

Guide

To the Legal Aspects of

Trench Cuts



METROPOLITAN
TRANSPORTATION
COMMISSION



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Trench Cuts



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Contents

Executive Summary

Introduction

- Background and Purpose 1
- Topics Included in the Guide 1
- Drafting Notes and Disclaimers 1

Municipal Authority to Regulate Encroachments and Excavations

- Introduction 2
- Authority as Property Owner Under State Law 2
- Authority Under Police Power 2
- Authority Over Franchises 3
- Other Statutory Provisions 4

Municipality's Ability to Condition Excavation/Encroachment Permits

- Introduction 5
- Express Authority to Impose Conditions 5
- Need for Reasonable Connection 5
- Standard Conditions v. Encroachment Agreements 5
- Potential Conditions That May Be Imposed on Issuance of a Permit 6
 - Legal and Financial Protection for the Municipality 6
 - Traffic, Bicycle, and Pedestrian Control 7
 - Disabled Access 7
 - Access to Right of Way 8
 - Joint Trenching 8
 - Noise Control and Work Hours 8
 - Labor Code 6500 8
 - Underground Services Alert (USA) 9
 - Trench Restoration Requirements 9
 - Inspections 10
 - As-Built Maps 10
- Maintenance, Relocation, and Removal of Facilities 10
 - Maintenance of Facilities 10
 - Relocation and Removal Facilities 10
 - Abandoned Facilities 11
- California Environmental Quality Act (CEQA) 11
- Waiver/Modification of Permit Conditions 11
- Appeal of Imposition of Condition 11

Local Authority to Assess Fees Against the Permittee

- Administrative Fees 12
- Inspection Fees 12
- Street Deterioration Fees 13
 - Street Deterioration Fee Study 13
 - Legal Arguments Made Against Imposition of Street Deterioration Fees 14
 - Violation of Proposition 218 14
 - Dispute Regarding Underlying Assumption of Street Deterioration 14
 - Franchise Utilities: Contract Rights Violated by Street Deterioration Fee 14
 - Adjustment of Fee 15
- Other Fees 15
 - Fees for Obstructing Right of Way 15
 - Fee to Reimburse for Lost Parking Meter Revenue 15
 - Franchise Fees 15
 - User or Rental Fees 16
- Collection of Fees 16

Trench Inspections

- Authority of Inspectors 16
- Use of Outside Consultants 16
- Liability of Agency for Faulty Inspections of Encroachments 17

Enforcement of Permit Conditions

- Administrative Enforcement 18
- Civil Enforcement 18
- Criminal Enforcement 19
- Contractual Enforcement 19
- Enforcement Against Persons Other Than Permit Holder 19

Emergency Repairs 20

Moratorium on Trench Cuts 21

Coordination Between Street Paving and Trench Cuts 21

Trench Cut Permitting Process in Small Cities 22

Conclusion 23

Frequently Asked Questions 25

Executive Summary

Background and Purpose

Many municipalities are faced with an increasing number of requests to excavate and place facilities in the public right of way. As cities age and cuts and re-cuts on streets occur, the streets begin to look like a patchwork quilt. Of all the methods of managing pavement cuts, the most productive is effective communication through utility coordination committees. However, questions often arise relating to the extent to which the municipality may regulate utilities and companies seeking access to the municipality's right of way. Further, many municipalities do not have the mechanisms needed to effectively regulate excavations and encroachments within their public right of way.

This guide addresses the legal issues affecting municipalities that regulate trench cuts. It is designed to assist municipalities' staff in regulating and managing trench cuts and encroachments within their public right of way.

Municipal Authority to Regulate Encroachments and Excavations

In most cases, municipalities that regulate encroachments and excavations in the public right of way will have local laws and administrative procedures that govern issuance of the proper permits and the assessment of fees, if any.

State law provides that a municipality may "improve, preserve, take care of, manage, and control" its property. In particular, municipalities may prohibit and prevent encroachments and obstructions in the public right of way.

Municipalities also have the right to control access to the public right of way under their police powers. A municipality's police power provides its legislative body with the ability to regulate to protect the public's health, safety, and welfare to the extent the municipality is not preempted by state or federal law.

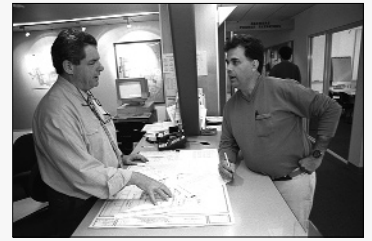
With respect to franchises, the municipality's legal ability to regulate depends upon the type of franchise granted:

PUBLIC UTILITY FRANCHISES State law permits municipalities to regulate utilities that operate under California Public Utilities Commission authority with respect to the use and repair of public streets. Further, a franchise ordinance or agreement may contain specific provisions with regard to requiring a permit prior to performing excavations in the public right of way. If specific questions arise as to the municipality's authority to require a permit, the franchise agreement and/or ordinance should be closely examined by the municipality's legal counsel.

CABLE FRANCHISES Federal law specifies that a grant of franchise shall be construed to authorize the construction of the cable system over public rights of way and through easements. However, federal law further requires the cable operator to ensure (1) that the safety, functioning, and appearance of the property and the public convenience are maintained; (2) that the cost of installation, construction, operation, or removal of the facilities be borne by the cable company or its subscribers; and (3) that the municipality be reimbursed for any damage to public property.

The Trenching Process

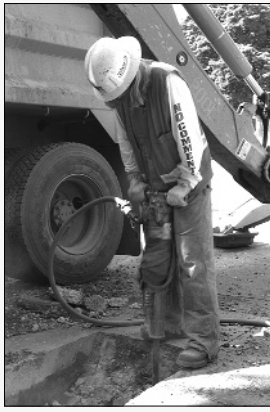
1 Applying for the permit



2 Preparing the site



3 Cutting the pavement



4 Digging the trench



TELEPHONE FRANCHISES State law has, in effect, granted telephone companies a statewide franchise to construct and maintain telephone lines within public streets and highways. However, state law does not limit a municipality from exercising reasonable control over the time, place, and manner of access to its right of way as long as such control is exercised in a nondiscriminatory manner.

MUNICIPAL CORPORATIONS AND MUNICIPALLY OWNED UTILITIES As with telephone companies, municipalities and municipally owned utilities have the right to construct, operate, and maintain utilities in the public right of way. However, state law requires municipalities to seek an agreement with the city or county in which the right of way is located before performing any excavation.

Other governmental agencies also have the right to access the public right of way:

MUNICIPAL UTILITY DISTRICTS State law permits a municipal utility to construct facilities in the public right of way. However, the district is required to restore the right of way to its former state as near as may be possible.

WATER MANAGEMENT AGENCIES The California Water Code grants water management agencies the right to construct works across any public right of way. However, as with Municipal Utility Districts, these agencies are required to restore the right of way to its former state as near as may be possible.

Municipality's Ability to Condition Excavation/Encroachment Permits

The power to deny a permit implies the power to place conditions on the issuance of that permit. Under its police power, the municipality may condition the issuance of the permit to address the public health, safety, and welfare issues that otherwise might cause the municipality to deny the permit.

Generally, however, a municipality will have some express local authority to impose conditions on the issuance of encroachment/excavation permits. In order to impose a condition on the applicant, there needs to be a reasonable connection between the impact of the project and the conditions that are placed upon issuance of the permit.

Local agencies may wish to consider drafting standard conditions that are reasonable to impose on applicants for encroachment/excavation permits. In certain situations, the local municipality may wish to supplement the encroachment permit with an encroachment agreement. Examples of areas where the municipality may wish to impose conditions include legal and financial protection for the municipality, traffic control, disabled access, access to right of way, joint trenching, noise control, work hours, state trenching permit requirements, underground services alert (USA), trench restoration requirements, inspections, as-built maps, maintenance, relocation, and removal of facilities.

Local Authority to Assess Fees Against the Permittee

Administrative Fees

Municipalities have the authority to impose fees pursuant to their police powers as long as the fees are not in conflict with state or federal law. The purpose of establishing fees is to reimburse the municipality for its costs related to issuing permits and administering the permitting process. The fee cannot exceed the estimated reasonable cost of providing the service for which the fee is charged. The municipality can recover both its direct and indirect costs through fees.

Inspection Fees

Municipalities may decide to charge inspection fees separate from and in addition to their administrative fees related to issuing the permit. The municipality also may wish to include the municipality's costs for using outside consultants for inspections, materials testing, etc., as part of the fee.

Street Deterioration Fees

Several cities have adopted trench cut fee ordinances in an attempt to recover future costs related to repair and resurfacing of streets damaged by trench cuts. Street deterioration fees are mitigation fees collected from the entities performing the trench cuts, and are similar to the administrative fees discussed previously. In order to impose such a fee, a fee study is commonly performed to document the need for the fee and to determine the amount of the fee. These fees are controversial and are currently the subject of litigation.

Other Fees

There are other fees that the municipality may wish to consider. They include fees for obstructing right of way, fee to reimburse for lost parking meter revenue, franchise fees and user or rental fees.

Trench Inspections

An inspector's authority to inspect is governed by the laws and regulations of the local municipality. The municipality's ability to define an inspector's authority flows from its police power. Under state law, municipalities may use outside consultants to perform inspections. These inspectors may be retained on an as-needed basis or hired as temporary employees.

Generally, a municipality is not liable for injury caused by a failure to make an inspection, or by making an inadequate or negligent inspection of encroachments located on the municipality's property where the encroachments are not owned or controlled by the municipality.

Enforcement of Permit Conditions

There are various methods by which a municipality may enforce permit conditions. In determining what enforcement method to use, the municipality should consider (1) the nature and extent of the violation, (2) who the permit holder is, (3) the municipality's past history with the permit holder, and (4) the amount of cooperation the municipality has received from the permit holder to resolve the violation.

