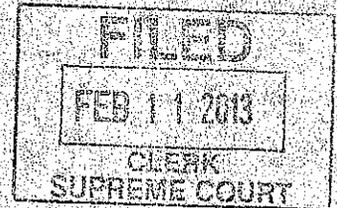


SUPREME COURT OF KENTUCKY
No. 2012-SC-000169-D
(2010-CA-000693 & 2010-CA-000730)



**KENTUCKY STATE BOARD OF
LICENSURE FOR PROFESSIONAL
ENGINEERS AND LAND SURVEYORS**

APPELLANT

V.

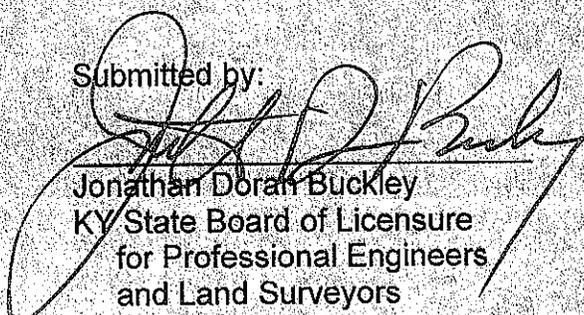
**FRANKLIN CIRCUIT COURT
2009-CI-00231**

JOSEPH B. CURD, JR.

APPELLEE

APPELLANT'S BRIEF

Submitted by:


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for Professional Engineers
and Land Surveyors
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CERTIFICATE OF SERVICE

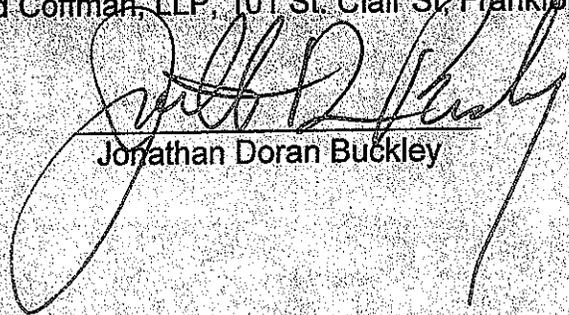
I hereby certify that on this the 11th day of February, 2013, ten copies of the foregoing was hand delivered to:

The Clerk of the Supreme Court of Kentucky, The Capitol, Frankfort, Ky 40601;
with a true copy of the foregoing being hand delivered to:

The Clerk, Court of Appeals, 360 Democrat Dr, Frankfort, KY 40601; and
sent by First Class U.S. Mail to:

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
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Jonathan Doran Buckley

INTRODUCTION

This is a case where the Court of Appeals affirmed in part and reversed in part, a Circuit Court's decision that reversed an administrative disciplinary decision of Appellant Board.

The Court of Appeals found two sections of one statute, and two sections of one regulation, unconstitutionality vague as applied to the Appellee land surveyor, and it is from this determination of unconstitutionality of those sections of the state's regulatory scheme governing land surveying in Kentucky that Appellant Board now appeals.

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. Also in issue, is the consideration of whether or not the Court of Appeals failed to correctly follow both statute and precedent in considering the constitutionality of the sections of the statute and regulation involved, and by such failure impermissibly crossed the fine line separating the exclusive jurisdiction of the legislature from that of the judiciary. Appellant believes that oral argument would be helpful to the Court in deciding the significant issues presented.

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STATEMENT 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 regulations and statutes.

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 Appellant 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. 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) and it is from this determination of unconstitutionality of those parts of that statute and regulation that the Board is seeking discretionary review.

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 Dennys 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) that lay north and east of two tracts 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 (Denny also owns the property bounded by the Eadesville Highway to his north.)

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

The deed description of the 110 acre original conveyance from Ramsey to the first purchaser, is identical to the description of Tract III in the conveyance to the Southwoods, eventual successors in title to the tract. 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, 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., Appellee herein.

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).

