

Introduced by: Mayor  
Date: 10/11/94  
Hearing: 12/06/94  
Withdrawn by sponsor: 10/11/94  
Action:  
Vote:

**KENAI PENINSULA BOROUGH  
ORDINANCE 94-49**

**AN ORDINANCE ESTABLISHING A PERMIT SYSTEM FOR REGULATION OF  
CONSTRUCTION ACTIVITIES BY PUBLIC UTILITIES WITHIN  
KPB RIGHTS-OF-WAY AND ESTABLISHING REGULATIONS FOR USE  
AND CONTROL OF RIGHTS OF WAY**

**WHEREAS,** over 1800 miles of dedicated right-of-way are located within the Kenai Peninsula Borough outside of the first and second class cities and not subject to State maintenance; and

**WHEREAS,** by statute, these right-of-way are available for use as public utility corridors as well as for transportation purposes; and

**WHEREAS,** the lack of Borough regulation to coordinate utility and road construction can lead to conflicts, where the placement of the first built improvement can deny a later right-of-way project any practical room for construction without relocation of the first built improvement; and

**WHEREAS,** such relocation expenses could be avoided through coordination of the development of the roads and utilities within the Borough rights of way;

**NOW, THEREFORE, BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:**

**SECTION 1.** That a new KPB Chapter 14.08 is enacted as follows:

**Chapter 14.08  
Permits for Utility Use of Right-of-Way**

**14.08.010. Definitions.**

A. **Borough right-of-way:** all dedicated right-of-ways, public easements and section line easements within the Kenai Peninsula Borough which are outside of the boundaries of any first- and second- class city and which are not subject to jurisdiction and maintenance by the Alaska Department of Transportation and Public Facilities.

B. Maintenance: upkeep, repair, or improvement work on an existing utility facility which does not expand the area occupied by, or change the location of the facility.

C. Excavation: the removal, carrying away, backfilling, tunnelling, boring, bulldozing, digging out, leveling, clearing, or moving of earth or soil by manual or mechanical means.

D. Public Utility: every corporation, company, individual or association of individuals as defined by AS 42.05.720 that owns, operates, manages or controls any plant, pipeline or system for furnishing electrical service, telephone service, cable television service, natural or manufactured gas service, water service or sewer service to the public for compensation.

E. Road Opening: excavation within a road accepted for maintenance by the Kenai Peninsula Borough.

#### **14.08.020. Utility use of right-of-way – Permits required.**

A. After ~~(the effective date of this Ordinance)~~, a public utility shall not construct any facility in, under or over Borough right-of-way without first having been granted:

1. A general utility right-of-way use permit as set forth in Section 14.08.030 of this Chapter; and,

2. A Utility Construction Project Permit for each individual excavation and road opening as set forth in Section 14.08.040 of this Chapter.

B. Utility right-of-way use permits may include reasonable conditions deemed necessary to protect the public health, safety and welfare and the interests of the Borough.

C. Decisions of the Borough Mayor regarding utility right-of-way use permits shall be final unless appealed by the applicant to the Planning Commission within twenty (20) days of posting of the written decision/permit to the address contained in the application. Appeal of the Planning Commission's determination shall be directly to the Alaska Public Utilities Commission (APUC), or to the Superior Court of the State of Alaska at Kenai, as appropriate.

D. Normal maintenance of utility facilities within a right-of-way shall not require a separate individual permit under this Chapter.

#### **14.08.030. General utility right-of-way use permit.**

A. A general right-of-way use permit shall give written evidence of a Utility's written agreement to comply with terms, conditions and requirements of this Chapter, including, but not limited to:

1. A provision for indemnification by the utility saving the Borough harmless against any loss or damages due to the negligence of the Utility or its agents and employees while constructing, operating and maintaining its plant and equipment in, under or over Borough right-of-way.

B. There is established a \$1,000 annual fee for a General Utility Right-of-Way Use Permit to defray administrative costs of the Borough to manage and govern use of its right-of-way by utilities.

#### **14.08.040. Utility construction project permits.**

A. After securing a General Right-of-Way Use Permit as provided in Section 14.08.030 of this Chapter, a Utility shall obtain a permit from the Borough Planning Department for each individual road opening project or excavation sought to be performed by the Utility.

B. Application shall be made upon forms provided by the Borough and shall include, at a minimum, the following information:

1. The name and location of the right-of-way for which the permit is sought;
2. The type of improvement or facility planned;
3. Plans, drawings, or sketches showing the length, horizontal width, vertical depth and configuration of the improvement, its specific location within the right-of-way and its relationship to the existing roadway;
4. The proposed method of location and marking of the boundaries of the right-of-way for construction purposes;
5. The name of the Utility, its address, phone number and contact person;
6. Whether any subcontractor may be working for the Utility on this project and, if so, the subcontractor's name, address, phone number and contact person;
7. Whether a detour of traffic will be necessary and, if so, a traffic routing narrative statement and plan as required by Section 14.08.060 of this Chapter;
8. Exceptions to assigned utility locations as prescribed by Section 14.08.070 of this Chapter; and,
9. Any additional information and assurances as the Planning Director shall find reasonably necessary for the issuance of a construction project permit.

