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ISSUE DATE: SEPTEMBER 6, 2005
RULE ADOPTIONS
LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS

37 N.J.R. 3440(a)

Adopted Amendments: N.J.A.C. 13:40-3.1 and 5.1

Adopted New Rule: N.J.A.C. 13:40-5.2

Corner Markers

Proposed: August 2, 2004 at 36 N.J.R. 3500(a).

Adopted: June 2, 2005, by State Board of Professional Engineers and Land Surveyors, James K. Valenti, Esq., P.E., President.

Filed: July 28, 2005 as R.2005 d.280 with technical changes not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 45:8-27 et seq., specifically 45:8-29, 45:8-71 and 45:8-36.3.

Effective Date: September 6, 2005.

Expiration Date: January 28, 2006.

Summary of Public Comments and Agency Responses:

The official comment period ended October 1, 2004. The Board received written comments on the proposed amendment from the following individuals:

1. David R. Bernard, P.L.S.
2. William U. Bohren, II, P.L.S.
3. Anthony Bonasera
4. Christopher Bouffard
5. Richard W. Carlson, Sr.
6. Wayne Canada, P.L.S.
7. James E. Cleary, P.E., P.L.S.
8. Lewis H. Conley, Jr., P.L.S., Van Note - Harvey Associates, P.C.
9. Paul E. De Lorenzo
10. Anthony F. Dombroski, President, A.F.D. Title Company, Inc.
11. Joseph A. Donato, Jr., P.L.S., P.P.
12. William M. Doran, P.E., P.L.S., P.P. and Daniel M. Doran, P.E., P.L.S., P.P.
13. Thomas A. English, P.L.S., Land Development Consultants, P.C.
14. Frank J. Ernst, P.L.S., Senaca Survey Company, Inc.
15. Thomas M. Ernst, P.L.S., P.P.
16. Thomas Craig Finnegan, P.L.S.
17. James Fitzgerald, Friedman, Kates, Pearlman & Fitzgerald
18. Paul J. Fletcher, P.E., P.P., Fletcher Engineering, Inc.
19. Franklyn C. Gluckler, P.L.S., Gluckler & Den Bleyker
20. Thomas A. Harris, P.L.S.
21. Jack L. Held, P.L.S., P.P., William Held Associates, Inc.
22. Barry S. Jones, P.L.S., P.P., Fralinger Engineering PA

23. Russell I. Knudson, P.L.S., Fletcher Engineering, Inc.
24. Lawrence Latore
25. Edward A. Loram
26. George T. Lucas, II, P.L.S., individually
27. George T. Lucas, II, P.L.S., P.P., Executive Director, Garden State Land Surveyors Alliance, Inc.
28. Anthony J. Manno, P.L.S., P.P.
29. Anthony Marucci, P.E., P.L.S., P.P.
30. Valerian J. Mayerczak
31. Michael McGurl
32. Christopher A. Melick, P.L.S., P.P.
33. Robert L. Nieltopp, President, Title Agency Inc.
34. Joseph Oettinger, Jr. and Joseph Oettinger, III, Pascack Title Agency, Inc.
35. Daniel Parker, P.L.S.
36. Jay F. Pierson, P.L.S., P.P.
37. Ann Marie Posada, Vicari Land Surveying, P.C.
38. William R. Postman, Jr.
39. William N. Scott, P.L.S. and Nancy Jean Scott, P.L.S., Ensurlan, Inc.
40. Edward P. Shamy, Jr.
41. Robert M. Siluk, P.L.S.
42. Ryan Smith
43. Richard F. Smith, Jr., P.L.S.
44. James A. Tarella
45. Richard G. Titus, P.L.S.
46. Mark Turnamian
47. Robert P. Vicari, P.L.S.
48. Susan L. Victoria
49. Charles Worthington
50. John J. Yuro, Jr., P.L.S., P.P.
51. William H. Ziemann, Jr., P.L.S.

1. COMMENT: A commenter supports the proposed rules, and another commenter specifically supports the revisions to N.J.A.C. 13:40-3.1.

RESPONSE: The Board thanks the commenters for their support.

2. COMMENT: Several commenters state that they oppose this rule proposal as being unnecessary and confusing and state that the Board's existing form is sufficient and works well. Another commenter questions how the health and general welfare of the public will be better protected by adoption of this rule.

