

## WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



### Wisconsin Department of Safety and Professional Services Access to the Public Records of the Reports of Decisions

This Reports of Decisions document was retrieved from the Wisconsin Department of Safety and Professional Services website. These records are open to public view under Wisconsin's Open Records law, sections 19.31-19.39 Wisconsin Statutes.

#### Please read this agreement prior to viewing the Decision:

- The Reports of Decisions is designed to contain copies of all orders issued by credentialing authorities within the Department of Safety and Professional Services from November, 1998 to the present. In addition, many but not all orders for the time period between 1977 and November, 1998 are posted. Not all orders issued by a credentialing authority constitute a formal disciplinary action.
- Reports of Decisions contains information as it exists at a specific point in time in the Department of Safety and Professional Services data base. Because this data base changes constantly, the Department is not responsible for subsequent entries that update, correct or delete data. The Department is not responsible for notifying prior requesters of updates, modifications, corrections or deletions. All users have the responsibility to determine whether information obtained from this site is still accurate, current and complete.
- There may be discrepancies between the online copies and the original document. Original documents should be consulted as the definitive representation of the order's content. Copies of original orders may be obtained by mailing requests to the Department of Safety and Professional Services, PO Box 8935, Madison, WI 53708-8935. The Department charges copying fees. *All requests must cite the case number, the date of the order, and respondent's name* as it appears on the order.
- Reported decisions may have an appeal pending, and discipline may be stayed during the appeal. Information about the current status of a credential issued by the Department of Safety and Professional Services is shown on the Department's Web Site under "License Lookup."

The status of an appeal may be found on court access websites at:

<http://ccap.courts.state.wi.us/InternetCourtAccess> and <http://www.courts.state.wi.us/wscga>

- Records not open to public inspection by statute are not contained on this website.

**By viewing this document, you have read the above and agree to the use of the Reports of Decisions subject to the above terms, and that you understand the limitations of this on-line database.**

**Correcting information on the DSPS website:** An individual who believes that information on the website is inaccurate may contact [DSPS@wisconsin.gov](mailto:DSPS@wisconsin.gov)

0003128

STATE OF WISCONSIN  
BEFORE THE LAND SURVEYOR SECTION OF THE EXAMINING BOARD OF  
ARCHITECTS, LANDSCAPE ARCHITECTS, PROFESSIONAL ENGINEERS,  
DESIGNERS AND LAND SURVEYORS

---

IN THE MATTER OF DISCIPLINARY  
PROCEEDINGS AGAINST

FINAL DECISION AND ORDER  
WITH VARIANCE

MICHAEL KOTLAREK  
RESPONDENT.

DHA Case No. SPS-13-0025  
DSLSC Case No. 12 LSR 001

---

**BACKGROUND**

On January 13, 2014, Administrative Law Judge Jennifer Nashold, State of Wisconsin, Division of Hearings and Appeals, issued a Proposed Decision and Order (PDO) in the above referenced matter. The PDO was served upon all parties. Respondent filed objections to the proposed decision; no objections or response to Respondent's objections were filed by the Department of Safety and Professional Services, Division of Legal Services and Compliance (Division). On March 20, 2014, the Land Surveyor Section of the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Land Surveyors (Section) met to consider the merits of the PDO and Respondent's objections.

Pursuant to Wis. Stat. §§ 440.035(1) and 448.02, the Board is the regulatory authority and final decision maker governing disciplinary matters of those credentialed by the Section. The pending matter is characterized as a class 2 proceeding pursuant to Wis. Stat. § 227.01(3). The Section may make modifications to a PDO, a class 2 proceeding, pursuant to Wis. Stat. § 227.46(2). The PDO is attached hereto and incorporated in its entirety into this Final Decision and Order with Variance (Order). The Section adopts the PDO with the exception of the "**ORDER**" located on page twenty two of the PDO. The Section varies the "**ORDER**" as set forth below.

### **EXPLANATION OF VARIANCE**

The three purposes of discipline are: (1) to promote the rehabilitation of the credential holder; (2) to protect the public from other instances of misconduct; and (3) to deter this and other credential holders from engaging in similar conduct. *See State v. Aldrich*, 71 Wis. 2d 206, 209, 237 N.W.2d 689 (1976). In resolution of this matter the Administrative Law Judge recommended a reprimand and limited license, the terms of which would require Respondent to complete three (3) hours of education and submit three (3) surveys for review. The Section concurs with the recommendations, but believes further limitations are required to ensure that the education addresses the identified matter which is at issue in this case. This can be accomplished by requiring preapproval of the coursework by the Continuing Education Liaison for the Land Surveyors Section. The Section also finds that a requirement that this education not be used to satisfy the continuing education requirements will also serve the disciplinary goal of deterring the Respondent from similar conduct in the future by imposing additional expense and effort on Respondent in meeting this limitation. Further it will emphasize the importance of the education to the Respondent's rehabilitation. Finally, setting a specific timeframe in which Respondent is to accomplish this education provides both guidance to the Respondent and enforceability to the Order.

The Section also finds that further limitations should be included with regard to the provision of surveys prepared by the Respondent. As recommended by the Administrative Law Judge the surveys should be the first three surveys completed by Respondent after the effective date of this Order. Also, as recommended, those surveys should be submitted to the Wisconsin Society of Land Surveyors Survey Map Review Committee for evaluation. However, the Section modifies the Order to further require that Respondent shall also submit the surveys to the

Section along with the results of the Survey Map Review Committee's review to the Section in order that the Section may perform its duties by ensuring compliance with the various legal requirements which the Section oversees.

