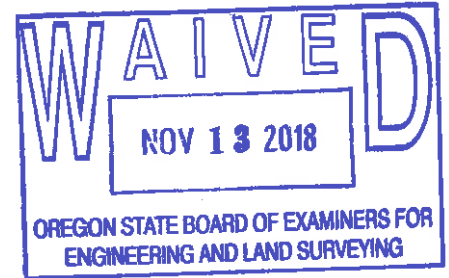




DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM



DATE: October 10, 2018

TO: Mari Lopez, Administrator

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

SUBJECT: Right Entry - Documents Provided to Landowners
DOJ File 917001/GB0053-18

Question: You have asked whether a professional land surveyor who is exercising the Right of Entry outside of the urban growth boundaries must provide a copy of the survey documents created to the landowner who received notice of entry, if the documents are not required to be filed with the County Surveyor, and the professional land surveyor's client refuses to give the surveyor permission to provide a copy of the documents

Answer: It is unclear.

ANALYSIS

ORS 672.047 provides the right for professional land surveyors, their employees and their agents, to enter land other than that of their clients without the owner or occupier's permission. There are then several corresponding responsibilities accompanying that right. One of those responsibilities is set forth in ORS 672.047(3), which reads, "If land that is entered and surveyed under this section is located outside of an urban growth boundary and the landowner makes a timely request in writing, the registered professional land surveyor shall provide a copy of the survey in a timely manner to the landowner." The issue, therefore, is what is meant by "the survey." Is the survey only those documents that must be filed with the County Surveyor as public records, or does the survey include any paper or electronic document resulting from the survey work performed?

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To determine legislative intent when construing a statute, we consider the principles of statutory construction established by the Oregon Supreme Court. First, we examine the text and context of the statute in question, giving words of common usage their plain, natural and ordinary meaning. ORS 174.010; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143, 1145-46 (1993); *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042, 1050-51 (2009). The text of the statute itself is “the best evidence of legislative intent,” *PGE*, 317 Or at 610-11, 1145-46. *In re Marriage of Morrow*, 191 Or App 354, 357, 82 P3d 647, 648 (2004), and context of a statute includes other provisions of the same statute, related statutes, and judicial interpretations of those statutes. *Oregonian Pub. Co. v. Portland Sch. Dist. No. 1J*, 329 Or 393, 399-400, 987 P2d 480, 483-84 (1999), citing *PGE v. BOLI*, 317 Or. at 611; *Owens v. Maass*, 323 Or 430, 435, 918 P2d 808, 811 (1996). We also consider legislative history after examining text and context where the legislative history appears useful to the analysis. *State v. Gaines*, 346 Or at 160. Second, if unable to determine a clear meaning of the statute, we apply general maxims of statutory construction to determine the legislative intent. *PGE v. BOLI*, 317 Or at 612.

Text

The text of ORS 672.047(3) refers to “the survey.” The applicable plain, ordinary meaning of “survey” is “an examination of land,” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 1746, (unabridged, 2002), so it is not useful in answering your question. Moreover, “survey” as a noun is not defined in ORS chapter 672 or the rules adopted thereunder, nor in ORS chapters 209 or 92, which address survey corner monument, map, and plat requirements. Surveying work may produce a map or plat that must be filed as a public record, but it may also produce a map that does not need to be filed with the County Surveyor, or a report, narrative, etc. “Survey” is, therefore, an ambiguous term when text alone is examined.

Context

Context does not appear to provide additional clarity. For example, on one hand, it is logical to construe “the survey” as meaning *all* maps, plats, narratives, reports, or any other paper or electronic document produced from surveying work, because it would have been unnecessary to enact a law requiring a land surveyor to provide an adjacent landowner with a copy of a survey of record; surveys of record are already public documents that anyone (including the adjacent landowner) may access and copy at any time. It seems similarly pointless to require the landowner to make a written request for a copy of survey of record to the professional land surveyor, when that same landowner could obtain such a copy from the County Surveyor’s Office without having to put the request in writing. Unless “the survey” includes documents that are not ordinarily public records, subsection (3) is arguably unnecessary.

On the other hand, a surveyor’s responsibilities under ORS 672.047 are, fundamentally, specific, formalized courtesies. Interpreting “the survey” to mean only surveys of record would be consistent with the statute’s other formalized courtesies. Professional Land Surveyors are, for example, required to provide adjacent landowners with a specific, written notice that the land will be entered for surveying work. The Notice is not necessary to protect the land surveyor from trespass law. Instead, the land surveyor is already protected by holding PLS registration. The

notice of entry is simply a formalized courtesy to the neighbor. The land surveyor must give the notice, by law, but already has the right to enter the property. ORS 672.047(3) could be viewed the same way. The landowner already has a right to a copy of any survey of record. The land surveyor's duty to provide the copy upon request is arguably yet another formalized courtesy.

With regard to a client's permission to disclose the survey documents, professional land surveyors are bound by the Board's Rule of Professional Conduct OAR 820-020-0015(3), which prohibits registrants from revealing "facts, data or information obtained in a professional capacity without the prior consent of the client, or employer except as authorized or required by law." Therefore, this Rule of Professional Conduct does not prevent a professional land surveyor from giving landowners copies of survey documents without a client's permission if "the survey" means *all* survey documents. However, a professional land surveyor *is* prohibited from giving landowners copies of clients' private survey documents if "the survey" means only a survey of record.

Legislative History & Maxims of Statutory Construction

Legislative history fails to resolve the ambiguity. Subsection (3) was added to ORS 672.047 through House Bill 2893 (2011). We researched the legislative history of House Bill 2893 but found no history at all on what was intended by the phrase "the survey" in subsection (3). We also found no maxims of statutory construction that appeared to apply here.

RECOMMENDATION

Because analysis of text, context, legislative history, and maxims of statutory construction all fail to provide a definitive or even likely applicability of survey copy requirements, we recommend that the Board adopt a rule defining the term "survey" as it is used in ORS 672.047(3). Clarification by rule appears to be the only way to provide guidance to registrants. Furthermore, until the rule is adopted, we recommend refraining from pursuing any law enforcement cases against professional land surveyors who either do or do not provide adjacent landowners with a copy of survey documents other than a survey of record. Currently, either decision by a surveyor is equally defensible.