

WORKSHOP
APALACHICOLA CITY COMMISSION
MONDAY, MARCH 6, 2023, 5:00PM
BATTERY PARK COMMUNITY CENTER
1 BAY AVE., APALACHICOLA, FLORIDA 32320

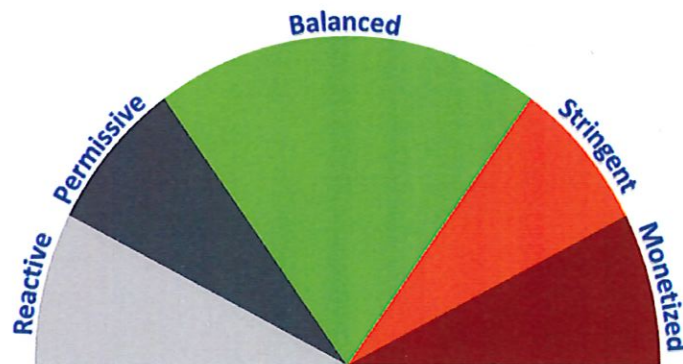
Agenda

You are welcome to comment on any matter under consideration by the Apalachicola City Commission when recognized to do so by the Mayor. Once recognized please rise to the podium, state your name for the record and adhere to the three minute time limit for public comment. Comments may also be sent by email to the City Manager or to Commissioners.

- I. Call to Order**
- II. Agenda Adoption**
- III. Encroachment Discussion**
- IV. Public Comment**
- V. Adjournment**

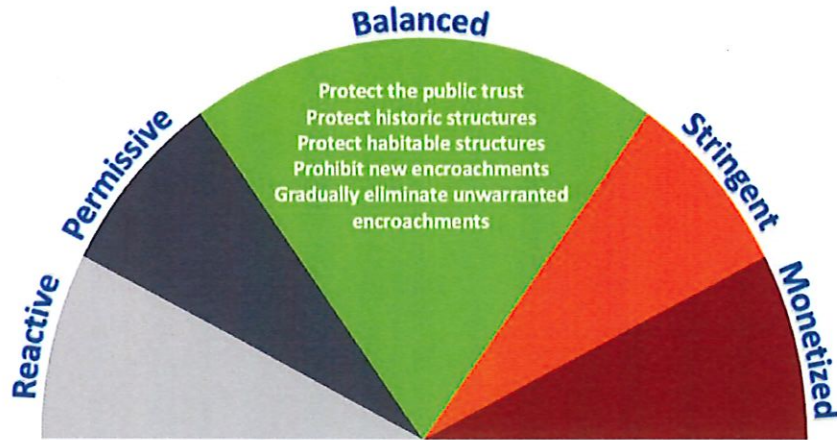
Any person who desires to appeal any decision at this meeting will need a record of the proceeding and for this purpose, may need to ensure that a verbatim record of the proceeding is made which includes testimony and evidence upon which the appeal is based. Persons with disabilities needing assistance to participate in any of these proceedings should contact the City Clerk's Office 48 hours in advance of the meeting.

HAPPI Encroachment Ordinance Recommendations Summary



Submitted by Historic Apalachicola Partnerships for Preservation, Inc.

A Balanced Approach to Managing Right-of-Way Encroachments



Historic Apalachicola Partnerships for Preservation, Incorporated. (HAPPI) is pleased to present to the City of Apalachicola and its citizens these recommended additions and improvements to the city's existing encroachment ordinance.

In working to revise Apalachicola's encroachment ordinance and, in the process, establish new policies regarding the protection of the city's public right-of-way, the Commission has an important decision to make. It must decide where it wishes to position the city on the wide spectrum of possible encroachment enforcement solutions. The choice is bounded on one side by the city's duty to hold its public lands for the benefit of all its citizens. That duty was nicely summarized by one noted commentator as follows:

The public trust resources of America are owned by the public ... and no one has the right to use them in a way that will diminish their use and enjoyment by others. The [government], as trustee, has no authority to enact policies that favor one public user over another.

Were the Commission to decide, as some cities have, to "grandfather" all existing encroachments on the city's right-of-way, and thereby sanction the exclusion of the public from those encroached spaces in perpetuity, it would come face to face with that duty.

The choice is bounded on the other side by political realities and principles of fairness. As we detail in the accompanying memorandum, at least one well-known city has gone much too far, causing its citizens to protest, and forcing a reconsideration of the policies that caused the protests.

To aid the city in making its decision, we conducted a survey of hundreds of encroachment ordinances across the United States. We examined those with an eye to the city's historic character, the demographics of our citizenry, and the resources available to our city government.

We encountered a very wide range of approaches, from municipalities that simply waited for problems to arise and then reacted to them, to cities that tried to turn encroachments into a business, encouraging new encroachments and then charging thousands of dollars a year for that privilege (seriously).

In the end, we came to believe that a balanced use of the practices we encountered, trying to be neither aggressive nor passive, would serve the city best. The recommendations that follow represent our effort to find that narrow middle path--one that stays within the boundaries, but results in a gradual, but effective reduction of encroachments.

Along the way, we encountered some difficult considerations. For example, the city has many recognized historic structures, some number of which encroach on the public right-of-way. After examining the practices and ordinances of historic cities across the nation, we came to believe that the public good was best served by granting those structures the right to remain in place. Fortunately, the doctrines that govern the duty to preserve public property for the use of all also require that the overall public good be balanced against that duty. And preserving historic structures in a city that depends on them does serve a higher public good.

Another such balancing was required in connection with encroaching non-historic structures that are used for human habitation. In a city striving to greatly expand the availability of affordable housing, we thought requiring those homes to remedy their sometimes decades-old encroachments risked serious reductions in affordable housing stocks and significant increases in the cost of housing. When balanced against the need to provide affordable housing, we thought the duty to prevent encroachments had to yield.

With respect to the remaining encroachments, we recommend no change to the city's existing encroachment ordinance that regulates commercial streetside and sidewalk encroachments in the downtown business district.

We do recommend, however, that new provisions be added to the existing encroachment ordinance: (1) to effectuate encroachment policies regarding historic structures and non-historic structures meant for human habitation, and (2) to implement a policy of gradual elimination of the remaining encroachments. The result, we hope, will be a comprehensive ordinance that provides clear guidance to both members of the public and city officials responsible for its implementation, resulting in consistent, predictable, and fair results for both landowners and the public. We believe the proposed approach, with its careful balancing of the duty to protect public property against the greater public good, should easily withstand judicial scrutiny and should reduce the city's exposure to costly litigation. We believe the approach we recommend will intentionally guide landowners with existing encroaching structures that cannot be justified as historic or otherwise protectable to remove those encroachments by a date certain established by the Commission.

We present our recommendation in two parts. This first part is intended to be a ready resource to use in workshops and commission discussions. The second part is a longer memorandum that provides a high-level look at the policies and legal principles governing encroachments, an exploration of how some cities met the challenges inherent in encroachment enforcement, and an accounting of the decision-making process that led to our recommendations.

Recommended Encroachment Ordinance Goals

Based on what we have learned from studying what works and what doesn't in other communities, HAPPI recommends that the city adopt the following goals for its encroachment policy. We believe they are reasonable and achievable.

A. Protect the public's ownership of and access to publicly owned right-of-way.

That governments hold public land and right-of-way in trust for the benefit of all their citizens is a principle that dates to the earliest expressions of law, and it serves as a foundation for the law governing encroachments in Florida. Private use of public lands is allowable only in the rarest of circumstances, and then only when the greater public good demands it.

The best encroachment ordinances identified in our survey expressly acknowledge their duty of public trust and we believe such an acknowledgment can serve as a foundational goal for the city. To be successful, that goal and any policies that stem from it must apply with equal force to all citizens, at every stratum of society. Effective policy centers on trust. We believe that equitable enforcement is what builds that trust.

B. Provide the citizens of Apalachicola with a straightforward, easy-to-understand guide on the city's policies regarding encroachments on public right-of-way.

To achieve maximum levels of understanding and compliance with the city's encroachment policies, we believe that those policies and the ordinances that express them should be made accessible with the use of plain English guides--whether online or otherwise. We have encountered many examples of how other municipalities have done so with their own citizens. Apalachicola should easily be able to match or improve upon those efforts.

C. Prohibit all future encroachments on public right-of-way unless expressly provided for by ordinance.

The duty to hold public lands in trust for the benefit of all demands a bright line with respect to future encroachments. The city should prohibit all new encroachments except those that are expressly authorized under the city's encroachment ordinance as well as those few that fall into a hardship exception.

D. Provide protection and a stable chain of title for recognized historic structures that now encroach on public right-of-way.

The city's historic structures define Apalachicola and are part of its economic lifeblood. We believe that the protection of those structures achieves a public good that more than counterbalances the city's duty to safeguard public trust lands. As have many other historic cities, we think Apalachicola should allow encroaching historic structures to stand where they have long stood, and that the city should protect those with recordable encroachment agreements that follow the land and assure that protection persists through successive owners.

With respect to those historic structures that require maintenance or are damaged or destroyed over the years, we think the city should adopt an approach similar to its treatment of "nonconforming historic structures" in the Land Development Code (LDC).

E. Provide protection and a stable chain of title for existing non-historic buildings that now encroach on the public right-of-way, provided they are used for human habitation, and do so in the same manner as with historic structures.

Apalachicola's LDC calls for "limited" protection of non-historic structures, and we believe that philosophy has a place in the city's encroachment policies as well. If an encroaching non-historic dwelling is an existing part of the city's housing stock, then we think there is good cause to allow it to remain in place. Affordable housing is already a challenge in Apalachicola, and requiring expensive structural changes, or the moving or removal of habitable structures threatens both availability and affordability. Here again, we think that the public good outweighs the city's duty to safeguard public trust lands.

With respect to those non-historic structures that require maintenance or are damaged or destroyed over the years, we think the city should also adopt an approach like its treatment of "non-conforming non-historic structures" in the LDC.

F. Provide a mechanism to accommodate any parcel that, through some characteristic inherent and unique to the parcel itself, cannot be used without being permitted to encroach.

We recognize that some parcels may have inherent characteristics that prevent their use without encroachment, so we recommend that the city adopt a mechanism modeled after the

hardship exception found in the LDC, using similarly strict criteria, augmented with the balancing of public good required by the public trust doctrine.

G. Provide a separate mechanism to provide relief for those landowners who lack the financial means to remove encroaching structures.

We also recognize that some landowners may not have the financial means to remove structures within the required timeframe. How to aid or otherwise assist with those issues is beyond the scope of our undertaking, but we think that the problem will have to be addressed and that some creativity will be required to do so. While there are many possible solutions, the difficult aspect is defining and documenting financial hardship in a way that is not overly intrusive for a deserving applicant and yet does not become the exception that swallows the rule.

H. Prohibit the expansion of the footprint of any existing encroachment on a public right-of-way, whether historic or non-historic.

