

VOLUME 47, ISSUE 21
ISSUE DATE: **NOVEMBER 2, 2015**
PUBLIC NOTICES
LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
NEW JERSEY STATE BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS

N.J.A.C. 13:40-5.1, 7.2, 7.3, and 7.4

Notice of Action on Petition for Rulemaking

Preparation of Land Surveys, Site Plans, and Major Subdivision Plans

Petitioner: New Jersey Society of Professional Land Surveyors.

Take notice that on May 21, 2015, the New Jersey State Board of Professional Engineers and Land Surveyors (Board) received a petition for rulemaking from Robert A. Wayne, Esq., of LeClairRyan, counsel for petitioner, the New Jersey Society of Professional Land Surveyors (NJSPLS), a professional organization whose approximately 850 current members constitute over 50 percent of the licensed professional land surveyors in the State of New Jersey.

The petitioner requests that the Board amend its current regulations at N.J.A.C. 13:40-5.1, 7.2, 7.3, and 7.4 in order to codify what the petitioner describes as the Board's long-standing interpretation of N.J.S.A. 45:8-28 and the Board's rules at N.J.A.C. 13:40-5 and 7, regarding the division of responsibilities between licensed professional engineers and land surveyors in connection with the preparation of land surveys, topography, existing conditions surveys, site plans, subdivision plats, and maps.

A notice acknowledging the Board's receipt of the petition was filed with the Office of Administrative Law and published in the New Jersey Register on July 6, 2015, at 47 N.J.R. 1677(b).

The Board considered the petition for rulemaking at the open public session of its July 16, 2015, meeting. The Board determined that this matter should be referred for 90 days for further review and analysis of the issues raised by the petitioner. A notice acknowledging the Board's action on July 16, 2015, was filed with the Office of Administrative Law and was published in the New Jersey Register on August 17, 2015, at 47 N.J.R. 2190(d).

Take further notice that the Board considered the petition for rulemaking at the open public session of its October 1, 2015, meeting and determined to deny the petitioner's request to initiate a rulemaking proceeding.

The petitioner cited to and relied upon the Board's Notice Regarding Preparation of Topographical Surveys and Existing Conditions Depicted on Site Plans (Notice) published on

November 1, 2004, in 36 N.J.R. 5008(a) as support for some of its requests. The Board's Notice did not establish any new rules, but simply recognized existing laws, and sought to remind licensees of their authorized scope of practice pursuant to the statute and the Site Plan Rule. The Notice did not effect a change in existing law, interpret language in an unestablished way, or impose any new requirements; rather, it merely directed licensees to the laws that the Board would seek to enforce, if necessary, at an administrative hearing.

The petitioner requested that the Board amend its rules at N.J.A.C. 13:40-5.1, the section that applies to professional land surveyors and the preparation of land surveys. The petitioner requested that the Board amend subsection (n) to state that "only a licensed professional land surveyor may prepare topography or existing condition surveys. Further, only a licensed professional land surveyor may prepare maps or plans that depict existing features or structures, existing contour lines, topographic data or planimetric data, rights of way lines, lot lines, easement lines, restriction lines, or any other representation of limits of rights or title thereon..."

The Board agrees that only a licensed surveyor can prepare a survey in New Jersey; however, it believes that this is already clear pursuant to the practice definition in the statute, N.J.S.A. 45:8-28(e), and incorporated in the rules at N.J.A.C. 13:40-1.3 and 5.1(e). No other design professional (that is, architect, landscape architect, professional engineer, professional planner) is authorized by statute to prepare a survey. Furthermore, this practice definition also clearly sets forth the elements, features, and/or conditions to be measured and located by a licensed land surveyor for depiction on a survey. Thus, the Board has determined to deny the petitioner's request to make these amendments. The Board believes that it is unnecessary and redundant to state in N.J.A.C. 13:40-5.1(n) that only a licensed professional land surveyor may prepare topography or existing conditions surveys because N.J.A.C. 13:40-5.1 applies only to surveyors and to the preparation of land surveys. N.J.A.C. 13:40-5.1(a) states, "The practice of land surveying includes surveying of areas for their correct determination and description and for conveyancing, and for the establishment or reestablishment of land boundaries and the plotting of lands and subdivisions thereof, and such topographical survey and land development as is incidental to the land survey." N.J.A.C. 13:40-5.1(e) states that a plat or plan of survey shall be prepared either by a surveyor or under the supervision of a surveyor. Existing N.J.A.C. 13:40-5.1(n) states that maps prepared to show topographic data or planimetric data, which also delineate property lines or street right-of-way lines shall be prepared by a licensed surveyor.