For these reasons the Section enters the following modified Order:

**ORDER**

Accordingly, IT IS HEREBY ORDERED that:

1. Mr. Kotlarek is REPRIMANDED.
2. Mr. Kotlarek's license is limited as follows:
  - a. Mr. Kotlarek shall successfully complete three credits of education on the topic of legal principles and practices of boundary reestablishment.
    1. The course/class nominated by Mr. Kotlarek to meet this limitation shall be preapproved by the Continuing Education Liaison of the Land Surveyor Section.
    2. Respondent shall enroll in the approved educational class on or before September 15, 2014.
    3. The education taken pursuant to this Order may not be used to satisfy the continuing education requirements under Wis. Admin. Code § A-E 10.
  - b. Mr. Kotlarek shall submit the first three surveys (3) he completes following the Section's final order in this matter to the Land Surveyor Section and the Wisconsin Society of Land Surveyors' Survey Map Review Committee for review.

c. Mr. Kotlarek shall submit the findings of the Wisconsin Society of Land Surveyors' Survey Map Review Committee to the Land Surveyor Section for review within thirty days of the date of completion of the findings.

3. Thirty percent of the costs of these proceedings shall be assessed against Mr. Kotlarek in accordance with Wis. Stat. § 440.22 and Wis. Admin. Code § 2.18.

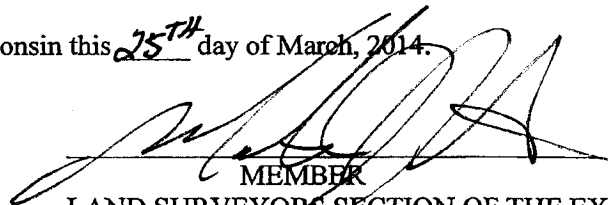
4. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

**Department Monitor  
Division of Legal Services and Compliance  
Department of Safety and Professional Services  
P.O. Box 8935  
Madison, WI 53708-8935**

5. The terms of this Order are effective the date the Final Decision and Order is signed.

IT IS FURTHER ORDERED that the above-captioned matter is hereby closed as to Respondent Michael Kotlarek.

Dated at Madison, Wisconsin this 25<sup>TH</sup> day of March, 2014.



MEMBER  
LAND SURVEYORS SECTION OF THE EXAMINING  
BOARD OF ARCHITECTS, LANDSCAPE  
ARCHITECTS, PROFESSIONAL ENGINEERS,  
DESIGNERS AND LAND SURVEYORS



Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS

0003128

---

In the Matter of the Disciplinary Proceedings  
Against **MICHAEL KOTLAREK**, Respondent

PROPOSED DECISION AND ORDER  
DHA Case No. SPS-13-0025

---

**Division of Legal Services and Compliance Case No. 12 LSR 001**

The parties to this proceeding for purposes of Wis. Stat. §§ 227.47(1) and 227.53 are:

Michael Kotlarek  
N80 W28352 Keesus Road  
Hartland, WI 53029

Wisconsin Joint Examining Board of Architects, Landscape Architects, Professional  
Engineers, Designers and Land Surveyor, Land Surveyor Section  
P.O. Box 8935  
Madison, WI 53708-8935

Department of Safety and Professional Services, Division of Legal Services and  
Compliance, by

Attorney Sarah Norberg  
Department of Safety and Professional Services  
Division of Legal Services and Compliance  
P.O. Box 8935  
Madison, WI 53708-8935

**PROCEDURAL SUMMARY**

These proceedings were initiated on June 18, 2013, when the Department of Safety and Professional Services ("the Department"), Division of Legal Services and Compliance ("the Division"), served a formal Complaint upon Respondent Michael Kotlarek, alleging that Mr. Kotlarek's land surveyor license was subject to disciplinary action pursuant to Wis. Stat. § 443.12(1) and Wis. Admin. Code § A-E 7.04 and 8.03 due to various deficiencies in two separate

plats of surveys he prepared, one submitted on August 26, 2011 and a revised version submitted on February 11, 2012.

Mr. Kotlarek submitted his Answer on July 5, 2013. A hearing was held on December 4, 2013, a transcript of which was filed on December 12, 2013.

### **FINDINGS OF FACT**

1. Respondent Michael Kotlarek (DOB April 7, 1958) is licensed in the State of Wisconsin as a land surveyor, having license number 1677-8, first issued on January 29, 1982, and current through January 31, 2014. (Complaint, ¶ 1, Answer, ¶ 1)

2. Mr. Kotlarek's most recent address on file with the Department is N80 W28352 Keesus Road, Hartland, Wisconsin 53029. (Complaint, ¶ 2, Answer, ¶ 2)

3. On August 26, 2011, Mr. Kotlarek signed and sealed a plat of survey of property located at 6346 7<sup>th</sup> Avenue in Kenosha, Wisconsin. The document is two pages. The first page contains a map of the property and the second page is the recorded deed for the property. The first and second pages indicate the same Parcel Number, which is 05-125-06-106-021. They also indicate the same Document Number, which is 1058900. (Complaint, ¶ 3, Answer, ¶ 3; Division's Exhibit 1; Hrg. Trans., p. 21)

4. The two pages of the August 26, 2011 plat of survey were attached to each other, and page 2, which is the recorded deed for the property, was intended as the description of the surveyed property. (Hrg. Trans., pp. 20-22, 39, 67-68, 91)

5. The Department's Complaint alleges that the survey contains the following deficiencies:

- a. There was no legal description.
- b. There were no ties to the adjoining 7<sup>th</sup> Avenue.

- c. There was/were no right of way line(s) identified.
- d. There was no reference to the quarter-quarter.
- e. There were no ties to public lands.