We believe the city needs to draw another bright line when it comes to expanding the footprint of existing encroachments. The city's encroachment ordinance and encroachment agreements should forbid such expansion and landowners who do violate that ban should be required to remove such violations at their own expense.

I. Create a timeline and path for the removal of non-historic encroachments on the public right-of-way for structures that are not used for human occupation.

We believe it is in the city's interests to create a direct path for the removal of encroaching structures of all types that are neither historic nor used for human habitation. We chose an intermediate timeline that requires their removal by the earlier of five years or the sale of the property.

J. Assure that permitted encroachments on public right-of-way are subject to encroachment agreements that state all necessary conditions of the agreement (provisions for removal, consequences for violation, etc.), and that are recorded and run with the land so as to apprise and bind any future purchasers to the agreement.

In our opinion, the most important feature of any encroachment agreement is that, rather than being a personal obligation of the landowner, it attaches to the land and becomes a part of the chain of title for an encroaching parcel. Its conditions, requirements, and remedies thereby bind a

succession of landowners, not just the original one. Encroachment agreements thus can be drawn to exert forces to assure continuing compliance and those can reduce the overall incidence of encroachments.

- K. Provide a mechanism for landowners to install public amenities such as landscaping and permeable parking areas on abutting right-of-way without the need for an encroachment agreement or permit.**

Making provision for permitless public amenity encroachments imports past city informal practices into the encroachment ordinance and reduces burdens on both city staff and landowners. It also provides an incentive for landowners to beautify adjacent right-of-way, thereby serving the public good without requiring the city to allocate budgeted funds towards right-of-way beautification.

- L. Assure that permitted or permitless encroachments on the public right-of-way do not increase the city's potential liability for injury, death, or property damage arising from such encroaching structures.**

Insurance and indemnification requirements should be a part of every encroachment agreement. With respect to permitless public amenity encroachments, the city should impose insurance requirements if it can do so under Florida law, but in any case, it should manage the risks most likely to cause problems by imposing requirements on landowners that help control liability exposure (such as landscaping height and sight triangle specifications).

Encroachment Ordinance Recommendations

A. Create a simple framework to achieve goals.

1. At the time of ordinance enactment, grant a revocable, non-transferable permit for all fixed encroachments existing at the time of enactment.
 - Provide for the automatic revocation of the permit at the earlier of the sale of the property or the expiration of a grace period.
 - We recommend setting the grace period at five years.
 - Prohibit expansion of the footprints of existing encroachments, both historic and non-historic.
 - Require an affidavit of non-encroachment or an encroachment agreement for all building permits.¹
 - Steer landowners with encroaching historic or qualified non-historic structures into path 2 or 3 to obtain an encroachment agreement.

While granting an encroachment permit across the board may seem like grandfathering and thereby a permissive strategy, it's the potential revocation of the permit that gives this strategy power. Potential purchasers face the revocation of the initial encroachment permit upon their taking ownership of the property, and that is a burden on the property that should provide an incentive for the landowner to address the encroachment, either by getting a permanent encroachment agreement as a qualified structure or removing the encroachment before sale of the property. The grace period puts all those with encroaching structures on notice that they have a maximum of five years to get a permanent encroachment agreement as qualified structure, remove the encroachment, or face the prospect of the city removing it at the expense of the landowner.

Requiring an affidavit of non-encroachment in order to obtain a building permit provides another incentive to remedy the encroachment, either by removal at the time or by entering into

¹ Affidavits affirming a lack of encroachments are a common feature of real estate closings, but some municipalities have adapted them to use with encroachment agreements and easements. See, e.g. [Johns Creek, Georgia](#) certification of non-encroachment in connection with the grant of easements.

an encroachment agreement appropriate to the nature of the structure. It is not the sledgehammer that some cities have employed (with astronomical fees), but it still has power.

2. Provide a path to convert the non-transferable permit to an encroachment agreement that runs with the land for qualifying historic structures.

The city's historic structures define Apalachicola and are part of its economic lifeblood. We believe that the protection of those structures achieves a public good that more than counterbalances the city's duty to safeguard public trust lands. As have many other historic cities, we think Apalachicola should allow encroaching historic structures to stand where they have long stood, and that the city should sanction those with recordable encroachment agreements that follow the land and assure that protection persists through successive owners.

With respect to those historic structures that require maintenance or are damaged or destroyed over the years, we think the city should adopt an approach similar to its treatment of "nonconforming historic structures" in the Land Development Code (LDC).

3. In recognition of the hardship attached to moving or removing a habitable structure, provide a path to convert the non-transferable permit to an encroachment agreement that runs with the land for existing non-historic structures that are used for human habitation.

Apalachicola's LDC calls for "limited" protection of non-historic structures, and we believe that philosophy has a place in the city's encroachment policies as well. If an encroaching non-historic dwelling is an existing part of the city's housing stock, then we think there is good cause to allow it to remain in place. Affordable housing is already a challenge in Apalachicola, and requiring expensive structural changes, or the moving or removal of habitable structures threatens both availability and affordability. Here again, we think that the public good outweighs the city's duty to safeguard public trust lands.

With respect to those non-historic structures that require maintenance or are damaged or destroyed over the years, we think the city should also adopt an approach like its treatment of "non-conforming non-historic structures" in the LDC .

4. Limit construction activities on structures not otherwise qualified under 2 or 3 above to such repairs and maintenance as are necessary to keep the structure in safe, usable condition until it is removed.

While removal is pending, protecting the health and safety of the public requires that those encroaching structures be kept in good repair. That repair obligation, however, should not be used to, for example, transform an encroaching shed into a granny cabin.

5. With respect to structures not otherwise qualified under 2 or 3 above, the encroachment permits of which have expired, provide for their removal at the expense of the landowner.

We have recommended that the city use a grace period to buffer the requirements of the encroachment ordinance. For the grace period to be effective, however, it needs to have a hard stop. For those cases of revocable permits where no action has been taken before a sale or by the end of the grace period, enforcement should commence as soon as practicable.

6. Prohibit unauthorized encroachments in the future.

- Going forward from the date of enactment, prohibit encroachment agreements with landowners who build encroaching structures without an encroachment agreement.
- Going forward from the date of enactment, require landowners to remove encroaching structures built without an encroachment agreement.

We believe the city should send a clear message that the "ask for forgiveness rather than permission" philosophy cannot apply to encroachments on public lands. This is, we think, another area where a bright line should be drawn.

7. Use strong encroachment agreements to do the bulk of the work.

- Potential purchasers may not be aware of ordinance requirements regarding encroachments.
- An encroachment agreement that runs with the land will come up as part of a title search.

An encroachment agreement that is properly structured to be a recordable obligation that attaches to the land not only can inform the decisions of the landowner regarding city right-of-way, but it also becomes a message to any subsequent purchaser. It is an opportunity to shape behavior, perhaps for decades to come. A strong encroachment agreement can also help the city in enforcing both the terms of the agreement and any city ordinances relating to it.²

² See [this](#) example of a strong encroachment agreement executed by the city of Orlando in connection with permission to occupy portions of an easement. The city established the right both to attach a lien to the single-family residence that encroached 2 1/2 feet into the easement, but also to remove the residence at the owner's expense should the terms of the agreement be violated. (the link is a downloadable PDF attachment from a commission meeting agenda).

B. Create a class of “public amenity” encroachments that require no permit or encroachment agreement.

1. Codify existing practices regarding landscaping, permeable parking pads, etc.
2. Include measures to manage the city's exposure to liability from landowner additions, acts, or activities on the encroached right-of-way, such as references to standards for sight triangles, landscape plant heights, and insurance coverage (if possible).

Apalachicola’s informal practice of allowing landowners to landscape, add permeable parking and driveways, and otherwise beautify city right-of-way adjacent to their property is itself a best practice adopted by many communities. All it needs is authorization in the encroachment ordinance and some clarification as to details. Since sightline obstructions are a common cause of traffic accidents, we believe the city should emulate other municipalities in specifying or pointing to measures to preserve public safety for traffic and pedestrians using the right-of-way. We think it unlikely that the city can require certain types of liability insurance covering such encroachments but believe that possibility should be investigated.

C. Combine the provisions in Part 2 Article III of Chapter 36 of the Apalachicola Code of Ordinances (§§ 36-48 through 36-60) with new provisions relating to "fixed" or “permanent” encroachments to create a comprehensive ordinance governing right-of-way encroachments of all types.

1. Clarify that all the provisions under the combined ordinance are intended to protect and promote the public trust with respect to city-owned right-of-way.
2. Separate the policy guide called for in Goal B from the ordinance and make it accessible to everyone: building permit applicants, citizens inquiring about landscaping, prospective real estate purchasers, etc.

The addition of provisions relating to fixed encroachments to Apalachicola's existing provisions regarding temporary encroachments is an opportunity for the city to create a comprehensive ordinance modeled on the best practices from across the United States. We believe those practices should include specific references to the public trust, and the creation of a policy guide that sits beside the ordinance and is intended to aid lay citizens.

See also this recordable [Fence Covenant and Restriction](#) from St. Cloud, Florida. It operates as an easement encroachment agreement that includes specifications regarding fence placement, etc., and also as an attestation of non-encroachment on the public right-of-way.

Fortunately, there are good models for creating such a combination. Attachment A to the accompanying memorandum contains a list of some of the ordinances consulted in the preparation of these recommendations. We have highlighted a few of those ordinances that can provide useful language or otherwise serve as examples in constructing a comprehensive ordinance.

Encroachment Policies and Best Practices

To: Brenda Ash, Donna Duncan, Adriane Elliot, Despina George, Anita Grove

From: Historic Apalachicola Partnerships for Preservation, Inc. (HAPPI)

CC: Dan Hartman, Bree Robinson, Travis Wade

Date: February 28, 2023

I. Overview

This memorandum distills findings from a survey of the encroachment ordinances of hundreds of municipalities across the United States¹. The survey sought to identify and prioritize those best practices that could be applied effectively in Apalachicola, given its historic character, small population, and limited resources².

Part II of this memorandum summarizes the doctrinal and policy underpinnings of regulating encroachments on public property³. The most thoughtful and effective encroachment ordinances are grounded on those principles (often mentioning them expressly), and thus are more likely to survive review when challenged.

Part III gathers discrete best practices selected from among the many ordinances examined during the survey. No one encroachment ordinance proved an exact match to Apalachicola's needs, requiring us to forge a new model from the pieces we gathered, in some cases modifying what we found to achieve an effect more suited to the city's needs.

¹ See Attachment A for a list of some of the municipalities consulted and links to their municipal codes.

² A city's small size is not necessarily a handicap when it comes to management of encroachments. See the sophisticated encroachment ordinances from, for example, Mancos, Colorado, [Article 6](#), and Cañon City, Colorado, [Chapter 12.12](#).

³ Throughout this memorandum we address encroachments on Apalachicola's public right-of-way, but the principles and best practices described here apply equally to other public lands, such as parklands, intertidal lands, etc.