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, which testimony violated 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.

With regard to Mr. Curd's testimony concerning the deed description of Southwood, the Hearing Officer found as follows:

* 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; (CL 28)

* Curd did not conduct his practice in order to protect public and professional interests served by application of minimum standards of surveying practice; (CL 28)

* 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.

With regard to Mr. Curd's testimony concerning the work performed by Mr. West, the Hearing Officer found as follows:

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

* that surveyors are permitted to rely on records supplied by others under 201 KAR 18:150; (CL 34)

* that 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; (CL 37)

* that the Eadesville Road was a controlling monument and boundary line, and that this conclusion was readily apparent to Curd based upon his possession of relevant deeds and plats; (CL 37)

* that Mr. Curd's attempt to discredit West's conclusions and research was not made upon an honest conviction; (CL 37)

* that Mr. 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)

* that Curd's attempt to discredit West's proper conclusions were intended to mislead a public court; (CL 39)

* that Mr. Curd's testimony about Mr. West's research was not founded on adequate knowledge of the facts in issue, was without honest conviction as to the accuracy and propriety of his testimony, and was not made objectively or impartially; (CL 41,42)

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

* that 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.

With regard to Mr. Curd's testimony concerning the status of his employment with the Board, the Hearing Officer found as follows:

* that in reciting his qualifications Mr. Curd testified that he was at that time, an investigator for the Board. (FF 49)

* that Mr. Curd had previously been an investigator for the Board but that he was no longer so employed at the time of trial. (FF 50)

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

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

E. Procedural history – Board's Final Order

The Board adopted in its Final Order, without any change, all of the Hearing Officer's Findings of Fact, and Conclusions of Law, and imposed the Hearing Officer's recommended penalty.

F. Procedural history – Appeal to Franklin Circuit Court

Mr. Curd appealed to the Franklin Circuit Court, which found the statutes and regulations Mr. Curd violated, to be unconstitutionally vague as applied to

Mr. Curd. Both the Board and Mr. Curd appealed the Franklin Circuit Court decision to the Court of Appeals.

G. Procedural history – Discretionary Review

Both Parties have been granted Discretionary Review by the Supreme Court. The Board is seeking review of the determination of unconstitutionality of the four sections of the statute and regulation the Court found unconstitutionally vague as applied to the facts of the case.

ARGUMENT

I. The Court of Appeals, after articulating an appropriate standard of review for considering a constitutional challenge to statutes and regulations based on "vagueness as applied", wrongfully failed to apply that standard in finding some of the statutes and regulations unconstitutional.

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". The Court determined that the standard to be employed should be whether or not Curd, in his capacity as a professional land surveyor using ordinary common sense, could reasonably understand what the statute and regulation required of him when applied to the facts of the case. (Tab 1, Pg. 12, first full paragraph)

B. The Appellate Court correctly determined Section 3 of 201 KAR 18:142, the Code of professional practice and conduct, to be constitutional.

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.

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).

C. The Appellate Court, in evaluating the remaining statutory and regulatory sections deemed unconstitutionally vague by the lower court, failed to consider the actual facts of the case at bar, 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 statutes and regulations based on the wording of the statute alone, more appropriate for reviews of statutes for "overbreadth", an issue both inappropriate under the circumstances of the 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,^{FN5} a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.^{FN6} 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.^{FN7} 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 application of different standard in a Court’s review of a statute for issues of vagueness.

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)

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 conduct of Mr. Curd.

To the contrary, the Court chose to look only 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, at Pages 17 and 18 thereof, 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 previously articulated standard.

D. In the 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 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. In taking this approach, the Court of Appeals has implicitly rejected the

use of common and ordinary terminology in statutory construction; such an approach is not supported by either statute or case law.

It is entirely appropriate for the legislature to craft statutes using common and everyday 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 meaning which attaches to words of common usage in considering the application of the statutory provisions to the facts of the case at bar.

