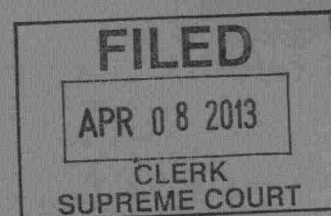


SUPREME COURT OF KENTUCKY  
No. 2012-SC-000165-D  
(2010-CA-000693 & 2010-CA-000730)



JOSEPH B. CURD, JR

APPELLANT

V.

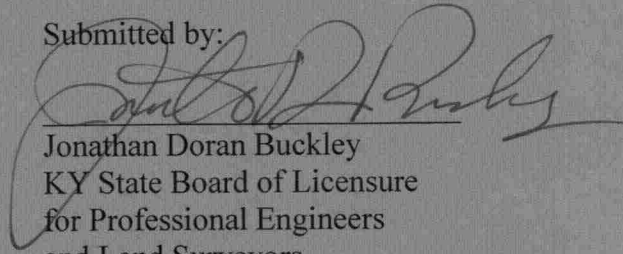
FRANKLIN CIRCUIT COURT  
2009-CI-00231

KENTUCKY STATE BOARD OF  
LICENSURE FOR PROFESSIONAL  
ENGINEERS AND LAND SURVEYORS

APPELLEE

BRIEF FOR APPELLEE

Submitted by:



Jonathan Doran Buckley  
KY State Board of Licensure  
for Professional Engineers  
and Land Surveyors  
160 Democrat Drive  
Frankfort, KY 40601  
(502)573-2680

CERTIFICATE OF SERVICE

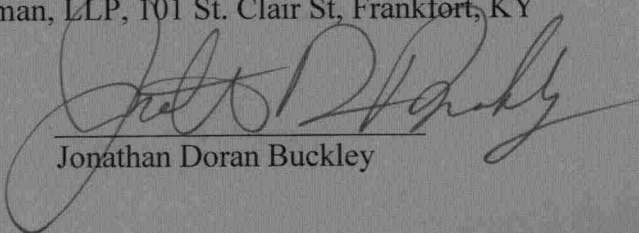
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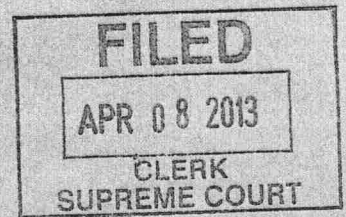
Hon. Thomas D. Wingate, Judge, Franklin Circuit Court, Division II, Franklin County  
Judicial Bldg., 669 Chamberlain Ave., Frankfort, KY 40601; and

Hon. Robert v. Bullock, Bullock and Coffman, LLP, 101 St. Clair St, Frankfort, KY  
40601, Counsel for Appellee.



Jonathan Doran Buckley

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40601, Counsel for Appellee.

  
Jonathan Doran Buckley

## STATEMENT CONCERNING ORAL ARGUMENT

This appeal involves the determination of the constitutionality of part of the regulation embodying the ethical code to which all Kentucky licensed land surveyors are subject, along with part of the agency's primary disciplinary statute. Appellant believes that oral argument would be helpful to the Court in deciding the significant issues presented.

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## COUNTERSTATEMENT OF THE CASE

### I. OVERVIEW

The statutes and regulations governing the practice of land surveying in Kentucky include a mandate that:

*A licensed land surveyor serving as an expert or technical witness before any tribunal, shall express an opinion only if it is founded on adequate knowledge of the facts in issue, and upon honest conviction of the accuracy and propriety of that testimony. A licensee in so testifying is required to act with objectivity and impartiality, and shall include in that testimony, all material facts, and not ignore or suppress a material fact.*  
**201 KAR 18:142 Section 3**

*A licensed land surveyor shall conduct his or her practice in order to protect the public health, safety, and welfare.* **201 KAR 18:142 Section 2**

(See **201 KAR 18:142, Code of professional practice and conduct at Appendix, Tab 5**)

*A licensed land surveyor shall avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of his or her profession.* **201 KAR 18:142, Section 9**

*The Board may . . . suspend . . . a land surveyor's license if the licensed land surveyor engages in gross negligence, incompetence or misconduct in the practice of land surveying, **KRS 322.180(2)**, or engages in conduct likely to deceive or defraud the public. **KRS 322.180(12)**.*

(See **KRS 322.180 at Appendix, Tab 6**)

Appellant Board initiated a disciplinary action against Respondent Joseph B. Curd, Jr., a licensed professional land surveyor, for his testimony as an expert witness in a boundary dispute case in Wayne County Circuit Court, alleging that his testimony as an expert witness in that case was dishonest and violated the above listed sections of 201 KAR 18:142 and KRS 322.180.

Following a three day hearing before a Hearing Officer provided by the Attorney General, Mr. Curd was found to have violated those statutes and regulations, and his

license was suspended for six months. (See Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order at **Appendix, Tab 4** and Appellee Board's Final Order at **Appendix, Tab 3**)

Mr. Curd appealed and the Franklin Circuit Court, Second Division, entered an Opinion and Order finding the two parts of the statute and the three sections of the regulation unconstitutionally vague as applied to Mr. Curd. Note: Both the Board and Mr. Curd appealed the Franklin Circuit Court decision to the Court of Appeals. (See Circuit Court Opinion at **Appendix, Tab 2**)

The Court of Appeals entered its decision in a reported opinion, in which it determined that the Franklin Circuit Court, sitting in its appellate capacity of the subject disciplinary action, committed error by:

- \* failing to determine what issues were preserved for appeal;  
(Appendix, Tab 1, Pg. 20, second paragraph)
- \* failing to give appropriate deference to the findings of the Attorney General's Hearing Officer, and impermissibly reweighing the evidence;  
(Appendix, Tab 1, Pg.15, second paragraph)
- \* failing to determine if the findings of fact by were supported by substantial evidence;  
(Appendix, Tab 1, Pg. 28, first paragraph)
- \* impermissibly adding a restrictive application to a recent Kentucky Supreme Court decision that had significant relevance to one of the issues before the Court;  
(Appendix, Tab 1, Pg. 21, second paragraph)
- \* wrongfully finding Section (3) of 201 KAR 18:142, (*Code of Professional Practice and Conduct*) to be unconstitutional based on "vagueness as applied". The Court of Appeals believed this section of the regulation was sufficiently detailed to withstand such a challenge, and that the relevant underlying facts as found by the Hearing Officer, were supported by substantial evidence. (See Appendix, Tab 1, Pg. 17, first paragraph and first sentence of second paragraph.)

The Court of Appeals did, however, affirm the Franklin Circuit Court's determination that Sections (2) and (12) of KRS 322.180 (*Grounds for denial of licensure*

and for disciplinary action), and Sections 2 and 9 of 201 KAR 18:142, (*Code of Professional Practice and Conduct*), were unconstitutionally vague as applied to Mr. Curd. (See Appendix, Tab 1, Pg. 17, second paragraph)

## II. MATERIAL FACTS

The Respondent Joseph B. Curd, Jr. is a Professional Land Surveyor who testified as an expert witness in the case of *Denny v. Southwood*, Wayne Circuit Court Civil Action No. 01-CI-00201, a quiet title action between two adjacent property owners, the Denny's and the Southwoods. In that case, Mr. Curd testified both in a deposition on September 10, 2003, ( Deposition transcript, TH, Exhibit 1) and again at trial on October 2, 2003 ( Trial transcript, TH, Exhibit 2).

Mr. Curd testified in three areas that became the subject of this disciplinary action, that is: the testimony regarding what his client's deed encompassed, the testimony regarding the work performed by the Denny's surveyor, James West, and the testimony regarding Mr. Curd's employment status with the Board.

### A. Mr. Curd's expert testimony regarding the deed description.

The Southwoods had a deed to a 110 acre tract (Southwood's Deed, TH, Exhibit 7, **Appendix, Tab 7**) that lay north and east of two tracts owned by Denny. The Southwoods purchased that property in April of 1994. The deed description describes the west boundary of the tract to be the line of Mark Matthews (now owned by Denny), and the south boundary to be the Eadesville Highway.

The 110 tract was originally created by R.S. Ramsey from a larger tract, and was first sold at auction in 1944. (Ramsey Sale Deed, TH, Exhibit 4, **Appendix Tab 8**). A



plat that was prepared when the tract was first created and sold in 1944, also shows those boundaries. (Auction Sale Plat, TH, Exhibit 3, **Appendix, Tab 9**).

The deed description of the 110 acre original conveyance from Ramsey is identical to the description of Tract III of Southwood's deed. The tract is described as having the line of Mark Matthews as its western boundary, and the Eadsville Highway as its southern boundary.

The Southwoods, however, maintained that this description of their 110 acre tract extended west to encompass the Matthews tract (now Denny) and south across the highway to encompass about 12 acres of the Denny description. (Court of Appeals Opinion in Southwood v. Denny, TH, Exhibit 13, Pg. 2, Lns 7-12). The Southwoods' deed description did have distance and direction calls, that might carry the property line across the highway but *only if monumentation in the deed was ignored*. ( Judgment of the Wayne Circuit Court, TH, Exhibit 12, Pg.12, Paragraph 3).

The Dennys filed a suit to quiet title against the Southwoods to establish their boundary lines and they employed as their expert witness, surveyor James West. The Southwoods employed as their expert witness, surveyor Joseph B. Curd, Jr..

In testifying as an expert witness in a deposition and at trial, Mr. Curd maintained that the deed description of Southwood encompassed the Matthews tract, and also encompassed 12 acres across and south of the Eadsville Highway. (Deposition transcript, TH Exhibit 1, Pg. 44, Lns. 6-10; Trial transcript, Exhibit 2, Pg.23, Lns 6-12; Pg.34, Lns 4-6.), and Mr. Curd also drew the lines of the Southwood description on a topo map, which lines he represented as encompassing the Matthews tract and the 12 acres south of the Eadesville Highway. ( Judgment of the Wayne Circuit Court, TH, Exhibit 12, Pg.12,

Paragraph 3; See also, Topo Map annotated by Mr. Curd, TH, Exhibit 10, **Appendix, Tab 10**).

