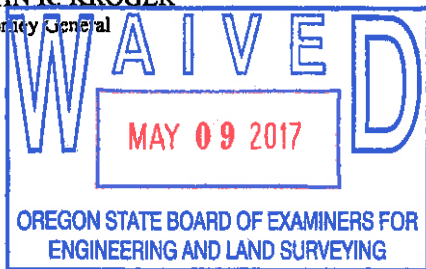
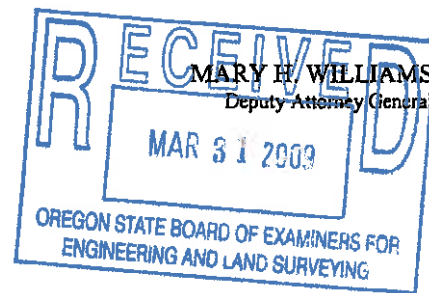


JOHN R. KROGER  
Attorney General



DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION




MEMORANDUM

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DATE: March 26, 2009

TO: Mari Lopez, Executive Secretary  
Oregon State Board of Examiners for Engineering & Land Surveying

FROM: Joanna L. Tucker Davis, Assistant Attorney General   
Business Activities Section

SUBJECT: Right of Entry and Notice  
DOJ File No. 917-001-GB0254-09

You have asked for advice as to whether mailing a notice to the landowner or publishing a notice in the newspaper when the landowner is not available are acceptable means of providing notice under ORS 672.047(4). The short answer is that it does not appear the legislature intended for notice under ORS 672.047(4) to include mailings or publication in a newspaper.

As a general matter, ORS 672.047 performs two functions. It grants land surveyors (and their employees and agents)<sup>1</sup> a privilege, under certain circumstances, to enter property on foot where otherwise they would be committing a trespass.<sup>1</sup> Second, it imposes duties on land surveyors when exercising this privilege:

A registered professional land surveyor, or any employee or agent of the surveyor, shall not enter upon or establish any permanent survey monument upon any land without first attempting to provide notice to the landowner or occupant of the property in person. When the landowner or occupant is not available, written notice shall be posted in a conspicuous place where it is most likely to be seen. The posted notice shall give the professional land surveyor's name, address, telephone number, purpose, availability of the

<sup>1</sup> For the purpose of brevity, we will use the term "land surveyor" when discussing ORS 672.047 to also include the agents and employees of the land surveyor.

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survey and the presence of any temporary or permanent monuments or other markers left on the property.

ORS 672.047(4) (emphasis added).<sup>ii</sup> This "shall not" language by the legislature is a directive that if a land surveyor enters upon or establishes a permanent surveyor monument on any land without attempting to notify the owner/occupant in person or posting written notice, they are in violation of this statute. "Shall not" is mandatory language, not discretionary. If a land surveyor violates these requirements, OSBEELS may impose a civil penalty through the contested case procedures.<sup>2</sup> Presumably, the land surveyor would also be unable to claim ORS 672.047 as a defense if a civil or criminal action was brought by the State or the landowner.

You have asked for advice as to what notice is required, and allowed, under this provision. To determine what notice is allowed under this statute, we look to the legislative intent. We do so through the analytical framework given in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). We first look at the text of the statute and its context, which includes other provisions of the same statute and related statutes. In so doing, we consider statutory and judicially developed rules of construction that bear directly on how to read the text, such as the rule that "where there are several provisions or particulars [of a statute] such construction is, if possible, to be adopted as will give effect to all." ORS 174.010; PGE, at 611; See also *1000 Friends of Oregon v. Land Conservation and Development Commission*, 303 OR 430, 737 P2d 607 (1987) ("In construing statutes, a court should harmonize different sections of a single act whenever possible.") Additionally, we follow the directive of the legislature itself to "ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. If the legislative intent is clear from the text and context, the search ends there. Only if the legislative intent is not clear from the text and context of the statute will we look to the legislative history to attempt to discern that intent. PGE, at 611-612. If, after considering the text, context and legislative history, the intent of the legislature remains unclear, we may resort to general maxims of statutory construction to resolve any remaining uncertainty as to the meaning of the statute. *Id.* at 612.

