



TITLE: License Agreements for Encroachments for Private Use of Public Property	POLICY NUMBER:
EFFECTIVE DATE:	PAGES:
ENABLING ACTIONS:	REVISED DATES:
APPROVED:	

PURPOSE

This policy establishes procedures for permitting, licensing, inspecting, and enforcement of private encroachments in the Town's public right-of-way (ROW) and on Town Owned Properties. The intent of this policy is: to protect public safety, mobility, and infrastructure; to ensure fair and consistent treatment of property owners; to recover costs associated with private use of public property; and to preserve the Town's flexibility to implement public improvements.

Private use of any public property shall at all times remain subordinate to the public's interest. Any authorization granted under this policy is conditional, revocable at will, and shall not create a vested property right in the public ROW or Town Owned Properties.

This policy is further intended to provide a consistent and transparent framework for addressing previously installed, unauthorized Private Improvements in the public right of way and on Town Owned Properties, while preserving the Town's full authority to regulate, revoke, or require removal of such improvements in the public interest.

SCOPE

This policy applies to all Private Improvements in the ROW or on Town Owned Property, except driveways and walkways constructed with Standard Materials and mailboxes placed in accordance with USPS standards. Encroachments installed by utilities or agencies acting under separate statutory authorities are exempt and subject to the direction of the Parks and Public Works Department, as applicable by law.

Encroachments typically requiring a license agreement include retaining walls, fences, gates, and driveways using non-standard materials. Encroachments extending into the airspace above

or the subsurface below the ROW, including, but not limited to balconies, basements, structural tie-backs, utility vaults, and overhangs, are subject to this policy.

No encroachment may prevent or delay Town capital projects. Encroachments interfering with planned or future improvements shall be removed at the owner's sole expense in a timely manner and without compensation.

POLICY

The Town's authority is derived from Chapter 23 of the Los Gatos Town Code, which prohibits unauthorized obstructions (§23.30.005), provides inspection rights (§23.30.035), requires settlement correction (§23.30.045), and allows removal without compensation from the Town (§23.30.055). Additional authority comes from Chapter 12, which regulates grading, drainage, excavation, and public improvements; and Chapter 29, which establishes zoning and fence standards. Relevant provisions of the California Streets & Highways Code (§1921) and the Santa Clara County Assessor's guidance on possessory interest tax also apply.

Definitions

For purposes of this policy:

- **Encroachment** is any Private Improvement located within the public right-of-way or on Town Owned Property.
- **Encroachment Permit** is a limited authorization issued by the Town for the construction of a Private Improvement that is revocable by the Town at its sole discretion.
- **Immediate Hazard** refers to any encroachment presenting an imminent threat to public safety, traffic circulation, or Town infrastructure.
- **License Agreement** is a recorded legal agreement that authorizes and stipulates the terms to maintain a Private Improvement in the public ROW or on Town Owned Property. The agreement is binding on successors and generally includes revocation language with due notice from the Town.
- **Legacy Encroachment** is any unpermitted Private Improvement located in the public ROW or on Town Owned Property that existed prior to the effective date of this policy. The designation of an encroachment as a Legacy Encroachment is solely for administrative consistency and does not create any vested, prescriptive, or equitable right.
- **Possessory Interest Tax** is a property tax levied by Santa Clara County for private benefit derived from the use of public property.
- **Private Improvement** is any structure, object, or other private asset within the ROW or on Town Owned Property that is owned or maintained by a private party.
- **Right-of-Way ("ROW")** is land dedicated to the Town in fee or as an easement for public use, including but not limited to streets, sidewalks, gutters, park strips, utility easements, and stormwater facilities. The ROW extends vertically from the center of the earth to space.
- **Standard Materials** are Portland cement concrete and asphalt concrete.

- **Substantial Portion of the Right-of-Way** means more than twenty-five percent (25%) of a property's street frontage or more than two hundred (200) square feet, whichever is less.
- **Town Owned Property** means any parcel owned by the Town, excluding public rights of way, which are defined separately.

PROCEDURES

I. Approval Authority

License Agreements for long-term encroachments involve discretionary consideration by the Town before granting approval. Nothing obligates the Town to approve a discretionary License Agreement, unless specifically authorized by Federal, State, or local laws or regulations. All License Agreements require Town Manager, or designee approval.