E. 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 to define the above terms, 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

NEGLIGENCE

1: the quality or state of being negligent

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

Pg 1513

Applying those definitions to the language of Section 2 of KRS 322.180, the Hearing Officer's findings of fact 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 (201 KAR 18:142 Section 3) or standard of behavior (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 Hearing Officer's findings of fact 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 this particular section of the statute, is that disciplinary action is warranted regardless of the state of mind of the individual; that is the individual comes within the purview of the statute if he doesn't know how to do his job (incompetency), if he knows how to do his job but chooses not to (misconduct), or if he knows how to do his job and fails to exercise the care a prudent person would exercise under a like situation, and in so acting evidences a nearly total disregard of the rights of others and the nearly total indifference to the consequences of the act (gross negligence).

Another 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 engineers were initially licensed in Kentucky, the **Engineering Act of 1938, Section 20**

(Tab 8):

("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.

The licensing and regulatory oversight of land surveyors in Kentucky, and the expansion of the engineering board to include responsibility for land surveyors occurred in 1966 which now makes land surveyors subject to that same terminology.

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 (Tab 9)**: (“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.

F. 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 8-10 of this brief.)

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, an individual exercise common sense and in reliance of the ordinary appreciation of the phrase "conduct likely to deceive or defraud the public", would experience little difficulty considering Curd to be in violation of this section of the statute.

G. The proper application of the standard of review to 201 KAR 18:142, Section 3, 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 creates the question of whether any professional land surveyor who testified 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.

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

H. 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 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 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, as any professional land surveyor, exercising common sense could have easily have understood the applicability of this regulatory language to that set of facts.

II. 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 Appeals Court properly applied their articulated standards 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 should 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, 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), 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(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 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(2)

* Additionally, since 201 KAR 18:142(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 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 (9)

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

III. The Court of Appeals de facto requirement of the necessity for specificity within the language of the statute without consideration of any other means or procedure of establishing that desired specificity conflicts with a central element of the administrative law system established by the legislature.

As noted previously, the legislature, pursuant to its constitutionally conferred police powers, has the responsibility of ensuring the protection of the public's health, safety, and welfare. The legislature discharges that responsibility in part, by deciding which areas of public life should be subject to regulation and oversight. In furtherance of this endeavor, it creates various regulatory boards and commissions to implement its oversight responsibilities. Kentucky, at present, has at least seventy-nine (79) such boards and commissions.

(See **Executive Branch Ethics Commission List of Regulatory Boards and Commissions at Tab 10**)

A. The practical impossibility of legislative enactment for a statute or regulation for every situation.

Also as noted previously above, it is a practical impossibility to write a statute or regulation covering all facets of every conceivable event that the legislature would deem unacceptable in its quest to protect the public. See *Fowler v. Board of Educ. of Lincoln County, Ky.* 819 F.2d 657, 664 -665 (C.A.6 (Ky.), 1987)

General, broad, and inclusive terms are utilized by necessity. The dilemma of course, is to find a point of balance between the requirement of due process to which each individual is entitled before he or she can be deprived of his or her property, and the needs of the legislature to protect the public, while taking into consideration the limitless potential situations that need to be addressed.

The answer to this dilemma is the administrative law system which has developed over time with the guidance supplied by court interpretations and decisions, and by legislative action. It is a delicate configuration but one that works extremely well if the parties understand their obligations and limitations.

B. Legislature's obligation to make laws.

Legislatures write laws, not courts. So the first obligation is for the legislature to write an intelligible statute. As previously discussed and as supported by numerous court decisions validating the application of various "catch-all" statutes or terminology, statutes can be written using general terms as long as there is a method of application and statutory interpretation that does not encourage or produce arbitrary or discriminatory results, since that is the danger of vague laws.