RESPONSE: The Board disagrees with the commenters and has found that consumers need to understand the consequences of not having corner markers set when a survey is performed. The waiver form that had been required by the Board did not ensure that the consumer was adequately informed by the land surveyor of the possible consequences of not having corner markers set. The general welfare of the public will benefit by having consumers and land surveyors discuss when corner markers are appropriate and ensuring that these consumers are knowledgeable of the effects of waiving their placement.

3. COMMENT: A commenter believes that the rule assumes that an ultimate user does not understand that an additional survey may be needed if the corners are not marked.

RESPONSE: While some consumers may be knowledgeable about the setting and use of corner markers, the Board believes that the majority of ultimate users (consumers) are unaware of the possible consequence of not having corner markers set. Therefore, the Board believes these amendments are necessary to ensure that consumers are adequately informed when making their decisions.

4. COMMENT: A commenter questions whether this rule is contrary to N.J.S.A. 45:8-36.3, the statutory requirement that corner markers be set unless the actual corner is not accessible or unless a written waiver signed by the ultimate user is obtained and retained for a period of not less than six years by the surveyor performing the survey.

RESPONSE: The Board states that this rule is not contrary to N.J.S.A. 45:8-36.3, but, rather, it provides specific guidance and clarification concerning the content of the waiver that makes it acceptable for the purpose of this statute.

5. COMMENT: Several commenters suggest that the statement in the waiver that the licensed land surveyor "[r]eviewed the waiver to ensure that it was properly signed by the ultimate user and witnessed by a person other than a land surveyor" implies that the licensed land surveyor would also have to witness the signing by the ultimate user and witness in order to "ensure" that they were properly signed.

RESPONSE: The Board believes that this language does not require the land surveyor to witness the signing of the waiver by the ultimate user and witness but rather requires the land surveyor to perform whatever reasonable steps are necessary to discharge this responsibility.

6. COMMENT: A commenter requests that wording in the proposed waiver form be changed from "I hereby certify" to "I submit" because the commenter believes that the certification is a "warranty to perfection."

RESPONSE: The Board disagrees with this commenter. A certification is not a "warranty to perfection." A certification, which is commonly used in the making of contracts and waivers, is a statement by the signer that he or she attests that the statement is true.

7. COMMENT: A commenter suggests that the waiver form be signed and sealed by the licensed land surveyor because the commenter believes that the form represents "a final report or document."

RESPONSE: The Board disagrees with the commenter that the form needs to be sealed because the waiver form is not a work product of the licensee. The waiver form is more akin to a contract which also does not need to be sealed.

8. COMMENT: A commenter states that surveyors often request a waiver from the purchaser's attorney; thus, the surveyors are not in the position to witness the signature. The commenter, therefore, suggests that the attorney should be responsible for witnessing the signature. Another commenter states that the majority of survey requests come from attorneys and title companies with little contact with purchasers and that the waivers are often signed by the attorney.

RESPONSE: The Board acknowledges that attorneys often play a significant part in real estate transactions. However, the land surveyor's client is not the attorney, but rather, the ultimate user. Because the land surveyor's responsibilities lie with the ultimate user, the land surveyor cannot delegate his or her responsibilities to the attorney to ensure that the waiver is properly completed and to inform the ultimate user of the consequences of not having corners set as part of a survey. A waiver form that is signed by an attorney who is not the ultimate user should be accompanied by a power of attorney signed by the ultimate user that provides the attorney with the authority to sign on behalf of the ultimate user in this instance,

9. COMMENT: A commenter suggests that the waiver be maintained for 10 years to be consistent with the "statute of repose."

RESPONSE: The Board thanks the commenter but believes that the specific statutory retention requirement of six years for these waivers is appropriate. See N.J.S.A. 45:8-36.3.a. Certainly, licensees have the option to retain the waiver forms for more than six years, but the Board believes that to require it would be unduly burdensome.

10. COMMENT: A commenter suggests that the rule infers that the witness should be a surveyor.

RESPONSE: The Board disagrees with the commenter because the proposed rule specifically states in N.J.A.C. 13:40-5.2(b)2 that the licensed land surveyor must review the "[w]aiver to ensure that it is properly signed by the ultimate user and witnessed by a person other than a land surveyor."

11. COMMENT: A commenter states that N.J.A.C. 13:40-5.1(d) allows the setting of stakes which would not be durable or detectable by means to locate ferrous or magnetic objects.

RESPONSE: The Board thanks the commenter for his comment but notes that the comment is outside the scope and purpose of this rulemaking.