(Complaint, ¶ 3)

6. On February 11, 2012, Mr. Kotlarek signed and sealed a revised plat of survey which he submitted to the Department. The Department's Complaint alleges that the February 11, 2012 revised survey contains the following deficiencies:

- a. There was no reference to, or depiction of, monumentation, including describing and substantiating the right-of-way lines of either 7<sup>th</sup> or 8<sup>th</sup> Avenues.
- b. Three items had been moved from their original positions.
- c. Eleven new pieces of information were included.

(Complaint, ¶ 4)

7. A hearing was held on December 4, 2013. Aside from Mr. Kotlarek's testimony, the only other testimony was from the Division's expert, Gerald Mahun, who, with the agreement of Mr. Kotlarek, was deemed qualified as an expert in land surveying. Mr. Mahun opined that neither the August 26, 2011 plat of survey contained in the Division's Exhibit 1 or the February 11, 2012 plat of survey contained in the Division's Exhibit 2 met the minimum standards established in Wisconsin for property surveys. (Hrg. Trans, pp. 15-16, 33)

8. Mr. Mahun credibly testified that the August 26, 2011 plat of survey was legally deficient because the description did not contain unequivocal identification of lines or boundaries, there was no reference to the quarter-quarter section, and there were insufficient ties to public lands.



## **DISCUSSION**

### **Burden of Proof**

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3); *see also* Wis. Admin. Code § HA 1.17(2). To prove by a preponderance of the evidence means that it is “more likely than not” that the examined action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18, 306 Wis. 2d. 129, 743 N.W.2d 460, citing *United States v. Sauter*, 60 F.3d 270, 280 (7th Cir. 1995).

### **Violations of Wis. Stat. § 443.12 and Wis. Admin. Code §§ A-E 7.04 and 8.03**

The Division alleges that Mr. Kotlarek is subject to discipline pursuant to Wis. Stat. § 443.12(1), which provides that the Land Surveyor Section of the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Land Surveyors (“the Section”) “may reprimand or limit, suspend or revoke the certificate of registration of any land surveyor for the practice of any fraud or deceit in obtaining the certificate, or any gross negligence, incompetence or misconduct in the practice of land surveying.”

For purposes of this proceeding, the relevant language in Wis. Stat. § 443.12(1) is “negligence, incompetence or misconduct in the practice of land surveying.” Specifically, the Division contends that Mr. Kotlarek violated the standards contained in Wis. Admin. Code §§ A-E 7.04 and 8.03(3)(b). Wisconsin Admin. Code § A-E 7.04 provides:

**A-E 7.04 Descriptions.** Descriptions defining land boundaries written for conveyance or other purposes shall be complete, providing unequivocal identification of lines or boundaries. The description shall contain necessary ties to adjoining together with data and dimensions sufficient to enable the description to be mapped and retraced and shall describe the land surveyed by government lot, recorded private claim, quarter-quarter section, section, township, range and county and by metes and bounds commencing with some corner marked and established by the U.S. public land survey; or, if the land is located in a recorded

subdivision, a recorded addition to the subdivision, or recorded certified survey map, then by the number or other description of the lot, block or sub-division of the land which has been previously tied to a corner marked and established by the U.S. public land survey.

Further, Wis. Admin. Code § A-E 8.03(3)(b) defines "misconduct in the practice of land surveying" as "an act performed by a[] . . . land surveyor in the course of the profession which jeopardizes the interest of the public" and includes "[p]reparation of deficient plans, drawings, maps, specifications or reports." Here, the Division argues that Mr. Kotlarek engaged in misconduct by failing to include proper written descriptions of the parcels he surveyed with both of his maps. (Hrg. Trans., pp. 8, 95) The Division's position with respect to Wis. Admin. Code § A-E 8.03(3)(b) has been construed to mean that Mr. Kotlarek's descriptions were not "proper" because he failed to comply with the description requirements of Wis. Admin. Code § A-E 7.04.<sup>1</sup>

#### **August 26, 2011 Plat of Survey**

##### ***Allegation that the plat of survey contained "no legal description."***

The Division's Complaint first alleges that the August 26, 2011 survey contained "no legal description." The Division has not clarified what it means by the phrase "legal description," nor has it cited any authority which uses that phrase. In addition, the Division's own expert, Mr. Mahun, testified that if the deed was attached to Mr. Kotlarek's map, the attachment would constitute a "legal description." (Hrg. Trans., p. 39) Because the record supports the fact that the deed was attached to the map, the Complaint's allegation that there was "no" legal description is not supported by a preponderance of the evidence. However, the Division's position at hearing did not appear to be that there was "no" legal description of the

---

<sup>1</sup> During its closing argument, the Division, in discussing misconduct, also referenced Wis. Admin. Code § A-E 7.05(5) which requires, in relevant part, that a map be drawn for every survey and that the map "describe the parcel as provided in A-E 7.04." Because Wis. Admin. Code § A-E 7.05 was not referenced in the Complaint and was relied upon by the Division solely insofar as it requires compliance with § A-E 7.04, § A-E 7.05 is not addressed with respect to the misconduct allegation. I note, however, that § A-E 7.05 is discussed with respect to the issue of monuments. Although the Division has never cited this provision with regard to the issue of monuments (an issue which, as discussed below, the Division did not address at hearing), it is the relevant rule addressing monuments.

August 26, 2011 plat of survey, but that the description was inadequate under Wis. Admin. Code § A-E 7.04. This provision, cited in full above, explains what information must be contained in a description defining land boundaries.

