocation

80. While rule 5J-17.011 contains some general language outside of this table, such as the provision that "penalties set forth in the guidelines include lesser penalties, i.e., reprimand and or course work" which may be included in the final penalty, it contains no reference to costs or attorneys' fees.

81. Section 472.0355(3) provides that the board shall adopt by rule disciplinary guidelines to designate possible mitigating and aggravating circumstances and the variation and range of penalties permitted for such circumstances.

82. The Board has adopted rule 5J-17.011(4), which provides in part:

The Board shall consider as mitigating or aggravating circumstances the following:

- (a) The degree of harm to the consumer or public;
- (b) The number of counts in the administrative complaint;
- (c) The disciplinary history of the applicant or licensee;
- (d) The status of the applicant or licensee at the time the offense was committed;
- (e) The degree of financial hardship incurred by a licensee as a result of the imposition of the fines or suspension of his practice;
- (f) The length of time the licensee has practiced;
- (g) The deterrent effect of the discipline imposed;
- (h) Any efforts at rehabilitation;
- (i) Actual knowledge of the licensee pertaining to the violation; and
- (j) Any other mitigating or aggravating circumstances.

83. Although the violation of Counts I and II were minor in nature, none of the aggravating or mitigating circumstances delineated in the rule are present here to the extent necessary to warrant deviation from the range of penalties already permitted within the guidelines with respect to Respondent Haas.

84. With respect to Respondent Exacta, however, its prior disciplinary history is considered as an aggravating factor under rule 5J-17.011(4) (c), justifying an enhanced fine.^{5/}

Kaplan v. Dep't of Health, 8 So. 3d 391, 393 (Fla. 5th DCA 2009).

RECOMMENDATION

Upon consideration of the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department of Agriculture and Consumer Services, Board of Professional Surveyors and Mappers:

Finding Wesley Brian Haas and Exacta Land Surveyors, Inc., in violation of section 742.0351(1)(h), Florida Statutes, for failing to conduct surveying and mapping in accordance with the minimum technical standards prescribed by Florida Administrative Code Rules 5J-17.051(2)(b)3., 5J-17.051(3)(b)3., 5J-17.051(3)(b)15.b.(II), 5J-17.052(2)(a)8., and 5J-17.052(2)(b)7.; imposing an administrative fine of \$1500.00 on Wesley Brian Haas; and imposing an administrative fine of \$4000.00 on Exacta Land Surveyors, Inc.

DONE AND ENTERED this 14th day of April, 2015, in
Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of April, 2015.

ENDNOTES

^{1/} Except as otherwise indicated, references to statutes and rules are to versions in effect in September 2012, the time the survey in question was performed.

^{2/} Respondents' Unilateral Pre-Hearing Admissions to Facts and Law, List of Exhibits and Witnesses stated:

That as stated in paragraph five (5) (b) of
Petitioner's Administrative Complaint:

"A review of Respondent's Survey in
question, using the Minimum Technical
Standards ("MTS") in force at that time
pursuant to Florida Administrative Code
Chapter 5J-17,
showed the following:

b. Noncompliance with Rule 5J-
17.051(3)(b)3., in that the field notes
that are dated show a date of 9/24/12,
[while] the survey drawing has a field
work date of 9/25/12."

This document further provided:

That as stated in paragraph 12 (twelve) of
Petitioner's Administrative Complaint:

Respondent violated § 472.0351(1)(h), Fla.
Stat., through a violation of Florida
Administrative Code Rule 5J-17.051(3)(b)3.,
in that the field notes that are dated show
a date of 9/24/12, while the survey
drawing has a field work date of 9/25/12.

These statements appear to admit not only the different dates,
but also that the survey as submitted to Petitioner constituted
a violation of the rule, albeit a minor one.

^{3/} Mr. Gloer noted that the complainant said there was no water
meter at the easterly corner, both in testimony and in his
report; however, this was hearsay unsupported by competent
evidence at hearing.

^{4/} The Administrative Complaint did not allege that point 8,
which was shown as set in the field notes, was not plotted on
the survey. Cf. Trevisani v. Dep't of Health, 908 So. 2d 1108,
1109 (Fla. 1st DCA 2005) (reference to statute allegedly violated
without factual allegation of act or omission that constituted
the alleged violation denied licensee reasonable notice).

^{5/} Although Petitioner proposed a recommended penalty including
suspension for Respondent Exacta, given the strict construction
of penalty statutes and rules, it is not clear that suspension
is authorized for a business entity. Rule subsection 5J-
17.011(3) is quite confusing. Rule paragraph (3)(b) appears to
authorize suspension for "grounds set forth in subsection (1),"
but that rule subsection does not set forth grounds for
discipline. Further, rule subsection (3) does not appear to
comply with section 473.0355. Finally, rule subsection (3)
appears to apply only to surveyors and mappers, consistent with
the language of section 472.0351(2). Even assuming suspension
is authorized for business entities, the specific disciplinary
guidelines for violation of section 472.0351(1)(h) themselves
apparently permit suspension only in the context of an ongoing
violation: "until compliance with legal obligation."

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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.