

## **BOARD RULE NO. 23**

Adopted: November 12, 2013

**Subject:** Residential Right-of-Way Use Policy

**Summary:** This rule sets forth the general policy of the Corporation concerning residential uses of the ARRC Right-of-Way (ROW) and sets forth guidelines for formally permitting residential uses of the ROW by adjoining property owners.

## **BOARD RULE NO. 23**

### **ALASKA RAILROAD CORPORATION RESIDENTIAL RIGHT-OF-WAY USE POLICY**

#### **GENERAL PURPOSE AND INTENT**

The Alaska Railroad Corporation (ARRC) Right-of-Way (ROW) is an essential part of the state's transportation network that serves several purposes.<sup>1</sup> 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 "transportation, communication, and transmission purposes."<sup>2</sup> In addition to its primary purpose of accommodating railroad operations, the ROW also provides maximum protection to the public and ARRC employees from safety risks inherent in such operations, and delineates the boundary of ARRC's property interests near its tracks.<sup>3</sup>

Unfortunately, ARRC and its predecessor, the federal Alaska Railroad, have been inconsistent both in their decision-making processes and enforcement regarding the use and occupancy of the ARRC ROW by adjoining residential property owners. Over time, non-permitted uses and non-permitted construction by adjoining residential property owners have occurred within the ARRC ROW. Such uses and construction could pose safety risks to the public and to ARRC employees and equipment, and could limit the use of the ARRC ROW for its statutorily mandated purposes.

The purpose of this policy is to establish consistent guidelines and procedures to regulate residential uses of the ARRC ROW by adjoining property owners in order to better protect and preserve the integrity of the ROW so that it remains intact and available for its intended purposes.

This policy requires ARRC management to set up a permit process for residential uses and structures within the ROW. Permits will be issued for a certain term, but will be renewable if the permitted uses or structures continue to be allowable under the terms of this policy. A permit issued under this policy will be assignable to new owners of a permit holder's property upon a transfer of ownership interest in that property by the permit holder, provided ARRC receives notice of the transfer as specified in the permit. The uses and structures allowed under a permit transferred to a new property owner shall be limited to only those uses and structures allowed by the original permit.

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<sup>1</sup> AS 42.40.350(a) defines the ARRC ROW as a "railroad utility corridor."

<sup>2</sup> §1 ch 153 SLA 1984

<sup>3</sup> 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).

This policy also requires that all structures be removed from the ARRC ROW and that all areas subject to this policy be vacated immediately by any residential user who either (i) does not obtain a permit under this policy, or (ii) obtains a permit which is subsequently terminated. Although costs associated with removal of structures and the vacation of the ARRC ROW will be the sole responsibility of the residential user, allowing structures and uses to remain until permits terminate will allow time to plan for any such costs.

## **POLICY STATEMENT**

It is the policy of ARRC to preserve and protect the integrity of its ROW for transportation, communication, and transmission purposes as required by state law. Pursuant to statute, however, reasonable residential uses of the ARRC ROW may be authorized in the sole discretion of ARRC management, but only if they do not restrict train operations; create a safety hazard; or otherwise limit or interfere with transportation, communication, transmission or other parallel uses of the corridor.<sup>4</sup>

## **POLICY**

### **A. Scope**

This policy establishes appropriate procedures, terms and conditions for allowing certain residential uses of the ARRC ROW under a permit system.

### **B. Coverage**

This policy applies to all residential uses within the ARRC ROW. It does not apply to (i) public utility uses, (ii) commercial uses, or (iii) governmental uses. Also not subject to this policy are any permitted or unpermitted uses of the ARRC ROW where such uses constitute residential property owners' sole means of access to their properties.

### **C. Distribution and Point of Contact**

This policy will be posted on the ARRC website at [www.AlaskaRailroad.com](http://www.AlaskaRailroad.com) and also will be available through the ARRC Real Estate and Corporate Affairs Departments. The Real Estate Department will be the main contact for public information concerning this policy. The contact number is (907) 265-2670. Printed copies of this policy will be available at the ARRC Anchorage Headquarters Building located at 327 W. Ship Creek Avenue.

### **D. References/Authority**

Authority for issuance of this policy is established by:

1. AS 42.40.390

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<sup>4</sup> AS 42.40.350(b)

2. AS 42.40.350(b)
3. 45 U.S.C. §1207(e)
4. ARRC Board of Directors (Resolution No. 2013-42)

## **E. Responsibility**

The following ARRC management employees are responsible for the implementation, administration and enforcement of this policy, and shall exercise their respective responsibilities under this policy within their sole discretion:

Vice President, Engineering is responsible for determining impacts of existing or proposed residential uses or encroachments within the ARRC ROW and whether those impacts are compatible with this policy. Impacts include but are not limited to safety, erosion, drainage, slope stability, and maintenance activities. The Vice President, Engineering or his delegate shall decide whether to grant or deny a permit application under this policy.