In its Findings of Fact, Conclusions of Law, and Judgment, the Wayne Circuit Court specifically found that in placing the lines of the Southwood tract on the topo, and in Mr. Curd's his testimony relative to the Southwood description encompassing the Matthews tract and 12 acres south of the Eadesville Highway, Mr. Curd ignored the specific description in the Southwood's deed and the monuments that properly defined the west and south boundaries of the Southwood tract. ( Judgment of the Wayne Circuit Court, TH, Exhibit 12, Pgs. 12-13, Paragraph 3).

**B. Mr. Curd's testimony regarding the work of Mr. West.**

Mr. Curd, in his testimony as an expert witness, repeatedly testified that Mr. West, the Denny's surveyor, did not do any research to support his survey. Mr. Curd based his remarks on the first part of a statement made in a deposition by Mr. West, without adequately representing the true situation which was patently evident from the balance of the statement made by Mr. West and which indicated that the title work had been supplied by an attorney. (TH, Exhibit 1, Pg.22, Lns.11-16; TH, Exhibit 5, Pg.5, Lns 12-17; TH, Exhibit 12, Pg.7, first sentence).

The actual question and response by Mr. West in his deposition, is as follows:

***Q.** What work did you do in the deed room prior to surveying this property?*

***A.** I didn't do any. Mr. Jones furnished me with the research on it. I did look up adjoining deeds and so forth, but I didn't do any title work on this deed.*

(Deposition of James West in the boundary dispute case, at TH, Exhibit 5, Pg. 5, Lns. 12-17)

Wayne Circuit Court entered a judgment for the Dennys, and in that judgment made a specific finding of fact that Mr. West had complied with the profession's research requirements for his survey. ( Judgment of the Wayne Circuit Court, TH, Exhibit 12, Pg. 7, first paragraph).

The Southwoods appealed the final judgment, and the Court of Appeals affirmed the decision of the trial court. (Court of Appeals Opinion, Southwood v. Denny, TH, Exhibit 13).

**C. Mr. Curd's testimony about his employment as an investigator for the Board.**

In reciting his qualifications to be accepted in the Wayne Circuit Court action as an expert witness, Mr. Curd testified that he was at that time, an investigator for the Board. (TH, Exhibit 2, Trial, Pg. 4, Lns. 12-16). This was not a true statement; Mr. Curd had been an investigator in the past, but was no longer employed by the Board.

**D. The disciplinary action.**

The Board filed a disciplinary action against Mr. Curd, alleging that Mr. Curd, in testifying both in his deposition and at the trial, testified dishonestly, misleadingly, and incompletely, ignoring or suppressing a material fact or facts, or, alternately, failed to put himself in a position of acquiring all relevant information prior to testifying, in violation of the Code of Professional Practice and Conduct, 201 KAR 18:142 (2),(3), and (9), and KRS 322.180(2) and (12).

Following a three day trial before a hearing officer supplied by the Attorney General, the Hearing Officer filed his Findings of Fact, Conclusions of Law, and Recommended Order, consisting of 64 specific Findings of Fact, and 57 Conclusions of

Law, and a Recommended Order of a six month suspension for Mr. Curd. (Appendix, Tab 4).

Some of the specific findings and conclusions, with regard to the three areas with which the disciplinary action was concerned, are set out hereinbelow:

**1. Hearing Officer's findings of fact as to Mr. Curd's testimony regarding the Southwood's deed description.**

*\* Curd's testimony and placement of lines on the topo map disregarded other obvious and recognizable monumentation of the Eadesville Highway and a branch called for in the Southwood's deed. (FF 43)*

*\* The only purpose for the introduction of Curd's deed plotted topo map was to convince the court that the Southwood's boundary extended south of Eadesville Highway and west into the Matthews tract. (CL 17)*

*\* Curd attempted to cause the court to believe that he had performed most of the parts of a survey, and then presented the deed plotted topo map as inferentially representing his opinion as to where the boundary line was located based upon his completed work. (CL 23)*

*\* Although Curd argues that he did not intend to mislead the court, the trial court's judgment (Wayne Circuit Court) reveals his attempt by the following findings of fact:*

*"Mr. Kurd [sic] stated that in his opinion the 110 acre tract description in the Southwood's deed did cover property on the west side of the Ridge Road and encompass the Matthews property as listed on the R.S. Ramsey Auction Plan and also covered the approximate 12 acres of property claimed by the Southwoods on the south side of Kentucky Highway 789 (Eadesville Highway)." (CL 24)*

*\* It was a material fact in the boundary line litigation that the Southwood's southern boundary could not cross the Eadesville Highway under the minimum standards of surveying practice. (CL 26)*

*\* Curd did not comply with his duty to be truthful, objective, and not suppress a material fact, by his failure to advise the court of the material fact that the Southwood's boundary line could not have been south of the Eadesville Highway or west of the Matthews tract under the minimum standards of surveying practice. (CL 27)*

*\* Curd's conduct and failure to so advise was purposely intended to deceive a public court as to the location of the boundary under applicable minimum standards of surveying practice. Curd did not conduct his practice in order to protect public and professional interests served by application of minimum standards of surveying practice.*



*Curd's representation of the boundary location by deed plotted topo map, his testimony, and implication was not founded on adequate knowledge of the facts in issue, without honest conviction as to the accuracy and propriety of his testimony, and was not made objectively or impartially. (CL 28)*

*\* Curd's testimony was result driven, not objective and honest, and reflected unfavorably upon the dignity or honor of the surveying profession. (CL 29)*

*\* The Hearing Officer concludes that Curd violated KRS 322.180(2) and (12), and the Code of Conduct, 201 KAR 18:142 Sections 2,3,and 9, by the his conduct discussed above. (CL 30)*

## **2. Hearing Officer's findings of fact as to Mr. Curd's testimony regarding the work of Mr. West, the Denny's surveyor.**

*\* In deposition, Curd was asked about West's survey work and Curd stated that, based upon West's deposition testimony and a review of some of his plats, it did not appear that West conducted any research involving a determination of the boundary line. Curd made several direct and indirect statements at his deposition and at trial to the effect that West did not do any research or performed inadequate research. (FF 33)*

*\* At the hearing, Curd explained that he based his testimonial conclusions that West did not perform any research on a statement made by West in his deposition. (FF 34)*

*\* The actual statement by West referenced by Curd occurred when the Southwoods' attorney asked West the following question: "[w]hat work did you do in the deed room prior to surveying this property?" West responded, "I didn't do any. Mr. Jones [Denny's attorney] furnished me with the research on it. I did look up adjoining deeds and so forth, but I didn't do any title work on this deed". (FF 35)*

*\* Curd's testimony was result driven, not objective. Curd knew or should have known that West's ultimate conclusions as to placement of the boundary lines was correct; (CL 33)*

*\* Surveyors are permitted to rely on records supplied by others under 201 KAR 18:150. (CL 34)*

*\* Also, there is a material difference between not doing work in a deed room and not doing any survey work or research. Deed work is only part of necessary research and survey work which also includes taking measurements, physically locating corners, etc.. (CL 35)*

*\* Since West did perform research and was entitled to rely on supplied records, Curd's statements that West did not perform **any** research were false; Furthermore, West clearly conducted adequate research to conclude that the Eadesville Road was a*

*controlling monument and boundary line. Since this conclusion was readily apparent to Curd based upon his possession of relevant deeds and plats, his attempt to discredit West's conclusions and research were not made upon an honest conviction. (CL 37)*

*\* Curd did not comply with his duty to be truthful, objective, and not suppress a material fact, by his statements that West did not perform any research and by failing to advise the court that West was entitled to rely on records supplied by the Denny's attorney. (CL 38)*

*\* Furthermore, Curd attempted to discredit West's proper conclusions SO THAT Curd's statements were intended to mislead a public court. (CL 39)*

*\* Curd's testimony was not founded on adequate knowledge of the facts in issue, without honest conviction as to the accuracy and propriety of his testimony, and was not made objectively or impartially. (CL 42)*

*\* Curd's conduct reflected unfavorably upon the dignity or honor of the surveying profession. (CL 43)*

*\* Curd violated KRS 322.180(2) and (12) and 201 KAR 18:142, Sections 3 and 9, by testifying by deposition and at trial, in other than a truthful manner, either deliberately or negligently, regarding the research performed by James West. (CL 44)*

**3. Hearing Officer's findings of fact as to Mr. Curd's testimony regarding being currently employed as an investigator for the Board.**

*\* At trial Curd testified that he was an investigator for the Board. (FF 49)*

*\* Curd had been a contract investigator for the Board over the years. However, at the time of his testimony, the Board had no contract with Curd as a contract investigator and no contract was ever entered retroactively. (FF 50)*

*\* Curd knew his contract would not be renewed. (CL 48)*

*\* Curd violated KRS 322.180(2) and (12), and 201 KAR 18:142, Sections 3 and 9, by testifying dishonestly and incorrectly at trial that he was still an investigator for the Board on October 2, 2003. (CL 49)*

**ARGUMENT**

**I. The Board's statutes and regulations were not unconstitutionally vague as applied to Mr. Curd.**

Appellant maintains that the parts of the statute and regulation in issue were unconstitutionally vague as applied to Mr. Curd. What Appellant fails to do however, is reference a single, specific finding of fact or conclusion of law of this case. Essentially, Appellant is asking this Court to consider only his unsupported argument rather than apply the standard of review articulated by the Court of Appeals against the actual findings and conclusions of the Hearing Officer. Such an approach is not justified by statute or case law.