Part IV recommends a set of encroachment-related goals for the city, ones we believe are achievable based on what we've seen other communities do.

Finally, Part V recommends specific steps Apalachicola should consider taking as it adds to or restructures its existing encroachment ordinance—with emphasis on the treatment of historic structures⁴, and ways in which it can cost-effectively monitor and enforce its encroachment ordinance as to non-historic⁵ preexisting, and prospective encroachments. Some of the steps recommended can vary as to their particulars, thus giving the Commission a way to calibrate any resulting ordinance to match its intentions.

⁴ The Apalachicola Land Development Code (LDC) uses the terms "historic building" and "historic structure." With respect to "historic building," [§107-187](#) of the LDC adopts the definition of "historic building" used in Chapter 11 of the Florida Building Code (FBC). The FBC defines a historic building as follows:

HISTORIC BUILDING. *For the purposes of this code and the referenced documents, an historic building is defined as a building or structure that is:*

1. Individually listed in the National Register of Historic Places; or
2. A contributing property in a National Register of Historic Places listed district; or
3. Designated as historic property under an official municipal, county, special district or state designation, law, ordinance or resolution either individually or as a contributing property in a district; or
4. Determined eligible by the Florida State Historic Preservation Officer for listing in the National Register of Historic Places, either individually or as a contributing property in a district.

The LDC also adopts the FBC's definition of "historic structure" in LDC [§107-284](#). The FBC definition of historic structure is as follows:

HISTORIC STRUCTURE. *A building, bridge, lighthouse, monument, pier, vessel or other construction that is designated or that is deemed eligible for such designation by a local, regional or national jurisdiction as having historical, architectural or cultural significance.*

In day to day practice the City has been using [Master Site File](#) maintained by the Florida Secretary of State as a determinant of historic status.

In this memorandum, we will standardize on the term historic structure, and intend it to apply to anything within the historic exceptions laid out in the FBC.

Note that the FBC definition of structure goes well beyond buildings. A number of municipalities extend historic status to such things as fences. See, e.g., Mount Vernon, Texas COO, [§ 5.2-35 \(11\)](#); Evansville, Indiana, Historic District Guidelines and Procedures, [§ on Fences, Gates, and Walls](#); Gainesville, Georgia, Preservation Manual and Design Guidelines, [§ 3.3.3](#);

⁵ Neither the Apalachicola Land Development Code nor the Florida Building Code defines the term non-historic as it applies to buildings and structures. As a practical matter, a non-historic building or structure is one that does not appear on the [Master Site File](#) that is used by the city in determining eligibility for the special provisions applicable to historic buildings or structures.

II. Underpinnings of encroachment laws and policies

A. Guardian of the Public Trust

Most of the jurisprudence and public policy best practices relating to private party encroachments on publicly held lands derive from one foundational principle. Governments (including municipalities) and the officials who oversee them are fiduciaries of the public trust and are duty-bound to honor that trust and act in the best interests of all the citizens they serve. Many municipal right-of-way and encroachment ordinances from around the country expressly recognize that duty,⁶ as with this acknowledgment from Boulder, Colorado's encroachment ordinance:

*Public rights-of-way and public easements are held by the city in trust for public use to ensure the health, safety, and welfare of the residents of the city.*⁷

Or this one from the Orange, California Municipal Code:

*The city's rights-of-way...are held in trust by the city for the benefit of the public.*⁸

B. Many Sources of the Duty

Hundreds of cases from courts in every state in the union have helped define the particulars of this duty. It manifests in many areas of jurisprudence touching on everything from management of intertidal zones and other public lands⁹, to the need to preserve

⁶ See, e.g., [Aspen, Colorado](#), [Boulder, Colorado \(section 8-6-6 \(a\)\)](#), [Ennis, Texas \(§ 16-6\)](#), [Gilbert, Arizona \(Ordinance 2631\)](#), [Henderson, Nevada \(Ordinance 3581\)](#), [Loveland, Colorado \(12.16.010\)](#), [Mancos, Colorado, Article 6](#), [Missoula, Montana \(Chapter 12\)](#), [Norwood, Ohio \(Ch. 919.01\)](#), [Ouray, Colorado \(§ 13-3 B. 5.\)](#), [Plano, Texas \(§ 19-59 \(b\)\(5\)\)](#), [Pasadena, Texas \(§ 32-93\(d\)\)](#), [Payette, Idaho \(Ordinance 1292\)](#), [Pflugerville, Texas \(§ 96.01 \(d\)\(5\)\)](#)

⁷ City of Boulder, Colorado Municipal Code [Chapter 6, § 8-6-6.](#); see also *Sun Oil Company v. Gerstein*, 206 So. 2d 439, 441 (Fla. Dist. Ct. App. 1968) (“the public places and rights-of-way of a municipality are held in trust by the authorities for the benefit of the public to be used for proper purposes”).

⁸ City of Orange, California Municipal Code [§ 12,64.010 A.](#)

⁹ The “Public Trust Doctrine,” as it is called, was first developed in disputes relating to publicly held navigable waterways, coastwise tidal lands, and riparian lands. Those lands are held in trust for the benefit of the public and may not be withdrawn from public use for the benefit of private owners absent some other overarching public purpose. The Florida Supreme Court has made clear that the government’s ability to make disposition of those lands with which it is entrusted is both limited and subject to the requirement that such disposition be “in the interest of the public welfare, where the rights of the whole people of the state” are protected. *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353, 355 (1908). See also *5f, LLC v. Dresing*, 142 So. 3d 936, 946 (Fla. Dist. Ct. App. 2014). Similar standards have been applied by courts and municipalities throughout the country. Harry N. Scheiber, [Public Rights and the Rule of Law in American Legal History, California Law Review Vol. 72 No.2 \(1984\) pp. 217-254](#),

public right-of-way as public forums¹⁰, to the ancient doctrines surrounding public commons.¹¹

Inherent in all this public trust jurisprudence is a presumption *against* any private uses of public lands that exclude other members of the public and serve no other public good. As one of the most frequently quoted commentators on these doctrines put it:

The public trust resources of America are owned by the public ... and no one has the right to use them in a way that will diminish their use and enjoyment by others. The [government], as trustee, has no authority to enact policies that favor one public user over another.¹² [emphasis added]

225.

The Public Trust Doctrine has also been extended to upland public right-of-way, including streets and alleys. See *Sun Oil Company v. Gerstein*, *supra*; *Douglass v. City Council of Montgomery*, 118 Ala. 599, 600 (Ala. 1898); [State ex rel. Rich v. Idaho Power Co.](#), 346 P.2d 596, 601 (Idaho 1959) (“Streets and highways belong to the public and are held by the governmental bodies . . . in trust for use by the public.”); [Sebree v. Bd. of County Comm’rs of County of Shawnee](#), 251 Kan. 776, 781 (1992) (quoting *Smith v. State Highway Commission*, 185 Kan. 445, 451 (1959) recognizing the public common-law right of access in state highways); *Burlington & M.R.R. Co. v. Reinhackle*, 18 N.W. 69, 70 (Neb. 1883) (explaining that the trust was created to give permanency to streets and dedicate them wholly to public use); *McRoble v. Mayor and Com’rs of Westernport*, 272 A.2d 655, 657 (Md. 1971) (Property Held As A Public Trust Or In A Governmental Capacity Cannot Be Disposed Of Without Express Authority) (citing 10 *McQuillin, Municipal Corporations* (3rd ed.), § § 28.37-.38); See also [Molly Sevin, Public Trust Doctrine in American Law and Economic Policy](#), 1980 *Wis. L. Rev.* 1403, 1412 (1980); [Erin Ryan, The Public Trust Doctrine, Property, and Society Handbook of Property, Law, and Society \(Graham, Davies & Godden, eds.\) p. 12 \(2022\)](#)

¹⁰ The more recent “Public Forum Doctrine,” which relates to speech on public right-of-way, uses a different theoretical foundation than does the Public Trust Doctrine but winds up articulating many of the same governing principles with respect to public right-of-way and parklands. See *Hauge v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public”); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (noting that “all public streets are held in the public trust”); *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (noting that “all public streets are held in the public trust”). See generally [Karl P. Baker & Dwight H. Merriam, Indelible Public Interests in Property: The Public Trust and the Public Forum](#), 32 *B.C. Env’tl. Aff. L. Rev.* 275 (2005) (“While these doctrines stand on distinct historical and theoretical foundations and diverge from each other in many respects, there are important parallels between them in how they conceptualize the relationship between government’s power to regulate, control, and dispose of land it owns, and the rights belonging to what one scholar has called the ‘unorganized public’ in that same property.”).

¹¹ See [Carol Rose, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property," University of Chicago Law Review: Vol. 53: Issue 3, Article 1 \(1986\).](#)

¹² [Joseph L. Sax, Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention](#), 68 *Mich. L. Rev.* 471, 477 (1971).

In light of these judicial underpinnings, best practice suggests the wisdom of embodying this prohibition of purely private uses in the encroachment ordinance itself. There are many ways of doing this. One Canadian municipality, for example, prohibits:

*Encroachments for the purpose of, or having the practical effect of, privatizing the affected area for the exclusive use or benefit of one or a limited number of individual owners in lieu of the general public....*¹³

Belmont, California requires both a finding of a public benefit before an encroachment permit will be granted, and requires this additional finding:

*That the encroachment is not solely for increasing the usable area of a private residence or business without a public benefit.*¹⁴

Including a provision like either of these in Apalachicola's encroachment ordinance would bring to the front the question of whether the action sought will be purely for the private benefit of the requesting party. If it is, then the decision is simple: the encroachment is not allowable.¹⁵

c. Florida Law: The Pool Wall Case

The principle that municipalities lack inherent authority to dispose of public trust assets is also echoed in Florida law. In *Town of Lauderdale v. Meretsky*,¹⁶ a landowner built a swimming pool with a surrounding wall that encroached well into the town right-of-way. The town had initially issued a permit for the construction, then, realizing that its right-of-way had been encroached, revoked the permit. Litigation ensued.

¹³ City of Tiburon, Ontario Resolution [No. 45-2014, § D. 1.](#) Section C.5 allows parking pads on public right-of-way where "public safety or welfare is better served" by doing so.

¹⁴ Belmont, California COO [§ 22-6\(e\)\(5\)](#).

¹⁵ Looking to a Florida municipality for an example, Valparaiso, Florida articulates its public trust obligations in this way: [Sec. 74-31. - Control and authority of city over city property.](#)

"The city is the steward of all city property and as such has control over its property and has a responsibility to manage it for the common good of the community. Further, it has an obligation to protect itself from unnecessary liability. In general, no public property can be used for private purposes, except for uses outlined in sections 74-34 and 74-35 that are allowed, subject to the provisions of this article. Private parties who maintain city property or use it in any way must have permission from the city, assume liability for such property and must realize that the city has final authority over the use of any city property."

¹⁶ *Town of Lauderdale v. Meretsky*, 773 So. 2d 1245 (Fla. Dist. Ct. App. (2000)).

