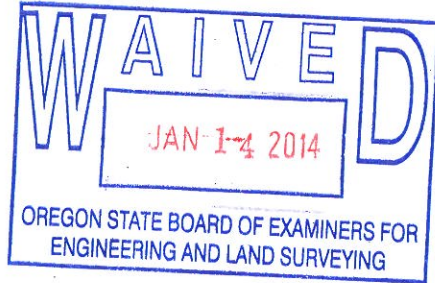


ELLEN F. ROSENBLUM
Attorney General

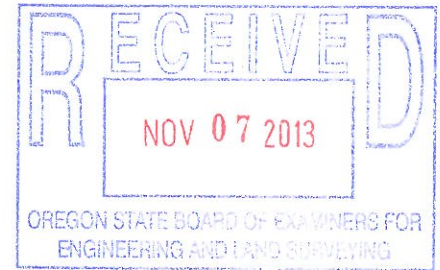


MARY H. WILLIAMS
Deputy Attorney General



**DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION**

November 6, 2013



Mari Lopez
Oregon State Board of Examiners for Engineering
and Land Surveying
670 Hawthorne Avenue SE, Suite 220
Salem, OR 97301

Re: Opinion Request OP-2013-4

Dear Ms. Lopez:

The Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS) asks two questions about the interplay between the Oregon statutes that govern the professional practices of engineering and land surveying, ORS 672.002 to 672.325, and ORS 215.080, which authorizes county planning commission members, officers and employees to enter upon land and, among other things, survey it. Below we set out your specific questions and our short answers, followed by a discussion.

FIRST QUESTION PRESENTED

Does ORS 672.025(1), which prohibits any person from practicing land surveying in Oregon unless the person is registered and has a valid certificate to practice land surveying issued under ORS 672.002 to 672.325, apply to members, officers and employees of county planning commissions exercising their authority under ORS 215.080 to enter upon and survey land?

SHORT ANSWER

Yes, to the extent that the commission members, officers or employees are practicing land surveying for purposes of ORS 672.002 to 672.325 and are not exempt from the application of those provisions under ORS 672.060. ORS 215.080 provides authority to commission personnel to enter upon and survey land, but does not exempt them from professional licensing requirements.

SECOND QUESTION PRESENTED

Do the restrictions that ORS 672.047 places on the right of registered professional land surveyors and their employees and agents to enter upon land apply to county planning commission members, officers and employees exercising their authority to enter upon land under ORS 215.080?

SHORT ANSWER

No.

DISCUSSION

1. Applicability of ORS 672.025's land surveying registration requirement to county planning commission personnel performing surveys under ORS 215.080

a. Methodology for interpreting statutes

Your questions require us to interpret several statutory provisions. In doing so, we use the method for interpreting statutes established by the Oregon Supreme Court, which involves examining the text and context of the statute as well as the legislative history, to the extent that it is helpful, with the goal of discerning the legislature's intent. *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–12, 859 P2d 1143 (1993). When construing several statutory provisions, we must adopt the construction that gives effect to all, if possible. ORS 174.010. If that is not possible because of an unavoidable conflict between the provisions, we give effect to a particular intent over an inconsistent general intent. ORS 174.020(2).

b. Requirement under ORS 672.025 to be registered to practice land surveying

ORS 672.002 to 672.325 govern the professional practices of engineering and land surveying. ORS 672.025(1) prohibits any person from “practic[ing] land surveying in this state unless the person is registered and has a valid certificate to practice land surveying issued under ORS 672.002 to 672.325.” *See also* ORS 672.045(1) (prohibiting any person from engaging in the practice of land surveying without a valid certificate or permit).

A person practices land surveying if he or she “perform[s] * * * any land surveying service or work or any other service that is defined by ORS 672.005 as the practice of land surveying.” ORS 672.007(2)(c). ORS 672.005(2) defines the “practice of land surveying” to include, among other things:

(a) Providing or offering to provide professional services that apply mathematics, geodesy and other sciences and involve:

(A) The making of geometric measurements and gathering of related information pertaining to:

(i) The physical or legal features of the earth;

(ii) Improvements on the earth; or

(iii) The space above or below the earth; or

* * * * *

(c) Establishing, reestablishing or replacing boundaries or geodetic control monuments or reference points.

(d) Locating, relocating, establishing, reestablishing or retracing any property lines or boundaries for any tract of land, road right-of-way or easement.

