

2010-00107

**STATE OF FLORIDA
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
BOARD OF PROFESSIONAL SURVEYORS AND MAPPERS**

IN RE: PETITION FOR DECLARATORY STATEMENT BY
FLORIDA SURVEYING AND MAPPING SOCIETY, INC.,
a Florida corporation,

AND

Agency Clerk #A65537

JAMES H. HUMPHREY,
an individual,

_____ /

DECLARATORY STATEMENT

FLORIDA SURVEYING AND MAPPING SOCIETY, INC. ("FSMS") and JAMES H. HUMPHREY ("HUMPHREY"), referred to herein collectively as "Petitioners," have petitioned the Department of Agriculture and Consumer Services ("Department") for a declaratory statement pursuant to Section 120.565, Fla. Stat. (2009). On January 15, 2010, the Agency Clerk for the Department received a Petition For Declaratory Statement filed by the Petitioners by and through their attorney, Ms. Claire A. Duchemin, Esq. Notice of the Receipt of the Petition was published in the Florida Administrative Weekly on January 29, 2010. A public hearing was held on February 17, 2010. The Board was represented by Mr. Bennett M. Miller, Esq. Petitioners were present and represented by Ms. Duchemin.

PRELIMINARY STATEMENT

Section 120.565, Fla. Stat., provides the authority for administrative agencies to issue declaratory statements:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

(3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Weekly and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Weekly. Agency disposition of petitions shall be final agency action.

This statutory provision has been incorporated into the Florida Uniform Rules of Administrative Procedure as Florida Administrative Code Rule 28-105.001, "Purpose and Use of Declaratory Statement":

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Florida Administrative Code Rule 28-105.003, "Agency Disposition," provides:

The agency may hold a hearing to consider a petition for declaratory statement. If the agency is headed by a collegial body, it shall take action on a petition for declaratory statement only at a duly noticed public meeting. The agency may rely on the statements of fact set out in the petition without taking any position to the validity of the facts. Within 90 days of the filing of the petition, the agency shall render a final order denying the petition or issuing a declaratory statement.

According to the language of §120.565, Florida Statutes, and the underlying administrative rules, the Legislature clearly intended the use of declaratory statements to be limited in scope. Declaratory statements determine a narrow range of issues that are the direct result of the application of agency authority to a particular set of circumstances as alleged by the petitioner. The sole purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance. *Carr v. Old Port Cove Property Owners Ass'n, Inc.*, 8 So.3d 403

(Fla. 4th DCA 2009); *Novick v. Dept. of Health, Board of Medicine*, 816 So.2d 1237, 1240 (5th DCA 2002). This declaratory statement is based solely upon the factual assertions contained in the Petition, together with the testimony and evidence presented at the hearing. *Alameda Isles Homeowners Association, Inc. v. State, Dept. of Health*, 798 So.2d 784 (2nd DCA 2001). The Department takes no position on the validity of the facts presented.

Accordingly, nothing in this declaratory statement shall be read to expand the authority of the Board or increase the regulation of licensed and unlicensed individuals. This declaratory statement comments solely on the future conduct of the petitioners only, based only upon the proposed facts contained in the Petition. While this Declaratory Statement may be used as general guidance to others, no part of this Declaratory Statement is binding upon other parties. This declaratory statement also may not be used to obtain a collateral estoppel or a *res judicata* effect. See generally, *Dept. of Revenue v. Accredited Surety & Casualty Co.*, 690 So.2d 614 (Fla. 5th DCA 1997).

THE PETITION

The Petition requests a declaratory statement that the services contemplated in a particular Request for Proposals (“RFP”) issued by the United States Department of Agriculture (“USDA”) constitute the practice of professional surveying and mapping under the definition provided at §472.005(4), Florida Statutes. Second, the Petition seeks a statement or order that the services requested in the RFP may only be provided in Florida by licensed professional surveyors and mappers. Third, the Petitioners request a response from the Board that the Petitioners are not aiders and assisters of unlicensed activity by responding to the RFP or performing work under the contract. Finally, the Petitioners ask whether they have an obligation under the licensing statute to report to the Board any potential aiding and assisting of unlicensed

activity, including any aiding and assisting contemplated by governmental entities such as USDA.

JURISDICTION

Because the Petitioners request a declaratory statement regarding the applicability of a statute regulating the practice of surveying and mapping in the State of Florida, the Florida Board of Professional Surveyors and Mappers has jurisdiction. See generally, §§472.001, 472.007, Fla. Stat. (2009).

