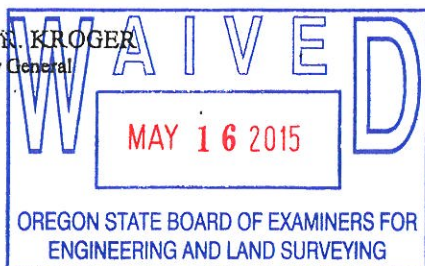
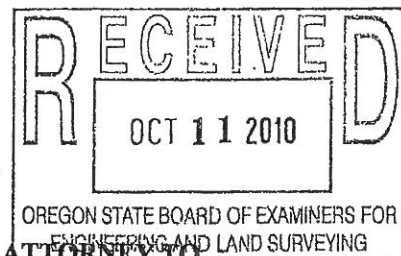


JOHN A. KROGER
Attorney General



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MARY H. WILLIAMS
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MEMORANDUM

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DATE: October 8, 2010

TO: Oregon State Board of Examiners for Engineering and Land Surveying
Professional Practices Committee
Jenn Gilbert, Executive Assistant

FROM: Joanna L. Tucker Davis, Assistant Attorney General 
Business Activities Section

SUBJECT: Industrial Exemptions / Legislative History
DOJ File No. 917001-GB0349-10

You have asked for advice on the legislative history of what the Board commonly calls the "industrial exemptions," found in ORS 672.060(5) & (6).

As a starting point, the current text of these exemptions is as follows:

- (5) An individual, firm, partnership or corporation practicing engineering or land surveying:
 - (a) On property owned or leased by the individual, firm, partnership or corporation, or on property in which the individual, firm, partnership or corporation has an interest, estate or possessory right; and
 - (b) That affects exclusively the property or interests of the individual, firm, partnership or corporation, unless the safety or health of the public, including employees and visitors, is involved.
- (6) The performance of engineering work by a person, or by full-time employees of the person, provided:
 - (a) The work is in connection with or incidental to the operations of the person; and
 - (b) The engineering work is not offered directly to the public.

ORS 672.060(5),(6).

The legislation to create the Board of Engineering Examiners and the statutes to regulate professional engineers was first enacted in 1919. General Laws of Oregon 1919, chapter 381. The original laws contained two exemptions from the requirement for registration. One exemption was in the definition of practice of engineering. It stated:

The execution as a contractor of work designed by a professional engineer or the supervision of the construction of such work as a foreman or superintendent for such a contractor shall not be deemed to be the practice of professional engineering within the meaning of this act.

General Laws of Oregon 1919, chapter 381, section 1(2). The practice of engineering was then defined as "the design and supervision of construction" of a long list of certain types of projects, such as "railroads, bridges, highways, roads, canals, harbors, river improvements, lighthouse, wetdocks, drydocks, ships, barges," and went on to list many others, and at the end of the list said, "which require for their design or the supervision of construction such experience and technical knowledge as are required in section 8 of this act for admission to examination." Section 8 required six years experience "engaged upon engineering work" and during that period "had charge of engineering work, as principal or assistant, for at least one year," or in lieu of that experience, to have been a graduate from an engineering school and been engaged in engineering work for at least two years and during that period had charge of engineering work as principal or assistant, for at least one year.

The other exemption from the registration requirement was in section 16 of the Act, "Application of Act." It provided, in part:

This act shall not apply to any professional engineer working for the United States government; nor to an architect practicing architecture; nor to any professional engineer employed as an assistant to a professional engineer register under this act; (nor to) any professional engineer coming from without this state and possessing the qualifications for the practice of [engineering, as required by the act] [who shall] be permitted to practice not to exceed three months * * * [and that United States military service engineers would be registered without an examination].

The language creating an exemption for the practice of engineering by individuals, firms or corporations on their own property, "unless the public safety or health is involved" was added to the law in 1921:

Nothing in this act shall be construed as requiring registration for the purpose of practicing professional engineering by an individual, firm or corporation, other than public utilities, on property owned or leased by said individual, firm or corporation, or in which said individual, firm or corporation has an interest, estate or possessory right, or which affects exclusively the property or interests of said individual, firm or corporation, unless the public safety or health is involved.

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General Laws of Oregon 1921, chapter 112, section 2(2). Unfortunately, there is no legislative history of the traditional variety for these old enactments.¹

According Webster's New International Dictionary of the English Language (1910), the definitions of the following terms existed at the time:

- Public: "[o]f or pertaining to the people; relating to, or affecting, a nation, state, or community at large; - opposed to *private*."
- Safety: "[c]ondition or state of being safe; freedom from danger or hazard; * * * [f]reedom from whatever exposes one to danger or from liability to cause danger or harm."
- Health: "[s]tate of being hale, sound or whole, in body, mind or soul; well-being; esp., state of being free from physical disease or pain."