The court noted as a starting point that building a fence or other obstruction in public right-of-way (which includes alleys) is a misdemeanor under [861.01 Florida Statutes](#). It then held that municipalities lack inherent authority to permit private encroachments in the public right-of-way—absent specific legislative language (state or municipal) granting that authority. Lauderdale had no such authorization, so the initial permit was “*ultra vires*,” or beyond the power of the town to grant. The permit retraction was therefore valid. The landowner lost, and the cement block fence the landowner erected had to be removed.

Meretzky is an important case in this discussion because it establishes that to agree to allow the private permanent encroachment of public right-of-way a municipality must first have in place a state statute or a home rule ordinance expressly authorizing the granting of such permission. Otherwise, it lacks the power to do so. This principle will come into play in drafting an ordinance that identifies the exceptional circumstances in which an encroachment will be allowed. *Meretzky* stands for the proposition that it needs to be specific.

Meretzky did not reach the question of whether a swimming pool wall built purely for private use was in any way beneficial to the public good and is in furtherance of Lauderdale’s duty. Almost certainly, the answer would be that it was not.

The *Meretzky* case and its emphasis on the public trust doctrine appears to be at odds with some of the encroachment agreements the city has entered into in the past. Viewed through a contemporary lens, some past encroachment agreements appear to have allowed exclusion of the public for the sole benefit of the private party who was granted an encroachment agreement. Whether any challenge of an existing encroachment agreement would be advised or successful is a thorny legal question. For the sake of clarity, we recommend that existing encroachment agreements be excluded from the gradual encroachment elimination proposal (five years or sale) recommended herein, unless the city attorney renders a legal opinion that a *Meretzky*-styled challenge of an existing encroachment agreement is warranted.

III. Gathering Best Practices

The following subsections set out a limited set of best practices that, in our view, will most help the City of Apalachicola create encroachment policies, draft an encroachment ordinance, and enforce the provisions of that ordinance. No one of the ordinances we have encountered provides an ideal solution for Apalachicola. The intention here is to identify pieces that can later be puzzled together into a whole.

A. Making encroachment policies express

Some forward-looking municipalities don't leave it to judges and commentators to articulate the rationale for limiting private use of public property. They embody policy guidance in their ordinances or in separate publications aimed at helping both those authorities who will later make judgments about encroachments and those citizens who might be tempted to encroach. For example, the City of Aspen, Colorado frames its encroachment policies this way:

An encroachment effectively provides public property for private use. Therefore, as a general policy, it is not in the city's interest to grant encroachments. New structures should be able to accomplish their various needs within the confines of their property boundaries and required setbacks.¹⁷

Other municipalities go further still. Burlington, Iowa, for example, has created [a separate policy guide](#) governing right-of-way encroachments, and it defines six policy goals right at the head of its encroachment ordinance.¹⁸ There are many different approaches to such policy guides, from a modest web page such as that from [Lafayette, California](#), to more detailed guides, such as those from [Lee's Summit, Missouri](#), [Orange, California](#), [Okotoks, California](#), [Wake Forest, North Carolina](#), and [Webster City, Iowa](#), to extremely detailed and comprehensive guide, such as that from [Portland, Oregon](#).

¹⁷ City of Aspen, Colorado [Permanent Encroachment Permit Review Procedures](#).

¹⁸ Burlington's goals are:

"1. To ensure the public continues to have aesthetically pleasing views as well as safe areas to walk and drive. 2. To protect and preserve the sidewalks, streets, and all other property owned or controlled by the City of Burlington. 3. To promote a consistent policy of reducing and minimizing encroachments on the public right of way. 4. To establish consistent and objective criteria for assessing each existing encroachment as well as future encroachments, and to accept these encroachments where exceptional circumstances apply. 5. To encourage appropriate outdoor activity in the public right of way, to ensure future private uses of public right of way are for the better of the community, and to guarantee adequate space for pedestrians and motorists for safe travel. 6. To establish a uniform application process and solution for all encroachment on the public right of way."

The point of all these publications and policy statements is to provide clear, unambiguous guidance to citizens that doesn't require a law degree to interpret. It is a best practice because it helps assure compliance with encroachment standards and minimizes the sorts of misunderstandings and disappointed expectations that lead to lawsuits.

B. Prohibition plus exceptions

Most of the municipalities we have surveyed begin their treatment of right-of-way and other public property encroachments with a strongly worded prohibition. Some end there, as does, for example, the ordinance from [Destin, Florida](#). It defines no exceptions to that prohibition (and, per *Meretzky*, is thus not authorized to allow any exceptions).

Apalachicola's existing prohibition of encroachments is clear and more than sufficient. Section [36-49](#) of the Apalachicola Land Development Code (LDC) prohibits any:

[O]bstruction or encroachment whatsoever on the streets, alleys or sidewalks, rights-of-way or public space or property except where a permit has been issued by the city for the same and all requirements of this article and other rules, regulations and laws/ordinances of the city and other jurisdiction have been and are met."

Because of Apalachicola's large contingent of encroaching historic structures, there is no question of standing on this simple prohibition. Apalachicola's historic encroachments will have to be addressed and considerations of fairness and public good will likely require that many of them be allowed to enter into encroachment agreements. The question for the city becomes how to categorize and manage historic structure exceptions, as well as exceptions for any other structures (non-historic dwellings, fences, outbuildings, etc.), so as to achieve a fair and desirable result consistent with the city's duty to the public trust.

C. Categories of exceptions

Municipalities around the country use many different categorization schemes for the encroachment exceptions they wish to allow in service of the public good. Very often, they divide encroachments into two broad categories. Some examples are:

Temporary vs. Permanent¹⁹
Temporary vs. Fixed²⁰
Movable vs. Immovable²¹
Minor vs. Major²²

There are very significant differences in how municipalities and the courts treat encroachments, depending on which side of the divide they fall on. We will address the differences in detail below.

D. Temporary encroachments

1. Apalachicola's "Left-Side" Ordinance

Apalachicola's current encroachment ordinance²³ only addresses the left-hand category. It provides a permitting mechanism for allowing certain temporary, moveable, or "personal property" obstructions on city right-of-way. It covers construction materials,²⁴ vehicles and other private property left standing on city right-of-way,²⁵ downtown business district trade fixtures on sidewalks and streets, such as tables, chairs, retail displays, etc.,²⁶ signs,²⁷ and dogs (present in outdoor retail spaces).²⁸

The permits required under this article (and required accompanying encroachment agreement) address, among other issues, the need for permittees to obtain and maintain liability insurance²⁹. Permits are for an annual term, which is renewable with payment of a fee (averaging about \$200).

¹⁹ Aspen, Colorado [Encroachment Guidelines](#).

²⁰ Mancos, Colorado Municipal Code [§ 11-6-30 \(c\)](#).

²¹ Boulder City, Nevada COO, [§ 9-15-2](#).

²² Norfolk County California [Encroachment Guide](#), Canon City, Colorado Code of Ordinances [§ 12-12-050](#).

²³ Apalachicola COO [Part 2, Article III, §§36-48 to 36-603648--36-60](#)),

²⁴ Apalachicola COO § 36-53.

²⁵ Apalachicola COO § § 35-51, 36-52.

²⁶ Apalachicola COO § § 36-50, 36-55

²⁷ Apalachicola COO § 56-60.

²⁸ Apalachicola COO § 56-59.

²⁹ Protecting against potential liability from activities related to encroachments is an almost universal concern in encroachment ordinances. Where an encroachment agreement is entered into or a conditional permit is granted, potential liability can be addressed with insurance requirements. The issue becomes more complicated in the case of "public amenities" that are allowed without an encroachment agreement or permit. We will take that issue up in a later section.

Nothing in Apalachicola’s encroachment ordinance addresses the revocability of permits or encroachment agreements. Most ordinances dealing with temporary encroachments make any permits or encroachment agreements expressly revocable, and that is a best practice in the sense that it gives a municipality another tool for assuring compliance with permit conditions.

2. Police Power and Temporary Encroachments

Like Apalachicola, many municipalities list moveable or temporary right-of-way obstructions, which are allowed under certain conditions and only after being issued a (usually revocable) permit.³⁰ The intent of these ordinances is to regulate temporary or impermanent obstructions in streets, sidewalks, alleys, and other city rights-of-way to assure access to all and to ensure the safety of citizens as they transit these city thoroughfares. These municipalities are less concerned with the permanent taking of public property than in maintaining good order in their public right-of-way. Such provisions are thus more akin to traffic regulations than to permanent encroachment ordinances.

The root of a municipality’s power to regulate uses of and activities in its right-of-way is the “police power”—the inherent power of a government to exercise reasonable control over persons and property within its jurisdiction and provide for the general security, health, safety, and welfare of its citizens.³¹ . As with the obligation to protect the public trust, many municipalities also expressly refer to their police power in such ordinances relating to right-of-way and encroachment.³²

³⁰ See, e.g., Cañon City, Colorado COO [Chapter 12](#), Mancos, Colorado, [Article 6](#), Manitou Springs, Colorado [Ordinance 3917](#), Rico, Colorado [Ordinance 2019-02](#), Victor, Colorado, [Article 3](#), (an unusual number of very small towns in Colorado have quite sophisticated encroachment ordinances, as do these municipalities, see especially those of Mancos and Victor), Ashland, Oregon [Encroachment Guidelines](#), Reno, Nevada Administrative Code [Title 6](#), San Rafael, California [Encroachment Guide](#).

³¹ See, e.g., *Lawton v. Steele*, 152 U.S. 133 (1894) (Generally on the police power); *Coca-Cola Co., Food Div., Polk Cty. v. Department of Citrus*, 406 So. 2d 1079 (Fla. 1981), appeal dismissed, 456 U.S. 1002 (1982) (state may regulate in protected areas where there is a reasonable relationship to public safety, health, morals and the general welfare); *Hav-A-Tampa Cigar Co. v. Johnson*, 5 So. 2d 433, 437 (Fla. 1942) (private property rights are subject to the sovereign police power of the state to protect the safety, health, morals and general welfare of the public). See also [Karl P. Baker & Dwight H. Merriam, "The Law and Planning of Public Open Spaces: Boston's Big Dig and Beyond: Indelible Public Interests in Property: The Public Trust and the Public Forum"](#), 32 B.C. Envtl. Aff. L. Rev. 275, 279 (2005); and [Donna Jalbert Patalano, Note, "Police Power and the Public Trust,"](#) 28 B.C. Envtl. Aff. L. Rev. 683, 703 (2001).

³² See, e.g., Cañon City, Colorado COO, [Chapter 12](#), Martinez, California COO, [Title 12](#), Mancos, Colorado Municipal Code, [Chapter 11, Article 6](#).

The net of all of this is that ordinances dealing with temporary right-of-way obstructions or encroachments do not necessarily need to meet the rigorous tests of public good imposed by doctrines that relate to permanent takings, and municipalities therefore have somewhat more flexibility in administering them.

