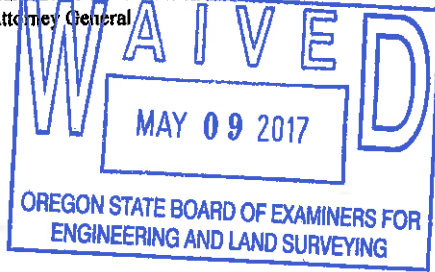


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Attorney General



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Deputy Attorney General



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

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DATE: January 9, 2014

TO: Mari Lopez, Administrator
Oregon State Board of Examiners for Engineering and Land Surveying

FROM: Katharine M. Lozano, Senior Assistant Attorney General
Business Activities Section

SUBJECT: Permission as a Substitute for Right of Entry

You have asked for advice as to whether a registered professional land surveyor (PLS) or the employees or agents of the PLS may use the landowner's permission to enter private property for the purpose of performing surveying work, as a substitute for exercising the right of entry provided by ORS 672.047.

Short Answer: Possibly, for the purpose of avoiding civil and criminal trespass violations, but not for the purpose of avoiding violation of ORS 672.047(4).

ORS 672.047 creates a privilege for a PLS or an employee or agent of the PLS to enter upon private land to perform surveying work and establish permanent monuments, which conduct could otherwise subject the PLS and the PLS's employees and agents to civil and criminal trespass laws for entering private property.

Subject to subsection (4) of this section, a registered professional land surveyor, or any employee or agent of the land surveyors, 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.

ORS 672.047(1).

Although obtaining permission to enter or remain on private property may, under certain circumstances, avoid or provide a defense to charges or allegations of trespass¹, the text of ORS 672.047 itself creates a separate prohibition against a PLS and the employees and agents of the PLS entering private property for the purpose of conducting surveying work or setting monuments, unless specific affirmative requirements are met – none of which include obtaining permission. Subsection (4) of ORS 672.047 provides:

A registered professional land surveyor, or any employee or agent of the land surveyor, *may not enter upon land* for the purpose of surveying, performing other survey work or establishing a permanent survey monument without first providing notice to the landowner by first class mail or by personal notice.

(emphasis added). As we advised in our January 20, 2012 advice²:

Absent this sentence, the only prohibitions on the land surveyor (or employees or agents) would be those found in other laws, and the sole purpose of this statute would be to carve out an exemption to those laws. This sentence, however, goes beyond creating an exemption and affirmatively prohibits land surveyors (or employees or agents) from entering land without first complying with the conditions in the subsection.

The conditions in the subsection are, “first providing notice to the landowner by first class mail or by personal notice.” In order for a PLS (or employee or agent) to enter private land without violating ORS 672.047(4), the PLS (or employee or agent) must provide notice as specified, not merely obtain permission from the landowner.

In our January 20, 2012 we also explained, in relation to Oregon Department of Transportation employees, that although:

ORS 366.365 allows ODOT to go upon private property when planning a highway or road, so long as there is notice, as described in ORS 35.220 * * * as discussed above, ORS 672.047(4) contains more than just an exemption to trespass laws. The prohibitive language in ORS 672.047(4) appears to require that land surveyors (and employees and agents) follow its notice requirements when entering land for the purpose of surveying.

The same analysis applies to a non-ODOT PLS (or employee or agent) who may be allowed to enter private property as any private citizen would, so long as there is permission to do so, but is still subject to the notice requirements of ORS 672.047(4) when entering land for the purpose of surveying or setting monuments.

Therefore, it appears that a PLS must comply with the notice requirements of ORS 672.047(4) when entering private property to conduct surveying work, regardless of landowner permission.

¹ See, e.g., ORS 164.205(3) and (5), ORS 164.245 and ORS 164.255.

² Attached.

Thank you for the opportunity to work with you. Please let me know if you have further questions or concerns.

ⁱ **164.205 Definitions for ORS 164.205 to 164.270.** As used in ORS 164.205 to 164.270, except as the context requires otherwise:

* *

(3) "Enter or remain unlawfully" means:

(a) To enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public or when the entrant is not otherwise licensed or privileged to do so;

(b) To fail to leave premises that are open to the public after being lawfully directed to do so by the person in charge;

(c) To enter premises that are open to the public after being lawfully directed not to enter the premises; or

(d) To enter or remain in a motor vehicle when the entrant is not authorized to do so.