C. A \$100 fee for each permit shall accompany an application to defray costs of the Borough for review, coordination, inspection and recording of Utility Construction Projects.

D. The Borough shall review and grant or deny Construction Project Permits within 10 working days, where the standards, terms and conditions of the Chapter are met.

#### **14.08.050. Construction permit requirements.**

A. Each permit shall set out a window for construction dates including projected start and completion dates, and the procedure to be followed for any required road closures during the course of construction.

B. Utility lines or facilities shall be located to assure compatibility with all present and anticipated future uses of the right-of-way in which the utility is located. The following general standards shall apply:

1. Utilities shall be located outside of the existing or anticipated travel surface and avoid impacting the drainage of the roadway whenever possible.
2. The location of the utility shall allow for the safe and practical maintenance and improvement of both the utility and the roadway.
3. Surface utility fixtures shall be set back from the existing or planned roadway surface and shall not be located so to create a visual sight distance or physical obstacle or hazard.
4. Excavation, backfill, or other disturbance by utility construction or maintenance activities shall be finished in a manner which restores the ground surface and landscape to the original or better condition. Clearing of vegetation shall be held to the minimum necessary for safe construction and maintenance of the utility. Slash and debris shall be disposed of in a neat and orderly manner. Felled timber shall be removed in a manner approved by the Borough Planning Director prior to the next construction season.

C. Each permit shall require that prior to beginning the next construction season the permittee shall provide proof of compliance with the application and permit requirements by filing with the Borough Planning Department as-built survey or other similar documentation as approved

by the Planning Director showing the actual location and configuration of the facility within the right-of-way.

D. No construction permit shall be valid unless and until the Utility has given twenty-four hours notice to all other utilities operating in the area of its intention to excavate in the area proposed, and all existing utility lines or pipes have been staked or otherwise clearly marked.

E. Coordination between utilities for their construction activities within Borough rights-of-way shall be solely the responsibility of the utilities and each permit shall expressly state the Borough's disclaimer of any warranty or liability regarding coordination of utility facilities.

**14.08.060. Standards concerning excavation activity.**

Upon securing a permit, all Utilities shall abide by the following excavation standards:

A. Repair Broken Lines. The Utility shall immediately notify an affected Utility of any damage to their plant or equipment.

B. Project Coordination. The Utility shall insure adequate and timely notice to fire, emergency medical and police agencies and attempt to coordinate its work with the schedule for other construction work. It is the responsibility of the Utility to see that proper traffic signs, detours and safeguards are provided, and that property owners affected are notified.

C. Traffic Routing. Where traffic is affected, the Utility shall provide that proper signing and safeguards be in accordance with the Alaska Traffic Manual and shall notify fire, emergency medical, police and school bus transportation agencies to obtain clearance for the type of detour, time and other limitations imposed.

D. Closing Roads. When traffic conditions permit, the Borough may, by written approval, permit the closing of roads to all traffic for a necessary period of time. Such approval may require the Utility to give notification to various public agencies and to the general public.

E. Clearance for Vital Structures. The excavation work shall be performed and conducted so as not to interfere with access to fire hydrants, fire stations, fire escapes, water gates, underground vaults, valve housing structures and all other vital equipment unless approved on the permit.

F. Restoration of Right-of-Way. The right-of-way shall be restored to the grade and condition originally found. Gravel, paving or seal coating, ditches, culverts, fences, signs or other improvements shall be replaced, unless specific direction to the contrary is authorized in writing by the Borough. Failure to do so will be cause for the Borough to accomplish the required work and to collect damages from the Utility.

1. Unpaved Roads. In the case of unpaved roads, nothing but non-frost susceptible material shall be placed in the excavation and six inches of good Type B gravel on the driving surface except where the existing road itself is not built according to these standards in which case the excavation shall be refilled as nearly as possible as found and in any event with compaction at 95% or better. The excavation and adjacent areas shall be graded to leave the site in the same condition than prior to the excavation.

2. Paved Roads. In the case of paved roads, 26 inches of Type A material, six inches of Type B material and two inches of D1 leveling course shall be placed in the excavation before overlaying the area with 2 inches of hot asphaltic concrete. Compaction density shall be maintained at 95% or greater. The excavation shall be guaranteed for two years against settling. Any area that has settled within two years shall be promptly rectified at no cost to the Borough.