In general, we believe that Apalachicola's existing sections on temporary and commercial encroachments are sufficient both to stand up to judicial scrutiny and sufficient to meet the current needs of the city. Any recommended changes would be only to align existing language with any suggested new provisions.

E. Fixed encroachments

Most municipalities are extremely restrictive with respect to permanent or otherwise longstanding encroachments of public property. As mentioned above, Destin, Florida forbids all encroachments, and seems not to have provided for any exceptions. But other municipalities with encroachment ordinances usually permit one or a few categories of permanent or fixed encroachments in their public right-of-way. We believe that Apalachicola, like those municipalities, should allow relatively few types of encroachments into its public right-of-way. Its duty to preserve public lands for the use of all citizens dictates that outcome. Three questions are presented in regard to that recommendation:

1. Which fixed encroachments on city right-of-way should be allowed?
2. What justifies allowing them?
3. What should the city do about the rest?

In exploring the encroachment practices of other cities, we have seen a wide variety of approaches, from purely reactive passivity to extraordinarily aggressive entrepreneurism. Over time, we have come to see the wisdom of adopting a middle path, especially with respect to the fixed encroachments discussed in this section. We have seen damaging public reactions to the more aggressive tactics--damage that can undo the public good that a city government is duty-bound to seek. And we have come to believe that the passivity exhibited by some municipalities also does not honor the duty of a municipality to protect public lands, and is largely ineffective anyway.

In the discussion that follows we will be building a set of tools that we believe can help the city navigate this middle path. We will use several sources to illustrate our analysis--other cities'

ordinances as well as Apalachicola's own decisions, as expressed in its Land Development Code. These examples may be either negative or positive...or both; the lessons offered by them may come from what cities did or from what they did not do.

In the following subsections, we will group the principles extracted under the names of the cities that we use as examples.

a) *Nantucket Massachusetts*

(1) Protecting encroaching historic structures serves the public good.

(2) We should use a recognized list in determining which structures receive historic protection.

(3) Too aggressive a policy with respect to non-historic structures can damage the public good.

Nantucket, Massachusetts, like Apalachicola, contains many historic and encroaching structures. The minutes of town meetings also suggest that Nantucket has many other types of fixed encroachments. However, it allows just one type of permanent encroachment:

Encroachments that have a historical precedent, as determined by the Board of Selectmen, with advice of pertinent town officials, may be permitted to remain. [These] encroachments will be identified on a Town-maintained list and, where appropriate, on land records.³³

Nantucket's approach is set down here both because it is an example of a relatively stringent encroachment approach, and because it provides a useful illustration of how the "for the public good" duty works in connection with private uses of the public right-of-way. Nantucket has more than 2,600 homes within its boundaries, many of which are historic structures. As with Apalachicola, Nantucket derives a significant amount of its revenue from historic tourism. Suddenly deciding to enforce plat boundaries that in some cases have been superimposed on existing homes and otherwise have been ignored for decades or even centuries is unquestionably inequitable.

Fair or not, forcing homeowners to bulldoze, rebuild, or move those structures to eliminate encroachments would devastate the community and greatly impair the kind of

³³ Town of Nantucket, Massachusetts [Encroachment Policy](#).

historic tourism that is now a principal component of Nantucket's local economy. The public good obviously dictates that such structures be allowed to remain intact, and so Nantucket permits historic building encroachments when it permits no other type of permanent encroachment.³⁴

Coincident with the creation of this provision regarding historic encroachments, Nantucket began an aggressive campaign to resolve other non-historic encroachments. One distinguishing feature between Apalachicola and Nantucket is that most of Nantucket's homes are historic. The historic district encompasses the entire island. Consequently, Nantucket's non-historic encroachments do not generally involve habitations. The minutes of Nantucket city council meetings speak instead of boulders blocking right-of-way, fences, outbuildings, and such. We believe that Apalachicola has a higher percentage of non-historic encroaching structures than Nantucket, including inhabited ones.

We adopt three best practices from Nantucket. First, we think generosity regarding encroaching historic residences and historic commercial structures is warranted. Such action easily meets the requirement of acting in the best interests of the public good. Second, we think using a recognized list as the determinant of which structures qualify for treatment as historic structures is the most efficient mechanism and is one that is consistent with available city resources. A structure's presence on the list can be the trigger for the benefits and conditions that become part of a grant of permission that runs with the land.³⁵

Finally, while we think Nantucket's aggressive pursuit of non-historic encroaching structures is a best practice, we think that Apalachicola has additional factors to consider. For example, because Apalachicola likely contains some non-historic buildings that are used for human habitation, applying Nantucket's stringent standards would likely

³⁴ During discussions of Nantucket's encroachment policy, historic encroachments were not regarded as a problem at all. The ordinance was enacted to facilitate the removal of more recent right-of-way encroachments. The town was more concerned with ways of notifying landowners of the intention to remove newer encroachments and discussed using community organizations to get the word out. That method of notification is the best means of doing so we encountered in our survey and is probably a best practice. See Nantucket, Massachusetts [Town Council Minutes December 17, 2019](#)

³⁵ Apalachicola does use such a list. It is the [Master Site File](#) maintained by the Florida Department of State.

necessitate radical alteration or destruction of those buildings, exacerbating an already serious shortage of affordable housing. The public good may thus require a good deal more nuance than Nantucket applied.

b) *Aspen Colorado*

(1) We should try to create incentives that motivate encroaching landowners to enter into encroachment agreements that enable a planned removal of encroachments.

(2) The test for which encroachments besides historic structures should be allowed is whether doing so will serve the public good.

Aspen, Colorado is famous for its Victorian-era mansions, but it also is home to hundreds of other historic structures, from what were once mining shacks to antique commercial buildings. As with Nantucket, Aspen adopts a stringent standard: it allows only two types of fixed encroachments: (1) “Public Amenities,” which are, by definition, constructed to benefit the public in some way, and (2) historic structures. The latter category is created:

To acknowledge an existing, historical unlicensed encroachment and to outline the owner’s liability and responsibility for maintenance and future removal of the encroaching structure. [emphasis added]³⁶

We take two best practices from Aspen. The first is the idea of building the removal of certain encroachments into whatever licensing or permit structure is used to manage those encroachments. If a city wishes to create a grace period after which a structure is to be removed, for example, one way to do it is to grant a revocable license or permit and give it an expiration date.

Aspen’s other best practice is really a name as much as a practice. Aspen also allows private party encroachments where those encroachments serve as “public amenities.” Public amenities serve the public good, notwithstanding that private owners create them. We adopt the term public amenities here because it is a useful way of explaining which encroachments besides historic structures should be allowed. We also believe that the term public amenity nicely describes the test of which encroachments besides historic structures should be allowed. They must serve the public good in some way.

³⁶ City of Aspen, Colorado [Permanent Encroachment Permit Review Procedures](#)

c) *Belmont, California*

(1) Permanently grandfathering non-historic encroachments amounts to giving away public lands and is not a best practice.

(2) The obtaining of a building permit is an inflection point where the city meets the landowner in a position with leverage, and it may be useful in building incentives for landowners.

Belmont, California is a mid-sized community north of San Francisco, and it has a sizable historic district. Most of its encroachment ordinance addresses temporary encroachments, “public amenity” encroachments such as underground utilities, etc. But § 22-13(d) pertains to “any major existing” encroachments that antedate Ordinance 994 (governing encroachments), which was passed in 2003.

With respect to those, it says that any encroachment that:

[D]oes not interfere with the safe sight distance of drivers or pedestrians, does not block the free passage of pedestrians or vehicles, does not constitute a threat to health and safety, and does not interfere with the construction or maintenance of public improvements as noted in section 22-9, is required to have a permit agreement only at the time when the encroachment is replaced. [emphasis added]³⁷.

Two aspects of the otherwise undistinguished Belmont ordinance are useful. First, it “grandfathered” in every encroachment in existence at the time of enactment, except for those that presented a hazard or obstruction of some kind. Other municipalities have used such a “permissive” approach as well. Grandfathering seems to be more an act of desperation than one of policy. It is an easy way to make the problem go away.³⁸ But those cities ignore the fact that they are essentially giving away public property with no showing of public good. In our view, grandfathering is decidedly not a best practice.

What is interesting about Belmont, though, is that they added a twist to their grandfathering. At the time a structure is replaced (whatever that means), the city claws

³⁷ Belmont, California COO, [§ 22-13\(d\)](#).

³⁸ We have encountered other municipalities and county governments that, facing an overwhelming number of encroachments, simply “grandfather” all of them, historic and nonhistoric alike, so that the encroachments established before a certain date are deemed allowed. See, e.g., City of Yonkers, New York COO [§ 103-89](#); Bartow County, Georgia COO [§ 55-26](#); City of Belle Isle, Florida [Right-of-Way Policy](#).

back some control and requires an agreement that, presumably, entails some mitigation of the encroachment.³⁹

Belmont's twist and those of the other cities using a similar approach⁴⁰ are too undefined to be of use to Apalachicola, but the notion of grandfathering with a clawback is interesting. With some more flesh on it, the idea might just rise to the level of a best practice for Apalachicola.

The second thing that is interesting about Belmont is this: According to staff at the Belmont Public Works Department, the triggering event for investigating such encroachments is usually a request for a building permit needed to effect a major change or replacement in the encroaching structure.

Belmont's idea of using building permits to police encroachments is in some respects a brilliant one, and, as will be discussed more in connection with New Orleans, can become a powerful tool. And the clawback twist is worth remembering as well.

d) Portsmouth, Virginia

(1) Grandfathering becomes a useful tool if it is made to expire on transfer.

(2) The sale of a property is another inflection point, and anything that alerts a potential buyer of possible risk can be a useful lever. The expiration of a valuable right on sale is such a warning flag.

Portsmouth, Virginia sits on the Elizabeth River, across from Norfolk and a stone's throw from the Chesapeake Bay. Although larger than Apalachicola, it otherwise shares many traits with our city. It was founded in 1752 and has a rich history, reflected in its five recognized historic districts and its large population of historic structures.

³⁹ Grandfathering is not uncommon, but adding twists to the process is. For another example of a twist, see Folsom, California, which uses a technique related to that of Belmont. Folsom grandfathered in encroachments until such time as repairs/refurbishments effecting [sic] fifty percent or more of the encroaching structure's value and/or size are accomplished. Folsom, California COO [§12.20.040](#). The City of Belle Isle, Florida also used this twist: It " Pre-existing encroachments may be allowed to remain in place as non-conforming encroachments, without requiring a review by the City or require a ROW Permit, as long as they are not: (a) deemed to be a safety hazard or nuisance, (b) modified, (c) damaged, (d) removed or relocated, and/or (e) the subject of a complaint." City of Belle Isle, Florida [Right-of-Way Policy](#).

⁴⁰ See footnote 38.

Rather than flatly approving all grandfathered encroachments, Portsmouth burdens all those encroachments in this way:

Existing encroachments.