5 Shoring the cut



6 Placing the pipe



7 Backfilling the trench and compacting the fill in layers



8 *Inspecting***Administrative Enforcement**

As encroachment permits will usually be issued pursuant to legal authority in the Municipal Code, violations of conditions imposed on the permit may be abated by using the code's administrative enforcement regulations.

Civil Enforcement

Municipalities may seek an injunction in Superior Court where there has been a violation of a permit condition. The court, through an injunction, may either order the violator (1) to perform some action, or (2) prohibit them from continuing to perform some action, depending on the particular facts of the situation.

Criminal Enforcement

State law permits cities and counties to prosecute code violations as either infractions or misdemeanors through the criminal courts. The municipality has the discretion to set the punishment within the limits established by state law.

Contractual Enforcement

If an encroachment agreement has been entered into, the municipality may enforce the provisions of the agreement in the same manner as any other contract. Enforcement may be through the civil injunction process or by requesting the court to order specific performance of the agreement.

Enforcement Against Persons Other Than Permit Holder

It is often difficult to enforce permit conditions against a third party who has hired a contractor to obtain the encroachment permit and perform the work. One option is to have both the contractor and the third party sign the application.

Emergency Repairs

Emergency repairs to the public right of way are usually required where there is some condition that places the public's health and safety at risk. If the responsible party is unwilling or unable to make the repairs within the municipality's time frame, the municipality can perform the repairs using its own funds and seek financial recovery from the responsible party. If the responsible party performs an emergency repair at its own initiative, the municipality may wish to require the excavator to apply for a permit within one working day of the excavation.

Moratorium on Trench Cuts

A municipality may place a moratorium on trench cutting a street based on its age. In addition, a municipality may impose a use moratorium to prevent excavation for a certain use where the municipality is considering enacting regulations relating to that use.

Coordination Between Street Paving and Trench Cuts

Some municipalities require that entities seeking to perform trench cuts coordinate, to the extent possible, with the repaving of the municipality's streets. In coordinating with applicants, the municipality may need information that the applicant considers confidential. The municipality should

9 *Repaving the road*

treat this information as confidential and should not disclose such information to anyone outside of the municipality without the applicant's permission. However, the municipality should be aware that the Public Records Act may impose a legal duty to disclose information that has been treated as confidential.

Trench Cut Permitting Process in Small Cities

Many small cities do not have adequate resources to administer the trench cut permitting process to the extent they may wish. One option to address the lack of resources is to hire outside consultants where the costs of the consultants may be recovered through the fee charged to the applicant. Another option is to contract with the county to take on all or some aspects of the permitting process.

Conclusion

This guide is intended to provide municipalities with a discussion of the extent to which they may regulate excavations and encroachments in the public right of way; however, each municipality needs to determine for itself what level of regulation is appropriate. It is important that the municipality consult with its legal counsel and also involve those utilities and other companies that will be requesting access to the agency's right of way. Communication and cooperation will reduce conflict between the municipality and those companies seeking access to the right of way.



Introduction

Background and Purpose

Many municipalities are faced with an increasing number of requests to excavate and place facilities in the public right of way. As cities age and cuts and re-cuts on streets occur, the streets begin to look like a patchwork quilt. Of all the methods of managing pavement cuts, the most productive is effective communication through utility coordination committees. However, questions often arise relating to the extent the municipality may regulate utilities and companies seeking access to the municipality's right of way. Further, many municipalities do not have the necessary mechanisms needed to effectively regulate excavations and encroachments within their public right of way.



This guide is intended to provide municipalities with an understanding of the legal aspects of their ability to regulate and manage trench cuts and encroachments within their public right of way. It also is developed to assist with issues that are raised “over the counter” as trench cut requests are submitted.

Topics Included in the Guide

This guide addresses the legal issues affecting local agencies that regulate trench cuts in the public right of way. These agencies include cities (general and charter law), counties, special districts, and transit districts. However, this guide shall focus on those issues that particularly affect cities and counties (referred to as “municipalities.”) In addition, this guide discusses legal issues that are particular to the type of entity performing the trench cut, including: companies regulated by the California Public Utilities Commission (CPUC), state chartered utilities, developers and general contractors, cable and telecommunications companies, and government agencies.

Drafting Notes and Disclaimers

This guide is designed to assist municipalities in managing trench cuts and encroachments within their public right of way. The intent is to minimize legal jargon and maximize clarity and simplicity for use by public works staff. Although this guide is intended for municipalities, it presents arguments and issues raised by the entities being regulated. It is not intended as legal advice. While this guide is designed to assist local agencies in managing their rights of way, municipalities should always consult their legal counsel for advice regarding specific, factual situations.

Definition • public right of way

The “public right of way” is generally defined to include those areas along, beneath, in, on, and within any dedicated public alley, boulevard, court, lane, road, sidewalk, space, street, and way within the jurisdiction of the municipality.

Definition • encroachment

The term “encroachment” is used in a variety of contexts to refer to any use of public property by someone other than the municipality. Examples include trenching and excavations, placing facilities in the public right of way, placing an antenna on public property, placing a mailbox in a parking strip, or conducting a parade on a public street. Municipalities will have differing rules regarding which encroachments will require a permit.

Municipal Authority to Regulate Encroachments and Excavations

Key point

The municipality has the ability to require that anyone wishing to use the street for a period of time obtain permission through a franchise, an easement, license, or an encroachment permit.

Key point

A municipality's police power provides its legislative body with the ability to regulate to protect the public's health, safety, and welfare to the extent the agency is not preempted by state or federal law (Cal. Const. Article XI, section 7).

Introduction

In most cases, municipalities that regulate encroachments and excavations in the public right of way will have local laws and administrative procedures that govern issuance of the proper permits and the assessment of fees, if any. However, in some cases, staff may be unclear as to the extent of their authority to regulate when their asserted authority is challenged. This chapter discusses the legal authority of a public municipality in regulating its public right of way and the types of conditions it may consider imposing on the issuance of an encroachment/excavation permit.

Authority as Property Owner Under State Law

State law provides that a municipality may “improve, preserve, take care of, manage, and control” its property (Government Code section 25353 (counties)). In particular, municipalities may prohibit and prevent encroachments and obstructions in the public right of way (Government Code section 38775 (cities)).

Therefore, the municipality has the ability to require that anyone wishing to use the street for a period of time obtain permission through a franchise, an easement, license, or an encroachment permit.¹ The municipality can take legal action under the law of trespass or nuisance to prevent its public right of way from being used without permission. However, there may be certain circumstances where a municipality's ability to control access to its right of way is limited (see *Authority Over Franchises*, page 3).

Authority Under Police Power

Municipalities also have the right to control access to the public right of way under their police power. A municipality's police power provides its legislative body with the ability to regulate to protect the public's health, safety, and welfare to the extent the municipality is not preempted by state or federal law (*Cal. Const.* Article XI, section 7).² This is a very broad power and courts tend to defer to the local legislative body's judgment as to what con-

1. What is the difference between an easement, an encroachment permit, and a license? An easement is a legal document recorded with the County Recorder's office against a particular property allowing someone other than the owner to use the property to the extent specified in the easement. An easement gives the easement holder a property interest in the property. In contrast, an encroachment permit is a municipality-issued revocable permit allowing the permit holder to encroach on the public right of way. It is rarely, if ever, recorded and is not intended to convey a legal interest in the property that is the subject of the permit. A license is similar to an encroachment permit in that it does not convey a legal interest and is not recorded. A license often is drafted so that it may be revoked by the municipality at any time at the municipality's sole option; however, municipalities may, infrequently, enter into irrevocable licenses, which limit the agency's ability to revoke during the specified term of the license.

2. Preemption refers to a situation where state or federal law overrides a local agency's law. For example, federal law has preempted many aspects of the field of cable and telecommunications regulation. Therefore, municipalities may only regulate cable and telecommu-

stitutes the proper exercise of police power as long as the exercise is not arbitrary or discriminatory and there is no conflict with state or federal law (*Carlin v. City of Palm Springs*, (1971) 14 Cal. App.3d 706, 711, 92 Cal. Rptr. 535, 539). A municipality has the power, therefore, to regulate encroachments and excavations in the public right of way to the extent necessary to protect and preserve the public's health, safety, and welfare.

Authority Over Franchises

PUBLIC UTILITY FRANCHISES A public utility franchise is granted by a municipality either under the provisions of the Broughton Act (Public Utilities Code section 6601 *et seq.*) or under the Franchise Act of 1937 (Public Utilities Code section 6201 *et seq.*). The purpose of a franchise is to permit a utility to place its facilities in the public right of way in order to serve customers within the municipality's territory. A municipality may adopt an enabling local ordinance to establish additional procedures and guidelines for the granting of franchises. However, this ordinance cannot conflict with applicable state law (Public Utilities Code section 6001.5, 6002). State law permits municipalities to regulate utilities that operate pursuant to CPUC authority with respect to the use and repair of public streets (Public Utilities Code section 2902, 2904). Further, a franchise ordinance or agreement may contain specific provisions with regard to requiring a permit prior to performing excavations in the public right of way. If specific questions arise as to the municipality's authority to require a permit, the franchise agreement and/or ordinance should be closely examined by the municipality's legal counsel.

CABLE FRANCHISES Local municipalities have the authority under federal law to grant franchises to cable companies as long as the grant is not in conflict with provisions of federal law (47 U.S.C. section 541). State law also authorizes the grant of franchises to cable companies (Government Code section 53066(a)). Federal law specifies that a grant of franchise shall be construed to authorize the construction of the cable system over public rights of way and through easements except that the cable operator shall ensure (i) that the safety, functioning, and appearance of the property and the public convenience are maintained; (ii) that cost of installation, construction, operation, or removal of the facilities shall be borne by the cable company or its subscribers; and (iii) that municipality be reimbursed for any damage to public property (47 U.S.C. section 541(a)(2)).