PETITIONERS

Petitioner FSMS is a voluntary professional association composed of more than one thousand six hundred licensed professional surveyors and mappers in the State of Florida. The members of FSMS are subject to the licensing requirements of Chapter 472, Florida Statutes, engage in the licensed practice of professional surveying and mapping in the State of Florida, and regularly contract with individuals and entities requiring services similar to those listed in the RFP. Approximately one hundred and sixty members of FSMS engage in the practice of photogrammetry.

Petitioner Humphrey is a professional surveyor and mapper, licensed in the State of Florida pursuant to Chapter 472, Florida Statutes, who currently operates within the State of Florida. Petitioner Humphrey's license number is LS5453. Petitioner Humphrey asserted at the public hearing that he was familiar with the USDA RFP. However, he did not submit a response because he believed that the RFP requested unlicensed services and that if he responded he may aid or assist unlicensed activity.

Based upon the Petition and the testimony at the public hearing, the Board finds that both are substantially interested parties for the purposes of this declaratory statement.

UNLICENSED ACTIVITY

Generally, the types of activities that require licensure in the State of Florida are included within the definition of the practice of professional surveying and mapping. The practice of surveying and mapping is defined at §472.005(4), Florida Statutes:

(a) "Practice of surveying and mapping" means, among other things, any professional service or work, the adequate performance of which involves the application of special knowledge of the principles of mathematics, the related physical and applied sciences, and the relevant requirements of law for adequate evidence of the act of measuring, locating, establishing, or reestablishing lines, angles, elevations, natural and manmade features in the air, on the surface and immediate subsurface of the earth, within underground workings, and on the beds or surface of bodies of water, for the purpose of determining, establishing, describing, displaying, or interpreting the facts of size, shape, topography, tidal datum planes, legal or geodetic location or relocation, and orientation of improved or unimproved real property and appurtenances thereto, including acreage and condominiums.

(b) The practice of surveying and mapping also *includes, but is not limited to*, *photogrammetric control*; the monumentation and remonumentation of property boundaries and subdivisions; the measurement of and preparation of plans showing existing improvements after construction; the layout of proposed improvements; the preparation of descriptions for use in legal instruments of conveyance of real property and property rights; the preparation of subdivision planning maps and record plats, as provided for in chapter 177; the determination of, but not the design of, grades and elevations of roads and land in connection with subdivisions or divisions of land; and the creation and perpetuation of alignments related to maps, record plats, field note records, reports, property descriptions, and plans and drawings that represent them. (Emphasis Added)

In addition, §472.031(1)(a), Florida Statutes, provides:

(1) No person shall:

(a) Practice or offer to practice surveying and mapping unless such person is registered pursuant to ss. 472.001-472.037;

Thus, if services are performed that fall within the definition of the practice of surveying and mapping, then such services must be performed by a licensed professional surveyor and mapper.

The Petitioners request the Board's statement as to whether the activities in the RFP constitute unlicensed activity and, if so, whether they may only be performed by a Florida licensed professional surveyor and mapper.

A review of the RFP reveals a request for services which appear to include activities falling within the definition of professional surveying and mapping in Florida. Specifically, the RFP appears to request photogrammetry services, including orthophotography.

For instance, on Page 11 of Exhibit 1 of the Petition, the RFP requests that a responsive proposal include as part of its General Requirements, " ... digital orthorectification of the scanned aerial photography ... " On Page 23 of Exhibit 1 of the Petition, the RFP contains a section titled "C-8 Digital Orthorectification." There are numerous other references in the RFP to terms which are consistent with a request for services that fall within the definition ortho-images/photos or photogrammetric methods, particularly in Attachment C to the RFP.

By definition, the word orthorectification means to geometrically correct the position of all the images in a standard photograph and place them into a ground coordinate system so that scale is uniform and dimensions can be determined from the image. While planimetric maps show features by means of lines and symbols, orthophotos show the actual images of features. Thus, orthophotos have the pictorial qualities of a photograph and the planimetric correctness of a map.

In this way, the production of orthophotos falls within the definition of professional surveying and mapping in part because a standard photograph alone does not have coordinates or other elements consistent with a map. Orthophotography is a process where a verifiable method or system of measurement is used to produce a synthetic image that corrects individual locations on the photograph and places those locations in a proper coordinate system. This process results

in a photograph that retains an original image, but also includes a geometrically correct image which enables the determination of coordinates. Thus, an orthophotograph can be used to measure distances and present an accurate representation of the earth's surface. As such, the production of orthophotography falls within the definition of the practice of professional surveying and mapping, under §§472.005(4)(a) and (b), Florida Statutes, because in the production of orthophotos, the professional must use the application of special knowledge of the principles of mathematics, the related physical and applied sciences to determine, establish, describe, display, or interpret the facts of size, shape, topography, or geodetic locations on the surface of the earth.

