

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

In the Matter of the Accusation Against:)

RODOLFO VENTURA DIMALANTA)
17 Summitridge Court)
Pittsburg, CA 94565)

Case No. 825-A

OAH No. 2009010617

Civil Engineer License No. C 54787,)

Respondent.)
_____)

ORDER DENYING PETITION FOR RECONSIDERATION

The Petition for Reconsideration filed by the respondent, by and through his attorney, in the above-entitled matter has been read and considered by the Board for Professional Engineers and Land Surveyors. Good cause for the granting of the petition has not been shown; therefore, the Petition for Reconsideration is hereby denied.

The Decision issued by the Board for Professional Engineers and Land Surveyors shall become effective upon expiration of the Order Granting Stay of Expiration of Stay of Execution of Decision on April 7, 2010.

IT IS SO ORDERED March 30, 2010.

Original Signed

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

NANCY A. EISSLER
Enforcement Program Manager
Board for Professional Engineers and Land Surveyors
Department of Consumer Affairs
State of California

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Probationer/Respondent.)
_____)

DECISION

Pursuant to Government Code section 11517, the Board for Professional Engineers and Land Surveyors of the State of California hereby adopts the attached Proposed Decision of the Administrative Law Judge as its Decision in the above-entitled matter.

In adopting this Proposed Decision as its Decision, the Board for Professional Engineers and Land Surveyors has made the following technical or other minor changes pursuant to Government Code section 11517(c)(2)(C):

Condition 4 of the Order is corrected to read as follows:

4. During the period of probation, Respondent may practice professional engineering only under the supervision of a professional engineer licensed in the same branch as Respondent. This person or persons shall be approved in advance by the Board or its designee. Such supervising professional engineer shall initial every stamped or sealed document in close proximity to Respondent's stamp or seal.

Condition 9 of the Order is deleted as it is duplicative of Condition 8.

This Decision shall become effective on February 26, 2010.

IT IS SO ORDERED this 27th day of January, 2010.

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

By Original Signed
[Signature]

BEFORE THE
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DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

RODOLFO VENTURA DIMALANTA,

Respondent.

No. 825-A

OAH NO. 2009010617

PROPOSED DECISION

On September 15, 16 and 17, 2009, at Oakland, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter.

Leslie E. Brast, Deputy Attorney General, represented Complainant Cindi Christenson, P.E.

Dennis John Woodruff, Attorney at Law, 886 Longridge Road, Oakland, California 94610, represented Respondent Rodolfo Ventura Dimalanta, who attended the proceeding.

The record was held open to afford the opportunity to Complainant to supplement the record with a declaration from the Board's Enforcement Program Manager regarding the certification of Complainant's investigative and enforcement costs in this matter. And the record remained open to grant Respondent a reasonable period of time to file with OAH written objections, if any, to Complainant's certification of costs. On September 21, 2009, OAH received from Deputy Attorney General Brast correspondence that transmitted the declaration of Board Enforcement Program Manager Nancy A. Eissler. The declaration was marked as Exhibit "10a," and it was received into evidence. Also on September 21, 2009, OAH received the "Certification of Prosecution Costs: Declaration of Leslie E. Brast," which was marked as Exhibit "10b," and received into evidence. The transmittal letter by the deputy attorney general was marked as Exhibit "10c," and received as argument. On September 25, 2009, Respondent, through his attorney, filed with OAH a letter that set out objections to Complainant's certification of costs, including the costs for the services of both the prosecuting deputy attorney general and the industry expert. Respondent's letter was marked as Exhibit "P," and received as argument.

On October 5, 2009, OAH received ex parte communication from a witness at the hearing. In accordance with the directive of Government Code section 11430.10 et seq., by way of a letter, dated October 8, 2009, the written ex parte communication was reported to

the parties to the matter, and each side was given until October 23, 2009, to supplement the record with written input regarding the proper disposition of the received ex parte communication. On October 13, 2009, OAH received from Respondent's counsel, Mr. Woodruff, a letter, which was marked as Exhibit "Q," and received as argument. On October 14, 2009, OAH received from Deputy Attorney General Brast a letter, which was marked as Exhibit "11," and received as argument. Because a due date of October 23, 2009, was prescribed in the OAH letter, dated October 8, 2009, and because the OAH letter was dispatched to the author of the ex parte communication, the record was held open until October 23, 2009, to enable a thorough explanation regarding the ex parte communication. But by the due date, the ex parte communication's author filed no additional writing to explain the impetus for his act of writing the unsolicited letter.

On October 23, 2009, the matter was deemed submitted and the record closed.

FACTUAL FINDINGS

1. On December 11, 2008, Complainant Cindi Christenson, P.E., (Complainant), in her official capacity as Executive Officer of the Board for Professional Engineers and Land Surveyors, Department of Consumer Affairs, State of California, made the accusation against Rodolfo Ventura Dimalanta (Respondent).

License History

2. On October 5, 1973, the Board issued Civil Engineer License Number C 23334 to Respondent as a civil engineer. Effective August 14, 1995, in accordance with the Order on the Decision by the Board in the Matter of Accusation No. 573-A filed against Respondent, the Board accepted the voluntary surrender of Civil Engineer License No. C 23334, and effective on that same date in August 1995¹, the Board granted Respondent Civil Engineer License No. 54787.

Respondent's License No. 54787 as a Civil Engineer will expire on December 31, 2009, unless the registration is renewed, revoked or suspended before that date.

Background

3. Located in the southeast hills of Oakland, California, approximately one-half mile east of the Warren Freeway (Highway 13) and Redwood Road intersection, two existing

¹ Business and Professions Code section 8731, which is part of the Land Surveyor's Act, provides, in pertinent part, that a civil engineer registered before January 1, 1982, may engage in the practice of land surveying with the same rights and privileges and with the same duties and responsibilities of a licensed land surveyor without first obtaining a land surveying license. But effective January 1, 1982, a civil engineer wishing to perform land surveying work is required to meet all requirements for licensure as a land surveyor, including filing an application for licensure, meeting all pertinent educational requirements and passing the Board's prescribed examinations for licensure as a land surveyor.

large undeveloped parcels, situated on a very steeply sloped uphill 1.25-acre area, were proposed for the development of a subdivision with four high value houses (four parcels) for construction. The land comprising the proposed subdivision was bounded by woody hillsides as well as Colgett Drive and Crestmont Drive. In order for the proposed subdivision to be constructed, the project required a significant amount of excavation, regrading and installation of a pair of terraced retaining walls, which were as much as 220 feet long, with a combined height of not less than about 16 feet.

The principal developer of the subdivision was Mr. Dennis John Woodruff, who hired Respondent to perform civil engineering services that culminated in the subject licensee's preparation of a tentative parcel map (TPM) for the project. Around April 2003, Respondent prepared TPM 7940, which was presented for review to the City of Oakland, Community and Economic Development Agency, Building Services Division.

Houses on lots adjacent to the site of the proposed subdivision fell within the area monitored by the Crestmont Homeowners Associations.

Respondent's Contentions

4. Respondent contends that his licensed status as a civil engineer enabled him to prepare a tentative parcel map from previously complied temporary parcel maps, which were prepared by a land surveyor, and that such activity does not constitute "surveying" within the meaning of Business and Professions Code section 8725. Further Respondent contends that since there was no physical act constituting actual surveying by Respondent in connection with the preparation of TPM 7940, he did not engage in unlawful land surveying. He further contends that but for a few inconsequential notations on TPM 7940 the document met industry standards for the intended purpose of presenting the feasibility of the project. And an important underpinning of Respondent's defense to the allegation that Respondent engaged in the unauthorized practice of land surveying in the preparation of Tentative Parcel Map 7940 in his capacity as a civil engineer is that the Board lacks jurisdiction to prosecute an accusation against Respondent because under Government Code section 6641 a civil engineer may be authorized to prepare tentative parcel maps by a county or municipality's local ordinance.

5. Respondent's contentions and arguments are without merit. Respondent's positions are wholly rejected as not supported by the facts or a reasonable interpretation of California law, which vests the Board with exclusive authority for the enforcement of the licensing rights of civil engineers and land surveyors.

Respondent's Evidence

a. Mr. Jon Ewigleben

6. Respondent called Jon J. Ewigleben, City of Oakland Supervising Civil Engineer for Commercial and Special Projects, Community and Economic Development

Agency, as a witness in support of Respondent's contentions. But Mr. Ewigleben was not persuasive in offering his opinions regarding the ability of Respondent, as a registered civil engineer, to prepare TMP 7940 without unlawfully intruding into the practice realm of a land surveyor, or a civil engineer licensed before January 1, 1982.

Mr. Ewigleben unpersuasively propounded that TMP 7940 entailed a "re-subdivision of a previously recorded parcel map." He opined that no work relating to a boundary survey, or other work, was required for the subject tentative parcel map as opposed to the instance where boundary determinations have not been established by a boundary survey. Regarding the preparation of TMP 7940, Respondent's expert witness unconvincingly asserted that Respondent's work, as a licensed civil engineer, regarding the proposed grading and topographic surveying was within the scope of the authority granted Respondent by the local laws of the City of Oakland. Mr. Ewigleben erroneously concluded that TMP 7940 did not entail boundary survey work so as to render Respondent's work to be deemed unlicensed work product of a land surveyor. And without adequate basis he expressed: "I submit that the civil engineer [namely, Respondent] is qualified as [the] signatory for the TPM since the City's subdivision ordinance only indicates a land surveyor or civil engineer can sign this map and further that the state land surveyor's act doesn't apply to a TPM since the exterior boundary of the TPM has been established by a recorded parcel map."