The Division's expert, Mr. Mahun, testified that if the deed attached to the map was meant to serve as the description, then the description was inadequate because it did not meet the requirements for descriptions under Wis. Admin. Code § A-E 7.04. In addition to his opinion that the description did not contain quarter-quarter sections or have sufficient ties to a public land survey corner, discussed separately in other subsections below, Mr. Mahun testified that the description was deficient because it did not contain an unequivocal identification of the exterior of the property. (Hrg. Trans., p. 23) Wisconsin Admin. Code § A-E 7.04 states, in part: "[d]escriptions defining land boundaries written for conveyance or other purposes shall be complete, providing unequivocal identification of lines or boundaries." Mr. Mahun testified as follows with regard to one of the lines of the exterior of the property:

Along at least one line, there's about a 2-foot difference between the record dimension [in the recorded deed] and the dimension based on where Mr. Kotlarek decided to set the corner based on the evidence that he used, a difference of nearly 2 feet, which in a relatively short distance – it was under 50 feet – is a considerable difference. And to me, a 2-foot difference that's not reflected in an updated description, doesn't provide for unequivocal location of the parcel.

(Hrg. Trans., pp. 23-24) During cross-examination, Mr. Kotlarek also testified regarding this topic:

Q. [referencing the Division's Exhibit 1] Are there differences in the location of this property on your map as opposed to the record deed attached as the description?

A. No. There's conflicts but not – no.

Q. There are conflicts between your map and the deed? That's what you just testified, correct?

A. There's some conflicts – well –

Q. Yes or no. Did you just testify that there are conflicts between the map and the attached deeds?

A. No. There are no conflicts between the two. Do you want me to explain?

Q. No. . . .

(Hrg. Trans., pp. 85-86) Although he attempted to backtrack from his initial answer, Mr. Kotlarek himself indicated that there were conflicts between his map and the attached deed. In light of the testimony by Mr. Mahun and Mr. Kotlarek himself, the Division has demonstrated by a preponderance of the evidence that Mr. Kotlarek's description was legally insufficient under Wis. Admin. Code § A-E 7.04 because it did not contain "unequivocal identification of lines or boundaries."

***Allegation that the plat of survey contained no ties to the adjoining 7<sup>th</sup> Avenue.***

Pursuant to Wis. Admin. Code § A-E 7.04, the description must "contain necessary ties to adjoining." The Division presented no evidence on this issue during the direct examination of its only witness, Mr. Mahun, and the Division's exhibits by themselves do not establish this allegation. Thus, had there been no additional testimony on this issue following the Division's case-in-chief, it would be clear that the Division had failed to meet its burden with respect to ties to adjoining 7<sup>th</sup> Avenue. However, Mr. Kotlarek himself raised the issue of adjoining 7<sup>th</sup> Avenue during his cross-examination of Mr. Mahun. Mr. Kotlarek attempted to elicit a concession from Mr. Mahun that because the Division itself stated in its Complaint that 7<sup>th</sup> Avenue was "adjoining" the property, it was clear that there was a tie to 7<sup>th</sup> Avenue.

Q. . . . [T]hat same paragraph B, they say, "There were no ties to adjoining 7<sup>th</sup> Avenue." Now, it's kind of redundant, because if a survey is adjoined to 7<sup>th</sup> Avenue, then there really would be no tie to 7<sup>th</sup> Avenue [sic]; is that correct?

A. That is correct.

Q. So, I guess, what we just decided or described is that paragraph 3 in the complaint, B, that also is not true? There is in fact a tie adjoining to 7<sup>th</sup> Avenue?

A. I don't agree with that.

Q. Please explain.

A. I explained that in the original report that I issued<sup>2</sup> because it was not clear, and it's just a point of clarification on a plat ambiguity. It identifies it "as traveled" for the street [7<sup>th</sup> Avenue] and the street centerline; and to me, that's not clear. Does that indicate a possession type of line, a use line, or does it actually represent a title or deed line? If it, in fact, is a street sideline, it should be labeled as such. To me, that's a point of confusion.

Q. I respect your comment, but what the complaint is saying – and, again, I want to stick to the complaint. It says that there was no ties to the adjoining 7<sup>th</sup> Avenue. And, again, they use the word "adjoining."

So if the survey – the department acknowledged that because of this, the word adjoining, they acknowledge the fact that that survey is, in fact, is contiguous –

MS. NORBERG: Objection. Is he testifying?

JUDGE NASHOLD: I'm sorry. This is testimony. You need to ask a question.

Q. (MR. KOTLAREK) When you have a parcel of land adjoining 7<sup>th</sup> Avenue – whether it be 7<sup>th</sup> Avenue or any other avenue, would there be a tie to 7<sup>th</sup> Avenue, or any other avenue, if it's adjoining? What's the difference between adjoining and the gap that –

A. If it's adjoining, then it is tied to it. If that is the street sideline.

Q. Okay. So, again, paragraph 3-B, they claim that there were no ties to adjoining 7<sup>th</sup> Avenue. And now what I just understood is you agree with me that that is not a violation?

MS. NORBERG: Mischaracterizes the testimony.

A. That's not what I testified.

JUDGE NASHOLD: Let's just take up the objection. I am going to allow the answer. It sounds like he is saying that that was mischaracterization. So go ahead.

A. I was just going to say that if the street line and the property line coincide or are adjacent to each other, that's true. But again, because that is indicated as an "as traveled" or "as used," to me that doesn't indicate a title location or deed location for the street. It indicates a use location, which is no different

---

<sup>2</sup> The Division did not introduce Mr. Mahun's report into evidence.

than, say, the fence location that is shown on the other side of the property, where that's identified as a use line, and that is not a contiguous boundary with respect to the property at that point.

If, in fact, that is the street line, all I'm saying there is it would have been clearer and less confusing if that would just have been identified as the street line as opposed to "as used."

