

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

In the Matter of the Accusation against:)

KENNY L. FARGEN)
600 Caribou Way)
Santa Maria, CA 93455)

Case No. 949-A

OAH No. 20111110228

Land Surveyor License No. L 4597,)

Respondent.)
_____)

DECISION

Pursuant to Government Code section 11517, the Board for Professional Engineers, Land Surveyors, and Geologists 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, Land Surveyors, and Geologists has reduced the penalty order pursuant to Government Code section 11517(c)(2)(B) as follows:

Condition 4 of the Order relating to Second Division Examination is removed and shall not be enforced.
Condition 5 of the Order relating to Practice Monitoring is removed and shall not be enforced.

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

The references to Business and Professions Code section 8780, subdivision (h), in Legal Conclusions 4, 5d, and 6 are corrected to refer to Business and Professions Code section 8780, subdivision (d).

Condition 3 of the Order is corrected to read as follows:

3. Continuing Education. During the first year of probation, Respondent shall successfully complete and pass, with a grade of "C" or better, two (2) college-level courses, approved in advance by the Board or its designee. Such courses shall be related to the areas of violation. For purposes of this condition, "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.

This Decision shall become effective on March 1, 2013.

IT IS SO ORDERED January 31, 2013.

Original Signed

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

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

In the Matter of the Accusation Against:

KENNY L. FARGEN,

Land Surveyor License No. L 4597

Respondent.

Case No. 949-A

OAH No. 2011110228

PROPOSED DECISION

This matter came regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in San Luis Obispo, California, on May 8, May 9 and September 17, 2012.

Susan Melton Wilson, Deputy Attorney General, represented Complainant Richard B. Moore, Executive Officer, Board for Professional Engineers, Land Surveyors, and Geologists (Board), Department of Consumer Affairs, State of California.

Arnold H. Lancaster, Attorney at Law, represented Kenny L. Fargen (Respondent).

Complainant seeks to discipline Respondent's license because Respondent allegedly was negligent, was incompetent, engaged in fraud or misrepresentation, failed to execute a written contract, failed to file a record of survey, failed to set durable monuments, and violated conflict of interest regulations in connection with survey work performed in San Luis Obispo County for two homeowners. Respondent denied most of the allegations and asserted that cause for discipline does not exist.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of certified court records by Complainant and for the submission of written closing argument. On September 26, 2012, Complainant submitted certified copies of two orders in the matter of *Olson v. Funkhouser*, Civil Action Number CV 040505, in the Superior Court of the State of California, San Luis Obispo County. The orders, dated August 28, 2007, and November 20, 2007, have been added to Exhibit 11, which contained other court records and, consistent with rulings made at the hearing, they are received in evidence.

Complainant filed a Closing Argument on October 12, 2012, and a Reply to Respondent's Written Closing Argument on October 30, 2012, which documents have been marked for identification as Exhibits 22 and 23, respectively. Respondent filed a Closing Argument on October 12, 2012, and a Reply of Respondent to Closing Argument of Complainant on October 31, 2012, which have been marked as Exhibits B and C, respectively.

The matter was submitted for decision on October 31, 2012.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Complainant filed the Accusation solely in his official capacity.

2. On March 14, 1979, the Board issued License number L 4597 to Respondent. The license has been in effect at all material times and expires on September 30, 2013, unless renewed. The license has not been previously disciplined.

Initial Work by Respondent

3. Gary Olson (Olson) and his wife Cathe owned a property located at 9975 Danford Canyon, in an area of San Luis Obispo County known as Suey Creek. The property was approximately 40 acres. Sam Funkhouser and his wife Cheri, owned an adjacent plot of land. The properties were located on rugged, hilly terrain, with oak trees and typically overgrown bushes. The Olsons had an easement to use a road through the Funkhouser property to access a public road. In 2004, the Olsons sued the Funkhousers and the Funkhousers countersued the Olsons in a dispute about the use and maintenance of the road. In connection with their respective lawsuits, the parties sought to survey various sections of their property.

4. Respondent's first work in the area was for the Funkhousers. In late 2004, Sam Funkhouser approached Respondent to survey his eastern boundaries for the purpose of building a fence, starting at the northeastern corner. At the hearing, Respondent sought to minimize the nature of the endeavor, testifying on September 17, 2012, that Funkhouser had asked him to give him "line points" between two accepted property lines. Funkhouser did not testify at the hearing, and Olson denied that there were two accepted property lines.

5. Respondent reviewed record maps before undertaking field work in December 2004. Respondent and his crew found an existing monument, a 1½-inch iron pipe, at the corner common to sections 1 and 12, Township 11 North, Range 34 West, and sections 6 and 7, Township 11 North, Range 33 West, San Bernardino Meridian. Funkhouser's property was in section 12 and Olson's was in section 7.

6. Respondent was unable to locate a monument at the southern end of the Funkhouser property line. He did not reset the monument, as such would have been an expensive process. It was his understanding that Funkhouser did not want to pay for such endeavor and that Funkhouser would continue to search for the monument.

7. Respondent placed wooden laths, or thin, flat wooden stakes, marked "point on line" along a north-south line from the established corner. In order to set the laths, Respondent relied on "the standard surveying method of triangulation," utilizing "random control points" and mathematical calculations based on an existing monument farther to the west. The north-south line marked by the laths stopped 1250 feet south of the northeastern corner of Funkhouser's property. Respondent testified that he did not know why his crew had stopped there, and assumed that Funkhouser asked his crew to do so. This vague, uncorroborated testimony is not credible. A better explanation, supported by the testimony of Olson, who also observed the laths placed by Respondent and his crew, was that the surveyors believed they had found the property corner. Olson credibly testified that the last wooden stake placed by Respondent was marked "property corner." Such marking would be consistent with the purpose of the survey, the building of a fence, and a partially completed fence would not make sense. Moreover, subsequent actions by Funkhouser, building the fence, and Respondent, conducting a survey for Olson, discussed below, corroborate Olson's testimony that Respondent set a property corner. In light of the foregoing, Respondent's denials at the hearing that neither he nor his crew placed the "property corner" lath are not credible. Respondent prepared a Sketch of Survey, or an informal drawing, for Funkhouser, showing the work he performed.

