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WEST VIRGINIA

STATE BOARD OF EXAMINERS OF LAND SURVEYORS

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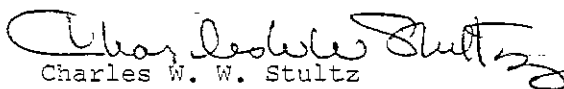
TO: SECRETARY OF STATE

NOTICE OF RULE MODIFICATION

LEGISLATIVE RULE: Rules and Regulations for the practice of land surveying in West Virginia.

The above titled rule has been modified as a result of comments by the Legislative Rule-Making Review Committee and the attached modifications have been incorporated into the above titled rule and filed in the Secretary of State's office on November 8, 1985.

WEST VIRGINIA STATE BOARD
OF EXAMINERS OF LAND SURVEYORS


Charles W. W. Stultz
Secretary of the Board

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SECRETARY OF STATE

WEST VIRGINIA ADMINISTRATIVE REGULATIONS
State Board of Examiners of Land Surveyors
CHAPTER 30-13A
SERIES I, (1969) AS AMENDED

TITLE: RULES AND REGULATIONS FOR THE PRACTICE OF LAND SURVEYING IN W.VA.

Section 1. General

1.1 Statutory Authority - These Rules and Regulations are promulgated by the State Board of Examiners of Land Surveyors under authority of Chapter 30, Article 13A, Section 4(a) of the West Virginia Code.

1.2 Temporary Board Office - 34 West Main Street, Romney, West Virginia.

1.3 Filing Date - These rules and regulations were filed in the office of the Secretary of State on the 4th day of June 1976, the 23rd day of February 1981, and the 12th day of January, 1984.

1.4 Effective Date: 1st. day of July, 1985.

Section 2. General Purpose

2.1 These Rules and Regulations with the Minimum Standards of Practice for the performance of Boundary Surveys are promulgated for the purpose of administration and enforcement of Chapter 30, Article 13A of the West Virginia Code.

Section 3. Satisfactory Records

3.1 Satisfactory Records, shall include plats, deeds, and descriptions of surveys, certificates or reports of surveys, field notes, calculations for latitude, departure, coordinates, area, variation, observation for true meridian and other related records; related to the survey work performed.

Section 4. Experience

4.1 The Board will consider adequate experience under a supervisor to include the subjects in Section 6 of these Rules and Regulations: satisfactory or approved experience as diversified practical training in land surveying as defined in Section Two, Article Thirteen-a, Chapter Thirty of the Code of West Virginia under the direct supervision of a licensed land surveyor, such experience shall be acquired in positions of responsibility requiring exercising of independent judgment, initiative, and professional skill. Approved experience shall not include positions of routine work such as chainman or rodman.

Section 5. Examinations

5.1 The content of examinations will be taken from the subjects in Section 6 of these Rules and Regulations.

Section 6. Accredited Surveying Curricula

6.1 The Board will be guided in accrediting survey curricula by the extent to which the following subjects are included in said curricula:

6.2 At least two years instruction are required to cover the subject of land surveying, with at least 60 semester credit hours. The curricula should cover the following subjects:

6.3 Mathematics to meet land survey needs, including arithmetic, algebra, plane geometry, trigonometry, functions and formulas, logarithms, triangulation, square roots, latitudes, departures, coordinates, curves, area, significant figures, accuracy, precision, theory and probability and kinds of errors, elementary data and statistical analysis, interpolations, omitted measurements, drainage calculations, and partitioning. Sufficient to The above subjects should supplement high school deficiencies curricula.

6-4 6.3 English, spelling, grammar, writing, speaking, and typing, sufficient to supplement high school deficiencies.

6-5 6.4 Ethics and public relations for surveyor. Responsibilities to the public, clients, adjoining, and to the profession.

6-6 6.5 Legal and historical aspects of surveying. Records of ownership and transfer of title, controlling elements, adverse possession, ejectment, seniority, resurveys, surplus and deficiency, riparian rights, meander lines, metes and bounds surveys, U.S. Public Land survey system, laws, ordinances, and rules for surveys and subdivisions, liability for trespass, witnessing in court, handling of disputes, boundary line agreements, authority of surveys.

6-7 6.6 Preliminary procedures. Record sources, searches, abstracts, platting, detection and adjustment of errors, ground evidence.

6-8 6.7 Survey equipment capabilities, use and care. Compass, transit, theodolite, electronic devices, clinometer, stadia, plane table, level, tapes, rods, plumb bob, verniers, notebooks, and small tools.

6-9 6.8 Field methods. Rural lands, city lots, subdivisions, underground, oil and gas well, surface mines, rights-of-way, title insurance surveys, hydrographic, topography, Public lands, field notes, precisions, accuracies, bypassing obstacles, route and construction surveying.

6-10 6.9 Plotting, drafting, mapping. Equipment, methods, material, scales, sheet sizes, recordability, conventional symbols.

6-11 6.10 Calculations. Latitude, departure, DMD's, coordinates, areas, curves, inversing and intersections. Balancing latitudes and departures, errors of closure. Calculating equipment.

6-12 6.11 Reports. Descriptions, certificates, reports. Distribution and recordability.

~~6.13~~ 6.12 Meridian observations. On Sun and Polaris for true north, including magnetic declination and variation. Declination and variation of the magnetic needle.

~~6.14~~ 6.13 Monumentation. Markers for corners and references; marking of lines.

~~6.15~~ 6.14 Photogrammetry. Use and interpretation of aerial photos for locating corners, possession lines, distances. Stereoscopes; distortion.

~~6.16~~ 6.15 Miscellaneous. Tree and wood identification, geology, ~~paeing~~ and hydrology.

~~6.17~~ 6.16 Field work. A four week program curriculum covering rural, city lot, and underground surveys: surveying and Meridian observations. Also included will be curves and construction stake out including route survey procedures. Meridian observations; needle declination and variations.

Section 7. Unethical Practices

7.1 Signing or affixing a seal to any document prepared by persons who are not employees or who are not under supervision of the licensees as defined in Chapter 30, Article 13A, Section 5 of the West Virginia Code.

7.2 Accepting, paying, or offering to pay, either directly or indirectly, any gift, bribe, or other consideration to make an improper survey.

7.3 Associating with any survey project known by the licensee to be fraudulent or, dishonest in character: or unlawful.

7.4 Failing to exercise due regard for the safety of persons under supervision of the licensee.

7.5 Violating, aiding or abetting any person in the violation of any provision of the West Virginia Code related to the practice of land surveying or any of the Rules and Regulations promulgated by the Board.

7.6 Injuring or attempting to injure, falsely or maliciously, directly or indirectly, the reputation or business of another surveyor.

7.7 Reviewing the work of another land surveyor for the same client, except with the knowledge of such surveyor, or unless the connection of such surveyor with the work has been terminated.

7.8 Calling, naming, describing, designating or otherwise alleging that any service performed by a licensed land surveyor or any person under the supervision of said surveyor, is a survey, land survey, mortgage survey, loan survey, title insurance survey or similar wording, unless the service is performed in accord with the provisions of Article 13A of Chapter 30 of the Code of West Virginia or the regulations promulgated thereunder. If the work is described as a mortgage inspection or similar title, state in the title block or other visible place that "This is not a land survey".

7.9 Signing, sealing or approving plats, descriptions or reports that are not in accord with Article 13A of Chapter 30 of the Code of West Virginia or any reasonable rule or regulation promulgated by the board, nor or any document(s) that were not prepared under the supervision of the person responsible.

7.10 Failing to respond within 30 days to written communications from the board and to make available any records relevant to any inquiry or complaint about the licensee's professional conduct. The 30-day period shall begin on the date when such communication was sent by the board by certified mail with return receipt requested to the last known address of the surveyor.