TELEPHONE FRANCHISES State law has, in effect, granted telephone companies a statewide franchise to construct and maintain telephone lines within the public streets and highway (Public Utilities Code section 7901). Therefore, municipalities are preempted from requiring that telephone companies obtain a local franchise. However, this statewide grant of franchise does not limit the municipality from exercising reasonable control over the time, place, and manner of access to its prop-

nications companies to the extent permitted by federal law. Another example is the state law that grants telecommunications companies a statewide franchise to use the public right of way. This law preempts municipalities from requiring these companies to obtain a municipal franchise.

Key point

Courts tend to defer to the local legislative body's judgment as to what constitutes the proper exercise of the police power as long as the exercise is not arbitrary or discriminatory and there is no conflict with state or federal law.

Key point

A franchise ordinance or agreement may contain specific provisions with regard to requiring a permit prior to performing excavations in the public right of way. If specific questions arise as to the agency's authority to require a permit, the franchise agreement and/or ordinance should be closely examined.

Key point

Local agencies are preempted from requiring that telephone and telecommunications companies obtain local franchises.

erty and the public right of way as long as such control is exercised in a nondiscriminatory manner (Public Utilities Code sections 2902, 7901.1).



MUNICIPAL CORPORATIONS AND MUNICIPALLY-OWNED UTILITIES As with telephone companies, municipalities and municipally-owned utilities have the right to construct, operate, and maintain water and gas pipes, mains and conduits, electric light and power lines, telephone lines, sewer and sewer mains within the public right of way (Public Utilities Code section 10101). The municipality is required to restore the public right of way to its former state as near as may be possible and to locate its facilities as not to interfere with the existing use of the public right of way (Public Utilities Code section 10102). State law requires the municipality to seek an agreement with the city or county in which the right of way is located. This agreement will specify where the facilities may be located and any conditions that the city or county will impose (Public Utilities Code section 10103). The types of conditions that may be imposed will depend on the particular circumstances of each encroachment.

Other Statutory Provisions

MUNICIPAL UTILITY DISTRICTS A municipal utility district may construct works across or along any street, public highway, or across any stream or watercourse. However, the district is required to restore the street or highway to its former state as near as may be possible, in compliance with local ordinances, and shall not use it in a manner that unnecessarily affects the use of the street (Public Utilities Code section 12808).

WATER MANAGEMENT AGENCIES The California Water Code grants water management agencies the right to construct works across any public right of way. However, these agencies also have the duty to “restore the property crossed as near as may be to its former state or so as not to have impaired unnecessarily its usefulness” (Water Code sections 22431 (Irrigation Districts); 31060 (County Water Districts) 35603 (California Water Districts) 43153 (County Water Storage Districts); 55377 (County Water Works Districts); and 71697 (Municipal Water Districts)).

TELECOMMUNICATIONS ACT OF 1996 This federal law covers all telecommunications providers, including cable companies, and its provisions preempt local regulation. Section 253 of the act provides that no local statute or regulation may prohibit or have the effect of prohibiting a company’s ability to provide telecommunications service. However, subsection (c) states that municipalities retain the right to manage the public right of way and to require fair and reasonable compensation from telecommunication providers on a competitively neutral and nondiscriminatory basis and the amount of the compensation is publicly disclosed. To confirm that a company has been authorized by the CPUC to operate as a telecommunications provider, the municipality may request the company to provide a copy of its Certificate of Public Convenience and Necessity (CPCN) issued by the CPUC.

Municipality’s Ability to Condition Excavation/Encroachment Permits

Introduction

The power to deny a permit implies the power to place conditions on the issuance of the permit. Under its police power, the municipality may condition the issuance of the permit to address the public health, safety, and welfare issues that otherwise might cause the municipality to deny the permit. This chapter discusses the municipality’s ability to condition issuance of an encroachment/excavation permit and covers some specific conditions that the municipality may find appropriate to impose.

Express Authority to Impose Conditions

Generally, a municipality will have some express local authority to impose conditions on the issuance of encroachment/excavation permits. This authority will usually be expressed in an ordinance, resolution, or internal administrative regulation. It is preferable to have the municipality’s legislative body authorize the imposition of conditions either through an ordinance or resolution.

The sample regulation on this page is an example of the type of language that can be inserted into an ordinance or resolution to provide express authority to impose conditions on encroachment permits.

Need for Reasonable Connection

There must be a reasonable connection³ between the impact of the project and the conditions that are placed upon issuance of the permit. For example, a court would likely conclude that there is a reasonable connection between approval of an excavation and a condition that the excavation be inspected before being filled in.

Standard Conditions v. Encroachment Agreements

Municipalities may wish to consider drafting standard conditions that are reasonable to impose on applicants for encroachment/excavation permits. (Types of conditions that a municipality may consider imposing are presented in the next section.) In other cases, the local municipality may wish to supplement the encroachment permit with an encroachment agreement.

Encroachment agreements are generally most useful when the applicant is seeking to place extensive new facilities in the right of way, such as fiber optic conduit. Encroachment agreements should be used in conjunction with encroachment permits, not as a replacement.

Case study

An applicant seeks to trench cut along City’s busiest street. In certain cases, due to traffic and safety concerns, City may either direct the applicant to use an alternative route or deny the permit. However, the applicant submits a mitigation plan that addresses all of the City’s traffic and safety concerns. The City issues an encroachment permit.

Sample regulation

“Applications for encroachment permits may be approved, conditionally approved, or denied by the public works director.”

3. The term “reasonable connection” often is referred to by the legal term “nexus.”

Case study

A telecommunications company contacts City with a plan to install fiber optic network facilities within the public right of way throughout the City. The company and the City enter into an encroachment agreement that specifies the rights and duties of both parties. The agreement specifies the following:

- the approved route for the facilities and that the facilities be kept in good and safe condition;
- that the company cooperate in planning and location of the facilities in joint trenches;
- the company's responsibility for removal and relocation of the facilities;
- the requirement for an encroachment permit and the payment of fees prior to issuance of the permit;
- the company's responsibility for repair of any damage to the public right of way;
- the company's responsibility to provide the local agency with plans and maps of the facilities as installed;
- the requirement that the company indemnify the local agency, provide proof of insurance, and provide a performance bond; and
- a requirement that the company utilize joint trenching and provide oversize capacity at the City's expense.

Definition • Performance bond

A performance bond differs from a warranty in that the performance bond is a guarantee only that the work designated in the permit will be completed. A warranty, on the other hand, guarantees the quality of the work performed.

Potential Conditions That May Be Imposed on Issuance of a Permit

This section discusses potential conditions that a municipality may wish to impose on the issuance of a permit.⁴

Legal and Financial Protection for the Municipality

The following types of conditions may be imposed on a permit to provide legal and financial protection for the municipality from loss or liability that may arise from the work authorized under the permit.

HOLD HARMLESS AND INDEMNIFICATION This is a standard condition that requires the applicant to pay for the municipality's defense if it is sued by someone in connection with the work done under the permit issued to the applicant. For example, "A" trips and falls over some debris from a trench cut being performed by contractor "B" under a permit issued by county "C". "A" sues both contractor "B" and county "C" for her injuries. Contractor "B" would be required under a Hold Harmless and Indemnification clause to pay for the county's defense against "A's" lawsuit and to reimburse the county for any damages awarded to "A."

INSURANCE In order to protect itself in case the applicant does not have the necessary financial resources to defend against claims, the municipality also should require that the applicant provide an insurance certificate that names the local agency as an additional insured. Commonly, the amount of general liability and automobile insurance required is set between \$1 million and \$5 million for property damage and personal injury.⁵ Municipalities should be aware, however, that they cannot require an applicant to file proof of insurance with the agency as a condition of issuance unless this requirement is imposed by ordinance (Government Code section 53080.5). As many government agencies and companies are self-insured, the insurance condition should allow for the substitution of proof of self-insurance.

PERFORMANCE BOND A performance bond (also known as a faithful performance bond) is a guarantee that the applicant will faithfully perform its obligations under the permit.⁶ For example, if the applicant does not dig the trench in the manner required by the municipality's standard specifications or abandons the work prior to completion, the municipality may seek to call the bond and use the proceeds to reimburse the municipality's costs for completing the work.⁷ Generally, the bond amount required will be equal to the value of work within and

4. The encroachment permit also should reference any other local ordinances that may apply to the work being performed under the permit: for example, the tree removal ordinance, noise ordinance, hazardous materials ordinance, etc.

5. Often an applicant will request a waiver or modification of the insurance requirement. The municipality's legal counsel or risk manager should be consulted for approval of any requests to modify or waive the insurance requirements.

6. The Federal Highway Administration recommends that municipalities hold such bonds for at least three years or that they should require utility companies to maintain standing bonds so that a new bond is not needed for each new cut.

7. There is no formal procedure for collecting on a bond unless it is specified in the bond itself. If an agency wishes to make a claim on a performance bond, it should request its legal counsel to send a notice of claim to the bonding company. However, it should be borne in mind that bonding companies are notoriously reluctant to honor claims made against bonds (see Civil Code section 3242 for preliminary notice provisions for labor and materials bonds (also known as payment bonds) that are often required for public works contracts under state law).

affecting the public right of way, although the municipality may require a lesser amount. If the municipality, based on prior experience, has determined that a public utility has not adequately filled or compacted previous trenches, the municipality may require the utility to post a bond of up to one (1) year in an amount of two times the cost to the municipality to repair the backfill work and any related damage. The municipality, in addition or as an alternative, may require that the utility submit a report from a registered soil engineer that the backfill has been properly compacted (Public Utilities Code section 787(b)).

WARRANTIES The municipality also may wish to have the applicant guarantee that the trench cut will be performed according to the municipality's standard specifications and that the applicant will perform any necessary repair work at its own cost for some specified period of time after the original trench cut has been made. In many cases, the municipality will want to designate this time period as the life of the street or the life of the facilities placed in the right of way. If the municipality does impose a warranty condition, it also may want to require a maintenance bond to cover damage during the warranty period. If repairs are not completed by the applicant within a reasonable time frame, the municipality may do the repairs and then make a claim on the maintenance bond to recover the agency's costs. What constitutes a "reasonable time frame" will depend on a number of factors including: (1) who the applicant is, (2) the nature and severity of the problem, and (3) the responsiveness of the applicant once it becomes aware of the problem. The fact that the municipality is requiring warranty, however, does not relieve the applicant from its responsibility to maintain the facilities after the warranty or maintenance bond expires.