A statute is impermissibly vague when a person disposed to obey the law cannot determine with reasonable certainty what conduct is prohibited. See *Commonwealth v. Foley*, Ky., 798 S.W.2d 947 (1990). See also *State Board for Elementary & Secondary Education v. Howard*, Ky., 834 S.W.2d 657 (1992). The courts will also strike down as vague statutes written in a manner that encourages arbitrary and discriminatory enforcement. *Howard*, 834 S.W.2d at 662.

Craig v. Kentucky State Bd. for Elementary and Secondary Educ.
902 S.W.2d 264, 268 (Ky.App., 1995)

C. The administrative law system is designed to avoid, not encourage the litigation of constitutional questions.

The administrative law system is designed to avoid, not encourage, the litigation of constitutional questions. See *Honea v. Harris* 498 F.Supp. 1169, 1174 (D.C.Miss., 1980) If the Kentucky's system is engaged appropriately with all parties performing their appropriate duties, constitutional challenges based on vagueness as applied would be minimized, if not eliminated.

The analysis of that point is as follows:

1. Danger of vague laws.

Vague laws, as noted above, are to be avoided since they can allow or produce arbitrary results, which would constitute a violation of an individual's constitutional right to due process. The focus is on arbitrariness.

2. Necessity of use of general terms.

Language can be elusive and the legislature has a need to employ some general terms in statutory language in the effort to discharge its obligation to protect the public health, safety, and welfare under a limitless number of situations occurring within the regulated areas.

3. Due process satisfied by the process itself minimizing the risk of arbitrary action.

Due process concerns can be satisfied by providing a rational process whereby the reasonableness of the applicability of the statute in question to the individual can be determined.

4. The administrative law process and its multiple opportunities to identify arbitrary treatment.

To that end, KRS Chapter 13B, provides the procedural due process that allows the individual multiple opportunities to contest the inapplicability of the statute in issue. See KRS 13B.050, .080, 090, .110, and .120

5. The administrative process and burden of proof.

An area that may go underappreciated in KRS Chapter 13B as it relates to due process concerns, is the obligation of burden of proof set out in KRS 13B.090.

KRS 13B.090, part of the Administrative Procedure Act, addresses burdens of proof in connection with administrative proceedings. Section (7) states:

In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative*458 defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

McManus v. Kentucky Retirement Systems 124 S.W.3d 454, 457 - 458 (Ky.App.,2003)

The significance of the burden of proof, when considered in the light of avoidance of arbitrary and discriminatory action, is that in order for the agency to meet its initial burden in disciplinary actions, it must first establish the standard addressed by the statute in question and then show the applicability of that standard to the individual. If the statute is too vague to be applicable to the individual given the facts of the case, the agency will not be able to carry its burden. Once the applicability of the statute is established, the agency must prove the violation of that standard to shift the burden to the individual to go forward with a defense. If the agency fails to carry its burden, any subsequent decision in its favor would likely not be supported by substantial evidence, and would be rejected by a reviewing court on appeal as arbitrary.

6. The administrative process and exceptions.

Another area that goes underappreciated as well, is the obligation of the parties to file exceptions to the Hearing Officer's findings. See KRS 13B.110(4). Exceptions are an essential element to the administrative system, including the

minimization of due process concerns resulting from potentially arbitrary action by an oversight board.

The Hearing Officer is the finder of fact in the administrative system, but unlike a Court of Justice judge in a bench trial, he does not decide the case; rather, his findings are recommendations which the oversight board can accept or reject. See KRS 13B.120(2)

Exceptions give the parties the opportunity prior to the board entering its final order, to take specific issue with the Hearing Officer's findings. That right and responsibility is an extremely significant one for several reasons:

First, it is an opportunity for the individual to point out any arbitrary findings and explain in as great detail as he or she would like, exactly why the finding was not supported by substantial evidence. It is an opportunity to raise the issue of arbitrariness in significant detail with time to fully develop the justification for the exceptions. Exceptions allow the board, essentially a panel of the individual's professional peers possessing the same specialized knowledge, and subject to the same regulatory scheme, to exercise that specialized knowledge in consideration of the findings to avoid acting arbitrarily.

