

CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS

Study Session Worksheet

Presentation Date: 09/10/2013 **Approx. Start Time:** 9:30 a.m. **Approx. Length:** 1/2 hour

Presentation Title: Obstructions in Unimproved Rights of Way

Department: Department of Transportation and Development

Presenters: Mike Bezner

Other Invitees: Scott Caufield, Greg Petersen

WHAT ACTION ARE YOU REQUESTING FROM THE BOARD?

Staff is asking the Board to adopt a new policy that County resources will only be used to resolve issues within the right of way when a permit has been obtained for improvements or if it is a matter of life, safety or health.

EXECUTIVE SUMMARY:

Throughout the County there are public rights of way that are not accepted or maintained by the County. Though the County has no liability to improve or keep these rights of way in repair, they are still under the County's jurisdiction and the County is the permitting authority for private parties wanting to construct improvements within them. Most of them already have existing roads. However, there are some that are still unimproved- no road or pathway has ever been constructed within the right of way easement.

Historically, the Department of Transportation and Development Engineering Division (DTD-Engineering) has investigated and resolved issues involving obstructions in these unimproved public road rights of way. These issues initiate from citizen complaints that a neighbor has a structure in the right of way that restricts the use of the area. Currently this issue is not specifically addressed in the County Code and is not listed on the Code Compliance Violation Priority list.

The public has the right to use the right of way for ingress and egress regardless of whether there is an improved surface. However, most complaints involving obstruction of the right of way generally do not involve the transportation system or public safety but rather begin with two neighbors that have other issues that they are disputing. DTD-Engineering has had success in the past working with the neighbors to resolve these types of disputes. However, budget constraints and diminishing resources have hindered staff's ability to properly research, investigate and evaluate these types of issues. As a result DTD-Engineering is advocating limiting its involvement regarding some issues within public rights of way.

Issues involving public safety and permits for transportation maintenance or improvements will continue to be a priority for staff. For other issues, staff can direct the public as follows:

- 1) Research of the history, type, location and other pertinent information about the right of way can be done by the citizen at the County Surveyor's Office, County Clerk's Office and at the County Tax Assessor's Office.

Last updated: January 2012

- 2) A permit for improvements to be performed within the right of way can be obtained from DTD-Engineering. The permit application would be reviewed and appropriate action taken by staff to ensure issues within the right of way are resolved prior to construction.
- 3) If applicable, a citizen can hire a private land surveyor to determine the precise location of the right of way.
- 4) Discuss the option of filing an official complaint with the County Code Enforcement Division and explain the code compliance process and priorities.
- 5) Discuss the option of civil action, without providing legal advice.

FINANCIAL IMPLICATIONS (current year and ongoing):

Currently, responding to complaints and issues not involving construction or safety occupies staff time at all levels in the organization. In all, the time spent probably equates to approximately 1 FTE.

LEGAL/POLICY REQUIREMENTS:

Current Code Enforcement policy does not support enforcing these types of violations. The County will still issue permits for acceptable construction applications.

PUBLIC/GOVERNMENTAL PARTICIPATION:

N/A

OPTIONS:

- 1) Adopt a policy that County resources will only be used to resolve issues within the right of way when a permit has been obtained for improvements being performed in the right of way or if it is a matter of life, safety or health. Doing so effectively means that only those rights of way violations listed above will be classified as Priority 1 enforceable violations. All other rights of ways violations will be low priority, unenforceable violations.
- 2) Continue with the current practice of Engineering researching, investigating and working with citizens to try and resolve issues arising from obstructions in the right of way. Doing so effectively means that *all* issues within a public right of way will remain enforceable based on current practice.

RECOMMENDATIONS:

Staff respectfully requests that the Board adopt a policy that County resources will only be used to resolve issues within the right of way when a permit has been obtained for improvements being done in the right of way or if it is a matter of life, safety or health. Additionally, staff recommends that the County's Violation Priority Matrix be revised to reflect that such issues within a right of way are classified as Priority 1 enforceable violations.

ATTACHMENTS:

Summary of policies from other counties in Oregon (2 pages).

SUBMITTED BY:

Division Director/Head Approval MB

Department Director/Head Approval M. B. Cartmill 9-4-13

County Administrator Approval _____

For information on this issue or copies of attachments, please contact Greg Petersen @ 503-742-4672

How do other counties deal with fences across unimproved public rights-of-way. Specifically, rights-of-way that are not maintained by the