Every encroachment existing prior to August 24, 1976, is presumed to have been constructed under authority of a revocable permit, which may be revoked at the pleasure of the city manager. ⁴¹

With this provision, Portsmouth hangs a Sword of Damocles over each grandfathered property and that sword may well become an issue for purchasers of the property. That is an interesting technique and may provide some incentive for landowners to remedy encroachments.⁴² But, in our view, Portsmouth's ordinance does not go far enough to be useful to Apalachicola.

However, with only slight modification, this ordinance can become quite powerful as an incentive to resolve encroachments. By making the permit both revocable and nontransferable to successors in title, and coupling that with an announced intention to pursue encroachments related to revoked or expired permits, the city can build in a huge incentive to resolve encroachments prior to sale. That can happen either by way of an encroachment agreement that approves the encroachment (with historic structures, for example), or one that contains a plan for moving or removing the encroachment, as Aspen's ordinance suggested.

⁴¹ Portsmouth, Virginia COO [§ 32-7](#).

⁴² Other cities emphasize the peril of relying on a revocable permit too. Belle Isle, Florida says this: "A ROW Permit is a revocable license that authorizes the use of the City's right of way. With exception of utilities and governmental entities, a ROW Permit may be revoked at any time and without cause. Applicants should keep this in mind when proposing to expend significant monies in the City's right of way." City of Belle Isle, Florida [Right-of-Way Policy](#).

e) *New Orleans, Louisiana*

(1) Some right-of-way encroachments can positively contribute to historic character, and the public good may be served by protecting them...to the point of encouraging new ones.

(2) Using the building permit process as means of encouraging landowners to obtain encroachment agreements has potential, but it is also fraught with the risk of undermining city goals.

(3) Substantial encroachment fees can serve as a deterrent to future encroachments, but when applied to existing encroachments, they can be difficult to manage. Best practice suggests using substantial or market-based fees only in limited circumstances and not across all encroachments, and even then, a middle path may be wiser.

Desirable encroachments. Right-of-way encroachments are an integral part of New Orleans' urban aesthetic. Houses are built right up to, or over, sidewalk and street lines, as in the illustration. Stoops, roof overhangs, balconies, galleries, and stairways routinely



overhang the right-of-way. The galleries, stoops, and balconies referred to in this section are signature architectural features in many of New Orleans' 21 historic neighborhoods and have been a design standard in those districts for, in some cases, centuries. New Orleans city officials recognized that such features are a key component of the city's historic tourism and therefore of the city's economy.

The city has special provisions applicable to a relatively small number of qualifying structures that "contribute to New Orleans' distinct character and their preservation serves a public purpose."⁴³ Those "may remain" without the need for any permit, lease, or servitude agreement, and without payment of the fair market value portion of the encroachment fee.⁴⁴

The city not only protects existing encroachments of this type but also encourages new construction of a similar nature. New Orleans' Comprehensive Zoning Ordinance contains this provision regarding common architectural features that encroach:

⁴³ New Orleans COO, [§ 146-778](#).

⁴⁴ This provision even applies to reconstructed buildings the reconstruction of which has been approved by the applicable historic commission.

Within the Historic Core Neighborhood Districts, new construction is encouraged to include common architectural features that encroach into the public right-of-way, such as galleries, stoops, and balconies, in keeping with the established development pattern. A long-term grant of servitude from the Department of Property Management is required for this type of encroachment.⁴⁵

The encouragement of new encroaching construction is part of a broader scheme in New Orleans that we will discuss below in connection with fees.

Building permits. Most of New Orleans' structures with existing right-of-way encroachments did not have "servitudes"⁴⁶ recorded for their encroachments. In 2015, New Orleans completely reworked its policies regarding existing encroachments, in significant part to deal with those "ghost" encroachments. The city now requires a grant of servitude for any encroachment, whether new or existing, for a building undergoing work that requires a building permit or some other authorization from a city agency.⁴⁷ Even a minor maintenance project can trigger the encroachment review process, which determines the eligibility of a property for protectable status, as well as for a grant of servitude.

This use of building permits as a trigger to force the consideration and resolution of encroachments is an idea worth considering in Apalachicola because it uses existing code enforcement staff in the way they are accustomed to operating. It requires no new departments and does not require enforcement staff to actively canvas the city looking for violations. Nonetheless, it will require what may be a considerable amount of extra work by that existing staff, and that must be weighed in formulating a solution.

Using building permits as a trigger for action on encroachments has another cost as well--one beyond the additional labor by city staff. It can also cause protests among the citizenry affected, particularly when small inexpensive projects are turned into small

⁴⁵ New Orleans Comprehensive Zoning Ordinance, [Article 9, § 9.3.C](#).

⁴⁶ A servitude is an instrument derived from Louisiana's civil law system (in contrast with our common law system) which serves a function similar to an encroachment agreement that runs with the land.

⁴⁷ New Orleans, Louisiana COO [§§146-768 through 146-775](#).

expensive projects. New Orleans has been beset by such protests since it changed its approach in 2015.⁴⁸

Fees. In 2015, New Orleans began charging substantial fees for servitudes involving new encroachments and existing encroachments without servitudes that do not qualify for the "special character" exemption. Among the encroachments targeted were those relating to the city's "air rights" over city sidewalks. The fees were based on the market value of the property involved and were due annually; in effect, the city leased the servitude to the private property owner.⁴⁹

The annual fees at that time were quite substantial--in some cases thousands of dollars a year for each encroachment. The higher fees clearly served to discourage undesirable encroachments and that goal was discussed during deliberations for the provisions. But they also had the effect of--according to some citizens--punishing landowners who had for years been providing valuable services such as awnings, galleries, and verandas over city sidewalks.⁵⁰ The protests arising from those fees prompted the city to suspend them and reevaluate, and it has since fees associated with conventional encroachments, but retains a "fair market value" approach for air rights encroachment leases.⁵¹

The new servitude fees were not just a disincentive to undesirable encroachments. They were also, in effect, a new revenue line item for the city, part of a broader "entrepreneurial" initiative to raise permit fees.⁵² And therein may be the source of New Orleans' problems and the reason for so much public pushback. The principal determinant in setting the fees was revenue generation, not effective public policy.⁵³

⁴⁸ See The Times Picayune, [Property owners in French Quarter, other areas protest steep city bills for sidewalk encroachments](#), June 6, 2016.

⁴⁹ [Report](#) by Adamick Architecture, New Orleans, Louisiana; New Orleans, Louisiana COO [Article XIII](#).

⁵⁰ "It is a matter of public and judicial history that galleries, or 'verandas,' as they are also called, have been sanctioned by usage in New Orleans almost from time immemorial." *Lambert v. American Box Co.*, 144 La. 604, 611 (La. 1919)

⁵¹ The Times Picayune, [New Orleans Stops 'Air Rights' Leasing for Balconies for 30 Days to Review Legality](#), March 18, 2017; see the current fees at New Orleans, Louisiana COO [§§146-768 through 146-775](#).

⁵² See Uptown Messenger, [Mayor Landrieu's New Tax on Very Old Architecture](#), June 13, 2016.

⁵³ New Orleans is far from the only municipality to take a very aggressive approach to encroachment fees. Salt Lake City charges market-based fees for encroachments. Salt Lake City, Utah COO [§ 57-8-4](#); as does Austin, Texas, see Austin, Texas

f) *Apalachicola, Florida*

- (1) Apalachicola has sufficiently established the protection of historical structures as a valid public purpose.
- (2) Extending a core principle of Apalachicola's land use policy, we should prohibit the expansion of any encroachment, whether historic or non-historic.
- (3) Non-historic encroaching structures may, in limited cases, be eligible for some protection. Given the public trust attached to public lands, the test of which structures qualify for protection should be whether doing so serves the public good.

It turns out that the city can learn something from itself. Apalachicola has already established a philosophy with respect to historic structures, and, when taken together with the examples discussed above, that foundation can furnish a starting point for crafting specific recommendations regarding encroachments.

Public Purpose. Article II of Apalachicola's Land Development Code embodies a serious commitment to the preservation of the city's:

[S]ites, buildings, structures, objects and areas, both public and private, which are reminders of past eras, events and persons important in local, state or national history, or which provide significant examples of architectural styles of the past, or which are unique and irreplaceable assets to the city and its neighborhoods, or which provide for this and future generations examples of the physical surroundings in which past generations lived.⁵⁴

It declares that historic preservation:

[I]s a public purpose and is essential to the health, safety, morals, and economic, educational, cultural and general welfare of the public, since these efforts result in the enhancement of property values; the stabilization of neighborhoods and areas of the city; the increase of the economic benefits to the city and its inhabitants; the promotion of local interests; the

COO [§§ 14-11-51 through 14-11-53](#); Nantucket charges \$10 a square foot a year. Nantucket, Massachusetts [Encroachment Guidelines, Article VII](#), plus email from Nantucket Department of Public Works.

For a more graduated approach that uses market-base fees only in some circumstances, see the Calgary, California, [Encroachment Fee Schedule](#). Other fees can come into play as well. A number of municipalities charge "investigation fees" that cover the administrative burden of assessing an encroachment. They are sometimes enough to cover the cost of a surveyor. See, e.g. Benicia, California Municipal Code [§ 12.12.060 F](#); Minneapolis, Minnesota COO [§ 91-1020](#); South Boston, Virginia COO [§ 46-34\(m\)](#).

Surprisingly, Savannah, Georgia is at the low end of encroachment fees. It charges a one-time "application processing fee" of \$250 for residential encroachments in a historic district that have been reviewed and approved by the city's Historic Board of Review. The fee for commercial structures is \$500. Savannah, Georgia [Petition for Encroachment Submittal Criteria](#).

⁵⁴ Apalachicola LDC, [§ 109-21\(a\)\(1\)](#).

*enrichment of human life in its educational and cultural dimensions serving spiritual as well as material needs; and the fostering of civic pride in the beauty and noble accomplishments of the past.*⁵⁵

Apalachicola has thus declared legislatively that its treatment of historic structures is pursuant to a public purpose. When taken together with the broad consensus among other municipalities that historic preservation is a public purpose, this is more than sufficient justification for allowing certain encroachments relating to historic structures.

Historic and non-historic structures. Apalachicola’s zoning regulations are directed at uses of property within the bounds of a landowner’s parcel. Encroachments, of course, are uses of land beyond the boundaries of a landowner’s parcel. Nonetheless, Apalachicola’s existing zoning regulations that pertain to “nonconforming” historic structures and appurtenances provide useful concepts that may be applied to encroachments as well.

In particular, the distinction between “historic, nonconforming structures,” and “nonhistoric, nonconforming structures”⁵⁶ in the Land Development Code may be mapped over to encroachments by substituting “encroaching” for “nonconforming.” Thus, the distinction would become between “historic, encroaching structures” and “nonhistoric, encroaching structures.”