7. At the hearing of this matter, Mr. Ewigleben presented City of Oakland Ordinance 16.08 that pertains to "Tentative Maps," which includes a section regarding the contents of a tentative map that is offered by a subdivider. Section 16.08.10, subdivision A, sets out that "[s]uch map and street profiles shall be prepared by a licensed surveyor or a registered civil engineer. . . ."

8. Mr. Ewigleben was not persuasive when he asserted that errors made by Respondent on TPM 7940 regarding misplacement of spot elevations at the roadbed level as shown by topographic contour lines did not show negligence. Even when the markings on the map were inexact by more than two or three inches from the proper location on the map, Mr. Ewigleben viewed the errors on the tentative parcel map not to be of meaningful significance or great concern.

First he unpersuasively alluded to the TPM being a device used to express the feasibility of the grading plans for the contemplated project and that deviations or errors in a TPM may be corrected in the future by way of a final map.

Second Mr. Ewigleben unconvincingly professed that the errors regarding spot elevations in TPM 7940 (marking items 775, and 787.10 at the 786 contour line) were not important because the area will be radically excavated by removal of about seven feet of dirt from the existing hillside for placement of retaining walls and that a "cut" of eight feet was needed for the prospective driveway placement.

9. Mr. Ewigleben failed to demonstrate that he possessed the requisite knowledge of the Board's licensing authority when he expressed a dubious opinion that Respondent did not violate the Land Surveyor's Act when he prepared TPM 7940.

And Mr. Ewigleben failed to offer a rational basis for his opinion that Respondent did not fall below the standard of care expected of a civil engineer when he depicted erroneous entries on TPM 7940 for retaining wall heights. And Mr. Ewigleben was not credible when he expressed an opinion that Respondent did not fall below the standard of care by erroneously depicting two spot elevations on the map when the subject area was contemplated for excavation.

10. Mr. Ewigleben was not credible when he asserted at the hearing that it was within the focus of his functions and responsibilities of the Supervising Civil Engineer for the City of Oakland to make a determination regarding whether individual licensed civil engineers and land surveyors are lawfully practicing within the bounds of the respective California State licensing acts. He was not believed when he proclaimed that he competently "wrote" or definitively contributed to the formulation of the City of Oakland policy that permitted civil engineers to perform "topo"² markings on maps but civil engineers cannot prepare boundary markings on maps. The Oakland City building amendments, which Mr. Ewigleben purportedly drafted, grants civil engineers various certificates to prepare particular types of surveys for maps; but, the amendments were not developed in concert with, or advice from, the Board of Professional Engineers and Land Surveyors.

11. Mr. Ewigleben was not persuasive when he asserted that there are "thousands of communities" throughout California that follow the practice of authorizing civil engineers, licensed after January 1, 1982, to prepare tentative parcel maps similar to TPM 7940 prepared by Respondent.

12. Mr. Ewigleben has a degree in architecture that dates to 1964, but since his term of active duty service with the United States Army expired in 1965 he has been involved in the engineering profession. In 1969 Mr. Ewigleben was first granted registration in California as a civil engineer.

Mr. Ewigleben has been a municipal employee engaged in primarily administrative plan check work over the substantial span of his professional career, which spans about forty years. (For about 12 years in the late 1960s and the 1970s, he worked in private business as a civil engineer.) From 1989 until the present time, he has held the civil service position of Supervising Civil Engineer for the City of Oakland. Mr. Ewigleben worked for the City of Hayward from 1985 to 1987. He worked for the City of Pittsburg, California, from 1987 to 1989. (For one project in 1989 between civil service jobs with Hayward and Oakland, Mr. Ewigleben worked on only a single project for a report of survey for the placement of hillside marks. And it was in 1986 that he last prepared a tract map as a civil engineer with authority

² "Topo" means topography.

to perform land surveying tasks, which occurred between public sector positions with Pittsburg and Hayward.)

Mr. Ewigleben has devoted the last two decades in the public realm regarding civil engineering

. The public realm for civil engineering, as noted by Complainant's expert witness, is devoted to the review of documents and administrative tasks associated with the analysis of the work product of others. In contrast, those licensees who are engaged in the private practice of civil engineering and land surveying are involved directly in the preparation of documents that springs from actual field work.

13. Mr. Ewigleben was shown by Complainant to lack sufficient practical experience and training as a land surveyor or civil engineer to express persuasive expert witness opinions. The opinions of Complainant's expert witness, Robin Hamers, were more rational, exact and well-presented opinions on the issue of licensing rights of a civil engineer to prepare tentative parcel maps, as well the contents of the subject tentative parcel map. Accordingly, little weight is given to the opinion expressed by Mr. Ewigleben that Respondent did not unlawfully practice as a land surveyor in preparing TPM 7940. Nor can any real weight be extended to the views of Mr. Ewigleben that Respondent's preparation of TPM 7940 did not reflect negligence and incompetence.

b. Respondent Dimalanta

14. Respondent was neither a persuasive nor a believable witness at the hearing of this matter. His manner of providing testimony was unduly circumspect and vague so that his counsel was prompted to "testify" for him through his counsel's use of expansive leading questions and exposition during direct examination of Respondent. Respondent demonstrated a lack of fluency and grasp of the intricacies of TMP 7940, which he supposedly had prepared. By his demeanor while testifying, his attitude towards the proceeding and the inconsistency in his testimony, Respondent demonstrated that he was not a credible³ witness.

15. Through his testimony, Respondent described that in his preparation of TPM 7940, he found survey monuments of record "under casements" on the street surface for Crestmont Drive in Oakland during his field study prior to preparing the subject map. He further made an admission that he personally measured between the monuments and that the measurements "fit" the prior specifications for the monuments. And he surveyed along the boundary line, which may have been the center line of the nearby street. Accordingly, Respondent did, in fact, survey between monuments to give him assurance that he was "in the correct place" regarding the preliminary work for the completion of TPM 7940. At a minimum, Respondent's activity fell within the meaning of land surveying as defined by

³ Government Code section 11425.50, subdivision (b), third sentence.

Business and Professions Code section 8726, subdivision (c),⁴ in that he “reestablished” a boundary for a right of way by surveying down Crestmont Drive.

Respondent made a further admission that he prepared electronic or computerized data in the performance of acts by himself or by persons under his direction or employment that showed the practice of land surveying. Respondent’s testimony at the hearing of this matter showed he unlawfully engaged in land surveying work within the meaning of Business and Professions Code section 8726 subdivisions⁵ (a), (b), (c), (d), (e), (f), (k) and (l).

⁴ Business and Professions Code section 8726, subdivision (c), states that a person practices land surveying when such person “[l]ocates, relocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land . . . or alignment of those lines or boundaries.”

⁵ Business and Professions Code section 8726 states, in pertinent part, that:

A person, including any person employed by the state or by a city, county, or city and county within the state, practices land surveying within the meaning of this chapter who, either in a public or private capacity, does or offers to do any one or more of the following:

(a) Locates, relocates, establishes, reestablishes, or retraces the alignment or elevation for any of the fixed works embraced within the practice of civil engineering, as described in Section 6731.

(b) Determines the configuration or contour of the earth's surface, or the position of fixed objects above, on, or below the surface of the earth by applying the principles of mathematics or photogrammetry.

(c) Locates, relocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land, right-of-way, easement, or alignment of those lines or boundaries.

(d) Makes any survey for the subdivision or resubdivision of any tract of land. For the purposes of this subdivision, the term "subdivision" or "resubdivision" shall be defined to include, but not be limited to, the definition in the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code) or the Subdivided Lands Law (Chapter 1 (commencing with Section 11000) of Part 2 of Division 4 of this code).

(e) By the use of the principles of land surveying determines the position for any monument or reference point which marks a property line, boundary, or corner, or sets, resets, or replaces any monument or reference point.

(f) Geodetic or cadastral surveying. As used in this chapter, geodetic surveying means performing surveys, in which account is taken of the figure and size of the earth to determine or predetermine the horizontal or vertical positions of fixed objects thereon or related thereto, geodetic control points, monuments, or stations for use in the practice of land surveying or for stating the position of fixed objects, geodetic control points, monuments, or stations by California Coordinate System coordinates.

....

16. The calculations and demonstrations by Respondent during his testimony at the hearing of this matter were shown by Complainant's expert witness (Mr. Robin Hamers) to be faulty, erroneous and misleading. Respondent's work product in the form of TMP 7940 reflected negligence and incompetence.

Causes for Discipline

a. Negligence and/or Incompetence in the Practice of Civil Engineering

Mr. Joe DeCredico

17. Mr. Joe DeCredico⁶ appeared at the hearing to offer compelling and persuasive evidence. His manner of rendering testimony, the consistency of his evidence and his attitude towards the proceeding indicate that he was a credible and trustworthy witness.

18. As a member of the Board of Directors for the Crestmont Homeowner Association (Association), Mr. DeCredico was tasked in his capacity as chairperson of the Association's Architecture Review Committee (Committee) to review the subdivision at issue in this matter. In the summer of 2003, the Committee reviewed the development proposal by Mr. Woodruff and determined the need to influence the proposed subdivision's appearance and functions through great scrutiny by an Association subcommittee, which included a retired civil engineer, a mechanical engineer, other homeowners and Mr. DeCredico as the subcommittee chair.