Second, the Hearing Officer is usually not a member of the affiliated group for whom the board is responsible, so the exception process is an opportunity for the board to correct any findings it deems were based upon any perception that the Hearing Officer misunderstood or misconstrued any part of the case. However, in consideration of due process concerns and the need to avoid arbitrary action, the board must, if it rejects any finding in arriving at its final

order, include in that order separate findings of fact and conclusions of law so that the reviewing court on appeal, will have an understanding of the board's departure from the normal deference it is obligated to give the finder of fact, and be able to review the findings for substantial evidence support. See KRS 13B.120(3)

Lastly, the exceptions define what issues are preserved for appeal to the reviewing court. If the individual fails to file sufficiently detailed exceptions, those issues will not be preserved for appeal to the reviewing court.

As stated in *Swatzell v. Com.* 962 S.W.2d 866 (Ky.,1998):

It is an elementary rule that trial courts should first be given the opportunity to rule on questions before those issues are subject to appellate review. *Akers v. Floyd County Fiscal Court*, Ky., 556 S.W.2d 146 (1977); *Pittsburg and Midway Coal Mining Company v. Rushing*, Ky., 456 S.W.2d 816 (1969); *Kaplon v. Chase*, Ky.App., 690 S.W.2d 761 (1985); *Carr v. Cincinnati Bell, Inc.*, Ky.App., 651 S.W.2d 126 (1983).

This principle has been extended to administrative proceedings and requires a party to raise issues before that particular entity (the Cabinet in the case *sub judice*) before those issues are available for appellate review. If a party fails to exhaust all available administrative remedies, a reviewing court is without jurisdiction to consider the contested matters as the administrative agency did not have the opportunity to first review them.

As the Court succinctly stated almost fifty years ago in *Goodwin v. City of Louisville*, Ky., 309 Ky. 11, 215 S.W.2d 557 (1948):

Orderly procedure in cases of public administrative law favors a preliminary sifting process, particularly with respect to matters within the competence of the administrative authority set up by a statute, *869 as where the question demands the exercise of sound administrative discretion. 42 Am.Jur., Public Administrative Law, sec. 198. And where an administrative remedy is provided by the statute, relief must be sought from the administrative body and this remedy exhausted before the courts will take hold. The procedure usually is quite simple. Ordinarily the exhaustion of that remedy is a jurisdictional prerequisite to resort to the courts. *Martin v. Board of Council of City of Danville*, 275 Ky. 142, 120 S.W.2d 761.

Swatzell v. Com. 962 S.W.2d 866, 868 -869 (Ky.,1998)

7. The administrative process and the common understanding of the affiliated group.

The Court of Appeals, in its Opinion, articulated a standard which relies on the common sense of individuals similarly affiliated. The standard addressed by the statute under review, and its applicability to the individual, may be proved by common understanding of the affiliated group.

When the persons affected by the regulations are a select group with specialized understanding of the subject being regulated the degree of definiteness required to satisfy due process concerns is measured by the common understanding and commercial knowledge of the group. *Id.* (*Diebold, Inc. v Marshall*, 585 F.2d 1327) at 1336; *Precious Metals Associates, Inc. v. Commodities Futures Trading Commission*, 620 F.2d 900, 907 (1st Cir.1980); *United States ex rel. Shott v. Tehan*, 365 F.2d 191, 198 (6th Cir.1966), *cert. denied*, 385 U.S. 1012, 87 S.Ct. 716, 17 L.Ed.2d 548 (1967).

Fleming v. U.S. Dept. of Agriculture 713 F.2d 179, 184 (C.A.6,1983)

See also, *Nicholson v. Judicial Retirement and Removal Commission* 562 S.W.2d 306, 308-309 (Ky.1978)

The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.