7.11 Advertising that is false, fraudulent, deceptive, misleading or unlawful.

7.12 Accepting and undertaking to perform land survey services which the surveyor is not competent to perform.

7.23 Failing to give adequate supervision to subordinates.

Section 8. Field and Office Techniques

8.1 The surveyor shall use the proper equipment, methods, and precisions for the job to be done in the field and office.

8.2 8.1 The surveyor shall examine, to a reasonable limit, all land records and field survey data essential to performing the work, including establishing property lines. All laps, gaps, seniority, and errors must be considered. The surveyor shall study and give due weight to descriptions and other evidence for all properties adjoining or affecting the survey. Records of such evidence shall be kept on file.

8.3 8.2 Inform adjoiners of survey plans, progress and results as fully as whenever possible.

8.3a Land Records Research Procedures:

The land surveyor shall search the land records for the proper description of the land to be surveyed and obtain the description of adjoining land as it pertains to the common boundaries. The land surveyor shall have the additional responsibility to utilize any other available data pertinent to the survey being performed from any other source that is known to him/her. Evidence found, from all sources, shall be carefully compared with that located and found by field survey in order to establish the correct boundaries of the land being surveyed. It is not the intent of this rule to require the land surveyor to research the question of title or encumbrances of the land involved.

8.3b Minimum Field Procedures:

(1) Angular Measurement:

Angle measurements made for traverse or boundary survey lines will be made by using a properly adjusted instrument which allows a direct reading to a minimum accuracy of one minute (1') of arc or metric equivalent. The number of angles turned at a given station or corner will be the number which, in the judgement of the land surveyor, can be used to substantiate the average true angle considering the condition of the instrument being used and the existing field conditions.

(2) Linear Measurement:

Distance measurement for the lines of traverse of boundary surveys shall be made with tapes which have been checked and are properly calibrated during manufacture and include incremental distances, or with properly calibrated electronic distance measuring equipment. All linear measurements shall be reduced to the horizontal plane and other necessary corrections performed before using for computing purposes.

8.4 Consider proper calculations for magnetic variation when retracing lines that have been surveyed before.

8.5 Express final line distance in horizontal terms. If necessary to show surface distances, put in parenthesis, and include the word "surface".

8.6 8.4 Bearings of new subdivision lot lines shall be from the true (astronomic) meridian. Bearings of other surveys may be from magnetic or true, but if true, it shall be so stated on the plat and in the description. Grid north of the West Virginia Coordinate System may be shown on plats. It is essential that the meridian reference used identifies the date and year.

8-7 New or re-established markers shall be of the most permanent type practicable, and shall be selected or installed so as to be most easily found in future years. Monuments shall be adequately marked, referenced and described. As a minimum, at least one corner shall be referenced to three of the most permanent objects available. No wood stakes shall be left as permanent property markers. In subdivisions, two stone or concrete monuments, not less than 24" long by 6" square or in diameter at the top, with proper centers, shall be set in each block so that all street lines can be re-established; in addition, iron pipes or equally good markers shall be set at all other outside points of angles, curves and tangents and at any staked lot corners.

8-8 Property lines shall be marked whenever possible. In wooded areas, by two hacks facing each side of the line within general reach of the person who marks. In open areas, markers or monuments should be intervisible.

8-9 Error of closed traverses shall be calculated by latitude and departure or by coordinates, unless errors can be determined visually by plotting or by inspection.

8-10 Areas of closed traverses shall be calculated by two methods:

8-10a Either triangles or planimeter, and

8-10b Double meridian distances or coordinates, unless, as in the case of regularly shaped areas, it can be found by other calculations.

8-11 Plats should be clear, show the results of the work, and be suitable for recording and photocopying. Boundary lines of the property surveyed shall be solid and heavier than tie lines, which shall be solid or dashed, but lighter and narrower.

8.12 Guides for the accuracy of surveys to be striven for are:

CLASS	ERROR OF CLOSURE	THEORETICAL UNCERTAINTY	
		Foot	mm
Rural	1:1500	1.00	300
City lot	1:5000	0.10	30
Underground	1:5000	0.10	30
Subdivision (urban)	1:7500	0.10	30
Commercial	1:10000	0.05	15

PRECISION OF MEASUREMENT

CLASS	BEARINGS	DISTANCES		VERTICAL ANGLES
		Foot	mm	
Rural	5'	0.20	60	15'
City lot	1'	0.01	3	05'
Underground	1/2'	0.01	3	02'
Subdivision (urban)	1/2'	0.01	3	02'
Commercial	1/2'	0.01	3	01'

8.5 The maximum permissible error of closure for a field traverse in connection with a boundary survey located in a rural area shall be one (1) foot in five thousand (5,000) feet or metric equivalent of perimeter length. The attendant angular closure shall be that which will sustain the 1/5,000 foot closure. The maximum permissible error of closure for a traverse in connection with a boundary survey located in an urban area shall be one (1) foot in ten thousand (10,000) feet or metric equivalent of perimeter length. The attendant angular closure shall be that which will sustain the 1/10,000 foot closure.

8-13 8.6 Oil and gas well location surveys shall comply with Chapter 22, Article 4, Section 2 of the West Virginia Code of the Rules and Regulations promulgated thereunder.

8.7 The computation of field work data shall be accomplished by using mathematical routines that produce closures and mathematical results that can be compared with descriptions and data of record. Such computations shall be used to determine the final boundary of the land involved.

8.8 The following information shall be shown on all plats and/or maps used to depict the results of the boundary survey:

8.8a The title of the boundary plat shall identify the land surveyed and show the district and county or city in which the land is located. A caption or heading stating: "Plat of Survey of (or for) ... or some similar wording. Data of plat and revisions, name, address, signature, and seal of the surveyor in charge. Certificates that may be required. The name of any surveyor-in-training in charge of the work and the licensee responsible for supervision of the survey work."

8.8b The owner's name and deed book referenced where the acquisition was recorded.

8.8c Names of all adjacent owners, including their deed book and page number and/or subdivision lot designations.

8.8d Names of highways and roads with route numbers, railroads, streams adjoining or running through the land, and other prominent or well-known objects or areas which are informative as to the location of the boundary survey.

8.8e Bearings of all property lines to nearest one minute (01') or a metric equivalent.

8.8f Distances of all property lines to nearest one tenth (0.1) of a foot or metric equivalent.

8.8g Area to the nearest hundredth (.01) of an acre or metric equivalent for rural located surveys.

8.8h North arrow and source of meridian used for the survey.

8.8i On interior surveys a reference distance and bearing to at least two property corners of the parent tract.

8.8j Tax map designation and parcel number if available.

8.8k Indication and description of each monument found and each monument set by the land surveyor during the survey work performed.

8.8l The certificate required by these regulations that has been signed, dated and sealed by the land surveyor performing the survey.

8.8m In all cases any overlaps, encroachments or gaps shall be shown.

8.8n A statement that the boundary survey shown is based on a current field survey; or that the land boundaries shown on the plat are the result of a compilation from deed and/or plats by others.

8.9a Monumentation: Property Boundaries. Each boundary survey of a tract or parcel of land shall be monumented at all corners. Where it is not feasible to set actual corners appropriate reference corners shall be set preferably on line and the location of each shall be shown on the plat or map of the boundary. All reference corners shall show location by bearing and distance to the property corner. When a property line passes through a wooded area "line trees" may be blazed or other trees within three feet of the property line may be marked by two hacks facing the line. Permission of adjoining owners should be

obtained prior to the marking of trees located on the adjoining property.
However, if the property line is already marked by fences or other definite
structures additional marking is not required.

8.9b Subdivision surveys shall be monumented in accordance with all
federal, state and local laws, rules and regulations.

8.9c Monumentation of property corners for new subdivisions shall
include as a minimum the following:

8.9c.1 Two permanent monuments for each subdivision or sections thereof
which comply with the following criteria:

8.9c.1a Field or cut stone having a nominal diameter of 6 inches with
center marking chiseled into the face.

