

**SUPERIOR COURT OF CALIFORNIA**

**COUNTY OF SACRAMENTO**

**JOSEPH ELFELT**

**v.**

**BOARD FOR PROFESSIONAL  
ENGINEERS, LAND SURVEYORS,  
AND GEOLOGISTS**

Case Number: 34-2015-80002130

**RULING ON SUBMITTED MATTER**

Date: August 19, 2016

Time: 9:00 a.m.

Dept.: 29

Judge: Timothy M. Frawley

**Proceeding:** Petition for Writ of Mandate

**Tentative Ruling:** Granted

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The Executive Officer of the Board for Professional Engineers, Land Surveyors, and Geologists (Board) issued Petitioner Joseph Elfelt a citation for practicing land surveying without a license. The citation included a \$5,000 fine and an order that Petitioner cease offering and/or practicing land surveying in California. Petitioner appealed the citation, but the Board upheld the citation. By his First Amended Petition for Writ of Administrative Mandate, Petitioner challenges the Board's decision. The court shall grant the petition.

Background Facts and Procedure

Petitioner operates an internet-based business from his home in the State of Washington. Petitioner's business, Property Line Maps, uses software that he developed to analyze property information (that is supplied by the customer or obtained online) and provide clients with "approximate" property corner coordinates and a map showing the property's boundaries according to the approximate coordinates produced.

Petitioner does not visit his client's land; he does all his work in his home office in Washington State.

Petitioner markets his business through a website at <http://www.PropertyLineMaps.com>. At all relevant times, the website included the following statements:

Our goal is to help you find property lines and find property corners by producing the *most accurate GPS coordinates possible without hiring a surveyor*. We do this by taking the information you supply and combining it with any online research we might do. That data is then processed by our own unique *first-of-its-kind proprietary software*.

Our goal is to produce coordinates that are *within 30 feet of accurate* on average. (Italics original.)

A link to "FAQ" on the website included the following questions and answers:

Q: *I have a property line dispute with my neighbor. Can your service help me?*

A: Maybe. Take a look at the example online maps on the homepage. On average the property lines on those example maps and the GPS coordinates that we produce should be within 30 feet of accurate. No, the data we produce is not survey-grade, however for many purposes it is close enough. But if you need to know exactly where your property corners and lines are, then you need to contact a surveyor. The online map links we produce are not surveys.

Q: *How can the coordinates your service produces be any good given that the cost is so modest?*

A: Our service produces the most accurate coordinates possible without hiring a surveyor and does so at an extremely affordable price for the simple reason that the software we developed uses a unique approach to do most of the work. Our very first client was so impressed with the quality of our product and the value he received that he donated an additional \$60 to support Gmap4. (The Gmap4 software we developed is a free enhanced Google map viewer that displays the online map links we produce. [Gmap4 homepage](#))

Q: *When you say the land corner coordinates that your service produces are "approximate," what does that mean?*

A: Our goal is to produce coordinates that are within 30 feet of accurate on average.

Q: *My property has never been surveyed. Can I use the coordinates you provide to mark my property corners on the ground?*

A: No. There are two reasons for this. First, the coordinates we provide are only approximate. Second, it might be a violation of state law for anyone, even the property owner, to mark their property corners on the ground unless they are a licensed surveyor. If your goal is to get your property corners accurately marked on the ground then you must hire a surveyor.

Q: *Can I use your coordinates to determine if my neighbor's building or my neighbor's road is on my land?*

A: No. The only way to know for certain whether anything like a building or road is on the wrong side of the property line is to know the exact location of the property line. The only way to know the exact location is to hire a surveyor. (Italics original.)

A link to "About" contained the following statement about the property line mapping service that Petitioner provides:

The property information that you supply plus our own online research is used by our software to produce the corner coordinates. The Online research we do will vary depending on the circumstances. This research may include accessing databases or GIS systems maintained by the federal Bureau of Land Management, state government and/or county government. No one piece of information is used alone to determine your coordinates. Instead, our proprietary software advances state-of-the-art by letting us process all this information, make any needed adjustments and supply you with *property coordinates that are as accurate as possible without hiring a land surveyor.*

But please keep one thing in mind. Joseph is not a land surveyor and the coordinates that you purchase from us and the maps displayed by those coordinates do not constitute a land survey. If what you really need is a survey then our service cannot help you and your only option is to pay the money and hire a licensed surveyor. (Italics original.)

The online maps that Petitioner produces state "Not a survey," and include a link titled "About this map." Clicking the "About this map" link displays text that states, in relevant part:

**Our goal is to produce coordinates for property corners that are within 30 feet of accurate on average.**

However, the map is not a survey.

The coordinates you see when you click (or touch) a corner are only intended to be close to the property corners and are not intended to authoritatively locate the property corners or lines.

If you need to locate or mark your property corners and lines accurately on the ground please contact a licensed surveyor. (Bold original.)

Petitioner has never been licensed in any capacity by the Board.