8. Olson learned that Respondent had conducted the survey and, believing that someone associated with the survey and Funkhouser had trespassed on his property during the survey, called Respondent and requested advance notice if they planned to return to the area. Olson testified that Respondent seemed amiable during the conversation and agreed to provide the requested notice.

9. The north-south staked line was approximately two feet east of Olson's barn, which had been the subject of encroachment allegations by the Funkhousers. Approximately one week later, Olson noticed that a t-post and barb wire fence had been built along the line delineated by the wooden laths.

Work for Olson

10. As part of a mediation agreement in the pending lawsuit, Olson agreed to obtain a survey of the east-west property line between the parties' properties. In January 2005, in part because of the prior amiable telephonic conversation and in part because Olson believed Respondent was familiar with the area due to the prior work, Olson asked Respondent to perform the work.

11. Olson credibly testified that he explained to Respondent that the survey was being done as part of a mediated agreement in the lawsuit, and testified that Respondent seemed to be aware of the lawsuit, as he knew some of its details. Respondent denied having been told about the lawsuit, and testified that Olson simply wanted him to trace a line from the 1250-foot terminus of the north-south line to ascertain whether a knoll to the west was on his property. Respondent's testimony is not credible. It is inconsistent with his declaration dated March 9, 2006, submitted on behalf of Funkhouser in the litigation with Olson, in which Respondent asserts, with respect to this work, "It was my understanding that this survey was being done because of an agreement between Mr. Funkhouser and Mr. Olson." (Exhibit 7, at p. 3.) Olson had indeed signed an agreement that made him responsible for a survey of the boundary line between his property and that of the Funkhousers, and Olson's testimony is more likely to be true in light of undisputed facts, such as the mediated agreement. It is more likely that Olson requested a boundary survey of the northern boundary of his property, and not one just involving a knoll, because such was his legally binding task, and that he told Respondent such task was required by a legal agreement, which survey and lawsuit were unusual events for Olson.

12. Respondent agreed to perform the work, but did not prepare a written contract setting forth the scope of work or any other terms of their agreement.

13. At the hearing, Respondent testified that he told Olson that a formal survey would cost thousands of dollars and take a lot longer. Olson credibly denied receiving options about the type of survey to be performed, including those of a formal as opposed to an informal survey.

14. Respondent did not provide any written disclosure to Olsen of his relationship with Funkhouser. In fact, Respondent did not even verbally inform Olsen about his relationship with Funkhouser, or disclose the nature of the prior or existing work arrangement.

15. a. Respondent performed the survey in January 2005, with Olson assisting by clearing some brush. Respondent used three existing survey maps, RS 22/44, RS 39/1, and RS 16/90, and survey instruments. Respondent and Olson walked south along the Funkhouser fence, and turned west after the lath marked "property corner." Respondent took measurements with his instruments and set down wooden stakes marked "point on line" on the east-west line he was measuring.

b. As with respect to prior work for Funkhouser, Respondent characterized his work as providing "line points" west from the 1250-foot "control point," and denied that he performed a "survey."

16. On or about February 7, 2005, Respondent billed Olson \$700 for professional services simply described as "boundary" on the "Fence Line Suey" project.

17. Respondent did not provide Olson with any document reflecting the results of the survey.

18. In reliance of the east-west boundary line established by the laths set down by Respondent, Olson took action to prepare the site for placement of a mobile home. He spent approximately \$1,932 in obtaining permits (\$1,182), preliminary studies to bring power to the site (\$500), and soils testing (\$250).

Last Work Performed by Respondent on the Site

19. In March 2005, during a telephonic conversation, Respondent informed Olson that he had misread a map and that the January survey was in error. Respondent stated that the true border was 70 feet to the south of the east-west line. Respondent further stated that “the county had blessed his new survey” and that he would be out to the property to complete the survey.

20. About one week after his telephonic conversation with Respondent, Olson saw new stakes, also designated as “point on line,” but running through approximately 70 feet further south, through Olson’s building site. A lath designated “property corner” was set at the eastern terminus of the east-west line demarcated by the “point of line” laths.

21. Respondent testified that he was asked by Funkhouser to measure a distance of 1320 feet south from the northeast corner of his property. According to Respondent, Funkhouser was still looking for the lost monument and believed it to be at that location. Respondent performed the measurements and placed a lath at the 1320-foot point.

Events After Completion of Respondent’s Work

22. On July 6, 2005, in reliance of Respondent’s statements regarding where the east-west property line was, Olson entered into a Settlement Agreement and General Release in his lawsuit against the Funkhousers. In pertinent part, the agreement states: “4. SURVEY OF SOUTH BOUNDARY. Olson previously agreed to and did obtain a survey, at Olson’s expense, of the following: Funkhouser’s property from the Southeast corner going west to the intersection with the Wineman property (as that property is identified on pages 2-3 of the Judgment by Stipulation filed May 12, 1981 in San Luis Obispo Superior Court case No. 48983, Funkhouser v. Wineman). Unfortunately, this survey used an incorrect point for the southeast corner of the Funkhouser’s property (the northwest corner of Olson Parcel 2). After extensive consultation with county officials, the parties now agree that the corner point is located 70 feet further south than was used by Olson for the survey. Funkhouser hired Fargen Surveys, Inc. to properly locate the corner and perform the survey previously agreed to. Funkhouser paid \$765.00 for this survey and Olson agrees to reimburse him one-half of this amount.” (Exh, 10, at p. 4; emphasis in original.)

23. In 2007, Olson decided to sell his property, and hired a different surveyor, Richard Cassara (Cassara), to conduct a survey. Cassara concluded that the southeast corner of Funkhouser's property was actually 70 feet to the north of where Respondent had determined it to be in March 2005. Cassara filed a record of survey with his findings and conclusions.