U.S. v. Petrillo 332 U.S. 1, 8, 67 S.Ct. 1538, 1542 (U.S. 194

8. The administrative process and the reviewing court's focus on arbitrariness.

The reviewing court on appeal, is primarily focused on arbitrariness, but the test of arbitrariness is a determination of whether or not the decision was supported by substantial evidence. If it was supported by substantial evidence,

then the decision could not be arbitrary and the statute could not be vague as to the individual when the facts of the case were considered.

When a court reviews the agency's final order, the court may only overturn the agency's decision if the agency acted arbitrarily or outside its scope, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 300-01 (Ky.1972).

Arbitrariness is the focus of the court's review of an administrative decision. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky.1964).

Alliance for Kentucky's Future, Inc. v. Environmental and Public Protection Cabinet 310 S.W.3d 681, 686 (Ky.App.,2008)

and:

Our review of this case is governed by the substantial evidence standard of review applicable to decisions made by administrative agencies. See *Kentucky Unemployment Ins. Comm'n v. Landmark Community Newspapers of Kentucky, Inc.*, Ky., 91 S.W.3d 575, 578 (2002). "If the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law to the facts so found." *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n*, Ky., 437 S.W.2d 775, 778 (1969). Substantial evidence is defined as "evidence of substance and relative consequence having the fitness to induce conviction in the minds of reasonable [persons]." *Owens-Corning Fiberglas Corp. v. Golightly*, Ky., 976 S.W.2d 409, 414 (1998).

This court must also consider whether the decision of the administrative agency was arbitrary or clearly erroneous. A decision is said to be of such character if it is "unsupported by substantial evidence." *Danville-Boyle County Planning & Zoning Comm'n v. Prall*, Ky., 840 S.W.2d 205, 208 (1992). If there is any substantial evidence to support the decision of the administrative agency, "it cannot be found to be arbitrary and will be sustained." *Taylor v. Coblin*, Ky., 461 S.W.2d 78, 80 (1970). Thus, a final order of an administrative agency will be affirmed if this court finds the agency applied the correct rule of law to facts supported by substantial evidence. *Vanhoose v. Commonwealth*, Ky.App., 995 S.W.2d 389, 392 (1999).

Borkowski v. Com. 139 S.W.3d 531, 533 -534 (Ky.App.,2004)

Given the precedent allowing for determination of the applicability of the language of a suspect statute to be established by the common sense of the affiliated group as applied to the facts of the case in question, and the need of the legislature to fulfill its constitutional duties by providing for the protection of the public health, safety, and welfare in a myriad of situations subject to regulation, the Court of Appeals limiting approach of requiring the necessary specificity of language to be present in the statute itself, would clearly defeat the constitutional role of the legislature. Additionally, the position of the Court of Appeals would be difficult to reconcile with established case law and some statutory requirements.

The system of administrative law would be severely impacted. There would be no justification or purpose to each agency's board, which essentially functions as a jury of the individual's professional peers, since their specialized knowledge would have no significant role within the system. Additionally, ethical codes, which reflect general standards and are situationally dependent in their application, would be difficult to reduce to the specificity desired by the Appellate Court. There would also not be a need for independent hearing officers since if all the specificity were to be found within the statute itself, the regular judicial system could manage any litigation.

The public, of course, would pay the ultimate price for this development, in diminished protection of its health, safety, and welfare. If dishonest testimony in Court in violation of both the oath a witness takes, as well as a specific regulation

mandating honesty in testimony, does not, by the Court of Appeals de facto requirements for statutory constitutional acceptability, constitute some level of misconduct, or a failure to protect the public, or demean the profession, or is conduct likely to deceive the public, then that approach to constitutional review should be reconsidered.

IV. The Court of Appeals, by mandating that the required specificity of statutory language be contained within the statute itself, impermissibly infringed on the constitutional duties of the Legislative Branch in violation of the Separation of Powers Doctrine.