ORS 672.047(4) lays out a two step process for providing notice to a landowner or occupant of the property in question. First, the land surveyor must attempt "to provide notice to

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<sup>2</sup> ORS 672.325 grants OSBEELS the authority to impose civil penalties for violations of ORS 672.047. ORS 672.325(1) provides:

In addition to any other penalty provided by law, any person who violates any provision of ORS 672.002 to 672.325 or any rule adopted thereunder shall forfeit and pay to the State Board of Examiners for Engineering and Land Surveying a civil penalty in an amount determined by the board of not more than \$1,000 for each offense.

This statute provides OSBEELS the authority to assess a civil penalty for any violation of the laws found between ORS 672.002 and 672.325. ORS 672.047 clearly lies within this range.

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the landowner or occupant of the property in person.” If the landowner or occupant is unavailable, “written notice shall be posted in a conspicuous place where it is most likely to be seen.” In terms of our PGE analysis, we first look to whether the phrase “posted in a conspicuous place where it most likely to be seen” would encompass these types of notice. Below we apply the first level of the PGE analysis to each of the possibilities in turn.

**Posting as Mailing:**

In our PGE analysis, we begin with the text and context. The dictionary definition of the term “posted” has multiple definitions, including the use of the term as a synonym for “mailing”: “2: mail <stroll down the street to ~ a letter – Elspeth Huxley>” \* \* \*.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 2002) (Webster’s) at 1771. However, we also look to the context in determining the legislative intent of using a term. Looking at the use of the word “posting” in context, it does not appear that the legislature intended for it to mean mailing a letter to a landowner. The entire phrase is “posted in a conspicuous place where it is most likely to be seen.” This phrase does not make sense in the context of mailing a letter. Letters are not mailed by placing them in a conspicuous place where most likely to be seen; letters are mailed by placing them in the hands of the post office or other delivery service. ORS 647.047(4) does not otherwise address mailing the notice. Therefore, it does not appear that the legislature intended for “posting” to mean mailing.

**Posting as Publication in a Newspaper:**

We were unable to find a dictionary definition that supports the use of the verb “posting” as a synonym for publishing a notice in the newspaper. We would also note that an electronic search of Oregon statutes showed a consistent use by the legislature of the word “publish” to describe placing a notice in a newspaper and “post” to mean affixing a sign or placard in a physical place on real property.<sup>iii</sup> Under our first level PGE analysis, it does not appear that “posting” in ORS 672.047(4) was meant to include publishing notice in a newspaper.

**Physically Leaving Notice on the Property:**

We now turn to whether the phrase “written notice shall be posted in a conspicuous place where it is most likely to be seen” means affixing the notice to a stake, tree, wall or other place. The plain, natural and ordinary meaning of the word “post” includes:

1: to affix (as a paper or bill) to a post, wall, or other usual place for public notices:  
PLACARD <~ the notice on the bulletin board> <signs are ~ed throughout the state> 2 a: to publish, announce, or advertise by or as if by the use of a placard <the students grades are ~ed>\* \* \*

Webster’s at 1771. This meaning is consistent with the context of the phrase, as leaving affixing written notice physically on a property or otherwise announcing by use of a placard would be placing the notice “in a conspicuous place where it is most likely to be seen.” In sum, it appears

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that, under the first level of the PGE analysis, posting the notice was meant by the legislature to mean physically leaving the written notice on the property (as opposed to mailing or publication in a newspaper).

**Legislative History:**

To the extent any ambiguity remains, the next level of the PGE analysis is to look at the legislative history. Here, the legislative history shows that "written notice shall be posted in a conspicuous place where it is most likely to be seen" was meant to mean physically leaving the written notice on the property. We have previously provided advice on the legislative history of this bill, and have attached that advice to this memorandum. In reviewing the tape recording of the committee discussion where the current language in ORS 647.047(4) was debated and decided on, the committee explicitly discussed what "posting" notice is meant to encompass in this statute as they discussed and changed the language in the statute:

CHAIR TARNO: Had a conversation with Mr. Kafory about how feasible it would be to put a small amendment in the bill that would require the surveyor to post a stake on the property of a land owner whose property he had to cross, with a card, some kind of notification to indicate to the property owner that it was surveyed on this date by John Doe surveyor, just a notice that he did he have to cross property. I can see the real problem is that you have with absentee property owners, folks out of town, hard to time to make notification to that property owner, that you do need to access that property for the purpose of that survey. I think Representative Naito had a concern, as did Representative Lindquist, that we should make sure the property owner is adequately notified by someone accessing their property.