Q. So it's your opinion.

A. That's my opinion. That's just a point of clarification.

Q. What administrative code requires this to be shown on a map?

A. That requires what to be shown on a map?

Q. Identification of 7<sup>th</sup> Avenue on the map. Actually labeled right on the map.

A. The ties to adjoining parcels, and the street would be an adjoining parcel because it represents a different set of rights, so that's within the administrative code.

(Hrg. Trans., pp. 39-42) This testimony, elicited during Mr. Kotlarek's cross examination, comes close to establishing that the description was inadequate under Wis. Admin. Code § A-E 7.04 because it did not contain the necessary ties to adjoining 7<sup>th</sup> Avenue. However, he never directly testifies that the description was legally insufficient, and, at best, states that the description could have been clearer and less confusing. The issue becomes even more unclear, and more favorable to Mr. Kotlarek, during Mr. Mahun's testimony on re-direct examination:

Q. Does A-E 7.04 require ties to joiners?

A. Necessary ties to joiners.

Q. Do any ties to joiners on Exhibit 1 meet the minimum standards of A-E 7.04?

A. In the description or on the map?

Q. The description.

A. The description does call out joiners. It calls out the streets.

Q. Does that meet the minimum standards of Chapter A-E 7?

A. Insofar as it identifies necessary ties to joiners, yes.

(Hrg. Trans., pp. 68-69) As shown above, Mr. Mahun testified that, with respect to “streets,” the necessary ties to adjoiners are identified. Although it is somewhat unclear whether Mr. Mahun means to include “avenues” (such as 7<sup>th</sup> Avenue) within his use of the term “streets,” or instead draws a distinction between “avenues” and “streets,” I note that during another point in his testimony quoted above, he referred to 7<sup>th</sup> Avenue as a “street.” When asked what provision of the administrative code requires identification of 7<sup>th</sup> Avenue on the map, he stated, “The ties to adjoining parcels, and the street would be an adjoining parcel . . . .” Thus, it appears that Mr. Mahun drew no distinction between avenues and streets and that therefore, his opinion was that the description complies with the code insofar as it identifies necessary ties to adjoiners, including with respect to 7<sup>th</sup> Avenue. In light of the testimony on this point and because the Division has the burden of proof, I must find in favor of Mr. Kotlarek on this issue. Based on the record, the Division has failed to establish by a preponderance of the evidence that the August 26, 2011 plat of survey did not contain ties to the adjoining 7<sup>th</sup> Avenue.

***Allegation that the plat of survey did not identify right-of-way lines.***

As with the issue involving 7<sup>th</sup> Avenue, the Division did not elicit any testimony during its direct examination of Mr. Mahun regarding identification of right-of-way lines, nor does the Division’s evidence, by itself, establish a violation with respect to this issue. Again, the issue of right-of-way identification was first raised by Mr. Kotlarek during his cross-examination of Mr. Mahun:

- Q. (MR. KOTLAREK) I guess the question was: What administrative code requires that identification of a right-of-way needs to be depicted on the map?
- A. In 7.03, boundary location, the second sentence reads, “Surveyors will acquire data necessary to retrace record title boundaries such as deeds, maps, certificates of title and centerline and other boundary line locations,” which

means that the centerline needs to be located since the side line is the coincident boundary with the parcel, then the side line or the right-of-way would have to be shown with respect to that centerline.

...

Q. Maybe I misunderstood. My question was: Where in A-E – in the administrative code requires that a right-of-way identifier needs to be shown on a survey map?

A. There's nothing in A-E 7 that specifies a right-of-way line has to be shown.

Q. Perfect. . . .

(Hrg. Trans., pp. 44-45) With no further evidence or argument from the Division, the record does not establish a violation based on failure to indicate a right-of-way.

***Allegation that the survey contained no reference to the quarter-quarter section.***

Wisconsin Admin. Code § A-E 7.04, set forth in full above, is clear that plats of survey must describe quarter-quarter sections. Mr. Mahun testified during direct examination that Mr. Kotlarek's August 26, 2011 plat of survey did not meet the requirements of Wis. Admin. Code § 7.04 because "it misses a few of the required items, such as the identification to a government lot or quarter-quarter section. The deed is only to the nearest quarter. It should have gone down another level to the nearest 40-acre parcel within the public land survey system." (Hrg. Trans., p. 22) He testified similarly during re-direct examination:

Q. Does Exhibit 1 [the August 26, 2011 plat of survey] contain a description that references a quarter-quarter section?

A. The description does not reference a quarter-quarter section, no. It only references a quarter section.

Q. Does A-E 7.04 require reference to a quarter-quarter section?

A. Yes. Or a government lot.

(Hrg. Trans., p. 69)



Moreover, Mr. Kotlarek admits in his Answer filed on July 5, 2013 that the August 26, 2011 plat of survey does not reference the quarter-quarter section. However, his Answer then goes on to state:

ADMIT. The Plat of Survey dated August 26, 2011 shows "*Part of the Northeast ¼ of Section 6, Town 1 North, Range 23 East, City of Kenosha, County of Kenosha, Wisconsin, Doc. #1058900[.]*" [T]his was taken from the recorded document #1058900. The said doc. #1058900 that was attached to the Plat of Survey, fully describes this parcel as it was transferred to the Ludke's on 5/29/1997[.]

(Answer, ¶ 3(d)) Mr. Kotlarek likewise admitted to this allegation during cross-examination:

Q . . . Does your description on Exhibit 1 describe the land surveyed by quarter-quarter section?

