November 25, 2013

Mr. John Blount
Director/Architecture & Engineering Division
Public Infrastructure Department
Architecture & Engineering Division
1001 Preston, 7th Floor
Houston, Texas 77002

Opinion No.: VR-0006 (2013)

Re: County authority to conduct surveying and non-invasive studies;
C.A. File No. 13GEN1733

Dear Mr. Blount:

This is in response to your request for advice as to the scope of authority of Harris County personnel or that of firms hired by the County to conduct surveys upon all private lands without obtaining a right of entry from the owner or otherwise obtaining their consent.

Earlier advisory opinions provided by this office concluded that County personnel or those of its contractors are authorized to conduct a traditional, lineal, or alignment survey upon private land without the consent of the owner. However, this right is available only in those instances in which the County is seeking to acquire land for a project or purpose for which the rights of eminent domain and condemnation attach. See attached 1994 advisory opinions.

However, since these opinions were written, a 2000 Texas Court of Appeals case has significantly broadened and expanded the authority of a county to conduct nontraditional surveys upon private land without a right of entry or other manifestation of consent. See Coastal Marine Service of Texas v. City of Port Neches, 11 S.W. 3d 509 (Tex. App.—Beaumont 2000, no pet.).

The court in Coastal Marine held that a municipality’s authority to conduct surveys upon private lands without the consent of the owner included Phase I Environmental Site Assessment surveys as well as such other surveys and inspections that are customarily conducted upon the land, in the normal course of business, prior to its acquisition. However, this authority is limited to those surveys and inspections such as traditional, lineal, or alignment surveys, environmental site assessments, and such other similar surveys, inspections, testing procedures, or examinations that require physical entry upon the land for the purpose of observing and recording, by photographic or other means, the visible characteristics and conditions of the land or otherwise.
measuring the land and its features, but which are not invasive in nature in the respect that they require the use of coring, drilling, boring, other digging devices or tools such as those employed in the subsurface testing of soils or the taking of soil samples incident to a comprehensive geotechnical investigation or survey or which involve the taking and actual removal of any material or substance from the land for testing purposes.

While the 2000 Coastal Marine opinion was written from the standpoint of a municipality, it is equally applicable to a county inasmuch as the authority of a county to enter upon private land for the purpose of conducting surveys, like that of municipalities, has been judicially implied from earlier statutes that incorporated the right of railroads to conduct nonconsensual surveys on private land incident to their efforts to acquire rights-of-way under the threat of condemnation. To the extent that the source law is basically the same for both, the reasoning used by the court to reach the result in the Coastal Marine case, would be equally applicable to a similar factual situation involving the County.

Summary

The personnel of Harris County or that of a firm under contract to Harris County may enter onto private lands without the consent of the owner for the purpose of conducting a traditional lineal or alignment survey, a Phase I Environmental Site Assessment or any other type of survey, inspection, or testing procedure so long as such survey, inspection, or testing procedure complies with the criteria set forth above. The County would not be authorized to conduct such surveys, inspections, or testing procedures on private land without the landowner's consent to the extent that any aspect thereof would be invasive in the respect that it involves the use of a coring, drilling, boring, or digging device, implement, or tool or the taking and removal from the premises of soil or other types of samples. Soil and other material located at or very near the surface may be examined upon the premises to the extent the examination does not involve coring, boring, or the use of any mechanical digging device. Also, note that the expanded authority conferred upon the County, as described herein, is limited to those situations in which the land that is the subject of the survey is being acquired for a project or purpose for which the County has available to it the right of eminent domain and condemnation.