The matter that focused the attention of the subcommittee on the TPM 7940 was survey marks, including spot elevations that were inconsistent with survey lines. The Association's subcommittee also had objections to top-of-wall elevations for retaining walls, along with depicted elevations on the subject TPM above and below the proposed retaining walls. The subcommittee determined that the depictions on the TPM that were represented as six-foot to eight-foot retaining walls would, in reality, result in much higher walls. The trouble, which was reasonably contemplated by the subcommittee, pertained to the very steep hillside region for the proposed project and the realization that significant excavation would be necessary. Accordingly, existing houses situated above the proposed development might be adversely affected by the excavation and associated changes with regard to the hillside's integrity.

(k) Coordinates the work of professional, technical, or special consultants in connection with the activities authorized by this chapter.

(l) Determines the information shown or to be shown within the description of any deed, trust deed, or other title document prepared for the purpose of describing the limit of real property in connection with any one or more of the functions described in subdivisions (a) to (f), inclusive.

⁶ Mr. DeCredico is a principal with the company known as Garcia DeCredico Studio Architecture and Planning, which is located in Berkeley. He is a licensed Architect in the State of California.

In August 2003, over the signature of Mr. DeCredico, the Association's subcommittee dispatched a letter to the City of Oakland. The letter expressed perceived errors, inconsistencies and invalidity of matters set out in TPM 7940. At about the time that the Association's subcommittee crafted a letter of complaint to the City of Oakland, Mr. DeCredico made contact with the Board's personnel regarding Respondent's license status and Respondent's ability to engage in land surveying activity that might result in preparation of a tentative parcel map. (Later, Mr. DeCredico sent the Board copies of all documents that the Association had lodged with the City of Oakland.)

The subcommittee's letter, which revolved around the Association's concerns about the impact of the proposed subdivision on existing houses, sought to shape the project to conform to the existing structures in the neighborhood. The subcommittee's objections and conclusions were grounded on reasonable observations and objective analysis. Those observations and conclusions of the Association were later confirmed by Complainant's expert witness, Mr. Robin Hamers.

Ms. Jacqueline Jenkins

19. Jacqueline Jenkins, an investigator with the Board, appeared at the hearing. She offered credible and persuasive evidence in the hearing of this matter.

Ms. Jenkins engaged in a conscientious and thorough investigation of allegations against Respondent. She exerted diligence and fidelity to her official duties in aiding Complainant's formulation of a determination to initiate formal disciplinary action against the license issued to Respondent. Ms. Jenkins employed objectivity and exhibited unbiased, strictly professional motivations in retaining the services of Complainant's industry expert, Mr. Robin Hamers, as well as communicating with him and analyzing the written and oral reports of the expert witness.

Mr. Robin B. Hamers

20. Mr. Robin B. Hamers, Complainant's expert witness, appeared at the hearing to offer reliable and persuasive evidence. By his demeanor while testifying, the consistency of his testimony and his attitude towards the proceeding, Mr. Hamers established himself to be a credible and persuasive witness.

21. Mr. Hamers is a registered civil engineer, who has been licensed by the State of California since 1981. (He is also licensed as a civil engineer by the State of Hawaii.) Currently, he is the principal of his own private company that engages in land development, civil engineering and surveying work through a principal office in Costa Mesa, California. Mr. Hamers was shown to be proficient in several areas, including boundary establishment and surveying, topographic map preparation, tentative parcel maps, tentative tract maps, records of survey, parcel maps, easement maps and legal description writing, retaining wall plans and profile work, and other technical areas associated with civil engineering and land

surveying. Among other projects, in an independent contractor capacity, Mr. Hamers has served as the consulting engineer and General Manager for the Costa Mesa Sanitary District.

22. Mr. Hamers wrote Investigator Jenkins a technical report, dated October 9, 2005, that describes acts and omissions by Respondent that indicate violations of standards of practice for a professional engineer with regard to Respondent's preparation on a TPM 7940. The subject tentative parcel map showed errors on Respondent's part that not only demonstrated negligence, that is the failure by the subject licensee that shows a lack of due care that violates or breaches standards of care ordinarily exercised in similar instances by a duly licensed professional engineer, but also TPM 7940 reflected Respondent's incompetence, that is a work product that demonstrates the absence of requisite knowledge, training or experience of a licensee to adequately perform tasks or functions expected of licensed professional engineer.

Inaccuracy of Topographic Information in TMP 7940

23. Mr. Hamers concurred with the conclusions by the Crestmont Homeowners' Association's subcommittee chairperson, Mr. DeCredico, regarding the inaccuracy of the site topography depicted in TMP 7940, which was prepared by Respondent. In at least three instances the spot elevation shown on the subject tentative parcel map's site topography is inconsistent with the contour lines on each side of the spot elevation. In one instance spot elevation 787.10 is surrounded by contour lines of 784 and 786. Mr. Hamers persuasively noted that either the spot elevation is incorrect or the contour lines are incorrect because a spot elevation should always have an elevation between the elevations of the surrounding contour lines. Such inconsistency occurs in three distinct instances on TMP 7940.

Further, Mr. Hamers pointed out that spot elevations are more accurate than contour lines because spot elevations are the result of a direct reading of the survey instrument, while contour lines are produced in an office to fit the spot elevation. In three instances, Mr. Hamers agreed with Mr. DeCredico that the contour lines should have had higher elevations than depicted on TMP 7940 so as to match the spot elevations. Mr. Hamers adopted Mr. DeCredico's written observation that "[t]his means either more excavation will need to take place to accommodate the proposed building pads and shared access drive elevations or retaining walls will increase in height and the road will get steeper." Mr. Hamer found that Mr. DeCredico's determination was very important because the proposed slope of the road on TMP 7940 was depicted at the "maximum allowed" range and the depicted walls were large retaining walls that exceeded acceptable standards.

Mr. Hamers showed Respondent's negligence when TMP 7940, as filed on March 31, 2003, with the City of Oakland included a note that reads: "[s]urvey [d]ata is provided by previous property owners from a survey" by a land surveyor in January 1998. But Respondent's note does not specify whether the survey data included the topographic information with the errors described above (that is, the inconsistency between spot elevation and contour lines) or were perpetrated directly by Respondent's own errors. Nevertheless, Mr. Hamers persuasively noted that whether the source of the topography was from another

engineer or a land surveyor, or whether the topography was obtained by Respondent himself or by a person under his direction or employment, the errors should not have occurred. Respondent's errors were readily recognizable by competent civil engineer who is trained and authorized to effect land surveying work by simply inspecting the information on a county recorder's map. Moreover, Respondent in presenting TMP 7940 had a duty to correct, or to cause corrections, of the errors that may have existed in earlier prepared documents.

Inaccuracy of Retaining Wall Heights

24. In the subject tentative parcel map, an area is shown as "Section 'C' " that denotes how an access driveway would function in relation to the sloping ground. Respondent showed two retaining walls standing at eight feet heights and separated by three feet of clear space. In the configuration depicted in Section C of TMP 7940, Respondent advanced that the two eight-foot high walls would retain 17 feet of elevation based on the assumption that the three-foot clear space would occupy one additional foot of vertical elevation. Mr. Hamers⁷ established through detailed calculations and drawings at the hearing that Respondent's proposed vertical slope of greater than one foot in the contemplated three-foot clear area would be impracticable as such clear area would lack adequate drainage and the soil would not hardly be stabilized by planted vegetation.

Also Mr. Hamers' analysis established that TMP 7940 reflects a proposed road grade and contour line information at ten distinct points along the retain walls on the tentative parcel map, which necessarily leads to a conclusion that when constructed the vertical difference will be much higher than the 17 feet difference depicted in Section C of TMP 7940. When constructed the combined walls must retain hillside material having a height of between 19 feet and 23 feet at no less than seven of the 10 locations studied by Mr. Hamers and Mr. DeCredico's subcommittee. And Mr. Hamers observed that the height of the retained earth will become greater when the effect of a drainage gutter behind the upper retaining wall is considered. And further the height will be even higher when the contour lines are adjusted to fit the spot elevations.

Omission of On-Site Stair Design

25. Mr. Hamers pointed out that on TPM 7940 Respondent denoted a proposed five-foot wide stair easement. The stairs were proposed to allow prospective owners of two houses on the upper level (Parcel 3 and Parcel 4) of the project to cross through a lower property (Parcel 2) in order to access by foot their property from Crestmont Street. But the tentative parcel map failed to show that Respondent had engaged in any form of analysis of the stairs relative to retaining walls and the hillside slope. Mr. Hamers agreed with Mr. DeCredico's note that "stair does not work with grade or retaining walls. Considering 7.5

⁷ Mr. Hamers fully adopted the position expressed by the Crestmont Homeowners' Association representative, Mr. DeCredico, in a letter from August 2003, which represented a conclusion that, in fact, the retaining walls' heights when constructed would be higher than depicted on TMP 7940.

inch risers and 10 inch treads with 12 foot vertical rise and then a landing, the stair from driveway of Parcel 2 to the driveway of Parcel 4 takes five stairs runs that will require retaining walls from three feet to eight feet. The effect . . . is that the stair is underground and the drawings do not indicate any retaining walls at the sides of the stair.” Respondent did not note the determination of the need for a retaining wall in the vicinity of stair pathway on the tentative parcel map.