A. I did not write a legal description. If you are asking me if the description my survey does not describe a quarter-quarter section directly, it does describe and indicate a tax key number. That tax key number then is mapped on a GIS mapping in Kenosha County, and it would be identified in the quarter-quarter section. It could be tied down within 4 feet.

Q. But your description on Exhibit 1 does not reference a quarter-quarter section?

A. It does not.

Q. On Exhibit 2 [the February 11, 2012 plat of survey], however, your description does reference a quarter-quarter section, correct?

A. Correct.

(Hrg. Trans., p. 86) Mr. Kotlarek has admitted that the August 26, 2011 plat of survey does not include quarter-quarter sections. Moreover, he has failed to provide any support for his suggestion that he was absolved from such a duty by attaching the recorded deed or by including a tax key number which, in turn, is mapped on a GIS mapping that would include quarter-quarter section information.

Based on the foregoing, the Division has met its burden of establishing a violation based on Mr. Kotlarek's failure to include information regarding quarter-quarter sections.

***Allegation that the plat of survey did not include ties to public lands.***

As stated above, Wis. Admin. Code § A-E 7.04 requires:

*The description . . . shall describe the land surveyed by government lot, recorded private claim, quarter-quarter section, section, township, range and county and by metes and bounds commencing with some corner marked and established by the U.S. public land survey; or, if the land is located in a recorded subdivision, a recorded addition to the subdivision, or recorded certified survey map, then by the number or other description of the lot, block or sub-division of the land which has been previously tied to a corner marked and established by the U.S. public land survey."*

(Emphasis added).

During his direct testimony, Mr. Mahun testified that the description was legally inadequate because it "does not commence at a public land survey corner by bearing in distance to the property." (Hrg. Trans., p. 22) He testified similarly during re-direct examination:

Q. On Exhibit 1, is there a description that commences with a corner marked and established by the US Public Land Survey?

A. It does not.

(Hrg. Trans., p. 69)

In his Answer filed on July 5, 2013, Mr. Kotlarek admits this allegation. However, his Answer further explains:

ADMIT. The recorded legal description for this tract of land was not described from public lands rather it describes "*commencing at a point on the west line of the street running south from the Southeast corner of park, known as [S]eventh Avenue, (formerly Park Avenue) which is 47 rods, 8 feet and 10 inches South of the Southeast corner of Lot 16. . . []*" The Plat of Survey clearly shows this and the ties to said Lot 16. The property will be tied into the local USGS datum when the courts make a decision on the disputed property line, (*See Circuit Court, Kenosha County Case No. 2012CV1746 before Hon. Bruce E. Schroeder Circuit Court Judge, Br 3*)

(Answer, ¶ 3(e)) During his cross-examination of Mr. Mahun, Mr. Kotlarek attempted to elicit testimony from Mr. Mahun that the description contained on the deed was tied to Lot 16 and that

Lot 16 was part of a subdivision. Mr. Mahun acknowledged that the description reflected on the deed is tied to Lot 16. (Hrg. Trans., p. 71) However, Mr. Mahun further testified that the description does not state that Lot 16 is in a subdivision. (Hrg. Trans., pp. 23, 71) Further, Mr. Kotlarek did not present evidence showing that Lot 16 was in a recorded subdivision or that the land on which the recorded subdivision was allegedly located “has been previously tied to a corner marked and established by the U.S. public land survey,” as required by Wis. Admin. Code § A-E 7.04. Indeed, as set forth above, his Answer asserts that “[t]he property *will be* tied into the local USGS datum when the courts make a decision on the disputed property line.” (Emphasis added.)

Accordingly, a preponderance of the evidence supports the Division’s allegation that Mr. Kotlarek’s August 26, 2011 plat of survey did not comply with Wis. Admin. Code § A-E 7.04 because it did not describe the property “by metes and bounds commencing with some corner marked and established by the U.S. public land survey,” as required by that provision.

In sum, the Division proved three out of the five specific deficiencies with respect to the August 26, 2011 plat of survey, namely, that the plat of survey did not contain identification of unequivocal lines and boundaries, reference to the quarter-quarter or adequate ties to public lands, as required by Wis. Admin. Code § 7.04. As a result, Mr. Kotlarek’s preparation of the August 26, 2011 plat of survey also constitutes misconduct in the practice of land surveying under Wis. Admin. Code § A-E 8.03(3)(b) because he prepared “deficient plans, drawings, maps, specifications or reports” which “jeopardize[d] the interest of the public.”

#### **February 11, 2012 Plat of Survey**

The Complaint alleged three deficiencies with respect to the February 11, 2012 plat of survey: first, that there was no reference to, or depiction of, monumentation, including describing and substantiating the right of way lines of either 7<sup>th</sup> or 8<sup>th</sup> Avenues; second, that three items had

been moved from their original position; and third, that eleven new pieces of information were included. The three specific violations were not explained in any way by the Division's expert during direct or redirect examination, were not explained by the Division in its closing argument and were not established by the Division's exhibits. The only testimony the Division elicited with respect to the February 11, 2012 plat of survey (Division's Exhibit 2) was that it did not meet the minimum standards for land surveys required by Wis. Admin. Code § A-E 7.04. (Hrg. Trans., pp. 15-16, 33) The three specific violations were only addressed during Mr. Kotlarek's cross-examination of Mr. Mahun.

***Allegation that there was no reference to, or depiction of, monumentation, including describing and substantiating the right-of-way lines of either 7<sup>th</sup> or 8<sup>th</sup> Avenues.***

The Division did not provide any argument with respect to monuments, nor has it provided any definition of what constitutes a monument. Monumentation is required by Wis. Admin. Code § A-E 7.05, a provision governing maps which was not referenced in the Complaint. Wisconsin Admin. Code § A-E 7.05(4) requires that a map must "describe all monuments used for determining the location of the parcel and show by bearing and distance their relationship to the surveyed parcel and indicate whether such monuments were found or placed."