1. Town Manager or Designee Approval

The Town Manager, or designee, may approve License Agreements for encroachments that include, but are not limited to, those that are:

- Residential in nature and serve or benefit a single family, multi family, or duplex property;
- Minor in scale, such as fences, landscaping, driveways, irrigation, or retaining walls that do not require a building permit to construct;
- Not blocking or materially interfering with sidewalks, pedestrian routes, ROW sight line triangles, utilities, or stormwater facilities; and
- Not creating a health or safety hazard.

2. Town Council Approval

Town Council approval is required for all other License Agreements, including any encroachment that:

- Is commercial in nature or primarily serves or benefits a commercial property or use;
- Occupies or privatizes a Substantial Portion of the ROW;
- Involves permanent structures (e.g., buildings, retaining walls that require a building permit to construct, decks); or
- Has broader community impact, establishes a precedent for future requests, or is contentious, sensitive, or otherwise likely to generate significant public concern.

When a proposed private improvement is tied to a land use entitlement (such as a subdivision, variance, or design review application), the approval authority shall occur concurrently with review and approval required per the requirements of Chapter 29 of the Town Code.

II. Review Criteria and Prohibitions

No License Agreement, whether issued prospectively or retroactively, shall authorize, legalize, or allow any Private Improvement that is in violation of the Town Code, applicable state or

federal law, or adopted Town standards. A License Agreement shall not waive, supersede, suspend, or modify any requirement of the Town Code.

Any Private Improvement that requires a variance, exception, modification, or discretionary relief from any provision of the Town Code shall be ineligible for approval of a License Agreement. License Agreements shall not be used as a mechanism to cure, bypass, or mitigate noncompliance with the Town Code.

Applications for License Agreements will be evaluated, at the Town's sole discretion, on factors including, but not limited to safety, including traffic visibility and Americans with Disabilities Act ("ADA") compliance; impacts to drainage, stormwater, and utilities; compliance with zoning standards; consistency with neighborhood character; loss of public property for public benefit; and any foreseen or potential burden imposed on future Town projects or maintenance. All encroachments shall comply with applicable ADA requirements, Caltrans standards (where applicable), and Town standards. Consideration of these factors does not create an obligation for the Town to approve an encroachment.

The Town shall not approve encroachments that obstruct sidewalks, ADA routes, or ROW sight triangles; interfere with drainage or utilities; exist within intersections, fire hydrant, and utility cabinet clearance requirements, or emergency vehicle access areas; create safety hazards or public nuisances; or conflict with existing or foreseeable Town improvements.

The Town shall not approve encroachments that privatize public parking spaces, Town Owned Properties, or other ROW areas intended for public access, except where a clear and demonstrable public benefit exists.

III. Conditions of Approval

All License Agreements shall at a minimum include conditions requiring: 1) indemnification and hold harmless agreements consistent with Town Code §23.30.055; 2) an endorsement to liability insurance stating that the insurance is primary with regard to the Town and listing the Town as an additional insured with minimum limits, carriers, and renewal evidence as determined by the Town Manager, or designee, in consultation with the Town Attorney; 3) evidence of required insurance coverage provided to the Town annually; 4) ongoing maintenance of the encroachment in good working order; 5) notification of potential possessory interest tax levy by the County of Santa Clara; and 6) correction obligations for the life of the encroachment.

Encroachments permitted by a License Agreement remain revocable at the Town's discretion, and owners must remove them within thirty (30) days of notice from the Town, or sooner if health and safety hazards exist, and shall restore the ROW or Town Owned Properties to Town standards at their sole expense. For Legacy Encroachments, the Town Engineer may establish a reasonable compliance schedule for removal based on the nature and complexity of the improvement, provided that any extension of time shall not constitute authorization to remain within the public ROW or Town Owned Property.

Licensees are responsible for payment of any possessory interest tax levied by Santa Clara County. All proposed work must comply with Chapter 29, and all grading, excavation, and retaining wall work must comply with Chapter 12 of the Town Code. Compliance with the Town Code is a continuing obligation, and discovery of any noncompliance shall constitute grounds for revocation of a License Agreement and removal of the encroachment.

