

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

In the Matter of the Accusation against:)

MARVIN D. KIRKEBY)
73988 Desert Greens Drive South)
Palm Desert, CA 92260)

Civil Engineer License No. C 14001,)
Respondent.)

Case No. 837-A

DECISION

The attached Stipulated Settlement and Disciplinary Order is hereby adopted by the Board for Professional Engineers and Land Surveyors as its Decision in the above-entitled matter.

This Decision shall become effective on December 24, 2009.

IT IS SO ORDERED November 18, 2009.

Original Signed

BOARD FOR PROFESSIONAL ENGINEERS
AND LAND SURVEYORS
Department of Consumer Affairs
State of California

1 EDMUND G. BROWN JR.
Attorney General of California
2 FRANK H. PACOE
Supervising Deputy Attorney General
3 JONATHAN D. COOPER
Deputy Attorney General
4 State Bar No. 141461
455 Golden Gate Avenue, Suite 11000
5 San Francisco, CA 94102-7004
Telephone: (415) 703-1404
6 Facsimile: (415) 703-5480
Attorneys for Complainant

7
8 **BEFORE THE**
BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS
9 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

10 In the Matter of the Accusation Against:

11 **MARVIN D. KIRKEBY**
73988 Desert Greens Drive South
12 Palm Desert, CA 92260

13 Civil Engineer License No. C 14001

14 Respondent.

Case No. 837-A

OAH No. 2009030552

**STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER**

15
16
17 IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-
18 entitled proceedings that the following matters are true:

19 **PARTIES**

20 1. David E. Brown (Complainant) is the Executive Officer of the Board for Professional
21 Engineers and Land Surveyors. He brought this action solely in his official capacity and is
22 represented in this matter by Edmund G. Brown Jr., Attorney General of the State of California,
23 by Jonathan D. Cooper, Deputy Attorney General.

24 2. Respondent Marvin D. Kirkeby (Respondent) is representing himself in this
25 proceeding and has chosen not to exercise his right to be represented by counsel.

26 3. On or about February 20, 1963, the Board for Professional Engineers and Land
27 Surveyors issued Civil Engineer License Number C 14001 to Marvin D. Kirkeby. The License
28 was in full force and effect at all times relevant to the charges brought herein and will expire on
March 31, 2011, unless renewed.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JURISDICTION

4. Accusation No. 837-A was filed before the Board for Professional Engineers and Land Surveyors (Board), Department of Consumer Affairs, and is currently pending against Respondent. The Accusation and all other statutorily required documents were properly served on Respondent on December 15, 2008. Respondent timely filed his Notice of Defense contesting the Accusation. A copy of Accusation No. 837-A is attached as exhibit A and incorporated herein by reference.

ADVISEMENT AND WAIVERS

5. Respondent has carefully read, and understands the charges and allegations in Accusation No. 837-A. Respondent has also carefully read, and understands the effects of this Stipulated Settlement and Disciplinary Order.

6. Respondent is fully aware of his legal rights in this matter, including the right to a hearing on the charges and allegations in the Accusation; the right to be represented by counsel at his own expense; the right to confront and cross-examine the witnesses against him; the right to present evidence and to testify on his own behalf; the right to the issuance of subpoenas to compel the attendance of witnesses and the production of documents; the right to reconsideration and court review of an adverse decision; and all other rights accorded by the California Administrative Procedure Act and other applicable laws.

7. Respondent voluntarily, knowingly, and intelligently waives and gives up each and every right set forth above.

CULPABILITY

8. Respondent admits the truth of each and every charge and allegation in Accusation No. 837-A.

9. Respondent agrees that his Civil Engineer License is subject to discipline and he agrees to be bound by the Board for Professional Engineers and Land Surveyors (Board)'s imposition of discipline as set forth in the Disciplinary Order below.

CONTINGENCY

10. This stipulation shall be subject to approval by the Board for Professional Engineers and Land Surveyors. Respondent understands and agrees that counsel for Complainant and the staff of the Board for Professional Engineers and Land Surveyors may communicate directly with the Board regarding this stipulation and settlement, without notice to or participation by Respondent. By signing the stipulation, Respondent understands and agrees that he may not

1 withdraw his agreement or seek to rescind the stipulation prior to the time the Board considers
2 and acts upon it. If the Board fails to adopt this stipulation as its Decision and Order, the
3 Stipulated Settlement and Disciplinary Order shall be of no force or effect, except for this
4 paragraph, it shall be inadmissible in any legal action between the parties, and the Board shall not
5 be disqualified from further action by having considered this matter.

6 11. The parties understand and agree that facsimile copies of this Stipulated Settlement
7 and Disciplinary Order, including facsimile signatures thereto, shall have the same force and
8 effect as the originals.