Without expert testimony or any other authority on this issue, I cannot discern whether the map contained in the February 11, 2012 plat of survey (Division's Exhibit 2) contains a legally sufficient description of monuments. Moreover, the testimony elicited by Mr. Kotlarek during his cross-examination of Mr. Mahun suggests that the map did in fact contain monuments. Mr. Mahun testified that a street itself is a monument. (Hrg. Trans., p. 50) Both 7<sup>th</sup> and 8<sup>th</sup> Avenues are identified on the February 11, 2012 map, and, as stated above, it does not appear that Mr. Mahun drew any distinction between avenues and streets when he used the term

“street.” In addition, Mr. Mahun testified that a road marked “as traveled” can be considered a monument. (Hrg. Trans., p. 51) Both 7<sup>th</sup> and 8<sup>th</sup> Avenues are marked “as traveled” on the February 11, 2012 map. With regard to the specific allegation that neither 7<sup>th</sup> nor 8<sup>th</sup> Avenue showed right-of-ways, that argument was addressed above: the Division’s own expert testified that right-of-ways were not specifically addressed by Chapter § A-E 7. Without any further evidence or argument from the Division demonstrating a violation with respect to depiction of monuments, the Division has not met its burden of establishing this violation by a preponderance of the evidence.

***Allegations that three items had been moved from their original position and that eleven new pieces of information were included.***

As with several other allegations contained in the Complaint, the Division presented no evidence or argument with respect to these remaining two allegations, and the testimony elicited by Mr. Kotlarek during his cross-examination of Mr. Mahun served to undermine the allegations. During cross-examination, the following colloquy occurred:

- Q. In the complaint paragraph 4, subparagraph B, “Three items” – and now this is part of the complaint. “Three items have been moved from their original position.” Now that you have the administrative code in front of you, can you tell me what administrative code – or if there is none, just please say there are none – prohibits the moving of items on the . . . revised or updated plat?
- A. There’s nothing that prevents it because the revisions are not addressed in A-E 7.
- Q. So moving three items from their original position is not in violation of the administrative code?
- A. Not the administrative code, no.
- Q. In paragraph C of paragraph 3, “11 new pieces of information were included.” Is that in violation of the administrative code to move things around from the survey as long as it’s recorded at the surveyor’s office or what office does the duties of a registered – the county surveyor?
- A. So subparagraph 3 is not in violation of the administrative code?

MS. NORBERG: Did you mean C?

MR.KOTLAREK: C. I'm sorry.

JUDGE NASHOLD: You are welcome to look at that.

A. No. That is not in violation of the code. However –

Q. That's enough. Thank you. . . .

(Hrg. Trans., pp. 50-51) In view of the foregoing, the Department has not met its burden of establishing a violation with respect to these two specific allegations.

Accordingly, despite Mr. Mahun's general testimony that the February 11, 2012 plat of survey did not meet the minimum requirements of land surveying, I cannot find support for this assertion based on the evidence and argument in this case because the Division has not established that the deficiencies alleged in the Complaint constituted a violation of Wis. Admin. Code § A-E 7.04 or that there were any other deficiencies with regard to this plat of survey. If there are indeed deficiencies in the February 11, 2012 plat of survey, it was the Division's duty to prove and explain what they were. It has not met that burden. As a result, the Division has also failed to establish that Mr. Kotlarek engaged in misconduct as defined by Wis. Admin. Code § A-E 8.03(3)(b) with respect to his February 11, 2012 plat of survey.

### **Discipline**

The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Division requests that Mr. Kotlarek receive a formal reprimand and that his license be limited to require that he do two things: first, that Mr. Kotlarek successfully complete three credits of education on the topic of legal principles and practices of boundary reestablishment (enrolling in the next-available class following the Section's final order), and second, that he

submit the first three surveys he completes following the Section's final order or following completion of the ordered course credits to the Wisconsin Society of Land Surveyors' survey map review committee for review.

Based on the record in this case, I conclude that the Division's recommended discipline best serves the purposes of rehabilitation, protection of the public and deterrence. It is clear that the August 26, 2011 plat of survey failed to comply with the requirements of Wis. Admin. Code § 7.04 in several respects. First, it failed to include unequivocal identification of lines and boundaries, which is a serious violation and of primary concern for those requesting and relying on land surveys. The August 26, 2011 plat of survey also failed to describe the land surveyed by quarter-quarter section and by metes and bounds commencing with some corner marked and established by the U.S. public land survey. Mr. Kotlarek's conduct with respect to the August 26, 2011 plat of survey also constituted misconduct in the practice of land surveying in that he prepared a deficient plat of survey which jeopardized the public interest. The reprimand, along with the education and survey review requirements recommended by the Division, will help rehabilitate Mr. Kotlarek and also protect the public which relies on his land surveys. It will also serve to deter other land surveyors from failing to comply with the professional requirements for land surveyors.

With regard to the three surveys which Mr. Kotlarek will be required to submit for review, I conclude that they should be submitted for review directly following the Section's final order rather than after completion of the required credits so that the Section may immediately identify and address any further deficiencies. Presumably, Mr. Kotlarek will enroll in the required course in a timely manner so that the results of his education may be reflected in his submitted surveys.