The Board has also determined to deny the petitioner's request to amend N.J.A.C. 13:40-5.1(n) to include a list of the features that only a [page=2681] surveyor may depict on maps and plans. The Board believes that the list is too specific and may cause confusion. For instance, terms, such as "restriction lines," have not been defined, and are therefore open to interpretation. The Board has refrained from attempting to define and give names to the various types of surveys, but rather believes that the statutory practice definition is broad and encompasses all surveys, including a topographic survey, existing conditions plan, etc. The Board has encountered situations where a licensee has unsuccessfully attempted to argue that a plan depicting existing conditions is not a survey because the word "survey" does not appear in the title. Therefore, since the statutory language is broad and encompasses any type of survey, the Board has always taken the position that it will not delineate specific types of surveys because the names of surveys can be changed. The Board believes that the definition of "land surveying" or "surveying" in N.J.A.C. 13:40-1.3, the description of land surveying in N.J.A.C. 13:40-5.1(a), and the items that must be shown on a survey in N.J.A.C. 13:40-5.1(f), adequately set forth what is on a survey and what a survey is made of, and any plan that meets these criteria may be prepared only by

surveyors.

The petitioner also requested that the Board amend N.J.A.C. 13:40-5.1(n) to require that two benchmarks be referenced when surveying a site. The Board has determined to deny this request. In 2012, when the Board readopted its rules, it amended the rules to require that one benchmark be referenced, which the Board deemed sufficient as the minimum standard of practice. The Board cannot regulate all aspects of the practice of the profession; nor does it set forth and require a professional to meet the highest standard of practice. Instead the licensee is required to exercise his or her professional judgment in the best interests of the client while complying with the minimum standards set forth in the Board's rules. The Board recognizes that there may be differing thoughts on how many benchmarks should be referenced; however, the Board expects its licensees to use their professional judgment based on the circumstances to determine whether reference to more than one benchmark is necessary. Furthermore, the Board has not experienced any problems under the current rule. The Board will reconsider making this change when it readopts its rules at sunset if this becomes an issue in the future.

The petitioner also requested that the Board amend N.J.A.C. 13:40-5.1(n) to provide that only a licensed professional land surveyor may combine survey information from varied sources. The petitioner also requested that the term "transposed" be substituted for "transferred," and that the rule be amended to require that the survey from which the information is "transposed" be signed and sealed. Additionally, the petitioner requested that the rule be amended to require that the construction plans or other drawings onto which the survey information has been "transposed" show the date of the last survey revision, if applicable.

The Board has determined to deny the petitioner's request to make these amendments. The petitioner appears to be merely rewording what is already in the rule, but with confusing results. As stated above, N.J.A.C. 13:40-5.1 is a rule that relates only to surveyors. The Board will not speculate on the reason for the petitioner's request that the Board amend N.J.A.C. 13:40-5.1(n) to restrict anyone other than a surveyor from combining survey information from varied sources. The Board has already concurred with the petitioner that only a land surveyor can prepare a survey. As part of that process, a land surveyor is required to obtain pertinent information, such as prior surveys or survey information, in order to prepare a survey. Thus, making this proposed change is both unnecessary and unclear. Furthermore, the Board does not know what the petitioner means by the term "varied sources."

Additionally, the Board does not believe that the word "transposed" should be substituted for "transferred." According to the Merriam Webster Dictionary, the primary meaning of "transposed" is "to change the position or order of (two things)." "Transfer" means "an act or process of moving someone or something from one place to another" and is consistent with the acts of design professionals when using a signed and sealed survey to show existing conditions on a site plan. Because the Board does not wish to change the order of the survey information on construction plans or other drawings, it believes that the use of the term "transposed" would not be appropriate. The Board also believes that adding a requirement that survey information be taken from a signed and sealed survey is unnecessary and redundant; N.J.A.C. 13:40-8.1(b)i requires that maps and plats be signed and sealed. N.J.A.C. 13:40-8.3(a) requires that the title block contain the date the survey is signed.