Jim Buisman	Lincoln County	Complaint driven. Only deal with fences and gates when i have to.
Dan Crumley	Curry County Roadmaster	We ignore these encroachments unless we receive a complaint.
Penny Keller	Crook County Road Department	Nothing.
George Kolb	Deschutes County Road Department	The first thing that has to be done is to determine where the actual right-of-way is. On many unimproved public right-of-ways, there are no property pins to determine if the fence is in the right-of-way or not. If it is determined that the fence is in the right-of-way, we will contact the property owner in person and also with a certified letter informing them that they need to move the fence. If they don't within a 30 day time period, we contact our Code Enforcement division and they can be cited if they don't move the fence.
Mike Kuntz	Jackson County	If the fence is installed across a r/w that is utilized by other than the property owner, we will require the property owner to remove the fence. If r/w is unused, we ignore the situation.
John Niiyama	Multnomah County	If there is a safety issue or maintenance issue—the fence will be removed. Again, working with Right-of-way and Code Compliance.
Burke O'Brien	Morrow County	Have not had fence issue.
Jennifer Paugh	Lane County Public Works, Road Maintenance Planning	If the fence is not a maintenance concern, an immediate hazard to the travelling public or prevent an emergency vehicle from getting to all necessary citizens we typically leave it alone and do not enforce. We've had recent complaints that people are putting up fences and that has stopped people from being able to walk their dogs or things of that nature. These are case by case but typically they are on non-maintained roads and we suggest to them that it's more of a civil dispute and we generally will not get involved.
Victoria Saager	Washington County Department of Land Use & Transportation	Fences and retaining walls are allowed without permit provided that "such fence or retaining wall does not interfere with the use of the right-of-way for road purposes or create a sight obstruction...or create any other hazard to the travelling public."
Laurie Starha	Benton County Public Works	Don't know if we have had that issue come up in the past. The County does offer a permit (see attached) where temporary structures like fences can be placed in the right of way.
Liane Welch	Tillamook County	1. Fences will normally be placed beyond the catch points of road cuts and fills, and behind the back slope of ditch lines. 2. Fences shall not interfere with required sight lines for intersections, curves, road approaches ability to maintain or in any other location that they restrict drivers' visibility of traffic or road hazards. 3. Fences shall not interfere with the operation or maintenance of drainage ditches, culverts or any other drainage facility. 4. Fences shall be a minimum of 12' from the edge of the pavement or from the edge of the traveled way on unpaved roads or on the right of way line if that distance is less than 12'. 5. Localized repairs to existing fences will be allowed, but shall be of the same materials and on the same line as the existing fences. Reconstruction of entire fencelines shall require that the fence be relocated according to these standards. Reconstruction will be when corner posts and 35% of line posts are replaced in a 1 year period. 6. When a fence is moved or rebuilt all old fence material will be removed from the road right-of-way. 7. All fences constructed under these guidelines in the right of way shall be constructed of "breakaway" materials. Concrete, masonry or other non-yielding materials will not be allowed in the public road right of way.
Alan Young	Multnomah County Transportation Program	If a complaint is directed to the County regarding any public right-of-way within its jurisdiction, maintained or not, the complaint would be investigated.

If they receive a complaint, do they compel the fence to be removed regardless of the condition of the easement?

Jim Buisman	Lincoln County	I have not had the circumstance, but I think my answer would be circumstances dependent.
Dan Crumley	Curry County Roadmaster	Yes
Penny Keller	Crook County Road Department	only if it is in the County Maintained ROW. Otherwise it is a civil matter.
George Kolb	Deschutes County Road Department	We do. A lot of the time the fence is blocking walkers and horseback riders from using the easement to access other lands such as BLM or USFS
Mike Kuntz	Jackson County	This really depends upon the circumstances, there is not a one size fits all. If there is a public (even one public) demand to use the road, we will ask for removal of the fence. If there is no road, just a dedicated r/w, and it is just a neighbor dispute, we probably wouldn't ask for fence removal. Another option is to encourage property/fence owner to obtain a gate permit per ORS 368.056 and condition the permit such that access is provide to those who want/need it.
John Niiyama	Multnomah County	No, depends on the situation
Burke O'Brien	Morrow County	Would require removal if not permitted structure on right of way
Jennifer Paugh	Lane County Public Works	if it's a Lane County maintained road and the Fire Marshal has told us that they cannot properly gain access to a citizen then we take immediate action. Otherwise we generally do not get involved.
Victoria Saager	Washington County Department of Land Use & Transportation	In the case of both mailboxes and fences/retaining walls, the county will require removal if it is determined that the object is a hazard.
Laurie Starha	Benton County Public Works	Depends on the validity of the complaint. At a minimum we might require the owner of the fence to complete a permit.
Liane Welch	Tillamook County	???
Alan Young	Multnomah County Transportation Program	Not necessarily, part of the investigation process would be to determine if additional property owners are impacted by the closed right-of-way. If there is additional property owners involved the fence would generally be required to be removed unless resident or non-resident property owners also support an approved method to allow the gate to remain. A property owner(s) could request approval from the Board of County Commissioners to allow the gate to remain in place subject to specific safety or other concerns they may have. Any approval would be subject to the requirements imposed by the Board such as fire and safety issues. In this example we are talking very rural isolated properties.