

Alaska Railroad Corporation Proposed Residential Right-of-Way Use Policy: History, Status and Outstanding Issues.

The Issue – Unpermitted Residential Uses in the ARRC Right-of-Way:

The Alaska Railroad Corporation (ARRC) right-of-way (ROW) is an essential part of the state's transportation, communication and transmission networks.¹ Because of its importance to the long-term economic growth and development of Alaska, state law requires ARRC to preserve the integrity of the ROW for those critical purposes.² In addition to accommodating railroad operations and other utility corridor uses, the ROW also provides maximum protection to the public and ARRC's passengers and employees from safety risks inherent in such operations.

ARRC obtained its property interest in the ROW from the United States under the Alaska Railroad Transfer Act ("ARTA"). That property interest provides ARRC with the exclusive right to occupy and use the ROW, a right that is necessary for safe and economic railroad operations.³ Unfortunately, ARRC and its predecessor, the federal Alaska Railroad, were inconsistent in their decision-making processes and enforcement regarding the use and occupancy of the ROW by adjoining residential property owners. Permits were issued for some residential uses, many of which lapsed without renewal, while other residential uses were allowed to occur without permits. Over time, non-permitted residential uses and construction by adjoining residential property owners occurred within the ROW. Such uses and construction can pose safety risks to the public and to ARRC passengers, employees and equipment, and can limit the use of the ROW as a critical utility corridor. In short, left unregulated, such uses could impair the integrity of the ROW, a result contrary to ARCA.

¹ The Alaska Railroad Corporation Act, AS 42.40 ("ARCA") defines the ARRC ROW as a "railroad utility corridor" to be used for transportation, communication and transmission purposes. AS 42.40.350(a); §1 ch 153 SLA 1984 (stating statutory purpose for ARCA).

² §1 ch 153 SLA 1984. Besides the critical and valuable railroad facilities contained in the ROW, there are presently hundreds of utility lines (e.g. fiber optic, telephone, cable TV, electric, water, sewer, natural gas and petroleum), roads and other public facilities located within the ROW.

³ Pursuant to the Alaska Railroad Transfer Act of 1983 (ARTA), ARRC's property interest in the ROW is, at a minimum, an "exclusive use easement." 45 U.S.C. §1205(b)(4)(B). As defined by statute, the exclusive use easement grants ARRC the right to fence all or part of the ROW and to exclude other persons from all or part of such lands. 45 U.S.C. §1202(6). Congress expressly found in passing ARTA that "exclusive control over the right-of-way by the Alaska Railroad has been and continues to be necessary to afford sufficient protection for safe and economic operation of the railroad." 45 U.S.C. §1205(b)(4)(A)(ii).

The Need for an Effective and Fair Residential ROW Use Policy:

As unpermitted residential uses increased, ARRC's management recognized that the failure to consistently enforce the ROW had resulted in residential uses that posed potential safety and operational risks. Consequently, ARRC needed to establish fair and consistent guidelines and procedures to regulate residential uses of the ROW by neighboring residential property owners in order to better protect and preserve the ROW so that it remained intact and available for its intended purposes.

To address these concerns, ARRC management staff began working with the ARRC Board's Right-of-Way Committee ("ROW Committee") to develop a proposed policy regarding residential uses of the ROW. The ROW Committee undertook that project under the Board's authority to issue exclusive rules governing land use on railroad lands, as provided in AS 42.40.390. During its work on the policy, the ROW Committee sought and received the participation and assistance of non-ARRC personnel with expertise in land use matters.

ARRC's ultimate intent in developing a policy governing residential uses of the ROW was to preserve the integrity of the ROW as required by ARCA. To that end, the policy would need to include clear and consistent guidelines for what types of existing residential uses would be allowed to continue and for what period of time. The policy also would have to provide clear procedures for neighboring residential landowners to apply for permission to continue existing uses of the ROW, at least temporarily. And it would have to include guidelines for ARRC management staff to use in considering, evaluating and deciding permit applications, as well as the discretion to efficiently and finally decide whether a permit should be granted in light of safety and liability concerns.

ARRC management also realized that any policy addressing residential use of the ROW must balance the needs of ARRC to control its ROW with the expectations regarding residential uses that landowners neighboring the ROW had developed over the years. The policy would have to ensure railroad safety and operations, accommodate ARRC's obligations to use the ROW as a utility corridor for communication and transmission, treat adjoining landowners fairly and meet all of ARRC's other obligations under ARCA with respect to allowing use of its land.