Soundness of Complainant’s Expert Witness’s Opinion Regarding Causes for Discipline

26. Mr. Hamers persuasively expressed a reliable expert opinion that Respondent’s acts and omission with regard to TPM 7940 reflected a departure from the standards expected of a civil engineer because Respondent failed in material respects. The subject tentative parcel map showed incompleteness in that there were incorrect notations regarding elevations depicted on the tentative parcel map. And TMP 7940 showed significant error in reflecting the nature and scope of retaining walls for the project. The tentative parcel map created by Respondent was defective or substandard as set out in the factual findings above.

b. Practicing Land Surveying Without Legal Authority

27. Mr. Hamers was persuasive in showing that Respondent engaged in the unlawful practice of land surveying.

First Respondent possesses a civil engineer registration that was issued after January 1, 1982. Business Code section 6731 specifically prescribes that a land surveyor with a license issued after that date must meet all prerequisites for licensure (that is, completing a range of educational courses, filing an application with the Board and passing a prescribed licensure examination) as a land surveyor. Respondent has not fulfilled any of the requirements to acquire licensure as a land surveyor.

Second, by placing the outside boundary for the subject parcels depicted in TPM 7940, Respondent made a statement regarding the accuracy of the measured survey data from which he took the boundary information. Even though Respondent extracted, lifted or copied the boundary information from a preexisting map, in accordance with the industry standard for land surveyors, or civil engineers who are authorized to perform land surveying, affixing a seal and signature on a tentative parcel map or final map constitutes a statement or representation by a licensed professional regarding the accuracy of maps or measured survey data. Such acts fall within the meaning of the Professional Land Surveyors’ Act (Bus. & Prof. Code, § 8700, et seq.), and in particular Business and Professions Code section 8726, subdivision (n).⁸

⁸ Subdivision (n) of Business and Professions Code section 8726 prescribes that a person practices land surveying when he “renders a statement regarding the accuracy of maps or measured survey data.”

Mr. Hamers persuasively showed that the Professional Engineers' Act (Bus. & Prof. Code, § 6700 et seq.) does not reflect a clause similar to Business and Professions Code section 8726, subdivision (n). Hence, only a land surveyor with a license, as well as necessary training and experience, or a duly qualified and licensed civil engineer, can retrieve a map from a county recorder's office and competently state with a degree of certainty and professional reliability whether such map may be "highly accurate," "some what accurate," or of doubtful accuracy. Only a land surveyor, or a pre-January 1982 civil engineer who possesses experience and training, can lawfully exert judgment for preparation of a tentative parcel map or a final map.

28. Mr. Hamers observed that Respondent's acts in preparing TMP 7940 fell within the meaning of the definition of "land surveying" as set out in Business and Professions Code section 8726⁹.

⁹ Business and Professions Code section 8726 states:

A person, including any person employed by the state or by a city, county, or city and county within the state, practices land surveying within the meaning of this chapter who, either in a public or private capacity, does or offers to do any one or more of the following:

(a) Locates, relocates, establishes, reestablishes, or retraces the alignment or elevation for any of the fixed works embraced within the practice of civil engineering, as described in Section 6731.

(b) Determines the configuration or contour of the earth's surface, or the position of fixed objects above, on, or below the surface of the earth by applying the principles of mathematics or photogrammetry.

(c) Locates, relocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land, right-of-way, easement, or alignment of those lines or boundaries.

(d) Makes any survey for the subdivision or resubdivision of any tract of land. For the purposes of this subdivision, the term "subdivision" or "resubdivision" shall be defined to include, but not be limited to, the definition in the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code) or the Subdivided Lands Law (Chapter 1 (commencing with Section 11000) of Part 2 of Division 4 of this code).

(e) By the use of the principles of land surveying determines the position for any monument or reference point which marks a property line, boundary, or corner, or sets, resets, or replaces any monument or reference point.

(f) Geodetic or cadastral surveying. As used in this chapter, geodetic surveying means performing surveys, in which account is taken of the figure and size of the earth to determine or predetermine the horizontal or vertical positions of fixed objects thereon or related thereto, geodetic control points, monuments, or stations for use in the practice of land surveying or for stating the position of fixed objects, geodetic control points, monuments, or stations by California Coordinate System coordinates.

29. Mr. Hamers rendered an observation that several municipalities, such as the City of Oakland and the City of Costa Mesa, have ordinances regarding the ability of civil engineers, who were licensed after January 1, 1982, to prepare tentative parcel maps, and that such ordinances may be inconsistent with the license practice acts as well as the Board's regulations for land surveyors and civil engineers.

But such municipalities' local rules, along with improper local government implementation of the same, cannot be used as a shield against disciplinary action, as in the instances of Respondent, when the Board's personnel concludes there exists reasonable cause to initiate the prosecution of acts suggesting the unlawful practice of land surveying by an unqualified civil engineer.

Respondent showed negligence when he unduly relied on a dubious notion that a local entity, such as the City of Oakland, through its local law, could authorize him to perform land surveying work when the Board had not licensed him to act as a land surveyor.

c. Unprofessional Conduct

30. Mr. Hamers was persuasive that his experience and training has shown that the law as set out under Business and Professions Code section 6731, along with California Code

(g)Determines the information shown or to be shown on any map or document prepared or furnished in connection with any one or more of the functions described in subdivisions (a), (b), (c), (d), (e), and (f).

(h)Indicates, in any capacity or in any manner, by the use of the title "land surveyor" or by any other title or by any other representation that he or she practices or offers to practice land surveying in any of its branches.

(i)Procures or offers to procure land surveying work for himself, herself, or others.

(j)Manages, or conducts as manager, proprietor, or agent, any place of business from which land surveying work is solicited, performed, or practiced.

(k)Coordinates the work of professional, technical, or special consultants in connection with the activities authorized by this chapter.

(l)Determines the information shown or to be shown within the description of any deed, trust deed, or other title document prepared for the purpose of describing the limit of real property in connection with any one or more of the functions described in subdivisions (a) to (f), inclusive.

(m)Creates, prepares, or modifies electronic or computerized data in the performance of the activities described in subdivisions (a), (b), (c), (d), (e), (f), (k), and (l).

(n)Renders a statement regarding the accuracy of maps or measured survey data.

....

of Regulations, title 16, section 415,¹⁰ has a very practical application. Complainant's expert witness dispelled Respondent's use of the notion of "grandfathered" civil engineer licenses that were issued before January 1, 1982, so as to permit civil engineer licensees before that date to perform land surveying services without making application for that license and passing the Board's examination for the land surveyor license. Mr. Hamers pointed out that even a civil engineer licensed before January 1, 1982, must meet professional standards and demonstrate that by training, experience and knowledge that such civil engineer can competently engage in the work of a land surveyor.

The Code of Professional Conduct for professional engineers requires that such licensee must work only within the area of his or her expertise. But in this matter, Respondent showed that he lacked expertise, or even competence, in the areas of grading design, which includes topography, wall elevations, and cross section depictions on drawings. Respondent's substandard work product, as incompetently and negligently depicted in the preparation of TPM 7940, demonstrated his unprofessional conduct.

Respondent's unprofessional conduct was demonstrated through not only Respondent's negligence and incompetence but also by reason of his act of practicing land surveying without legal authority.

Respondent's Background

31. Respondent attended the University of Pengasinan in the Philippines, where he earned a Bachelor of Civil Engineers degree. He immigrated to the United States in 1968.

Respondent first acquired licensed status as a civil engineer in 1972.

Beginning in 1972, Respondent secured employed with various civil engineering firms around the San Francisco Bay Area. In 1983, Respondent began his own civil engineering practice, which enabled him to engage in such work as subdivision design, land development, and topography.

Over the past twenty years, Respondent has prepared about 20 tentative parcel maps for subdivision projects. And since 1995, he has prepared three tentative parcel maps for property located within the City of Oakland.

¹⁰ California Code of Regulations, title 16, section 415 is captioned "Practice with Area of Competence," and it provides, in pertinent part:

A professional engineer or land surveyor licensed under the Code shall practice and perform engineering or land surveying work only in the field or fields in which he/she is by education and/or experience fully competent and proficient.

Matters in Aggravation

32. On May 17, 1995, Respondent entered into a stipulation that settled the Board's accusation (Case No. 573-A), which sought disciplinary action against Respondent's civil engineer license. (The accusation set out causes for discipline grounded in negligence, incompetence and unprofessional conduct by Respondent regarding the poor preparation of five purposed final maps for a 20-unit condominium development in the City of Hayward. The accusation alleged that the maps contained errors and material omissions.) To avoid prosecution on the five causes for discipline set out in the 1995 accusation, Respondent surrendered Civil Engineer Registration No. C 23334. On the effective date of the decision that accepted the surrendered registration, the Board issued Respondent a new civil engineer registration that specifically noted that Respondent's altered licensure did not include an authorization for him to perform land surveying.

The stipulation, which resulted in the surrender of the originally issued civil engineer registration, noted Respondent's understanding of the limitation of the then newly issued license that "should he wish to perform land surveying in the future, he will be required to meet all requirements for licensure as a land surveyor, including but not limited to filing an application, meeting all pertinent educational requirements and taking and passing the pertinent licensure examinations." Yet, Respondent has engaged in land surveying activity over the past decade before Complainant brought the instant Accusation against Respondent.

