

September 23, 2004: Engineering and Surveying Practice Act

Representative Miguel P. Garcia

1118 La Font Rd SW

Albuquerque NM 87105

Re: Opinion Request

Dear Representative Garcia:

You requested our opinion regarding whether the Engineering and Surveying Practice Act, NMSA 1978, Sections [61-23-1](#) through [61-23-32](#) (2003) (“ESPA”), permits a licensed professional engineer to perform engineering surveys without a professional surveyor’s license, whether this is contrary to the ESPA’s stated purposes, and whether the engineering survey language in Section [61-23-3](#) is unconstitutionally vague. As discussed below, we conclude that Section [61-23-3](#) is not unconstitutionally vague and that its language allowing professional engineers to perform engineering surveys in certain limited situations does not contravene the ESPA’s stated purpose of protecting the public from harm.

The ESPA provides, in pertinent part:

The legislature declares that it is a matter of public safety, interest and concern that the practices of engineering and surveying merit and receive the confidence of the public and that only qualified persons be permitted to engage in the practices of engineering and surveying. In order to safeguard life, health and property and to promote the public welfare, any person in either public or private capacity practicing or offering to practice engineering or surveying shall be required to submit evidence that he is qualified to so practice and shall be licensed as provided in the Engineering and Surveying Practice Act.

Section [61-23-2](#) (2001) (emphasis added).

The New Mexico Legislature acknowledges the interrelationship between the engineering and surveying disciplines and states “there may be an overlap between the work of engineers and surveyors in obtaining survey information for the planning and design of an engineering project.” Section [61-23-3](#)(undesigned paragraph following subsection R) (2003). Recognizing this, a professional engineer licensed by the Board of Licensure for Professional Engineers and Surveyors (“Board”) may perform an engineering survey under certain circumstances:

A registered professional engineer who has primary engineering responsibility and control of an engineering project may perform an

engineering survey. Engineering surveys may be performed by a licensed professional engineer on a project for which he is providing engineering design services.

Id. (emphasis added).

The statute states further that “[e]ngineering surveys include topographic surveying activities required to support the sound conception, planning, design, construction, maintenance and operation of said projects.” Id. The statute excludes from engineering surveys “the surveying of real property for establishment of land boundaries, rights of way, easements and the dependent or independent surveys or resurveys of the public land system.” Id.

The ESPA defines an engineer as a person who is “qualified to practice engineering by reason of his intensive preparation and knowledge.” Section 61-23-3(D). The Board requires a person to “submit evidence that he is qualified” to practice as a professional engineer. See Section 61-23-2. A professional engineer in “responsible charge” of an engineering project is accountable for the “direction, control and supervision of the engineering ... work, ... to assure that the work project has been critically examined and evaluated for compliance with appropriate professional standards.” Section 61-23-3(M). The practice of engineering may include “other professional services as may be necessary to the planning, progress and completion of any engineering work ... [and] the use of photogrammetric methods to derive topographical and other data.” Section 61-23-3(E). These statutory provisions are consistent with the legislative intent to permit a professional engineer, on a project for which he has “primary engineering responsibility and control,” to perform an engineering survey within the limitations prescribed by law. See Section 61-23-3(undesigned paragraph following subsection R).

Although you asked whether the term “engineering survey” is unconstitutionally vague because it attempts to expand the practice of surveying, other jurisdictions consider the practice of engineering to include engineering surveys. Fifteen states, all using language similar or identical to New Mexico, specifically describe what an engineering survey by a professional engineer encompasses.¹ For example, the Texas statute governing the practice of engineering defines an engineering survey to include “any survey activity required to support the sound conception, planning, design, construction, maintenance, or operation of an engineered project,” and to exclude “the surveying of real property or other activity regulated under [the statute governing land surveyors].” Tex. Occ. Code Ann., § 1001.003 (Vernon 2003). An additional nine jurisdictions do not define engineering surveys but include these within the scope of the practice of engineering.² Our research revealed no jurisdiction that deemed an engineering survey performed by a professional engineer to constitute the practice of surveying.