(4) "Open to the public" means premises which by their physical nature, function, custom, usage, notice or lack thereof or other circumstances at the time would cause a reasonable person to believe that no permission to enter or remain is required. * * * *

164.245 Criminal trespass in the second degree. (1) A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully in a motor vehicle or in or upon premises.

(2) Criminal trespass in the second degree is a Class C misdemeanor. [1971 c.743 §139; 1999 c.1040 §9]

164.255 Criminal trespass in the first degree. (1) A person commits the crime of criminal trespass in the first degree if the person:

(a) Enters or remains unlawfully in a dwelling;

(b) Having been denied future entry to a building pursuant to a merchant's notice of trespass, reenters the building during hours when the building is open to the public with the intent to commit theft therein;

(c) Enters or remains unlawfully upon railroad yards, tracks, bridges or rights of way; or

(d) Enters or remains unlawfully in or upon premises that have been determined to be not fit for use under ORS 453.855 to 453.912.

(2) Subsection (1)(d) of this section does not apply to the owner of record of the premises if:

(a) The owner notifies the law enforcement agency having jurisdiction over the premises that the owner intends to enter the premises;

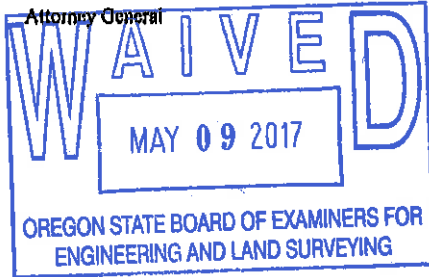
(b) The owner enters or remains on the premises for the purpose of inspecting or decontaminating the premises or lawfully removing items from the premises; and

(c) The owner has not been arrested for, charged with or convicted of a criminal offense that contributed to the determination that the premises are not fit for use.

(3) Criminal trespass in the first degree is a Class A misdemeanor. [1971 c.743 §140; 1993 c.680 §23; 1999 c.837 §1; 2001 c.386 §1; 2003 c.527 §1]

JOHN R. KROGER

Attorney General




MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: January 20, 2012

TO: Mari Lopez, OSBEELS

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

SUBJECT: ODOT Employed Land Surveyors & ORS 672.047

You have asked for advice as to whether ORS 672.047, which allows a registered professional land surveyor (PLS) or the employees or agents of the PLS to enter on private property for the purpose of performing surveying work, so long as certain conditions are met.

ORS 672.047 creates a privilege for registered professional land surveyors (and employees and agents) to enter upon private property:

Subject to subsection (4) of this section, a registered professional land surveyor, or any employee or agent of the land 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.

ORS 672.07(1). Absent this statute, the PLS (or employees or agents) could be subject to criminal or civil trespass laws for entering on private property. The statute calls this privilege "a right of entry." ORS 672.047(2).

The statute attaches obligations to this privilege. One obligation is that a person exercising the right of entry "shall do so with no unnecessary damage to the land entered upon." ORS 672.047(2). If damage is done while a PLS is on the property, it specifies how a landowner is to be compensated:

Damages to trees, shrubs and other vegetation intentionally caused by the land surveyor shall be subject to compensation and penalties as provided in ORS 105.810. The land surveyor shall compensate the landowner for all other actual monetary damages, or \$100, whichever is greater. Actual monetary damages may include but are not limited to all costs in time, labor and materials incurred by the land owner to return the property to the condition it was in prior to the damage.

Id. The statute also requires that, under certain circumstances, a copy of the survey be provided to the landowner and how materials left by the PLS are to be handled. ORS 672.047(3), (7).

The statute subjects the "right of entry" to the condition that notice must be properly served. Subsection (4) of the statute provides as follows:

A registered professional land surveyor, or any employee or agent of the land surveyor, may not enter upon land for the purpose of surveying, performing other survey work or establishing a permanent survey monument without first providing notice to the landowner by first class mail or by personal notice. If the land is occupied by a person other than the landowner, notice must also be given to the occupant by first class mail or by personal notice. Notice that is given by first class mail must be mailed at least seven days prior to the entry onto the land. Notice that is given by personal notice must be hand-delivered to the landowner or occupant or be posted in a conspicuous place where the landowner or occupant may reasonably be expected to see the notice. The 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 to be left on the land.