**A. Standard of review for vagueness as applied.**

The Court of Appeals issued its Opinion in which it articulated an appropriate standard of review for the Court's consideration of a constitutional challenge to statutes and regulations based on "vagueness as applied". In the Court of Appeals Opinion on Page 12, the Court stated:

*On the basis of the foregoing law, it is clear that the court below had the duty to examine the entire statute and regulation at issue and to determine whether or not Curd, in his capacity as a professional land surveyor using ordinary common sense, could reasonably understand the statute and regulation required of him. Moreover, the specific question sub judice is not whether the statutes or regulations themselves are unconstitutional, but whether they were unconstitutional as applied to Curd's particular testimony.*

**B. The Court of Appeals wrongfully failed to apply its own standard of review in finding some of the statutes and regulations unconstitutional.**

**1. The Appellate Court correctly determined that Section 3 of 201 KAR 18:142, the Code of Professional Practice and Conduct, to be constitutional and supported by substantial evidence.**

The Appellate Court correctly reversed the Franklin Circuit Court with regard to that Court's holding that 201 KAR 18:142, Section 3, was unconstitutionally vague as applied.

Section 3 of 201 KAR 18:142, the Board's ethical code, requires that:

*A licensed land surveyor, serving as an expert or technical witness before any tribunal, shall express an opinion only if it is founded on adequate knowledge of the facts in issue, and upon honest conviction of the accuracy and propriety of that testimony. A licensee in so testifying is required to act with objectivity and impartiality, and shall include in that testimony, all material facts, and not ignore or suppress a material fact. 201 KAR 18:142 Section 3.*

The Appellate Court addressed the constitutionality of this section on Page 16 and 17 of its Opinion. There, the Court stated:

*Certainly, a professional land surveyor, using ordinary common sense, should have understood the statutes and regulations at issue required honest, competent, and thorough testimony based upon an adequate understanding of the facts. The hearing officer – the individual in the best position to make a determination as to the veracity of Curd's testimony – concluded that his testimony was, quite simply, not honest, or, at the very least negligently given, on the basis of incompetent knowledge of the facts of the case.*

*The hearing officer's findings appear in all respects to be based upon a thorough review of the evidence and testimony provided. We find that the statutory and regulatory requirements that experts testify truthfully and competently to be specific and not vague. Curd, in his capacity as a professional land surveyor, could reasonably have been expected to understand that giving testimony other than that which was honest would expose him to professional discipline.*

*Having so found, we believe that reversal of the circuit court's determination that 201 KAR 18:142 Section 3 was vague as applied to Curd is appropriate.*

**(Tab 1, Pgs. 16, 17).**

It is perhaps useful to note, in considering the application of this section of the regulation to the facts of this case, that boundary cases occur frequently in Kentucky with the surveyors involved often disagreeing on the ultimate location of the boundary line in issue. In boundary dispute cases, it is well established that the trial court "may

choose between the conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors". *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky. App2002) (quoting *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 184-85 (Ky.App1987))

The fact that surveyors may disagree is, by itself, not something that would trigger any disciplinary action by the Appellee Board. 201 KAR 18:142, Section 3, would not be applicable to expert witness testimony that was honestly but mistakenly given but it is applicable to dishonest testimony. The findings of the Hearing Officer set out previously leave no doubt that Mr. Curd testified dishonestly as an expert witness, thereby bringing him within the purview of this part of the regulation.

**2. The Appellate Court, in evaluating the remaining statutory and regulatory sections deemed unconstitutionally "vague as applied" by the lower court, failed to consider the actual facts of the case *sub judice*, and therefore, failed to apply its own standard of review.**

The Court of Appeals failed to actually apply their own standard in its evaluation of the remaining statutory and regulatory sections under review. Instead, the Court of Appeals considered the language of the subject statutes and regulations without regard to the specific findings of the Hearing Officer.

The Court essentially evaluated the constitutionality of the statute and regulation based on the facial wording of the statute and regulation alone, an approach appropriate for constitutional challenges to statutes based on "overbreadth", but one both inappropriate under the circumstances of this case, and not before the Court on appeal.

The United States Supreme Court has drawn a distinction between a challenge to the constitutionality of a statute based upon the statute being vague in all its applications (overbroad), or just vague as applied to the matter at hand (vague as applied).

The Court considered the difference between those two approaches in the case of *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 102 S.Ct. 1186, 1191 (U.S.Ill.,1982). There the Court stated:

In a facial challenge to the overbreadth and vagueness of a law,<sup>FN5</sup> a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.<sup>FN6</sup> If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates \*495 no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.<sup>FN7</sup> A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 495, 102 S.Ct. 1186, 1191 (U.S.Ill.,1982)

Footnote 7 of that same case, further elaborates the Court's approach. FN7. "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975). See *United States v. Powell*, 423 U.S. 87, 92-93, 96 S.Ct. 316, 319-320, 46 L.Ed.2d 228 (1975); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33, 36, 83 S.Ct. 594, 597-598, 599, 9 L.Ed.2d 561 (1963). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 2561, 41 L.Ed.2d 439 (1974). The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague " 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971). Such a provision simply has no core." *Smith v. Goguen*, 415 U.S. 566, 578, 94 S.Ct. 1242, 1249, 39 L.Ed.2d 605 (1974).

*Ibid.*, at 495-496

See also *Doe v. Staples* 706 F.2d 985, 988 (C.A.Ohio,1983) where the Court reiterated the necessity of the application of a different standard in a Court's review of a statute for issues of vagueness where the statute does not involve criminal conduct or first amendment constitutional issues.



*When a statute is not concerned with criminal conduct or first amendment considerations, the court must be fairly lenient in evaluating a claim of vagueness. Exxon Corp. v. Busbee, 644 F.2d 1030 (5th Cir.1981), cert. denied, 454 U.S. 340, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981). As the court in Exxon stated:*

*[T]o constitute a deprivation of due process, it must be "so vague and indefinite as really to be no rule or standard at all." A.B. Small Co., 267 U.S. [233] at 239, 45 S.Ct. [295] at 297 [69 L.Ed. 589] (1925). To paraphrase, uncertainty in this statute is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible. 644 F.2d at 1033. Whether a statute is unconstitutionally vague must be assessed in the context of the particular conduct to which it is being applied. United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). Doe v. Staples 706 F.2d 985, 988 (C.A.Ohio,1983)*

Appellant states on page 10 of his brief that:

*The standard for determining whether a statute and presumably a regulation is unconstitutional because of vagueness or unconstitutional as applied is not in dispute.*

However, Appellant then suggests the application of a standard set out in *Commonwealth v. Foley*, 798 S.W.2d 947 (Ky.1990) and offers as additional support, language from *State Board for Elementary Education v. Howard, et. al* 834 S.W.2d 657 (Ky.1992). *Foley* is concerned with a criminal matter (vote buying), and *Howard* was concerned with the enforcement of statutes prohibiting public school employees from becoming involved in political campaigns, an area the court considered to be one of constitutionally protected conduct.

The case *sub judice* concerns the discipline of a professional license and is a civil matter that does not involve any constitutionally protected conduct. Additionally, no evidence was presented that the statutes and regulations that Mr. Curd was found to have violated, encouraged any arbitrary and discriminatory enforcement; therefore, any standard set out in *Foley* and *Howard* would not be applicable.

In the case at bar, the Appellate Court's analysis by which it determined that the four sections of the statute and regulation under consideration were unconstitutionally vague, is found on Pages 17-19 of that Opinion. It is interesting to note that in the entirety of that brief discussion, the Court of Appeals never considered any of the Hearing Officer's findings in its analysis. To the contrary, the Court chose to look exclusively at the language of the sections without regard to the conduct of Mr. Curd, essentially a review of the statute and regulation for overbreadth rather than for vagueness as applied. In its analysis, the Court stated, on Pages 17 and 18 as follows:

*We nevertheless briefly note our agreement with the court's determination that the remainder of the provisions at issue are indeed vague as applied to Curd's testimony below. These provisions repeatedly utilize words such as "gross negligence", "incompetence," and "misconduct," but do not elaborate in any detail as to what sorts of behavior might fall into the realm of the conduct intended to be prohibited. Likewise, although the provisions urge engineers to act in a manner which will "protect the public health, safety, and welfare," it gives no guidance as to how this is to be accomplished, or what sort of testimony would be in violation of this goal. Further, while the provisions require that, "The professional engineer or professional land surveyor shall avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of his or her profession," it is apparently left to the expert in question to ascertain, perhaps to his or her own peril, whether the testimony the expert intends to give during trial would be in violation of that provision or not.*

The Court never applied the facts of the case against the statutory language, an approach inappropriate for the case at bar, and one that violates the Appellate Court's own previously articulated standard of review in this matter.

**3. In the Appellate Court's review of the remaining sections of the statute and regulation, the Court imposed a de facto standard for statutory language which requires that sufficient specificity be found within the language of the statute before applying the facts of the case at bar, a method of statutory construction and review not found in either regulation or case law.**

The Court evaluated the statute and regulation against a de facto standard of a requirement of specificity being found solely within the language of the statute. As noted in the excerpt of the part of the Opinion quoted immediately hereinabove, the Appellate Court faulted the statutory and regulatory language for not elaborating “in any detail as to what sorts of behavior might fall into the realm of the conduct intended to be prohibited” and failing to give any “guidance as to how this is to be accomplished, or what sort of testimony would be in violation of this goal”. (Appendix, Tab 1 Pg. 17)

In taking this approach, the Court of Appeals has implicitly rejected the use of common and ordinary terminology in statutory construction. It is entirely appropriate for the legislature to craft statutes using common and ordinary language, which would seem to be compatible with that part of the standard of review that requires evaluating the statute from the perspective of one exercising common sense.

In KRS 446.080, the legislature mandates that statutes be written in common language, and be subject to liberal construction to carry out the intent of the legislature.

(1) All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. . . .”

. . . .  
. . . .

(4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning. Courts in interpreting statutes must give liberal construction and construe statutes according to the common and approved usage of language.

KRS 446.080

and

All bills introduced in the General Assembly after June 17, 1978, shall be written in nontechnical language in a clear and coherent manner using words with common and everyday meanings.

. . .

