

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

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DATE: June 9, 2014.

TO: Mari Lopez, Administrator
Oregon State Board of Examiners for Engineering and Land Surveying

FROM: Katharine M. Lozano, Senior Assistant Attorney General
Business Activities Section

SUBJECT: OSBEELS Authority over County Surveyors

You have asked us to provide any necessary updates to the advice we provided to the Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS or Board), in October of 1996, on the question of whether the Board has authority to discipline a county surveyor who fails or refuses to file a map that complies with Oregon Revised Statute (ORS) 209.250.¹

In our prior advice, we noted that ORS 209.250(2) and (3) set forth specific statutory requirements for permanent maps that are submitted by professional land surveyors who make surveys that establish or reestablish a boundary monument.¹ We now augment our prior advice to add that ORS 209.250(1) also sets forth statutory requirements for maps filed by professional land surveyors. Specifically, it requires three things². First, it provides time limits for professional surveyors to file those permanent maps after they establish or reestablish boundary

¹See Attachment

²See ORS 209.070(4) and 209.200.

monuments. Second, it requires surveyors who establish or reestablish a public land survey corner to make all surveys of legal subdivisions "with reference to the current United States Manual of Surveying Instructions." Third, it requires that for the resurvey of lands surveyed under the authority of the United States, the professional land surveyor conducting the resurvey: (1) follows the rule that section and quarter-section corners, and all other corners established and approved by the General Land Office or its successors, must stand as the legal and permanent corners; (2) reestablishes a legal and permanent corner at the identical spot where the original corner was located by the government survey, when the identical spot can be determined; and, (3) reestablishes the legal permanent corner "with reference to the current United States Manual of Surveying Instruction" when the identical spot cannot be determined.

In our prior advice, we also noted that, under Oregon Revised Statute (ORS) 209.115, county surveyors and deputy surveyors were required to be registered with the board as professional land surveyors, and were therefore subject to same grounds for discipline as any other professional surveyor, under ORS 672.200 (e.g., negligence, gross negligence or incompetence in filing a non-compliant map). The relevant portions of ORS 209.115 and ORS 672.200 have not been revised since that time, and our advice remains the same on this point. However, we again augment our prior advice, adding that ORS 209.250(11) provides, "A registered professional land surveyor failing to comply with the provisions of subsections (1) to (9) of this section, ORS 92.050 to 92.080 or a county ordinance establishing standards for surveys or plats is subject to disciplinary action by the State Board of Examiners for Engineering and Land Surveying." As we have discussed, county surveyors are required by law to be registered professional land surveyors. Therefore, a county surveyor who fails to comply with ORS 209.250(1) to (9), the subject provisions of ORS chapter 92, or select county ordinances, is also subject to discipline by the Board on those grounds.

It is county surveyors' responsibility to determine whether the maps submitted by professional land surveyors should be filed as submitted, or returned to the submitting surveyor for correction. In our prior advice we opined that ORS 209.250(4)(d) and (e) offer some protection for county surveyors to exercise their professional judgment in deciding whether to file or send back for correction any map presented to them for filing. However, we now revise that portion of our prior advice; subsection (4)(d) and (e) do not address all maps presented to county surveyors for filing. Instead, they provide, "[n]o action may be maintained against the county surveyor for recording a survey map that does not comply with this section [and] [n]o action may be maintained against the county surveyor for refusal to file a survey map that does not comply with this section." (Emphases added) ORS 209.250 only provides protection for county surveyors regarding their decisions on whether to file permanent maps that do not comply with ORS chapter 209 section 250. ORS 209.250 does not provide any protection for county surveyors who fail or refuse to file permanent maps that do comply with the requirements section 250.

ORS 209.250 lays out specific duties for County Surveyors to whom permanent maps are submitted for filing. It provides:

(a) Within 30 days of receiving a permanent map under this section, the county surveyor shall review the map to determine if it complies with subsections (1), (2) and (3) of this section and applicable local ordinances. A map must be indexed by the county surveyor within 30 days following a determination that the map is in compliance with this section. A survey prepared by the county surveyor in an official or private capacity must comply with subsections (1), (2) and (3) of this section.

(b) A survey map found not to be in compliance with subsection (1), (2) or (3) of this section must be returned within 30 days of receipt for correction to the surveyor who prepared the map. The surveyor shall return the corrected survey map to the county surveyor within 30 days of receipt of the survey map from the county surveyor.

(c) A map that is not corrected within the specified time period must be forwarded to the State Board of Examiners for Engineering and Land Surveying for action, as provided in subsection (11) of this section.

(d) An action may not be maintained against the county surveyor for recording a survey map that does not comply with this section.

(e) An action may not be maintained against the county surveyor for refusal to file a survey map that does not comply with this section.

