

**STATE OF FLORIDA  
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES  
BOARD OF PROFESSIONAL SURVEYORS AND MAPPERS**

IN RE: PETITION FOR DECLARATORY STATEMENT BY  
T.S. MADSON d/b/a FLORIDA LAND SURVEYORS COUNCIL

Agency Clerk #A70610

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**FINAL ORDER DENYING PETITION**

Mr. T.S. MADSON, presently doing business as FLORIDA LAND SURVEYORS COUNCIL, referred to herein collectively as "Petitioner," has petitioned the Board of Professional Surveyors and Mappers ("Board") for a declaratory statement pursuant to Section 120.565, *Florida Statutes* (2010). On November 9, 2010, the Agency Clerk for the Department of Agriculture and Consumer Services ("Department") received a Petition For Declaratory Statement filed by the Petitioner. Notice of the Receipt of the Petition was published in *Florida Administrative Weekly* on November 24, 2010 at Vol. 36, No. 47. A public hearing was held on February 3, 2011. The Board was represented by Mr. Bennett M. Miller, Esq. The Petitioner was present.

**PRELIMINARY STATEMENT**

Section 120.565, F.S., provides the authority for administrative agencies to issue declaratory statements:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.
- (3) The agency shall give notice of the filing of each petition in the next available issue of the *Florida Administrative Weekly* and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition

within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Weekly. Agency disposition of petitions shall be final agency action.

This statutory provision has been incorporated into the Florida Uniform Rules of Administrative Procedure as Rule 28-105.001, *Florida Administrative Code* (2010), "Purpose and Use of Declaratory Statement":

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.003, F.A.C., "Agency Disposition," provides:

The agency may hold a hearing to consider a petition for declaratory statement. If the agency is headed by a collegial body, it shall take action on a petition for declaratory statement only at a duly noticed public meeting. The agency may rely on the statements of fact set out in the petition without taking any position to the validity of the facts. Within 90 days of the filing of the petition, the agency shall render a final order denying the petition or issuing a declaratory statement.

According to the language of §120.565, F.S., and the underlying administrative rules, the Legislature clearly intended the use of declaratory statements to be limited in scope. Declaratory statements determine a narrow range of issues that are the direct result of the application of agency authority to a particular set of circumstances as alleged by the petitioner. *Carr v. Old Port Cove Property Owners Ass'n, Inc.*, 8 So.3d 403 (Fla. 4<sup>th</sup> DCA 2009); *Novick v. Dept. of Health, Board of Medicine*, 816 So.2d 1237, 1240 (5<sup>th</sup> DCA 2002).

### JURISDICTION

Because the Petitioner requests a declaratory statement regarding the applicability of a statute regulating the practice of surveying and mapping in the State of Florida, the Board has jurisdiction. See generally, §§472.001, 472.007, F.S.

### THE PETITION

The Petition, a copy of which is attached to this Final Order as Exhibit "A" and incorporated herein, requests the opinion of the Board regarding whether licensed professional surveyors and mappers may contract to perform services that are contingent on a future event, such as the transfer of real estate from one party to another at a real estate settlement or "closing." The Petitioner cites to Rule 5J-17.010(6)(e)(1), F.A.C. and requests the opinion of the Board regarding whether contingency fee arrangements are permitted under such circumstances.

### PETITIONER

Petitioner stated at the hearing that Florida Land Surveyors Council is not a business entity organized pursuant to the laws of any state or district. However, the Petitioner asserted that the Petitioner acts as a voluntary professional association whose membership includes persons who are subject to the licensing requirements of Chapter 472, F.S.

### PARTICULAR SET OF CIRCUMSTANCES

The Petition states that Petitioner's members have been asked to perform completed boundary surveys by clients "who only want to pay for those surveys after the closing for the mortgage closes ..." The Petition states that it appears to be a violation of Rule 5J-17.010(6)(e)(1), F.A.C. to agree to such a contractual arrangement. The Petition does not contain a copy of any agreement, the names of the parties, or any other information on how a licensed surveyor would be compensated. The Petitioner stated at the public hearing that the

Petitioner was not personally engaged in the day to day practice of professional surveying and mapping. No testimony was offered that demonstrated that the Petitioner was in doubt about the Petitioner's own future personal conduct.