3. Rights-of-Ways Other than Roads. In the case of rights-of-way which are not

Borough maintained roads, the compaction shall be 85% or better.

G. Clean Up. As the excavation work progresses, all roads shall be thoroughly cleaned of all rubbish, excess earth, rock and other debris. All gutters shall be maintained free and unobstructed. Whenever a gutter crosses an intersection street, an adequate waterway shall be provided and maintained at all times. All clean up operations shall be accomplished at the expense of the Utility and shall be completed to the satisfaction of the Borough.

H. Prompt Completion of Work. After an excavation is commenced, the work shall be promptly completed and the road restored to its original condition as soon as possible.

I. Urgent Work: The Borough shall have the authority to condition the issuance of a permit upon the utility's operating on a twenty-four hour per day schedule, in order to complete an excavation as soon as possible when required by traffic conditions, safety or the convenience of the traveling public

J. Emergency Action. Nothing in this Chapter shall be construed to prevent the making of such excavations as may be necessary for the preservation of life or property or for the location of trouble in conduit or pipe, or for making repairs, provided that the person making such excavation shall make a reasonable effort to notify police dispatch of the location of the emergency excavation. A Utility excavating on an emergency basis in a roadway shall apply for a permit on the first working day after such work is commenced.

#### **14.08.070. Utility Locations within the Right-of-Way.**

A. All utility facilities shall be placed within one of the two ten-foot corridors running along either side of the right of way, except:

1. If only half of the right-of-way has been dedicated, utilities shall be placed only along the side of the right-of-way that is likely to become a future road.

B. Exceptions to assigned utility locations

1. Whenever a utility finds it unreasonable to place its facilities within their assigned area, it may apply for an exception on a form provided by the borough Planning Department and shall include, at a minimum, the following information:

- (a) A complete explanation as to why the utility is requesting an exception from its assigned location within the right of way;
- (b) Additional plans, drawings or sketches necessary to show locations of other existing utilities, problem areas such as rock or wetlands, and locations where the utility is proposing to place new facilities; and,
- (c) Evidence that the request for an exception has been reviewed and approved by all other affected utilities.

2. Subject to appeal to the Planning Commission, the borough Planning Director or his designee has authority to grant an exception to the assigned utility location within the borough right of way.

3. Requests for exceptions that become necessary and evident during actual ongoing construction shall be deemed approved if not rejected or modified within four (4) normal working hours after receipt by the borough Planning Department. It is a utility's responsibility to inquire if the request for an exception has been approved, rejected or modified.

#### **14.08.100. Appeals/Enforcement.**

A. A person aggrieved by a decision of the borough or a utility pertaining to this chapter

may, within 30 days after a decision is mailed or delivered to the person, file an appeal to the Alaska Public Utilities Commission (APUC) pursuant to AS 42.05.251, or to the superior court of the State of Alaska, at Kenai, as appropriate.

B. Nothing in this section shall prohibit a mutually acceptable alternative dispute resolution procedure between the borough and a utility to avoid the expense of an appeal to the APUC.

**SECTION 2.** That there is enacted a new chapter to the KPB Chapter 14.10 entitled "Protection of Public Roads and Road Rights of way."

### Chapter 14.10

**14.10.010. Purpose.**

The purpose of this section is to provide for the protection of public roads and rights of way dedicated for such roads.

**14.10.020. Encroachment prohibited.**

No person shall cause, create, maintain or expand an encroachment within a dedicated road right of way.

**14.10.030. Encroachment – Abatement – Notice – Expense.**

A. If the any encroachment exists in or is constructed upon, over, or under a public road or within a right of way dedicated for such roads the borough may require that the encroachment be removed at the expense of the owner or person in possession of the encroachment, or by the person causing or permitting any encroachment. The owner, occupant, or person in possession of an encroachment or any person causing or permitting an encroachment to exist shall within 30 days be given notice to remove the encroachment. If the circumstances warrant, the borough may provide for immediate removal of the encroachment.

B. The borough shall deliver notice to remove an encroachment by serving a copy of the notice on the owner, occupant, or person in possession of the encroachment, or to the person causing or permitting the encroachment to exist. The service may be made by certified mail. If the owner, occupant, or person in possession of the encroachment, or the person causing or permitting the encroachment is unknown and cannot be reasonably be found, posting of the notice at the site of the encroachment shall be deemed sufficient. Notice shall describe encroachment as to character and location and specify the time for removal.

C. If a person who receives a notice demanding removal of an encroachment fails to comply with the requirements of the notice, the borough may remove or cause to be removed, the encroachment, and the person shall pay the borough: a) all expenses for removal of the encroachment; b) all costs and expenses paid by the borough as a result of claims filed against the borough for damages due to the existence of the encroachment, if any; and c) costs and expenses of suit and interest from the date the expense was incurred.