The licensee must provide performance security, including but not limited to a bond, letter of credit, or cash deposit for all License Agreements to ensure funding for any necessary ROW or Town Owned Property restoration efforts required due to a revocation of the License Agreement.

The Town's failure to discover, object to, or act upon an encroachment at an earlier date shall not constitute waiver, estoppel, or limit the Town's authority to enforce removal or impose conditions at any time.

No Legacy Encroachment shall give rise to claims of equitable estoppel, laches, or reliance against the Town based on the passage of time, prior inspections, or approvals unrelated to the encroachment.

All License Agreements shall require renewal at least once every ten (10) years, unless specified otherwise in the License Agreement. Failure to renew shall constitute automatic termination of the license, and the encroachment shall be removed at the owner's expense within time frames permitted in the License Agreement, typically thirty days. Renewal of a License Agreement for a Legacy Encroachment does not ratify the original unauthorized construction and does not limit the Town's authority to require future removal.

Payment of regulatory cost recovery fees, license consideration, and provision of performance security are independent requirements. Satisfaction of one requirement shall not excuse compliance with the others.

IV. Unpermitted Encroachments

The Town strongly encourages property owners to apply in advance for a License Agreement. When an encroachment has been constructed without prior approval, the Town may take one of two approaches:

- 1. Code Enforcement and Removal.** The Town may require the owner to remove the unlicensed improvements at their expense and may pursue code enforcement actions, including but not limited to citations, fines, and penalties.

The Town's failure to identify or act on unlicensed improvements at an earlier time does not waive its authority to require removal or imposing other conditions at any time. Any unlicensed improvements in the public ROW or Town Owned Property resulting in, but not limited to, a

hazard, health, safety, compliance, or other exposure which may impair the function or use of the ROW or Town Owned Property will require removal unless, to the satisfaction of the Town Engineer, such exposures are immediately mitigated.

2. **Retroactive License Application.** The granting of a retroactive License Agreement is considered an exceptional condition and not intended to encourage unauthorized improvements in the ROW or Town Owned Property. Approval of a retroactive license is entirely discretionary, and the Town Manager or designee is under no obligation to consider or grant such. Approval of a retroactive License Agreement authorizes the continued presence of an existing encroachment on a prospective basis only. Such approval does not ratify or legalize the original unauthorized construction, does not constitute a waiver of the underlying violation, and does not limit or waive the Town's authority to revoke the license or require removal of the encroachment in the future.

Town staff may consider a retroactive License Agreement if the unlicensed improvements meet the standards specified in section IV Approval Authority, above, and meets the legacy enforcement threshold review, below. All approved retroactive License Agreements shall be recorded with the County and be on file with the Town Clerk.

V. Legacy Encroachment Threshold Review

In considering any Legacy Encroachment request for retroactive licensing, Town staff shall conduct a threshold review prior to determining whether removal will be required or whether the owner may apply for a discretionary retroactive License Agreement. The threshold review shall be applied uniformly and shall include, at a minimum, evaluation of the following:

1. Whether the encroachment presents a current or potential health or safety hazard;
2. Whether the encroachment impairs ADA access, pedestrian mobility, drainage, utilities, or emergency access;
3. Whether the encroachment conflicts with existing or reasonably foreseeable Town capital projects, public improvements, or maintenance activities;
4. Whether the encroachment occupies or privatizes public property intended for public access or parking;
5. Whether the encroachment complies with all applicable provisions of the Town Code without the need for a variance, exception, modification, or appeal of any code requirement; and
6. Whether the encroachment exceeds minor or incidental use of the public ROW.

Failure to satisfy any individual threshold criterion shall require removal of the encroachment and shall render the encroachment ineligible for a retroactive License Agreement. Any Legacy Encroachment that requires, seeks, or is the subject of a variance, exception, modification, or appeal from a Town Code requirement shall be ineligible for retroactive licensing and shall be subject to removal.

Town staff may solicit and consider written public comments received during the threshold review process; however, no level of neighbor consent or opposition shall be determinative, and failure to obtain neighbor support shall not create entitlement or bar removal.

Town staff shall prioritize enforcement in the following order: (1) Private Improvements in the ROW or Town Owned Property posing immediate hazards; (2) Private Improvements in the ROW or Town Owned Property impairing compliance or function of the ROW or Town Owned Property; and (3) Private Improvements in the ROW or Town Owned Property creating aesthetic issues such as blight or nuisances such as light pollution.