8.9c.1b Precast or cast-in place concrete monument with a nominal
diameter of 6 inches containing a metallic rod or other appropriate
indicator of the center point clearly visible in the face.

8.9c.1c Non-ferrous metallic monument having a minimum diameter of 2
inches over the total length of the monument and the exposed face
clearly stamped or cast with an appropriate center marking.

8.9c.1d All permanent monuments shall have a minimum length below ground
level of 24 inches.

8.9c.2 All other property corners within the subdivision shall meet the
requirements for monumentation as specified in Section 8.9a of these
rules and regulations as appropriate.

Section 9 Plats: Plats Shall Contain The Following Data:

9-1 State, County, and District where the land is located: If
applicable, the City, Subdivision, Addition, Block, and Lot Number.

9-2 Deed Book, plat book, page number or other place where the deed, plat or other instrument covering the land, is recorded or found.

9-3 Names of adjoining owners with lot numbers, deed book and page numbers or other place where their deed, plat or other instrument is recorded or found.

9-4 Overlaps, encroachments or gaps.

9-5 Type of markers at corners, and if artificial, whether found (fd) or set. Reference markers optional provided they are in the description. For rural surveys, show bearing and distance ties to at least two parent tract corners or significant adjoining corners. For city lots, show bearing and distance to original markers in the block or to edge of three nearest streets, including half or full street width dimensions, and to other significant property markers. For subdivisions, in addition to those described above, show ties to at least two markers of any adjoining subdivisions and to any public triangulation stations in the vicinity.

9-6 For rural and subdivision surveys, show the magnetic and true (astronomic) north arrows, the amount and direction of the declination as of the year of survey and for the instrument used for the survey, and the location where the instrument declination was read. Said location shall be described so a future surveyor may go to that spot and read the declination on the instrument and thus calculate the variation that has occurred since the original or former survey. Arrows on rural and subdivision plats shall be platted within 1/2 degree of accuracy.

9-7 Bearings, distances, curve data (central angle, radius, arc and chord) and other measurements shall be shown with an accuracy consistent with the field equipment, methods and precision employed. Show comparative conflicting data if significant, in parenthesis or other way. Enough dimensions shall be shown to enable all omitted dimensions to be determined by inspection or calculation.

9-8 Bearings shall be clockwise if practicable.

9-9 Scale of the plat showing inch first and its equivalent last.

9-10 Area of the entire tract and of any significant parts. Total subdivision area shall include streets, alleys, and other non-lotted space. Accuracy of area figures shall be consistent with field methods employed.

9-11 Significant cultural, topographical or other relevant features. These may include buildings, utility facilities, pipelines, easements, fences, walls, driveways, watercourses, certificates with prescribed wording, etc.

9-12 Sheet and parcel number of tax map for the tract surveyed or of the parent tract whenever practicable.

9-13 On rural and subdivision plats, show general location of survey by (1) an insert sketch, or (2) by an arrow and approximate mileage to a landmark, or (3) by latitude and longitude of a specific corner by sealing from a 7 1/2' quadrangle to the nearest 2 or 3 seconds. City lots are located from three nearest streets.

9-14 Month and year of survey. Show day if desirable.

9-15 A caption of heading stating: "Plat of Survey of (or for) ---" or some similar wording. Date of plat and revisions; name; address; signature; and seal of the surveyor in charge. Certificates that may be required. The name of any surveyor in training in charge of the work under supervision of the licensee may be shown.

9-16 Comply with metric measurement requirements.

Section 10 9. Description of Property Boundary Line Surveys

10-1 9.1 The preamble shall contain the District, County, and State where the land is located, and if practicable, the watershed and location in relation to a well-known landmark.

10-2 9.2 The body of the description shall contain: type, size and markings of monuments, and whether found or set; type, size, bearing and distance to reference markers; bearing and length of lines; names of present or former adjoiners at corners or along lines; the point on lines where significant markers or features are located; acreage; name of surveyor in charge; date of survey; and a reference to the accompanying plat. If bearings are from true (astronomic) meridian, it should be so stated. Show calls in tabular form, starting each new paragraph with the bearing.

10-3 9.3 The closing or "being" clause should contain data relating to the legal source of title to the land, or the land of which it is a part, such as the name of the grantor and grantee, date of deed, book and page number in the proper County Clerk's Office or other location.

Section 11 10. Description of Other Surveys

11-1 10.1 Description of other surveys shall conform to the requirements of the work.

Section 12 11. Certificate or Report of Survey

11.1 The surveyor shall furnish to the client or employer, plats and descriptions of the work performed; along with and may provide a certificate or report stating that he has made the survey, plat and description, giving the date surveyed, and describing all unusual circumstances, including the weight given to conflicting evidence; any encroachments; overlaps or gaps and how they were resolved; names of adjoiningers contacted and the information they supplied; the distribution of plats, descriptions, and reports; and the date of the certificate, and the signature, address and seal of the surveyor.

11.2 A minimum certificate of the survey shall be furnished to the client or employer by plat of survey including the following certification: I CERTIFY THAT THIS PLAT OF SURVEY REFLECTS THE BOUNDARY OF THE PROPERTY, BASED ON DEED OF RECORD AND/OR OTHER EVIDENCE AND IS CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF AND COMPLIES WITH ALL LAWS, RULES AND REGULATIONS GOVERNING THE PRACTICE OF LAND SURVEYING IN THE STATE OF WEST VIRGINIA.

Section 12 12. Underground Surveys and Maps

~~12.1~~ 12.1 Underground surveys and maps shall comply with the requirements in Chapter 22, Article 2, Section 1 of the West Virginia Code.

Section 12 13. Competency

~~13.1~~ 13.1 Competency in the practice of land surveying includes, but is not limited to, compliance with the provisions of Section 8, 9, 10, 11, 12 and 13 of these Rules and Regulations.

Section 13. Suspension or Revocation of License to Practice Land Surveying.

13.1 Upon a finding by the board that a person holding a license to practice land surveying has been incompetent, grossly negligent, or guilty of fraud, deceit or other misconduct in the practice of land surveying as defined by these rules and regulations, the board shall suspend or revoke such person's license. Whether one or more violations of these rules and regulations constitutes a basis for suspension or revocation shall be a question of fact to be determined in each particular case.

13.2 As used in these rules and regulations:

"Incompetent" means lacking in ability, legal qualification, or fitness to discharge a required duty.

"Grossly negligent" means intentionally failing to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness."

Section ~~13~~ 14. License by Comity

~~13.1~~ 14.1 The Board recognizes the principle of comity with other states and countries, and ~~will~~ may honor the ~~acts~~ actions of licensing agencies in those jurisdictions, provided said acts are at least equivalent to the requirements set forth in these Rules and Regulations.

Section ~~14~~ 15. Compensation and Expenses of the Board

~~14.1~~ 15.1 The Board hereby sets a rate of ~~\$4.00~~ \$6.00 per hour for the time of its members while performing official work ~~of~~ for the Board.

~~14.2~~ 15.2 The Board hereby sets a rate established by the Governor for the use of its personal vehicles in official travel of Board members.

FILING OF ADMINISTRATIVE REGULATIONS

References are to Sections in W. Va. Adm.

Reg. 30-13A Series I.

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Authority for rules, 1:1	Field Techniques, 8
Certificate of survey, 12	Office, location of, 1:2
Comity, 15	Office techniques, 8
Compensation of Board, 16	Plats, 9, 13
Competency, 14	Reciprocity, 15
Curricula, accredited survey, 6	Records, satisfactory, 3
Description of survey, 10, 11	Reports of survey, 12
Ethics, 7	Techniques, field and office, 8
Examination, 5	Underground surveys and plats, 13
Expenses of Board, 16	Unethical practices, 7

WEST VIRGINIA ADMINISTRATIVE REGULATIONS
State Board of Examiners of Land Surveyors...
CHAPTER 30-13A
SERIES I, (1969) AS AMENDED

Title: Rules and Regulations for the Practice of Land Surveying in W.Va.