The original goal for the policy was to eventually eliminate residential uses of the ROW. ARRC's exclusive control of the ROW made that possible, and no residential use of the ROW was the preferred outcome from a safety and operational standpoint since it maximized safety and minimized risk. In setting that goal, the ROW Committee recognized that neighboring landowners who had used the ROW for residential purposes would be impacted by the policy. In order to soften that blow, the ROW Committee endeavored to create a policy that would eliminate residential uses of the ROW over time, thereby allowing an

adjustment period. As described below, the goal of removing residential uses from the ROW has since evolved into an approach allowing safe residential uses of the ROW to continue indefinitely as long as the residential use area is not needed by ARRC for railroad purposes and/or other statutory use of the ROW.

Development and Evolution of the Proposed Residential ROW Use Policy – ARRC Seeks and Responds to Public Input:

Between 2008 and the present, the proposed residential ROW use policy evolved markedly as management staff and the ROW Committee sought to balance the need for ARRC to control the ROW with the adjoining landowners' desire to continue existing residential uses that had grown up over time. The focus of early versions of the policy was to set up a transition period during which all residential uses of the ROW would be eliminated. As recently as late 2011, the draft policy called for a ban on all new residential uses of the ROW and the elimination of existing residential uses over the course of ten years. During the ten-year phase-out period, adjoining landowners would need a permit to continue their use, after which they would have to vacate the ROW.

In early 2012, the ROW Committee recognized that a ten-year transition period to phase out all residential uses was too aggressive given the history of uneven enforcement of the ROW and resulting expectations of neighboring landowners. The Committee and management staff proceeded to revise the policy to allow existing residential uses to continue under permit until a landowner transferred title to the adjoining land to another party. Once title was transferred, the permitted use would end. The ROW Committee recommended the revised policy to the full Board, which was to consider the policy at the Board meeting scheduled for June 7, 2012.

All landowners adjoining the ROW were notified of the draft policy and invited to submit comments before or at the June 7 Board meeting. Many of ARRC's residential neighbors provided comments, either in writing or in person. Many of the comments adverse to the policy focused on its phase-out of existing residential uses upon the transfer of title to adjoining properties. Commenters wanted to be able to pass on their right to continue existing uses of the ROW to purchasers of the properties or to their heirs.

After considering the public comments, the Board decided at the June 7 meeting to resubmit the draft policy to the ROW Committee to consider whether to make changes to address those comments. The ROW Committee worked with management staff to revise the proposed policy to address the public comments. In September 2012, the ROW Committee approved a revised draft policy that allowed existing residential uses to be continued indefinitely under permit as long as the neighboring landowner complied with the permit, the continuing use remained safe and the portion of the ROW that was used was not needed for railroad use or for other transportation, communication or transmission uses.

Permits would be renewable indefinitely and could be transferred to purchasers or inheritors of the adjoining land. Because the new policy contemplated long-term continued residential uses of the ROW and ARRC is generally obligated to receive fair market value for use of its property, the revised policy created a new fee structure for residential use permits based on the value of a residential user's adjoining land and the amount of ROW used.

In October 2012, ARRC notified all landowners neighboring the ROW of the revised policy. It scheduled and held public meetings in Anchorage, Fairbanks and Wasilla in November 2012 to discuss the new draft policy, and took public comments on the revised policy both at the meetings and in writing through mid-December 2012. At the public meetings, participants seemed satisfied with many of the changes made to the policy, but many expressed concern about the new fee schedule, which they felt would result in overly expensive permits. Other participants felt that perhaps a lower fee schedule should apply to lawn and garden uses than to uses involving structures. Fees also were the subject of many written comments, although a few commenters questioned ARRC's right to require permits and impose fees for residential uses of the ROW.

The ROW Committee currently is considering a recommendation by staff to adjust the fee schedule downward for lawn and garden uses. If and when the ROW Committee approves the revised policy, another mailing will be made to ARRC's neighbors along the ROW informing them of the revised policy. It will then be up to the Board as to whether and when it will consider and vote on the revised policy. If the Board includes the policy on the agenda of an upcoming Board meeting, the public will once again be invited to submit written comments or to attend the meeting to comment on the revised policy.

The Current Draft of the Residential ROW Use Policy:

As noted above, the current draft of the proposed residential land use policy, now titled the Residential Right-of-Way Use Policy ("RRUP"), has been revised to accommodate public comments supporting the transferability of permits for existing residential uses of the ROW. That change means that existing uses, if approved for a permit, could continue indefinitely. Consequently, all language in the policy indicating the intent to phase out residential uses has been removed, and the term "transitional" has been removed from the title and text of the policy. Given the potential for indefinite duration of permits, however, and in order to protect and preserve the ROW, permits will be terminable where a use is later determined to be incompatible with railroad safety and operations or the portion of ROW in question is needed for transportation, communication or transmission purposes.