12. COMMENT: Several commenters state that N.J.A.C. 13:40-5.2(b)1i may be misleading because there may be reasons for surveys to be redone even when the corners have been marked; for example, some municipalities require surveys for additions to be no older than 360 days. Two commenters believe that the wording of the proposed rules may pressure ultimate users to have corner markers set and will result in delayed closings.

RESPONSE: The Board disagrees with the commenters that the waiver form is misleading or will pressure ultimate users to have corner markers set. The waiver form is not designed to be the sole communication between the land surveyor and the ultimate user. The waiver form is intended to memorialize the conversation between the land surveyor and the ultimate user in which the land surveyor would provide reasonable disclosure to the client of the costs, benefits and possible consequences of not having corner markers set. The Board believes that the use of a witness for the ultimate user's signature provides a necessary level of protection that the ultimate user signed the form. Because the witness can be anyone other than a licensed land surveyor, the Board believes that a delay, if any, in having the ultimate user's signature witnessed would be minimal.

13. COMMENT: A commenter states that the proposed rule is unclear on the precise language and manner of presentation to be displayed and suggests the Board provide an example which would be helpful. RESPONSE: The Board notes that N.J.A.C. 13:40-5.2(c) as proposed presents the actual language to be used in a waiver. No other example is necessary.

14. COMMENT: A commenter suggests that the rule be amended to allow the waiver to be witnessed and signed by a licensed land surveyor other than the surveyor performing the survey.

RESPONSE: The Board believes that the witness should be someone other than a land surveyor since the responsibility for ensuring that the waiver form is properly completed should rest with one land surveyor and allowing another land surveyor to witness the client's signature may present issues as to whether the responsibility might be considered to be split. Therefore, the Board has decided not to amend the rule as suggested.

15. COMMENT: A commenter states that the proposed rule requires surveyors to have a tremendous amount of needless responsibility to make sure all forms are signed by their clients and to inform them of the ramifications of not having corner markers set. The commenter states that after the fact, clients may challenge signing the waiver and being informed by the surveyor of consequences to the detriment of the surveyor. A commenter suggests that the requirement for a person to witness the ultimate user signing the waiver be optional. Another commenter inquires why a witness for the ultimate user's signature is necessary.

RESPONSE: The Board believes that this rule will protect both the consumer who will be informed of the consequences of waiving the setting of corner markers and the land surveyor who will ensure that the waiver form is properly signed and witnessed. The signed waiver form will provide evidence that the client has been informed. The Board disagrees that the witnessing of the ultimate user's signature should be optional because the Board believes that it is an element of the waiver form that will provide necessary protection to both the ultimate user and the land surveyor.

16. COMMENT: A commenter believes that corner markers foster boundary disputes.

RESPONSE: The Board disagrees with the commenter. The Board believes that the use of corner markers brings any boundary issue in the open for discussion and resolution at an appropriate time prior to a transaction being finalized.

17. COMMENT: A commenter states that getting waivers signed at present is difficult and that the added requirements under the rule proposal may result in delayed real estate closings.

RESPONSE: The Board notes that the use of a waiver form is a statutory requirement and that these rules are necessary to clarify land surveyors' responsibilities to provide the necessary interaction between the land surveyor and the consumer so that the consumer may make an educated decision as to the setting of corner markers.

18. COMMENT: A commenter states that if corner markers are required for all closings, a huge expense would be added to real estate transactions.

RESPONSE: The Board notes that this proposed rule does not require that corner markers be set for all closings. An ultimate user may waive the requirement for corner markers to be set as part of a survey and thereby avoid this extra expense.

19. COMMENT: A commenter does not see a need for added regulatory burdens on licensed land surveyors and believes that the Board should try to relax existing regulations.

RESPONSE: As stated previously, the Board believes that this rule is necessary to protect consumers and licensed land surveyors. The Board notes that it continuously reviews its rules to ensure that they are necessary for the protection of the public's health, safety and welfare.

20. COMMENT: A commenter believes that the proposed rules go beyond the scope of N.J.S.A. 45:8-36.3.

RESPONSE: The Board disagrees with the commenter because the proposed rule only clarifies the requirements of the content of the waiver form to ensure that the consumer, the ultimate user, is advised of the ramifications of signing the waiver form as required by the statute.

21. COMMENT: A commenter states that advising the ultimate user regarding the consequences of not having corner markers set during a survey is extremely close to rendering legal advice.

RESPONSE: The Board disagrees with the commenter since all professionals render advice related to their respective professions and the services they perform.