Section 1. General

2. General Purpose
3. Satisfactory Records
4. Experience
5. Examination
6. Accredited Surveying Curricula
7. Unethical Practices
8. Field and Office Techniques
9. Description of Property Boundary Line Surveys
10. Description of Other Surveys
11. Certificate or Report of Survey
12. Underground Surveys and Maps
13. Suspension or Revocation of License to Practice Land Surveying
14. License by Comity
15. Compensation and Expenses of the Board

WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee



NOTICE OF ACTIONS TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

January 28, 1986

TO: Ken Hechler, Secretary of State; State Register

TO: Mr. R. Nelson McCoy, Chairman
State Board of Examiners
for Licensed Land Surveyors
34 West Main Street
Romney, WV 26757

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: Proposed rules and regulations governing the
practice of land surveying in West Virginia

FILED
1986 FEB -4 PM 12:11
BUREAU OF STATE RECORDS

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule as originally filed or as modified by the agency _____
2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached. _____
3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached. _____ X
4. Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached. _____

Pursuant to Code 29A-3-11(c), this notice has been filed in the state register and with the agency proposing the rule.

cc: Charles W. W. Stultz
Secretary-Treasurer

AMENDMENT

Legislative Rule-making Review Committee

Agency: West Virginia State Board of Examiners of Land Surveyors

Subject: Proposed rules and regulations governing the practice of land surveying

Senator ~~Delegete~~ *Williams* moves to amend the proposed legislative rule on page 7, Section 8.4, by striking all of Section 8.4, and inserting in lieu thereof a new Section 8.4, to read as follows:

1 "8.4.1 Bearings of new subdivision lot lines shall be from
2 the true (astronomic) meridian.

3 8.4.2 In accordance with the provisions of W.Va. Code, §37-
4 12-1, bearings of lines for lands which have been surveyed before
5 shall be by the magnetic meridian, but the surveyor making such survey
6 shall return and certify in his plat the degree of variation of the
7 magnetic needle from the true meridian, at the time of the resurvey;
8 and also (if the same can be done) the degree of such variation at the
9 time of the original survey.

10 8.4.3 If, during the 1986 regular session of the Legisla-
11 ture or at any time subsequent thereto, the Legislature amends the
12 applicable Code section or sections to authorize surveys other than
13 new subdivision lot lines to be from magnetic or true, then notwith-
14 standing the provisions of 8.4.2 above, this legislative rule shall be
15 construed, from the effective date of such amendment, to authorize
16 such surveys to be from magnetic or true, but if true, it shall be so
17 stated on the plat and in the description.

18 8.4.4 Grid north of the West Virginia Coordinate System may

1 be shown on plats.

2 8.4.5 Meridian reference used in surveys shall be identi--

3 fied by the date and year."

ADOPTED

REJECTED

AMENDMENT

Legislative Rule-making Review Committee

Agency: West Virginia State Board of Examiners of Land Surveyors

Subject: Proposed rules and regulations governing the practice of land surveying

Senator/Delegate Williams moves to amend the proposed legislative rule on page 16, Section 13, by striking all of Section 13, and inserting in lieu thereof a new Section 13, to read as follows:

1 "13. Suspension or Revocation of License to Practice Land Surveying.

2 13.1 Upon a finding by the board that a person holding a
3 license to practice land surveying has been incompetent, grossly
4 negligent, or guilty of fraud, deceit or other misconduct in the
5 practice of land surveying as defined by these rules and regulations,
6 the board shall suspend or revoke such person's license. Whether one
7 or more violations of these rules and regulations constitutes a basis
8 for suspension or revocation shall be a question of fact to be
9 determined in each particular case.

10 13.2 As used in these rules and regulations:

11 "Incompetent" means lacking in ability, legal qualification,
12 or fitness to discharge a required duty.

13 "Grossly negligent" means intentionally failing to perform a
14 manifest duty in reckless disregard of the consequences as affecting
15 the life or property of another; such a gross want of care and regard
16 for the rights of others as to justify the presumption of wilfulness
17 and wantonness."

ADOPTED

REJECTED

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: West Virginia State Board of Examiners of Land Surveyors

Subject: Proposed rules and regulations governing the practice of land surveying

PERTINENT DATES

Filed for public hearing: January 12, 1984
Date of public hearing: February 17, 1984
Filed following public hearing: March 6, 1985
Filed LRMRC: March 11, 1985
Filed as emergency:

ABSTRACT

Section 1 of the proposed rules and regulations is a general section, dealing with statutory authority, location of the board office, filing dates of previous rules and regulations by the board, and the proposed effective date of the rules and regulations.

Subsection 1.01 deals with statutory authority, and cites W.Va. Code, §30-13A-4(a) as the authority to promulgate the proposed legislative rules.

Subsection 1.02 establishes the Board office at 34 West Main Street, Romney, West Virginia.

Subsection 1.03 lists the filing dates for the Board's rules and regulations as being June 4, 1976, February 23, 1981, and January 12, 1984.

Subsection 1.04 sets a proposed effective date for the rules and regulations as July 1, 1985.

Section 2 of the proposed rules and regulations sets forth the general purpose. New language states that the Board is seeking to establish minimum standards of practice for the performance of boundary surveys for the purpose of administration and enforcement of W.Va. Code, §30-13A-1, et seq.

Section 3 has a section heading indicating that it deals with "Satisfactory Records", however the section deals with more than that subject. Also included within Section 3 are two new subsections (3.02a, 3.02b) which are concerned with land records research procedures and minimum field procedures for angular and linear measurement.

Subsection 3.01 defines the term "satisfactory records" by listing certain records which are included in the term. New language in this subsection deals with the application of the surveyor's seal and signature to records, stating that such application "shall be evidence that the boundary survey is correct to the best of the Land Surveyor's knowledge and belief, and complies with the minimum procedures and standards established herein."

Subsection 3.02a describes procedures to be followed by surveyors in searching the land records to obtain a proper description of the property to be surveyed, as well as that of adjoining properties. Land records are to be compared to evidence found by field survey. Finally, this portion of the rules and regulations would make clear that a land surveyor is not required to search the title or determine the state of encumbrances to the realty in question.

Subsection 3.02b establishes minimum field procedures, and is divided into two subdivisions. Subdivision (1) provides that angular measurements shall be made by an instrument "which allows a direct reading to a minimum accuracy of one minute (1') of arc or metric equivalent." Subdivision (2) of Section 3.02b, dealing with linear measurements, would require that distance measurements be made with the use of steel tapes or electronic distance measuring equipment. Subdivision (2) also requires that all linear measurements be reduced to the horizontal plane.

Section 4 of the proposed rules and regulations generally describes the type of experience which the Board will consider as training in land surveying.

Section 5 contains a broad statement as to the contents of examinations, incorporating by reference the subject matter of Section 6 (Accredited Surveying Curricula).

Section 6 sets forth the subjects to be included in an accredited survey curricula, requiring two years of instruction and at least 60 semester credit hours. The proposed rules and regulations make few changes in this section from what has been required in prior rules and regulations.

Section 7 defines certain unethical practices not to be engaged in by land surveyors. The principal change made in this section by the proposed rules and regulations relates to so-called "mortgage inspections". Under Subsection 7.08 of the proposed rules and regulations, language would be eliminated which formerly required that, in the case of a mortgage inspection, the surveyor had to state in the title block or other visible place that "This is not a land survey". Also eliminated is prior Subsection 7.13, which made "failing to give adequate supervision to subordinates" an unethical practice.