24. The Olsons petitioned the Superior Court of the State of California, County of San Luis Obispo, to sever paragraph 4 of the July 2005 Settlement Agreement and General Release, set forth in factual finding 22 above, alleging that it was based on Respondent's fraudulent misrepresentations. The court was not persuaded that there was any fraudulent misrepresentation and, on August 28, 2007, denied the Olsons's motion.

25. In a second declaration executed by Respondent in litigation between the Olsons and the Funkhousers, dated August 13, 2007, Respondent asserts, consistent with his hearing testimony, that he performed an "informal survey" or, simply "measurements," not "formal surveys" for the Olsons and Funkhousers. These statements are alleged to be fraudulent representations.

Expert testimony and Findings

26. Complainant called Eugene A. Shaffer (Shaffer), a licensed land surveyor since 1978, as an expert witness. Shaffer has extensive experience as a surveyor, and has performed many projects similar to the Olsons's. Respondent did not call an independent expert witness.

27. Shaffer opined that Respondent performed a survey for Olson, and he was therefore required to adhere to the standards that govern the profession. In Shaffer's opinion, Respondent performed a survey because he marked a line for a fixed object, a fence or a boundary line, by means of measuring angles and lines and applying the principles of mathematics. Respondent, on the other hand, denies having performed any surveys for either property owner. In his view, he simply staked lines and provided distance numbers between agreed upon established points. Extensive research of the type suggested by Shaffer was not required for the kind of work he performed, and he did not establish any points or make any findings that would require the filing of a record of survey or any other document with the County of San Luis Obispo.

28. Shaffer's opinions have been found more persuasive. Shaffer was a disinterested witness, who was fair and measured in his assessment, and who gave Respondent the benefit of the doubt when appropriate. His testimony takes better account of the established facts, including those that Respondent cannot credibly dispute. While Respondent claims he was only providing the property owners with distances between agreed points, he never presented evidence that the property owners had in fact agreed on the points in question; on the contrary, Respondent never met with both at the time of any of his surveys. Nor did Respondent present evidence of a contract with either property owner in which his "non-survey" was disclosed.

Lastly, Respondent presented no authority or other support for the distinction he tried to make. As Shaffer's testimony persuasively established, if Respondent used survey tools, principles, and techniques to stake a line between two properties, he performed a survey. Calling it an "informal" survey or stating that only distances were provided does not change the character of the activity involved. Shaffer's better articulated and supported opinions are therefore sufficient to establish that Respondent performed three surveys in the Suey Creek area and that he deviated from the standards of practice for professional land surveyors in several respects.

29. Respondent was negligent by failing to disclose his conflict to Olson in writing, since he had been previously employed by Funkhouser at the time Olson sought to contract with him. Respondent was further negligent by not even verbally disclosing to Olson his actual or apparent conflict in his prior work for Funkhouser.

30. Respondent was negligent by not performing adequate and sufficient research, such as checking property descriptions, prior surveys, and court cases involving the property, before undertaking the survey for Olson.

31. Respondent was negligent by not documenting his work and findings on the second survey, performed for Olson in January 2005.

32. Respondent was negligent by failing to locate the monument at the southeastern corner of Funkhouser's property. Once he started retracing the north-south line between the Olson and Funkhouser properties, Respondent was required to verify the existing monument at the southern end, or to file a record of survey indicating his failure to find the monument.

33. Respondent was negligent by not documenting his work and findings on the third survey. He changed his findings from the January 2005 survey, and did not provide any written explanation for his actions.

34. Shaffer's testimony is also sufficient to establish that Respondent was incompetent in the practice of professional land surveying in several respects, including that Respondent was incompetent in failing to prepare and execute a contract for professional services with Olson.

35. Respondent was incompetent in that he failed to file a record of survey with the County of San Luis Obispo with respect to his retracement of the north-south line separating the Olson and Funkhouser properties. Once he failed to find the iron pipe monument in the southern end, which had been previously identified in prior survey records, he was obligated to file a record of survey that would place others on notice of the change. A record of survey was also required because Funkhouser planned to build a fence, and such could potentially disrupt or destroy the monuments on either end of the line and possibly make finding the southern monument more difficult.

36. Respondent was incompetent in that he failed to notify Olson and Funkhouser that because the southern line he set during the second survey was not on any recorded record of survey the line might be in violation of the Subdivision Map Act.

37. It was not established that Respondent's actions in connection with his work with Olson or Funkhouser constituted fraud, deceit or misrepresentation. In each of the three alleged instances of intentional misconduct, Respondent was able to establish that, although incorrect as a matter of fact or law, he did have an explanation for his actions. Thus, it was not established that his failure to disclose his actual or potential conflict in undertaking the Olson project was fraudulent or deceitful since Respondent was aware Olson knew of his work for Funkhouser. It was not shown that his failure to document some of his work was in order to mislead or deceive. His distinction between a "formal" and an "informal" survey was not shown to have been intended to deceive or misrepresent. Rather, as found above, Respondent's actions and omissions in these regards constitute negligence and/or incompetence.

38. The Board has incurred \$1,895.08 in expert costs and \$9,300 in charges from the Attorney General's office, or a total of \$11,195.08 in costs of investigation and prosecution. These costs are reasonable.

39. Except as set forth in this Proposed Decision, all other allegations in the First Amended Accusation, and other contentions of the parties, are without merit or constitute surplusage.

LEGAL CONCLUSIONS

1. Business and Professions Code¹ section 8780, authorizes the Board to "[r]eprove, suspend for a period not to exceed two years, or revoke the license or certificate of any licensed land surveyor . . . whom it finds guilty of: (a) Any fraud, deceit or misrepresentation in his or her practice of land surveying. [¶] (b) Any negligence or incompetence in his or her practice of land surveying. [¶] . . . [¶] (h) A violation in the course of the practice of land surveying of a rule or regulation of unprofessional conduct adopted by the board."