As such, the Petitioner has failed to allege in the Petition a sufficient set of particular circumstances to allow the Board to respond to the Petition. Thus, the Petition is deficient under Rule 28-105.002, F.A.C.

#### BROAD STATEMENTS OF AGENCY POLICY

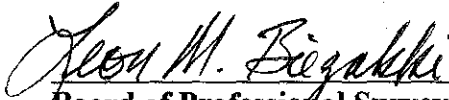
A petition for a declaratory statement is similar to a petition for declaratory judgment. *Sutton v. Department of Environmental Protection*, 654 So.2d 1047 (5<sup>th</sup> DCA 1995), *Couch v. State*, 377 So.2d 32, 33 (Fla. 1<sup>st</sup> DCA 1979). A declaratory judgment is rendered to afford relief from insecurity and uncertainty to rights, status, and other equitable or legal relations. Individuals seeking declaratory relief must show a bona fide, actual, present, and practical need for the declaration with a present controversy as to a state of facts. *State Farm Mut. Ins. Co. v. Marshall*, 618 So. 2d 1377 (Fla. 5<sup>th</sup> DCA 1993), disapproved on other grounds, *Cunningham v. Standard Guar. Ins. Co.*, 630 So.2d 179 (Fla. 1994). An administrative agency may not use a declaratory statement to provide statutory or rule interpretations that apply to an entire class of persons. *Regal Kitchens, Inc. v. Florida Dept. of Revenue*, 641 So.2d 158, 162 (Fla. 1<sup>st</sup> DCA 1994). Petitioner testified at the public hearing that the Petitioner was requesting a rule interpretation of a "washout survey" on behalf of Petitioner's membership, many of whom perform washout surveys. Because the Petitioner is requesting a rule interpretation for a large class of persons, a response would require a statement of broad agency policy and is inappropriate.

PETITION IS MOOT

The Petition requests that the Board provide guidance to the Board regarding "washout" surveys. The Petition references events that have occurred in the past. The Petition alleges that Petitioner's members' future course of conduct might include the use of "washout" surveys, but does not otherwise allege an actual, present, and practical need for a Declaratory Statement. Under these circumstances, neither §120.565, F.S., nor Rule 28-105.001 F.A.C., affords this Board the authority to respond under the circumstances. *See generally, National Association of Optometrists v. Florida Dep't of Health and Wal-Mart Stores, Inc.*, 922 So.2d (1<sup>st</sup> DCA 2006).

**THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED** that the Petition is **DENIED**.

DONE AND ORDERED this 4<sup>th</sup> day of March, 2011.

  
Board of Professional Surveyors and Mappers  
Leon M. Biegalski, Executive Director,  
For Arthur A. Mastronicola, Jr., Chair

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Declaratory Statement is entitled to seek review of this Declaratory Statement pursuant to § 120.68, F. S. and Rule 9.110, *Florida Rules of Appellate Procedure*. Review proceedings must be instituted by filing a Petition or Notice of Appeal with the Clerk, Room 509 Mayo Building, Tallahassee, Florida 32399-0800, and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Declaratory Statement.

Filed with the Clerk, this 7<sup>th</sup> day of March, 2011.

  
Agency Clerk

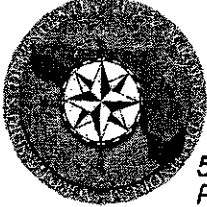
Copy mailed by Certified U.S. Mail, RRR# 701 027800000, on <sup>March</sup>~~February~~ 8, 2011 to:

Florida Land Surveyors Council, P.O. Box 1041, Douglas GA 31534

I certify that true copies of this Final Order were mailed to the above individuals on the above referenced dates.