Section 8, dealing with field and office techniques, has been substantially rewritten by the proposed rules and regulations. Most

significant are the changes which would establish a maximum permissible error of closure (Subsection 8.04), and proposed provisions which would require bearings, distances, and areas to come within a specific range of accuracy (Subsection 8.07). Under prior regulations, the standards set are merely "[g]uides for the accuracy of surveys to be striven for . . ." Under the proposed rules and regulations, the standards would be mandatory. Further, the requirements for accuracy would be increased. As an example, under the past regulations, the standard for error of closure for rural property was one (1) foot in one thousand five hundred (1,500) feet. Under the proposed regulation, the maximum permissible error of closure in a rural survey "shall be one (1) foot in five thousand (5,000) feet or metric equivalent of perimeter length. The attendant angular closure shall be that which will sustain the 1/5,000 foot closure."

Another substantial change in Section 8 is found in subsection 8.08, dealing with the subject of monumentation. Each corner would be required to be monumented with an object made of permanent material and have attached to it a metal or plastic cap with the name and license number of the surveyor.

Section 9 has been completely rewritten. Past versions of Section 9, which dealt with plats and the contents thereof, would be struck, and the requirements for plats would henceforth be contained in new Subsection 8.07. The new Section 9 of the proposed rules and regulations describes what must be set forth in a description of a property boundary line survey.

The proposed Section 10 is the same as Section 11 in prior rules and regulations of the Board, and simply says that descriptions of other surveys (other than boundary line surveys) shall conform to the requirements of the work.

Section 11 under the proposed regulations is a rewrite of Section 12 as it appeared in prior regulations of the Board. Under past regulations, a certificate or report of survey was required to be furnished to the client. Subsection 11.02 of the proposed regulation would make such certificate or report optional. Further, under this new subsection, the certificate or report need not contain the surveyor's subjective assessment of the weight given to conflicting evidence, or his opinion as to encroachments. (Under the proposed Subsection 8.07, encroachments would be required to be shown on the plat used to depict the results of the boundary survey.) New Subsection 11.02 prescribes a minimum certificate of survey which would be furnished on the plat.

Proposed Section 12 is identical to the former provision found in Section 13 in prior regulations, and simply requires underground surveys and maps to comply with W.Va. Code, §22-2-1.

In past rules and regulations, competency was defined in Section 14. In the proposed rules and regulation, this section appears as Section 13, and has been rewritten. It sets forth the rule that failure to comply

with any of the provisions of Sections 8, 9, 10, 11, and 12 of the rules and regulations may be considered a negligent act and shall be cause for suspending and/or revoking a license.

Section 14 would promulgate what has, in prior rules and regulations, been set forth in Section 15, relating to license by comity. The law would be changed by making comity with other states and countries permissive rather than mandatory.

Section 15 of the proposed rules and regulations, formerly Section 16, would increase the compensation of Board members from \$4.00 per hour to \$6.00 per hour.

AUTHORITY

Statutory authority: W.Va. Code, §30-13A-1, et seq.

W.Va Code, §30-13A-4, provides, in pertinent part, as follows:

(a) The board shall have the power and duty to:

(3) Promulgate reasonable rules and regulations implementing the provisions of this article and the powers and duties conferred upon the board hereby, all of which reasonable rules and regulations shall be promulgated in accordance with the provisions of article three, chapter twenty-nine-a of this Code;

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

W.Va. Code, §30-13A-4(3) provides for a limited authority of the Board of Examiners to "[p]romulgate reasonable rules and regulations implementing the provisions of this article and the powers and duties conferred upon the board hereby . . ." There are no express provisions in Section four, Article thirteen itself which would appear to authorize the Board to approve such rules and regulations as have been proposed.

First, Article 13A deals almost entirely with the requirements as to training and experience necessary to be licensed to engage in the practice of land surveying, and also deals with the procedures for suspension or revocation of a license.

Second, the specific duties of the Board, as set forth in Section Four of the article, do not authorize the Board to make rules and regulations for the definitions of standards of workmanship and skill, nor is the

Board given any express authority to prescribe the methods and equipment to be utilized by licensees in surveying land.

An oblique reference to the power of the Board to promulgate such rules and regulations may be found in W.Va. Code, §30-13A-8, dealing with suspension or revocation of license. That section reads, in part, as follows:

(b) The board shall suspend or revoke any license when it finds the holder thereof has:

(3) Been incompetent, grossly negligent, or guilty of fraud, deceit or other misconduct in the practice of land surveying as defined by the board by reasonable rules and regulations . . . [emphasis added]

Arguably, the above-cited statute delegates to the Board the authority to define, by reasonable rule and regulation, the practice of land surveying. If so, the statute is a broad grant of rule-making authority.

In a case such as this, if regulations promulgated under such a statute were challenged judicially, a reviewing court would look to see if the statute contained standards for the guidance of the agency in the exercise of its power, and/or safeguards for the protection of those who are affected by the administrative action. Broad grants of legislative powers will be permitted where there are procedural and judicial safeguards against arbitrary, unreasonable, or oppressive conduct of the agency.

Article 13A, Chapter 30 of the Code does contain standards to guide the Board as to the qualifications of applicants for licenses. These are set forth in §30-13A-5 and 5a. There are no statutory standards to guide the Board in exercising its power to define the practice of land surveying. However, Sections 9 and 10 of the statute set forth extensive procedural and judicial safeguards for the protection of persons adversely affected by an order of the Board suspending or revoking a license. Accordingly, the delegation of legislative power to the Board in Article 13A would likely be upheld by a reviewing court.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Article 13A of the Code does not contain a section setting forth the legislative purpose and intent in enacting the statute. §30-13A-1 contains a broad statement to the effect that licenses are required "[i]n order to provide for the regulation of land surveying in this State . . .". Also, as earlier noted, it was evidently the intention of the Legislature in enacting §30-13A-8 that the Board should, by reasonable rules and regulations, define the practice of land surveying. In this regard, the proposed rules and regulations are in conformity with the perceived intent

of the statute.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

There are several conflicts which exist between the proposed rules and regulations and the Code. Principal among the conflicts is that which arises as a result of the language used in Section 13, dealing with competency.

Section 13.01 reads as follows:

Failure to comply with any of the provisions of Sections 8, 9, 10, 11, and 12 of these Rules and Regulations may be considered a negligent act and shall be cause for suspension and/or revoking a license to practice land surveying in this State.

This language in the proposed rules and regulations should be compared to the wording of W.Va. Code, §30-13A-8(b)(3), which reads as follows:

(b) The board shall suspend or revoke any license when it finds the holder thereof has:

(3) Been incompetent, grossly negligent, or guilty of fraud, deceit or other misconduct in the practice of land surveying as promulgated by the board by reasonable rules and regulations[.]

The immediate question which arises is whether or not the board can use one act of simple negligence as a basis for suspension or revocation of a license. The statute itself requires a finding that a surveyor has been grossly negligent before a surveyor may have his license suspended or revoked. Is it therefore proper for the board to take action against a surveyor by making an act of simple negligence constitute incompetence, as is done in the proposed rules and regulations, Section 13? The difference between simple negligence and gross negligence is significant,

Simple negligence, in official conduct, is ordinarily the failure to use such reasonable care and caution as would be expected of a prudent man. Negligence is not intentional conduct. Black's Law Dictionary, 4th Ed. (1957).

On the other hand, gross negligence is the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life and property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness. Id.

And "negligence" is not synonymous with "incompetency," since the competent may be negligent. Id.

"Incompetency" means lack of ability, legal qualification, or fitness to discharge the required duty. Id.

If these definitions are applied to the language of W.Va. Code, §30-13A-8(b)(3), it must be concluded that the Legislature, in enacting that statute, intended that a surveyor having the requisite ability and legal qualifications, and being fit to discharge his required duties, cannot have his license suspended or revoked for an act which constitutes simple negligence. Such action may be taken only upon a showing of gross negligence.