This conclusion is bolstered by the Board's previous adoption of definitions for ortho images/photos and photogrammetric methods. As part of the Minimum Technical Standards for licensees, the Board adopted the following definitions at Florida Administrative Code Rule 5J-17.50, "Definitions.":

(6) Ortho-Images/Photos: a synthetically produced image in which positions of features are properly located in the specific map projection. Generally, this involves correction of a perspective image for relief displacement and scale variation so that the resulting scale is uniform throughout.

(7) Photogrammetric Methods: a means of surveying and mapping that involves: making precise measurements from a combination of ground control, photographs and other sources of imagery, to document, within pre-ordained accuracies, the existence, the identity, the location and the size of selected features.

Therefore, photogrammetry services and deliverables, similar to those requested in the RFP, must be provided in the State of Florida only by Florida licensed professional surveyors and mappers, in conformity with the Minimum Technical Standards established by the Board by administrative rule.

AIDING AND ASSISTING UNLICENSED ACTIVITY

Under the facts described in the petition, the request for services by the USDA constitutes neither an offer of employment nor an advertisement that USDA is available to perform unlicensed services. Under the facts presented in the Petition, the RFP is a request for individuals or business entities to offer to perform services for USDA. While the activities described in the RFP do require licensure to be performed in the State of Florida, Florida Law does not prohibit the act of requesting unlicensed services. As a result, it is not unlicensed activity, nor is it aiding and assisting unlicensed activity, for an individual, business entity, or government body to request those services be performed. Therefore, the Petitioners are not aiding and assisting unlicensed activity by responding to the RFP.

However, the act of employing an unlicensed person may constitute aiding and assisting unlicensed activity by the party requesting services through an RFP, Request for Bids, or other method, under certain circumstances. For example, an employer may be guilty of unlicensed activity after an agreement for services has been entered into by the parties. See generally, §§472.351(1)(o), 472.036(1), Fla. Stat. (2009). Moreover, it is unlicensed activity for an unlicensed individual or business entity to submit an offer to perform services that require licensure, such as the services requested in the RFP. See generally, §472.031(1)(a), Fla. Stat. (2009). Because the Petition does not address these situations, the Board declines further comment.

DUTY TO REPORT UNLICENSED ACTIVITY

The Petitioners have inquired whether they have an obligation under §472.0351(1)(n), Florida Statutes, to report to the Department “... *any potential aiding and assisting of unlicensed practice* ...”(Emphasis added).

§472.0351(1), Florida Statutes, provides:

- (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken: ...
- (2) ... (n) Failing to report to the department any person who the licensee knows is in violation of this chapter or the rules of the department or the board; ...

Because Petitioner Humphrey and the membership of Petitioner FSMS are licensed pursuant to Chapter 472, Florida Statutes, disciplinary action may result against them if the Department establishes by clear and convincing evidence they had knowledge of any person who the licensee knows is in violation of Chapter 472, Florida Statutes, or the rules of the Department or the Board. The relevant statute does not address whether the Petitioners must report *potential* aiding and assisting. The statute only requires licensees to report activities where a violation has occurred. Therefore, there is no affirmative duty under the applicable statutes to report *potential* aiding and assisting of unlicensed activity.

In any event, the question, as phrased by the Petitioner, requires the Board to make conclusions regarding the knowledge the Petitioners may possess about present or future violations of the licensing statute. Because the Board is unable to ascertain what the Petitioners may or may not know about current or future aiders and assisters of unlicensed activity, the Board directs the Petitioners to review the applicable statutes and apply them to their current and future circumstances. The language in §472.0351(1)(n), Florida Statutes, is plain and unambiguous. By reviewing the statute and applying its plain meaning, the Petitioners should be able to ascertain the appropriate standard for their current and future circumstances based on their knowledge of unlicensed activities.

Further, the Legislature has established a privilege against civil liability for those persons providing information to the Department regarding complaints. See §472.33(11), Fla. Stat.

(2009). So long as the report is not made in bad faith or with malice, the Petitioners may avoid prosecution under §472.0351(1)(n), Florida Statutes, by reporting violations of licensure law known to them.

MOOTNESS

At the conclusion of the hearing on this Petition, there was anecdotal evidence presented by a member of the Board that the RFP may have been supplemented to require that the services be provided by a licensed individual or business entity. Under other circumstances, this additional fact might render moot the need to issue a declaratory statement.

