



RISK MANAGEMENT INFORMATION

DO YOU KNOW WHAT'S IN *YOUR* RIGHT-OF-WAY?

Introduction

Cities have a duty to manage rights-of-way in a safe and fiscally responsible manner. The management of rights-of-way involves complex interrelationships among all levels of government and the private sector. It involves planning, technical, engineering, construction, and maintenance issues. This memo is not meant to be a comprehensive discussion of all right-of-way issues. Rather, it is meant to highlight some important issues that cities should think about when managing and maintaining their rights-of-way.

Right-of-Way Definition

As it relates to cities, a right-of-way is typically an area on the side of a street. The city has an interest in managing and maintaining the right-of-way to ensure the safe travel of pedestrians and vehicles, as well as the efficient use of the right-of-way for necessary infrastructure such as sewer and water lines and other utilities. The use of a right-of-way by a city is known as a public right-of-way.

Private Right-of-Way

In addition to public rights-of-way managed and maintained by cities, there are private rights-of-way. A private right-of-way is a land usage right acquired by a private company such as a telecommunications company or a utility. The right to use the land is usually acquired by an easement. This private right to use the right-of-way must not interfere with the primary purpose of the road. Although private utilities in the right-of-way are not owned by the city, the city can and should adopt policies and regulations governing how rights-of-way can be used.

Who Owns the Right-of-Way?

A property owner typically owns the property to the middle of a platted street. The right-of-way is the right to use the property. It is not an ownership interest. This does not mean, however, that a property owner can do anything he or she wants with their property. Just as zoning regulations regulate what a property owner can build, a city can regulate what happens in the right-of-way.

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[Why Should You Have Street Maintenance Policies?](#)

Definition

The dictionary defines a "right-of-way" as: (1) the right to pass across the lands of another; (2) land, property or interests therein, usually in a strip, acquired or devoted to build facilities such as roads, railroads or utility facilities.

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Consult your attorney for advice concerning specific situations.

Thus, when thinking about rights-of-way, it is important to distinguish between ownership of the property and the enforcement of rules and regulations. If a city enforces unreasonable rules or takes some unreasonable action in the right-of-way, a court may consider the city's actions to be a taking of a person's property requiring just compensation. For example, if a city cuts down a tree on private property that is overhanging the right-of-way, it could be a compensable taking that requires the city to pay the property owner

Landowner's Rights

A landowner may use one-half of the roadway in any manner compatible with public's right to travel over the land. For example, a property owner can plant a tree in the right-of-way, assuming there is no city ordinance prohibiting such action. The property owner may not, however, plant the tree in the street, even though the property owner owns the land to the middle of the street. A tree in the street would clearly interfere with the public's right to use the street. So what could the city do if there was a tree or other encroachment interfering with public use?

What's in a Public Right-of-Way?

Many types of facilities can be found both above and below ground in a typical city's rights-of-way. All of these structures are important and need to be managed. Examples include:

- Street lighting.
- Traffic control devices.
- Signage.
- Sidewalks.
- Curbs and gutters.
- Storm drains.
- Trees.
- Fences.
- Retaining walls.
- Mailboxes.
- Landscaping.
- Irrigation lines and sprinkler heads.
- Fire hydrants.
- Newspaper boxes.
- Water and sewer lines.
- Electric and gas lines.
- Transformers.
- Railroad signals.
- Cable television.
- Poles and towers.
- Antennas.

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The Minnesota Supreme Court has ruled that cities have the right to remove an encroachment if there is a clear obstruction that interferes with the public's use of the road. Moreover, the city will not be held liable for any damages to the property owner for removing the obstruction. See *Foote v. City of Crosby*, 306 N.W.2d 883, 885 (Minn. 1981).

Managing the Right-of-Way

A city or other local unit of government is the recognized entity responsible to manage and maintain local rights-of-way. Governmental control is necessary to ensure the safe and efficient use of rights-of-way, to plan for community needs, and to provide public services. Proper management requires both long-range planning and day-to-day monitoring.

Ordinances

Ordinances are local laws enacted by the city council. A city council may pass ordinances regulating the right-of-way. For example, a city may regulate the placement of facilities in a right-of-way such as mailboxes, trees, landscaping, and fences. A city also could prohibit conduct in the right-of-way such as cutting down trees. Setting standards through an ordinance or policy helps to show that a city used due care when performing work in the right-of-way. In addition, a city can impose reasonable standards through an ordinance. For example, a city might require mailboxes meet a certain standard either in construction or placement. If the city damaged a mailbox that does not meet the standards, a city would have a strong argument that it was not negligent. The city could also limit its damages through the ordinance. For example, by requiring simple, non-decorative mailboxes, a city would probably not be liable for the expense of replacing a fancy, custom-made mailbox.