KRS 446.015

Case law supports this approach.

In the context of statutory provisions governing employee discipline, the Supreme Court has recognized the inherent difficulty in drawing statutes which are broad enough to cover a wide range of conduct, yet narrow enough to give fair warning. In *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), the Court concluded that the term "such cause as will promote the efficiency of the service" was not an unconstitutionally vague standard for employee discharge.

[T]here are limitations in the English language with respect to being both specific \*665 and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

*Id.*, at 159, 94 S.Ct. at 1647 (quoting *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 578-79, 93 S.Ct. 2880, 2897, 37 L.Ed.2d 796 (1973)). "[I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees includes 'catchall' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.' " *Arnett*, 416 U.S. at 161, 94 S.Ct. at 1648 (quoting *Meehan v. Macy*, 392 F.2d 822, 835 (D.C.Cir.1968), *modified*, 425 F.2d 469 (D.C.Cir.), *aff'd en banc*, 425 F.2d 472 (D.C.Cir.1969)).

A number of courts have rejected vagueness challenges when an employee's conduct clearly falls within a statutory or regulatory prohibition.

*Fowler v. Board of Educ. of Lincoln County, Ky.* 819 F.2d 657, 664-665 (C.A.6 (Ky.),1987)

See also *Jump v. Goldenhersh* 619 F.2d 11, 15 (C.A.Mo., 1980)

The vagueness doctrine "does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding." *Horn v. Burns and Roe*, 536 F.2d 251, 255 (8th Cir. 1976). This is not a criminal statute. Neither does the statute deal with First Amendment rights, which would require the application of a stricter standard. *Smith v. California*, 361 U.S. 147, 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959). The simple question is whether the challenged words "are such that the ordinary person exercising common sense can sufficiently understand and fulfill" the prescriptions of the statute. *Horn*, *supra*, at 254.

[6] Measured against these standards, the statute withstands constitutional attack. The words "debt" and "creditor" are terms of common usage. Persons of ordinary intelligence have a general understanding of what debts are and who creditors are. These words are not inherently ambiguous and do not require more precise statutory definitions. Although the term "class" is not a word which is so

commonly used, it is not unconstitutionally vague and is capable of a common-sense interpretation from the context in which it is used.

*Jump v. Goldenhersh* 619 F.2d 11, 15 (C.A.Mo., 1980)

By limiting its review to the wording of the statute, and implicitly requiring that the entire standard of the statute be contained within that wording, the Court violated its obligation to consider the common and ordinary meanings which attach to words of common usage in considering the application of the statutory provisions to the facts of the case *sub judice*; that approach, in addition to being unsupported by statute or case law, also unintentionally negates the “common sense” part of the standard of review.

**4. The proper application of the standard of review to KRS 322.180(2).**

The Court of Appeals did not incorporate the fact of Curd’s dishonesty in his testimony in considering whether or not the language of the statute would be reasonably understood to apply to him for that behavior.

Since the terms used in KRS 322.180(2), incompetence, misconduct, and gross negligence, are ordinary and common terms easily understood by every individual licensee, those same individuals exercising ordinary common sense could easily understand at least one of those terms would apply to a licensee who chooses to testify dishonestly:

**a)** despite having sworn to tell the complete truth in his oath as a witness; and

**b)** despite being required by the rules of the profession (201 KAR 18:142 Section 3) to testify truthfully and completely when testifying as an expert witness.

For those who would benefit from the assistance of a dictionary for a more concrete definition of the above common and ordinary terms, rather than relying on their intuitive common sense, the following definitions appear in *Webster's Third New International Dictionary, Merriam-Webster Incorporated, 1993*:

INCOMPETENCE: the state or fact of being incompetent

INCOMPETENT: one incapable of doing properly what is required (as in a particular position) Pg 1144

MISCONDUCT: intentional wrongdoing: deliberate violation of a law or standard of behavior. Pg. 1443

GROSS NEGLIGENCE: negligence marked by the total or nearly total disregard of the rights of others and by the total or nearly total indifference to the consequences of an act. Pg. 1002

NEGLECT

1: the quality or state of being negligent

2: failure to exercise the care that a prudent person usually exercises. Pg 1513

Applying those dictionary definitions to the language of Section 2 of KRS 322.180, and the specific findings of the Hearing Officer previously referenced at pages 7-9 of this Brief, those findings of the Hearing Officer clearly indicate that Curd, by his dishonest behavior:

\* did not do what was properly required of him by choosing to testify dishonestly and attempting to mislead the Court on an issue that would potentially deprive the Dennys of their property [INCOMPETENCE]; and

\* intentionally violated a law (i.e., 201 KAR 18:142 Section 3) or standard of behavior (i.e., oath taken as a witness) [MISCONDUCT]; and

\* failed to exercise the care that a prudent person usually exercises and in doing so, exhibited a nearly total disregard of the rights of others and a nearly total indifference to the consequences of his act of testimonial dishonesty [GROSS NEGLIGENCE].

Under either the application of common sense and common usage of the words, or by reference to the dictionary definition of incompetence, misconduct and gross



negligence, Curd's conduct as set out in the previously referenced Hearing Officer's findings of fact and conclusions of law clearly falls within each of those definitions, though it need only fall within one to be actionable under KRS 322.180(2).

One interesting thing about the employment of this terminology that the Court of Appeals in this case has declared unconstitutionally vague, is that that statutory terminology first appeared in the 1938 statute by which created Appellee Board., the *Engineering Act of 1938, Section 20 (Appendix, Tab 11)*:

*(“Revocations – The Board shall have the power to revoke the certificate of registration of any registrant who is found guilty of: . . . .(b) Any gross negligence, incompetency, or misconduct in the practice of professional engineering as a registered professional engineer. . . .)*

The use of these terms now in question, has existed without problems of constitutionality in Kentucky for seventy-five years. Essentially similar language exists as well, in other Kentucky administrative regulatory schemes, and in the administrative regulatory schemes for engineers and land surveyors of other states.

Additionally, these same terms also appear in the *NCEES Model Law, Section 150.10 Grounds for Disciplinary Action – Licensees and Interns*, as subsection A. 2. thereof (**Appendix, Tab 12**): (“Any negligence, incompetence, or misconduct in the practice of engineering or surveying”). Note: “NCEES” is an acronym for National Council of Examiners for Engineers and Surveyors and is the national organization serving the professions of engineering and land surveying, and is responsible for constructing the national part of licensing exams for those professions. The Model Law is just that, the template for an appropriate state regulatory framework for the engineering and land surveying professions.

Also of interest is that under *SCR 4.020 of the Judicial Conduct Commission*, “*Misconduct in office*” and “*Incompetence*” are established as standards which, if violated, may result in an action by the Commission for those individuals subject to its purview, and those terms are also not defined therein.

**5. The proper application of the standard of review to KRS 322.180(12).**

KRS 322.180(12) prohibits the land surveyor from engaging in conduct likely to deceive or defraud the public. A review of the findings of the Hearing Officer, which are the facts of this case, reveals that Curd was significantly dishonest in his testimony as an expert witness. (See relevant excerpts from Hearing Officer’s findings set out previously at pages 7-9 of this Brief. Note: Those specific findings establishing the dishonesty of Mr. Curd’s testimony underlie the consideration for the constitutionality of each of the parts of the statute or regulation in issue herein)

The Court of Appeals on Page 14 of its Opinion, stated:

*A review of the opinion issued by the hearing officer reveals that Curd’s testimony was repeatedly characterized as dishonest.*

Quite simply, dishonest testimony falls squarely within the average person’s concept of deceiving and defrauding the public, particularly when that testimony is also a violation of the oath every witness takes before testifying; to hold otherwise raises the question of “why bother with the oath if it is meaningless?”.

By applying the facts of the case to the statute, a licensed land surveyor exercising common sense and employing the ordinary appreciation of the phrase “conduct likely to deceive or defraud the public”, would experience little difficulty considering that should he testify dishonestly as an expert witness, his license would be subject to discipline by the oversight Board for engaging in conduct likely to deceive or defraud the public.

**6. The proper application of the standard of review to 201 KAR 18:142, Section 2, the obligation of the surveyor to conduct his practice to protect the public health, safety, and welfare.**

Applying the common sense standard to the facts of this case noted previously creates the question of whether any professional land surveyor who chooses to testify dishonestly as an expert witness would, through the exercise of common sense, reasonably understand that such behavior would be in violation of his obligation to conduct his practice to protect the public health, safety, and welfare.

The starting point for consideration of that question is the understanding that the legislature created this statute along with its parent regulatory scheme, through the exercise of the legislature's constitutionally conferred police power to protect the public health and welfare. See *Chambers v. Stengel* 37 S.W.3d 741 (Ky.,2001)

*Pursuant to its police power, the General Assembly may enact legislation to protect the Commonwealth's citizens' health and welfare, and any such statute is presumed to be constitutional if it appears that the provisions have a substantial tendency to provide such protections. See Moore v. Northern Kentucky Independent Food Dealers Ass'n, 286 Ky. 24, 149 S.W.2d 755 (1941).*

*Chambers v. Stengel* 37 S.W.3d 741, 743 (Ky.,2001)

KRS 322.290 makes all licensed land surveyors subject to the provisions of the statutes and regulations governing the practice of land surveying in Kentucky, and specifically recognizes that the code of professional practice and conduct (embodied as 201 KAR 18:142) shall have as objectives, "the protection of the public health, safety, and welfare" and the "maintenance of standards of objectivity, truthfulness, and reliability in public statements". KRS 322.290(11)(a) and (b).

Since the laws regulating the practice of land surveying in Kentucky were therefore created to advance the goal of protection of the public health, safety, and

welfare, it necessarily follows that a licensed individual who is subject to that regulatory scheme, and who violates any one of the regulations or statutes comprising that scheme, must be considered to have failed to conduct his practice to protect the public health, safety and welfare.