VI. Notification and Enforcement Procedures

For newly discovered unpermitted Private Improvement in the public ROW or Town Owned Property, the Town will issue an initial notice requiring the owner to apply for a License Agreement or to remove the Private Improvement. If unresolved after thirty (30) days, the Town will issue a second notice that constitutes a formal violation, and the owner will not be eligible for a discretionary License Agreement. If the owner fails to address the Private Improvement in the public ROW or Town Owned Property after fifteen (15) additional days, Town staff will proceed as allowed by law. These timeframes shall constitute mandatory deadlines unless extended in writing by the Town Engineer for good cause shown.

Private Improvements in the public ROW or on Town Owned Property that pose an immediate hazard may be summarily removed by the Town pursuant to §23.30.005 and §23.30.055, with post-removal notice provided and costs billed to the property owner or responsible party by the Town.

Town staff or its contractor(s) may enter upon the encroached area of ROW or Town Owned Property to conduct inspections, abatement, or removal as authorized by this policy or the Town Code.

At no time does an unpermitted Private Improvement create a vested right in the public ROW or Town Owned Property. For Legacy Encroachments, eligibility for retroactive licensing shall be governed by the Legacy Encroachment Threshold Review, notwithstanding the general notice timelines described above.

VII. Fees and Regulatory Cost Recovery

The Town shall recover the reasonable costs incurred in administering, reviewing, inspecting, enforcing, renewing, and recording License Agreements and related encroachment authorizations through regulatory cost recovery fees adopted by resolution of the Town Council.

Regulatory cost recovery fees are imposed pursuant to the Town's police power and Government Code sections 66014 and 66016 and are limited to recovery of the Town's actual and reasonable costs for services provided. Such fees are not imposed for the use, occupancy,

or privatization of public property and shall not exceed the cost of providing the applicable regulatory service.

Recoverable regulatory costs may include, but are not limited to:

- Application intake and processing
- Engineering, public works, and planning review
- Field inspections and compliance verification
- Legal review and document preparation
- Coordination of recordation and file maintenance
- Periodic compliance monitoring and renewal processing
- Enforcement staff time short of physical abatement or removal

Regulatory cost recovery fees shall be established, amended, and periodically reviewed based on a documented cost nexus study and adopted by resolution of the Town Council.

VIII. License Consideration for Use of Public Property

Separate and apart from regulatory cost recovery fees, the Town may require payment of consideration as a condition of approval of a License Agreement to compensate the Town for the private use or occupancy of public right of way or Town Owned Property.

License consideration is imposed under the Town's proprietary authority and constitutes contractual consideration for the grant of a revocable license to occupy public property. License consideration is not a regulatory fee, is not imposed pursuant to the Town's police power, and is not subject to the limitations applicable to regulatory cost recovery fees.

License consideration, if required, shall be established in the License Agreement and may include one time or recurring payments based on factors such as the extent, duration, location, and nature of the encroachment, the degree of exclusivity or privatization of public property, and the private benefit conferred.

The imposition or amount of license consideration shall be determined by the applicable approval authority consistent with this policy and shall be independent of any regulatory cost recovery fees or performance security requirements.

IX. Appeals

Code citations and enforcement actions may be appealed in accordance with procedures established in the Town Code. Decisions on discretionary License Agreements are final and not subject to administrative appeal, except where appeal is expressly provided by law.

Denial of a discretionary License Agreement request shall not be appealable, and approval or denial remains within the sole and absolute discretion of the Town.

Decisions to revoke an existing License Agreement shall not be appealable. Denials of initial or retroactive license requests remain non-appealable unless expressly authorized by law.

X. Implementation

The Town's Parks and Public Works Department reviews grading, excavation, and drainage matters for the proposed Private Improvements in the public ROW or Town Owned Property,

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administers the permit, License Agreement, and inspections; the Town Attorney's Office reviews License Agreements; and the Community Development Department ensures compliance with the Town Code zoning ordinances and provides enforcement.

XI. Effective Date and Amendments

This policy is effective upon adoption and may be amended by the Town Council or Town Manager as necessary to remain consistent with Town Code and California law.

APPROVED AS TO FORM:

Gabrielle Whelan, Town Attorney