Accordingly, insofar as the board has attempted to make an act of simple negligence a basis for suspending or revoking a license, the proposed rules and regulations are in conflict with the Code.

Another conflict with the Code arises out of Section 14 of the proposed rules and regulations, dealing with the licensing of surveyors licensed by another state or country. The pertinent language of the rules and regulations reads as follows:

The Board recognizes the principle of comity with other states and countries, and may honor the actions of licensing agencies in those jurisdictions, provided said acts are at least equivalent to the requirements set forth in these Rules and Regulations.

This language should be compared to the provisions of W.Va. Code, §30-13A-5(b), which read as follows:

(b) The following persons shall be eligible for a license to engage in the practice of land surveying without examination:

(1) Any applicant who is licensed, certificated or registered to engage in the practice of land surveying in any other state or country, if the requirements to obtain a license or certificate or to become registered in such other state or country are found by the board to be at least as great as those prescribed in this article.

The proposed Section 13 conflicts with the statute in several respects. First, it would make the licensing of otherwise qualified surveyors from other states and countries permissive, whereas the statute makes such licensing mandatory.

Second, the language of the statute is clear and unambiguous when it says a person shall be eligible for a license "if the requirements to obtain a license or certificate or to become registered in such other state or country are found by the board to be at least as great as those prescribed in this article." On the other hand, the proposed Section 13 is not clear. It speaks of the board honoring "the actions of licensing agencies in those jurisdictions, provided said acts are at least equivalent to the requirements set forth in these Rules and Regulations." This language is confusing inasmuch as it talks of actions of licensing agencies being equivalent to requirements. Further, if Section 13 is referring to licensing requirements when it speaks of requirements, it should be noted that there are no licensing requirements set forth in the proposed rules and regulations.

Another portion of the proposed rules and regulations which appears to be in conflict with the Code is Section 8.03. That section reads, in part, as follows:

Bearings of new subdivision lot lines will be from the true (astronomic) meridian, if required. Bearings of other surveys may be from magnetic or true, but if true, it shall be so stated on the plat and in the description.

This language is in conflict with the provisions of W.Va. Code, §37-12-1, which states that "[w]hen any surveyor is required to survey lands which have been surveyed before, he shall make such survey by the magnetic meridian, but shall also return and certify in his plat the degree of variation of the magnetic needle from the true meridian, at the time of the resurvey . . ."

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

A legislative rule defining the practice of land surveying and providing a means for the Board to effectively regulate the profession is needed to accomplish the objectives of the Legislature in enacting the statutory article in question. The appropriateness of the proposed rule is questioned for reasons set forth elsewhere in this abstract.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

A number of the provisions contained in the proposed rules and regulations have been the subject matter of discussion as to their reasonableness. At the agency's public hearing held on February 17, 1984, and again at the Committee's public hearing held on June 11, 1985, a number of persons presented arguments pro and con as to the new requirements of the

Board calling for increased accuracy in rural surveys. Testimony adduced would indicate that open sight compass surveying equipment used by a number of surveyors in this State is incapable of achieving the required accuracy standards under practical methodology and conditions.

The Board and its supporters view compass surveying as antiquated, inaccurate, and a source of litigation involving boundary line disputes. The Board points out that surrounding states have adopted higher standards, and argues that West Virginia needs to update its practices. The proposed rules and regulations would, for all practical purposes, do away with compass land surveying.

Persons opposing the increased accuracy standards contend that a well-trained surveyor should have the discretion to select the equipment and methods to be utilized for a particular survey; that in much of West Virginia's rural mountainous terrain, such increased accuracy is neither necessary nor desired; and that compass surveying is the only practical means of producing survey results at a cost which bears a correlation to the value of the land being surveyed.

It would appear that the Committee needs to address the following questions in considering the reasonableness of the proposed rules and regulations:

- (1) What reasonable degree of accuracy can be achieved through the use of an open-sight compass in surveying mountainous rural property?
- (2) What reasonable degree of accuracy can be achieved through the use of the traditional surveyor's transit and tape in surveying mountainous rural property?
- (3) What, if any, are the practical limitations to using modern equipment, such as theodolites and electronic distance measuring equipment, in surveying mountainous rural property?
- (4) If a hypothetical tract of rural mountainous property, typical to West Virginia, were to be described, how would the costs compare for surveys conducted by compass, by transit, and by theodolites and electronic measuring equipment?
- (5) What is the range of costs for compass surveying equipment adequate to perform such hypothetical survey?
- (6) What is the range of costs for transit surveying equipment adequate to perform such hypothetical survey?
- (7) What is the range of costs for theodolite and EDM surveying equipment adequate to perform such hypothetical survey?
- (8) In what range would the fair market value per acre for

timberland in West Virginia fall? For farmland?

(9) What facts did the Board rely on in determining that fiberglass or other tapes, other than metal tapes, were not acceptable equipment for linear measurement?

(10) What statistics, if any, are available which would indicate that compass land surveys are a greater source of boundary disputes and litigation than surveys made with other equipment?

(11) In the case of complaints lodged against surveyors and found to be valid, what percentage of the complaints arise from inherent deficiencies in the type of equipment used as opposed to the methods or techniques used by the surveyor?

It would appear that only after these and other similar questions are answered can the Committee determine what increased costs would result from approval of the proposed rules and regulations and what benefits might be derived by the citizens of this state and the persons affected by such rules and regulations.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

There are numerous technical terms contained in the proposed rules and regulations which are common language to engineers and surveyors, but which would be incomprehensible to a layman. A definitions section would be a suggested addition to the proposed rules and regulations.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

It would appear that the requirements for promulgation set forth in the Code have not been met. W.Va. Code, 29A-3-11 requires an agency, when submitting a proposed legislative rule to the Committee, to also submit a statement of the circumstances which require the rule. In the opinion of counsel, the statement submitted by the Board sets forth conclusions as to the need for the proposed rules and regulations, but does not present the underlying facts to support those conclusions. This is not to say that the Board is necessarily wrong in its conclusions, but rather that there are no facts which the Legislature could examine to determine whether the circumstances require the rule in question. As an example, the proposed rules and regulations would prohibit the use of fiberglass tapes for linear measurement, stating that such tapes "may vary somewhat with type of material, temperature, etc., and are not recommended for use." At both public hearings, statements were made in favor of the use of such tapes. But nowhere in the record is there factual evidence relating to the

characteristics of fiberglass tapes as compared to metal tapes.

In its statement, the Board indicates a desire to fulfill two fundamental obligations:

First to respect the right of the Surveyor licensed in this State to his means of livelihood when such individuals have prepared themselves conscientiously and thoroughly to practice land surveying; and second to exercise its power to protect the public against the dangers arising out of the attempts of incompetent or unethical persons engaged in the practice of said profession.

The proposed rules and regulations, with increased requirements for accuracy, would effectively eliminate compass land surveying. But the statement of the Board presents no facts which would indicate that the stated "fundamental obligations" will be addressed through the promulgation of the proposed rules and regulations which call for increased accuracy standards. Is the preparedness of surveyors to practice their profession a problem of accuracy requirements as opposed to a problem of education and training? Are there facts which would indicate that the incompetent or unethical surveyors are those individuals who are currently not using modern surveying equipment which would be required by the proposed rules and regulations? These types of issues have been raised in the hearings held to consider these proposed rules and regulations, but the facts which would allow such issues to be resolved have not been brought forward. In other words, the statement of the Board does not contain "a statement of the circumstances which require the rule" which is called for by W.Va. Code, §29A-3-11.

In short, Counsel would make the following observations:

(1) The facts in the rulemaking record are inadequate in critical degree;

(2) To some extent, the agency has failed to respond to comments that are deemed vital;

(3) The agency has failed to sustain the burden of proof with respect to essential facts; and

(4) The agency's statement of basis and purpose of the rules is unduly vague and is not firmly supported by facts in the rule-making record.