The facts of this case put Curd solidly in the core of this regulation. The Court of Appeals has correctly determined that Curd violated 201 KAR 18:142 Section 3, the regulation requiring complete and honest testimony as an expert witness. Clearly, there is no constitutional infirmity in finding Curd, under this set of facts, in violation of 201 KAR 18:142, Section 2 as well, based on his conduct.

**7. The proper application of the standard of review to 201 KAR 18:142 Section 9, the obligation of a licensed land surveyor to avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of the profession.**

Applying the common sense standard to the specific facts before the Court, it is patently obvious that anyone who chooses to testify dishonestly in an effort to mislead the Court would certainly not be seen to enhance the reputation of the profession and just as certainly be seen to have engaged in conduct likely to discredit or reflect upon the dignity or honor of the profession.

The legislature has an interest in maintaining the ethical standards of all professions and vocations it chooses to regulate. If the profession of land surveying were to become a meaningless designation in the eyes and opinions of the public, or a profession with no integrity, it stands to reason that neighbors who are involved in questions about their boundary lines would be less likely to resolve those issues peacefully by deferring to the professional opinion of a land surveyor.

If a surveyor's opinion was for sale to the client with the money to pay for it, or if the opinion was no more reliable than that of any unlicensed individual, the goal of the legislature to protect the welfare of the public would be frustrated. Maintaining the integrity of all regulated vocations and professions advances the legislature's interest in maintaining and promoting the public's safety and welfare.

Applying common sense and the facts of this case to the statute, Curd, by his voluntarily dishonest testimony as an expert witness, has denigrated the profession and is in clear violation of 201 KAR 18:142 Section 9; any professional land surveyor, exercising common sense could have easily have understood and foreseen the applicability of this regulatory language to such a set of facts.

**C. The Appellate Court failed to comply with its obligation to make every effort to construe the sections of the statute and regulation in question to be constitutional, and to honor the strong presumption of the constitutionality of statutes and regulations.**

The Court's obligation when reviewing the constitutionality of a statute was concisely set out in the case of *Posey v. Commonwealth*, 185 S.W. 3d 170 (Ky.2006).

In *Posey*, the court stated:

"When considering the constitutionality of a statute, this court draws all fair and reasonable inferences in favor of the statute's validity. *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493, 499 (Ky.1998) The violation of the Constitution must be clear, complete and unmistakable in order to find the law unconstitutional. *Id.*; see also *Walters v. Binder*, 435 S.W.2d 464, 467 (Ky.1968) ("It is the rule that all presumptions and intendments are in favor of the constitutionality of statutes and, even in cases of reasonable doubt of their constitutionality, they should be upheld and the doubt resolved in favor of the voice of the people as expressed through their legislative department of government.") . . . Indeed, the legislature's power to pass laws, especially laws in the interest of public safety and welfare, is an essential attribute of government. *Manning v. Sims*, 308 Ky. 587, 213 S.W.2d 577, 592 (Ky. 1948)("when the power of the Legislature to enact a law is called in question, the court should proceed

with the greatest possible caution and should never declare an act invalid until after every doubt has been resolved in its favor”(quotation and citation omitted). Thus, we must always accord great deference to the legislature’s exercise of these so-called “police powers”, unless to do so would “clearly offend () the limitations and prohibitions of the constitution.” *Id.*, see also, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 116 S.Ct.2240, 135 L.Ed2d. 700(1996)

*Posey v. Commonwealth*, 185 S.W.3d 170, 175(Ky.2006)

See also *Gurnee v. Lexington Fayette Urban County Government*, 6 S.W.3d 852 (Ky.App.1999), a vagueness case articulating a similar approach as *Posey* to the presumption of constitutionality of statutes.

Had the Court of Appeals properly applied their articulated standard to the case at bar in compliance with the required approach set out by *Posey* and *Gurnee*, the resolution would have been readily apparent and the constitutionality of all the sections of the statute and regulation would have been evident.

That considered approach could have occurred as follows:

\* The Legislature, pursuant to its constitutionally conferred police powers to protect the public health, safety, and welfare, has created the Board to exercise oversight over the practice of land surveying in Kentucky, and has passed statutes and regulations to effect that purpose, which statutes and regulations are binding on, and must be complied with, by all licensed land surveyors. KRS 322.180(3) and KRS 322.290(11)

\* This Court has an obligation in considering a challenge to the constitutionality of a statute or regulation based on vagueness as applied, to conduct its assessment in the context of the particular conduct to which it is being applied. *Doe v. Staples*, 706 F.2d 985 at 988 (6th Cir. 1983).



\* Additionally, this Court is obligated in considering a challenge to the constitutionality of a statute or regulation, to "*not destroy, but to construe it, if possible, consistently with the will of the Legislature.*" *Kay v. Austin*, 621 F.2d 809 at 812 (6th Cir. 1980).

\* "*When an administrative regulation is assessed for vagueness, it must be read as a whole not piecemeal.*"

*Alliance for Kentucky's Future, Inc. v. Environmental and Public Protection Cabinet* 310 S.W.3d 681, 689 - 690 (Ky.App.,2008)

\* In looking at the statute and regulation involved, the importance to the legislature of honest and competent performance by one who practices the profession of land surveying appears to be a central theme of the regulatory scheme.

The Code of professional practice and conduct, embodied as 201 KAR 18:142, (Appendix, Tab 5) was created pursuant to the directive of the legislature set out in KRS 322.290 (11), to establish and adopt a code of ethics that reflects generally recognized principles of professional ethical conduct and maintenance of standards of objectivity, truthfulness, and reliability in public statements, in furtherance of the protection of the public health, safety, and welfare.

A review of the seventeen sections of KRS 322.180 (Grounds for denial of licensure and for disciplinary action - See Appendix, Tab 6), reveals a very obvious common thread of required honesty by land surveyors in the conduct of their practice.

\* When viewed through the lens of the legislature's significant emphasis on honesty in the statutory scheme governing the practice of land surveying in Kentucky,

dishonest testimony as an expert witness would be easily understood by all those subject to that regulatory scheme, to fall within the application of the sections of the statute and regulation at issue.

\* Further, statutory and regulatory enactments may use "*ordinary terms to express ideas which find adequate interpretation in common usage and understanding.*" *Horn v. Burns and Roe*, 536 F.2d 251 at 255 (8th Cir. 1976).

\* Turning to the specific facts of the case at bar, 201 KAR 18:142 Section 3 mandates that a licensed land surveyor testifying as an expert witness, must do so honestly and completely. Mr. Curd violated that regulation in a significant way by testifying dishonestly as an expert witness and the determination of that violation is supported by substantial evidence. (Opinion of the Court of Appeals, last full sentence on page 15 thereof).

\* Since that regulation must be considered to have been created by the Legislature to protect the public's health, safety, and welfare, it necessarily follows that the violation of that regulation represents a failure of Mr. Curd to conduct his practice to protect the public health, safety and welfare. 201 KAR 18:142 Section 2

\* Additionally, since 201 KAR 18:142 Section 3 mandates honesty, it also necessarily follows that dishonest testimony in the public forum of a court proceeding would amount to a wrongful attempt to deceive or defraud the public. KRS 322.180(12)

\* Further, since Mr. Curd was obligated to not engage in behavior that violates the regulation prohibiting dishonest testimony as an expert witness, it also necessarily follows that such a violation would necessarily constitute some level of misconduct and/or incompetence as those terms are ordinarily used. KRS 322.180(2)

\* Additionally, Mr. Curd in exercising common sense, would have to be considered to have fair warning that should he, after representing himself to the Court as a licensed land surveyor with significant expertise in the profession, decide to testify dishonestly and thereby violate both the specific regulation prohibiting such action, and the oath every witness takes before testifying, that his failure would be commonly considered to reflect unfavorably on the entire profession of land surveying, and to diminish the respect and deference accorded to members of the profession.

Any profession that looks the other way and condones dishonesty in sworn testimony in legal proceedings must suffer a loss in dignity and honor in the eyes of the public. 201 KAR 18:142 Section 9

\* Therefore, all of the above noted statutes and regulations are not unconstitutionally vague as applied to Mr. Curd under the specific facts of this case.

**D. The Court of Appeals failed to dispose of all other non-constitutional issues before addressing the constitutionality of the statutes and regulations.**

The Court of Appeals failed to address the outstanding issue of what matters had been preserved for appeal by Appellant in the appeal of the Board's Final Order to Franklin Circuit Court.

Appellant, in his brief (Pg. 20), cites to the case of *D.F. v. Codell*, 127 S.W.3d 571 (Ky.2003) for the proposition that the court may consider constitutional issues first and declare the other issues moot.

In the case of *Louisville/Jefferson County Metro Government v. TDC Group, LLC*, 283 S. W. 3d 657 (Ky., 2009), one of the litigants therein attempted to rely on the *Codell* case for the proposition cited by Appellee, and the court did not agree, pointing out that the other issues ignored by the court in the *Codell* case also “involved other constitutional challenges to the statutory scheme in question”. *Id.* at 660.

(It is) “the long-standing practice of this Court ... to refrain from reaching constitutional issues when other, non-constitutional grounds can be relied upon.” *Baker v. Fletcher*, 204 S.W.3d 589, 597-98 (Ky.2006); see *Dawson v. Birenbaum*, 968 S.W.2d 663, 666 (Ky.1998) (“It is well settled that where a party pleads both statutory and constitutional claims, the court deciding those claims should limit itself to considering the statutory claims if in so doing the court may avoid deciding complex constitutional issues.”); *Preston v. Clements*, 313 Ky. 479, 232 S.W.2d 85, 88 (1950) (“The prevailing rule seems to be that the courts will avoid the question of constitutionality unless necessary to a proper determination of the merits of the cause under consideration.”); see also *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157-58, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984) (“It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them.”); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.”). This practice of avoiding constitutional questions is further buttressed in this Court's jurisprudence law by the presumption of constitutionality of statutes. *Baker*, 204 S.W.3d at 598.