2. Cause exists to discipline Respondent's license pursuant to section 8780, subdivision (b), and California Code of Regulations (CCR), title 16, section 404, subdivision (dd), in that he committed acts of negligence in the practice of land surveying, by reason of factual finding numbers 3 through 21 and 26 through 33.

¹ All further references are to the Business and Professions Code.

3. Cause exists to discipline Respondent's license pursuant to section 8780, subdivision (b), and CCR, title 16, section 404, subdivision (u), in that committed acts demonstrating incompetence in the practice of land surveying, by reason of factual finding numbers 3 through 21 and 34 through 36.

4. Section 8759, subdivision (a), requires a licensed land surveyor to execute a written contract when contracting to provide professional services, and sets forth some of the specific requirements of the contract. Cause exists to discipline Respondent's license pursuant to sections 8780, subdivision (h), and 8759, subdivision (a), in that he failed to present or execute a written contract with Olson for the performance of the professional services rendered to the property owner, by reason of factual finding numbers 10, 11, and 12.

5. a. Section 8762, subdivision (b), provides, in pertinent part, "Notwithstanding subdivision (a), after making a field survey in conformity with the practice of land surveying, the licensed land surveyor or licensed civil engineer shall file with the county surveyor in the county in which the field survey was made a record of the survey relating to land boundaries or property lines, if the field survey discloses any of the following: (1) Material evidence or physical change, which in whole or in part does not appear on any subdivision map, official map, or record of survey previously recorded or properly filed in the office of the county recorder or county surveying department, or map or survey record maintained by the Bureau of Land Management of the United States. [¶] . . . [¶] (4) The establishment of one or more points or lines not shown on any subdivision map, official map, or record of survey, the positions of which are not ascertainable from an inspection of the subdivision map, official map, or record of survey. . . ." The record of survey must be filed "within 90 days after the setting of boundary monuments during the performance of a field survey or within 90 days after completion of a field survey, whichever occurs first." (Bus. & Prof. Code, § 8762, subd. (c).)

b. The loss of the monument at the southern boundary of the Olson and Funkhouser properties constitutes a material change within the meaning of section 8762, subdivision (b)(1), and required the filing of a record of survey.

c. Respondent set a line at the conclusion of the January 2005 survey that differed materially from the position established in several recorded survey maps, which required the filing of a record of survey pursuant to section 8762, subdivision (b)(4).

d. Cause exists to discipline Respondent's license pursuant to sections 8780, subdivision (h), and 8762, subdivision (b), in that he failed to file a record of survey, by reason of factual finding numbers 3 through 21, 26, 27, 28, and 35, and legal conclusion numbers 5.a., 5.b., and 5.c.

6. Section 8771, subdivision (a), provides that "Monuments set shall be sufficient in number and durability and efficiently placed so as not to be readily disturbed, to assure, together with monuments already existing, the perpetuation or facile reestablishment of any point or line of the survey." Cause exists to discipline Respondent's license pursuant to sections 8780, subdivision (h), and 8771, subdivision (a), in that he failed to set a durable monument at the location he established on the southeastern corner of the Funkhouser property, by reason of factual finding numbers 3 through 21, 26, 27, 28, and 32.

7. CCR, title 16, section 476, subdivision (b)(1), contains the following rule of professional conduct: "If a licensee provides professional services for two or more clients on a project or related projects, the licensee shall disclose in writing to those clients and property owners or their authorized representatives his or her relationship to those clients." Cause exists to discipline Respondent's license pursuant to section 8780, subdivision (h), and CCR, title 16, section 476, subdivision (b)(1), in that he failed to disclose to Olson, in writing, his relationship with Funkhouser, by reason of factual finding numbers 3 through 7 and 10 through 14.

8. Cause does not exist to discipline Respondent's license pursuant to section 8780, subdivision (a), in that it was not established that he engaged in fraud, deceit or misrepresentation in the practice of land surveying, by reason of factual finding numbers 3 through 21 and 37.

9. Cause exists pursuant to section 125.3 to order Respondent to pay the Board's costs of investigation and prosecution, in the sum of \$11,195.08, by reason of factual finding numbers 3 through 36 and 38, and legal conclusion numbers 1 through 7.

10. All evidence presented in mitigation and aggravation and in Respondent's defense has been considered in accordance with CCR, title 16, section 419 (Disciplinary Orders). In light of the violations established, which are serious and which harmed Olson, revocation is appropriate. On the other hand, Respondent has not suffered any prior discipline in more than 30 years of practice and the acts or omissions at issue occurred more than seven years ago, and the revocation should be stayed subject to appropriate terms and conditions. On balance, therefore, the order that follows is necessary and sufficient for the protection of the public.

ORDER

Land Surveyor License number L 4597 issued to Respondent Kenny L. Fargen is revoked; provided, the revocation is stayed for a period of three years on the following terms and conditions:

1. Laws and Rules Examination. 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.

2. Ethics Course. During the first year of probation, Respondent shall successfully complete and pass a course in professional ethics, approved in advance by the Board or its designee.

3. Continuing Education. During the first year of probation, 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.

4. Second Division Examination. During the first two years of probation, Respondent shall take and achieve the passing score as set by the Board for the second division examination (including the seismic principles and engineering surveying examinations for civil engineers), provided that in the event the respondent holds multiple licenses, the Board shall select the examination in the area of practice of professional engineering and/or professional land surveying in which the violation occurred and in the area of professional engineering and/or professional land surveying in which Respondent is licensed. The Board or its designee may select the specific examination questions such that the questions relate to the specific area of violation and comprise an examination of the same duration as that required of an applicant for licensure. Respondent shall be required to pay the application fee as described in Section 407 and shall be afforded all examination appeal rights as described in Sections 407, 443, and 444.

5. Practice Monitoring. During the period of probation, Respondent may practice professional engineering and/or professional land surveying only under the supervision of a professional engineer and/or professional land surveyor 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 and/or professional land surveyor shall initial every stamped or sealed document in close proximity to Respondent's stamp or seal.