33. Respondent showed no remorse, concern or acknowledgement for the unlawful and unprofessional conduct exhibited by him in engaging in unlicensed activity with regard to the creation of TMP 7940. In fact, Respondent embraced a wholly unreasonable interpretation of the law that pertains to the preparation of a tentative parcel map. For example, Respondent, through his counsel, asserted "that a parcel map [does] not contain grading, retaining walls, or stairs, and that the depiction of these features on the [tentative parcel map] was purely conceptual and not intended to be, nor could they have been sufficiently detailed for a constructions permit. The City of Oakland sometimes requires that the developer . . . show such elements as retaining walls and stairs on the tentative parcel map to demonstrate the feasibility of the subdivision." But this position runs counter to generally accepted practice in the industry. As Complainant's expert witness credibly explained, a properly prepared tentative map will enable a government agency (city or county) to compare its standards, requirements and maximum allowable conditions with the parameters of the proposed development. And a properly prepared tentative parcel map will allow the developer to appreciate the financial risks that may reasonably be expected to result from construction of the project. In this matter, Respondent's substandard TMP 7940 erroneously set out calculations for retaining walls at a 17-foot height, when in fact the height of the walls was likely to reach 23 feet. And Respondent erred in failing to analyze the placement of stairs from the upper level to the lower section of the subdivision as having an affect on a retaining wall, as well as the driveway slope that could well exceed the slope allowed by the City of Oakland.

34. Respondent advanced a groundless defense that sprang from three interrelating faulty concepts, namely that: (i) "the preparation of the TPM from complied, recorded records does not involve 'surveying' as defined in Business and Professions Code section 8726"; (ii) "there was no act constituting surveying performed by [Respondent] in connection with the preparation of TPM 7940"; and, (iii) "the presentation of a TPM to the City, which contains boundary information obtained from existing recorded documents, does not constitute an act of surveying under section 8726." Respondent's unpersuasive conception is that when no physical act of surveying of the property is involved in a project, "surveying" does not occur. But as Complainant's expert witness demonstrated, the exercise of professional judgment regarding boundary information can only be accomplished by a licensee qualified to perform under Business and Professions Code section 8726, subdivisions (c) and (g).

Lack of Evidence in Mitigation

35. Respondent offered no evidence to explain the basis for his acts and omissions that contributed to the unprofessional conduct described in the factual findings above. Respondent neither called any witness nor offered any document to describe his reputation in the community of professional engineers. The record lacks any evidence regarding the level of satisfaction experienced by his clients over the years.

Lack of Rehabilitation Evidence

36. Respondent provided no evidence that suggest that he has taken steps to avoid the negligence, incompetence and unprofessional conduct proven by Complainant's comprehensive investigation and prosecution. Rather throughout the proceeding, Respondent sought to minimize the extent of his unprofessional conduct and to make excuses for the misconduct established at the hearing of this matter.

Complainant's Request for Recovery of Costs of Investigation and Prosecution and Respondent's Objection to Imposition of Costs

37. Complainant requests that Respondent be ordered to pay the Board the costs of prosecution under Business and Professions Code section 125.3. In support of the request for cost recovery, Complainant offers a declaration, dated September 15, 2009, by Nancy A. Eissler, Enforcement Program Manager of the Board, as well as the declaration, dated September 17, 2009, by Leslie E. Brast, Deputy Attorney General. The declarations state that the Board has incurred the following costs in connection with the investigation and enforcement of Complainant's accusation as follows:

Deputy Attorney General

Fiscal Year	Hourly Rate	Hours of Work	Amount of Cost
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Various Deputy Attorneys General and Supervising Attorneys General

2008/09	\$158	27.50	\$4,675.00
2009/10	\$170	38.75	\$6,122.50
2009/10 ¹¹	\$170	8.0	\$1,360.00

Deputy Attorney General's Costs.....	\$7,623.50
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Paralegal

Fiscal Year	Hourly Rate	Hours of Work	Amount of Cost
2008/09	\$101	2.25	\$227.25

Paralegal's Costs.....	\$227.75
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Subtotal of Prosecution Costs	\$12,385.25
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Complainant's Technical Expert's Statement of Services

Case Review and Preparation of Written Report (July to October 2005)
24 Hours at \$75 per hours

Subtotal of Investigative Costs	\$1,800.00
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Total Costs of Investigation and Prosecution	\$14,185.25
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¹¹ Time expended by Deputy Attorney General Brast between September 10, 2009, when the Department of Justice's billing summary was originally presented to Complainant for preparation of the original Certification of Costs of Investigation and Prosecution, and September 14, 2008, that is, the date before the beginning of the hearing in this matter.

38. The declarations by Enforcement Program Manager Eissler and Deputy Attorney General Brast fairly present such information by which the reasonableness of the costs may be determined for the Complainant's investigation and prosecution activities before September 15, 2009. The declarations and their attachments set forth a general, yet clear, description of the tasks performed, the time spent in attending to such tasks, and the methods of tabulating the hours involved in calculating the costs, as required by in California Code of Regulations, title 1, section 1042.

The comprehensive nature of the declarations and supporting documents for the Certification of Costs establish that the Board is entitled to the full measure of its costs of investigation and enforcement. The facts developed at the hearing indicate that the Deputy Attorney General devoted a reasonable amount of time, which is found to have been of a prudent nature, to the prosecution of this matter.

Respondent's objections to the reasonableness of the costs were without merit. The arguments set out in the letter, dated September 25, 2009, by Respondent's counsel were purposefully misleading and unduly disparaging of the exertion, attention to detail and lawyering skill of the prosecuting deputy attorney general. The time expended by personnel of the Department of Justice was well within reason and was justified and necessary to establish the extent of Respondent's negligence, incompetence, and unprofessional conduct.

39. Respondent did not advance a meritorious defense in the exercise of his right to a hearing in this matter. Respondent did not show that any component or allegation raised in the litigation by the deputy attorney general was not prosecuted and established by clear and convincing evidence. Also, Respondent cannot be seen, under the facts set out above, to have committed slight or inconsequential misconduct in the context of the accusation. And, Respondent did not raise a "colorable challenge" to the accusation's paramount cause for discipline, namely Respondent's unprofessional conduct, as manifested by negligence, incompetence and unlawful practice of land surveying.

The immediate foregoing factors do not indicate that the imposition upon Respondent of the full costs of investigation and prosecution will unfairly penalize Respondent.

A substantial basis does not exist to warrant a reduction of the assessment against Respondent for the costs of prosecution incurred by Complainant.

At the hearing of this matter, Respondent offered no evidence that he would be unable to pay the costs of prosecution and investigation by way of a schedule of payments that would enable him to make installments over the course of a term of probation.

40. Respondent failed to provide adequate, competent evidence that Complainant's certification of costs of investigation and prosecution are unreasonable. Accordingly, as of the date of the hearing, the reasonable amount of cost owed by Respondent to the Department of Consumer Affairs, on behalf of the Board, is \$14,185.25.

Analysis

The comprehensive and learned opinions and observations of Complainant's expert witness lead to the following analysis that impacts the license disciplinary action against Respondent.

A tentative parcel map is a proposal to a government agency, namely city or county, for the creation of a subdivision. A condition of approval regarding a tentative parcel map is that such drawing will lead to the recording of a final map (commonly referred to as a final tract map or tract map) or a parcel map (commonly referred to as a final parcel map)

The licensed preparer of a tentative parcel map makes representations upon which the agency, or its planning commission, will take action. A usual finding by the agency is that the resultant lot, lots, parcel or parcels¹² meet the lot or parcel size requirements as specified by the agency. After a tentative map is approved and all conditions of approval are satisfied, a final map or parcel map is submitted for signature by the agency's engineer. The statement by the city engineer or county engineer on the map includes language that the final map or parcel map is substantially in accordance with the approved tentative parcel map. In the instance when a subdivision developer asks a city engineer or county engineer to sign a final map or parcel map that deviates from the conditions or standards upon which the agency conditionally approved a tentative map, the engineer is compelled to deem the map as not being in substantial conformance. In practice a licensed professional, either an authorized civil engineer or a land surveyor, who prepares a tentative parcel map, is assuring that the resultant final map or parcel map will satisfy the requirements of the agency that approved the tentative map.

Business and Professions Code section 8726 defines, in part, land surveying practice as, "[l]ocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land . . . or alignment of those lines. (Bus. & Prof. Code., § 8726, subd. (c).), and, "[d]etermines the information shown or to be shown on any map or document prepared or furnished in connection with any one or more of the functions described in subdivisions (a), (b), (c), (d), (e), and (f)."

Government Code section 66425.5, subdivision (a), establishes that " '[t]entative map' refers to a map made for the purpose of showing the design and improvement of a proposed subdivision and the existing conditions in and around it and need not be based upon an accurate or detailed final survey of the property."

Together subdivisions (c) and (g) of section 8726 of the Business and Professions Code establish that only a licensed land surveyor or a civil engineer licensed and qualified before January 1, 1982, is qualified to execute property line surveys and to prepare documents that reflect survey information. Government Code section 66424.5, subdivision

¹² Lots are on tract maps, while parcel are on parcel maps.

(a), prescribes that the boundary information shown on a tentative parcel map need not be based on an accurate or detailed final survey. But, where a detailed survey is performed in the process of preparing a tentative map, the licensed preparer of such a tentative map represents that the information depicted in the document is accurate to a degree to meet the agency requirements when the Final Map or Parcel Map is approved. The professional judgment, experience and competency to make the representations upon which an agency must depend on a licensee qualified under Business and Professions Code section 8726, subdivisions (c) and (g), only rests with a land surveyor or qualified civil engineer licensed and regulated by the State of California's Board for Professional Engineers and Land Surveyors .

Descriptions of real estate in a tentative parcel map vary from portions of land that may have been created by complicated deeds to the land that may be shown on previously recorded maps that date back decades. On a previously recorded lot an elementary review of a map may give an impression that outside boundary lines have been established. But it is not necessarily very simple to examine a previously recorded map to assure with certainty that a tentative parcel map for a contemplated subdivision will satisfy an agency's minimum standards that anticipate a resultant Final Map or Parcel Map.