The next relevant amendment occurred in 1971, Or Laws 1971, c 751, sec 4, (Senate Bill 44) when the statutes governing professional engineers and land surveyors were combined. The language of what is now subsection 6 of ORS 676.060 was added. There was extensive commentary and debate regarding concerns that the definition of engineering was too vague and regarding a proposed registration requirement for public employees.¹

As for the industrial exemptions, the engrossed Senate Bill 44 included the following language:

[(4)] (7) An individual, firm, **partnership** or corporation [*other than a public utility*] practicing [professional] engineering or land surveying on property owned or leased by the individual, firm, **partnership** or corporation, or in which the individual, firm, **partnership** or corporation has an interest, estate or possessory right, or which affects exclusively the property or interests of the individual, firm, **partnership** or corporation, unless the public safety or health is involved. "Public safety or health" includes the safety and health of employees and visitors.

(8) The performance of engineering work or land surveying by any person, firm or corporation, or by full-time employees of any of them, provided such work is in connection with or incidental to the products, systems or services of such persons, firms or corporations, and provided that the engineering work or land surveying is not offered directly to the public.

Senate Bill 44, Engrossed, Section 4, subsections 7 and 8. The Engineers and Architects Council of Oregon provided a statement to the Judiciary Sub-Committee (the subcommittee reviewing this bill) and included the following language:

On Page 5, lines 23-27 – We have carefully considered Sec. 4, Sub-Section 8 and we find that the exclusion being sought in this section is adequately covered in

¹ Further research could be done by looking at old materials at the time, such as newspapers. This would likely be resource-intensive and may not lead to further clarification of the exemptions. If the Board would like this type of research done, please let us know.

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Section 4, Sub-Section 7 and we read into this section the possibility of persons unqualified by registration doing in-house engineering on products that will be offered for sale to the public; whereas it says that "no engineering work or land surveying work will be offered to the public" the products of those works can be offered. We feel that the safety and health of the public is the most important reason for this Registration Act and that protection could be lost with the inclusion of Sec. 4, Sub-Section 8. We respectfully urge the Committee's re-evaluation of this subsection and request its deletion.

5/18/71 Letter to Judicial Subcommittee from Engineers and Architects Council of Oregon (EACO), signed by Eugene P. DiLoreto, President. In the legislative history, there is also a letter to the chairman of the committee from the EACO, signed by John Talbott, further stating:

As to Section IV, sub-section (8) of all the provisions in this engrossed bill, this sub-section, which was not in the originally introduced bill, destroys the greatest amount of protection provided to the public. It would mean for instance that a person making trusses intended to be used in a building could sell trusses which had not been designed by professional engineers. These trusses presumably would be used in the construction of buildings which might be susceptible to failure with the potential of great harm to the public. There is no definition of the product, systems or services and no limitation on the nature or kind of product system or service which might be provided without the public benefit of [sic] engineer. Would it not permit an unethical developer to plan and construct streets, sanitary works and other facilities which might truly become a peril to the public which might later use these? If there is a basis for an engineering act at all, it would seem fundamental that the purpose of this act "to safeguard life, health and property" that products, systems or service, the design of which requires the practice of engineering, should be covered in the engineering registration law.

5/18/71 Letter to Honorable Skelton, Chairman of Judicial Subcommittee from the Engineers and Architects Council of Oregon, signed by John Talbott. The Committee minutes also show that John Talbott read a prepared statement on behalf of the organization to the Judicial Subcommittee on May 18, 1971. It is unclear which letter was read. The minutes of the May 20, 1971 meeting of the subcommittee reveal the following discussion regarding the exemption:

Proposed amendments were discussed. Page 5, section 8 is the alleged compromise the two groups disagreed on. On line 23 after the word "work" delete "or land surveying." On line 25, after "the" delete "or services" and insert "operations." In line 27 delete the words "or land surveyed [sic]." Engineers want section 8 out, the utilities want section 8 in. They have agreed that they can both live and work with these amendments.

May 20, 1971 minutes of the House Judiciary Subcommittee II. We were unable to find any statements in the minutes or documents submitted by utilities regarding subsection (8). The language in the final enrolled bill deleted the references to land surveying and changed "products, systems and services" to "operations:"

(8) The performance of engineering work by any person, firm or corporation, or by full-time employees of any of them, provided such work is in connection with or incidental to the operations of such persons, firms, or corporations, and provided that the engineering work is not offered directly to the public.

While it is not entirely clear what the compromise was intended to accomplish, it appears that the discussion centered on engineering that would be used in the creation of products to be sold to the public. The changes to these exemptions post-1971 do not appear to be significant and we did not research those changes.

Please let us know if you would like us to further analyze any of specific questions that have been raised in regards to these exemptions² or have any questions or concerns regarding this memorandum.

¹ When the bill was introduced, it contained a provision that was intended to require anyone in public employment who practiced engineering to be a registered engineer. This was to address a concern that people who were not qualified were practicing engineering and that was not in the interest of public safety. Senate Judiciary Committee, Minutes, February 3, 1971, Public Hearing (SB 44), p. 3. That provision read as follows:

(1) The state or a county, city, district or other political subdivision and any authority or agency thereof shall not construct, or contract for the construction of, a public works involving the practice of engineering, unless the engineering drawings, specifications and the estimate for the works are prepared by, and the construction is executed under the responsible charge of a registered professional engineer. Any contract executed in violation of this section is void.