Please note that this subsection both lists the conditions on which the "right of entry" is subject, but also creates an affirmative prohibition:

A registered professional land surveyor, or any employee or agent of the land surveyor, *may not enter upon land* for the purpose of surveying, performing other survey work or establishing a permanent survey monument without first providing notice to the landowner by first class mail or by personal notice.

(emphasis added). Absent this sentence, the only prohibitions on the land surveyor (or employees or agents) would be those found in other laws, and the sole purpose of this statute would be to carve out an exemption to those laws. This sentence, however, goes beyond creating an exemption and affirmatively prohibits land surveyors (or employees or agents) from entering land without first complying with the conditions in the subsection. In sum, a land surveyor who does not comply with ORS 672.047 would not just be potentially violating trespass laws outside chapter 672, but is also violating ORS 672.047(4) itself.

With this in mind, we now turn to the question of how this law potentially affects ODOT employed land surveyors. ODOT employees may not need the benefit of this statute as ORS 366.365 allows ODOT to go upon private property when planning a highway or road, so long as there is notice, as described in ORS 35.220.¹ But, as discussed above, ORS 672.047(4) contains more than just an exemption to trespass laws. The prohibitive language in ORS 672.047(4) appears to require that land surveyors (and employees and agents) follow its notice requirements when entering land for the purpose of surveying.

Therefore, it appears that ORS 672.047(4) applies to land surveyors employed by ODOT when land surveying and that land surveyors employed by ODOT must comply with ORS 672.047(4) when entering private property.

Please let me know if you have any further questions or concerns.

ORS 366.365 in pertinent part provides as follows:

(1) The Department of Transportation may go upon private property in the manner provided by ORS 35.220 to determine the advisability or practicability of locating and constructing a highway over the property or the source, suitability or availability of road-building materials thereon.

ORS 35.220, which is referenced in ORS 366.365, provides in pertinent part as follows:

(1) Subject to the requirements of this section, a condemner may enter upon, examine, survey, conduct tests upon and take samples from any real property that is subject to condemnation by the condemner. A condemner may not enter upon any land under the provisions of this section without first attempting to provide actual notice to the owner or occupant of the property. If the condemner has not provided actual notice, written notice must be posted in a conspicuous place where the notice is most likely to be seen. The posted notice must give the condemner's name, address and telephone number and the purpose of the entry. A condemner may conduct tests upon or take samples from real property only with the consent of the owner or pursuant to an order entered under subsection (2) of this section. All testing and sampling must be done in conformity with applicable laws and regulations. Testing and sampling results shall be provided to the owner upon request.

(2) If the owner of property objects to examination or survey of the property under this section, or does not consent to the terms and conditions for testing or sampling of the property, the condemner may file a petition with the court seeking an order providing for entry upon the property and allowing such examination, survey, testing or sampling as may be requested by the condemner. The court may enter an order establishing reasonable terms and conditions for entry and for any examination, survey, testing or sampling of the property requested by the condemner. Reasonable compensation for damage or interference under subsection (3) of this section may be established in the proceeding either before or after entry is made upon the property by the condemner.

(3) An owner is entitled to reasonable compensation for:

(a) Any physical damage caused to the property by the entry upon or examination, survey, testing or sampling of the property, including any damage attributable to the diffusion of hazardous substances found on the property; and

(b) Any substantial interference with the property's possession or use caused by the entry upon or examination, survey, testing or sampling of the property.

(4) If a condemner is required to pay compensation to an owner in a proceeding under subsection (2) of this section, and the condemner thereafter seeks condemnation of the same property, the owner is not entitled to any payment of compensation in the condemnation action that would result in the owner receiving a second recovery for the same damage or interference.

(5) Nothing in this section affects any liability under any other provision of law that a condemner may have to an owner or occupant of property by reason of entry upon or examination, survey, testing or sampling of property.