*Louisville/Jefferson County Metro Government v. TDC Group, LLC* 283 S.W.3d 657, 660 (Ky.,2009)

The Court should have considered what matters were preserved for appeal before moving on to any constitutional determination; by so doing, perhaps the constitutional issue would have remained to some degree, but at the very least, the case would have been narrowed with fewer issues available for review.

In particular, the Court should have considered the effect of Appellant's exceptions in determining whether or not the issue of substantial evidence was preserved for challenge on appeal by Appellant.

## **II. The Board had jurisdiction to discipline a licensee for his expert testimony in a court of law.**

### **1. Separation of Powers Doctrine.**

Appellant in his brief beginning on page 21, first proposes that the Separation of Powers Doctrine evidenced by Sections 109, 27, 28, and 116 of the Kentucky Constitution, denies jurisdiction to the Board to discipline Mr. Curd for his testimony before the Circuit Court.

Appellant relies on his own personal interpretation of the Kentucky's Constitution, and his version on the facts of the underlying case, rather than on the Facts and Conclusions of Law as established by the Hearing Officer.

The Legislature has the right, through the exercise of its police power, to protect and promote the health, safety, and welfare of its citizens.

*Pursuant to its police power, the General Assembly may enact legislation to protect the Commonwealth's citizens' health and welfare, and any such statute is presumed to be constitutional if it appears that the provisions have a substantial tendency to provide such protections. See Moore v. Northern Kentucky Independent Food Dealers Ass'n, 286 Ky. 24, 149 S.W.2d 755 (1941)."*  
*Chambers v. Stengel, 37 S.W.3d 741, 743 (Ky.,2001)*

The Kentucky Legislature established Appellee Board and empowered it with the discretionary authority to oversee a regulatory scheme which provides both for initial licensing of individuals to practice land surveying in Kentucky, and continued oversight of those so licensed.

Appellant relies for his position on the authority of *American Beauty Homes Corp. v. Louisville and Jefferson Co. Planning and Zoning Commission, et al.*, 379 S.W.2d 450 (Ky.1964) In *American Beauty*, the Court found that the separation of powers doctrine would not allow the Legislature to delegate its responsibility for zoning determinations to the Judiciary.

Contrary to the comments made by Mr. Curd, the Board is not dictating the content of any expert testimony but is simply mandating that if a licensee does choose to testify as an expert, he or she must do so honestly. The regulation is a reasonable requirement in support of a significant governmental interest, mandating conduct that serves the interests of both the legislature and the judiciary, and clearly protects the public. There is absolutely no evidence or finding that the Board attempted to influence in any way, any of the proceedings in Wayne Circuit Court. In fact, the Board's decision in this matter is an obvious affirmance of the decision in *Denny v. Southwood*. If anyone is trying to second-guess that Court, it is Appellant, not the Board.

There is no violation of the Separation of Powers Doctrine based on the Board performing its legislatively mandated role of implementing and overseeing the statutory scheme governing land surveying in Kentucky. The Court of Appeals was in agreement with the Board on this issue. (Opinion of the Court of Appeals, Appendix, Tab 1, Page 23, last paragraph)

**2. Mr Curd's assertion that he could not be disciplined for the failure of the attorneys or the Court to ask the proper questions.**

This is an issue that is not addressed in the Hearing Officer's Findings of Fact and Conclusions of Law, and never came up in any of Appellant's Exceptions. Additionally,



this issue was not addressed by the Franklin Circuit Court in its Opinion and Order, nor did Appellant disclose this issue on his Kentucky Court of Appeals Civil Prehearing Statement. The Court of Appeals found that this issue has not been preserved for appeal. (See Opinion of the Court of Appeals, Appendix, Tab 1 – pg. 26 last paragraph, continuing on to pg. 27) Accordingly, it is not available for review by any appellate court.

Appellee Board would also suggest however, that Mr. Curd had numerous opportunities to discuss the material fact of the boundary lines of Southwood being limited by, and located at, the monuments of the Mathews tract, and the Eadsville Highway.

For example, Mr. Curd alone, prepared for use as a court and deposition exhibit, a deed plot of Southwoods' deed description overlaid and drawn on a topographic map, but in doing so, ignored the monuments called for in Southwoods' deed that appeared on the topo map, which according to the rules of the profession, necessarily would define and limit the Southwood's boundaries to those locations. (TH, Exhibits 7 and 10). Those boundaries were the central issue in the case.

In fact, Mr. Curd was specifically asked at trial if the southern boundary line of Southwood extended across the road, and he answered that it did, despite knowing that it couldn't under the rules of the profession. (TH, Exhibit 2, Pg. 23, Lns. 10-12). Mr. Curd's answer should have been based on the essential principle of monumentation controlling what was clearly an incorrect course and distance. (See also Appendix, Tab 4, Findings of Fact, 31, 36, 37, 42-46, 63, and Conclusions of Law 14, 16, 17, 23, 24, 26 and 27.)

Mr. Curd was also asked specifically if the line he had drawn as being representative of Southwood's deed description could only cross the Eadsville highway if he just ran course and distance and ignored monumentation. Mr. Curd's response to that question was that he wasn't ignoring the monuments but that he just hadn't been out there to look for it. (Trial transcript, TH Exhibit 2, Pg. 40, Lns. 4-11) The problem for Mr. Curd was that he had previously testified that he had searched for monumentation and reviewed the corners of the description, and had done his research and done all the work of a survey except setting monumentation and field measurements. (See Appendix, Tab 4, FF 37,39, and 40.) The right questions were asked. The dishonest answers were given.

It was Mr. Curd's repeated, incorrect, and dishonest testimony that Mr. West did not perform any research that created a problem for Mr. Curd. The questions were not the issue, only Mr. Curd's dishonest and inaccurate answers to the questions that were asked. (See Tab 4, FF 33, 34, 35, CL 32, 33, 34, 35, 36, 37, 38, 39, 42)

Similarly, Mr. Curd alone testified that he was currently employed as an investigator when that was not true. (See Tab 4, FF 49, 50, CL 48)

Mr. Curd's active dishonesty in his various statements gives the lie to the assertion that he can't be disciplined for the attorneys and court not asking the right questions. While there may be some other case where this might be an actual issue, this is not such a case.

### **3. The Doctrine Of Witness Immunity does not apply.**

The issue of witness immunity was not noted in Appellant's exceptions and therefore, was not preserved for appeal to Franklin Circuit Court.

Appellant proposes that the Doctrine of Witness Immunity gives Mr. Curd immunity from any legal action arising out of his testimony as an expert witness, including disciplinary action by the Board for the professional shortcomings of that testimony.

In support, Appellant cites the case of *Turner v. Kentucky Bar Association, Ky.*, 980 S.W.2d 560 (Ky.1998). *Turner* was a case involving the Legislature's statutory authorization of non-lawyers representing parties in workers' compensation proceedings.

In *Turner*, the Court declined to extend comity to the Legislature, and rested its decision on the "exclusive authority of the Supreme Court to promulgate the rules of legal practice and procedures." *Turner v. Kentucky Bar Association, Ky.*, 980 S.W.2d 560, 562 (Ky.1998)

Our set of facts has absolutely nothing to do with Courts regulating who gets to practice law and where. There is no infringement on the judicial branch.

Kentucky's Supreme Court has recently addressed this very issue of witness immunity in the case of *Maggard v. Com., Bd. of Examiners of Psychology* 282 S.W.3d 301 (Ky.,2008), where the question at issue was whether or not a licensed psychologist could be disciplined by the Board of Psychology for his testimony as an expert witness in a civil trial.

*"We likewise reject Maggard's argument that he was entitled to absolute immunity because he was participating in a civil judicial proceeding. Maggard was neither court-appointed nor an integral part of the judicial process in the case. See Stone v. Glass, 35 S.W.3d 827 (Ky.App.2000). Moreover, the immunity granted to a witness in a judicial proceeding is immunity from liability for civil damages. Id. at 828 (citing Lawson v. Hensley, 712 S.W.2d 369 (Ky.App.1986)). Here, Maggard is seeking immunity from an administrative disciplinary proceeding, not from civil damages. We agree with the lower courts that Maggard is not entitled to immunity from an administrative disciplinary proceeding."*

*Maggard v. Com., Bd. of Examiners of Psychology*, 282 S.W.3d 301, 303 (Ky.,2008)

Both Franklin Circuit Court and the Court of Appeals found Maggard to be dispositive of the issue, thereby allowing Mr Curd to be subject to professional discipline for his testimony as an expert witness. Mr. Curd was not a court appointed witness, and therefore did not enjoy quasi-judicial immunity. Mr. Curd was simply an expert witness hired by the Southwoods.

### **III. The Findings Of Fact, Conclusions Of Law were not arbitrary and were supported by substantial evidence**

The Franklin Circuit Judge noted in his Order and Opinion that since he had ruled that all the involved statutes and regulations were unconstitutionally vague as applied to Mr Curd, "*any discussion of substantial evidence review is unnecessary.*" *Curd v. KY State Bd. of Licensure for Professional Engineers and Land Surveyors* (Franklin Circuit Court, Case No. 09-CI-231) Opinion and Order, Appendix, Tab 2 at Pg.9)

The Court of Appeals found that:

- \* *The hearing officer's findings appear in all respects to be based upon a thorough review of the evidence and testimony provided.* (Tab 1, Pg. 17, first sentence); and
- \* *Believing the hearing officer's findings to have been based upon substantial evidence of record, we do not find such a reassessment of the evidence to be merited in this instance.* (Tab 1, Pg. 15, last sentence)

Appellant approaches the issue of substantial evidence by stating that the volume of Findings and Conclusions is so large that to contest them individually would exceed the page limitation of the Brief. (Appellant's brief, Pg. 32) He then proceeds to divide them into four categories and give his personal, generalized summary of what a few of

the Findings and Conclusions may say, with little, if any, reference to the actual wording of a specific Finding or Conclusion.