The petitioner also requested that the Board amend its rules at N.J.A.C. 13:40-5.1 by adding new subsections (o) and (p). New subsection (o) would provide that flood elevation

certificates that require certification as to the exact building elevation information may be provided only by a surveyor. New subsection (p) would provide that record plats or plans and/or as built conditions may be prepared only by a licensed professional land surveyor.

The Board has determined to deny the petitioner's request to add these new subsections to N.J.A.C. 13:40-5.1. With respect to new subsection (o), FEMA documents are Federal forms subject to change by the Federal government, and the Board cannot dictate the content of these documents. Rather, the Board expects its licensees to understand their respective scopes of practice and prepare and sign applications and/or forms, whether from Federal, state, or local governments, consistent with that statutory authorization.

Moreover, the petitioner does not distinguish between pre-construction and post-construction flood elevation certificates. It may be appropriate for an architect or engineer to complete a flood elevation certificate with proposed elevations based on construction drawings because the proposed elevation information to which the architect or engineer would be certifying would be based on his or her design. On the other hand, a post-construction elevation certificate may fall within a surveyor's scope because the measurements required would be based on finished construction.

With respect to proposed subsection (p), the Board has also determined to deny the petitioner's request to add this new subsection. "As built conditions map" is a new term that has not been defined by the petitioner, and the Board believes that it could be interpreted to encompass more than just a survey. The Board also believes that this proposed requirement may conflict with N.J.S.A. 45:8-28(e), which states, in part, that, "Nothing in this chapter shall preclude a person licensed by the board as a professional engineer from performing those measurements necessary for the design, construction stake-out, construction and post-construction records of an engineering project, provided that these measurements are not related to property lines, lot lines, easement lines, or right-of-way lines, the establishment of which are required to be made by a land surveyor." Furthermore, for certain as built conditions relating to engineering projects, for example, some elements of sewer-water projects, or materials used in construction, an engineer, rather than a surveyor, would be the appropriate professional to certify that the project has been built in conformity with the design plan.

The petitioner also requested that the Board amend its rules at N.J.A.C. 13:40-7.2, 7.3, and 7.4, which comprise what is commonly and collectively known as the Site Plan Rule (Site Plan Rule). The Site Plan Rule sets forth the permissible scope of practices authorized by statute for, and the relationship between, engineers, land surveyors, architects, landscape architects, and professional planners. The Site Plan Rule is a uniform rule found within the regulations of the State Board of Professional Engineers and Land Surveyors (N.J.A.C. 13:40-7), the State Board of Architects (N.J.A.C. 13:27-7), and the State Board of Professional Planners (N.J.A.C. 13:41-4). The statute recognizes the licenses of these three boards as "closely allied professionals" pursuant to N.J.S.A. 45:8-28(j) and N.J.S.A. 45:3-1.1.f and the Site Plan Rule defines their relationships and respective scopes of practice. The Site Plan Rule operates as an inclusive rule, not exclusive - meaning that it sets forth what each profession is authorized to do, rather than what it is not authorized to do.

Since the statutory change that provided certification for landscape architects in 1983, the Site Plan Rule has undergone substantial change only twice. In 1991, the rule was changed, based on this new statutory scheme, to include landscape architects in the Site Plan Rule. The second change took place in 2015 as a result of statutory changes that occurred in 2008 - landscape architects became a licensed profession, and their scope of practice expanded. The Board notes that there has been no change to the land surveyor's statute

expanding their scope of practice and requiring a change to their rules.

[page=2682] The petitioner requested that the Board amend N.J.A.C. 13:40-7.2, the section dealing with the depiction of existing conditions on a site plan. In subsection (a), the petitioner requested that the Board initiate rulemaking in order to specify that surveys showing topographical and wetlands delineation locations may be performed by a licensed professional surveyor only. The current rule does not include the words, "topography," "wetlands delineation locations," "licensed professional," or "only."