9 12. In consideration of the foregoing admissions and stipulations, the parties agree that
10 the Board may, without further notice or formal proceeding, issue and enter the following
11 Disciplinary Order:

12 **DISCIPLINARY ORDER**

13 IT IS HEREBY ORDERED that Civil Engineer License No. C 14001 issued to
14 Respondent Marvin D. Kirkeby is revoked. However, the revocation is stayed and Respondent is
15 placed on probation for three (3) years on the following terms and conditions.

16 1. **Obey All Laws.** Respondent shall obey all federal, state and local laws and
17 regulations related to the practices of professional engineering and professional land surveying.

18 2. **Submit Reports.** Respondent shall submit such special reports as the Board may
19 require.

20 3. **Tolling of Probation.** The period of probation shall be tolled during the time
21 Respondent is practicing exclusively outside the state of California. If, during the period of
22 probation, the Respondent practices exclusively outside the state of California, Respondent shall
23 immediately notify the Board in writing.

24 4. **Notification.** Within thirty (30) days of the effective date of the Decision and Order,
25 Respondent shall provide the Board with evidence that he has provided all persons or entities with
26 whom he has a contractual or employment relationship relating to professional land surveying
27 services with a copy of the Decision and Order of the Board and shall provide the Board with the
28 name and business address of each person or entity required to be so notified. During the period
of probation, the Respondent shall be required to provide the same notification to each new
person or entity with whom he has a contractual or employment relationship relating to
professional land surveying services and shall report to the Board the name and address of each
person or entity so notified.

1 5. **College-Level Course.** Within two years of the effective date of the Decision and
2 Order, Respondent shall successfully complete and pass one college-level land surveying course,
3 related to the area of violation. Said course shall be approved in advance by the Board or its
4 designee. Respondent shall provide the Board with official proof of completion of the requisite
5 course. For purposes of this condition, "college-level course" means a course offered by a
6 community college or a four-year university of three semester units or the equivalent; it does not
7 include seminars.

8 6. **Ethics Course.** Within two years of the effective date of the Decision and Order,
9 Respondent shall successfully complete and pass a course in professionalism and ethics for
10 engineers and land surveyors, approved in advance by the Board or its designee. Respondent
11 shall provide the Board with official proof of completion of the requisite course.

12 7. **Examination.** Within 60 days of the effective date of the Decision and Order,
13 Respondent shall successfully complete and pass the California Laws and Board Rules
14 examination, as administered by the Board.

15 8. **Cost Recovery.** Within two years of the effective date of the Decision and Order,
16 Respondent shall reimburse the Board for its investigative and enforcements costs in the amount
17 of \$3,432.50. Said reimbursement may be paid in installments. Failure to reimburse the Board's
18 cost of its investigation and prosecution shall constitute a violation of the probation order.

19 9. **Violation of Probation.** If Respondent violates the probationary conditions in any
20 respect, the Board, after giving Respondent notice and the opportunity to be heard, may vacate
21 the stay and reinstate the disciplinary order which was stayed. If, during the period of probation,
22 an accusation or petition to vacate stay is filed against Respondent, or if the matter has been
23 submitted to the Office of the Attorney General for the filing of such, the Board shall have
24 continuing jurisdiction until all matters are final, and the period of probation shall be extended
25 until all matters are final.

26 10. **Completion of Probation.** Upon successful completion of all of the probationary
27 conditions and the expiration of the period of probation, Respondent's Civil Engineer's License,
28 No. C 14001, shall be unconditionally restored.

///

ACCEPTANCE

I have carefully read the Stipulated Settlement and Disciplinary Order. I understand the stipulation and the effect it will have on my Civil Engineer License. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be

1 bound by the Decision and Order of the Board for Professional Engineers and Land Surveyors.

2 DATED: Aug. 24, 2009 *Original Signed*

3 Marvin D. Kirkeby

4 Respondent

5 **ENDORSEMENT**

6 The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully
7 submitted for consideration by the Board for Professional Engineers and Land Surveyors of the
8 Department of Consumer Affairs.

9 Dated: 8/31/09

10 Respectfully Submitted,

11 EDMUND G. BROWN JR.
12 Attorney General of California
13 FRANK H. PACOE
14 Supervising Deputy Attorney General

15 *Original Signed*

16 JONATHAN D. COOPER
17 Deputy Attorney General
18 *Attorneys for Complainant*

Exhibit A

Accusation No. 837-A

1 EDMUND G. BROWN JR., Attorney General
of the State of California
2 FRANK H. PACOE
Supervising Deputy Attorney General
3 JONATHAN D. COOPER, State Bar No. 141461
Deputy Attorney General
4 California Department of Justice
455 Golden Gate Avenue, Suite 11000
5 San Francisco, CA 94102-7004
Telephone: (415) 703-1404
6 Facsimile: (415) 703-5480

7 Attorneys for Complainant

8
9 **BEFORE THE**
BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS
10 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

11 In the Matter of the Accusation Against:

Case No. 837-A

12 **MARVIN D. KIRKEBY**
13 73988 Desert Greens Drive South
Palm Desert, CA 92260

OAH No.