Sincerely,

VINCE RYAN
County Attorney

By:  
JAMES C. JONES
Senior Assistant County Attorney

Approved:  
ROBERT SOARD
First Assistant County Attorney
November 27, 2002

Mr. Arthur L. Storey, Jr., P.E.
Executive Director
Public Infrastructure Department
Harris County Administration Building
1001 Preston Avenue, 7th Floor
Houston, Texas 77002

Attention: Mr. Mark R. Dembeck, P.E.
Manager, Capital Projects Section

Re: Whether a surveyor acting on behalf of Harris County may conduct a surface survey on privately owned lands for purposes of right of way alignment without obtaining a right of entry; County Attorney File No. 02RPD0251

Dear Mr. Storey:

We are in receipt of your request for advice in connection with the referenced matter. On August 1, 1994, this office, in an advisory letter to the Harris County Right of Way Department, determined that surveyors employed by Harris County may survey privately owned lands for purposes of condemnation without obtaining a right of entry. On December 28, 1994, this office, in an advisory letter to the Harris County Right of Way Department, determined that an engineering firm that has contracted with Harris County may conduct a surface survey on private lands for purposes of right of way alignment without obtaining a right of entry. Copies of these advisory letters are attached. It follows, therefore, that a surveyor hired by an engineering firm that has contracted with Harris County may conduct a surface survey on privately owned lands for purposes of right of way alignment without obtaining a right of entry provided the surveyor is acting in furtherance of that contract, that is, on behalf of Harris County.

We trust this answers your inquiry. If, however, we may be of further assistance to you in this regard, please let us know.

Sincerely,

MIKE STAFFORD
County Attorney

By M. SCOTT BRESK
Senior Assistant County Attorney

MS:MSB
Attachments
August 1, 1994

MIKE DRISCOLL
county attorney

Mr. Robert C. Watts
Right of Way Department
1310 Prairie, Suite 1304
Houston, Texas 77002-2090

Re: Whether surveyors employed by Harris County may survey privately
owned lands without obtaining a right of entry?

Dear Mr. Watts:

We received your inquiry regarding whether Harris County is
required to obtain a right of entry prior to entering private
property to conduct a survey for purposes of condemnation. We
contacted Mr. Muhl and he explained that the Engineer's survey crew
is concerned about the legal implications of such an entry.
Pursuant to our conversation with Mr. Muhl, it is our understanding
that the survey crew will not be conducting any sub-surface testing
or drilling. Therefore, this response addresses only standard
surveys that will be conducted for purposes of acquiring right-of-way
for road construction.

Harris County acquired broad authority to exercise its right
of eminent domain or condemnation from the Texas legislature.
Code Chapter 21); Tex. Loc. Gov't. Code Ann. Sections 261.001-.003
(Vernon 1988); Tex. Const. Art I, Section 17. This authority allows
Harris County to do everything within its power to plan and
construct roads. Dallas County v. Plowman, 99 T. 509, 91 S.W. 221
(1905). However, Harris County does not have specific statutory
authority to enter onto private lands for the purpose of conducting
a preliminary survey. Therefore, potential criminal liability needs
to be examined.

Typically, a person cannot enter onto private property without
the owner's consent or a legal right. Johnson v. Phillips Petroleum
Unauthorized entry could subject a person to civil or criminal
liability for trespass.