The law developed two decades ago requires that civil engineers licensed after January 1, 1982, must be equipped with educational pursuits and experience so as to make the professional judgments necessary to record final maps, parcel maps or record of surveys. Such professional judgment by a civil engineer, qualified in modern land surveying techniques and practices are contemplated by the law to assure that tentative parcel maps are accurate to the extent that a Final Map or Parcel map will meet an agency's requirements. A developer of a subdivision has a significant financial stake in the representations shown on a tentative map and a government agency must expend substantial effort to review and approve the work of a civil engineer who seeks to delve into the realm of land surveying regarding the contents of a tentative map. Accordingly, only a land surveyor or a civil engineer with qualifications or licensed status (that is, pre-January 1, 1982) may lawfully be vested with the responsible charge for ascertaining and recording on maps boundaries and lot line information as shown on tentative parcel maps.

Respondent's theory of his defense turns the foregoing description into meaningless words in the state law. Moreover his argument embraces the proverbial notion of "mixing apples with oranges."

Respondent's unrelenting reliance at the hearing of this matter on Government Code section 66411¹³ has no merit. That statutory provision falls within the law pertaining to

¹³ Government Code section 66411 prescribes:

Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. Each local agency shall, by ordinance, regulate and control the initial design and improvement of common interest developments as defined in Section 1351 of the Civil Code and subdivisions for which this division requires a

subdivision creation. It must be read to mean that cities, rather than state government, control the creative schemes, planning and approval of adding portions of a city's appearance, scope and functions through new subdivision formulation. Accordingly, for purposes of subdivision creation, it is a city that regulates and controls issues such as areas permitted for construction, the types of structure suited for a proposed subdivision, the grading of land, or the placement of vegetation, as well as those matters that are to be included in tentative parcel maps.

Government Code section 66411 has nothing to do with a city, or a county for unincorporated areas, acquiring authority to grant license status, or to revoke or suspend licenses, of civil engineers or other persons to prepare tentative parcel maps or final maps that are used in advancing a subdivision project.

Respondent's defense theory in this matter is rejected in its entirety.

LEGAL CONCLUSIONS

Rulings Regarding Respondent's Motions

a. Doctrine of Laches

Respondent argues that Complainant unduly delayed commencing steps to prosecute this matter. And that such delay damaged his ability to defend his interests. The argument raises the doctrine of laches.

The doctrine of laches applies in administrative proceedings when the challenged administrative action has been unreasonably delayed. Such unreasonable delay, however, must result in prejudice to the party against whom the action is taken. Because of the relationship between prejudice and delay, circumstances that give rise to laches vary widely depending upon their interplay in the case at issue. (*Hope Rehabilitation Services v. Department of Rehabilitation* (1989) 212 Cal.App.3d 938.) The doctrine is designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witness have disappeared.

tentative and final or parcel map. In the development, adoption, revision, and application of such ordinance, the local agency shall comply with the provisions of Section 65913.2. The ordinance shall specifically provide for proper grading and erosion control, including the prevention of sedimentation or damage to offsite property. Each local agency may by ordinance regulate and control other subdivisions, provided that the regulations are not more restrictive than the regulations for those subdivisions for which a tentative and final or parcel map are required by this division, and provided further that the regulations shall not be applied to short-term leases (terminable by either party on not more than 30 days' notice in writing) of a portion of the operating right-of-way of a railroad corporation as defined by Section 230 of the Public Utilities Code unless a showing is made in individual cases, under substantial evidence, that public policy necessitates the application of the regulations to those short-term leases in individual cases.

The policy also guards against other injuries caused by change of position during a delay. Delay alone ordinarily does not constitute laches, as lapse of time is separately embodied in statutes of limitations. What makes the delay unreasonable in the case of laches is that it results in prejudice.¹⁴ (*Lam v. Bureau of Security & Investigative Services* (1995) 34 Cal.App.4th 29.) If no detriment has been suffered by the party pleading laches, the plea is in vain. (*Wells Fargo v. Guerard* (1997) 53 Cal.App.4th 596, 632.)

The record shows that in late August 2003 Board personnel became aware of the concern of the Crestmont Homeowners' Association that the subject tentative parcel map, as crafted by Respondent, reflected errors, miscalculation or nonexistent calculations. On September 18, 2003, the Board's Enforcement Analyst notified Respondent by letter that a complaint by the public had been filed against him and that an investigation would commence, and that Respondent should contact the Board by October 18, 2003. On October 16, 2003, Respondent sent the Board's investigator a letter that sought a delay for his response, which was granted. On November 13, 2003, Respondent's attorney, Dennis Woodruff, Esq., wrote the Board and expressed, that among other things, "before [Respondent] can respond he will need to see the complaint filed against him." The Board's personnel asked Respondent to prepare a writing to officially inform the Board that Mr. Woodruff was, in fact, his attorney of record and that the Board could communicate with him. Not until January 12, 2004, did Respondent send the Board a letter that notified the Board that Mr. Woodruff was authorized "to discuss the case" with Board personnel. Neither Respondent nor his attorney was prompt in dispatching copies of the tentative parcel map. The Board in 2005 retained Robin B. Hamers as an industry expert, who studied that matter and wrote in October 2005 a report on his findings and determinations. The matter was referred to the Attorney General's Office in mid-2008. On December 29, 2008, Complainant signed the Accusation against Respondent that resulted in the hearing in this matter.

The time that elapsed between the date the Board received the complaint from the affected Homeowners' Association and the date of the Accusation was about five years, four months. Such span of time was not extraordinary, especially in light of the chronic state budgetary difficulties. More importantly, Respondent offered no evidence that the period of time for the Board to investigate this matter before the filing of the accusation in Case No. 825-A caused him irreparable harm in perfecting a defense, especially when Respondent had the benefit of legal counsel who was the developer of the subject subdivision and who has been intimately associated with Respondent for several years..

¹⁴ See also, *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 581 [where two year delay was not within doctrine]; *Dresser v. Board of Medical Quality Assurance* (1982) 130 Cal.App.3d 506, 511-514 [acts occurring five years and four years occurred before discipline initiated was not within the doctrine]; *Brown v. State Personnel Board* (1985) 166 Cal.App.3d 1156, 1159-1161 [No laches where four years elapsed between the date of a professor's sexual overtures towards female students and the date the university filed charges of misconduct]; *Rudolph v. Athletic Commission* (1960) 177 Cal.App.2d 1, 21-22 [No laches where various acts occurred from five year to 14 years before disciplinary action.]

No merit exists regarding Respondent's assertion that he has an entitlement for application of the equitable doctrine of laches in this matter. His motion for an order to mitigate the penalty under a prospective order has insubstantial support through the facts established at the hearing of this matter. The motion is denied.

b. Motion for Dismissal and Motion for Nonsuit

Respondent argued, through a 12-page "Trial Brief," for dismissal of Complainant's Accusation on the ground that the Board lacked jurisdiction to prosecute the matter because under Government Code section 66411, et seq., which comprises the Subdivision Map Act, the Legislature had delegated to cities, such as Oakland, the exclusive authority to control subdivision design. And that the City of Oakland, through Municipal Code section 16.08.10, had specified that tentative maps "shall be prepared by a licensed land surveyor or a registered civil engineer." Accordingly, Respondent averred the Board's interpretation of the Land Surveying Act did not permit the Board to discipline Respondent on the ground that he unlawfully practiced land surveying without legal authority. Based on the weight of evidence presented at the hearing in this matter as synthesized in the factual findings above and as set out in the conclusions of law below, Respondent's motion is denied.

Respondent argued that because Complainant failed to present clear and convincing evidence in support of the causes for discipline in the Accusation, Respondent is entitled to dismissal by way of nonsuit. But the weight of evidence contradicts Respondent's animated arguments. Above all, Respondent's motion for nonsuit is not contemplated under the Administrative Procedure Act (Gov. Code, § 11500 et seq.) The motion for nonsuit is denied.

The Standard of Proof

1. The standard of proof in an administrative disciplinary action that seeks the suspension or revocation of a real estate professional's license is "clear and convincing evidence to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.)

"Clear and convincing evidence" means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered. "Clear and convincing evidence" is a higher standard of proof than proof by "a preponderance of the evidence." (*CACI*¹⁵ 201) "Clear and convincing evidence" requires a finding of high probability for the propositions advanced in an accusation against a targeted respondent licensee. It must be so clear as to leave no substantial doubt and to command the unhesitating assent of every reasonable mind. (*In re Michael G.* (1998) 63 Cal.App.4th 700.) And, the standard of proof known as clear and convincing evidence is required where particularly important individual interests or rights are at stake. (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487.)

¹⁵ Judicial Council of California, Civil Jury Instructions.

Complainant established by clear and convincing evidence the foregoing factual findings and the legal conclusions below upon which disciplinary action is imposed upon the respondent herein.

Causes for Discipline

2. Business and Professions Code section 6775, subdivision (c), provides that the Board for Professional Engineers and Land Surveyors may reprove, suspend for a period not to exceed two years, or revoke the registration of any professional engineer “who has been found guilty by the board of negligence or incompetence in his or her practice. . . .”

California Code of Regulations, title 16, section 404, subdivision (n), defines “incompetence” as:

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

California Code of Regulations, title 16, section 404, subdivision (w), defines “negligence” as

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

Cause exists for discipline under Business and Professions Code section 6775, subdivision (c), by reason of the matter set out in Factual Findings 16, 18, 22 through 26, and 29.