The net effect of this approach is that the actual wording of a Finding of Fact or Conclusion of Law is not addressed, and this Appellee and any reviewing Court are left to guess at just exactly which Findings and Conclusions, or which parts of any Findings and Conclusions are in contention.

Mr Curd cites no authority and only a few references to the record. Appellee will comment on each category in the order presented by Cross-Appellant.

### **1. Boundary testimony by Mr. Curd.**

Appellant cites no specific Finding of Fact and makes several misstatements in his generalized interpretations of the unidentified Findings. He then uses his mischaracterizations as the basis for his argument.

In addition to the citations to the record made by the Hearing Officer in Findings of Fact 36, 37, 42, 43, 44, 45, 46, and 55; and Conclusions of Law 14, 15, 16, 17, 18, 23, 24, 25, 26, 27, 28, 29, 36, all of which bear on the issue of the determination of the boundary, Appellee Board would offer the following additional citations to the underlying evidence supporting those determinations:

Mr. Curd testified in his deposition, that by plotting the Southwood deed and placing that plotting on a topo map, the Southwood line extends across highway 789 (TH, Exhibit 1, Deposition, Page 44, Lns 6-10; TH, Exhibit 2, Trial, Pg. 23, Lns 6-12); to do so, Mr. Curd had to ignore obvious monumentation, a fact noted by the Circuit Court in the both judgments (TH, Exhibit 17, Pg. 10, beginning with the first line, and also Pg. 12, Paragraph 3; and TH, Exhibit 12, Pgs. 11-13, Paragraphs #2 and 3).

The topo map showed both the monument of the branch called for in the Southwood deed, along with the monument of Highway 789, but Mr. Curd ignored those monuments in placing his lines on that topo map, and instead, held as controlling the placement of his lines, an ambiguous linear monument ("forks of the branch") which did not appear in the Southwood deed and appeared only in a deed from 1884, which deed was to a larger tract out of which the Southwood tract was eventually created in 1944. Mr. Curd did not introduce that deed into evidence. Mr. Curd had no rational justification for this approach.

That "forks of the drain" monument could certainly be considered "ambiguous" since:

- \* It is a monument not found in the Southwoods' 110 acre description; (TH, Exhibit 7; TH, Vol.IV, Pg.96, Lns 9-19) and

- \* It is located on the eastern side of the 100 acre tract, which boundary was not in issue in the case;(TH, Vol.V, Pg.70, Lns. 6-17; TH, Vol.I, Pg. Lns 9-20) and

- \* It was from DB U Pg. 268, an 1884 deed of a larger tract from which the Southwoods' 110 acre tract was eventually created in 1944, 60 years later; (TH, Vol.IV, Pg. 89, Lns. 11-12) and

- \* It is a linear monument in that the boundary line may be located on it at any number of points; and

- \* Mr. Curd never visited it;(TH, Vol.V, Pg.86, Lns.1-13) and

- \* While it is a natural monument, that quality means exactly nothing in this matter, since it is not in conflict with any monument called for in the Southwoods' description;(TH, Vol. IV, Pg. 99, Lns 6-21; TH, Vol.I, Pgs. 118-119, Lns. 12-19) and

- \* The very obvious monuments of the Eadsville Highway, and the branch and drain called for in Southwoods' description, were easily identifiable in the field and on the topo;(TH, Vol.I, Pg. 94, Lns. 17-20) and

- \* The beginning and ending calls of Southwoods' deed description were located on the Eadsville Highway, as the southern monument and clearly defining that part of the boundary of that tract; (TH, Exhibit 7) and

\* Mr. Curd, by his own admission, failed to use the monuments called for in Southwoods' deed that were also discernable on the topo map, in creating his drawing of his deed plot on the topo map. (TH, Vol. V, Pgs. 97-98, Lns. 13-6)

It is very evident that Conclusion of Law #16, one of two Conclusions of Law specifically referenced by Mr Curd in this discussion, is not arbitrary and is supported by substantial evidence.

Mr. Curd also complains about part of Conclusion of Law 23 but offers no support or argument for his complaint.

Conclusion of Law 23 states that:

*"Basically, Curd attempted to cause the court to believe that he had performed most of the parts of a survey, and then presented the deed plotted topo map as inferentially representing his opinion as to where the boundary line was located based upon his completed work."*

Mr. Curd alleges that the part of that Conclusion of Law that states that "Mr. Curd 'inferentially' and erroneously represented where the boundary line was located was not supported by substantial evidence." (Appellant's brief, Pgs.34 - 35.)

Mr. Curd testified that his graphic representation of the Southwood description "fit the topo" (TH, Exhibit 1, Deposition Pg. 44, Lns 6-10; TH, Exhibit 2, Trial Pg. 24, Lns 13-18) and that Southwoods' line "appears to go across the road" (TH, Exhibit 2, Trial Pg. 23, Lns.6-12) which clearly, as the Circuit Court opinion noted, cannot be true since it can only fit the topo by ignoring the monumentation of the deed,(TH, Exhibit 12, Pg. 12, Paragraph 3).

Mr. Curd had previously represented that he had:

\* reviewed the work of West, which he could only have done if he was knowledgeable about monumentation, (TH, Exhibit 1, Pg. 8, Lns 4-8; TH, Vol. I, Pg.95, Lns. 14-22);



\* conducted research (TH, Exhibit I, Pg. 8, Lns. 5-7; TH, Vol. I, Pg. 96, Lns 7-11);

\* performed preliminary field measurements (TH, Exhibit 1, Pgs. 8-9, Lns. 18-6; TH, Vol. I, Pg. 96, Lns 16-17;

\* walked along the property lines and compared notes and compared calls and deeds and plats and those sort of things (TH, Exhibit 1, Pg.10, Lns. 15-18; TH, Exhibit 2, Pg.23, Lns 13-18; TH, Vol. I, Pg. 98, Lns 9-12);

\* overlaid the 110 acre description on the topo map by determining monuments (TH, Exhibit 1, Pg. 37, Ln 16-20; TH, Exhibit 2, Pg. 24, Lns. 3-18; TH, Vol. I, Pg. 103, Lns. 5-9);

\* analyzed the property corners (TH, Exhibit 2, Pg. 21, Lns 22-23; TH, Vol. I, Pg. 108, Lns. 18-20); and

\*done all of a survey with the exception of actually doing field measurements and setting monuments (TH, Exhibit 1, Pg.20, Lns 15-24; TH, Vol. I, Pg. 100, Lns 1-10).

Mr. Curd's topo map with the lines drawn on it was much more than "just a deed plot" and clearly it was intended to mislead the Court into believing that the deed lines of Southwood extended into the areas claimed by Southwood.

Conclusion of Law 23 is not arbitrary and is supported by substantial evidence.

## **2. Mr. Curd's testimony regarding the research work of James West.**

Appellant takes issue with Conclusions of Law 33 and 44, since those are the only two he references by number.

Conclusion of Law 33 states that:

*As discussed above, Curd's testimony was result driven, not objective. Curd knew or should have known that West's ultimate conclusions as to placement of the boundary lines was correct.*

Conclusion of Law 44 states that:

*The Hearing Officer concludes that Curd violated KRS 322.189(2) and (12) and 201 KAR 18:142, Sections 3 and 9, by testifying by deposition and at trial, in other than a truthful*

*manner, either deliberately or negligently, regarding the research performed by James (West).*

Again, in discussing this issue, Appellant does not address the actual language of the two Conclusions of Law that he references by number; instead, he gives his impression of what each Conclusion says, and his summaries do not line up with the actual language of each Conclusion.

The well established rules of the profession would have resulted in any surveyor reaching the same conclusion that the boundary of Southwoods' property was the highway, and the Mathews line. (See FF 22-28) Even Mr. Curd's expert witness, Professor Kellie, testified that the Southwood boundary could not extend beyond the line of Mathews, or the Eadsville Highway, and that a surveyor who would testify as an expert witness in a case where this is the exact issue would be "derelict in his duty as a surveyor" if he did not stop the boundary at the Mathews line and at the Eadsville Highway. (TH, Vol. V, Pgs. 97, 98, Lns 10-2)

In addition to the citations to the record made by the Hearing Officer in Findings of Fact 30, 33, 34, and 35, and Conclusions of Law 32, 33, 34, 35, 37, 38, 39, 41, 42, the Board would offer the following citations to the underlying evidence supporting those determinations:

Mr. Curd repeatedly throughout his deposition and trial, stated in various ways that Mr. West did not do any research. (TH, Exhibit 1, Pg. 22, Lns 8-16; TH, Exhibit 1, Pgs. 26 and 27, Lns 15-6; TH, Exhibit 1, Pg. 41 Lns 2-9; TH, Exhibit 2, Pg. 11, Lns 10-12; TH, Exhibit 2, Pg. 43, Lns 4-24) A simple reading of the answer made by Mr West in his deposition shows that Mr West received the deed work from a title attorney, and

reveals Mr Curd's deliberate misstatement and distortion of what Mr. West actually said. (TH, Exhibit 5, Pg. 5, Lns 12-17).

It is not wrong for a surveyor to rely on someone else to do the title work on a piece of property. (TH, Vol.I, Pg. 34, Lns 7-9; TH, Vol.III, Pg.s 8-9, Lns 15-7; TH, Vol.IV, Pgs. 105-106, Lns 19-11).

Mr. Curd knew that his representation that Mr. West did not do any research was an erroneous characterization of Mr. West's effort and was taken out of context. (TH, Exhibit 11, Pg. 21, Lns 15-17).

The record fully supports Conclusions of Law 33 and 44.

**3. Mr. Curd's dishonest testimony that he was currently employed as an investigator for the Board.**

In stating his qualifications to be considered as an expert witness, Mr. Curd testified that he was then currently an investigator for the Board. That statement was not true. (TH, Vol. III, Pg. 5, Lns 4-10)

Mr. Curd had been a contract investigator for the Board in the past, but the Board had hired full time employee investigators. Mr. Curd had been informed by Mr. Fentress, Assistant Executive Director of the Board, that he would not be further employed as a contract investigator (TH, Vol. III, Pg. 5, Lns 11-17)

Mr. Curd's excuse for the incorrect testimony was that he was just reading from an incorrect resume.