The Board has determined to deny the petitioner's request to amend this section. The Board notes that N.J.A.C. 13:40-7.2 states that surveyors may prepare surveys for a site plan. The word "only" is unnecessary; no other professions are listed. Similarly, the addition of the words "licensed professional" is unnecessary because N.J.A.C. 13:40-1.3 defines "land surveyor" or "surveyor" as a "person who has been duly licensed as a professional land surveyor by the Board." Although the Board acknowledges that there are other places in the regulations where the words "licensed professional" appear before the word "surveyor," the Board believes that this is a non-substantive change that the Board will reconsider making at the time it readopts its rules at sunset. This response applies to all requests by the petitioner to add the words "licensed professional" before the word "surveyor."

The Board believes it is unnecessary and redundant to amend its rules to include the words "topography" and "wetlands delineation locations" in the description of items making up the survey for the purpose of depicting existing conditions on a site plan. The Board agrees with the petitioner that existing conditions include topography and wetlands. N.J.A.C. 13:40-7.2(a) describes a survey as "showing existing conditions and exact location of physical features including metes and bounds, drainage, waterways, specific utility locations, and easements."

Additionally, the Board notes that N.J.A.C. 13:40-5.1(a) states that, "The practice of land surveying includes surveying of areas for their correct determination and description and for conveyancing, and for the establishment or reestablishment of land boundaries and the plotting of lands and subdivisions thereof, and such topographical survey and land development as is incidental to the land survey." N.J.A.C. 13:40-5.1(e) provides that, "A plat, also referred to as a plan of survey, shall be prepared either by the licensed professional land surveyor or under the supervision of the licensed professional land surveyor. Such plat shall show all matter relevant to a complete and clear exposition of the property." Furthermore, N.J.A.C. 13:40-5.1(n) states that, "Maps prepared to show topographic or planimetric data, which also delineate property lines or street right-of-way lines thereon shall be prepared by a licensed professional land surveyor and shall identify the vertical datum and include reference to a benchmark on the site." However, the Board believes that it is unnecessary to include topography and wetlands delineation locations as items in a survey in N.J.A.C. 13:40-7.2 because they are existing conditions relevant to a complete and clear exposition of the property, and only a surveyor may show existing conditions on a site plan. Moreover, it is impractical for the Board to attempt to identify and list all existing conditions. This section does not list all existing conditions or exclude any of them.

The petitioner also requested that N.J.A.C. 13:40-7.2(a)1 be amended to require that survey information transferred to the site plan also show for whom it was prepared and the date of the last revision, if applicable. The petitioner also seeks to have multiple copies of a new or current survey submitted to the reviewing governmental body with the site plan submission. The petitioner also offers a definition for the term "current survey."

The Board has determined to deny the petitioner's request to make these changes. The addition of the words "it was prepared" is non-substantive and the Board will consider making that change when it readopts its rules at sunset. The Board does not believe that it is necessary to amend the rules at this time to require that the survey state the last revision date because this is something that is done in the normal course of practice. The Board considers this to be a non-substantive change and will reconsider making it when the Board readopts its rules at sunset.

The Board finds the petitioner's additional requests to be ambiguous and confusing. The petitioner seeks to have more than one copy of a new or current survey submitted to the reviewing body with the site plan submission, but does not state how many copies are required. The petitioner also requests that the Board require a new and/or current survey to be submitted, but the Board believes that this may be unnecessary. A survey that is 20 years old may still be accurate. N.J.A.C. 13:40-5.1(b) and (c) require a surveyor to render an accurate survey; the age of the survey is irrelevant as long it is accurate. Requiring an updated or new survey when nothing has changed would also have a negative impact on consumers because the cost would be passed on to them. Further, the number of surveys to be submitted may vary in accordance with the requirements of the municipality or governmental agency. If submitted to the design professional or client, then the number would be determined in accordance with his or her needs.

The Board also finds the petitioner's proposed definition of "current survey" ambiguous and confusing. The term "current survey" is proposed to be defined as "depicting existing site conditions and prepared in accordance with the statutes and regulations in effect on the date of submission." This definition does not specify which statutes and regulations it must be in accordance with, nor does it specify to whom the survey is being submitted, which would affect the requirement of compliance on the date of submission. Furthermore, the Board believes that any attempt to define a "current survey" belongs in N.J.A.C. 13:40-5.1, the section concerning preparation of land surveys, not in the Site Plan Rule. N.J.A.C. 13:40-5.1 specifically sets the standards for land surveyors in preparing surveys, maps and plats - the Site Plan Rule does not seek to establish those standards. Further, any standards for preparing those surveys in the Site Plan Rule would arguably apply only to those surveys accompanying a site plan and not to every survey.