3. Business and Professions Code section 8725 establishes

Any person practicing, or offering to practice, land surveying in this state shall submit evidence that he or she is qualified to practice and shall be licensed under this chapter.

It is unlawful for any person to practice, offer to practice, or represent himself or herself, as a land surveyor in this

state, or to set, reset, replace, or remove any survey monument on land in which he or she has no legal interest, unless he or she has been licensed or specifically exempted from licensing under this chapter.

Business and Professions Code section 8780, subdivision (d), sets forth that the Board may reprove, suspend for a period not to exceed two years, or revoke the license or certificate of any registered civil engineer when such person is determined to be culpable of “[a]ny violation of any provision of this chapter or of any other law relating to or involving the practice of land surveying.”

California Code of Regulation, title 16, section 415 prescribes, in pertinent part, that “a professional engineer . . . shall practice and perform engineering . . . work only in the field or fields in which he . . . is by education and/or experience fully competent and proficient.”

Cause exists for discipline under Code sections 8725, 8726,¹⁶ 8780, subdivision (d), and California Code of Regulation, title 16, section 415, by reason of the matter set out in Factual Findings 15, 22, and 27 through 29.

4. Business and Professions Code section 6775, subdivision (g), provides that the Board for Professional Engineers and Land Surveyors may reprove, suspend for a period not to exceed two years, or revoke a certificate of any professional engineer “who in the course of the practice of professional engineering has been found guilty by the board of having violated a rule or regulation of unprofessional conduct adopted by the board.

Business and Professions Code section 6775, subdivision (h), provides that the Board for Professional Engineers and Land Surveyors may reprove, suspend for a period not to exceed two years, or revoke a certificate of any professional engineer “who violates any provision of this chapter.”

California Code of Regulations, title 16, section 475, subdivision (a), in prescribing a Code of Professional Conduct, prescribes:

To protect and safeguard the health, safety, welfare, and property of the public, every person who is licensed by the Board as a professional engineer, including licensees employed in any manner by a governmental entity or in private practice, shall comply with this Code of Professional Conduct. A violation of this Code of Professional Conduct in the practice of professional engineering constitutes unprofessional conduct and is grounds for disciplinary action pursuant to Section 6775 of the Code. This Code of Professional Conduct shall be used for the sole purpose of

¹⁶ Business and Professions Code section 8726 is set out, in pertinent part, at footnote 8 on pages 13 and 14, above.

investigating complaints and making findings thereon under Section 6775 of the Code.

(a) Compliance with Laws Applicable to a Project:

A licensee shall provide professional services for a project in a manner that is consistent with the laws, codes, ordinances, rules, and regulations applicable to that project. . . .

Cause exists for discipline under Code section 6775, subdivisions (g) and (h), as those statutory provisions interact with California Code of Regulations, title 16, section 475, subdivision (a), by reason of the matter set out in Factual Findings 15, 16, 18, 22 through 30, and 32 through 34.

5. Respondent advanced a theory of defense that turned upon the notion that he did not engage in an unlawful practice of land surveying without legal authority because certain personnel with the City of Oakland's Engineering Office expressed a view that preparation of tentative parcel maps could be performed by a civil engineer, who secured a license after January 1, 1982, and who had not been licensed by the Board to engage in land surveying. Respondent propounds that such approval by a municipality precludes the Board from initiating administrative disciplinary action for unprofessional conduct associated with preparation of a tentative parcel map. Respondent's arguments have no merit. The ordinance of the City of Oakland regarding tentative parcel map preparation does not govern the practice of professional engineering, or practice of land surveying, in the State of California. Moreover, engineers employed by the City of Oakland are not charged with an obligation or responsibility to protect the public welfare, safety and welfare from the acts or omissions of incompetent, negligent or dishonest licensed civil engineers. Rather it is the mission of the Board to protect the public through the provisions of the Professional Engineers Act (Gov. Code, § 6700 et seq.)

6. Although Respondent's grave errors and obvious lack of skill as a land surveyor might warrant revocation, probation of his license status as a civil engineer would be just in this matter. First, Complainant offered no complaint from an actual client regarding any lost incurred through Respondent's unprofessional conduct. Second, Respondent's decades of work as a civil engineer does not indicate that revocation of that registration would be just.

Costs of Investigation and Prosecution

7. Business and Professions Code section 125.3 prescribes that a "licentiate found to have committed a violation or violations of the licensing act" may be directed to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

California Code of Regulations, title 1, section 1042, subdivision (2), sets forth "a certificate or affidavit in support of costs incurred by the agency for services provided by regular agency employees should include sufficient information by which the ALJ can

determine the costs incurred in connection with the matter and the reasonableness of such costs, for example, a general description of tasks performed, the time spent on such tasks, and the method of calculation the cost for such services.”

Respondent’s motion to strike complainant’s petition for an award of costs is denied.

The California Supreme Court’s reasoning on the obligation of a licensing agency to fairly and conscientiously impose costs in administrative adjudication as articulated in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45-46, is persuasive and should be considered in this matter. Scrutiny of certain factors, which pertain to the Board’s exercise of discretion to analyze or examine factors that might mitigate or reduce costs of prosecution upon a licensee found to have engaged in unprofessional conduct, are set forth in Factual Finding 39.

By reason of Factual Findings 37 and 38, the reasonable costs of prosecution as set forth in Factual Finding 40 amount to \$14,185.25

ORDER

Civil Engineering Registration No. 54787 issued to Respondent Rodolfo Ventura Dimalanta is revoked, by reason of Legal Conclusions 2, 3, and 4. The revocation of licensure shall be stayed for five (5) years, during which time Respondent’s license shall be placed on probation subject to the following terms and conditions:

1. Respondent shall obey all federal, state, and local laws. He will fully comply with state law governing the practice of professional engineering and professional land surveying in California.
2. From the effective date of the decision, Respondent shall submit and cause to be submitted special reports as required by the Board.
3. Within 45 days of the effective date of the decision, Respondent shall provide the Board with evidence that he has provided all persons or entities with whom he has a contractual or employment relationship in the area of professional engineering and land surveying with a copy of the decision and order of the Board. Within 30 days of the effective date of the decision, Respondent shall provide the Board with the name and business address of each person or entity required to be so notified. During the period of probation, Respondent may be required to provide the same notification of each new person or entity with whom he has a contractual or employment relationship provided that the relationship is in the area of practice of professional engineering and/or land surveying in which the violation occurred and he shall report to the Board the name and address of each person or entity so notified.

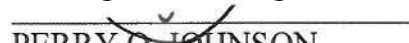
4. During the period of probation, Respondent may practice professional engineering only under the supervision of a professional engineer licensed in the same branch as Respondent. This person or persons shall be approved in advance by the Board or its designee. Such supervising professional engineer shall initial every stamped
5. Within 60 days of the effective date of the decision, Respondent shall successfully complete and pass the California Laws and Board Rules examination, as administered by the Board.
6. Within one year of the effective date of the decision, Respondent shall successfully complete and pass the California special Civil Engineer's surveying examination.
7. Within two years of the effective date of the decision, Respondent shall successfully complete and pass a course in professionalism and ethics, approved in advance by the Board or its designee. Respondent shall provide the Board with an official transcript as proof of successful completion within 60 days of the completion date of the course.
8. Within two years of the effective date of the decision, Respondent shall successfully complete and pass, with a grade of "C" or better, two college-level courses, approved in advance by the Board or its designee. Respondent shall provide the Board with an official transcript as proof of successful completion within 60 days of the completion date of each course.
9. Respondent shall successfully complete and pass, with a grade of "C" or better, a minimum of one and a maximum of three college-level courses, approved in advance by the Board or its designee. Such courses shall be specifically related to the area of violation. For purposes of this subdivision, "college-level course" shall mean a course offered by a community college or a four-year university of three semester units or the equivalent; "college-level course" does not include seminars. The probationary condition shall include a time period in which the course(s) shall be successfully completed which time period shall be at least 365 days less than the time period ordered for the period of probation.
10. The period of probation shall not run during the time Respondent is residing or practicing outside the jurisdiction of California. If, during probation, Respondent moves out of the jurisdiction of California to reside or practice elsewhere, Respondent is required to immediately notify the Board in writing of the date of departure, and the date of return, if any.
11. Respondent is hereby ordered to reimburse the Board the amount of \$14,185.25 within 90 days from the effective date of this decision for its

investigative and prosecutorial costs up to the date of the hearing. Failure to reimburse the Board's cost of its investigation and prosecution shall constitute a violation of the probationary order, unless the Board or its Executive Officer agrees in writing to payment by an installment plan because of financial hardship. However, full payment must be received no later than two years prior to the scheduled termination of probation.

12. If Respondent violates probation in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may revoke his probation and reinstate the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent, or if the matter has been submitted to the Office of the Attorney General for the filing of such, during probation the Board shall have continuing jurisdiction until all matters are final, and the period of probation shall be extended until all matters are final.
13. Upon successful completion of probation, including the fulfillment of all conditions, Respondent's engineering registration will be unconditionally restored.

DATED: November 23, 2009

Original Signed


PERRY O. JOHNSON

Administrative Law Judge
Office of Administrative Hearings

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6 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:

Case No. 825-A

11 **RODOLFO VENTURA DIMALANTA**
17 Summitridge Court
12 Pittsburg, CA 94565

A C C U S A T I O N

13 Civil Engineer License No. C 54787

14 Respondent.

15
16 Complainant alleges:

17 **PARTIES**

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

21 2. On or about August 14, 1995, the Board issued Civil Engineer License
22 Number C 54787 to Rodolfo Ventura Dimalanta (Respondent). The license was in full force and
23 effect at all times relevant to the charges brought herein and will expire on December 31, 2009,
24 unless renewed.