22. COMMENT: A commenter states that there should be no waiver form at all.

RESPONSE: The Board notes that the requirement for a waiver form comes from N.J.S.A. 45:8-36.3 and not from these proposed rules.

23. COMMENT: A commenter requests advice on the legal ramifications when a neighbor who signs off on a property corner survey has a relative erect an overreaching fence on another's property. The commenter notes that the neighbor's contractor constructed a wall using railroad ties without a building permit and without a standard survey.

RESPONSE: The Board notes that this comment is outside the scope of this rulemaking and suggests that the commenter retain private counsel to see if a legal remedy is possible.

24. COMMENT: A commenter suggests that the Board limit charges for stakes because the current prices charged by licensed land surveyors are too high at \$ 50.00 to \$ 100.00 per stake.

RESPONSE: The Board has not been made aware of any unreasonably high charges assessed by land surveyors for the setting of corner markers. The Board is of the opinion that this is not an issue which needs to be addressed at this time and is outside the scope of this rulemaking.

25. COMMENT: A commenter states that the use of the term "actual boundary" in N.J.A.C. 13:40-5.2(b)1ii is potentially misleading since the boundaries on a survey are the opinion of the surveyor.

RESPONSE: The Board recognizes that the term "actual boundary" is not defined in the rule nor used as a term elsewhere in the rules in N.J.A.C. 13:40. However, the Board notes that the "actual boundary" is not an opinion but is the legal boundary of the property that has been determined through surveying. In order to avoid confusion, the Board

on adoption has made a technical amendment to replace the term "actual boundary" with "boundary" which is a commonly understood term.

26. COMMENT: A commenter suggests that the Board prepare a pamphlet to inform consumers about the setting of corner markers.

RESPONSE: The Board thanks the commenter for the suggestion and will consider it at a later date.

27. COMMENT: A commenter suggests that the certification by the licensed land surveyor be amended to include language stipulating that the certification be "to the best of my knowledge."

RESPONSE: The Board thanks the commenter for the suggestion but believes that the certification should not have the recommended caveat. The elements of the certification are ones that the land surveyor controls and the land surveyor should have actual knowledge that the elements were performed. Therefore, using "to the best of my knowledge" would imply that the land surveyor does not have actual knowledge and/or did not perform each element for which the certification is being given.

28. COMMENT: A commenter states that the proposed rules increase the responsibility and liability of licensed land surveyors, and as a result, the costs to consumers will increase.

RESPONSE: The Board disagrees with the commenter. The Board notes that the use of a waiver form has been required for many years. These rules merely clarify the steps that should be taken to obtain the waiver, including the necessary informed disclosure to the ultimate user and a witnessed signature of the ultimate user. If properly implemented by land surveyors, these rules should reduce land surveyors' exposure to any liability as a result of a misunderstanding about the setting of corner markers.

29. COMMENT: A commenter recommends amendments to N.J.A.C. 13:40-5.1(c) to change the responsibilities of land surveyors when performing a survey; to N.J.A.C. 13:40-5.1(d) to allow alternative contracts that effect a waiver or a partial waiver, to change the standards concerning the setting of witness markers, to change certain standards related to the height of certain monuments used as corner markers, to add the license number of the surveyor responsible for setting a marker to the marker's cap under certain circumstances, to change the reference to the "Map Filing Law," to change the requirement for use of appropriate materials used in corner markers and to change the standards of offset monuments; to N.J.A.C. 13:40-5.1(f) to change a statutory reference related to title block compliance; to N.J.A.C. 13:40-5.1(g) to add a reference to "ultimate user;" to N.J.A.C. 13:40-5.1(h) to change the standards related to certain notations on plats and plans of survey; to N.J.A.C. 13:40-5.1(i) to make grammatical changes; and to N.J.A.C. 13:40-5.1(l) and (m) to change certain statutory references.

RESPONSE: The Board thanks the commenter for the comprehensive review and suggestions. However, the Board will not adopt these changes at this time because they are clearly substantive and beyond the scope of this proposal. The Board notes that it is undertaking its five-year "sunset" review and will consider these changes as it moves through its review of the regulations.

However, with respect to the request to permit alternative forms of waiver or partial waivers, the Board believes that the required form protects both the owner or purchaser of property and the licensee. Alternative forms or partial waivers might create ambiguities leading to disputes.

Federal Standards Statement

A Federal standards analysis is not required because the adopted new rule and amendments are governed by State statute and are not subject to Federal requirements or standards.