Revised 10-28-85

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: West Virginia State Board of Examiners of Land Surveyors

Subject: Proposed rules and regulations governing the practice of land surveying

PERTINENT DATES

Filed for public hearing: January 12, 1984
Date of public hearing: February 17, 1984
Filed following public hearing: March 6, 1985
Filed LRMRC: March 11, 1985
Filed as emergency:
Refiled with modifications: October 28, 1985

ABSTRACT

Section 1 of the proposed rules and regulations is a general section, dealing with statutory authority, location of the board office, filing dates of previous rules and regulations by the board, and the proposed effective date of the rules and regulations.

Subsection 1.1 deals with statutory authority, and cites W.Va. Code, §30-13A-4(a) as the authority to promulgate the proposed legislative rules.

Subsection 1.2 establishes the Board office at 34 West Main Street, Romney, West Virginia.

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Subsection 1.4 sets a proposed effective date for the rules and regulations as July 1, 1985.

Section 2 of the proposed rules and regulations sets forth the general purpose. New language states that the Board is seeking to establish minimum standards of practice for the performance of boundary surveys for the purpose of administration and enforcement of W.Va. Code, §30-13A-1, et seq.

Section 3 describes what constitute satisfactory records related to survey work performed.

Subsection 3.1 defines the term "satisfactory records" by listing certain records which are included in the term.

Section 4 of the proposed rules and regulations generally describes the type of experience which the Board will consider as training in land surveying.

Section 5 contains a broad statement as to the contents of examinations, incorporating by reference the subject matter of Section 6 (Accredited Surveying Curricula).

Section 6 sets forth the subjects to be included in an accredited survey curricula, requiring two years of instruction and at least 60 semester credit hours. The proposed rules and regulations make few changes in this section from what has been required in prior rules and regulations.

Section 7 defines certain unethical practices not to be engaged in by land surveyors. The principal change made in this section by the proposed rules and regulations relates to so-called "mortgage inspections". Under Subsection 7.8 of the proposed rules and regulations, language would be eliminated which formerly required that, in the case of a mortgage inspection, the surveyor had to state in the title block or other visible place that "This is not a land survey". Also eliminated is prior Subsection 7.13, which made "failing to give adequate supervision to subordinates" an unethical practice.

Section 8, dealing with field and office techniques, has been substantially rewritten by the proposed rules and regulations.

Subsection 8.3a describes procedures to be followed by surveyors in searching the land records to obtain a proper description of the property to be surveyed, as well as that of adjoining properties. Land records are to be compared to evidence found by field survey. Finally, this portion of the rules and regulations would make clear that a land surveyor is not required to search the title or determine the state of encumbrances to the realty in question.

Subsection 8.3b establishes minimum field procedures, and is divided into two subdivisions. Subdivision (1) provides that angular measurements shall be made by an instrument "which allows a direct reading to a minimum accuracy of one minute (1') of arc or metric equivalent." Subdivision (2) of Section 8.3b, dealing with linear measurements, would require that distance measurements be made with the use of properly calibrated tapes or electronic distance measuring equipment. Subdivision (2) also requires that all linear measurements be reduced to the horizontal plane.

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come within a specific range of accuracy (Subsection 8.8). Under prior regulations, the standards set are merely "[g]uides for the accuracy of surveys to be striven for . . ." Under the proposed rules and regulations, the standards would be mandatory. Further, the requirements for accuracy would be increased. As an example, under the past regulations, the standard for error of closure for rural property was one (1) foot in one thousand five hundred (1,500) feet. Under the proposed regulation, the maximum permissible error of closure in a rural survey "shall be one (1) foot in five thousand (5,000) feet or metric equivalent of perimeter length. The attendant angular closure shall be that which will sustain the 1/5,000 foot closure."

Another substantial change in Section 8 is found in subsection 8.9a, dealing with the subject of monumentation. Each boundary survey would be required to be monumented at all corners.

Section 9 has been completely rewritten. Past versions of Section 9, which dealt with plats and the contents thereof, would be struck, and the requirements for plats would henceforth be contained in new Subsection 8.8. The new Section 9 of the proposed rules and regulations describes what must be set forth in a description of a property boundary line survey.

The proposed Section 10 is the same as Section 11 in prior rules and regulations of the Board, and simply says that descriptions of other surveys (other than boundary line surveys) shall conform to the requirements of the work.

Section 11 under the proposed regulations is a rewrite of Section 12 as it appeared in prior regulations of the Board. Under past regulations, a certificate or report of survey was required to be furnished to the client. Subsection 11.1 of the proposed regulation would make such certificate or report optional. Further, under this new subsection, the certificate or report need not contain the surveyor's subjective assessment of the weight given to conflicting evidence; or his opinion as to encroachments. (Under the proposed Subdivision 8.8m, encroachments would be required to be shown on the plat used to depict the results of the boundary survey.)

New Subsection 11.2 prescribes a minimum certificate of survey which would be furnished on the plat.

Proposed Section 12 is identical to the former provision found in Section 13 in prior regulations, and simply requires underground surveys and maps to comply with W.Va. Code, §22-2-1.

In past rules and regulations, competency was defined in Section 14. In the proposed rules and regulation, this section appears as Section 13, and has been rewritten. It defines competency in the practice of land surveying, stating that it "includes, but is not limited to, compliance with the provisions of Section 8, 9, 10, 11, 12 and 13 of these Rules and Regulations."

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First, Article 13A deals almost entirely with the requirements as to training and experience necessary to be licensed to engage in the practice of land surveying, and also deals with the procedures for suspension or revocation of a license.

Second, the specific duties of the Board, as set forth in Section Four of the article, do not authorize the Board to make rules and regulations for the definitions of standards of workmanship and skill, nor is the Board given any express authority to prescribe the methods and equipment to be utilized by licensees in surveying land.

An oblique reference to the power of the Board to promulgate such rules and regulations may be found in W.Va. Code, §30-13A-8, dealing with

suspension or revocation of license. That section reads, in part, as follows:

(b) The board shall suspend or revoke any license when it finds the holder thereof has:

(3) Been incompetent, grossly negligent, or guilty of fraud, deceit or other misconduct in the practice of land surveying as defined by the board by reasonable rules and regulations . . . [emphasis added]

Arguably, the above-cited statute delegates to the Board the authority to define, by reasonable rule and regulation, the practice of land surveying. If so, the statute is a broad grant of rule-making authority.

In a case such as this, if regulations promulgated under such a statute were challenged judicially, a reviewing court would look to see if the statute contained standards for the guidance of the agency in the exercise of its power, and/or safeguards for the protection of those who are affected by the administrative action. Broad grants of legislative powers will be permitted where there are procedural and judicial safeguards against arbitrary, unreasonable, or oppressive conduct of the agency.

Article 13A, Chapter 30 of the Code does contain standards to guide the Board as to the qualifications of applicants for licenses. These are set forth in §30-13A-5 and 5a. There are no statutory standards to guide the Board in exercising its power to define the practice of land surveying. However, Sections 9 and 10 of the statute set forth extensive procedural and judicial safeguards for the protection of persons adversely affected by an order of the Board suspending or revoking a license. Accordingly, the delegation of legislative power to the Board in Article 13A would likely be upheld by a reviewing court.

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Article 13A of the Code does not contain a section setting forth the legislative purpose and intent in enacting the statute. §30-13A-1 contains a broad statement to the effect that licenses are required "[i]n order to provide for the regulation of land surveying in this State . . ." Also, as earlier noted, it was evidently the intention of the Legislature in enacting §30-13A-8 that the Board should, by reasonable rules and regulations, define the practice of land surveying. In this regard, the proposed rules and regulations are in conformity with the perceived intent of the statute.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

There are several conflicts which exist between the proposed rules and regulations and the Code. Principal among the conflicts is that which arises as a result of the language used in Section 13, dealing with competency.