Vice President, Transportation and Mechanical or his delegate is responsible for determining if a proposed permit use is compatible with train operations and safety requirements.

Vice President and General Counsel or his delegate is responsible for ensuring that this policy complies with all applicable governing statutes, advising the corporation regarding compliance with the provisions of this policy, and pursuing legal remedies/relief for non-compliance with the policy and associated permits where appropriate.

Vice President, Corporate Planning and Real Estate or his delegate is responsible for administering this policy, including but not limited to (i) determining, subject to the approval of the Vice President, Engineering, that an applicant qualifies for a permit under this policy; (ii) determining, again where appropriate subject to the concurrence of the Vice President, Engineering, that a permit should be terminated under Sections G.3 and G.4 of this policy; (iii) establishing permit fees under this policy; (iv) providing information about the ARRC ROW to the public (e.g. various widths of the ARRC ROW); and (v) recommending revisions to the policy as necessary or advisable.

Chief Special Agent or his delegate is responsible for investigating a residential user's non-compliance with this policy, issuing trespass citations when appropriate, and providing a violation report and/or evidence to the Legal Department for resolution of non-compliance. The Chief Special Agent shall coordinate with the Real Estate Department's Manager, Land Services to conduct an inspection of the entire ARRC ROW as often as necessary to ensure compliance under this policy.

## **F. Definitions**

Permit: A written, legally binding contract between ARRC and an adjoining land owner authorizing the latter to use a portion of the ARRC ROW for a Residential Use, as defined below, in exchange for a predetermined fee. The landowner's rights under such contract may not be transferred or assigned to any third party except in conjunction with the transfer to the third party of the landowner's ownership interest in the subject real property and upon notice to ARRC as described in Section G.5 of this policy. Any transferred permit will continue to allow only the same or less extensive Residential Use as the initial permit.

Right-of-Way (ARRC ROW): As required by statute, the Alaska Railroad rights-of-way are "railroad utility corridors" and are of a width at least 100 feet on both sides of the centerline of the main line or a branch line unless the corporation does not own or control sufficient land to allow a corridor of that width.<sup>5</sup>

Residential Use: Any use associated with a Residential Use Area, as defined below. A Residential Use of the ARRC ROW may only occur under a permit issued pursuant to this policy.

Residential Use Area: Area used solely for the purpose or purposes of (i) growing and maintaining a lawn, shrubbery, or garden in the ARRC ROW without structures except as specifically allowed by this paragraph (Lawn and Garden Use); and/or (ii) keeping, maintaining and/or repairing approved residential-related structures in the ARRC ROW (Residential Structure Use). For purposes of this policy, the term "structure" shall have the meaning set forth in Anchorage Municipal Code Section 21.35.020.B. At the discretion of ARRC management, a permitted Residential Use Area may have boundaries different from current use boundaries and may or may not include current improvements.

## **G. Procedures/Implementation**

Upon adoption of this policy, all existing Residential Uses within the ARRC ROW will be required to strictly comply with this policy and with all applicable laws, land use regulations and codes. Existing residential users with or without encroaching structures will be allowed to apply for a permit under this policy, which creates a one-time opportunity for adjoining property owners to legitimize their existing occupancy and use of the ARRC ROW. Any such existing use or structure may continue until termination of the permit as long as the continued use or structure complies with this policy in all respects.

An adjoining residential property owner who wishes to continue an existing Residential Use of the ARRC ROW must submit a completed ARRC permit application form within 180 days of notice of the adoption of this policy and the need to obtain a permit being given by ARRC to the most recent address of the property owner known to ARRC. This

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<sup>5</sup> AS 42.40.350; see also 45 U.S.C. §1202(11) (defining "right-of-way" for purposes of ARTA).

requirement applies to all adjoining property owners with existing uses, whether they are covered under an existing permit or not. Each permit application must be accompanied by the following, as applicable:

- a. The appropriate permit application fee as provided in Section G.7, below, and as set forth in Addendum A.
- b. A legible drawing meeting requirements set forth in the permit application that (i) shows the dimensioned proposed use area within the ARRC ROW, (ii) shows all encroaching structures in the proposed use area, and (iii) indicates the nature and location of each use the applicant seeks to have permitted. As-built drawings will typically be required for proposed use areas containing encroaching structures unless ARRC Real Estate, within its sole discretion, determines that another type of drawing is sufficient.
- c. Photographs of the existing uses and proposed permit area.
- d. Documentation of the applicant's ownership interest in the adjoining residential property acceptable to ARRC, such as a copy of the most recent tax assessment notice for the adjoining property.