REP. NAITO: My concern is balancing the competing interests here. One is the need of the surveyor to enter someone's land and not be subject to trespass, even criminal. The other interest is the property owner not to have someone coming on their land. My concern is, I can come down to a place where prior notice is given, either real notice, written notice or actual notice, a phone call \* \* \* I don't have a comfort level with surveyors going on land with after the fact notification \* \* \*.

SEN. KINTIGH: You don't think sub-four covers it?

REP. NAITO: I think it's very ambiguous. Doesn't specify what attempts. Does notice have to be written? Call them on the phone and leave a message? I would be open to saying either landowner or occupant. I don't think you have to do both.

SEN. JOHNSON: The public surveyors now have the authority to do this whenever they want. Bill would simply give the private surveyors the same authority. Could require actual certified return requested, would require surveyors to find actual owner's address

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and do the mailing ahead of time and what if he makes a mistake or she makes a mistake. We need to leave common sense. A little bit of flexibility on the surveyor to try to do notice if possible.

SEN. DWYER: Was going to speak to the amendment but haven't seen it. The kind of survey we're talking about are generally are rural surveys, or surveys that relate to forestry or those kind of lines. I say this because I'm not a surveyor but I was a county appraiser, you talk about confrontations \* \* \* So absentee landowners, 95% of the people will be reasonable in terms of a survey if you have to do it. A great number of land will not have a occupant \* \* \* surveyors lay out a stake or something written in absence of other kinds of notice, if you call them and can't get them \* \* \*.

\* \* \* \* \*

REP. MEEK: \* \* \* beginning on line 18, it says when the landowner or occupant not available, it says "written notice given to the landowner" and end of line 19, it says written notice shall be posted in a conspicuous place where it is most likely to be seen so you are talking about a four foot stake being inserted into the ground where it will most likely be seen with the card on it. We're not testifying about what notice is, just says if someone wants to complain, I guess they can complain.

Unknown representative: They've got those four foot lathes stakes with them anyhow. I see it on property in city. They do it, most of them do it voluntary now. This just specifies and gives them some protection by doing that.

\* \* \* \* \*

SEN. DWYER: I think it is reasonable, you know with mining claims and what not, for corner posts and what not, we use prince albert cans, you actually take prince albert can, nail it on the tree, put your claim information on there, your claim information, your corner information, how far it is, hey, that's this notice, this is my property. I don't see why it won't work that concept in this way.

REP. NAITO: If we adopt the amendments, just trying to clarify how it will work. The surveyor will first try to notify in person. Then when the landowner's not available, then written notice shall be given. There's no specification as to timeframe. The written notice would have to be in advance.

SEN. JOHNSON: In a timely manner. Need to clarify that it could be at the time he's there. We are talking about posted notice is the last sentence added by these dash fours. Posted notice as opposed to mailing notice.

\* \* \* \* \*

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SEN. JOHNSON: I see a potential legal case being filed over the ambiguity in that stuff we're working on. The sentences in 18 and 19 say, as amended, when landowner or occupant not available written notice shall be given. Doesn't say whether written notice should be mailed or posted. Just says written notice shall be given. Only applies when owner or occupant not available. I propose we emerge the two sentence so it's clear that posted written notice is all that needs to be given so the surveyor isn't required to, and it's implied here if we don't require this, to find the addresses and things to give written notice by mail. \* \* \* \* \*

Committee Minutes, Conference Committee on HB 2963, June 3, 1995. As can be seen by this debate, the Committee explicitly discussed (and changed the language to reflect the discussion) that the posted notice was not meant to be a mailing, but was meant to a written notice that was physically posted on the property (with examples given such as a stake or Prince Albert can) when the land surveyor was unable to notify the landowner or occupant in person. The Committee also debated, and decided on, allowing this posted notice to be left at the time of the survey, as opposed to prior to the survey, when the land surveyor was unable to notify the owner or occupant in person.

### Conclusion

It appears that the "posted notice" in ORS 647.047(4) was meant by the legislature to a written notice that is physically left on the property at the time of the survey. It does not appear to mean publication in a newspaper or a mailed notice.

JTD:jtd:ros/Justice #1342699

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<sup>i</sup> See e.g., ORS 164.245 (making it unlawful to enter or remain unlawfully on real property).