The practice of professional engineering also includes surveying to, among other things, “determine area or topography” or “to establish lines, grades or elevations[.]” ORS 672.005(1)(c), (d). But a registered professional engineer may not conduct surveys to “establish, reestablish or restore land boundaries, corners or monuments between lands not held in common ownership or intended for conveyance” without also being a registered professional land surveyor. ORS 672.025(3).

c. Surveying authorized under ORS 215.080

ORS 215.080 authorizes county planning commission members, officers and employees to “enter upon any land and make examinations and surveys and place and maintain the necessary monuments and markers thereon.” A threshold question is whether this provision authorizes any conduct that would constitute the practice of land surveying under ORS 672.005. If not, ORS 215.080 does not implicate the registration requirement imposed by ORS 672.025.

Neither the word “survey” nor any of the other pertinent terms in ORS 215.080 are defined, so we give them their plain meanings. ORS 215.080 was enacted in 1947. Or Laws 1947, ch 537, § 5. To determine the plain meanings of the terms it uses, we consult dictionaries that were in use around the time that the statutory language was enacted. *See State v. Perry*, 336 Or 49, 53, 77 P3d 313 (2003) (stating that, in determining the meaning of words used in a statute enacted many years earlier, courts will refer to dictionaries in use around the time of the enactment).

“[M]ake examinations” as used in the phrase “enter upon land and make examinations and surveys” most likely means “the act of examining” the land with the pertinent definition of “examine” being “to inspect carefully with a view to discover the real character of.” WEBSTER’S SECOND NEW INT’L DICTIONARY at 887 (unabridged 1952).

To “make * * * surveys” most likely means “the act or instance of surveying” the land. *Id.* at 2540. The three potentially pertinent definitions of “survey” are: (1) “[t]o look over or examine with reference to condition, situation, value, etc. * * * to examine and ascertain state of;

as to survey a building to estimate its value"; (2)"[t]o view with a scrutinizing eye; to examine or inspect closely"; and, (3) "[t]o determine and delineate the form, extent, position, etc. * * *, of, as a tract of land, a coast, harbor, or the like, by taking linear and angular measurements, and, by applying the principles of geometry and trigonometry." *Id.* at 2540 (1952). The first two definitions essentially are synonymous with "examinations." The third definition adds a more particular sense of the word "survey." It seems likely that the third sense is what was intended or the authority to make "examinations" alone would have sufficed. *See State v. Stamper*, 197 Or App 413, 418, 106 P3d 172 *rev den* 339 Or 230, 119 P3d 790 (2005) (stating that, as a general rule, courts assume that the legislature did not intend any portion of its enactments to be meaningless surplusage).

Other language in ORS 215.080 also suggests that the third sense is the one intended by the legislature. Specifically, the provision also authorizes the placement and maintenance of "monuments and markers" on the land. The pertinent definition of "monuments" in this context is "[a] stone or other permanent object serving to limit or mark a boundary." *Id.* at 1590. The pertinent definition of "marker" is "that which serves as a mark." *Id.* at 1504. And the pertinent definitions of "mark" are "[b]oundary; limit; border; territory" and "[a] fixed object serving to indicate a boundary; a landmark." *Id.* at 1504. Thus, ORS 215.080 allows the placement of objects on the land that indicate boundaries. That authority is consistent with the authority to "survey" in the sense of "determin[ing] and delineat[ing] the form, extent, position, etc. * * * of a tract of land."

Other context also bolsters that interpretation. Specifically, ORS 215.080 was enacted as part of legislation that created county planning commissions and authorized counties to zone. *See* 1 OREGON STATE BAR, CONTINUING LEGAL EDUCATION, LAND USE § 1.4 (2010) (stating that "[i]n 1947, the legislature authorized counties to zone. 1947 Or Laws, chs 537, 538."). In order to be able to zone county lands, the county would first likely have to delineate the form and extent of those lands.

We are not aware of any legislative history that is pertinent to the question or that suggests a contrary interpretation. Therefore, based on the text and context, we conclude that ORS 215.080 authorizes county planning commission personnel to enter upon and determine and delineate the form, extent, position, etc., of tracts of land in the county by taking linear and angular measurements and by applying the principles of geometry and trigonometry. The provision also authorizes commission personnel to place monuments and markers on the land.

As discussed, under ORS 672.005(2) the "practice of land surveying" includes: (1) providing professional services that apply mathematics, geodesy and other sciences and involve making geometric measurements and gathering related information about the physical or legal features of the earth, the space above or below the earth, and improvements to it, ORS 672.005(2)(a)(A); (2) "[e]stablishing, reestablishing or replacing boundaries or geodetic control monuments or reference points[,]" ORS 672.005(2)(c), and; (3) "[l]ocating, relocating, establishing, reestablishing or retracing any property lines or boundaries for any tract of land[,]" ORS 672.005(2)(d). ORS 215.080 appears to authorize planning commission personnel to do those things and, hence, to do acts that constitute the practice of land surveying. Accordingly, in

surveying land pursuant to ORS 215.080, commission personnel are subject to the registration requirement imposed under ORS 672.025 unless some exception applies.