(2) The state or a county, city, district or other political subdivision and any authority or agency thereof shall not engage in the practice of land surveying unless the surveys are executed under the responsible charge of a registered professional engineer or a registered professional land surveyor.

Senate Bill 44 (1971), section 4, as introduced. That language was taken from the Model Law prepared and adopted by the National Council of Engineering Examiners. But representatives of local governments testified in opposition to section 4, which resulted in its deletion, and amendments to ORS 672.060 were made instead. There was much discussion in the minutes about the perceived impact that the proposed language would have had on local governments, including discussion of projects that governments might or might not need a registered engineer to perform. Some of the situations that were mentioned that the amendment was intended to address (which led to the deletion of the proposed language set out above) were county roadmasters who build roads according to federal standards but may not be engineers, and sanitarians that design sewer or drainage systems, but should not be required to be registered engineers. Sanitarians and landscape architects were then specifically added to the exemptions in ORS 672.060. There were concerns that whatever the final product or result was, if it was something that could impact the public's safety it should require a registered engineer. There was also testimony that the definition of the practice of engineering (Or Laws 1971, section 2(1)) should be adequate to exempt the work that could be done by non-engineers and cover the work that they felt should be done by registered engineers.

² A number of specific questions relating to these exemptions have recently arisen, including:

- The meaning of the term "public;"
- The meaning of "engineering work;"
- When is the safety/health of public involved;
- Whether an independent contractor is an "employee;"
- Whether submitting plans to a city an "offering to the public."

JAMES A. REDDEN
ATTORNEY GENERAL



DEPARTMENT OF JUSTICE

100 State Office Building
Salem, Oregon 97310
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November 29, 1979

No. 7821

This opinion is issued in response to a question presented
by the Honorable Mike Ragsdale, State Senator.

QUESTION PRESENTED

Are the services of a registered professional
engineer required for construction, reconstruction
or repair of public roads?

ANSWER GIVEN

Yes, for construction or reconstruction of
roads, or for repair of roads in any case in which
the purpose is to strengthen or increase capacity,
or where the road has deteriorated to the extent
that the repair would constitute significant
strengthening. No, for repairs designed to preserve
the road or restore it to its original condition,
where the pre-repair condition is not greatly
deteriorated.

DISCUSSION

This opinion request arises out of a concern that there
are many road-work situations where it is not obvious whether
the services of a registered professional engineer are needed.

We are asked for some guidelines to aid in determining where one is required.

ORS 672.005 states in relevant part:

"As used in ORS 672.002 to 672.310, unless the context requires otherwise:

"(1) 'Practice of Engineering' means any professional service or creative work requiring engineering education, training and experience and the application of special knowledge of the mathematical, physical and engineering sciences to such professional services or creative work such as consultation, investigation, evaluation, planning, design and services during construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works or projects.

"(2) 'Practice of Engineering' does not include the execution of work designed by a professional engineer or the supervision of the construction of such work as a foreman or superintendent."

ORS 672.020(1) restricts the "practice of engineering" to "registered professional engineers" who possess a valid certificate to practice engineering issued by the State Board of Engineering Examiners under ORS 672.002 to 672.310. The purpose of this requirement is to "safeguard life, health and property." ORS 672.020(1). Several exemptions to the application of ORS 672.002 to 672.310 are found in ORS 672.060. Among these exemptions, it is found in subsection 5 that "[a]ny person practicing engineering under the supervision of a registered professional engineer" would not have to be so registered. These requirements should be

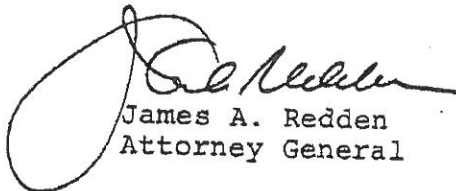
broadly construed in view of their purpose to "safeguard life, health and property."

This does not, of course, mean that every bit of repair work to the public roads must be performed, supervised or planned by an engineer. So long as the "life, health and property," of the public would not be endangered many tasks could be performed, e.g., the simple filling of a pothole. The circumstances present in each instance would, of course, be important in an actual determination of whether the services of a "professional registered engineer" would be needed. It is impossible in this opinion to set out the situations where such service would or would not be required. The tests set forth in the statute (necessity for skill, education, training and experience, and the safeguarding of life, health and property) must be applied on a case by case basis.

We do, however, suggest a guideline which may be used. Every case of construction of a roadway requires the services of a professional engineer. Reconstruction would probably require such services; repair may not. When a judgment decision must be made as to the best method to strengthen or increase the capacity of a road, the services of a registered professional engineer are required. If, however, the purpose is to preserve the road in or restore it to its original condition, such services would usually not be required. The exception would be a case in which a road has deteriorated to

an extent that the repair itself would constitute any significant strengthening. We are informed that there are adequate specifications, which can be followed by a non-engineer, for the preparation and application of the materials used, so that engineering skills would not be required for most such repairs.

There may, however, be cases in which tests required by the specifications, and particularly the interpretation of test results, would require the exercise of engineering judgment.



James A. Redden
Attorney General

JAR:DKH:tlg