A C C U S A T I O N

14 Civil Engineer License No. C 14001

15 Respondent.
16

17
18 Complainant alleges:

19 **PARTIES**

20 1. Cindi Christenson, P.E. (Complainant) brings this Accusation solely in her
21 official capacity as the Executive Officer of the Board for Professional Engineers and Land
22 Surveyors, Department of Consumer Affairs.

23 2. On or about February 20, 1963, the Board for Professional Engineers and
24 Land Surveyors issued Civil Engineer License Number C 14001 to Marvin D. Kirkeby
25 (Respondent). The License was in full force and effect at all times relevant to the charges
26 brought herein and will expire on March 31, 2009, unless renewed.

27 **JURISDICTION**

28 3. This Accusation is brought before the Board for Professional Engineers

1 and Land Surveyors (Board), Department of Consumer Affairs, under the authority of the
2 following laws. All section references are to the Business and Professions Code unless otherwise
3 indicated.

4 **STATUTES AND REGULATIONS**

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

9 5. Section 8780 of the Code states:

10 The board may receive and investigate complaints against licensed land surveyors
11 and registered civil engineers, and make findings thereon.

12 By a majority vote, the board may reprove, suspend for a period not to exceed two
13 years, or revoke the license or certificate of any licensed land surveyor or registered civil
14 engineer, respectively, licensed under this chapter or registered under the provisions of Chapter 7
15 (commencing with Section 6700), whom it finds to be guilty of:

16 (a) Any fraud, deceit, or misrepresentation in his or her practice of land surveying.

17 (b) Any negligence or incompetence in his or her practice of land surveying.

18 (c) Any fraud or deceit in obtaining his or her license.

19 (d) Any violation of any provision of this chapter or of any other law relating to or
20 involving the practice of land surveying.

21 (e) Any conviction of a crime substantially related to the qualifications, functions,
22 and duties of a land surveyor. The record of the conviction shall be conclusive evidence thereof.

23 (f) Aiding or abetting any person in the violation of any provision of this chapter.

24 (g) A breach or violation of a contract to provide land surveying services.

25 (h) A violation in the course of the practice of land surveying of a rule or
26 regulation of unprofessional conduct adopted by the board.”

27 5. Section 8762 of the Code provides:

28 (a) Except as provided in subdivision (b), after making a field survey in

1 conformity with the practice of land surveying, the licensed surveyor or licensed civil engineer
2 may file with the county surveyor in the county in which the field survey was made, a record of
3 the survey.

4 (b) Notwithstanding subdivision (a), after making a field survey in conformity
5 with the practice of land surveying, the licensed land surveyor or licensed civil engineer shall file
6 with the county surveyor in the county in which the field survey was made a record of the survey
7 relating to land boundaries or property lines, if the field survey discloses any of the following:

8 (1) Material evidence or physical change, which in whole or in part does not
9 appear on any subdivision map, official map, or record of survey previously recorded or properly
10 filed in the office of the county recorder or county surveying department, or map or survey record
11 maintained by the Bureau of Land Management of the United States.

12 (2) A material discrepancy with the information contained in any subdivision
13 map, official map, or record of survey previously recorded or filed in the office of the county
14 recorder or the county surveying department, or any map or survey record maintained by the
15 Bureau of Land Management of the United States. For purposes of this subdivision, a "material
16 discrepancy" is limited to a material discrepancy in the position of points or lines, or in
17 dimensions.

18 (3) Evidence that, by reasonable analysis, might result in materially alternate
19 positions of lines or points, shown on any subdivision map, official map, or record of survey
20 previously recorded or filed in the office of the county recorder or the county surveying
21 department, or any map or survey record maintained by the Bureau of Land Management of the
22 United States.

23 (4) The establishment of one or more points or lines not shown on any subdivision
24 map, official map, or record of survey, the positions of which are not ascertainable from an
25 inspection of the subdivision map, official map, or record of survey.

26 (5) The points or lines set during the performance of a field survey of any parcel
27 described in any deed or other instrument of title recorded in the county recorder's office are not
28 shown on any subdivision map, official map, or record of survey.