Traffic, Bicycle, and Pedestrian Control

Proper controls should be placed to minimize the impacts of the trenching on traffic and pedestrians, to the extent possible. The police and fire departments that serve the area where the trenching is to be performed should be involved early in the application process to assist in formulating those conditions necessary to minimize impacts and to review the applicant's traffic control plan.

Disabled Access

State and federal law require that roads and sidewalks must provide disabled persons with access to public places (42 U.S.C. section 12182; 24 Cal. Code of Regs. section 2-1107A.2.1). However, there is no legal requirement that access be maintained while work is being performed on or within a street or sidewalk. If the municipality intends to require that some temporary means of access be provided while the work is being performed, such access also should accommodate disabled persons if doing so is reasonably feasible (42 U.S.C. section 12131).



Case study

Contractor obtained an encroachment permit and installed conduit within City's main thoroughfare. As part of the permit conditions, Contractor warranted the work and provided a maintenance bond that covered one year from the date of completion of the work. Three months after completion of the work, depressions emerge due to improper compaction of the fill. City receives complaints that the depressions have caused damage to suspensions of several cars. City contacts Contractor who is unresponsive. City undertakes and completes repair of the street at its own cost. City has the option of seeking to recover its costs either through the maintenance bond, through action against the contractor, or by either method.

Case study

City has a policy that fiber optic conduit be placed whenever an entity performs a trench cut along a portion of the public right of way that has been identified by the City as appropriate for installation of conduit. City will pay for the conduit that is to be used for City purposes. Water District is planning to bid out a project for the installation of recycled water pipelines within the City's public right of way. City requests that Water District add bid items for the provision and installation of fiber optic conduit as part of the project for which the City will reimburse the costs to the Water District. These costs include the actual costs of materials and installation, along with a set amount for the Water District's administrative costs.

Sample condition

"Company shall cooperate in planning, locating and constructing its facilities in joint utility trenches with other similar utilities and/or municipality and to participate in cost-sharing for the joint trench and ducts when such joint utility installations are being planned for an existing area, provided that participation in such joint utility installations shall be on terms and conditions satisfactory to company and municipality."

Access to Right of Way

Municipalities have the right to exercise reasonable control as to the time, place, and manner in which streets are accessed (Public Utilities Code section 2902). However, this right does not extend to allowing a municipality to regulate the design and construction of utility facilities that are within the regulatory authority of the CPUC (*Southern California Gas Co. v. City of Vernon*, (1996) 41 Cal.App.4th 209; 48 Cal. Rptr. 661).

Joint Trenching

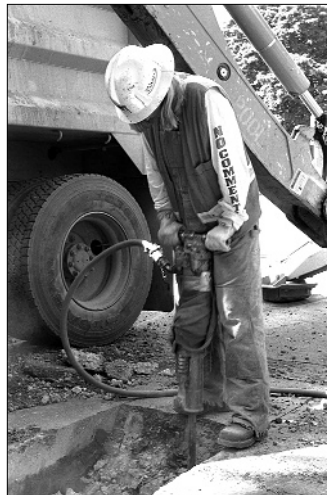
In joint trenching, applicants are required or encouraged, to the extent feasible, to coordinate placement of their facilities in the right of way with other applicants that also will be placing facilities in the same location. Municipalities also may take advantage of proposed excavation to place facilities at their own cost for the municipality's own use. (See sample joint trenching conditions on this page.) CPUC regulations, however, may limit a municipality's ability to require a CPUC-regulated utility to participate in joint trenching.

Noise Control and Work Hours

Most cities and counties have ordinances that impose restrictions on noise level and construction work hours. Some ordinances limit this restriction only to residential areas while others enforce the restriction throughout the jurisdiction. Both public nuisance law and the municipality's police power also may provide the authority for regulating noise and work hours.⁸ It

should be noted, however, that setting standards either administratively or through an ordinance will likely eliminate arguments that the conditions imposed are arbitrary with respect to a particular applicant.

A condition may be placed on issuance of the permit to require compliance with the local noise and work hours ordinance. If the municipality does not have such an ordinance, then it may still have the ability to impose noise and work hours conditions on issuance of the permit either on a case-by-case basis or as a standard condition.



Labor Code 6500

In general, state law requires that an employer obtain a permit from the state Division of Occupational Health and Safety for construction of

8. State law defines a public nuisance as being "anything which is injurious to health ...or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property" where the nuisance affects an entire community, or neighborhood, or any considerable number of people at the same time (Civil Code sections 3479 and 3480).

trenches or excavations that are 5 feet or deeper and into which a person is required to descend. Where appropriate, the municipality should consider conditioning issuance of an encroachment permit on the applicant/employer obtaining the necessary permits from the state (Labor



Code sections 6500, 6706; 8 Cal. Code of Regs. section 341 *et seq.*)⁹ There are exceptions to this requirement where the employer is the state, a city, county, district or public utility subject to the CPUC (Labor Code section 6508). There are further exceptions where the work is for the purpose of performing emergency repair work to underground facilities or where a person will not be descending into the excavation.

Underground Services Alert (USA)

California law requires that, except in an emergency, every person planning to conduct any excavation shall contact the Underground Services Alert (“USA”) at least two working days, but not more than 14 calendar days prior to commencing that excavation. This requirement only applies where the excavator knows or should have known that the area where the excavation is to be conducted contains underground facilities other than those owned or operated by the excavator (Government Code section 4216.22).

Trench Restoration Requirements

Many municipalities in their trench restoration standards require T-cut sections, specify compaction standards, require pavement replacement of the full width of the lane, and require replacement of full panels of concrete streets.¹⁰ This may involve greater pavement restoration and, therefore, increased costs to the applicant. The municipality has the discretion to choose the restoration standards it will impose as long as the standards are reasonable and are imposed in a non-discriminatory manner. However, it is to the benefit of the municipality to involve those companies and utilities that will be making trench cuts within the municipality’s right of way in the drafting of the standard specifications.



9. No public works contract in excess of \$25,000 for the excavation of any trench five (5) feet or more in depth, shall be awarded unless the contract contains a clause requiring the submission of detailed plans or other provisions to ensure worker protection from the hazard of caving ground during the excavation (Labor Code section 6705).

10. A public utility is allowed to backfill with native spoil if all the conditions listed in Public Utilities Code section 787(a) are met.

Sample condition

"Permittee shall keep facilities in good and safe condition and free from any nuisance, to the reasonable satisfaction of the public works director."

Case study

City approved development of two shopping centers and a residential development along First Street. As a condition of approval the developers were required to widen First Street, which required relocation of utility's electrical poles. City, at developer's request, formed an assessment district to help pay for the costs of widening the street and other improvements. City allocated the cost of relocating the poles to the utility company rather than to the assessment district. The utility company refused to pay, arguing that since the street widening was needed because of the developer's activities, it provided only a private benefit to the developers rather than a public benefit to the City as a whole. The court ruled that the street widening was a public benefit rather than a private benefit and ordered the utility company to pay for the relocation (*City of Livermore v. Pacific Gas & Electric* (1997) 51 Cal.App.4th 1410, 59 Cal. Rptr. 2d 852).

Inspections

The applicant should be required to notify the municipality at each point during excavation and restoration so that an inspection may be conducted prior to the next phase being started. If violations are found during the course of an inspection, the municipality may require that the violation be corrected prior to allowing the work to continue.

**As-Built Maps**

Municipalities may want to require that the applicant submit as-built maps of any new facilities installed in the public right of way. This condition may cause some concern for private entities in that it may require providing the municipality with confidential and proprietary information. There also may be security issues for the private entity. Municipalities should explicitly inform the applicant that the agency may be restricted by the Public Records Act (Government Code section 6250 *et seq.*) from keeping such information confidential if a public record request is made to review the information.

Maintenance, Relocation and Removal of Facilities**Maintenance of Facilities**

Damaged or unmaintained facilities may present potential health and safety problems as well as potentially reducing the life of the street restoration. The municipality may require that the applicant properly maintain and/or repair the facilities (see sample condition on this page).

Relocation and Removal of Facilities

The municipality may require that facilities be relocated or removed when a municipality activity such as the widening or realignment of a street makes it necessary. In particular, when dealing with gas, electric, and water franchises, the utility must remove or relocate its facilities without expense to the municipality if made necessary by any change of grade, alignment or width of any public street by the municipality (Public Utilities Code section 6297; Streets & Highways Code section 1463 (future improvements to county highways)).¹¹ However, this does not apply where the relocation requirement is solely to benefit private parties, such as property developers.

11. State law may require some special districts to bear the costs of relocation or removal of utilities. When a relocation or removal situation arises, the district should consult with its legal counsel to determine its responsibility, if any, for bearing the costs. In any contract where the municipality is a party, the municipality is responsible for the cost of removing or relocating any public utilities not identified in the specifications used to solicit the bid, subject to the requirements of Public Utilities Code section 6297.

Abandoned Facilities

The municipality may require that the owner of facilities in the public right of way notify the municipality after the owner has abandoned the facilities and provide the municipality with a map of the location of the abandoned facilities. Generally, municipalities will want to require the owner of the abandoned facilities to continue to be responsible for the facilities. The municipality also may require removal of abandoned facilities. The municipality should consider, however, that a removal requirement may not be appropriate or in the municipality's best interests for certain types of facilities.

California Environmental Quality Act (CEQA)

CEQA requires a municipality to perform an environmental review of projects that have the potential to cause a direct or reasonably foreseeable indirect physical change in the environment. However, review is only required where the project requires a discretionary approval from the municipality.

Municipalities generally consider that projects for which only an encroachment permit is issued do not require CEQA review, in that issuance of the permit is a "ministerial act." However, the imposition of conditions may make issuance a discretionary act, which may trigger a CEQA review requirement.