If a property owner with an existing Residential Use subject to this policy fails to submit a permit application within the 180-day application period, or otherwise fails or refuses to comply with the requirements and conditions of this policy or a permit issued under this policy, or has a permit under this policy terminated pursuant to Sections G.3 or G.4, below, the property owner must promptly and at his own expense discontinue the permitted use and remove and dispose of all encroaching structures.

- a. If the property owner does not promptly discontinue the use and remove any structures, ARRC will have the right to take an enforcement action requiring the property owner to vacate the area of the ARRC ROW currently being used or encroached upon.
- b. Such an enforcement action could lead to ARRC removing, at the property owner's expense, the property owner's personal property and structures from the use area and installing fencing to the limit of the ARRC ROW.

If a property owner who maintains a Residential Use wishes to discontinue that use and/or to remove all improvements to the satisfaction of ARRC, either before or after obtaining a permit for such use or structure, the property owner will be permitted to do so in compliance with the provisions of this policy.

Requests for permits for prospective new Residential Uses of the ARRC ROW may be directed to ARRC management. The decision of whether to grant or deny any such request shall be at management's sole discretion. Any new Residential Uses that are

approved shall strictly comply with the terms and conditions of this policy and the permit issued for such use.

Permits issued under this policy will contain, but not be limited to, the following provisions and requirements:

1. The permit will be personal to the permit holder and neither the permit nor the rights thereunder may be transferred or assigned except in conjunction with the transfer of the permit holder's ownership interest in the subject property. Under no circumstances may a permit under this policy or the rights thereunder be transferred to any person or entity who is not a subsequent owner of the property associated with that permit.
2. Uses and structures allowed by the permit must be discontinued and removed from the ARRC ROW upon the expiration or earlier termination of the permit as more specifically provided below.
3. The permit will automatically terminate on the earliest of the following:
  - a. Uses of the permit area that present, or may present, in the sole opinion of the Vice President, Engineering, a concern for employee safety, operational safety or other hazard.
  - b. Termination of the permit by either party as provided in item 4 below.
  - c. Discontinuation of all uses and/or the removal of all structures permitted under the permit.
  - d. Expiration of the term of a permit without the permit being renewed.
4. Permit holders will have the option to terminate permits at any time. ARRC may terminate a permit if the permit holder defaults, including but not limited to failing to pay permit fees, changing the nature of or expanding the scope of the permitted use or structure, failing to notify ARRC of the transfer of the adjoining residential property to a new owner, or violating any other material provision of the permit. ARRC also may terminate a permit if the continued use is determined, in the sole discretion of ARRC management staff, to be incompatible with public or ARRC employee safety, governing statutes, railroad operations, transportation, communication, transmission or other parallel uses of the ARRC ROW. Examples of situations in which a permit may be terminated due to incompatibility of use include but are not limited to determinations by ARRC management that (i) safety or security concerns require ARRC to install a fence or other structure to exclude persons from a portion of the ARRC ROW; (ii) a portion of the ARRC ROW is required for use by ARRC for railroad operations, construction or improvements such as for a double-tracking or realignment project; or (iii) a portion of the ARRC ROW is

- required for use by ARRC or others for purposes of another statutory priority use, such as the installation of fiber optic lines or other transportation, transmission, or communication facilities. Once a permit terminates pursuant to the terms of this policy, that permit will not be subject to reinstatement and the use or structure formerly covered by the permit must be ceased or removed.
5. A subsequent owner of the adjoining residential property will be entitled to have a permit for an existing Residential Use issued in the subsequent owner's name subject to timely notification to ARRC that the ownership interest in the adjoining property has been transferred to the new owner. ARRC will not object to the transfer of a permit subject to the new owner's compliance with all aspects of this policy and the permit and further subject to the termination provisions of Sections G.3 and G.4, above.
  6. Permits will be recorded in the appropriate Alaska State Recorder's Office by ARRC.
  7. Permits will be subject to an application fee, an annual permit fee and a renewal fee. The initial application, renewal and annual permit fee schedule is set forth in Addendum A. The ARRC Real Estate Department will have the sole discretion to adjust the permit fee schedule periodically in order to provide a fair return to ARRC for the use of its property as required by statute, to meet administrative costs or for any other prudent business purpose. The initial annual permit fee shall be charged retroactively to the beginning of the 180-day application period regardless of the date the application is submitted to ARRC. Annual permit fees shall be adjusted when permits are renewed. The minimum annual permit fee may be adjusted at any time.
  8. Vehicles will not be allowed to be parked or stored within the ARRC ROW.
  9. Permits will require that permit holders defend, indemnify and hold ARRC harmless against claims by third parties or the permit holders arising in relation to uses or structures covered under the permit or otherwise related to the permit holders' occupancy or use of the ARRC ROW. If a permit holder employs a contractor to conduct work in the ARRC ROW related to permitted uses or structures, the contractor must obtain a temporary construction permit or other appropriate permit from ARRC prior to commencing any such work within the ROW unless ARRC determines in writing not to require such a permit.
  10. Permits will require that permitted use areas and structures must be maintained in good condition and may not become unsightly or constitute a public or private nuisance.