d. Exceptions listed in ORS 672.060 to the application of ORS 672.002 to 672.325

ORS 672.060 lists 20 circumstances in which the provisions of ORS 672.002 to 672.325 do not apply. Those circumstances include the performance of certain governmental functions that might otherwise qualify as the practice of land surveying or engineering. *See, e.g.*, ORS 672.060(14) (exempting people performing certain activities relating to taxation under ORS 306.125 or 308.245), ORS 672.060(16) (exempting federal agencies or contractors preparing certain types of maps), ORS 672.060(18) (exempting law enforcement officers performing certain functions); ORS 672.060(19) (exempting peace officers and fire service professionals performing duties regarding an official investigation).

ORS 672.060 does not exempt county planning commission members, officers or employees performing duties pursuant to the authority provided by ORS 215.080. Accordingly, ORS 672.060 does not categorically exempt those individuals from the registration requirements imposed under ORS 672.002 to 672.325.

On the other hand, their conduct might fall, in a particular factual instance, within one of the general exemptions listed in ORS 672.060, such as for:

(4) A person practicing land surveying under the supervision of a registered professional land surveyor or registered professional engineer. The exemption in this subsection does not allow an engineer to supervise a land surveying activity the engineer could not personally perform under ORS 672.025.

Under that exemption, commission members, officers and employees who practice land surveying under the supervision of a registered land surveyor or registered professional engineer do not need to be registered. Of course, a registered land surveyor or engineer still would have to supervise the survey for the exemption to apply.

In summary, under the unambiguous terms of ORS 672.002 to 672.325, county planning commission members, officers and employees who perform acts under the authority of ORS 215.080 that constitute the practice of land surveying must have the proper registration unless, in a specific instance, their conduct qualifies for an exemption, such as for performing a survey under the supervision of a registered professional land surveyor or engineer.

e. ORS 215.080 does not create another exception

We next consider whether ORS 215.080 was intended to exempt county planning commission personnel from the registration requirement imposed by ORS 672.025. One potential interpretation of ORS 215.080 is that it was intended to authorize all county planning commission members, officers and employees to perform land surveys regardless of whether or

not those persons are licensed land surveyors. An alternative interpretation is that the provision merely was intended to authorize commission personnel to enter upon land for prescribed purposes.

Beginning with the text, ORS 215.080 does not explicitly exempt commission personnel from the registration requirement imposed under ORS 672.025. It does not say, for example, that commission personnel are authorized to perform land surveys “notwithstanding ORS 672.025.”

Nor does anything in ORS 215.080’s context suggest that the legislature intended the provision to create an exemption from registration requirements. The legislature enacted ORS 215.080 in 1947 as part of an act allowing local governments to establish and provide for the operations of county planning commissions. Or Laws 1947, ch 537, § 5. A statute enacted in 1943 made it unlawful for any person to practice professional land surveying unless the person was a registered professional land surveyor or professional engineer. Or Laws 1943, ch 377. We presume that the legislature enacts subsequent statutes with full knowledge of preexisting law. *See Coates v. Marion County*, 96 Or 334, 339, 189 P 903 (1920) (stating rule). When the legislature enacted ORS 215.080 in 1947 it neither amended the 1943 professional registration law to add an exemption for persons acting pursuant to ORS 215.080 nor included language in ORS 215.080 itself exempting them from the registration requirements. That suggests that the legislature did not intend ORS 215.080 to create an exemption. And neither ORS 215.080 nor ORS 672.060 have been amended subsequently to add an exemption.

Nor does construing the professional registration requirements to apply render the portions of ORS 215.080 that allow commission personnel to survey land and place monuments and markers on it without effect. If so, it would raise the possibility that ORS 215.080 necessarily must have been intended to create an exemption. First, although at first blush, ORS 215.080 might appear to authorize any member, officer or employee of a county planning commission – most of whom undoubtedly would not be registered professional land surveyors or engineers – to conduct a survey, on closer examination the authority that it provides is limited to acts that those persons do “in the performance of their functions.” ORS 215.080 does not purport to establish what those functions are or to authorize persons to perform acts that are not within their functions. Therefore, not all county planning commission members, officers and employees are authorized by ORS 215.080 to perform surveys.