As previously discussed, the Court of Appeals in rejecting the constitutionality of the four sections of the statute and regulation under review, failed to follow accepted procedures for statutory interpretation established by case law. Instead, the Court took issue with the fact that the provisions of the statutory sections in question “do not elaborate in any detail as to what sorts of behavior might fall into the realm of the conduct intended to be prohibited”.

(Tab 1 at Pg. 17, second paragraph.)

The Court also noted the provisions of the statute that requires “engineers to act in a manner which will ‘protect the public health, safety and welfare,” gave “no guidance as to how this is to be accomplished, or what sort of testimony would be in violation of this goal.” The Court limited its consideration only to the wording of the statutory provisions themselves, without even considering the specific facts of the case, nor the methods commonly used to facilitate statutory interpretation and application.

(Tab 1 at Pg. 17, second paragraph)

If *American Beauty Homes Corp. v. Louisville and Jefferson Co. Planning and Zoning Commission, et al.*, 379 S.W.2d 450 (Ky.1964), stands for the proposition that the Separation of Powers Doctrine prevents the Legislative Branch from delegating its constitutional responsibilities to its sister Judicial Branch, then the case at bar should stand for the proposition that the Judicial Branch is not entitled to encroach upon those same constitutional responsibilities of the Legislative Branch.

Admittedly, this is an area where the line of demarcation between the responsibilities of the two branches is very fine, and it is further complicated by the rather unique nature of administrative law, and the need to balance both due process concerns of the individual as overseen by the Judicial Branch, with the necessity and desirability of regulatory oversight by the Legislative Branch of a wide and ever changing range of human activities in furtherance of its responsibility to protect the public. It occupies an area where the Judicial Branch and the Legislative Branch must work in careful tandem.

However, it does appear that the Court of Appeals, by the rejection of the constitutionality of the four sections of the regulation and statute based not on the inability to apply the statutory language by customary methods of interpretation to the facts of the case, but on what it considered to be essential or desirable elements to be included in the statutory provisions. While such amendment to the statute and regulation may even be beneficial, the separation of powers doctrine gives the legislature the exclusive power to craft laws. The Court's job is

to interpret and apply those laws, not to suggest or specify improvements to statutory language.

The Kentucky Constitution in Sections 27 and 28 divides governmental authority among the three branches of government and provides:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Ky. Const. § 27.

No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Ky. Const. § 28.

.....

It is elementary that Const. Sec. 27 forbids one branch of government from performing functions belonging to another....

Vaughn v. Knopf 895 S.W.2d 566, 568 (Ky., 1995)

The framers of Kentucky's four constitutions obviously were cognizant of the need for the separation of powers. Unlike the federal constitution, the framers of Kentucky's constitution included an express *912 separation of powers provision. They were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of government were usurped by one or more branches of that government. Our present constitution contains explicit provisions which, on the one hand, *mandate* separation among the three branches of government, and on the other hand, specifically *prohibit* incursion of one branch of government into the powers and functions of the others. Thus, our constitution has a double-barreled, positive-negative approach:

Legislative Research Com'n By and Through Prather v. Brown 664 S.W.2d 907, 911 -912 (Ky., 1984)

Kentucky case law further explains the nature of the separation of powers between the legislature and the courts. "It is to be remembered ... that courts are interpreters and not makers of the law; it is not the province

of the courts to usurp the functions of the Legislature" *Gathright v. H.M. Byllesby & Co.*, 157 S.W. 45, 154 Ky. 106 (1913). Consequently, "[c]ourts cannot substitute their judgment for the legislative enactment for to do so would be to usurp the power reserved for the legislative authority." *Puryear v. City of Greenville, Ky.*, 432 S.W.2d 437, 442 (1968), citing *Schloemer v. City of Louisville*, 298 Ky. 286, 182 S.W.2d 782 (1944). "Moreover, it has been our view, in interpreting Section[s] 27 and 28, that the separation of powers is fundamental ... and must be 'strictly construed.'" *Vaughn v. Knopf, Ky.*, 895 S.W.2d 566, 568 (1995).

