



## Permitting Activities in the Right-of-Way

Protecting the right-of-way (ROW) is one of the most important town responsibilities. Every year towns invest millions of dollars into their roads. Protecting that investment in infrastructure becomes extremely important not only from a financial standpoint, but also from an economic perspective as well since Wisconsin's economy heavily relies upon roads and transportation. Farmers cannot get their milk or crops to market and loggers cannot transport timber without good roads. Thus rural economies often depend on good roads. Towns, however, are required to grant access to their right-of-way with other entities. Sharing the ROW does not have to be confrontational. There are basic rules and requirements both sides must adhere to when one party wants access to the town ROW. Knowing the rules and limitations for both sides will help reduce conflicts and ultimately all parties.

### Statutory Authority

The town's basic permitting authority in the ROW comes from two statutes. First, Wis. Stat. § 86.07(2)(a) requires any person seeking to do excavation, fill, installation of a culvert, or any other alteration within the ROW to get a permit from the town. This statutory provision is where towns get their authority for permitting driveways, culverts, or other similar types of ROW alterations.

Another important permitting authorization under this section allows for underground manure hoses. The statutes define a manure hose as "any hose, pipeline, or other conduit, whether temporary or permanent in nature, for the transmission of liquid manure within or across the right-of-way of a highway to a destination for spreading in a farm field or for storage." Towns may use their ROW permitting authority to allow these types of hoses in the ROW. Further, the statutes allow the town to grant access to bridges or support structures for the temporary placement of manure hoses.

The second statute that grants permitting authority is Wis. Stat. 86.16, which governs the placement of utility lines, underground manure hoses, and other structures within the ROW. This section requires a firm, corporation, or person to get written permission from the town to "construct and operate lines, wires, or fiber for telecommunications service, telegraph, telephone, or electric lines, or pipes or pipelines, for the purpose of transmitting voice, video, data, messages, water, liquid manure, heat, light, or power along, across, under, or within the limits of the highway." In simple terms this section governs utilities placing infrastructure in the ROW.

### Ordinance Requirements and Permit Conditions

The general grants of authority given to local governments regarding permitting allow for creating rules and procedures any entity requesting access must follow. That authority, however, is not unlimited. There are regulations in the Wisconsin Public Service Commission regulatory code, PSC 130, which govern municipal regulation of the ROW for utilities. Any ordinance requirement or permit condition related to utility access must comply with this administrative code.

PSC 130.03 limits when local governments can regulate construction and design standards. There is a general prohibition against controlling utility design and construction methods. There is an exception for the public

health, safety, and general welfare. If your town has a requirement related to design or construction, it can enforce that provision as long as there are adequate health, safety, or public welfare justifications for the requirement. The more details the town can use to justify the requirement as in the public interest, the better. For example, if the town requires constructing poles on the back-slope of the ditch and away from the pavement, it can justify that for public safety reasons because poles directly next to the pavement could be dangerous for traffic reasons or roadbed security reasons. That regulation is more likely to be upheld as valid. Further, aesthetics alone cannot justify a requirement to install facilities underground. Another exception to this rule is that a town may require special design or construction standards if the town or a third party covers the additional costs of construction, and the standards are consistent with sound construction practices.

Another restriction is that towns may not discriminate on utility access. One type of discrimination would be allowing one telecommunications provider to have access to the ROW, but denying another, assuming they have identical applications and projects. You cannot show favoritism between utilities. Further, if one project has above-ground infrastructure, while another applicant has under-ground infrastructure, the town cannot discriminate between the two. Both types of projects have the same access rights.

Fees are another frequent point of contention. Wis. Stat. § 66.0628 prohibits municipalities from charging a fee that exceeds their actual costs for administering the permit and application. PSC 130 defines some specific things that may be covered in a permit fee, such as inspection of job sites, maintaining, supporting, protecting, or moving utility equipment during work in the ROW, undertaking restoration work inadequately performed by a utility after providing notice and the opportunity to correct the work, as well as several other areas. The most important thing to remember is that the fee must have a relationship to what it is being charged for and the town cannot make a profit from it.

Some of the more important permit conditions or requirements relate to bonding/insurance, relocation, and abandonment. When issuing a permit, the town may place a bonding or insurance requirement on the permit if the town has reasonable grounds to question the financial responsibility or compliance ability of the utility. Additionally, the town can place conditions on the permanent relocation of the facility if there are adequate health, safety, or general welfare reasons for the requirement. For example, if the town needs to widen a road due to increased traffic, or relocate the road, the town would possibly be able to justify a condition for relocation because the pole's location is a danger to traffic. The relocation requirement would ensure the municipality is not on the hook for relocation costs. Further, the town may have a permit condition that requires the utility to notify the town if the equipment becomes abandoned. The town could then require removal of that facility.

The Public Service Administrative Code also deals with some other less common regulations so this article does not provide an exhaustive list of restrictions placed upon local government. With that said, as long as the town is not exceeding those requirements in the administrative code, it could enact ordinance provisions or requirements that it deems necessary and further the public health, safety, or general welfare. These restrictions and conditions should ideally be supported by evidence or data that shows how the requirement furthers the general welfare of the town. It is also important to know that the weaker the relationship between the requirement and the public welfare, the more likely a lawsuit will follow with an adverse judicial finding.

With all of these principles in mind, it is advisable that the town pass an ordinance that establishes its ROW policy. This will help provide clarity for those wanting access to the ROW as well as the current and future town boards. Having an attorney help draft the ordinance would be highly recommended as these issues can become complex. This would also help to ensure your ordinance requirements are legally defensible and comply with current law.