25 **JURISDICTION**

26 3. This Accusation is brought before the Board under the authority of the
27 following laws. All section references are to the Business and Professions Code (Code) unless
28 otherwise indicated.

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

5 STATUTORY AND REGULATORY PROVISIONS

6 5. Code section 6775 states, in pertinent part, that:

7 “[T]he board may reprove, suspend for a period not to exceed two years, or
8 revoke the certificate of any professional engineer registered under this chapter:

9 [¶] . . . [¶]

10 “(c) Who has been found guilty by the board of negligence or incompetence in his
11 or her practice.

12 [¶] . . . [¶]

13 “(g) Who in the course of the practice of professional engineering has been found
14 guilty by the board of having violated a rule or regulation of unprofessional conduct adopted by
15 the board.

16 “(h) Who violates any provision of this chapter.”

17 6. California Code of Regulations, title 16, section 404, subdivision (n),
18 defines “incompetence” as used in Code sections 6775 and 8780 as “the lack of knowledge or
19 ability in discharging professional obligations as a professional engineer or land surveyor.”

20 7. California Code of Regulations, title 16, section 404, subsection (w),
21 defines “negligence” as used in Code sections 6775 and 8780 as “the failure of a licensee, in the
22 practice of professional engineering or land surveying, to use the care ordinarily exercised in like
23 cases by duly licensed professional engineers and land surveyors in good standing.”

24 8. California Code of Regulations, title 16, section 475, states in pertinent
25 part:

26 “To protect and safeguard the health, safety, welfare, and property of the public,
27 every person who is licensed by the Board as a professional engineer, including licensees
28 employed in any manner by a governmental entity or in private practice, shall comply with this

1 Code of Professional Conduct. A violation of this Code of Professional Conduct in the practice
2 of professional engineering constitutes unprofessional conduct and is grounds for disciplinary
3 action pursuant to Section 6775 of the Code. This Code of Professional Conduct shall be used for
4 the sole purpose of investigating complaints and making findings thereon under Section 6775 of
5 the Code.

6 “(a) Compliance with Laws Applicable to a Project:

7 “A licensee shall provide professional services for a project in a manner that is
8 consistent with the laws, codes, ordinances, rules, and regulations applicable to that project. A
9 licensee may obtain and rely upon the advice of other professionals (e.g., architects, attorneys,
10 professional engineers, professional land surveyors, and other qualified persons) as to the intent
11 and meaning of such laws, codes, and regulations.”

12 9. California Code of Regulations, title 16, section 415, provides in pertinent
13 part that “[a] professional engineer or land surveyor licensed under the Code shall practice and
14 perform engineering or land surveying work only in the field or fields in which he/she is by
15 education and/or experience fully competent and proficient.”

16 10. Code section 8780 states, in pertinent part:

17 “The board may receive and investigate complaints against licensed land
18 surveyors and registered civil engineers, and make findings thereon. By a majority vote, the
19 board may reprove, suspend for a period not to exceed two years, or revoke the license or
20 certificate of any licensed land surveyor or registered civil engineer, respectively, licensed under
21 this chapter or registered under the provisions of Chapter 7 (commencing with Section 6700),
22 whom it finds to be guilty of:

23 [¶] . . . [¶]

24 “(d) Any violation of any provision of this chapter or of any other law relating to
25 or involving the practice of land surveying.”

26 11. Code section 8725 states:

27 “Any person practicing, or offering to practice, land surveying in this state shall
28 submit evidence that he or she is qualified to practice and shall be licensed under this chapter. It

1 is unlawful for any person to practice, offer to practice, or represent himself or herself, as a land
2 surveyor in this state, or to set, reset, replace, or remove any survey monument on land in which
3 he or she has no legal interest, unless he or she has been licensed or specifically exempted from
4 licensing under this chapter.”

5 12. Code section 8726 states, in pertinent part:

6 “A person, including any person employed by the state or by a city, county, or city
7 and county within the state, practices land surveying within the meaning of this chapter who,
8 either in a public or private capacity, does or offers to do any one or more of the following:

9 “(a) Locates, relocates, establishes, reestablishes, or retraces the alignment or
10 elevation for any of the fixed works embraced within the practice of civil engineering, as
11 described in Section 6731.

12 “(b) Determines the configuration or contour of the earth's surface, or the position
13 of fixed objects above, on, or below the surface of the earth by applying the principles of
14 mathematics or photogrammetry.

15 “(c) Locates, relocates, establishes, reestablishes, or retraces any property line or
16 boundary of any parcel of land, right-of-way, easement, or alignment of those lines or
17 boundaries.

18 “(d) Makes any survey for the subdivision or resubdivision of any tract of land.
19 For the purposes of this subdivision, the term "subdivision" or "resubdivision" shall be defined to
20 include, but not be limited to, the definition in the Subdivision Map Act (Division 2
21 (commencing with Section 66410) of Title 7 of the Government Code) or the Subdivided Lands
22 Law (Chapter 1 (commencing with Section 11000) of Part 2 of Division 4 of this code).

23 “(e) By the use of the principles of land surveying determines the position for any
24 monument or reference point which marks a property line, boundary, or corner, or sets, resets, or
25 replaces any monument or reference point.

26 “(f) Geodetic or cadastral surveying. As used in this chapter, geodetic surveying
27 means performing surveys, in which account is taken of the figure and size of the earth to
28 determine or predetermine the horizontal or vertical positions of fixed objects thereon or related

1 thereto, geodetic control points, monuments, or stations for use in the practice of land surveying
2 or for stating the position of fixed objects, geodetic control points, monuments, or stations by
3 California Coordinate System coordinates.

4 “(g) Determines the information shown or to be shown on any map or document
5 prepared or furnished in connection with any one or more of the functions described in
6 subdivisions (a), (b), (c), (d), (e), and (f).”

7 13. Code section 8792, subdivision (a), provides that every person who
8 practices, or offers to practice, land surveying in this state without legal authorization is guilty of
9 a misdemeanor unless he or she is exempt from licensing.

10 COST RECOVERY

11 14. Code section 125.3 provides, in pertinent part, that the Board may request
12 the administrative law judge to direct a licentiate found to have committed a violation or
13 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
14 and enforcement of the case.

15 CRESTMONT DRIVE PROJECT

16 15. In or around March 2003, while working as a Licensed Civil Engineer,
17 Respondent prepared and stamped Tentative Parcel Map 7940 for the development of four
18 single-family residences on or near Crestmont Drive in Oakland, California (Crestmont Drive
19 Project), for submission to the city planning department. The tentative map included spot
20 elevations inconsistent with contour lines and proposed retaining wall heights as much as five
21 feet below the actual heights necessary to retain the grade.

22 16. The tentative map prepared by Respondent also including boundary and lot
23 line representations that can only be made by a professional land surveyor. Respondent was
24 neither a licensed land surveyor nor a registered civil engineer authorized to practice land
25 surveying when he prepared and stamped the tentative map.

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1 FIRST CAUSE FOR DISCIPLINE

2 (Negligence and/or Incompetence in the Practice of Civil Engineering)

3 17. Respondent is subject to disciplinary action under Code section 6775,
4 subdivision (c), for negligence and/or incompetence in his engineering practice in that he failed
5 to exercise ordinary care in the preparation of Tentative Parcel Map 7940 for the Crestmont
6 Drive Project, as described in paragraph 15, above.

7 SECOND CAUSE FOR DISCIPLINE

8 (Practicing Land Surveying Without Legal Authority)

9 18. Respondent is subject to disciplinary action under Code sections 8725,
10 8726, 8780, subdivision (d), and California Code of Regulations, title 16, section 415, for
11 practicing land surveying without legal authority in that he practiced professional land surveying
12 in the preparation of Tentative Parcel Map 7940 for the Crestmont Drive Project without being
13 either a licensed land surveyor or a registered civil engineer authorized to practice land
14 surveying, as described in paragraph 16, above.

15 THIRD CAUSE FOR DISCIPLINE

16 (Unprofessional Conduct)

17 19. Respondent is subject to disciplinary action under Code section 6775,
18 subdivisions (g) and (h), and California Code of Regulations, title 16, section 475 (a), for
19 unprofessional conduct in that he failed to provide professional services in the preparation of
20 Tentative Parcel Map 7940 for the Crestmont Drive Project in a manner consistent with the
21 applicable laws, codes, ordinances, rules and/or regulations, as described in paragraphs 15 and
22 16, above.

23 DISCIPLINE CONSIDERATIONS

24 20. To determine the degree of discipline, if any, to be imposed on
25 Respondent, Complainant alleges that on or about August 14, 1995, in a prior disciplinary action
26 before the Board entitled *In the Matter of the Accusation Against Rodolfo Dimalanta*, Case
27 Number 573-A, Respondent surrendered his Civil Engineering License Number C 23334,
28 originally issued on October 5, 1973, by which he was authorized to practice professional land

1 surveying. Upon surrender of his license, Respondent was issued Civil Engineering License
2 Number C 54787.¹ Under the new license, Respondent is no longer authorized to practice
3 professional land surveying. The Board's August 14, 1995 decision is incorporated by reference
4 as if fully set forth.

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26 1. Civil engineers registered prior to January 1, 1982, are authorized to practice land
27 surveying with the same rights and privileges and the same duties and responsibilities of a
28 licensed land surveyor without obtaining a land surveying license. (Business and Professions
Code sections 6731 and 8731.)

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