In order to avoid the complex requirements of CEQA, a municipality may wish to consider drafting its encroachment ordinance to specify what conditions the applicant must comply with in order for the permit to be issued. This will have the effect of making issuance of the permit a ministerial act while still allowing the municipality to impose conditions with which the applicant must comply.

Waiver/Modification of Permit Conditions

Each permit application will present unique issues that the municipality will need to address. Depending on the circumstances, it may be appropriate for the municipality to consider waiving or modifying a permit condition for a particular applicant. The municipality's ordinance or regulations should specify which staff member has the authority to waive/modify permit conditions and under what circumstances. The ordinance or regulations also should specify that waiving a condition does not prevent the municipality from imposing it at a later time.

Appeal of Imposition of Condition

The municipality will have an ordinance that specifies the process for appealing administrative decisions. If an applicant objects to a condition and the municipality is unwilling to remove or modify the condition to the applicant's satisfaction, the applicant should be informed of its right to appeal and be provided with a copy of the ordinance that sets forth the appeal procedure. The ordinance will usually designate either the municipality's legislative body or its general manager to hear and pass judgment on the appeal.

Sample condition

"If any portion of the facilities are no longer used by company, or are abandoned for a period in excess of six (6) months, company shall notify municipality and shall either promptly vacate or remove the facilities at its own expense or, at the municipality's discretion, may abandon some or all of the facilities in place."

Definition • discretionary/ministerial approval

In discretionary approval, the municipality has the ability to approve or disapprove an application based on the municipality's judgment. In contrast, where the municipality's ordinance specifies the criteria for approval of an application, the municipality must approve the application if the applicant has satisfied all the criteria. This approval is referred to as a ministerial approval.

Local Authority to Assess Fees Against the Permittee



Administrative Fees¹²

Municipalities have the authority to impose fees pursuant to their police power as long as the fees are not in conflict with state or federal law (*Trent Meredith v. City of Oxnard*, (1981) 114 Cal.App. 3d 317, 327, 170 Cal. Rptr. 685, 690-691). The purpose of establishing fees is to reimburse the municipality for its costs related to issuing and administering the permitting process. A fee may not exceed the estimated reasonable cost of providing the service for which the fee is charged. A fee that does exceed such cost may be considered a special tax (Government Code section 50076; *Sinclair Paint v. State Board of Equalization*, (1997) 15 Cal. 4th 866, 64 Cal. Rptr. 2d 447).¹³

The municipality can recover both its direct and indirect costs¹⁴ through fees (*United Business Commission v. City of San Diego*, (1979) 91 Cal.App. 7th 156, 165, 154 Cal. Rptr. 263). Given the various demands on local municipal revenues, a municipality may wish to identify its costs and transfer these to the applicant through appropriate administrative fees.¹⁵

Municipalities historically have used various mechanisms to set fees. Often these fees were not sufficient to cover the municipality's actual costs. To address this issue, many municipalities have hired consultants to review their fee structures and make recommendations on the amount that should be charged, based on the agency's actual costs. However, with respect to encroachment permits, determining the fee amount can be somewhat more complex, in that the cost to the municipality will vary depending upon the type and the extent of the encroachment. In setting a new fee or changing an existing fee, the municipality will need to comply with the notice and hearing requirements of Government Code section 66018.

Inspection Fees¹⁶

Municipalities may decide to charge inspection fees separate from and in addition to the administrative fees related to issuing the permit. The reason for this is that it is often difficult to estimate ahead of time what the inspection will necessarily entail. For example, once a trench is open, conditions may be discovered that require a more extensive inspection than was initially anticipated. The types of inspection costs that may be imposed include

12. These fees often are referred to as regulatory fees.

13. A special tax requires approval by a two-thirds vote of the voters within the municipality's jurisdiction (Cal.Const. Art. XIIC, section 2).

14. An example of an indirect cost would be a situation in which excavation near an intersection requires the police department to assign personnel for traffic control. This cost is not directly related to the administrative costs of the city in issuing the permit, but it is still a cost associated with the permit issuance, which the municipality can recover through its fee.

15. One major exception to this authority is that the state, counties, cities, and districts are exempt from paying this type of administrative fee (Government Code section 6103). However, a fee may be assessed against these governmental agencies for plan checking services (Government Code section 6103.7).

16. Municipalities may assess inspection fees against other cities, counties, and districts as reimbursement for the costs of the inspection of work performed on any city or county street. However, municipalities may not assess a fee solely for the issuance of an excavation/encroachment permit (Government Code section 6103.6).

time spent by the inspector in inspecting the trench, administrative costs, and costs for outside consultants and materials testing.

In order for a municipality to accurately estimate and recover its costs, the local agency may wish to calculate a base inspection hourly fee with reference to the inspector's salary and benefits. For example, if a city inspector earns \$60,000 a year in salary and is provided an additional \$15,000 in benefits,¹⁷ the total cost to the city is \$75,000. If the inspector performs 35 hours of inspection work per week for 50 weeks a year, the equivalent hourly rate is approximately \$43. The inspection fee would then be calculated according to the actual number of hours that the inspector spent on a particular job. The municipality will need to carefully track and record the time that staff spends on inspecting excavations. The municipality's records should not only reflect the time spent on the inspections, but also should provide a brief description of what work staff performed.

In addition, a municipality may wish to assess a charge for its overhead costs related to inspecting the excavation. This overhead charge could include, for example, the cost related to providing the inspector with a pool car to travel to the excavation site, costs related to maintaining the municipality's building where the inspector works, the costs of support staff, such as secretaries and administrative aides, and the costs to provide and maintain the computer system used to track inspections. Generally, such overhead costs are calculated to add between 10 percent and 15 percent to the amount of the fee.

The municipality also may wish to include the municipality's costs for using outside consultants for inspections, materials testing, etc. If the permittee wishes to use its own consultants, the municipality may wish to ensure that it has approval authority over the consultant to be used.

Street Deterioration Fees

Although controversial, there are studies that purport to show that trench cuts, no matter how carefully restored, result in streets deteriorating more rapidly than streets that have not been cut. The result, it is argued, is that the municipality must repair and resurface streets with trench cuts more frequently, resulting in an increased cost to the municipality. Several cities have adopted trench cut fee ordinances in an attempt to recover future costs related to repair and resurfacing of streets damaged by trench cuts.

Street deterioration fees are mitigation fees collected from those entities performing trench cuts and are similar to the various administrative fees discussed previously. The purpose of the fee is to mitigate the long-term damage to streets caused by trench cuts by collecting the percentage of estimated cost of repair and resurfacing attributable to the applicant's work.¹⁸

Street Deterioration Fee Study

As with administrative fees, a municipality will need to justify the amount of the fee based on the costs to the agency to mitigate the damage caused by

Key point

The municipality will need to carefully track and record the time spent inspecting projects. The municipality's records should not only reflect the time spent on the inspections, but also should provide a brief description of what work staff performed.

17. Benefits may include, for example, medical, dental, vacation, sick leave, and retirement.

18. Another purported purpose of a street deterioration fee is to encourage affected applicants to reduce the number and frequency of their excavations and to encourage coordination with the municipality's resurfacing plan.

Key point

In calculating a street deterioration fee, it is important that the municipality account for the damage to the street caused by traffic use and other normal wear and tear, and separate this cost from the costs associated with damage caused by trench cuts.



the trench cuts (Government Code section 50030). The most common method of doing this is to conduct a fee study to determine whether trench cuts damage the strength and life of the pavement located adjacent to the trench where the excavation occurs. If the study confirms that damage is occurring, then the municipality will need to determine whether to impose a fee and, if so, in what amounts. In calculating a street deterioration fee, it is important that the municipality account for the damage to the street caused by weather, traffic use, and other normal wear and tear, and separate this cost from the costs associated with damage caused by trench cuts.

These types of studies tend to be expensive and may not be cost effective for smaller cities. One possibility is to use those studies that have already been conducted by other cities. However, it would be necessary to relate those studies to actual conditions within the jurisdiction of the municipality. Another option for smaller municipalities is to coordinate with adjacent municipalities in a joint fee study. However, such a study must be related to each participating municipality's local conditions.

Legal Arguments Made Against Imposition of Street Deterioration Fees

Street deterioration fees have yet to be challenged in court so there is uncertainty whether such fees are lawful under state and federal law, especially with respect to franchise utilities. Some legal arguments against imposition of deterioration fees follow. A municipality should consult with its legal counsel for an opinion regarding these legal arguments, and others that may be asserted, prior to adopting a fee ordinance.

VIOLATION OF PROPOSITION 218 The franchise under which the utility is granted access to the public right of way may be considered a property interest similar to an easement. Therefore, a street deterioration fee is argued to be unconstitutional in that it is a fee imposed as an incident of property ownership for the purposes of Proposition 218 (Cal. Const. Art. XIII D section 2(e)). A counter argument may be that street deterioration fees are not imposed on utilities based on their ownership interest created under the franchise, but are imposed based on the nature and extent of a utility's trench cutting activities.

DISPUTE REGARDING UNDERLYING ASSUMPTION OF STREET DETERIORATION

It is alleged that there is conflicting data as to whether properly restored trench cuts result in damage to the surrounding pavement as some studies have shown. It is argued that there are a number of studies demonstrating that trench cuts do not result in increased street maintenance costs to the municipality. Therefore, the argument is that by imposing a street deterioration fee, the municipality is reimbursed for costs that it will never incur. If this were the case, the street deterioration fee would be considered a special tax and not a fee.

FRANCHISE UTILITIES: CONTRACT RIGHTS VIOLATED BY STREET DETERIORATION FEE

A franchise between a municipality and a utility is argued to be a binding contract allowing the utility to use the public right of way to construct and maintain its facilities in exchange for payment of a franchise fee to the agency. Therefore, franchise utilities have argued that there is an implied right to excavate the streets for construction and maintenance purposes; otherwise, the express right to construct and maintain is meaningless. Consequently, the franchise fee

is intended to reimburse the municipality for the municipality's costs associated with excavation. Following this line of argument, imposition of a street deterioration fee (or any fee related to excavation for that matter) would be an unconstitutional use of the municipality's police power to unilaterally raise the franchise fee.