6. Record Filing. For any records of survey found not to have been filed and recorded, Respondent shall file or record, as appropriate, the required records with the appropriate governmental agency within 90 days of the effective date of the decision. Respondent shall provide the Board with verifiable proof that the required record(s) have been filed or recorded, as appropriate, by the governmental agency within 30 days of such filing or recordation.

7. Restitution. Within 30 days of the effective date of the decision, Respondent shall make restitution to Olson, in the sum of \$1,932. Within 60 days of making the restitution payment, Respondent shall provide verifiable proof to the Board that restitution has been paid as ordered.

8. Obey All Laws. Respondent shall obey all laws and regulations related to the practices of professional engineering and professional land surveying.

9. Reports. Respondent shall submit such special reports as the Board may require.

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

11. Cost Recovery. Respondent shall pay the Board the sum of \$11,195.08 in reimbursement of the Board's costs of investigation and enforcement, which payment shall be made during the period of probation on a schedule approved by the Board.

12. Violation of Probation. If Respondent violates the probationary conditions in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may vacate the stay and reinstate the disciplinary order which was stayed. If, during the period of probation, an accusation or petition to vacate stay is filed against Respondent, or if the matter has been submitted to the Office of the Attorney General for the filing of such, 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. Completion of probation. Upon successful completion of all of the probationary conditions and the expiration of the period of probation, Respondent's license shall be unconditionally restored.

DATED: 11/30/12

Original Signed
SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS.
Attorney General of California
2 GREGORY J. SALUTE
Supervising Deputy Attorney General
3 SUSAN MELTON WILSON
Deputy Attorney General
4 State Bar No. 106902
300 So. Spring Street, Suite 1702
5 Los Angeles, CA 90013
Telephone: (213) 897-4942
6 Facsimile: (213) 897-2804
E-mail: Susan.Wilson@doj.ca.gov
7 *Attorneys for Complainant*

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

11 In the Matter of the First Amended Accusation
Against:

12 **KENNY L. FARGEN**
13 600 Caribou Way
Santa Maria, CA 93455

14
15 Land Surveyor License No. L 4597

16 Respondent.

Case No. 949-A

17 **FIRST**
18 **AMENDED**
19 **ACCUSATION**

20 Complainant alleges:

21 **PARTIES**

22 1. Richard B. Moore, PLS (Complainant) brings this First Amended Accusation solely
23 in his official capacity as the Executive Officer of the Board for Professional Engineers, Land
24 Surveyors, and Geologists, Department of Consumer Affairs.

25 2. On or about March 14, 1979, the Board for Professional Engineers, Land Surveyors,
26 and Geologists (formerly "Board for Professional Engineers and Land Surveyors") issued Land
27 Surveyor License Number L 4597 to Kenny L. Fargen (Respondent). The Land Surveyor License
28 was in full force and effect at all times relevant to the charges brought herein and will expire on
September 30, 2013, unless renewed.

///

1 **JURISDICTION**

2 3. The original Accusation in this matter was filed on November 24, 2010 and served in
3 compliance with all statutory requirements to Respondent, who thereafter filed his timely Notice
4 of Defense. The First Amended Accusation is brought before the Board for Professional
5 Engineers, Land Surveyors, and Geologists (Board), Department of Consumer Affairs, under the
6 authority of the following laws. All section references are to the Business and Professions Code
7 unless otherwise indicated.

8 4. Section 8780 of the Code states:

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

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

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

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

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

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

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

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

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

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

26 5. Section 125.3 of the Code provides, in pertinent part, that the board may request the
27 administrative law judge to direct a licentiate found to have committed a violation or violations of
28

1 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
2 enforcement of the case.

3 6. Section 8759 of the Code provides:

4 (a) A licensed land surveyor or registered civil engineer authorized to practice land
5 surveying shall use a written contract when contracting to provide professional services to a client
6 pursuant to this chapter. The written contract shall be executed by the licensed land surveyor or
7 registered civil engineer and the client, or his or her representative, prior to the licensed land
8 surveyor or registered civil engineer commencing work, unless the client knowingly states in
9 writing that work may be commenced before the contract is executed. The written contract shall
10 include, but not be limited to, all of the following:

11 (1) A description of the services to be provided to the client by the licensed land surveyor
12 or registered civil engineer.

13 (2) A description of any basis of compensation applicable to the contract, and the method of
14 payment agreed upon by the parties.

15 (3) The name, address, and license or certificate number of the licensed land surveyor or
16 registered civil engineer, and the name and address of the client.

17 (4) A description of the procedure that the licensed land surveyor or registered civil
18 engineer and the client will use to accommodate additional services.

19 (5) A description of the procedure to be used by any party to terminate the contract.

20 (b) This section shall not apply to any of the following:

21 (1) Professional land surveying services rendered by a licensed land surveyor or registered
22 civil engineer for which the client will not pay compensation.

23 (2) A licensed land surveyor or registered civil engineer who has a current or prior
24 contractual relationship with the client to provide professional services pursuant to this chapter,
25 and that client has paid the surveyor or engineer all of the fees that are due under the contract.

26 (3) If the client knowingly states in writing after full disclosure of this section that a
27 contract which complies with the requirements of this section is not required.
28

1 (4) Professional services rendered by a licensed land surveyor or a registered civil engineer
2 to any of the following:

3 (A) A (licensed or registered) professional engineer ...

4 (B) A land surveyor licensed under this chapter.

5 (C) A (licensed) architect ...

6 (D) A (licensed) contractor ...

7 (E) A (licensed) geologist or a geophysicist...

8 (F) A manufacturing, mining, public utility, research and development, or other industrial
9 corporation, if the services are provided in connection with or incidental to the products, systems,
10 or services of that corporation or its affiliates.

11 (G) A public agency.

12 (c) "Written contract" as used in this section includes a contract that is in electronic form.

13 7. Section 8762 of the Code provides:

14 (a) Except as provided in subdivision (b), after making a field survey in conformity with the
15 practice of land surveying, the licensed surveyor or licensed civil engineer may file with the
16 county surveyor in the county in which the field survey was made, a record of the survey.