Using Apalachicola's own existing ordinance language, substitution gives rise to these principles:

*The intent of this section is not to permit either historic or nonhistoric [encroachments] to be enlarged upon, expanded, or extended....*⁵⁷

and:

*The intent of this section is to preserve all historic structures, including those that are [encroaching]....*⁵⁸

1. and also:

⁵⁵ Apalachicola LDC, [§ 109-21\(a\)\(2\)](#)

⁵⁶ Apalachicola COO, [§ 111-322](#).

⁵⁷ Apalachicola COO, [§ 111-322\(c\)](#)

⁵⁸ Apalachicola COO, [§ 111-322\(a\)](#)

The intent of this section is to provide for...limited protection of nonhistoric, [encroaching] structures.⁵⁹

With respect to the last principle, we believe that the nature of the public trust attached to public lands dictates that the limit for the protection of encroaching non-historic structures be that such protection must give rise to a public good. And that good should be weighty enough to justify the special treatment accorded these non-historic structures. We think that the notion of "hardship" used in determining the validity of zoning variances can be used in the encroachment setting as well, particularly in difficult cases, such as those involving inhabited structures. However, the public trust requires that hardship, which is already a strict standard in zoning cases, be even stricter when dealing with public lands. We will deal with the particulars of using hardship as a test in a later subsection.

The city has identified each of these three principles as a best practice. It makes sense to continue using them in drafting provisions regarding fixed encroachments. Doing so builds on experience and expertise already in existence and it employs a balancing of conflicting interests and duties that has already been made and approved.

We believe that the five examples cited above, when taken together with lessons learned from the hundreds of other encroachment ordinances examined as part of the survey, and framed in the context of Apalachicola's existing philosophy, provide a basis for dealing with many of the most problematic encroachments in the city, both historic and non-historic. But before beginning to propose solutions, we first want to deal with other types of fixed encroachments, so that the proposed solutions can accommodate them as well.

F. Public amenity encroachments generally

Aspen's "public amenities" term is a good name for broad classes of fixed encroachments that are approvable as being in service to the public good because they provide something that benefits the entire community. They are all aimed at improving public life in some concrete way—from beautifying the community to providing needed infrastructure, to enhancing safety along the public right-of-way. The examples that follow help tease out distinctions between encroachments that belong on a list of public amenities and those that don't. Once that dividing line is identified, then the question becomes: should all encroaching public amenities be required to go through an

⁵⁹ Apalachicola COO, [§ 111-322\(b\)](#)

elaborate permitting process or is there another way that both protects the public and may be administered in a way that minimizes the burden on the city? We believe there is such a way, and we will discuss that below under the heading of “permitless public amenities.”

What follows is a list of just some of the items that various municipalities have treated as public amenities, whether they used that term or not:

1. Public infrastructure and other utility-like functions⁶⁰
2. Public art,⁶¹
3. Permanent newspaper racks⁶²
4. Bus benches⁶³
5. Screening of high-traffic roadways,⁶⁴
6. Below-ground irrigation systems,⁶⁵
7. Mailboxes,⁶⁶
8. Landscaping⁶⁷
9. Flowerpots and planters⁶⁸
10. Fire escapes⁶⁹
11. Clocks⁷⁰

⁶⁰ Public utilities--companies that are accorded monopolies over certain types of infrastructure--usually have the power of eminent domain and may not require encroachment agreements. But many other companies providing utility-like infrastructure lack that power, and so must request encroachment agreements from the municipalities they deal with. For example, telecommunications companies often seek permission to encroach on public right-of-way. They do it so often that many of them have standardized the provisions that can be added to encroachment ordinances to accommodate their needs. Various telecommunications industry associations, regional task forces, and municipal leagues have addressed the problem of telecommunications encroachments with guidelines and model ordinances. *See, e.g.*, Land Use Planning Guide from the Western Connecticut Council of Governments. While the Municipal Technical Advisory Service (MTAS) of the Institute for Public Service advises against the word-for-word adoption of telecommunication company model ordinances (See MTAS “[Telecommunications Model Ordinances.](#)”), that has nonetheless happened in many municipalities. *See, e.g.*, Glendale, California Municipal Code [§ 12.08.037](#); Plymouth, Minnesota Municipal Code [§ 2177](#); Edina, Minnesota Municipal [Code Chapter 34](#); Simi Valley, California Municipal Code, [Chapter 35](#). Apalachicola will likely face the need to deal with requests for permits for such encroachments, if only for some of the hundreds of thousands of 5G installations that are going in nationwide now. When that time comes, the best practice will be to do as MTAS suggests and craft Apalachicola’s ordinance to take account of local considerations.

⁶¹ Bonita Springs, Florida COO [§ § 34-93 through 34-99](#).

⁶² Des Moines, Iowa COO, [§ § 102-604 through 102-608](#).

⁶³ Rockledge, Florida COO, [18-3](#).

⁶⁴ Mint Hill, North Carolina COO, [§ 6.4.2](#).

⁶⁵ Laguna Hills, California COO [§ 12-12-110](#).

⁶⁶ *Id.* [§ 12-12-110](#).

⁶⁷ Boulder, Colorado Municipal Ordinances, [§8-6-8](#).

⁶⁸ Des Moines, Iowa COO, [§102-604](#).

⁶⁹ *Id.*

⁷⁰ Oakland, California COO, [§12.08.030](#).

12. Flagpole sockets extending over the sidewalk⁷¹
13. Bus shelters⁷²
14. Phone booths⁷³
15. Bicycle Racks⁷⁴
16. Trees⁷⁵

The list could go on and on.⁷⁶ What all these have in common is that they are not purely private uses of right-of-way. They enhance city life in some significant way that serves the public good. Contrast these amenities with, say, the use made of public right-of-way in the *Meretzky* case. The pool and surrounding fence were purely for the landowners' use.

Decisions on what constitutes a public amenity are highly variable. For example, some communities allow only low-level landscaping,⁷⁷ while others allow larger features, subject only to traffic safety constraints, such as protection of a driver "sight triangle" at intersections and crosswalks.⁷⁸

G. Permitless public amenity encroachments

One of the principal variables with respect to public amenity encroachments concerns whether the municipality requires a formal encroachment agreement or some other formal document,⁷⁹ or permits such encroachments without such an agreement.⁸⁰ This latter approach may be a best practice for Apalachicola.

⁷¹ Id.

⁷² Id.

⁷³ Id.

⁷⁴ Boulder, Colorado Municipal Ordinances, [§8-6-8](#).

⁷⁵ Boulder, Colorado Municipal Ordinances, [§8-6-8](#)

⁷⁶ Public amenities can take many forms. One interesting variant comes from Pinellas Park, Florida. Pinellas Park COO [§14-402\(B\)](#) provides for "minor encroachments into rights-of-way or easements as result of prior structures occupying such rights-of-way or easement by right or error, where vacation is not possible or does not adequately protect the public interest."

⁷⁷ See Lee Summit, Missouri [Encroachment Policy, Exhibit A](#). Lee Summit uses a very efficient table to lay out allowed and non-allowed encroachments in right-of-way and other types of easements.

⁷⁸ See, e.g., Boulder, Colorado Municipal Code, [§ 8-6-2](#).

⁷⁹ ⁷⁹ See, e.g., El Mirage, California COO [§ 151.002](#), Newport Beach, California [Encroachment Policy](#), Hermosa Beach, California [Encroachment Policy](#), Spokane, Washington Spokane Municipal Code [§ 12.02.060](#).

⁸⁰ Cañon City, Colorado COO [§ 12-12-040](#), Lafayette, California [Encroachment Guide](#), Newport, Oregon, Newport Municipal Code [§ 9.15.020](#), San Carlos, California Encroachment Policy [§ 12.01040 D.](#), San Rafael, California [Encroachment Permit Guidelines](#).

Apalachicola has long allowed landowners to maintain certain beautifying and utilitarian encroachments in the city right-of-way, such as landscape plantings, turfgrass, in-ground irrigation, mailboxes, permeable driveways, permeable parking pads, etc. This practice goes well beyond mere indifference to the presence of such additions, instead rising to the level of an informal policy designed both to help beautify the city and to assure that the city continues to retain access to its right-of-way for necessary maintenance. City staff members have advised that such encroachments are allowable, provided landowners understand that the encroaching articles may be destroyed or damaged during city work or the work of utilities serving the city.

Another city taking the same approach has articulated the justification for it. Newport, Oregon's code states:

*Exempt encroachments are those which would have a minor impact on the present or planned use of the unimproved public right-of-way, easement, or public property....*⁸¹

In the terms of honoring a municipality's duty to protect the public trust, such uses do not exclude others, and they are often regarded as adding to the public good by beautifying city right-of-way or helping "maintain the town's unique village character."⁸² Municipalities often exert other controls on such encroachments, such as requiring that they not impair intersection sight lines⁸³ or that landowners maintain the right-of-way in accordance with certain standards.⁸⁴

Cañon City, Colorado, and some other municipalities call such uses of public property "incidental encroachments."⁸⁵ Others refer to "minor encroachments" or "minor continuing encroachments."⁸⁶ We will continue with the public amenity label, adding "permitless" to make clear the intention involved.

The list of allowable permitless public amenity encroachments can sometimes be quite long and intersect with what some municipalities consider to be licensable "temporary" encroachments.

⁸¹ Newport, Oregon, Newport Municipal Code [§ 9.15.020 A.](#)

⁸² Duck, North Carolina COO [§ 156.061.](#)

⁸³ Boulder, Colorado Municipal Ordinances, [§8-6-8](#)

⁸⁴ Id.

⁸⁵ Cañon City, Colorado COO [§ 12-12-040.](#)

⁸⁶ San Rafael, California [Encroachment Permit Guidelines.](#)

Boulder, Colorado, for example, has such a list of what it calls “Exempt Encroachments.”⁸⁷ It includes landscaping, “streetscape” items, such as bicycle racks, fences in utility easements (not in the public right-of-way), and sidewalk café accessories in a certain neighborhood.⁸⁸

Foregoing a permit requirement for certain public amenity encroachments is, we believe, a best practice for Apalachicola. The burden of monitoring temporary, ordinary fixed, and historic encroachments will already be substantial. Adding a long list of relatively minor public amenities to this workload would not seem, at this time, to add sufficient benefits to justify the additional burdens. And the city can manage expectations regarding, for example, damage that may occur as the result of necessary city work by incorporating language regarding the conditions attaching to permitless public amenity encroachments in an encroachment guide publication.⁸⁹

Public amenities that will not require a permit or city review should be carefully defined so as to be consistent with other city objectives or policies. For example, low-growth landscaping and permeable driveways or parking pads may be acceptable without permitting. However, the city may wish to require a permitting process for impervious non-exclusionary driveways or pads to ensure consistency with stormwater drainage policies; the same could be said for high-growth vegetation and access to utility lines.

H. Hardship as a justification for an otherwise private encroachment

A small number of municipalities make provision for allowing what would otherwise be purely private and prohibited encroachments based on some hardship that would befall the landowner if an encroachment on right-of-way is not permitted. Most municipalities have provisions in their zoning laws allowing the grant of a variance on a showing of hardship. A large body of jurisprudence has arisen laying out the principles applicable to zoning hardship exceptions. There is not a similar body of law relating to right-of-way encroachments, but we believe the principles in

⁸⁷ Boulder, Colorado Municipal Code [§ 8-6-6](#).

