

N.D.A.G. Letter to Zink (Aug. 20, 1990)

August 20, 1990

Mr. Laverne L. Zink
Executive Secretary
North Dakota State Board
of Registration for
Professional Engineers
and Land Surveyors
P.O. Box 1357
Bismarck, ND 58502

Dear Mr. Zink:

Thank you for your July 25, 1990, letter in which you have requested my opinion concerning questions presented in a July 19, 1990, letter to you from Brian J. Rittenhouse, president of the North Dakota Society of Professional Land Surveyors. The July 19, 1990, letter enclosed various property diagrams which included disclaimers that they were not surveys.

The questions presented in the letter from Mr. Rittenhouse related to whether the diagrams constituted land surveys or the practice of land surveying, whether the preparation of the documents attached to the letter by a nonregistered individual for a title company, abstract company, or financial institution constituted land surveying, and if the disclaimer on the documents affects a decision as to whether the preparation of the document involves the practice of land surveying.

I am unable to respond directly to the questions presented to the board by Mr. Rittenhouse because a response to those questions requires a resolution of questions of fact. As Attorney General, I am obligated to provide written opinions to legal questions relating to the duties of state officers. N.D.C.C. § 54-12-01. Prior Attorneys General and I have uniformly interpreted the obligations of N.D.C.C. § 54-12-01 relating to such opinions to restrict the questions which may be answered to questions of law. Because the questions posed by Mr. Rittenhouse involve questions of fact which may have to be resolved by the board or by a court as a trier of fact, my discussion is limited to the legal issues which may be considered by a fact finder.

N.D.C.C. § 43-19.1-02(4) defines "land surveying" as:

any service comprising the determination of the location of land boundaries and land boundary corners; incidental topography; the preparation of maps showing the shape and area of tracts of land and their subdivision into smaller tracts; the preparation of maps showing the layouts of roads, streets, and rights of way of same to give access to small tracts; and the

preparation of official plats or maps of said land thereof within this state.

Although this definition may appear to be all encompassing, courts of other states which have construed "similar statutory provisions have concluded that some limitations are imposed in defining the scope of land surveying. In Dempsey v. Chicago Title Insurance Company, 20 Ohio App. 3d 90, 484 N.E.2d 1064 (1985), the plaintiff, representing Professional Land Surveyors of Ohio, brought an action to enjoin the title insurance company from engaging in unlicensed surveying activities. These activities included the measurement of land boundaries, recording those measurements, and plotting the measurements on scale diagrams which purportedly depicted land area. The court determined that, to the extent the title insurance company undertook those activities for its own benefit in determining whether to sell title insurance for the described property, its employees were not engaging in the profession of surveying. These activities were incidental to its lawful sale of title insurance.

However, the court found that if the insurance company regularly undertook and charged for those services on the behalf of others, it was practicing the profession of surveying. The court was unable to conclude that the actual services provided by the title insurance company were or were not the practice of land surveying because the precise definition of the actual activities of the company involved factual issues. Although this case did not discuss similar activities undertaken by financial institutions prior to the issuance of a loan and subsequent mortgage, I must assume that the result most probably would have been the same.

The position taken in the above-cited case appears to be consistent with the exemption from licensing and registration requirements set forth in N.D.C.C. § 43-19.1-29(4). That section provides:

43-19.1-29. Exception clause. This chapter shall not be construed to prevent or affect:

. . . .

4. The practice of any other legally recognized profession or trade, nor shall it be construed to permit registered professional engineers to perform duties requiring the services of a licensed architect, as provided by the laws of the state of North Dakota licensing and regulating architects and architecture.

Activities which are incident to the practice of a legally recognized profession or trade would not be within the regulatory provisions of N.D.C.C. ch. 43-19.1. Again, whether or not those activities are incident or a part of the practice of such legally recognized profession or trade would be a question of fact which must be resolved by the appropriate fact finder.

In addition, N.D.C.C. § 43-19.1-29(5) sets forth an additional exemption. That section provides:

5. The practice of engineering and land surveying by any person regularly employed to perform engineering services solely for his employer or for a subsidiary or affiliated corporation of his employer, providing the engineering performed is in connection with the property, products, or services of his employer.

Whether this subsection will apply to exempt certain activities from N.D.C.C. ch. 43-19.1 may also require resolution of factual questions.

The presence of a disclaimer upon a document indicating that it is not a survey may or may not be important in determining whether the person or organization which prepared the document was engaged in the practice of land surveying. The activities of the person or organization must be viewed on a case-by-case basis to determine whether, in fact, that person or organization did engage in land surveying.

I am sorry that I could not directly respond to the questions presented to you by Mr. Rittenhouse. These matters, including the scope of the exemptions granted by N.D.C.C. § 43-19.1-29(4) and (5) should be determined and evaluated by the board. In addition, the board may also consider further legislation in the next legislative session which may address some of the concerns expressed by Mr. Rittenhouse.

Sincerely,

Nicholas J. Spaeth

vkk