1 (c) The record of survey required to be filed pursuant to this section shall be filed
2 within 90 days after the setting of boundary monuments during the performance of a field survey
3 or within 90 days after completion of a field survey, whichever occurs first.

4 (d) (1) If the 90-day time limit contained in subdivision (c) cannot be complied
5 with for reasons beyond the control of the licensed land surveyor or licensed civil engineer, the
6 90-day time period shall be extended until the time at which the reasons for delay are eliminated.
7 If the licensed land surveyor or licensed civil engineer cannot comply with the 90-day time limit,
8 he or she shall, prior to the expiration of the 90-day time limit, provide the county surveyor with
9 a letter stating that he or she is unable to comply. The letter shall provide an estimate of the date
10 for completion of the record of survey, the reasons for the delay, and a general statement as to the
11 location of the survey, including the assessor's parcel number or numbers.

12 (2) The licensed land surveyor or licensed civil engineer shall not initially be
13 required to provide specific details of the survey. However, if other surveys at the same location
14 are performed by others which may affect or be affected by the survey, the licensed land surveyor
15 or licensed civil engineer shall then provide information requested by the county surveyor
16 without unreasonable delay.

17 (e) Any record of survey filed with the county surveyor shall, after being
18 examined by him or her, be filed with the county recorder.

19 (f) If the preparer of the record of survey provides a postage-paid, self-addressed
20 envelope or postcard with the filing of the record of survey, the county recorder shall return the
21 postage-paid, self-addressed envelope or postcard to the preparer of the record of survey with the
22 filing data within 10 days of final filing. For the purposes of this subdivision, "filing data"
23 includes the date, the book or volume, and the page at which the record of survey is filed with the
24 county recorder.

25 6. Section 8764 of the Code states, in pertinent part:

26 The record of survey shall show the applicable provisions of the following
27 consistent with the purpose of the survey:

28 ...

1 (c) Name and legal designation of the property in which the survey is located, and
2 the date or time period of the survey.

3

...

4 7. California Code of Regulations, Title 16, section 404, subsection (n),
5 states:

6 For the sole purpose of investigating complaints and making findings thereon
7 under Sections 6775 and 8780 of the Code, "incompetence" as used in Sections 6775 and 8780 of
8 the Code is defined as the lack of knowledge or ability in discharging professional obligations as
9 a professional engineer or land surveyor.

10 8. California Code of Regulations, Title 16, section 404, subsection (w),
11 states:

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

17 ///

18 COST RECOVERY/RESTITUTION

19 9. Code section 125.3 provides that the Board may request the administrative
20 law judge to direct a licentiate found to have committed a violation or violations of the licensing
21 act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the
22 case.

23 ///

24 FACTUAL SUMMARY

25 10. On or about 2001, Respondent performed a survey of a property located in
26 Cupertino, California, at the request of Sanjay Swamy. During the survey, Respondent set new
27 boundary monuments and established one or more points or lines not shown on any previous
28 subdivision map, official map, or record of survey. The survey also disclosed material evidence

1 pertaining to the property, as set forth above in paragraphs 9 - 15.

2 ///

3 **SECOND CAUSE FOR DISCIPLINE**

4 (Negligence/Incompetence)

5 17. Respondent is subject to disciplinary action under section 8780(b) of the
6 Code in that he acted negligently and/or incompetently in the practice of land surveying, as set
7 forth above in paragraphs 9 - 15.

8 ///

9 **THIRD CAUSE FOR DISCIPLINE**

10 (Incorrect Information of Record of Survey)

11 18. Respondent is subject to disciplinary action under Code sections 8780,
12 subsection (d) and 8766, subsection (c) of the Code in that he filed a record of survey which
13 showed an incorrect date or time period of the survey, as follows:

14 19. The record of survey submitted by Respondent on or about May 15, 2005,
15 stated that it memorialized a survey that Respondent conducted in December, 2004. In fact,
16 Respondent conducted the survey several years prior to 2005, on or about 2001.

17 ///

18 ///

19 **PRAYER**

20 WHEREFORE, Complainant requests that a hearing be held on the matters herein
21 alleged, and that following the hearing, the Board for Professional Engineers and Land Surveyors
22 issue a decision:

23 1. Revoking or suspending Civil Engineer License Number C 14001, issued
24 to Marvin D. Kirkeby;

25 2. Ordering Marvin D. Kirkeby to pay the Board for Professional Engineers
26 and Land Surveyors the reasonable costs of the investigation and enforcement of this case,
27 pursuant to Business and Professions Code section 125.3;

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: 12/11/08

Original Signed
CINDI CHRISTENSON, P.E.
Executive Officer
Board for Professional Engineers and Land Surveyors
Department of Consumer Affairs
State of California
Complainant