11. Permits may require existing or previous permit boundaries to be adjusted and certain improvements to be removed. Depending on the permitted use or structure, this determination shall be based upon the drawing or as-built survey required to be submitted with the applicant's permit application. Compliance with any required adjustment to permit boundaries and any required removal of improvements will be a condition for continuing the permit process and failure to so comply may result in termination of existing permits or rejection of an application for a new permit.
12. Permits shall be for a set duration to be determined by the ARRC Real Estate Department in its sole discretion, and may be renewed by the person holding the permit at the date of expiration. Each permit shall require the permit holder to provide ARRC with written notice in advance of the expiration date of his intent to renew his permit. Failure to pay annual permit fees or to renew a permit will result in termination of the permit as provided in Sections G.3 and G.4, above. Upon a request for renewal, ARRC shall renew a permit subject to the permit holder's past and continuing compliance with all aspects of this policy and the permit and also subject to all other terms of this policy.
13. Permits will provide that the permit holder does not, by virtue of obtaining a permit, receive any ownership or other property interest in the ARRC ROW.
14. Permits will provide that permit holders will not be entitled to any compensation for termination of a permit in accordance with this policy and/or the terms of the permit.

#### **H. Removal of Unauthorized ROW Structures/Uses**

ARRC will remove from its ROW, upon discovery, any structure or other property which it deems to be a hazard to railroad operations or public safety. Additionally, structures and property related to Residential Uses shall be removed upon the termination of a permit for the use or structure, as provided under Section G of this policy. The costs associated with removal and disposal of structures or other property under this policy shall be borne by the residential user regardless of whether he/she is a former permit holder and regardless of the reason for any denial or termination of a permit. ARRC may pursue legal remedies and relief for non-compliance with this policy, including but not limited to defaults under permits issued under the policy or continued use or occupancy of the ARRC ROW without obtaining a permit or after a permit has terminated.

#### **I. Hazardous Materials**

Any release of petroleum products, wastes, or other chemicals in the areas of the ARRC ROW covered by this policy must be managed in accordance with all applicable statutes, regulations, ordinances and rules of any type. If ARRC incurs costs for such activities, including but not limited to cleanups or other forms of mitigation, the current

user of the ARRC ROW will be invoiced for and responsible to pay those costs. The requirements of this Section I shall be included in permits under this policy, but apply to all current users of the ARRC ROW, whether or not such users have applied for or obtained a permit under this policy.

## **Addendum A**

### **INITIAL FEE SCHEDULE<sup>6</sup>**

1. Permit Application Fee. The permit application fee for a Residential Use Area shall be \$250.00.
2. Permit Renewal Fee. The fee for renewing a permit for a Residential Use Area shall be \$200.00.
3. Annual Permit Fee.
  - a. The annual fee for a permit allowing a Residential Use in a Residential Use Area, as defined in Section F of this policy, shall be the amount obtained by multiplying the area in square feet of the Residential Use Area by \$0.25.
  - b. Notwithstanding the preceding calculations, the minimum annual permit fee shall be \$250.00.
4. Calculating Area of Residential Use Areas. For purposes of determining permit fees, a Residential Use Area shall include all portions of the ARRC ROW lying between the boundary of the ROW and a line parallel to the boundary of the ROW that passes through the furthest point at which the use(s) or structure(s) in question encroach into the ROW.

Example of Permit Fee Calculation: An owner of property that borders for 100 feet along the ARRC ROW uses an area encroaching 20 feet into the ROW for purposes of maintaining a lawn and garden and a storage shed. The proposed Residential Use Area is 2,000 square feet. The annual permit fee for this proposed use area would be  $2,000 \times \$0.25 = \$500.00$ .

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<sup>6</sup> As provided in Section G.7 of this policy, this schedule of application and annual permit fees is subject to revision by the ARRC Real Estate Department at its discretion in order to provide a fair return to ARRC for the use of its property, to meet administrative costs or for any other prudent business purpose.