<sup>ii</sup> ORS 672.047, in its entirety, provides:

(1) Subject to subsection (4) of this section, a registered professional land surveyor, or any employee or agent of the surveyor, may enter on foot, where practicable, upon any land for the purpose of surveying or performing any survey work and may establish permanent survey monuments as allowed by rule of the State Board of Examiners for Engineering and Land Surveying.

(2) Any person exercising the right of entry granted under subsection (1) of this section shall do so with no unnecessary damage to the land entered upon. Damages to trees, shrubs and other vegetation intentionally caused by the surveyor shall be subject to compensation and penalties as provided in ORS 105.810. The surveyor shall compensate the landowner for all other actual monetary damages, or \$100, whichever is greater. Actual monetary

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damages may include but are not limited to all costs in time, labor and materials incurred by the property owner to return the property to the condition it was in prior to the damage.

(3) If a request is made in writing in a timely manner, a copy of the survey shall be provided in a timely manner to any landowner who owns property that is outside an urban growth boundary and is affected by subsection (4) of this section.

(4) A registered professional land surveyor, or any employee or agent of the surveyor, shall not enter upon or establish any permanent survey monument upon any land without first attempting to provide notice to the landowner or occupant of the property in person. When the landowner or occupant is not available, written notice shall be posted in a conspicuous place where it is most likely to be seen. The posted notice shall give the professional land surveyor's name, address, telephone number, purpose, availability of the survey and the presence of any temporary or permanent monuments or other markers left on the property.

(5) A registered professional land surveyor, or any employee or agent of the surveyor, who enters land as allowed under this section is owed no greater duty of care than that owed by a landowner to a trespasser.

(6) Notwithstanding the provisions of subsection (1) of this section, a registered professional land surveyor, or any employee or agent of the surveyor, may use a vehicle to enter upon land provided that the vehicle remains on existing roadways where practicable.

(7) The surveyor shall remove all flagging, stakes and other temporary materials that are above ground if leaving them in place creates an unreasonable risk of harm to persons or property. Except for forestland as defined in ORS 527.620, the surveyor shall remove all temporary above ground materials within 60 days of placement unless written authorization to leave the materials in place is received from the landowner or occupant. [1995 c.382 §13; 1997 c.743 §1]

<sup>iii</sup> Examples of the use of the word "publish" to describe placing notice in a newspaper and "post" to mean physically affixing a sign to property include the following:

ORS § 18.924(5): "The sheriff shall publish a copy of the notice of sale of real property once a week for four successive weeks in a newspaper of general circulation in the county where the real property is located. The sheriff may not conduct the sale until the expiration of the four-week period."

ORS § 294.421(3): "If no newspaper is published in the municipal corporation, a municipal corporation whose aggregate of estimated budget expenditures for the ensuing fiscal year does not exceed \$ 50,000 or for the ensuing budget period does not exceed \$ 100,000 may, in lieu of the publication and notice provided in subsections (1) and (2) of this section and in lieu of publication by one or more of the methods described in ORS 294.311 (34), post the summaries and notices provided by ORS 294.416 or 294.418 in three conspicuous places in the municipal corporation for at least 20 days prior to the date of the meeting provided in ORS 294.430 and publish the notice provided by subsection (4) of this section."

ORS 450.850(2): "The board shall post notice of the time and place of the hearing in at least three conspicuous places in the area directly benefited, for two weeks prior to the hearing and publish such notice in a newspaper of general circulation printed and published in the area once a week for two successive weeks prior to the hearing or, if there is no such newspaper, in a newspaper of general circulation printed and published in the county in which the area, or the largest portion thereof, is situated. \* \* \* \* \*"

ORS 568.210(5): "'Due notice' means notice published at least twice, with an interval of at least seven days between the two publication dates, in a newspaper or other publication of general circulation within the appropriate area, or if no such publication of general circulation is available, by posting at a reasonable number of conspicuous places within the appropriate area, such posting to include, where possible, posting at public places where it may be customary to post notices concerning county or municipal affairs generally. \* \* \* \* \*"

Mari Lopez  
March 30, 2009  
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ORS 634.226(1)(a): "Within 30 days after the establishment of a protected area, as provided in ORS 634.216, the State Department of Agriculture shall give notice that petitions to nominate candidates for three positions on such committee shall be accepted by the department. Such notice shall be given by publication at least once in a newspaper of general circulation in the protected area and by delivery of a copy of the notice to the county clerk of the county in which the protected area is situated, who thereafter shall post the same in a conspicuous public place.  
\* \* \* \* \*