Adjustment of Fee

If a municipality does decide to adopt a street deterioration fee, a further question arises: how often the fee should be adjusted to keep it in compliance with state law requirements that the fee not exceed the estimated reasonable cost to the municipality. There is no definitive answer to this. While municipalities may wish to reexamine their fees on a more frequent basis, at a minimum they should be reviewed at the same interval as the municipality's street resurfacing schedule, which is usually about five (5) years. It is recommended that if a street deterioration fee is adopted, the revenue from the fee be placed in a separate fund and used for the specific purpose of repaving and repairing streets.

Other Fees

Fees for Obstructing Right of Way

Where the proposed excavation will obstruct the right of way, the municipality has the ability to assess a fee to reimburse it for the costs associated with detouring traffic and pedestrians or providing alternative access to the right of way.



Fee to Reimburse for Lost Parking Meter Revenue

Where an excavation will result in lost parking meter revenues, the municipality can require reimbursement from the excavator. Although it may not be possible to calculate lost revenue for the particular meters in question, it should be possible to calculate lost revenue per meter, based on municipality-wide meter revenues. However, the municipality cannot require reimbursement for lost parking meter revenue from private, public, or municipal utilities (Vehicle Code section 22512).

Franchise Fees

Franchise fees are different from administrative fees in that state and/or federal law allows the fee to be set without reference to the municipality's actual costs. Usually these fees are some percentage of the gross revenue earned by the utility from customers within the municipality's jurisdiction. For example, federal and state law limit the amount of the franchise fee that can be assessed against a cable company to 5 percent of gross revenues earned within the franchising agency's jurisdiction (Government Code section 53066). Franchise fees also may be calculated based on number of miles

Case study

Gas company obtains the rights to a pipeline already in place throughout City. It intends to use the pipes to deliver nitrogen gas to industrial customers in City. City has an ordinance that assesses a fee based on each mile or fraction of a mile of each gas-carrying pipe installed within the public streets, easements, ways and public places within City. Gas company's pipelines run within both public and private streets and through property owned by the county and the state. City may assess a franchise fee based on the length of pipes running within the public streets, but cannot assess a fee based on the length of the pipes running within private streets or county and state property.

of facilities that are placed in the right of way. Most often these franchise fees will be passed through to the customer.

User or Rental Fees

These fees take the place of franchise fees in cases where there is no legal authority to impose franchise fees on the particular entity requesting use of public property or where no franchise agreement exists. For example, cellular telephone companies will frequently enter into lease agreements with a municipality for use of particular municipality property for cellular telephone sites. A municipality seeking to collect a user or rental fee should do so through an agreement with the company seeking to place the facilities on public property.

Case study

City seeks to collect inspection fees prior to granting of encroachment permits, but due to the uncertainty of the eventual fee amount, it is difficult to determine the exact amount prior to granting the permit. City decides to require applicants seeking to excavate in the public right of way to open an agency fund account (sometimes referred to by some agencies as private job accounts.) The applicant deposits \$1,000 into this account and the City draws upon these funds as it incurs expenses. If the eventual fee amount is less than \$1,000, then the excess is refunded to the applicant. If it appears the fees will be in excess of \$1,000, the City requires the applicant to deposit an additional amount.

Collection of Fees

Municipalities usually will wish to collect the various fees prior to issuing permits or approval. In certain cases, the agency may wish to require the applicant to open a deposit account with the agency (see case study on this page).

Trench Inspections

Authority of Inspectors

An inspector's authority to inspect is governed by the laws and regulations of the local municipality. The municipality's ability to define an inspector's authority flows from its police power authority to legislate to protect the public's health, safety, and welfare as long as there is no conflict with state or federal law. A municipality should consider providing inspectors with the same authority as is granted to its other health and safety inspectors (e.g., building and fire inspectors).



Use of Outside Consultants

Municipalities may use outside consultants to perform inspections (Government Code section 53060). These inspectors can be retained on an as-needed basis or hired as temporary employees when an increased workload is likely to continue for some period of time. It should be specified in the consultant's contract that the consultant will have full authority to perform inspections on behalf of the municipality.¹⁹ The cost of outside consultants may be recovered through administrative fees.

19. Many municipalities include inspectors in their conflict of interest codes and require the inspectors to file an annual Statement of Economic Interests with the Fair Political Practices Commission (FPPC.) If the municipality hires a consultant to perform the same duties as an inspector whose position is listed in the municipality's conflict of interest code, then state law requires that the consultant also file an annual Statement of Economic Interests with the FPPC (2 Cal. Code of Regs. section 18700(a)(2)).

Liability of Agency for Faulty Inspections of Encroachments

A frequent concern for staff is whether the municipality or the inspector will be liable for errors made during the inspection that result in injury to persons or property. Generally, a municipality is not liable for injury caused by a failure to make an inspection, or by making an inadequate or negligent inspection of encroachments located on the municipality's property where the encroachments are not owned or controlled by the municipality (Government Code sections 818.4, 830). Further, a public employee is not liable for an injury caused by his or her discretionary issuance or denial of a permit or by his or her revocation or suspension of the permit (Government Code sections 818.4, 821.2).

■ *Enforcement of Permit Conditions*

There are various methods by which a municipality may enforce permit conditions. The difficulty is that enforcement tends to be a time-consuming process and require considerable staff time. Prior to taking formal enforcement actions, staff should seek compliance informally through direct contact with the permit holder. The permit holder should always be given strict but reasonable deadlines for compliance.²⁰

If the permit holder does not meet the deadlines, and appears to be uncooperative, staff should consider referring the matter to the municipality's legal counsel.²¹ Often, a letter from the municipality's legal counsel will be sufficient to secure compliance. In some situations, however, the municipality will need to take more formal action.

In determining what enforcement method to use, the municipality should consider (1) the nature and extent of the violation, (2) who the permit holder is, (3) the municipality's past history with the permit holder, and (4) the amount of cooperation the municipality has received from the permit holder to resolve the violation.²²

The municipality also can encourage compliance with the conditions by rewarding those companies that have demonstrated past compliance. Such rewards may include reduced fees, streamlined permitting process, or access to the municipality's online permitting system.

Key point

In determining what enforcement method to use, the municipality should consider (1) the nature and extent of the violation, (2) the holder of the permit, (3) the municipality's past history with the permit holder, and (4) the amount of cooperation the municipality has received from the permit holder to resolve the violation.

20. As a rule of thumb, 10 days is generally considered a reasonable time frame for compliance; however, circumstances may require imposing a greater or lesser time frame.

21. It is vital to a successful enforcement action that all of the municipality's actions be fully documented. Letters to the violator should always be sent by certified mail, return receipt requested to the last known address of the violator. When referring a matter to legal counsel, a copy of all documentation also should be provided.

22. Municipalities often prefer to enforce conditions through one or more of the procedures discussed in this chapter rather than to call the permit holder's performance or warranty bonds, because of the difficulty in collecting on the bonds and the possibility that the bonds will not cover the municipality's costs to remedy the violation.

Administrative Enforcement

Many municipal codes provide that violation of any provisions of the code is declared a nuisance²³ and may be corrected by the agency. Often the code will establish an administrative nuisance abatement process.²⁴ As encroachment permits will usually be issued pursuant to legal authority in the code, violations of conditions imposed on the permit may be abated using the code's administrative enforcement regulations. While the administrative process varies from jurisdiction to jurisdiction, the basic steps are as follows:

1. The municipality issues a notice of violation informing the permit holder of the violation and establishing a date for an administrative hearing if the violation is not corrected.
2. If the violation is not corrected, then an administrative hearing is held with a member of the municipal staff acting as hearing officer. The hearing is informal and is intended to allow the permit holder to present evidence as to why he or she is not in violation of the conditions. After considering the evidence presented, the hearing officer issues findings and an order. If the hearing officer has found the permit holder to be in violation of the conditions of the permit, the hearing officer may order the violation be corrected within a certain time frame.
3. The municipality's code will provide the permit holder with the right to appeal the hearing officer's decision and order. This appeal is either to the municipality's legislative body or to the municipality's general manager. As with the administrative hearing, the appeal hearing is informal and the municipality's code often will provide the appeal hearing procedures. The legislative body or the general manager may either uphold the appeal, modify the order, or sustain the order. The decision of the governing body or manager is usually designated as the final decision of the municipality.

If, after the final decision of the municipality, the permit holder does not correct the violation, the municipality may correct the nuisance itself or take further civil or criminal action. If the municipality's code so authorizes, the municipality may be able to collect its costs associated with correcting the nuisance from the violator (Government Code section 38773).²⁵

Civil Enforcement

Municipalities also may seek an injunction in Superior Court in cases where there has been a violation of a permit condition. There are two types of injunctions:

1. **MANDATORY INJUNCTION** A mandatory injunction is a court order that the person who is the subject of the injunction take some action. For

23. See footnote 8 for a definition of "nuisance."

24. Administrative enforcement must provide for adequate due process. Generally, adequate due process consists of notice to the violator and an opportunity for a hearing before the municipality (*Blinder, Robinson, and Company v. Tom* (1986) 181 Cal.App.3d 283).

25. Staff may wish to have the police or sheriff's office become involved where staff observes that the permit holder is violating a condition of the permit. Staff should be prepared to provide the police or sheriff's office with the particular municipal code section that criminalizes the permit holder's conduct. This will usually be found in the encroachment ordinance.

example, a court, through an injunction, may require a permit holder to re-excavate a trench to allow the municipality to inspect whether the facilities were properly installed.