Highlight

The League of Minnesota Cities and the City Engineers Association of Minnesota developed a Model Right-of-Way Ordinance. It's available at www.lmc.org.

Permits

A permit process usually is established by city ordinance. A right-of-way permit system is a useful administrative tool that helps to maintain the integrity of public works facilities and enhance coordination among users of public rights-of-way. The premise is that nothing should be constructed, altered or installed, and no uses established or changes made within the right-of-way unless a permit is secured. The city also could require the applicant to have insurance in case something goes wrong. Permits should be required for all construction in public rights-of-way to protect against damage and unsafe conditions, ensure proper placements and operations, provide access to underground facilities, guarantee that all work is done in accordance with applicable standards, and control encroachments. The permit process must be in compliance with all applicable laws, ordinances, codes, and rules.

Definition

A *permit* essentially is an agreement between a city and an applicant whereby permission is given to perform a specific act in the right-of-way, on the assurance it will be done according to applicable standards.

Utility Notification

In order to promote safety, protect vital services, and minimize disruption to the public during construction, the permit process needs to be coordinated with the utility notification process. Knowing where an excavation is to take place and when it is to occur are vital to the management of rights-of-way.

City Liability

When a person is injured or property is damaged in a right-of-way, there is a potential the city could be held liable. Generally, a city will be held negligent if it violates its duty to use reasonable or due care. What constitutes due care will depend on the specific facts. Below are several examples of potentially negligent conduct:

- Example A. A city snow plow hits and damages a property owner's mailbox. Is the city liable? It depends. More often than not, a city will be liable if the snowplow hits the mailbox. If the city could show that the mailbox was not set back a required distance from the edge of the street, however, it would support a city's argument that it was not negligent.
- Example B. A city employee cuts down a tree that a property owner planted in the right-of-way. Is the city responsible for the value of the tree? It depends. If the tree clearly encroached on the right-of-way and it was reasonably necessary for the city to cut down the trees to install sewer lines or for public safety reasons, the city would not be liable.
- Example C. A city employee cuts down a tree that a property owner planted because some of the tree's branches overhang a stop sign. Is the city responsible for the value of the tree? Probably. It likely was not reasonable for the city to cut down the tree. The city probably could have used less invasive means such as trimming the tree. The city likely would be responsible for replacing the tree or paying damages to the property owner.
- Example D. A branch falls off a tree and damages a car. Is the city liable for the damage? It depends. If the branch fell during a lightning storm and was considered purely an act of God, a city will not be held liable. If, however, the branch was dead and overhanging the street, the city may have a duty to remove the branch. If the city has a policy regarding trees, it is very important the city follow its policy.

Duty to Keep the Right-of-Way Free From Obstructions

By ordinance, a city can limit what is in the right-of-way. If there is an encroachment or obstruction in the right-of-way, it is the city's responsibility to see that the obstruction is removed. That is not to say the city must do the work. If the encroachment is an object owned by the property owner, the city can order the property owner to remove the obstruction. For example, a city could order a property owner to remove or trim a tree if it is obstructing the right-of-way. If the property owner fails to act, or if there is an emergency requiring the city to take immediate action, the city can charge that cost back to the property owner. If, however, the tree was owned by the city, the city would be responsible for taking any necessary action at the city's expense.

Telecommunication Act of 1996

The Telecommunications Act of 1996 revolutionized the formerly ministerial and routine use of public and private property for telecommunication use. Due to the complexities of the Act, it is important for cities to make sure their right-of-way regulations do not violate the Act. See the League's Model Right-of-Way Ordinance for guidance.

Conclusion

Public rights-of-way include the space on, above, and below the surface and are used for many purposes. Each year there are a number of accidents that kill or injure people or damage property that can be directly attributed to activities that occur in public rights-of-way. Cities have a legal duty and responsibility to manage, maintain, and balance all of the essential and sometimes competing uses. To do this, cities must have the tools in place to be able to manage rights-of-way for the safety, health, and welfare of the community.

Chris Smith, 03/08

Reviewed: 04/10

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Read more about right-of-way issues in:

[*Right-Of-Way Issues: When Is The City Responsible?*](#)