In 2014, following a complaint by a land-surveyor-in-training, the Board's Executive Officer issued a citation to Petitioner for practicing land surveying without a license, in violation of Business and Professions Code section 8792. The citation states that Petitioner is violating sections 8792(a) and 8726(c) and (n) by offering clients "approximate" ground coordinates by which they can retrace their own boundaries and by stating a level of accuracy regarding property corner information. The citation also charges Petitioner with violating section 8792(i) by managing a business from which land surveying services are offered and/or performed.

The citation levied a \$5,000 administrative fine and ordered Petitioner to cease offering and practicing land surveying activities in California. The citation notified Petitioner that he had a right to appeal the citation by requesting an administrative hearing. The notice states that, unless appealed, the citation shall become a final order of the Board.

Petitioner appealed and an administrative hearing was scheduled for January 22, 2015, before ALJ Wong. At the hearing, Lynn Kovach, a licensed land surveyor, testified as an expert witness for the complainant. She opined that Petitioner, by offering to provide coordinates for property corners "within 30 feet of accurate," is practicing land surveying without a license because he is providing information that can be used to establish or reestablish the positions of property corners and rendering statements regarding the accuracy of maps or measured survey data. Ms. Kovach distinguished services such

as Google Maps that provide approximate locations of property, but that make no claim to accuracy. Petitioner testified on his own behalf.

At the conclusion of the hearing, ALJ Wong found the testimony of Ms. Kovach more persuasive and issued a proposed decision upholding the citation. On April 16, 2015, the Board adopted the proposed decision as its Decision.

On July 16, 2015, Petitioner filed his First Amended Verified Petition for Writ of Administrative Mandate challenging the Board's decision. Petitioner alleges that the Board abused its discretion in finding that he violated the Business and Professions Code by practicing land surveying without a license.

Petitioner also alleges that the Board's regulations improperly delegated final decision-making authority to the Board's Executive Officer. Petitioner argues that because there is no statute expressly authorizing the Board to delegate final decision-making authority to its Executive Officer, the regulations are void, and therefore the Executive Officer lacked authority to issue the citation against him.

Finally, Petitioner alleges that he was denied a fair hearing because the Board members were biased against him.

#### Standard of Review

A court's review of an adjudicatory decision is subject to two possible standards of review, depending upon the nature of the right involved. If the administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence. If the administrative decision does not substantially affect a fundamental vested right, the court's review is limited to determining whether the administrative findings are supported by substantial evidence.

In this case, the parties disagree whether the Board's decision substantially affects a fundamental vested right. The Board argues that because Petitioner is faced only with a fine, no fundamental vested right is implicated. Petitioner argues that the Board's decision not only imposed a fine, but also included an order of abatement, prohibiting Petitioner from doing business in California.

The court agrees with Petitioner that the independent judgment test should apply. Prior to the Board's decision, Petitioner could offer his business services within the State of California. The Board's decision orders him to "cease and desist" from offering and/or

practicing land surveying in California. Thus, the Board's order substantially affected his right to operate his business in California.

Petitioner's authority to operate his business in California is a fundamental right because of its economic impact and the importance to Petitioner in his life situation. (See *Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313; *Berlinghieri v. DMV* (1983) 33 Cal.3d 392, 395-98; see also *Frink v. Prod* (1982) 31 Cal.3d 166, 177.) Thus, the Board's decision substantially affected a fundamental vested right.<sup>1</sup>

In any event, because the evidence is undisputed, the issue before this court is a question of law, and the court must apply its independent judgment in deciding whether the Board erred. (See *Stermer v. Board of Dental Examiners* (2002) 95 Cal.App.4th 128, 132.)

### Discussion

The court agrees with Petitioner that the Board abused its discretion in finding that he unlawfully engaged in the practice of land surveying without a license.

Business and Professions Code section 8726 defines the practice of "land surveying." It provides, in relevant part:

A person, including any person employed by the state or by a city, county, or city and county within the state, practices land surveying within the meaning of this chapter who, either in a public or private capacity, does or offers to do any one or more of the following:

(c) Locates, relocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land, right-of-way, easement, or alignment of those lines or boundaries.

. . .

(n) Renders a statement regarding the accuracy of maps or measured survey data. . . .

In its decision, the Board found that Petitioner violated subdivision (c) by "offering to provide approximate ground coordinates from which clients can trace their own boundaries," and violated subdivision (n) by "stating the level of accuracy of the property

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<sup>1</sup> Even if the substantial evidence test applied, the court would reach the same conclusions. There is not substantial evidence in the record to support the Board's findings.

corner information he provides as 'being within 30 feet on average.'" (Decision, p.14.) Both findings are based on a mischaracterization of the evidence in the record.

The Board's decision construes the information on Petitioner's website as "statements of accuracy" for the property corner coordinates that he provides, which may be used by clients to "retrace their own boundaries." The Board therefore concludes that Petitioner is "establishing or reestablishing" the positions of the property lines. There are several problems with this finding.