A petition for a declaratory statement is similar to a petition for declaratory judgment. *Sutton v. Department of Environmental Protection*, 654 So.2d 1047 (5th DCA 1995), *Couch v. State*, 377 So.2d 32, 33 (Fla. 1st DCA 1979). A declaratory judgment is rendered to afford relief from insecurity and uncertainty to rights, status, and other equitable or legal relations. Individuals seeking declaratory relief must show a bona fide, actual, present, and practical need for the declaration with a present controversy as to a state of facts. *State Farm Mut. Ins. Co. v. Marshall*, 618 So. 2d 1377 (Fla. 5th DCA 1993), disapproved on other grounds, *Cunningham v. Standard Guar. Ins. Co.*, 630 So.2d 179 (Fla. 1994).

Fortunately for the Petitioners, after questioning near the conclusion of the hearing, Petitioners did assert that the Petitioners do have an actual need for the issuance of this declaratory statement. In addition, the facts set forth in the Petition, together with the information presented in testimony at the hearing, also establish a present and practical need for this declaratory statement under these particular circumstances. The record reflects that any change in the RFP does not dispense with the doubts and insecurities expressed by the Petitioners

concerning their need to avoid engaging in the aiding or assisting of unlicensed activity or the need to report unlicensed activity.

CONCLUSIONS OF THE BOARD AND RECOMMENDATIONS TO THE PETITIONERS

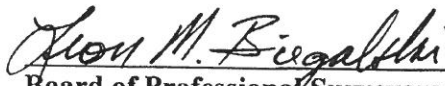
For the reasons set forth above, the Board finds that the services and deliverables requested in the RFP do constitute surveying and mapping within the meaning of Chapter 472, Florida Statutes.

Photogrammetry services and deliverables, similar to those offered in the RFP, may be provided in Florida only by Florida licensed professional surveyors and mappers.

So long as they are Florida licensed surveyors and mappers, the members of Petitioner FSMS and Petitioner Humphrey are not aiders and assisters of unlicensed practice merely by responding to the RFP and/or performing work if it is awarded pursuant to the USDA contract.

The members of Petitioner FSMS, including Petitioner Humphrey do have an obligation under Section 472.0351(1)(n), Florida Statutes, to report to the Board any aiding and assisting of unlicensed practice.

DONE AND ORDERED this 12th day of APRIL, 2010.


Board of Professional Surveyors and Mappers
Leon M. Biegalski, Executive Director,
For JEFFERY COONER, Chair

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Declaratory Statement is entitled to seek review of this Declaratory Statement pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a Petition or Notice of Appeal with the Clerk, Room 509 Mayo Building, Tallahassee, Florida 32399-0800, and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Declaratory Statement.

Filed with the Clerk, this 13th day of April, 2010.



Agency Clerk

Copies by Certified U.S. Mail, RRR# _____,

Counsel for the Petitioners, Ms. Claire A. Duchemin, 1615 Village Square Blvd., Suite #7,
Tallahassee, FL 32309.

Department of Agriculture and Consumer Services
State of Florida



Florida Department of Agriculture and Consumer Services
Office of General Counsel

CHARLES H. BRONSON
COMMISSIONER

INDEXING AND LISTING ADMINISTRATIVE FINAL ORDERS

I. CASE INFORMATION

File Name: Florida Surveying and Mapping Society, Inc. & James H. Humphrey
Division: CS Bureau: PSAM
Agency Clerk No.: 65537 Docket No.: N/A Attorney: Bennett Miller

All Administrative Final Orders, including, "Settlement Agreements" are to be listed.

II. CRITERIA FOR INDEXING: Certain Administrative Final Orders are required to be "Indexed" as a matter of law. In determining if this file needs to be indexed, please use the following criteria, and circle those that are applicable:

- Discusses a substantial legal issue of first impression which is actually resolved in the case.
- Establishes a rule of law, principle, or policy for the first time upon which the Department will rely and apply in similar circumstances.
- Alters, modifies, or significantly clarifies a rule of law, principle, or policy previously applied, announced, or relied upon by the Department.
- Resolves an apparent conflict in decisions of the Department or harmonizes decisions of appellate courts.

III. INDEXING REQUIRED: ☒ Yes ☐ No If yes, please Index below:

IV. INDEXING SUBJECTS: Using the **FLORIDA STATUTES GENERAL INDEX** as a non-exclusive guide, please indicate **ALL** subjects (up to three levels) under which the case should be indexed:

- 472.0351(1)(n)
- Unlicensed Activity
- Duty To Report Unlicensed Activity
-

V. Check the appropriate type of "Final Order":

- ☒ Declaratory Statement [DS] ☐ Existing Rule Challenge [RC] ☐ Proposed Rule Challenge [PC]
☐ Final Order Formal [FF] ☒ Final Order Informal [FI] ☐ Settlement Agreement [SA]
☐ Final Order - Default [FD]

Attorney's Initials: 

Date: 4/12/10

Note: Transmit completed form with proposed/reviewed Final Orders.