### Costs

The Department has the authority to assess costs pursuant to Wis. Stat. § 440.22. The Division requests that Mr. Kotlarek be ordered to pay the full costs of its investigation and of these proceedings. The factors to be considered in assessing costs are: (1) the number of counts charged, contested and proven; (2) the nature and seriousness of the misconduct; (3) the level of discipline sought by the prosecutor; (4) the respondent's cooperation with the disciplinary process; (5) prior discipline, if any; (6) the fact that the Department is a "program revenue" agency, whose operating costs are funded by the revenue received from licenses, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct; and (7) any other relevant circumstances. *See In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008).

With respect to the first factor, I note that of the eight specific deficiencies alleged, only three were proven, and the three proven only related to the August 26, 2011 plat of survey. The Division did not prove any violation with respect to the February 11, 2012 survey. Two of the three specific allegations proven were actually admitted in Mr. Kotlarek's Answer, although he attempted to show why the conduct should not be considered a violation. The three proven deficiencies were the only deficiencies addressed in any detail by the Division at hearing, suggesting that the Division may have been aware that the remaining allegations were not meritorious. Nevertheless, Mr. Kotlarek was required to prepare for and address, and the undersigned ALJ was required to consider, allegations that likely should either not have been pursued in the first instance or should have been abandoned at some point, particularly after the evidence was presented. I note that prior to closing arguments in the case, the Division's



attorney was asked by the ALJ if, in light of the evidence presented, the Division still wished to pursue all of the allegations contained in the Complaint or whether there were some that should be eliminated. The Division's attorney responded that she was not the original attorney on the case, that she was assigned to the case in the 11<sup>th</sup> hour when she believed it was too late to amend the Complaint, and that she felt compelled to pursue, and wished the ALJ to consider, all of the allegations alleged, despite the fact that the Division presented no evidence with respect to several of the specific allegations.

However, the Division did prove three of the deficiencies it alleged and these proceedings, proceedings which would not have occurred had Mr. Kotlarek understood and complied with the requirements of his profession.

Regarding the second factor, the nature and seriousness of the misconduct, I note that Mr. Kotlarek's shortcomings, although serious in the context of land surveying, were not intentional or done for any personal gain. With respect to the third factor, the level of discipline sought by the Division, I note that the discipline requested, which is appropriate, is not particularly severe in the scheme of disciplinary hierarchy. I also note that with respect to the fourth and fifth factor, Mr. Kotlarek has been very cooperative and respectful of the disciplinary process throughout these proceedings and that he has had no prior discipline. The only factor that unequivocally operates in favor of the Department, as it always does, is the fact that the Department is a "program revenue" agency, whose operating costs are funded by the revenue received from licenses, and it is unfair to impose the costs of disciplining Mr. Kotlarek on the vast majority of the licensees who have not engaged in misconduct.

Based on the factors above, I conclude that it is appropriate to impose 30 percent of the costs of these disciplinary proceedings on Mr. Kotlarek.

## CONCLUSIONS OF LAW

1. The Division met its burden of establishing that Mr. Kotlarek violated Wis. Admin. Code § A-E 7.04 because the description in his August 26, 2011 plat of survey did not include unequivocal identification of lines or boundaries or quarter-quarter sections or describe the property “by metes and bounds commencing with some corner marked and established by the U.S. public land survey,” as required by that provision. The Division also met its burden of establishing that these deficiencies jeopardized the interests of the public and that therefore, Mr. Kotlarek also committed misconduct in the practice of land surveying, in violation of Wis. Admin. Code § A-E § 8.03(3)(b).

2. The Division did not meet its burden of establishing that the August 26, 2011 plat of survey was legally insufficient under Wis. Admin Code § A-E 7.04 because it did not contain ties to adjoining 7<sup>th</sup> Avenue or identify right-of-way lines, nor did the Division establish that these allegations constituted misconduct in the practice of land surveying under Wis. Admin. Code § A-E 8.03(3)(b).

3. The Division did not meet its burden of establishing that Mr. Kotlarek violated Wis. Admin. Code §§ A-E 7.04, 7.05 or 8.03(3)(b) due to the alleged deficiencies in his February 11, 2012 plat of survey.

4. A reprimand, along with the educational and survey review requirements set forth in the Order section below, are appropriate under *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

5. Imposition of 30 percent of the costs on Mr. Kotlarek for these disciplinary proceedings is warranted under Wis. Stat. § 440.22 and *In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008).

## **ORDER**

Based on the foregoing, it is hereby ORDERED that:

1. Mr. Kotlarek is REPRIMANDED.
2. Mr. Kotlarek's license is limited as follows:
  - a. Mr. Kotlarek shall successfully complete three credits of education on the topic of legal principles and practices of boundary reestablishment, and must enroll in the next-available class following the Section's final order.
  - b. Mr. Kotlarek shall submit the first three surveys he completes following the Section's final order in this matter to the Wisconsin Society of Land Surveyors' survey map review committee for review.
3. Thirty percent of the costs of these proceedings shall be assessed against Mr. Kotlarek in accordance with Wis. Stat. § 440.22 and Wis. Admin. Code § SPS 2.18.
4. Payment of costs shall be made payable to the Wisconsin Department of Safety and Professional Services and sent to the Department Monitor at the address below:

**Department Monitor  
Division of Legal Services and Compliance  
Department of Safety and Professional Services  
P.O. Box 8935  
Madison, WI 53708-8935**
5. The terms of this Order are effective the date the Final Decision and Order is signed by the Section.

IT IS FURTHER ORDERED that the above-captioned matter is hereby closed as to  
Respondent Michael Kotlarek.

Dated at Madison, Wisconsin on January 13, 2014.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 264-9885

By: 

Jennifer E. Nashold  
Administrative Law Judge

G:\DOCS\SPS DECISIONS\KOTLAREK\MIC.PROPDEC.JEN.DOC