2. **PROHIBITORY INJUNCTION** A prohibitory injunction is a court order prohibiting the subject of the injunction from taking, or continuing to take, some action. For example, a court may prohibit a person who has not received an encroachment permit — in violation of municipality law — from continuing to perform excavations in the public right of way.

In extreme circumstances, the municipality may need to request a court to impose a temporary restraining order (TRO) on the violator. The purpose of a TRO is to prevent the violator from taking, or continuing to take, some action until the court can schedule a hearing on the municipality's request for injunction. A court will issue a TRO in cases where the municipality can show that it will suffer some irreparable harm unless the TRO is imposed. Usually, the municipality will only need to seek a TRO where there is an immediate threat to the public's health and safety. Staff should consult closely with the municipality's legal counsel as to whether a TRO is necessary.

Violating an injunction is considered civil contempt, which may be punished by a fine not to exceed \$1,000 or imprisonment not to exceed five days, or both (Code of Civil Procedure section 1218).

Criminal Enforcement

State law permits cities and counties to prosecute code violations as either infractions or misdemeanors (Government Code sections 25132, 36900). The punishment for an infraction is a fine and the punishment for a misdemeanor can be either a fine, a jail term, or both. The municipality has the discretion to set the punishment within the limits established by state law (Penal Code sections 17(a), 19, 19.6, 19.8). In the court system, criminal violations are handled as any other criminal violation of state law. The municipality's local ordinances should be consulted to determine what punishment is specified for the particular violations.

Contractual Enforcement

An encroachment agreement can be enforced in the same manner as any other contract. Usually, this will require a court order, unless the agreement provides for other enforcement mechanisms. This court order can take the form of an injunction as discussed above or as an order requiring specific performance of the provisions of the agreement. Often, the encroachment agreement will include specific provisions regarding remedying violations.

Enforcement Against Persons Other Than Permit Holder

Often, the permit applicant will be a contractor hired by a third party to perform the excavation or install the facilities. Enforcing permit conditions against the third party is difficult because this third party usually will not have signed the permit application and, generally, will not be listed on the permit.

One possible option is for the municipality to require both the contractor and the third party to sign the permit application and have the permit issued jointly to both parties. Often, however, the municipality may not

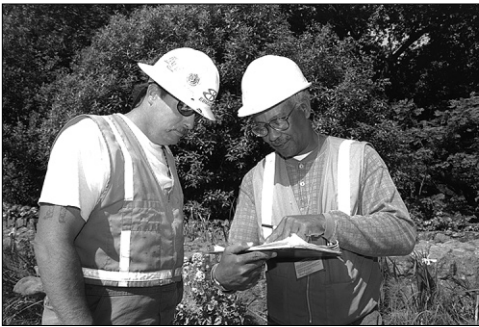


Key point

Enforcing permit conditions against the third party is difficult because this third party usually will not have signed the permit application and, generally, will not be listed on the permit.

wish to enforce permit conditions against the third party because the third party may be relying, in good faith, on the contractor to perform the work properly and in compliance with all the agency's regulations. An example of this is where a homeowner hires a contractor to install a sewer lateral that connects to the sewer main in the public right of way. It sometimes occurs that the contractor will charge the homeowner for both installing the lateral and pulling all the necessary permits; however, unknown to the homeowner, the contractor will do the work but not pull the permits. Thus, the contractor gains a windfall at the expense of both the homeowner and the municipality. In such a case, it may not make sense for the municipality to seek enforcement against the homeowner.

■ *Emergency Repairs*



Emergency repairs to the public right of way are usually required where there is some condition that places or has the potential to place the public's health, safety, and welfare at risk. If the responsible party is unwilling or unable to make the repairs within the municipality's time frame, the municipality can make the repairs using its own funds, and then seek financial recovery from the responsible party.

The municipality has flexibility as to setting a time frame in which the responsible party must make the repairs. Where there is an imminent risk to the public's health, safety, and welfare, the time frame can be shorter. In determining a time frame, the municipality should take into account such factors as the nature of the emergency, who the responsible party is, what will be needed to make the repairs in terms of equipment, personnel, and technical expertise, and the extent of the repair work required.²⁶ The time frame set should be reasonable and not be intended to punish the party whose facilities are involved.

The municipality may wish to require that, when an excavator performs an emergency repair without a permit, the excavator apply for a permit within one (1) business day of the excavation and supply an explanation of the nature of the emergency and what work was performed. If the municipality discovers that the work performed was not needed to address an emergency, it should notify the excavator that this action is not allowed and that future violations may result in the municipality taking enforcement action against the excavator.

26. Depending on the nature of the emergency, time frames as short as four to eight hours are not necessarily unreasonable.

Moratorium on Trench Cuts

When the term moratorium is used in relation to trench cuts, it takes on two distinct meanings. The more common meaning relates to a municipality's restriction on excavations based on the age of the street (age moratorium). The second, less common meaning is a restriction on the performance of excavations for the installation of certain facilities until the agency is able to institute regulations (use moratorium). Age and use moratoria may be imposed pursuant to the agency's police power and its general ability to control the time, place, and manner of access to its public right of way. The municipality may enforce a moratorium by the methods discussed under *Enforcement of Permit Conditions*, page 17.

AGE MORATORIUM An age moratorium places a restriction on the excavation of any street block that has been reconstructed, repaved, or resurfaced within a specific period of time. A municipality wishing to impose a moratorium should do so through an ordinance or some other formal action by the municipality's legislative body. The age moratorium also should contain a provision allowing staff to waive the moratorium for a particular street block for good cause.

USE MORATORIUM A use moratorium is imposed to prevent excavation for a certain use in cases where the local agency is considering enacting regulations related to that use.²⁷ If a municipality wishes to impose a use moratorium, it should do so by enacting an ordinance.

Case study

City is contacted by a telecommunications company seeking to install fiber optic conduit in City's right of way. City had informally discussed construction of fiber optic network that would link the various City administration buildings but had not yet taken any action. City places a temporary moratorium on the installation of fiber optic conduit. During the time the moratorium is in effect, City will determine its needs with respect to the fiber optic network and whether it will require telecommunications companies to install extra conduit that the City would then purchase for use in its own fiber optic network.

Coordination Between Street Paving and Trench Cuts

Some municipalities require that entities seeking to perform trench cuts coordinate, to the extent possible, with the repaving of the municipality's streets. Such a requirement may be permissible as an exercise of the municipality's police power and through its ability to control the time, place, and manner of access to its right of way. Municipalities may facilitate this coordination by preparing multiyear repaving plans and making these available to those utilities and companies that may be performing future trench cuts.²⁸ The advantage of coordination for the municipality is that, since a street that is trench cut is repaved soon after the excavation is completed,

27. Government Code section 65858 provides a procedure for placing a moratorium on land uses that may be in conflict with a contemplated general plan, specific plan, or zoning ordinance. The moratorium cannot remain in effect for more than a total of two years.

28. Some municipalities are posting their street repaving schedules on the agency's Internet Web site.



the negative effect of the cut on the useful life of the street is greatly diminished.

In coordinating with applicants, the municipality may need information that the applicant considers confidential. The municipality should treat this information as confidential and should not disclose such information to anyone outside of the municipality without the applicant's permission. The municipality may, however, be faced with a request for the information under the Public Records Act (Government Code section 6250 *et seq.*). This act requires the disclosure of public documents unless the requested documents fall under an exemption specified in the act. Information provided to the agency on a confidential basis may fall within the exemption specified in Government Code section 6254(k) and Evidence Code section 1040. The municipality's legal counsel should be consulted to determine the municipality's responsibility for disclosure under the act.

■ *Trench Cut Permitting Process in Small Cities*

Many small cities do not have adequate resources to administer the trench cut permitting process to the extent that they may wish. While there is no legal requirement that cities establish an encroachment permit process, given the serious public health, safety, and welfare issues involved, it is, generally, in a city's best interest to require a permit.

As discussed above, many cities retain outside consultants to perform inspections. A city with limited resources may wish to consider retaining an outside consultant to administer the entire encroachment permit process, including the performance of inspections. The advantage to the city is lower personnel and administrative costs. The sole cost to the city, in addition to the cost of the consultant, is the cost of monitoring the consultant's performance. The city may recover the costs of the consultant through the fee charged to the applicant.

Another alternative is for the city to contract with the county to take on all or some aspects of the permitting process. Commonly, smaller cities will contract with the county to perform some services such as police or fire protection (Government Code section 51301). State law does not allow the initial term of the contract to exceed five years. Thereafter, the term automatically renews for five-year periods unless the legislative body of either the city or the county gives a one-year notice of termination (Government Codes section 51302). The county personnel will have the same power and duties as city employees. As with the use of an outside consultant, the advantage to the city is lower personnel and administrative costs. An additional advantage is that county personnel will likely have experience administering a municipal permit process and may tend to be more familiar with the city's particular issues. A potential disadvantage is that the county may

require that the permitting process mirror the one that the county uses. Therefore, the city may have to revise its ordinances and regulations to fit the county's process. Another disadvantage is that the county is under no legal obligation to offer this service to the city and therefore may be unwilling to cooperate with the city.

■ *Conclusion*

This guide is intended to provide municipalities with a discussion of the extent to which they may regulate excavations and encroachments in the public right of way; however, each municipality needs to determine for itself what level of regulation is appropriate. It is important that the municipality consult with its legal counsel and also involve utilities and other companies that are expected to frequently request access to the municipality's right of way. Communication and cooperation will reduce conflict between the municipality and those companies seeking access to the right of way.



Frequently Asked Questions

■ Authority to regulate

What legal authority does a municipality have to regulate excavations in the public right of way?

Public municipalities generally have the same right to control access to the public property as would a private property owner (Government Code Section 38775). The municipality may control access to its property under its police power. The term “police power” is shorthand for the power of the municipality’s governing body to legislate to protect the health, safety, and welfare of its citizens (*Cal. Const.* Article XI, Section 7). Lastly, a municipality has the authority to reasonably regulate the time, place, and manner of access to public right of way.

What legal limitations are there on a municipality’s authority to regulate excavations in the public right of way?