The petitioner also requested that the Board add language to N.J.A.C. 13:40-7.2(b), the subsection that permits architects, planners, engineers, surveyors, licensed landscape architects, or other persons acceptable to the reviewing governmental body, to show vegetation, general flood plain determination, or general location of utilities, buildings, or structures on a site plan. The proposed additional language would read, "provided that the same are clearly indicated on the plan that the general locations thereof are not intended to indicate exact locations since the showing of exact locations may only be undertaken by a licensed professional land surveyor as set forth in subsection (a) above." The Board believes that this change is unnecessary and redundant because existing subsection (a) permits no profession other than land surveyors to show exact locations of physical features and existing conditions on a site plan.

The petitioner also requested that the Board add several new subsections to N.J.A.C. 13:40-7.2. Proposed new subsection (c) would provide that only surveyors may prepare elevations and mapping in connection with flood hazard and floodway mapping as required under N.J.A.C. 7:13, and/or the preparation and execution of a FEMA Elevation Certificate, or other documents that include certification as to building elevation information for flood plain management, flood insurance, or other purposes when required by the reviewing

governmental body.

The Board has determined to deny the petitioner's request for several reasons. The Board does not believe that any requirements regarding the preparation of FEMA and DEP certifications belong in the Site Plan Rule. The preparation of FEMA and DEP documents has nothing to do with depictions of existing conditions on a site plan, which is the purpose of this section.

The Board is also unclear as to what is meant by a FEMA Elevation Certificate - FEMA documents have multiple sections and some sections of the documents can be signed by engineers who design elevations. As discussed earlier, the petitioner does not distinguish between pre-construction and post-construction FEMA elevation certificates, and it may be appropriate for an engineer or architect to complete a flood elevation certificate with proposed elevations based on construction drawings because the proposed elevation information to which the engineer or architect would be certifying would be based on his or her design. Additionally, FEMA documents are Federal forms subject to change by the Federal government, and the Board cannot dictate the content of these documents. The Board also believes that it would be unwieldy to try to name all of the documents that each profession may sign. Rather, the Board expects licensees to know their scope of practice, and sign only those documents that they are permitted to sign according to their scope of practice.

The petitioner also requested that the Board add a new subsection (d) to N.J.A.C. 13:40-7.2. This subsection would provide that only a [page=2683] surveyor may show on a site plan the as built height of structures in relation to a datum as required by the reviewing municipal body pursuant to municipal ordinances or regulations. The Board believes that the petitioner's request is confusing and has determined to deny the petitioner's request. N.J.A.C. 13:40-7.2 relates to existing, pre-construction conditions on a site plan. An "as built" height measurement of a structure is a post-construction measurement. Accordingly, the Board believes that the petitioner's proposed provision would be both confusing and misplaced in N.J.A.C. 13:40-7.2.

The petitioner also requested that the Board add a new subsection (e) stating that hydrographic and/or bathymetric surveys can be done only by surveyors. The Board has determined to deny the petitioner's request for the following reasons: (1) it is unnecessary - under N.J.A.C. 13:40-7.2(a), no one other than a land surveyor may do any type of survey; (2) hydrographic and bathymetric surveys are not defined, creating the potential for confusion; (3) as stated earlier, the Board does not wish to name and define different types of surveys in its rules - survey names can change, and the Board wants to capture all types of surveys; and (4) any specific provisions relating to surveys belong in N.J.A.C. 13:40-5.1, not in the Site Plan Rule.

The petitioner also requested that the Board amend N.J.A.C. 13:40-7.3, the section of the Site Plan Rule which designates the profession or professions authorized to show certain design changes on a site plan. The petitioner requested that the Board amend N.J.A.C. 13:40-7.3(a) and (b) to permit land surveyors to show on a site plan, the location of proposed buildings and their relationship to the site and the immediate environs, as well as drives, parking layouts, pedestrian circulation, and means of ingress and egress. The Board has determined to deny the petitioner's request because showing proposed design elements on a site plan is outside the scope of practice of surveyors. N.J.A.C. 13:40-1.3 defines land surveying, surveying, or the practice of land surveying as