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

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

25 (2) A material discrepancy with the information contained in any subdivision map, official
26 map, or record of survey previously recorded or filed in the office of the county recorder or the
27 county surveying department, or any map or survey record maintained by the Bureau of Land
28

1 Management of the United States. For purposes of this subdivision, a “material discrepancy” is
2 limited to a material discrepancy in the position of points or lines, or in dimensions.

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

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

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

13 (c) The record of survey required to be filed pursuant to this section shall be filed within 90
14 days after the setting of boundary monuments during the performance of a field survey or within
15 90 days after completion of a field survey, whichever occurs first.

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

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

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

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

9 8. Section 8771 of the Code provides:

10 (a) Monuments set shall be sufficient in number and durability and efficiently placed so as
11 not to be readily disturbed, to assure, together with monuments already existing, the perpetuation
12 or facile reestablishment of any point or line of the survey.

13 (b) When monuments exist that control the location of subdivisions, tracts, boundaries,
14 roads, streets, or highways, or provide horizontal or vertical survey control, the monuments shall
15 be located and referenced by or under the direction of a licensed land surveyor or registered civil
16 engineer prior to the time when any streets, highways, other rights-of-way, or easements are
17 improved, constructed, reconstructed, maintained, resurfaced, or relocated, and a corner record or
18 record of survey of the references shall be filed with the county surveyor. They shall be reset in
19 the surface of the new construction, a suitable monument box placed thereon, or permanent
20 witness monuments set to perpetuate their location if any monument could be destroyed,
21 damaged, covered, or otherwise obliterated, and a corner record or record of survey filed with the
22 county surveyor prior to the recording of a certificate of completion for the project. Sufficient
23 controlling monuments shall be retained or replaced in their original positions to enable property,
24 right-of-way and easement lines, property corners, and subdivision and tract boundaries to be
25 reestablished without devious surveys necessarily originating on monuments differing from those
26 that currently control the area. It shall be the responsibility of the governmental agency or others
27 performing construction work to provide for the monumentation required by this section. It shall
28 be the duty of every land surveyor or civil engineer to cooperate with the governmental agency in

1 matters of maps, field notes, and other pertinent records. Monuments set to mark the limiting
2 lines of highways, roads, streets or right-of-way or easement lines shall not be deemed adequate
3 for this purpose unless specifically noted on the corner record or record of survey of the
4 improvement works with direct ties in bearing or azimuth and distance between these and other
5 monuments of record.

6 (c) The decision to file either the required corner record or a record of survey pursuant to
7 subdivision (b) shall be at the election of the licensed land surveyor or registered civil engineer
8 submitting the document.

9 9. Title 16 of the California Code of Regulations, at Section 476 provides:

10 To protect and safeguard the health, safety, welfare, and property of the public, every
11 person who is licensed by the Board as a professional land surveyor or professional civil engineer
12 legally authorized to practice land surveying, including licensees employed in any manner by a
13 governmental entity or in private practice, shall comply with this Code of Professional Conduct.
14 A violation of this Code of Professional Conduct in the practice of professional land surveying
15 constitutes unprofessional conduct and is grounds for disciplinary action pursuant to Section 8780
16 of the Code. This Code of Professional Conduct shall be used for the sole purpose of investigating
17 complaints and making findings thereon under Section 8780 of the Code.

18 . . .

19 (b) Conflict of Interest:

20 (1) If a licensee provides professional services for two or more clients on a project or
21 related projects, the licensee shall disclose in writing to those clients and property owners or their
22 authorized representatives his or her relationship to those clients.

23 (2) If a licensee has a business association or a financial interest which may influence his or
24 her judgment in connection with the performance of professional services, the licensee shall fully
25 disclose in writing to his or her client(s) or employer(s) the nature of the business association or
26 the financial interest.

27 . . .

28 / / /

1 **CAUSES FOR DISCIPLINE**

2 **SUMMARY OF FACTS**

3 10. The following facts are common to all causes for discipline alleged herein:

4 A. Between December 2004 and March 2005, Respondent, d.b.a. "Fargen Surveys Inc."
5 was hired to provide professional services related to real property in San Luis Obispo County
6 which was the subject of a protracted dispute between neighboring owners, identified as Lot 2,
7 *Section 7, T11N, R33W* and a portion of Lot 2, *Section 12, T11N, R33W* ("SLO Property").

8 B. The property owners, the Olson and Funkhouser families - had been involved in a
9 longstanding dispute regarding easements. After mediation, in an effort to reach a settlement
10 agreement, both parties agreed to have a professional land surveyor identify and lay out the
11 property boundaries.

12 C. No written contract for professional services was executed at any time between
13 Respondent and parties to the dispute.

14 D. By his own admission, Respondent was aware that he was hired by the parties as part
15 of their effort to settle a boundary dispute, and that the "boundary" line was to be used for fence
16 construction.

17 **First Survey – December 2004**

18 E. Respondent performed a survey in December 2004 where he staked a north-south
19 line from the corner common to sections 1 & 12, T. 11 N., R 34 W., and sections 6 & 7, T. 11 N.,
20 R 33 W., S.B.M. beginning at a monument referenced to record of survey book 22 page 44 and
21 traversing South. He marked the line with lath (marked "point on line") for a distance of 1250
22 feet (1250.05' per L.S.22/44) and set a lath marked "property corner."

23 F. This survey was requested and paid for by Mr. Funkhouser. This line is not listed
24 or established in the subsequent agreement document of the parties. Respondent provided a
25 "sketch of survey" dated December 2004 which shows ties to three monuments of record per L.A.
26 22/44 and L.S. 39/1.

27 **Second Survey – January 2005**

1 G. Respondent performed a second survey in January 2005 where he staked a line
2 running west from his lath marked “property corner” (noted in para. “E” above) to “the remains
3 of old fence line” which line was surveyed by Mr. Welch while Respondent was Mr. Welch’s
4 employee - to mark a property line defined in an agreement boundary in 1980 (see L.S. 39/1).
5 Again, the only evidence Respondent left on the ground was a lath line and a lath at the end
6 marked “property corner”.