**14.10.040. Other prohibited activities within rights of way.**

Except as provided in this chapter, the following uses are prohibited within dedicated rights of way:

A. Placement of any sign, except a name and street number identification located on a mail box or mail box mounting device located in the right of way. If no mailbox is present the owner may place a sign identifying the residence and address number in such an manner that does not impede or interfere with the use of the right of way for road or utilities being installed in accordance with KPB 14.08. Such signs shall be a size and type consistent with a sign placed upon a mailbox. If the construction of any road or installation of any utility requires removal of a name and address sign, no responsibility shall attach to the borough for such removal. The sole responsibility for placement and proper maintenance of a name and address sign or mailbox within a right of way is the responsibility of the owner of such box or sign.

B. Dedicated rights of way for street and road purposes within the borough may not be used for access to streams or lakes where such right of way extends to the edge of such stream or lake, except as provided within this chapter.

C. No person may use the right of way intersection with a stream or lake as a place to tie-up dock, store, or otherwise leave vessels and boats, except for entering and exiting such boat for pedestrian access from that point.

D. No dock or other access facility may be constructed from a point in the right of way to water or streams or rivers or lakes, except as specifically provided in this chapter.

E. No person may conduct any commercial enterprise within the right of way; provided however, that the conduct of a commercial enterprise does not include parking which is incidental to access to the premises of a commercial enterprise; and further provided that such parking shall be conducted in a reasonable and prudent manner so as to not impede or unduly interfere with travel on any roads constructed within the right of way.

F. No private person or individual may regulate or purport to regulate the flow of traffic or place any traffic regulatory device or sign within the right of way without the express permission of that Kenai Peninsula Borough.

#### **14.10.050. Permits for stream and boat access facilities.**

The borough may issue permits for use of the right of way for launching, docking or tie-up of boats. Such permits may only be issued by the assembly upon a determination that the activity will not unduly impact the use of the right of way or create a use inconsistent with the existing use of properties abutting the right of way at the point where it reaches the shore of the stream. The permit shall be conditioned upon the facility being open to use by members of the general public, 2) the permittee agreeing to be responsible for all construction, maintenance and operating costs associated with the activity 3) meeting permit requirements for all applicable federal, state and local government laws and regulations governing the facility or activity; and 4) meeting additional requirements imposed by the assembly to address specific conditions or problems associated with a particular site. The assembly shall have the discretion to deny a permit when it deems it in the best interest of the borough to do so.

#### **14.10.060. Parking regulation.**

A. No person may park a vehicle or other device within a dedicated road right of way, except as in a manner which allows reasonable use of the right of way by other persons. Parking in any manner or for such periods of time that would interfere with or impede the use of the right of way or other persons or the construction or use of activities permitted by this chapter or KPB 14.08, is prohibited.

B. The borough may establish specific parking limitations within areas of the right of way if it determines a need exists for limitation. Such limitations will be posted at that location by the borough.

**14.10.070. Traffic regulation.**

The mayor may establish traffic regulations within the right of way for the purposes of weight limitations, and dust control as deemed necessary for the protection of the roads and users of them. The mayor may delegate such authority for administration of this to the road maintenance service area board in accordance with the maintenance of roads in the borough road maintenance system. The mayor is authorized to place such traffic regulatory signs or devices in the rights of way or to provide such other notice as is reasonably necessary for the implementation of any restrictions adopted pursuant to this section.

**14.10.080. Violations.**

Violation of any provision of this chapter shall constitute a misdemeanor and shall be punishable by a fine of up to \$1000 for each occurrence. The purpose of this chapter each day upon which a violation of this chapter or encroachment continues to be allowed in the right of way shall be considered a separate offense.

**14.10.090. Definitions.**

A. "Dedicated road right of way" or "right of way" means a right of way dedicated on a plat for road and street and utility purposes in accordance with the platting requirements of the Kenai Peninsula Borough, or such rights of way as have been specifically granted and dedicated to such use by the borough. It does not include such rights of way within the boundaries of a city within the borough.

B. "Encroachment" means any structure, facility, activity or use of a right of way or dedicated right of way that is not specifically allowed under this chapter or KPB 14.08, or an authorized activity that is not conducted in accordance with the requirements imposed for that activity.

C. "Permitted encroachment" means an encroachment that is allowed under a permit that has been issued in accordance with the provisions of this chapter, but which would otherwise be a prohibited activity. It does not include activities not conducted in accordance with the permit conditions.

**SECTION 3.** That this ordinance shall take effect immediately upon its enactment.

**ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 1994.**

\_\_\_\_\_  
Betty J. Glick, Assembly President

ATTEST:

\_\_\_\_\_  
Gaye J. Vaughan, Borough Clerk