Second, even if ORS 215.080 did authorize all commission members, officers and employees to make surveys, construing the registration requirements to apply would not necessarily render any part of ORS 215.080 ineffective. Neither the professional registration law in effect at the time that ORS 215.080 was enacted nor the current version require persons who are conducting surveys under the supervision of a licensed land surveyor or engineer to be registered themselves. *See Or Laws 1943, ch 377* (defining the practice of land surveying to mean having “responsible charge” of surveying), ORS 672.060(4) (exempting from the licensing requirement persons practicing land surveying under the supervision of a professional land

surveyor or registered professional engineer). Consequently, unregistered county commission members, officers and employees may participate in surveys under the supervision of a registered professional surveyor or engineer.

Finally, but perhaps most tellingly, before ORS 215.080 was enacted in 1947, no statute authorized county officials to enter land for the purpose of examining and surveying it for county planning purposes. Read in that context, the legislature most likely intended ORS 215.080 simply to provide authority for the newly-authorized county planning commissions' personnel to enter upon land in the county for the specified purposes.

In sum, ORS 672.025(1) unambiguously requires persons practicing land surveying to be registered, ORS 672.060 does not exempt persons performing surveys under ORS 215.080, and ORS 215.080 neither explicitly nor implicitly exempts persons acting under its authority from the registration requirements. For those reasons, we conclude that ORS 672.025(1) requires those persons to be registered if they are engaging in activities that qualify as the practice of land surveying, unless they are exempt under ORS 672.060 from the registration requirement in the particular instance.

2. Applicability of restrictions in ORS 672.047 to county planning commission personnel entering upon land under ORS 215.080

Your second question concerns ORS 672.047, which authorizes registered professional land surveyors to enter upon land, but places certain restrictions on that right. You ask whether those restrictions apply to persons entering upon land pursuant to the authority provided in ORS 215.080. We conclude that they do not.

As discussed, ORS 215.080 authorizes county commissioners, officers and employees to "enter upon any land and make examinations and surveys and place and maintain the necessary monuments and markers thereon." The sole restriction on that authority is that it may be exercised only by individuals in "the performance of their functions."

ORS 672.047, on the other hand, authorizes registered professional land surveyors and their employees and agents to enter and survey land, but places numerous conditions and restrictions on the exercise of that authority. Subsection (1) provides that:

Subject to subsection (4) of this section, a registered professional land surveyor, or any employee or agent of the land surveyor, may enter on foot, where practicable, upon any land for the purpose of surveying or performing any survey work and may establish permanent survey monuments as allowed by rule of the State Board of Examiners for Engineering and Land Surveying.

Subsection (4) requires that notice be provided to landowners before entering and performing those activities. Subsection (2) states that "[a]ny person *exercising the right of entry granted under subsection (1) of this section* shall do no unnecessary damage to the land entered upon" and provides for compensation and penalties for damage. (Emphasis added.) Subsection (3)

requires that, in certain circumstances, a copy of the survey be provided to landowners for "land that is *entered and surveyed under this section*[" (Emphasis added.) Subsection (5) establishes the duty of care that is owed to a person "who *enters land as allowed under this section*[" (Emphasis added.) Subsection (6) allows for use of a vehicle to enter upon land "notwithstanding the provisions of subsection (1) of this section[" (Emphasis added.) Finally, subsection (7) establishes requirements for land surveyors to remove above-ground surveying materials from land except for forestland as defined in ORS 527.620.

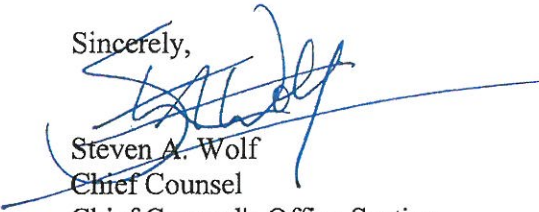
In short, ORS 672.047 gives registered professional land surveyors and their agents and employees a right to enter, survey, and place monuments on land, but places conditions and restrictions on the exercise of that right. Interpreting the text, in context, the restrictions and conditions established in ORS 672.047 apply only to the exercise of the right that the provision grants.

ORS 215.080 grants separate authority to county planning commission members, officers and employees to enter upon land and survey and place markers and monuments upon it. As long as it is clear that a person is exercising that authority and not the authority to enter granted by ORS 672.047(1), the restrictions that apply to the exercise of the latter do not apply. Whether any other restrictions from any other source of law apply to commission personnel entering land pursuant to ORS 215.080 is beyond the scope of this advice, which concerns only OSBEELS regulatory authority under ORS chapter 672.

CONCLUSION

ORS 215.080 authorizes county planning commission members, officers and employees to enter upon land for certain purposes, but does not exempt those persons from registration requirements imposed under ORS 672.002 to 672.325. Persons entering upon land pursuant to the authority provided in ORS 215.080, however, are not subject to the restrictions imposed under ORS 672.047.

Sincerely,



Steven A. Wolf
Chief Counsel

Chief Counsel's Office Section