Key terms of the current draft policy include:

- Neighboring residential land owners will have 180 days from the time they are notified of the need to obtain a residential use permit to apply to continue an existing residential use. This application period was doubled as compared to the previous draft to ensure adequate time to apply.
- Permits may be obtained for existing residential uses of the ROW where the use does not present a safety hazard or interfere with railroad operations or other transportation, communication and transmission uses.
- Permit duration will be set by ARRC Real Estate and permits will be renewed upon request as long as the permit holder complies with the permit, continuing the use will not pose a safety hazard and ARRC does not need that portion of the ROW for railroad or other statutory purposes.
- Permits for existing uses will be transferable to buyers or inheritors of permit holders' property adjoining the ROW. ARRC will approve such a transfer if both original and new owner continue to comply with the permit.
- The permit fee structure remains under discussion by management staff, the ROW Committee and the Board based on recent public comments.
- Permit holders may terminate permits at any time if they discontinue use and vacate the ROW
- ARRC may terminate permits if:
 - The existing residential uses or structures are removed
 - Permit holder attempts to assign the permit to someone other than a new owner of the adjoining property
 - Permit holder changes the nature or scope of the residential use
 - The permit expires without any request for renewal
 - Permit fees are not paid or the permit holder otherwise fails to comply with permit
 - ARRC determines the permitted uses are incompatible with safety, railroad operations, or other statutory uses of the ROW, such as the need to securely fence the ROW at the location or to use the area for double-tracking, track realignment, installation of communication or transmission lines or other transportation, communication or transmission purposes

- Existing uses must be removed at the adjoining landowner's cost if no permit is obtained or a permit is terminated
- Permit holders indemnify ARRC for claims by third parties and/or permit holders related to the permits and the use of the ROW
- ARRC management staff has discretion to implement the RRUP
- The current draft RRUP focuses on existing residential uses, but new uses or expanded uses can be requested and may be allowed within ARRC management's discretion

Disputes Arising From the Proposed RRUP:

As discussed above, many residential land owners neighboring the ROW have provided comments and criticisms regarding the evolving drafts of the proposed RRUP. With the exception of ongoing concerns regarding permit fees, most of the concerns raised by ARRC's neighbors have been accommodated by changes to the proposed policy. Several residents of one neighborhood, however, have challenged the whole concept of the RRUP. These neighbors question the nature and scope of ARRC's property interest in the ROW.

One resident believes that the ROW is not under the exclusive control of ARRC, that adjoining landowners and the general public have broad rights to occupy and use the ROW and that adjoining landowners will receive title to the ROW should it ever be abandoned for use as a railroad. This resident contends that the ROW was established as a non-exclusive easement by the federal Act of 1914, which directed the President of the United States to withdraw public lands for use as right-of-way and other lands needed to establish a railroad line or lines in the Territory of Alaska. He argues that the non-exclusive nature of the ROW, as he sees it, precludes ARRC from either excluding neighboring property owners from the ROW or charging those owners for use of the ROW.

ARRC has drafted and made available to interested parties, including legislators, a memorandum outlining the numerous legal authorities establishing that the ARRC ROW is under the exclusive control of ARRC. As detailed in that memorandum, title to most of the ROW is held by ARRC in fee simple as the result of interim conveyances and final patents under ARTA. Title to the remainder of the ROW is held by ARRC in the form of an exclusive-use easement as defined under ARTA. The authorities cited by ARRC demonstrate that the 1914 Act provided for establishment of a ROW exclusively controlled by the Alaska Railroad, that railroad easements have consistently been interpreted to provide exclusive control by the railroads in order to ensure safe and economic railroad operations and that Congress provided that conveyances of the ROW under ARTA guarantee transfer of at least an exclusive use easement to ARRC from the United States.

Summary:

The proposed RRUP was developed to address the problem of unpermitted residential uses that have grown up in the ARRC ROW. In response to public comments and management analysis, the proposed policy evolved from one seeking to eliminate all residential uses over a relatively short time period to one that will allow existing residential uses to continue as long as they are properly permitted, can continue to be conducted safely, do not interfere with railroad operations and other statutory uses of the ROW and do not involve areas needed for the development of additional facilities related to railroad and other statutory uses. Public participation in the process of developing the RRUP has been and will continue to be extensive. ARRC remains confident in its position regarding its exclusive control of the ROW and would be happy to supply additional information supporting that position upon request.