"any service or work, the adequate performance of which involves the application of

special knowledge of the principles of mathematics, the related physical and applied sciences and the relevant requirements of law to the act of measuring and locating distances, directions, elevations, natural and man-made topographical features in the air, on the surface of the earth, within underground workings, and on beds of bodies of water for the purpose of determining areas and volumes, and for the establishing of horizontal and vertical control as it relates to construction stake-out, for the monumentation of property boundaries and for platting and layout of lands and subdivisions thereof and for the preparation and perpetuation of maps, record plats, field notes, records and property descriptions in manual and computer coded form that represents these surveys. The practice of land surveying includes the establishment and maintenance of the base mapping and related control for land information systems that are developed from the practice of land surveying."

Surveyors show existing conditions on a survey and that information is transferred by the appropriate licensed design professional to the site plan; they are not authorized to make and show design changes to the site plan. For this reason, the Board has also determined to deny the petitioner's request to amend N.J.A.C. 13:40-7.3(j) to permit surveyors to show the general layout of a conceptual site plan for a multiple building project, showing the developmental elements, including their relationship to the site and immediate environs. If a layout is still in the conceptual design stage, it is not an existing condition that can be located and measured; thus it is outside of the surveyor's scope of practice.

The Board has also determined to deny the petitioner's request to amend its rules to add proposed subsection (k) because it is confusing. It appears to require engineers (the only professionals authorized to design sewage disposal systems) to comply with the provisions of the subchapter and with N.J.A.C. 7:9A, but also appears to permit only surveyors to show portions of individual subsurface sewage disposal system design plans that include topography or elevations and/or tie-ins to the boundaries and other existing site conditions on a site plan. The Board believes that the first part of the proposed subsection is unnecessary; engineers are expected to comply with their own rules and with the rules set forth in N.J.A.C. 7:9A as well as any other relevant laws when designing and showing sanitary sewage disposal systems on a site plan. The Board also believes that the proposed subsection is unclear because it mixes together what engineers and surveyors may do with respect to individual subsurface sewage disposal system design plans; it may lead to confusion as to which profession is permitted to do sewage disposal designs. The Board also notes that N.J.A.C. 13:40-5.1 and 7.2 require that surveyors show existing conditions such as topography on a survey, which is transferred by the appropriate licensed design professional to a site plan, and the Board does not believe that this needs to be repeated in this section.

The Board has also determined to deny the petitioner's request to add proposed (l), which states that the height of structures in relation to a datum can be shown by a surveyor only. The Board does not believe that this provision belongs in N.J.A.C. 13:40-7.3, because N.J.A.C. 13:40-7.3 deals with proposed design improvements, not existing conditions. The Board also believes that even if this provision had been proposed to amend N.J.A.C. 13:40-7.2, the section relating to depiction of existing conditions on a site plan, it would be unnecessary; N.J.A.C. 13:40-5.1(n) provides that maps prepared to show topographic data which also delineate property lines or street right-of-way lines thereon must be prepared by a licensed surveyor and must identify the vertical datum and include reference to a benchmark on the site.

The Board has also determined to deny the petitioner's request for rulemaking at N.J.A.C. 13:40-7.4, the section that deals with preparation of a major subdivision plan. The

petitioner's request to include preliminary subdivision maps with metes and bounds as part of subsection (c) is unnecessary and redundant, as N.J.A.C. 13:40-5.1(m) states that "[s]ubdivision plats, whether classified as major or minor, preliminary or final, shall be prepared by a licensed professional land surveyor and shall be based on a new and existing current and accurate survey of the property being subdivided." Further, this is not within the scope of practice of the design professionals.

In summary, the Board believes that the Site Plan Rule continues to adequately govern the relationships between the various closely allied professionals in accordance with each Board's enabling statute. The Board also believes that the rules setting forth the minimum standards in Subchapter 5 to practice as a professional land surveyor in New Jersey provide adequate guidance to its licensees and already address many of the issues raised in the petition. The Board appreciates the input provided by NJSPLS at prior sunsets and its continued efforts to ensure the integrity and professionalism of these various professions. As identified herein, the Board will revisit the various non-substantive rule change requests at sunset, and looks forward to the continued support and recommendations from NJSPLS at that time.

A copy of this notice has been mailed to the petitioner pursuant to N.J.A.C. 1:30-4.2.