Thus, under the plain text of ORS 209.250(4), it is the county surveyor who determines whether a submitted map complies with ORS 209.250(2), (3) and, when applicable, (1). It is also the county surveyor who has the responsibility of making that determination within 30 days of receiving the map. ORS 209.250(4)(a). Then, based upon that determination, certain additional responsibilities are triggered for the county surveyor.

If the county surveyor determines that a map submitted does comply with ORS 209.250(1), (2) and (3), ORS 209.250(4)(a) mandates that the map "be indexed" by the county surveyor within 30 days after that determination (therefore, the county surveyor has a maximum of 60 days to index after receiving the compliant map – 30 days to make the determination and 30 days to index a compliant map).

In contrast, although there are no statutory indexing requirements one way or the other for non-compliant maps, ORS 209.250(4)(b) requires that the county surveyor *return* a non-compliant map to the submitting surveyor within 30 days after receiving it, for corrections. Therefore, under ORS 209.250(11), a county surveyor who fails to, either: index a compliant map within 60 days of receiving it; or, return a non-compliant map to the submitting surveyor for corrections within 30 days after receiving it, appears to be subject to discipline by the OSBEELS. Moreover, under ORS 209.250(4)(c), the county surveyor must forward a map that the county surveyor has returned for corrections, but which is not then corrected within 30 days, to the Board for the purpose of potential discipline against the submitting surveyor. Because the statutory provision of ORS 209.250(4)(c) that requires forwarding of uncorrected maps to the Board is mandatory and not permissive, a county surveyor who fails to forward an uncorrected map to the OSBEELS, if the map has remained uncorrected for more than 30 days, also appears to be subject to discipline.

Finally, a question arises regarding what OSBEELS's role and authority over a county surveyor is, if any, in a situation where there is disagreement between a professional surveyor who submitted a map for filing and the county surveyor who receives that map, over whether that the map complies with ORS 209.250 (thereby triggering, either, indexing or return for corrections). Advice from our 1996 memorandum applies here:

It does appear that the exercise of discretion by a county surveyor in evaluating maps submitted to the surveyor for filing is an evaluation relating to land surveying matters in the words of the statute [ORS 672.005(2)(d)]. Thus, the review of maps for filing is the practice of land surveying and the county surveyor may be investigated and disciplined if the county surveyor engages in gross negligence, negligence or incompetence in the practice of land surveying, including the evaluations of maps presented for filing. ORS 672.200(2)(d).

Memorandum of Advice, October 9, 1996, p.2.

Further, and as may be useful as a tool for the Board's analysis of a county surveyor's exercise of discretion in determining whether a map submitted for filing does or does not comply with ORS 209.250, ORS 209.250(1) -- via reference to ORS 209.200 and 209.070(4) -- does provide some specific methodology professional surveyors are bound to apply, at least when those professional surveyors, "establish or reestablish a public land survey corner...[or] resurvey... lands surveyed under the authority of the United States."

In conclusion, the OSBEELS appears to have the authority to discipline a county surveyor who fails to comply with ORS 209.250(1) through (9), including a county surveyor who: fails to determine whether a map submitted to that county surveyor for filing complies with ORS 209.250(1), (2) and (3) within 30 days of receipt; determines that a map submitted for filing complies with ORS 209.250(1), (2) and (3), but fails to index that map within 30 days of determining it compliant; determines that a map submitted for filing does not comply with ORS 209.250(1), (2), or (3), but fails to return that map to the submitting surveyor within 30 days of receipt for correction; or, fails to forward to the OSBEELS a map the county surveyor has returned to a professional land surveyor for correction, when those corrections were not made within 30 days of the county surveyor's return of the map. The OSBEELS also appears to have the authority to discipline a county surveyor under ORS 672.200, including for negligence, gross negligence or incompetence in the county surveyor's exercise of judgment in determining whether a map submitted for filing complies with ORS 209.250.

ENDNOTE

ⁱ ORS 209.250 requires that permanent maps include the following:
(2) The permanent map must have a written narrative that may be on the face of the map. If the narrative is a separate document, the map and narrative must be referenced to each other. The map and narrative must be made on a suitable drafting material in the size

required by the county surveyor. The lettering on the map and narrative must be of sufficient size and clarity to be reproduced clearly. The narrative must explain the purpose of the survey and how the boundary lines or other lines were established or reestablished and must state which deed records, deed elements, survey records, found survey monuments, plat records, road records or other pertinent data were controlling when establishing or reestablishing the lines. If the narrative is a separate document, the narrative must also contain the following:

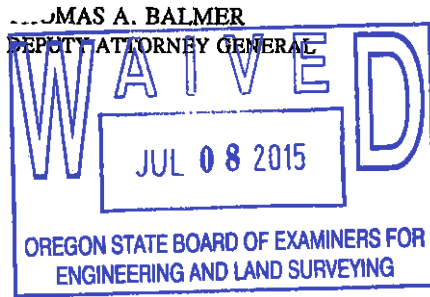
- (a) Location of survey by one-fourth section, Township and Range.
 - (b) The date of survey.
 - (c) The surveyor's seal and original signature.
 - (d) The surveyor's business name and address.
- (3) A permanent map must show the following:
- (a) Location of survey by one-fourth section, Township and Range.
 - (b) The date of survey.
 - (c) Scale of drawing and North Arrow.
 - (d) The distance and course of all lines traced or established, giving the basis of bearing and the measured distance and course to a monumented section corner, one-quarter corner, one-sixteenth corner or Donation Land Claim corner in Township and Range, or to a monumented lot or parcel corner or boundary corner of a recorded subdivision, partition or condominium.
 - (e) Measured bearings, angles and distances that are used as a basis for establishing or reestablishing lines or monuments separately indicated from those of record together with the recording reference. Metric measurements may be used if a conversion to feet is provided.
 - (f) Monuments set and their relation to older monuments found. A detailed description of monuments found and set must be included and monuments set must be separately indicated from those found.
 - (g) The surveyor's seal and original signature.
 - (h) The surveyor's business name and address.

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DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

October 9, 1996

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Oregon State Board of Examiners for
Engineering and
Land Surveying

STATE BOARD OF EXAMINERS FOR ENGINEERING & LAND SURVEYING
750 Front Street, NE, #240
Salem, OR 97310

Re: Board Authority to Discipline County Surveyors

Dear Board:

This letter responds to the attached memorandum to Assistant Attorney General Tom Cowan dated September 26, 1996 asking for a letter of advice regarding the authority of the Board to discipline county surveyors, particularly the refusal of a county surveyor to file a survey map which appears to meet the statutory requirements for filing.

In order to hold the office of county surveyor or deputy surveyor, an individual must be licensed as a registered professional land surveyor. ORS 209.115. Consequently, the county surveyor is subject to the same grounds for denial, suspension or revocation of registration as any other professional land surveyor. ORS 672.200.

Registered professional land surveyors are required to file certain maps with the county surveyor. ORS 209.250(1). Oregon law specifies the nature and the quality of the map in order to qualify for filing. ORS 209.250(2) and (3).

The county surveyor is required to promptly file and index maps that comply with the requirements as noted above. ORS 209.250(4)(a). If the survey map is found not to be in compliance, the county surveyor must return the map for correction to the surveyor. ORS 209.250(4)(b).

The legislature provided some protection for county surveyors from the exercise of their professional judgment in whether or not to file, or to send back for corrections, any map presented to the county surveyor. The protections are found in ORS 209.250(4)(d) and (e) as follows:

(d) No action may be maintained against the county surveyor for recording a survey map that does not comply with this section.

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(e) No action may be maintained against the county surveyor for refusal to file a survey map that does not comply with this section.

The ostensible purpose of those subsections of the statute are to provide protection to the county surveyor from civil causes of action inherent in the nature of the county surveyor's work and we are advised that the legislative history and purpose of seeking that protection at the legislature reflects this conclusion. The protections provided in subparagraph (d) and (e) do not provide a "safe harbor" for county surveyors to avoid the responsibility of acting in accordance with the requirements of the licensing statutes, including ORS 672.005 and 672.200.

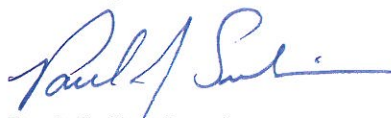
In a September 26, 1994 letter of advice on this subject, Assistant Attorney General Armonica M. Gilford had expressed the opinion that OSBEE lacked jurisdiction to discipline county surveyors for failing to file survey maps. That opinion, however, was premised upon her understanding that the OSBEE had not decided that county surveyors perform "evaluations" relating to land surveying matters. Assistant Attorney General Gilford suggested that the county surveyor's review might not be an evaluation that is subject to discipline, but she did hold open the possibility that the OSBEE could decide that it was.

Consequently, if the OSBEE decides that the county surveyor's review and exercise of professional judgment concerning the adequacy of fileable surveys is an "evaluation" within the meaning of ORS 672.005(2)(d), then I advise you that the Board has jurisdiction over the practice of land surveying which includes "consultation, investigation, evaluation or planning relating to land surveying matters." ORS 672.005(2)(d).

It does appear that the exercise of discretion by a county surveyor in evaluating maps submitted to the surveyor for filing is an evaluation relating to land surveying matters in the words of the statute. Thus, the review of maps for filing is the practice of land surveying and the county surveyor may be investigated and disciplined if the county surveyor engages in gross negligence, negligence or incompetence in the practice of land surveying, including the evaluation of maps presented for filing. ORS 672.200(2).

I hope this answers your questions regarding the OSBEE's jurisdiction to review this practice of land surveying by one class of its licensees, county surveyors. Should you have any additional questions or concerns, please do not hesitate to contact me.

Sincerely,



Paul J. Sundermier
Assistant Attorney General
Business Activities Section
General Counsel Division