Bennett M. Miller  
Board Counsel  
Florida Board of Professional Surveyors and Mappers



# Florida Land Surveyors Council

The Surveyor's Competency Maintenance Organization— Founded 1992

Ted Madson, PSM & Executive Director

512 South Peterson Avenue  
P. O. Box 1041  
Douglas, Georgia 31534

(800) 874-7876 -- Toll-Free Office  
(912) 383-6719 -- Office  
(800) 304-4809 -- Toll-Free FAX

website: <http://surveyors.org> ..... Email: [ted.madson@surveyors.org](mailto:ted.madson@surveyors.org)

Thursday, November 4, 2010

Mr. Leon Biegalski, Executive Director  
Florida Department of Agriculture and Consumer Services  
Terry Lee Rhodes Building  
2005 Apalachee Parkway  
Tallahassee, Florida 32399-6500  
Phone: (850) 410-3833 – Office  
(850) 410-3797 – FAX

Re: Petition for a Declaratory Statement from the *Florida Board of Professional Surveyors & Mappers*.

Dear Mr. Biegalski:

§120.565(1), *Florida Statutes*, states that:

"(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or any rule or order of the agency, as it applies to the petitioner's particular set of circumstances."

§120.565(2), *Florida Statutes*, further states that:

"(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances."

The rule of the Board of Professional Surveyors & Mappers, at §5j-17.010(6)(e)(1), *Florida Administrative Code*, states that:

"(e) Licensees, whether individual people or business entities holding certificates of authorization, may not offer any bribe, commission or gift, either directly or indirectly, to obtain selection or preferment for surveying and mapping employment."

"1. An example of prohibited activity under this part is a practice known as the "washout" survey, wherein a licensee agrees to accept payment for surveying and mapping service only upon the contingency of a future event other than the completion of the survey and map."

The *Florida Land Surveyors Council* is a "trade or professional organization" recognized by the Board of Professional Surveyors and Mappers on its website at <http://www.800helpfla.com/psm/psm.html> and since its members are regulated by the *Board of Professional Surveyors and Mappers* it qualifies as a "substantially affected person" pursuant to the following rule stated by the Courts in *NAACP v. Fla. Bd. of Regents*, 822 So. 2d 1, (Fla. 1st DCA, February 26, 2002, Opinion Filed ) and *Coalition*

*of Mental Health Professions v. Department of Professional Regulation*, 546 So. 2d 27 (Fla. 1st DCA 1989).

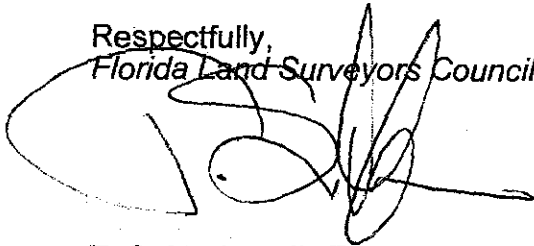
"The fact that a trade or professional association's members will be regulated by proposed rules is alone sufficient to establish that their substantial interests will be affected, and there is no need for further factual elaboration of how each member will be personally affected."

From time to time our members are requested to perform completed boundary surveys for clients who only want to pay for those surveys after the closing for the mortgage on the surveyed property. The obvious intent of these clients is to only pay if the mortgage closes; therefore, if our members agree to perform these services it seems that they would be agreeing "... to accept payment for surveying and mapping service only upon the contingency of a future event other than the completion of the survey and map." Accordingly, if one of our members agrees to be paid when the mortgage closes any member working under such an agreement would appear to be in violation of the Board of Professional Surveyors & Mappers rule at §5j-17.010(6)(e)(1), *Florida Administrative Code*, even if such a member is otherwise able to secure payment in the event that the mortgage does not close.

Since the *Florida Land Surveyors Council* is a "substantially affected person" and entitled to a Declaratory Statement pursuant to §120.565(1), *Florida Statutes*, this Petition for a Declaratory Statement is to seek the opinion of the *Board of Professional Surveyors and Mappers* about whether our members performing boundary surveys for clients who are only required to pay for those surveys after the closing for the mortgage on the surveyed property are violating rule §5j-17.010(6)(e)(1), *Florida Administrative Code*.

Please present this petition to the full *Board of Professional Surveyors and Mappers* at its next regularly scheduled meeting together with our request for an immediate Declaratory Statement regarding this issue. TIME IS OF THE ESSENCE! Thank you for your help.

Respectfully,  
*Florida Land Surveyors Council*

A large, stylized handwritten signature in black ink, appearing to read 'T. S. Madson II', is written over the typed name and title.

T. S. Madson II, *Executive Director*