First, Petitioner does not claim to provide accurate property corners or lines. Petitioner's website clearly states that he only provides "approximate" coordinates and that the coordinates he provides are not "survey-grade" and cannot be used to mark the exact location of property lines on the ground. Although not mentioned in the decision, the FAQs include the following question and answer directly addressing this issue:

*Q: My property has never been surveyed. Can I use the coordinates you provide to mark my property corners on the ground?*

*A: No. There are two reasons for this. First, the coordinates we provide are only approximate. Second, it might be a violation of state law for anyone, even the property owner, to mark their property corners on the ground unless they are a licensed surveyor. If your goal is to get your property corners accurately marked on the ground then you must hire a surveyor.*

The website states that it is Petitioner's "goal" to "produce coordinates that are within 30 feet of accurate *on average*," but Petitioner does not represent to his clients that he will meet this goal. He does not represent that the particular coordinates he provides to a client will be "within 30 feet of accurate" or meet any other standard of accuracy. His website repeatedly states that Petitioner is not a "surveyor" and that the information he produces is not a "survey." The website warns clients that "if [they] need to locate or mark [their] property corners and lines accurately on the ground," then they need to "contact a licensed surveyor." "The only way to know the exact location is to hire a surveyor."

The Board dismisses all of these statements as "prefatory language" that does not negate his "statements of accuracy." However, words have meaning. By ignoring Petitioner's disclaimers, the Board is twisting Petitioner's statements into something they are not: a representation that he will provide "accurate" coordinates. Petitioner makes no such claim and is very careful to inform clients that the coordinates he

provides are “approximate” and cannot be used to mark property corners and lines accurately on the ground.

In addition, section 8726(c) unambiguously applies only to the person who “does or offers to do” the activities listed in the subsection. Merely providing “approximate” ground coordinates, with a “goal” of being accurate within 30 feet “on average,” is not locating or establishing any property line or boundary within the meaning of section 8726(c). Petitioner cannot be found guilty of a misdemeanor for violating Business and Professions Code section 8792(a) based on speculation that his clients might misuse the information at some time in the future.

For the same reason, Petitioner is not guilty of rendering statements regarding the “accuracy of maps or measured survey data” within the meaning of section 8726(n). Even if the term “map” is broadly defined to include any drawing depicting physical earth features,<sup>2</sup> as Ms. Kovach defined it, Petitioner is not “rendering statements regarding the accuracy” of his maps.

This language is aimed at persons who create maps purporting to accurately define or establish property corners or boundaries. The Board is turning the statute on its head, trying to hold Petitioner guilty of practicing land surveying without authorization because he created a map and disclaimed any attempt to accurately and authoritatively locate property corners or lines.

Petitioner’s stated “goal” of producing coordinates that are “within 30 feet of accurate on average” does not change the character of his maps -- which merely show “approximate” property coordinates, or his representations about their “accuracy” (lack of accuracy) “on average.” Petitioner expressly advised his clients that his maps do not accurately depict property corners and lines, and that if clients need such information, they must contact a licensed surveyor. Under the circumstances, it was an abuse of discretion for the Board to use these statements against him, and find Petitioner guilty because he made clear on his website that his maps are not – and are not intended to be – accurate survey maps.

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<sup>2</sup> If the court were to adopt this definition, it is difficult for the court to see how online services such as Zillow and Google Earth or Google Maps, which also provide approximate property locations, would not also be subject to section 8726. The court does not agree that these services are distinguishable because they “make no claim to accuracy whatsoever.” Indeed, if the only difference between Petitioner and Google is Petitioner’s claims to accuracy, then Petitioner could cure the ostensible problems with his business merely by deleting the statements regarding the accuracy/inaccuracy of his information. The Board’s decision goes much further, prohibiting Petitioner from offering his services in California, regardless of his advertising claims.



Petitioner's clients may question whether obtaining approximate property corner coordinates is worth the price Petitioner charges, but this has no bearing on whether Petitioner's activities constitute "land surveying" within the meaning of the statutory scheme.

The court concludes that the Board's decision must be set aside because the evidence does not support the finding that Petitioner is practicing land surveying without a license. This renders it unnecessary for the court to consider Petitioner's claims that the decision must be set aside because the Board's Executive Officer lacked authority to issue the citation, or because the Board was biased against Petitioner.

Disposition

The petition is granted. The court shall issue a writ of mandate commanding the Board to set aside its decision affirming the citation and issue a new decision granting Petitioner's appeal and dismissing the citation. The court shall prepare a formal judgment and writ consistent with this ruling.

Petitioner shall be entitled to recover his costs upon appropriate application.

Dated: August 29, 2016

  
Hon. Timothy M. Frawley  
California Superior Court Judge  
County of Sacramento



**CERTIFICATE OF SERVICE BY E-MAILING**

**(C.C.P. Sec. 1013a(4))**

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing **RULING ON SUBMITTED MATTER** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed to:

**JOHN W. KILLEEN  
STANTON LEE  
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1300 I Street, Suite 125  
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**Joseph Elfelt  
20707 NE 120th Street  
Redmond, WA 98053**

I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: August 29, 2016

Superior Court of California, County of  
Sacramento

By: F. Temmerman  
Deputy Clerk, Dept.29