Mr. Fentress, in his testimony, stated that Mr. Curd should have known that his statement was inaccurate (TH, Vol. III, Pg. 6-7, Lns 19-1) and that it was used to elevate Mr. Curd's status (TH, Vol. III, Pg. 69, Lns. 2-17; Vol. III, Pg. 54, Lns. 13-24).

The Hearing Officer of course, not only listens to the testimony, but observes the demeanor of the witnesses, weighs the evidence, and considers everything that occurs in the hearing in determining who to believe or not believe. He or she should be afforded great latitude in making those determinations. *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 at 458 (Ky.App.2003)

Mr. Curd is an individual who understands the importance of attention to detail, given his background as a former investigator for the Board, as a licensed realtor, appraiser, and land surveyor, as a mediator, as an individual who conducts seminars for the profession, and as a land surveyor who testifies frequently as an expert witness.

The Hearing Officer's evaluation of witness should be afforded great deference by the Court. See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 at 494 (1951) and *Kentucky State Racing Commission v. Fuller*, 481 S.W. 298 (Ky. 1972).

There is substantial evidence to support the Hearing Officer's determination of Conclusions of Law 45-48, and 49.

**4. Mr Curd's inconsistent testimony that he had not been to the site to look for monumentation.**

The actual exchange took place near the end of the Wayne Circuit Court trial. Mr Jones, the Dennys' attorney had just taken Mr Curd through a step by step cross examination on the subject of Mr Curd's testimony of the Southwood's deed description line running across the Eadsville Highway into the field beyond.

Mr. Jones asked Mr. Curd:

*"Going back to your plat on the topo, the way that you get the property, the 110 acres, to go across the highway is just to run course and distance and ignore monumentation.*

Mr. Curd responded:

*"Well, I'm not ignoring it. I haven't been out there to look for it. I just am doing the process of getting to that field survey."*

*TH, Exhibit 2, Pg. 40, Lns 5-11.*

However, as noted above, Mr Curd had previously testified that he had:

- \* reviewed the work of West, which he could only have done if he was knowledgeable about monumentation, (TH, Exhibit 1, Pg. 8, Lns 4-8; TH, Vol. I, Pg.95, Lns. 14-22);

- \* walked along the property lines and compared notes and compared calls and deeds and plats and those sort of things (TH, Exhibit 1, Pg.10, Lns. 15-18; TH, Exhibit 2, Pg.23, Lns 13-18; TH, Vol. I, Pg. 98, Lns 9-12);

- \* overlaid the 110 acre description on the topo map by determining monuments (TH, Exhibit 1, Pg. 37, Ln 16-20; TH, Exhibit 2, Pg. 24, Lns. 3-18; TH, Vol. I, Pg. 103, Lns. 5-9);

- \* analyzed the property corners (TH, Exhibit 2, Pg. 21, Lns 22-23; TH, Vol. I, Pg. 108, Lns. 18-20); and

- \*done all of a survey with the exception of actually doing field measurements and setting monuments (TH, Exhibit 1, Pg.20, Lns 15-24; TH, Vol. I, Pg. 100, Lns 1-10).

Mr. Curd's testimony was inconsistent and contradictory. Findings of Fact # 37, 39 and 40 are supported by substantial evidence.

**IV. The penalty of a six month suspension was within the discretion of the Board and was appropriate.**

Mr. Curd complains that the six month suspension recommended by the Hearing Officer and imposed by the Board, was excessive.

Appellant cites the case of *Hughes v. Kentucky Horse Racing Authority*, 179 S.W.3d 865(Ky.App.2004) in support of his argument.

In *Hughes*, a Kentucky Racing Commission employee appealed his termination from the position of racing license inspector. The state Personnel Board modified the

penalty to a 30 day suspension without pay. The Kentucky Racing Commission appealed and the Franklin Circuit Court reversed. The employee appealed and the Court of Appeals reinstated the Personnel Board's modification finding that the Personnel Board had explicit statutory authority to do so. In the case *sub judice*, there is no such comparable statutory authority empowering a judicial court acting in its appellate capacity of review of an administrative disciplinary action to substitute its own concept of a penalty.

KRS 322.180 grants the Board the power to suspend or revoke a licensee.

*A circuit court, in reviewing the decision of the administrative agency, may not substitute its view of the penalty or discipline assessed by the agency. The circuit court is without authority to change the penalty in the absence of a finding that the decision of the board was arbitrary and capricious, or a clear abuse of discretion.*

*City of Louisville By and Through Kuster v. Milligan* 798 S.W.2d 454, 458 (Ky.,1990)

A six month suspension can hardly be considered a clear abuse of discretion. As set out above, Mr. Curd, in his voluntary testimony as an expert witness:

- \* testified at trial inconsistently that he had not been to the site to look for monumentation when he had previously testified at deposition that he had made two physical inspections of the property during which time he had analyzed the property corners (FF 37, 39, and 40)

- \* plotted deed lines on a topo map using a monument that did not appear in the subject deed description, and ignored the obvious monumentation in the subject deed, in an attempt to deceive a public court. (FF 36, 37, 42, 43, 44, 45, 46, and 55; Conclusions of Law 14, 15, 16, 17, 18, 23, 24, 25, 26, 27, 28, 29, 36)

- \* testified incorrectly and dishonestly, in relating his credentials to qualify as an expert witness, that he was at that time, an investigator for the Board. (FF 49, 50, 51. CL 47, 48)

- \* stated that he knew that the Southwoods' deed did not encompass the 12 acres south of the Eadsville Road, and the 9 ½ acres of the Mathews tract, but yet testified to the contrary. (FF 31, 63)

\* testified incorrectly and dishonestly about the work done by James West, the surveyor testifying for the opposing side, by stating repeatedly that Mr. West had not done any research, based on Mr. West's statement that an attorney had supplied him with the title work. (FF 30, 33, 34, and 35; CL 32, 33, 34, 35, 37, 38, 39, 41, 42)

All of these failures of Mr. Curd to abide by the regulations of the profession evince an attitude of dishonesty and deception. In addition, Mr. Curd displayed a complete disregard for the rules guiding the performance of his professional duties, and used his extensive experience and knowledge to attempt to benefit his paying client and attempt to wrongfully deprive the Denneys of their property.

Both the Denneys and the Southwoods have undergone an unnecessary long, expensive, and stressful experience largely because Mr. Curd opted to depart from the basic rules and guidelines of the profession.

By his actions, he has violated a number of our statutes and regulations and has clearly held the profession up in a dishonorable light.

A six month suspension is certainly appropriate.

### **CONCLUSION**

The Hearing Officer in the underlying administrative action set out in great detail a number of findings and conclusions which clearly indicate the extent of the Appellee's dishonesty in his testimony as an expert witness, which dishonesty violated the very specific and clear provisions of 201 KAR 18:142, Section 3, as well as his oath as a witness. A review of the statutory scheme governing the practice of land surveying in Kentucky also reveals just how important honesty in the performance of the practice of land surveying is to the legislature.



The Court of Appeals found the Appellant's violation of his professional obligation to testify truthfully, honestly, and completely to be supported by substantial evidence. That very same behavior by the Appellee constitutes the factual basis for his violation of the remaining sections of the statute and regulation that are in issue. However, the Court of Appeals failed to consider the facts of the case in considering the constitutionality of the other sections of the statute and regulation in question, which failure violated the very standard the Court had articulated. In essence, the Court considered the wording of the statute and regulation alone as if they were evaluating them for being overbroad, rather than vague as applied.

The fact that the Court of Appeals could not conclude that the Appellant's dishonest testimony in violation of his oath as a witness, as well as a specific regulation requiring honest testimony, amounted to at least some level of misconduct, would suggest that the Court of Appeals' method of statutory interpretation actually employed, rather than the one they articulated, should be set aside.

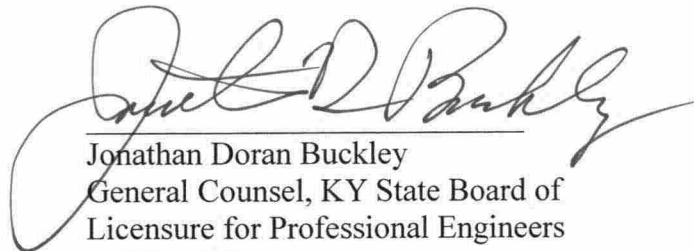
The Court of Appeals' rejection of the use of common language in statutes, in favor of a more specific construction, goes to the very heart of the system of administrative law, with destructive results for the public, whose protection will be significantly diminished, as well as for the courts of the judiciary as well, since every defense attorney will take his or her chances on appeal.

If this demonstrated approach of the Court of Appeals to constitutional review of the vagueness of statutes not involving criminal statutes or first amendment constitutional issues is validated, it will be unlikely that any entity's ethical code will be enforceable, since they are all by necessity, crafted to some degree in broad language.

Appellant's contention that Mr. Curd had some version of immunity for his voluntary testimony as an expert witness is, as noted in this brief, contrary to existing case law. Additionally, any license issued by a regulatory board is not a license to lie. It is difficult to see how the respective interests of the public, the legislative branch, and the judicial branch would be improved by allowing any licensee to ignore the accepted standards of his or her profession or vocation, and go into court as an expert witness and testify dishonestly.

For all of the above reasons, the Final Order of Appellee Board should be reinstated as dispositive of this matter and the Opinion of the Court of Appeals should be reversed for the four sections of the statute and regulation the Court deemed unconstitutionally vague as applied.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Jonathan D. Buckley', is written over a horizontal line.

Jonathan Doran Buckley  
General Counsel, KY State Board of  
Licensure for Professional Engineers  
and Land Surveyors  
160 Democrat Drive  
Frankfort, KY 40601  
(502) 573-2680  
Counsel for Appellant