A municipality may not regulate in a manner that conflicts with the requirements of state or federal law. A municipality may be further limited by the terms of a franchise agreement in regulating franchise utilities such as gas, electric, and cable companies.

■ Access to the public right of way

What is meant by the “public right of way”?

The public right of way is generally defined as those areas in, on, and within any dedicated public alley, boulevard, court, lane, road, sidewalk, space, street, and way within the jurisdiction of the municipality.

A utility company representative has told me that my municipality has to allow them access to the public right of way. Is this true?

Yes, most likely. Gas and electric utilities will have franchise agreements with the municipality that grant them access to the right of way. Telephone and telecommunications companies have been granted a statewide franchise that allows them access to any public right of way within the state (Public Utilities Code Section 7901). Other governmental municipalities such as municipal utility districts and water districts also have statewide authority to access the public right of way. However, the municipality still has the legal authority to reasonably regulate the time, place, and manner in which these utilities access the right of way.

■ Conditions on permits

What legal authority does the municipality have to place conditions on the issuance of an encroachment permit?

The municipality’s encroachment ordinance should be reviewed to determine whether it allows conditions to be imposed. The ordinance may expressly state those conditions that shall be placed on the encroachment permit. The ordinance may, on the other hand, simply provide that the public works director (or other designated staff member) may conditionally approve issuance of the permit.

Is there any legal limitation on what conditions can be imposed on the permit?

Yes. There must be a reasonable connection between the condition and the impact on the municipality of the project for which the permit is issued. For example, a utility company applies for a permit to excavate a street in order to repair its facilities. The municipality imposes a condition that the utility restore the excavation in accordance with the municipality’s standard specifications. This condition is reasonably connected to the impact of the project because the standard specifications are intended to ensure the street is properly restored after an excavation. However, if the municipality were to require as a condition that the utility entirely resurface the street for two blocks on either side of the excavation, there would not be a reasonable connection if the impact of the utility’s excavation did not extend to these other blocks.

What types of conditions can be imposed?

A municipality has the legal authority to impose a variety of conditions. Determining what conditions, if any, to impose will depend on the extent to which the municipality wishes to regulate encroachments, the type of project under consideration, and who is performing the work. Some conditions the municipality may wish to consider imposing are:

1. The applicant must indemnify the municipality and provide proof of insurance.
2. The applicant must comply with the municipality’s traffic and pedestrian control regulations.
3. The applicant must comply with the municipality’s noise control and work hours regulations.

4. The applicant must notify the Underground Services Alert (USA).
5. The applicant must comply with the municipality's standard specifications for restoring the right of way.
6. The applicant must allow for the inspection of the project prior to restoration of the right of way.
7. The applicant must maintain and repair any facilities placed in the right of way.
8. The applicant must relocate or remove facilities where legally required.

■ Fees

What legal authority does the municipality have to recover its administrative costs in issuing encroachment permits?

A municipality may impose a fee that does not exceed the estimated reasonable cost of providing the service for which the fee is charged. However, it should be noted that the state, counties, cities, and special districts are exempt under state law from paying administrative fees, except that the municipality may assess plan checking and inspection fees against these governmental agencies (Government Code Sections 6103, 6103.6, 6103.7). This does not prevent the municipality, however, from requiring these public agencies to obtain a permit prior to excavation in the right of way.

What legal authority does the municipality have to recover its costs related to inspection of the project for which the permit was issued?

As with administrative fees, the municipality may impose fees to reimburse the municipality for its estimated reasonable inspection costs.

May the municipality require applicants to deposit with the municipality an amount equal to the municipality's estimated reasonable costs prior to issuance of the permit?

A municipality may require an applicant to deposit with the municipality the estimated fee prior to issuance of the permit. If the municipality's costs exceed the amount deposited, it can require the applicant to deposit an additional amount. If the municipality's costs are less than the amount deposited, the remaining money must be refunded.

What are trench cut fees?

Trench cut fees, also known as street deterioration fees, are intended to reimburse the municipality for the costs associated with the more rapid deterioration of streets that have been subjected to trench cuts. Although controversial, there are studies that purport to show that trench cuts, no matter how well restored, will cause a street to deteriorate more rapidly. This would result, therefore, in the municipality

having to repair and resurface the street more frequently than if the trench cuts had not been made, and thus, presumably, would impose additional costs on the municipality.

What is necessary legally in order to impose these fees?

As with the other fees discussed above, trench cut fees must not exceed the estimated reasonable costs to the municipality. In order to calculate the fee, there needs to be a study performed to determine what effect trench cuts are having on the municipality's streets and what additional costs the municipality is incurring because of these effects. This type of fee is usually imposed by ordinance.

What is the legal procedure for adopting or increasing a fee?

Fees may only be imposed by the municipality's legislative body. Fees are generally imposed or changed by resolution; however, some municipalities use ordinances. Government Code Section 66018 requires that the legislative body hold a public hearing prior to adopting a new fee or increasing an existing fee. Notice of the hearing must be published prior to the hearing in a local newspaper for ten (10) days.

■ Inspections

What legal authority do municipal inspectors have to inspect excavations?

An inspector's authority to inspect is governed by laws and regulations of the municipality. Generally, an inspector will have the authority to inspect the work, to require access to the work for inspection, to reject improperly performed work, require repairs, and to stop the work in appropriate situations.

May the municipality use outside consultants to perform inspections?

Local municipalities may use outside consultants to perform inspections (Government Code Section 53060). These consultants may be retained on an as-needed basis or hired by the municipality as temporary employees. The cost of these consultants can be recovered from the applicant through administrative fees.

■ Enforcement

What options does the municipality have when an applicant has violated any of the permit conditions?

A municipality has a number of options when seeking to enforce a permit condition. Determining which enforcement method to use depends on the nature and extent of the violation, who the violator is, the municipality's past history with this violator, and the amount of cooperation the municipality has received from the violator to resolve the violation. The municipality's ordinances also should be

reviewed to determine what enforcement options are authorized. Examples of potential enforcement methods include:

1. Informal enforcement consisting of notice letters and personal contacts with the violator
2. Enforcement through the municipality's administrative process, if the municipality's ordinances provide for such a process
3. Civil injunction against the violator sought through the civil courts
4. Prosecution of violation in criminal court as a misdemeanor or infraction.

How can the municipality enforce its local requirements when there is an emergency that requires a utility or company to immediately trench without first obtaining the necessary permits?

One method of enforcing local requirements is to impose a condition either on the original permit or through an ordinance requiring the utility or company to apply for an emergency permit no later than the next city business day. As part of the application, the municipality may wish to require the utility or company to explain what the emergency was and why immediate trenching was necessary. The municipality also may wish to impose the same conditions and charge the same fees as it would for a regular encroachment permit that is issued prior to excavation.

Under what conditions may the municipality perform emergency repairs on facilities in the right of way and seek reimbursement from the utility or company that owns the facilities?

A municipality should, if the situation allows, make a reasonable effort to contact the responsible utility or company and give a reasonable opportunity to begin repair work. What constitutes a reasonable opportunity depends on the particular circumstances of the situation. If the owner of the facilities is not responsive, the municipality may wish to declare the facilities to be a public nuisance and an immediate threat to the public health and safety. The municipality may then proceed to summarily abate the nuisance under the authority of the municipality's nuisance ordinance. The municipality should limit its work on the facilities to the minimum necessary to make the facilities safe. The municipality should track its costs carefully and, upon completion of the repair work, may make a claim for these costs against the owner of the facilities. If the owner rejects the claim, the municipality may wish to consult with its legal counsel as to whether further legal action under the municipality's nuisance ordinance is appropriate.

How can applicants be encouraged to comply with permit conditions?

There are a number of ways in which applicants can be "rewarded" for past compliance with permit conditions, which, in turn, should encourage future compliance. These include reduced fees or deposits, streamlined permit process, and issuance of blanket permits.

■ Street moratoria

What is a street moratorium and how can it be enforced?

A street moratorium prevents the excavation of any street that has been resurfaced within some specified period of time. Generally, this time period is specified to be five (5) years or less. The municipality should consider allowing certain exemptions, for example, for emergency repairs or for underground boring. A street moratorium should generally be imposed through an ordinance and may be enforced in the same manner as any other permit condition. The municipality's departments will need to carefully coordinate so that the department issuing encroachment permits is aware of which streets are subject to the moratorium.

■ Ordinances

What are the basic provisions of a trench cut ordinance and what is the procedure for adopting one?

The provisions of trench cut ordinances vary from municipality to municipality. What provisions to place in an ordinance will depend upon the needs of the municipality and the extent to which the municipality wishes to regulate. This often becomes an issue of the municipality's financial resources and the availability of personnel to administer the ordinance. The municipality should be aware that any fees imposed pursuant to such an ordinance will be unlikely to fully reimburse the municipality's costs. If the municipality wishes to adopt such an ordinance, it should, at a minimum, consider including the following types of provisions:

1. Encroachment permit required
2. Compliance with all municipal regulations
3. Required application for permit with the municipality
4. Emergency excavations
5. Liability and indemnification requirements
6. Imposition of fees
7. Regulation of excavation and restoration (standard specifications)
8. Applicant's repair and maintenance obligations

9. Enforcement.

Each municipality will have its particular process for adopting ordinances. The general process for adopting a city ordinance is as follows:

1. Staff provides a draft ordinance to the city attorney for review and approval.
2. The final ordinance, along with a staff report and recommendation, is given to the city clerk for inclusion on the council meeting agenda.
3. At the council meeting, reading of the ordinance is waived beyond the title, and the ordinance is introduced. At this time the council may choose to hear the staff report and any public comment, or wait until the next meeting when adoption of the ordinance is considered.
4. At the next meeting, reading of the ordinance is waived beyond the title and the council will consider adoption of the ordinance.
5. The city clerk must publish the ordinance at least fifteen (15) days after adoption.
6. The ordinance takes effect and may be enforced thirty-one (31) days after adoption.