Generally, a person is liable for criminal trespass if he
enters or remains on property or in a building of another without
effective consent and he had notice that the entry was forbidden; or
received notice to depart but failed to do so. Tex. Penal Code Ann.
§ 30.05(a); (Vernon 1974); Johnson v. State, 665 S.W.2d 554, 556
(Tex. App.-Houston [1st Dist.] 1984, no writ). However, Texas
courts have held that entities vested with condemnation power have a right to enter onto private property to conduct a preliminary survey. Puryear v. Red River Authority of Texas, 383 S.W.2d 818, 820-21 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.). If one enters onto private property pursuant to statutory authority or a duty created by the legislature, one generally cannot be held liable for criminal trespass. Ludewig v. Houston Pipeline Co., 773 S.W.2d 610, 615 (Tex. App.—Corpus Christi 1989, writ denied). Right of entry protects surveyors employed by the County from criminal liability for trespass as long as they act in good faith and enter the land for purposes of surveying for condemnation. Lewis v. Texas Power & Light Company, 276 S.W.2d 950, 954 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.); 32 Tex. Jur. 3d Eminent Domain § 103 (1981); 41-A Tex. Jur. Trespass § 6 (1953). In some instances, there are express statutes that authorize entry onto private property to survey. Rainey v. Red River T. & S. Ry. Co., 99 Tex. 276, 89 S.W. 768, 771 (1905) (based upon statutory authority, the railroad was entitled to enter upon private property to conduct a survey to aid in the selection of a route); Puryear, at 820-21 (several applicable articles authorized a water district to conduct a survey on private property); Hailey v. Texas Municipal Power Agency, 757 S.W.2d 832, 835 (Tex. App.—Waco 1988, writ dism'd w.o.j.) (an electric power company was allowed to conduct a survey on an owner's land based upon an article providing a right of entry). When there are no express statutes, courts have implied a right of entry to ensure that entities with condemnation power may properly select lands to be acquired. Lewis, at 950 (court implied a right of entry onto private land to conduct a preliminary survey to secure future easement rights); Hicks v. Texas Municipal Power Agency, 548 S.W.2d 949, 955 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (court held that a municipal power agency had an implied right to survey private property prior to building a railroad spur or prior to instigating condemnation proceedings); L. P. Farms v. Exxon Pipelines Co., 646 S.W.2d 544, 545 (Tex. App.—Houston [1st Dist.] 1982, no writ) (entry onto private land to conduct a survey to locate a route for a pipeline was implied because the court reasoned that surveying rights are an ancillary power to a governing body's power of eminent domain).

Accordingly, surveyors employed by Harris County may survey privately owned lands for purposes of condemnation without obtaining a right of entry.
If I can provide you with any further information, please do not hesitate to contact me.

Sincerely,

MIKE DRISCOLL
COUNTY ATTORNEY

Angela C. Mogan
Assistant County Attorney
December 28, 1994

Dear Mr. Watts:

We received your inquiry regarding whether Harris County is required to obtain a right of entry for an engineering firm hired by Harris County to conduct a surface survey for purposes of condemnation on private property. This inquiry follows a previous request regarding whether a right of entry is required for employees of Harris County who are surveying private property for purposes of condemnation. (See attached Opinion dated August 1, 1994)

Based upon information provided by the Right of Way Department, it is our understanding that the survey crew will not be conducting any subsurface testing or drilling at this time. Therefore, this response addresses only standard surveys that will be conducted for purposes of a right of way alignment incident to condemnation.

Harris County has broad authority to exercise its right of eminent domain or condemnation. Tex. Loc. Gov't. Code Ann. §§ 261.001-003 (Vernon 1988); Tex. Const. art. I, § 17. This authority allows Harris County to do everything within its power to plan and construct roads. Dallas County v. Flowman, 99 Tex. 509, 91 S.W. 221 (1906). Commissioners Court may hire private contractors for county road construction and maintenance. Tex. Rev. Civ. Stat. Ann. art. 5702-2, § 3.209 (Vernon Supp. 1994). However, neither Harris County nor the private engineering firm has specific statutory authority to enter onto private property to conduct a preliminary survey.

(Tex. App.-Waco 1988, writ dism'd w.o.j.); Hicks v. Texas Municipal Power Agency, 548 S.W.2d 949 (Tex. Civ. App.-Houston [14th Dist.] 1977, writ ref'd n.r.e.); L.P. Farms v. Exxon Pipelines Company, 646 S.W.2d 544 (Tex. App.-Houston [1st Dist.] 1982, no writ). Although independent contractors are not specifically addressed in these cases, the courts' analysis appears to be applicable because surveying for a right of way alignment is incident to the exercise of condemnation or eminent domain powers.

Accordingly, based upon the above-cited case law, it appears an engineering firm that has contracted with Harris County may conduct a surface survey on private lands for purposes of right of way alignment without obtaining a right of entry.

If I can provide you with any further information, please do not hesitate to contact me.

Sincerely,

MIKE DRISCOLL
COUNTY ATTORNEY

By Angela C. Mogan
Assistant County Attorney