7 H. This survey was requested and paid for by Mr. Olson and fits record data shown
8 on L.S. 22/44. This line is the line agreed to by both parties in the subsequent agreement.
9 Respondent invoiced Mr. Olson for the survey in February. The invoice shows the project name
10 as “*fence line*” and describes professional services as “*boundary*”.

11 **Third Survey – March 2005**

12 I. Respondent performed a survey in March 2005 where he staked a second line
13 some 70 feet South and parallel to his January line. This new line was requested by Mr.
14 Funkhouser, based on his (Funkhouser’s) representation that the line staked by Fargen for Mr.
15 Olson was not correct and should be moved 70 feet South. Respondent agreed to stake the new
16 line without consulting Mr. Olsen.

17 J. Afterward, on or about March 7, 2005, Respondent informed Mr. Olson by
18 telephone that he had “misread a map” and that the property line was located further south than
19 the earlier survey.

20 K. Respondent did not set any permanent monuments to perpetuate his corners in any
21 of the surveys – nor did he file any maps or corner records with the county surveyor to document
22 his work in any of the surveys.

23 L. In or about July 2005, based in part on Respondent’s work – parties entered into a
24 negotiated settlement agreement which concluded their dispute about the SLO Property.
25 Specifically, paragraph 4 of the settlement agreement regarding the location of the Southeast
26 corner of Funkhouser’s property was based on Respondent’s third survey (setting the line about
27 70 feet further South than the position of the boundary in Respondent’s first survey) and
28

1 identifies a fee of \$765.00 for the survey be shared by both parties. By signing this agreement, the
2 Olsons gave up any rights to the 70 foot strip of land, ceding ownership to the Funkhousers.

3 M. The Olsons subsequently determined to sell the subject property and in January of
4 2007, to comply with escrow requirements, hired another surveyor to locate and confirm the
5 boundary lines of their property.

6 N. The new surveyor located the Southeast boundary of the Funkhouser property
7 along the same line as Respondent's "first" survey. This placement also conforms to previous
8 surveys of record.

9 O. On or about February 21, 2007, Respondent maintained that he had only been
10 retained to "measure distances between points" provided by the parties, and that he had never
11 actually conducted a boundary survey. Further, in a declaration under penalty of perjury dated
12 August 28, 2007, Respondent stated that he did not do a "formal survey" of the SLO Property,
13 and that he believed both parties were fully aware of that fact.

14 P. Financial losses by Mr. Olson attributable to Respondent's misconduct include
15 approximately \$2,200.00 (building permits, soil testing, etc.) for a planned building project which
16 was abandoned by Olson due to his reliance on the boundary line(s) described by Respondent in
17 the "third survey" described above.

18 **FIRST CAUSE FOR DISCIPLINE**

19 **(Negligence in Professional Practice)**

20 11. Respondent is subject to disciplinary action under section 8780 at subsection (b) in
21 that between approximately December 2004 and July 2005, Respondent engaged in negligence in
22 his practice of land surveying in connection with the SLO Property, by reason of the following
23 facts:

24 **A. Failure of Due Diligence**

25 Despite his understanding that the lines he was surveying were related to a court
26 ordered mediation and settlement attempt, Respondent failed to exercise due diligence in
27 the execution of his survey(s) to assure that his clients were given quality professional
28

1 services and results which were accurate and reliable. 'Failure of due diligence' includes
2 but is not limited to:

- 3 - Respondent's failure to research and/or review local record surveys in the location;
- 4 - Respondents failure to properly document his work publicly and privately,
- 5 - Respondent's failure to become familiar with the matters in dispute between the
6 parties; and
- 7 - Respondent's failure to have both parties present when location of the lines was
8 discussed.

9 **B. Failure to Disclose Possible Conflict of Interest**

10 Respondent was negligent in his dealings with Mr. Olson and Mr. Funkhouser in
11 his failure to disclose and reveal an apparent conflict of interest - particularly in
12 connection with execution of the third survey.

13 **C. Failure to Search for Material Evidence**

14 Respondent failed to follow the most basic requirements of a survey when he
15 failed to search for material evidence to support his retracement of the section line
16 established by L.S. 22/44. Though he was attempting to retrace or re-establish the section
17 line for the fence, and was aware of local surveys – he failed to search for that monument
18 to verify his line.

19 **D. Failure to Support Professional Opinion With Viable Evidence**

20 In the third survey, Respondent changed his professional opinion about the
21 location of a boundary line based on the instructions of a client, without evidence which
22 reasonably supported a change in the line position, and completely disregarded the
23 previous surveys, the opinion of his mentor and employer, and advise from the local
24 country surveyor.

25 **SECOND CAUSE FOR DISCIPLINE**

26 **(Incompetence in Professional Practice)**

27 12. Respondent is subject to disciplinary action under section 8780 at subsection (b) in
28 that between approximately December 2004 and July 2005, Respondent engaged in incompetence

1 in the practice of land surveying in connection with the SLO Property, by reason of the following
2 facts:

3 **A. Failure to Document Agreement For Services**

4 Respondent failed to prepare and execute a written contract for professional
5 services which conforms to the requirements of Section 8759 subdivision (a).

6 **B. Failure to File a Record of Survey with County Surveyor**

7 Respondent's failure to file any record of survey with the county surveyor in this
8 case was incompetence for reasons as follows:

9 (1) In the course of providing professional land surveying services,
10 Respondent established a professional opinion about the location of a boundary line which
11 differed materially the position established by several record maps. In such circumstances,
12 Respondent was required to file a record of survey with county surveyor under section
13 8762 subsection (b).