“In testing the constitutionality of statutes, courts must indulge every presumption in favor of the validity of the [statute].” Drink, Inc. v. Babcock, 77 N.M. 277, 280, 421 P.2d 798 (1966). A statute is unconstitutionally vague only if a person of

common intelligence must guess at its meaning. See State ex rel. Stratton v. Sinks, 106 N.M. 213, 218, 741 P.2d 435 (Ct. App. 1987) (statute requiring registration of pyramid companies in New Mexico is not unconstitutionally vague because it clearly outlines how these companies must comply with the law).

“The text of a statute ... is the primary, essential source of its meaning.” NMSA 1978, Section [12-2A-19](#) (1997). Without ambiguity, the ESPA explains in common language what an engineering survey encompasses and what it does not. If possible, a statute is construed to give effect both to its objective and purpose and to its entire text, and to avoid an unconstitutional, absurd or unachievable result. Section [12-2A-18\(A\)](#) (1997). Because the ESPA delineates what a professional engineer may and may not lawfully do when performing an engineering survey, we construe the statute to give effect to its recognition of an “overlap between the work of engineers and surveyors in obtaining survey information for the planning and design of an engineering project.” Section [61-23-3](#)(undesigned paragraph following subsection R).

Although the ESPA’s list of an engineering survey’s inclusions and exclusions may not be exhaustive, it certainly is descriptive enough so that members of the public, including professional engineers and professional surveyors, need not guess at its meaning. A careful reading of the ESPA reveals ample clarity in its requirements. When read together with all of the ESPA’s provisions, no reasonable question remains as to what constitutes an engineering survey and, therefore, the term is not unconstitutionally vague. See Section [61-23-3\(D\)](#)(definition of engineer), (E)(definition of engineering or practice of engineering), (N)(definition of surveying or practice of surveying), (P)(definition of surveyor), and (undesigned paragraph following subsection R)(engineering survey).

The state of Florida addressed a similar question in a challenge by licensed surveyors of a proposed rule defining “engineering survey” as used in the statutory definition of “engineering.” Department of Prof. Regulation, Bd. of Prof. Eng’rs v. Florida Soc’y of Prof. Land Surveyors, 475 So.2d 939 (Fla. Dist. Ct. App. 1985). The court accepted the licensing board’s characterization of the proposed definition of “engineering survey” as setting forth “those generally accepted types of ‘surveying’ which qualified professional engineers have as a matter of course performed in [Florida] ... and ... which are nationally accepted as being capable of being performed by qualified professional engineers.” Id. at 941. The court then concluded that the proposed definition of “engineering survey” was not invalid “merely because it appears to authorize engineers to perform certain functions under ‘engineering surveys’ that also appear to fall within the definition of ‘land surveying.’” Id. at 944.

In conclusion, Section [61-23-3](#) is not unconstitutionally vague. It acknowledges an overlap between the practices of engineering and surveying and contemplates professional engineers obtaining survey information and performing engineering surveys on specific projects and under specific circumstances. Permitting a licensed professional engineer to perform an engineering survey neither constitutes the practice

of surveying without a license nor contravenes the ESPA's stated purpose of safeguarding life, health and property and promoting the public welfare.

We trust that this letter addresses the questions raised in your request. If we may be of further assistance, please let us know. Your request was for an Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of this letter instead of a formal Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Very truly yours,

Mary H. Smith

Assistant Attorney General

xc: Stuart M. Bluestone, Chief Deputy Attorney General

1 Alabama, Florida, Indiana, Iowa, Kansas, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, and West Virginia.

2 Alaska, Arkansas, California, Colorado, District of Columbia, Guam, Kentucky, Massachusetts, Missouri, North Dakota, and Utah.