Section 13.1 reads as follows:

Competency in the practice of land surveying includes, but is not limited to, compliance with the provisions of Section 8, 9, 10, 11, 12 and 13 of these Rules and Regulations.

This language in the proposed rules and regulations should be compared to the wording of W.Va. Code, §30-13A-8(b)(3), which reads as follows:

(b) The board shall suspend or revoke any license when it finds the holder thereof has:

(3) Been incompetent, grossly negligent, or guilty of fraud, deceit or other misconduct in the practice of land surveying as promulgated by the board by reasonable rules and regulations[.]

What result would occur under the proposed legislative rule, when a competent surveyor, through an act of simple negligence, violates one of the regulations? The Board would equate such negligent act with incompetence. The immediate question which arises is whether or not the board can use one act of simple negligence as a basis for suspension or revocation of a license. The statute itself requires a finding that a surveyor has been grossly negligent before a surveyor may have his license suspended or revoked. Is it therefore proper for the board to take action against a surveyor by making an act of simple negligence constitute incompetence, as is done in the proposed rules and regulations, Section 13? The difference between simple negligence and gross negligence is significant.

Simple negligence, in official conduct, is ordinarily the failure to use such reasonable care and caution as would be expected of a prudent man. Negligence is not intentional conduct. Black's Law Dictionary, 4th Ed. (1957).

On the other hand, gross negligence is the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life and property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. Id.

And "negligence" is not synonymous with "incompetency," since the competent may be negligent. Id.

"Incompetency" means lack of ability, legal qualification, or fitness to discharge the required duty. Id. A violation of the proposed rules and regulations may or may not have anything to do the question of competency.

If these definitions are applied to the language of W.Va. Code, §30-13A-8(b)(3), it must be concluded that the Legislature, in enacting that statute, intended that a surveyor having the requisite ability and legal qualifications, and being fit to discharge his required duties, cannot have his license suspended or revoked for an act which constitutes simple negligence. Such action may be taken only upon a showing of gross negligence.

Accordingly, insofar as the proposed rule would make an act of simple negligence a basis for suspending or revoking a license, the proposed rules and regulations are in conflict with the Code.

Another portion of the proposed rules and regulations which appears to be in conflict with the Code is Section 8.4. That section reads, in part, as follows:

Bearings of new subdivision lot lines will be from the true (astronomic) meridian. Bearings of other surveys may be from magnetic or true, but if true, it shall be so stated on the plat and in the description.

This language is in conflict with the provisions of W.Va. Code, §37-12-1, which states that "[w]hen any surveyor is required to survey lands which have been surveyed before, he shall make such survey by the magnetic meridian, but shall also return and certify in his plat the degree of variation of the magnetic needle from the true meridian, at the time of the resurvey . . ."

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

A legislative rule defining the practice of land surveying and providing a means for the Board to effectively regulate the profession is needed to accomplish the objectives of the Legislature in enacting the statutory article in question. The appropriateness of the proposed rule is questioned for reasons set forth elsewhere in this abstract.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

A number of the provisions contained in the proposed rules and

regulations have been the subject matter of discussion as to their reasonableness. At the agency's public hearing held on February 17, 1984, and again at the Committee's public hearing held on June 11, 1985, a number of persons presented arguments pro and con as to the new requirements of the Board calling for increased accuracy in rural surveys. Testimony adduced would indicate that open sight compass surveying equipment used by a number of surveyors in this State is incapable of achieving the required accuracy standards under practical methodology and conditions.

The Board and its supporters view compass surveying as antiquated, inaccurate, and a source of litigation involving boundary line disputes. The Board points out that surrounding states have adopted higher standards, and argues that West Virginia needs to update its practices. The proposed rules and regulations would, for all practical purposes, do away with compass land surveying.

Persons opposing the increased accuracy standards contend that a well-trained surveyor should have the discretion to select the equipment and methods to be utilized for a particular survey; that in much of West Virginia's rural mountainous terrain, such increased accuracy is neither necessary nor desired; and that compass surveying is the only practical means of producing survey results at a cost which bears a correlation to the value of the land being surveyed.

It would appear that the Committee needs to address the following questions in considering the reasonableness of the proposed rules and regulations:

(1) What reasonable degree of accuracy can be achieved through the use of an open-sight compass in surveying mountainous rural property?

(2) What reasonable degree of accuracy can be achieved through the use of the traditional surveyor's transit and tape in surveying mountainous rural property?

(3) What, if any, are the practical limitations to using modern equipment, such as theodolites and electronic distance measuring equipment, in surveying mountainous rural property?

(4) If a hypothetical tract of rural mountainous property, typical to West Virginia, were to be described, how would the costs compare for surveys conducted by compass, by transit, and by theodolites and electronic measuring equipment?

(5) What is the range of costs for compass surveying equipment adequate to perform such hypothetical survey?

(6) What is the range of costs for transit surveying equipment adequate to perform such hypothetical survey?

(7) What is the range of costs for theodolite and EDM surveying equipment adequate to perform such hypothetical survey?

(8) In what range would the fair market value per acre for timberland in West Virginia fall? For farmland?

(9) What statistics, if any, are available which would indicate that compass land surveys are a greater source of boundary disputes and litigation than surveys made with other equipment?

(10) In the case of complaints lodged against surveyors and found to be valid, what percentage of the complaints arise from inherent deficiencies in the type of equipment used as opposed to the methods or techniques used by the surveyor?

It would appear that only after these and other similar questions are answered can the Committee determine what increased costs would result from approval of the proposed rules and regulations and what benefits might be derived by the citizens of this state and the persons affected by such rules and regulations.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

There are numerous technical terms contained in the proposed rules and regulations which are common language to engineers and surveyors, but which would be incomprehensible to a layman. A definitions section would be a suggested addition to the proposed rules and regulations.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

It would appear that the requirements for promulgation set forth in the Code have not been met. W.Va. Code, 29A-3-11 requires an agency, when submitting a proposed legislative rule to the Committee, to also submit a statement of the circumstances which require the rule. In the opinion of counsel, the statement submitted by the Board sets forth conclusions as to the need for the proposed rules and regulations, but does not present the underlying facts to support those conclusions. This is not to say that the Board is necessarily wrong in its conclusions, but rather that there are no facts which the Legislature could examine to determine whether the circumstances require the rule in question.

In its statement, the Board indicates a desire to fulfill two fundamental obligations:

First to respect the right of the Surveyor licensed in

this State to his means of livelihood when such individuals have prepared themselves conscientiously and thoroughly to practice land surveying; and second to exercise its power to protect the public against the dangers arising out of the attempts of incompetent or unethical persons engaged in the practice of said profession.

The proposed rules and regulations, with increased requirements for accuracy, would effectively eliminate compass land surveying. But the statement of the Board presents no facts which would indicate that the stated "fundamental obligations" will be addressed through the promulgation of the proposed rules and regulations which call for increased accuracy standards. Is the preparedness of surveyors to practice their profession a problem of accuracy requirements as opposed to a problem of education and training? Are there facts which would indicate that the incompetent or unethical surveyors are those individuals who are currently not using modern surveying equipment which would be required by the proposed rules and regulations? These types of issues have been raised in the hearings held to consider these proposed rules and regulations, but the facts which would allow such issues to be resolved have not been brought forward. In other words, the statement of the Board does not contain "a statement of the circumstances which require the rule" which is called for by W.Va. Code, §29A-3-11.

In short, counsel would make the following observations:

- (1) The facts in the rule-making record are inadequate in critical degree;
- (2) To some extent, the agency has failed to respond to comments that are deemed vital;
- (3) The agency has failed to sustain the burden of proof with respect to essential facts; and
- (4) The agency's statement of basis and purpose of the rules is unduly vague and is not not firmly supported by facts in the rule-making record.