14 (2) Survey evidence indicates that Respondent surveyed the North-South line
15 between the Funkhouser and Olsen Property for fence construction in an attempt to retrace
16 the line established by LS22/44. However, Respondent failed to locate the iron pipe
17 monument shown on LS 22/44 near the south end of the line. In such circumstances,
18 Respondent was obligated to file a record of survey to notify the county surveyor under
19 section 8762, subsection (B)(1) since the fact that a monument on a line has been lost is a
20 physical change. An additional circumstance supporting Respondent's obligation to notify
21 the county surveyor is that Respondent knew the parties intended to build a fence on the
22 boundary line, potentially destroying one or both monuments on that line.

23 **C Failure to Notify Clients of Potential Lot Line Adjustment**

24 Because the boundary line established by Respondent does not occupy the location
25 of the south line of the parcel described in the deed to Funkhouser as established by
26 previous surveys of record – Respondent was obligated to notify both clients that said
27 boundary line might be in violation of the Subdivision Map Act, in that it might constitute
28 a lot line adjustment, requiring a ruling from the county surveyor.

1 **THIRD CAUSE FOR DISCIPLINE**

2 **(Fraud, Deceit or Misrepresentation in Professional Practice)**

3 13. Respondent is subject to disciplinary action under section 8780 at subsection (a) in
4 that between approximately December 2004 and July 2005, Respondent failed to properly locate
5 the property lines, did not properly mark the corners with monuments, failed to file a record of
6 survey, misrepresented or was deceitful in his contracting procedure and execution of the survey ,
7 offered opinions that were not based in fact, and otherwise engaged in acts of fraud, deceit, or
8 misrepresentation in his practice of land surveying in connection with the SOL Property, by
9 reason of the following facts:

10 **A. Failure to Disclose Possible Conflict of Interest**

11 Respondent was negligent in his dealings with Mr. Olson and Mr. Funkhouser in
12 his failure to disclose and reveal an apparent conflict of interest - particularly in
13 connection with execution of the third survey.

14 **B. Failure to Support Professional Opinion With Viable Evidence**

15 Respondent changed his professional opinion about the location of a boundary line
16 based on the instructions of a client, without evidence which reasonably supports a change
17 in the line position, and completely disregarded the previous surveys, the opinion of his
18 mentor and employer, and advise from the local country surveyor.

19 **C. Denial of Surveying Work in 2007 Declaration**

20 In his declaration under penalty of perjury on in 2007, Respondent made untrue
21 and contradictory statements, including but not limited to his false assertion that his work
22 on the SLO Property was not “formal surveys.”

23 **FOURTH CAUSE FOR DISCIPLINE**

24 **(Failure To Execute A Written Contract For Professional Services)**

25 14. Respondent is subject to disciplinary action under section 8759 at subsection (a) in
26 that between approximately December 2004 and July 2005, Respondent contracted to provide and
27 did provide professional land surveying services for which he received compensation to clients in
28

1 connection with the SLO Property without use of an executed written contract conforming to
2 statutory requirements.

3 **FIFTH CAUSE FOR DISCIPLINE**

4 **(Failure to File a Record of Survey)**

5 15. Respondent is subject to disciplinary action under section 8762, subsection (b) in
6 that between approximately December 2004 and July 2005, in the course of providing land
7 surveying services, on the SLO Property, Respondent did not at any time file a record of survey
8 with the county surveyor. This omission was a violation of statutory filing requirements in two
9 instances as follows:

10 **A.** At the time of the third survey, Respondent established a professional
11 opinion about the location of a boundary line which differed materially the position
12 established by several record maps. Respondent was thus required to file a record of
13 survey with county surveyor within 90 days under section 8762 subsection (b).

14 **B.** Survey evidence indicates that Respondent surveyed the line between the
15 Funkhouser and Olsen Property for fence construction in an attempt to retrace the line
16 established by LS22/44. However, Respondent was apparently unable to locate the south
17 end monument shown on LS 22/44. In such circumstances, Respondent was obligated to
18 file a record of survey to notify the county surveyor under 8762 subsection (b)(1) since the
19 fact that a monument on a line has been lost is a physical change. Further, Respondent
20 knew the parties intended to build a fence on the boundary line, potentially destroying one
21 or both monuments on that line.

22 **SIXTH CAUSE FOR DISCIPLINE**

23 **(Failure to Set Durable Monuments)**

24 16. Respondent is subject to disciplinary action under section 8771 in that between
25 approximately December 2004 and July 2005, in the course of providing land surveying services,
26 on the SLO Property, Respondent did not at any time set durable monuments.

27 / / /

28 / / /

1 **SEVENTH CAUSE FOR DISCIPLINE**

2 **(Violation of Regulations Related to Land Surveying: Conflict of Interest)**

3 17. Respondent is subject to disciplinary action under section 8780 subsection (h) in
4 conjunction with Title 16 of the California Code of Regulations section 476, subsection (b) (1), in
5 that between approximately December 2004 and July 2005, in the course of providing land
6 surveying services to two sets of clients with opposing interests on the SLO Property project,
7 Respondent failed to disclose in writing to those clients or their authorized representatives his
8 relationship to those clients.

9 **PRAYER**

10 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
11 and that following the hearing, the Board for Professional Engineers, Land Surveyors, and
12 Geologists issue a decision:

13 1. Revoking or suspending Land Surveyor License Number L 4597, issued to Kenny
14 L. Fargen;

15 2. Ordering Kenny L. Fargen to pay restitution in the approximate sum of \$2,200.00 to
16 Mr. Olson for losses resulting from Respondent’s misconduct;

17 3 Ordering Kenny L. Fargen to pay the Board for Professional Engineers, Land
18 Surveyors, and Geologists the reasonable costs of the investigation and enforcement of this case,
19 pursuant to Business and Professions Code section 125.3;

20 4. Taking such other and further action as deemed necessary and proper.

21 DATED: 9/7/12

21 *Original Signed*
22 RICHARD B. MOORE, PLS
23 Executive Officer
24 Board for Professional Engineers, Land Surveyors,
25 and Geologists
26 Department of Consumer Affairs
27 State of California
28 *Complainant*

27 LA2010600569
51156757.docx