Full text of the adoption follows (deletions from proposal indicated in brackets with asterisks *[thus]*):

13:40-3.1 Enumeration of prohibited acts

(a) Misconduct in the practice of professional engineering or land surveying shall include, without limitation:

1.-13. (No change.)

14. Failure to comply with the requirements set forth in N.J.A.C. 13:40-5.1(d) and 5.2 concerning the waiver of the setting of corner markers.

13:40-5.1 Land surveyors; preparation of land surveys; setting of corner markers

(a)-(c) (No change.)

(d) Appropriate corner markers, such as stakes, iron pipes, cut crosses, monuments, and such other markers as may be authorized by (d)2 below, shall be set either by the licensed land surveyor or under the supervision of the licensed land surveyor. Such markers shall be set at each property corner not previously marked by a property marker, unless the actual corner is not accessible, or unless a written waiver signed by the ultimate user and witnessed by a person other than a land surveyor is obtained as set forth in N.J.A.C. 13:40-5.2. The failure to obtain a waiver when corner markers are not set shall be considered professional misconduct. Any violation of this subsection shall subject the licensee to a penalty of not more than \$ 2,500 for each violation.

1.-10. (No change.)

(e)-(n) (No change.)

13:40-5.2 Waiver of corner marker

(a) For purposes of this section, "ultimate user" means the contract purchaser of the property. If no purchaser exists, the ultimate user is the owner of the property. In cases where there are multiple ultimate users of the property being surveyed, only one ultimate user is required to sign the waiver.

(b) Whenever the setting of corner markers is waived by the ultimate user, the land surveyor shall:

1. Advise the ultimate user in writing as set forth in (c) below of the impact of signing the corner marker waiver. Such advice shall include, but not be limited to:

- i. The possible need for a future survey as a result of physical improvements to the property; and
- ii. The potential inability of the ultimate user to identify the *[actual]* boundary of the property;

2. Review the waiver to ensure that it is properly signed by the ultimate user and witnessed by a person other than a land surveyor; and

3. Perform a physical measurement of the property.

(c) The corner marker waiver shall be in the following form:

WAIVER AND DIRECTION NOT TO SET CORNER MARKERS

To: (Name, address and telephone number of the Land Surveyor)

FROM: (Name, address and telephone number of the Ultimate User)

Re:

Property (Lot and block number, municipality or other identifier)

This is to advise that I have been made aware of my right to have corner markers set as part of a survey to be

performed on the aforementioned property. In addition, I have been made aware of the potential impact of signing the waiver including: (1) the possible need for a future survey as a result of physical improvements to the property, such as a fence, addition, deck, pool, or shed, and (2) the potential inability of the ultimate user to identify the *[actual]* boundary of the property which could result in a boundary dispute with an adjoining property owner and/or property improvements not accurately situated on my property. The right to have corner markers set is hereby waived, and you are directed to perform the land survey without the setting of corner markers as provided by the regulation (N.J.A.C. 13:40-5.2) of the State Board of Professional Engineers and Land Surveyors.

Ultimate User's Signature

Date:

Witness' Signature

Date:

Name of Witness (Typed or Printed)

Address of Witness (Typed or Printed)

I hereby certify that I have:

1. Advised the ultimate user of the impact of signing the corner marker waiver, which shall include, but not be limited to, the possible need for a future survey as a result of physical improvements to the property and the potential inability of the ultimate user to identify the *[actual]* boundary of the property;
2. Reviewed the waiver to ensure that it was properly signed by the ultimate user and witnessed by a person other than a land surveyor; and
3. Performed a physical measurement of the property.

ew Jersey Licensed Land Surveyor

Date:

(d) Whenever a written waiver to omit corner markers is obtained, the following notation shall be included on the plat or plan of survey: "A written Waiver and Direction Not to Set Corner Markers has been obtained from the ultimate user pursuant to P.L. 2003, c.14 (N.J.S.A. 45:8-36.3) and N.J.A.C. 13:40-5.1(d)."

(e) The licensee shall maintain the signed corner marker waiver for a minimum of six years.

(f) The licensee shall submit documentation of any waiver to the Board upon its request.

(g) The Board may review the records of licensees periodically to determine compliance with this section.

(h) Failure to comply with the provisions of this section shall be deemed professional misconduct. Any violation of the provisions of (d) or (e) above shall subject the licensee to a penalty of not more than \$ 2,500 per violation.