Scheer v. Zeigler 21 S.W.3d 807, 813 -814 (Ky.App.,2000)

It would appear that the Appellate Court crossed the line when it rejected the legislative enactments on the basis of what the statutory provisions did not include, rather than on the basis of any inability of the Court to apply the statutes to the facts of the case before them after having utilized customary approaches to statutory interpretation and application. As noted above, separation of powers is to be strictly construed, and the constitution both mandates separation and prohibits incursion. It may be a small, inadvertent step over the line, not as easy to discern perhaps, as when a legislative enactment attempts to transfer its obligations to a sister branch, but an impermissible incursion none the less that should not be permitted.

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 Appellee'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 Appellee'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, and 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 is validated, it will be unlikely that any entity's ethical code will be enforceable, since they are all crafted to some degree in broad language.

Lastly, there is the issue of the separation of powers. By rejecting the legislature's creation of the statute and the regulation for insufficiently precise language, and by failing to engage in customary procedures recognized by a large number of decision over many years, which procedures are utilized to help give meaning and determine applicability of generally worded statutes, the Court of Appeals is sending its message to the legislature as to how it wants statutes to be crafted in the future.

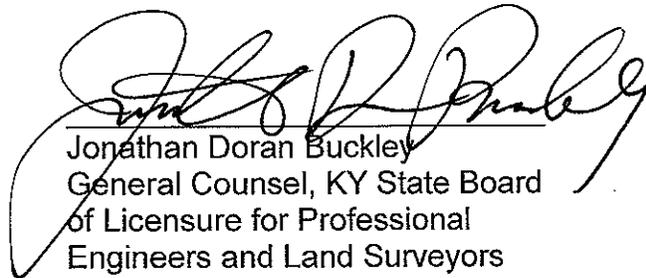
That determination crosses the very fine line between the branches. The legislature makes the laws; the judiciary interprets the law, but it must do so to attempt to confirm the constitutionality of those laws if at all possible. The rejection of general terms written in common and ordinary language as required by statute, and the failure of the Court to engage in the normal methods of statutory interpretation particularly when the system of administrative law is set up precisely to sort out statutes written in general terms, is an indication that the Court is impermissibly over the line.

Since Kentucky law is clear that separation of powers issues must be strictly construed, the benefit of any doubt on this issue should come down on the side of the legislature. The legislature needs the flexibility of language if it is to effectively protect the public health, safety, and welfare in those areas that it

regulates. There seems to have developed over the years, a system that can accommodate both judicial and legislative needs in harmony, but it does require some effort in application.

For all of the above reasons, the Opinion of the court of Appeals should be reversed for the four sections of the statute and regulation the Court deemed unconstitutionally vague.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jonathan Doran Buckley', is written over a horizontal line. The signature is stylized and cursive.

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APPENDIX

1. Opinion, Commonwealth of Kentucky Court of Appeals, No. 2010-CA-000693 and No. 2010-CA-000730, rendered: February 17, 2012
2. Opinion and Order, Franklin Civil Action No. 09-CI-231
3. Findings of Fact, Conclusions of Law and Final Order, Commonwealth of Kentucky, Kentucky State Board of Licensure for Professional Engineers and Land Surveyors, Administrative Action No. 07-KBELS-0056
4. Findings of Fact, Conclusions of Law and Recommended Order, Commonwealth of Kentucky, Kentucky State Board of Licensure for Professional Engineers and Land Surveyors, Administrative Action No. 07-KBELS-0056
5. 201 KAR 18:142
6. KRS 322.180
7. KRS 322.290
8. Engineering Act of 1938, Section 20
9. NCEES Model Law, Section 150.10, dtd. August 2011
10. KY Executive Branch Ethics Commission, Regulatory and Policy Making Boards and Commissions, September 2009