⁸⁸ Boulder’s is one of the best-drafted ordinances in its efficient use of cross-referenced standards and low administrative burden and might serve as a useful model for some of Apalachicola’s encroachment provisions.

⁸⁹ One additional consideration concerning permitless public amenities is that of city liability for death, injuries or damages arising from those permitless amenities. This is of particular concern with respect to line-of-sight obstructions. Encroachment agreements routinely cover such issues with insurance and indemnification requirements. The question is whether, under Florida law, such issues can be dealt with legislatively in the encroachment ordinance is beyond the scope of this memorandum. Whether or not it is possible, the city can still manage risk by imposing and monitoring sight triangle and obstruction height standards.

the zoning hardship cases can help inform Apalachicola's decision-making regarding whether to provide a hardship exception in its own encroachment ordinance and how that exception should operate.

1. Hardship means REALLY hard

Courts make clear that granting a hardship variance for a zoning requirement is a rare occurrence and is not an act of friendship or kindness. Rather, a finding of hardship relates to a specific characteristic unique to the property rather than to the person.⁹⁰ The hardship must be so extreme as to make the property unusable without relief,⁹¹ and it cannot have arisen as a consequence of the owner's own actions.⁹²

The net of this is that hardship exception is not allowable because someone is a friend of the city, is a nice person, has supported city causes, or runs an important business in the city. It is also not allowable because complying with a particular zoning requirement is expensive or difficult.

2. Hardship in Apalachicola's zoning ordinance

Apalachicola's current Land Development Code is consistent with the jurisprudence relating to hardship exceptions. The city has adopted the most-used standard for determining hardship in the context of granting zoning variances. Apalachicola's LDC says:

Conditions for issuance of variances

Variances shall be issued only upon:

(1) Submission by the applicant, of a showing of good and sufficient cause that the unique characteristics of the size, configuration, or topography

⁹⁰ *Elwyn v. City of Miami*, 113 So. 2d 849, 851 (Fla. Dist. Ct. App. 1959) ("[T]he difficulties or hardships relied on must be unique to the parcel involved in the application for the variance. They must be peculiar to that particular property, and not general in character, since difficulties or hardships shared with others in the area go to the reasonableness of the zoning generally, and will not support a variance....").

⁹¹ *Hemisphere Equity v. Key Biscayne*, 369 So. 2d 996, 1001 (Fla. Dist. Ct. App. 1979) ("[V]ariations may not be sustained in the absence of a non-self created characteristic, or 'hardship,' of the property in question, which renders it virtually impossible to use the land for the purpose or in the manner for which it is zoned."); *See also Maturo v. City of Coral Gables*, 619 So. 2d 455, 456 (Fla. Dist. Ct. App. 1993) ("*Herrera v. City of Miami*, 600 So.2d 561 (Fla. 3d DCA), review denied, 613 So.2d 2 (Fla. 1992); *Bernard v. Town Council of Town of Palm Beach*, 569 So.2d 853 (Fla. 4th DCA 1990); *Town of Indialantic v. Nance*, 485 So.2d 1318 (Fla. 5th DCA), review denied, 494 So.2d 1152 (Fla. 1986); *Elwyn v. City of Miami*, 113 So.2d 849 (Fla. 3d DCA), cert. denied, 116 So.2d 773 (Fla. 1959)");

⁹² *Green v. City of Miami*, 107 So. 2d 390, 392 (Fla. Dist. Ct. App. 1959) ("The authorities are generally in accord on the proposition that in seeking a variance on the ground of a unique or unnecessary hardship, a property owner cannot assert the benefit of a 'self-created' hardship.").

of the site limit compliance with any provision of this chapter or the required elevation standards;

(2) Determination by the city commission that:

a. Failure to grant the variance would result in exceptional hardship due to the physical characteristics of the land that render the lot undevelopable; increased costs to satisfy the requirements or inconvenience do not constitute hardship;

b. The granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, nor create nuisances, cause fraud on or victimization of the public or conflict with existing local laws and ordinances; and

c. The variance is the minimum necessary, considering the flood hazard, to afford relief.⁹³

In substance, the zoning hardship cases say that such language means what it says. Apalachicola has laid down a strict standard for granting a hardship exception, and the courts have made clear that they will enforce such a standard.

3. Encroachment hardship exception examples

We found very few instances where encroachment ordinances contained hardship exceptions. These provisions from Minturn, Colorado and Contra Costa, California are typical of what we did find.

a) Minturn, Colorado

The City of Minturn, Colorado imposes a burden of proof on an applicant for a hardship exception:

The encroachment applicant shall provide overwhelming evidence that the requested encroachment cannot be reasonably accommodated on the applicant's own property and outside of the right-of-way. The requested encroachment shall not be the result of a situation created by the applicant or the applicant's agents. The applicant affirmatively shall demonstrate with evidence that a hardship exists necessitating the encroachment and that the hardship was not created by the applicant or his or her agents. No permit shall be issued where the above conditions are found to exist.⁹⁴

b) Contra Costa, California

Contra Costa, California's hardship provision requires a specific finding by their board of adjustment:

⁹³ Apalachicola, Florida LDC, [§107-190](#).

⁹⁴ Minturn, Colorado Municipal Code § 11-3-90;

1002-2.016 - Conditions for granting permit.

If, in addition to the requirements of Chapter 26-2, the board of adjustment finds all of the following to be true, the permit shall be granted:

(1) That the applicant will be substantially damaged by the refusal to grant the permit as requested;

(2) That no other reasonable method of obtaining the desired results is available except as proposed by applicant;

(3) That the granting of the permit will not be materially detrimental to the public interest, safety, health, and welfare or injurious to other property.⁹⁵

These provisions contain language similar to the language found in typical zoning ordinance hardship exceptions. But we believe they are missing one essential additional component.

4. Hardship and the public trust

Zoning laws are primarily a function of the police power. Because they involve no publicly held property, considerations of the public trust aren't involved in the balancing of interests as they are with encroachments. When those considerations are added, the decision of whether to allow hardship exceptions becomes a much closer and more difficult question. It is that difficulty, we think, that accounts for the relative rarity of hardship exceptions in encroachment ordinances.

We think we think it wise to add a hardship exception to Apalachicola's expanded encroachment ordinance, and its analytical framework should operate in much the same manner as was employed here on the question of whether to allow historic encroachments. The duty to protect the public trust is balanced against the public good that will arise from allowing the encroachment, and the decision goes whichever way the balance tips. If the city is to formalize this process for encroachment hardships, we suggest that it take the approach used by Minturn and Contra Costa and borrow concepts from Apalachicola's own zoning hardship standards but add a weighing of the public good to those requirements. That weighing goes beyond the requirement that granting the exception is not "detrimental to the public interest, safety, health, and welfare" that is found in the Contra Costa ordinance. It requires that granting the exception accomplishes some positive public good.

⁹⁵ Contra Costa, California Ordinance code, [§ 1002-2.016](#).

Adding such an exception provides a mechanism for dealing with many of the most common encroachments in Apalachicola, such as fence, outbuildings, and other relatively small structures. If any of those structures can meet requirements like those laid out in § 197-190 of Apalachicola's Land Development Code, and they can be shown to benefit the public good, then they should be allowed. Otherwise, the landowner should be encouraged to enter into an encroachment agreement that contains a plan for the removal of the encroachment according to an agreed schedule, as described in the recommendations contained in Section V of this memorandum.

IV. Goals

Based on what we have learned from studying what works and what doesn't in other communities, HAPPI recommends that the city adopt the following goals for its encroachment policy. We believe they are reasonable and achievable.

A. Protect the public's ownership of and access to publicly owned right-of-way.

That governments hold public land and right-of-way in trust for the benefit of all their citizens is a principle that dates to the earliest expressions of law, and it serves as a foundation for the law governing encroachments in Florida. Private use of public lands is allowable only in the rarest of circumstances, and then only when the greater public good demands it.

The best encroachment ordinances identified in our survey expressly acknowledge their duty of public trust and we believe such an acknowledgment can serve as a foundational goal for the city. To be successful, that goal and any policies that stem from it must apply with equal force to all citizens, at every stratum of society. Effective policy centers on trust. We believe that equitable enforcement is what builds that trust.

B. Provide the citizens of Apalachicola with a straightforward, easy-to-understand guide on the city's policies regarding encroachments on public right-of-way.

To achieve maximum levels of understanding and compliance with the city's encroachment policies, we believe that those policies and the ordinances that express them should be made accessible with the use of plain English guides--whether online or otherwise. We have encountered many examples of how other municipalities have done so with their own citizens. Apalachicola should easily be able to match or improve upon those efforts.

C. Prohibit all future encroachments on public right-of-way unless expressly provided for by ordinance.

The duty to hold public lands in trust for the benefit of all demands a bright line with respect to future encroachments. The city should prohibit all new encroachments except those that are expressly authorized under the city's encroachment ordinance as well as those few that fall into a hardship exception.

D. Provide protection and a stable chain of title for recognized historic structures that now encroach on public right-of-way.

The city's historic structures define Apalachicola and are part of its economic lifeblood. We believe that the protection of those structures achieves a public good that more than counterbalances the city's duty to safeguard public trust lands. As have many other historic cities, we think Apalachicola should allow encroaching historic structures to stand where they have long stood, and that the city should protect those with recordable encroachment agreements that follow the land and assure that protection persists through successive owners.

With respect to those historic structures that require maintenance or are damaged or destroyed over the years, we think the city should adopt an approach similar to its treatment of "nonconforming historic structures" in the Land Development Code (LDC).

E. Provide protection and a stable chain of title for existing non-historic buildings that now encroach on the public right-of-way, provided they are used for human habitation, and do so in the same manner as with historic structures.

Apalachicola's LDC calls for "limited" protection of non-historic structures, and we believe that philosophy has a place in the city's encroachment policies as well. If an encroaching non-historic dwelling is an existing part of the city's housing stock, then we think there is good cause to allow it to remain in place. Affordable housing is already a challenge in Apalachicola, and requiring expensive structural changes, or the moving or removal of habitable structures threatens both availability and affordability. Here again, we think that the public good outweighs the city's duty to safeguard public trust lands.

With respect to those non-historic structures that require maintenance or are damaged or destroyed over the years, we think the city should also adopt an approach like its treatment of "non-conforming non-historic structures" in the LDC.

F. Provide a mechanism to accommodate any parcel that, through some characteristic inherent and unique to the parcel itself, cannot be used without being permitted to encroach.

We recognize that some parcels may have inherent characteristics that prevent their use without encroachment, so we recommend that the city adopt a mechanism modeled after the hardship exception found in the LDC, using similarly strict criteria, augmented with the balancing of public good required by the public trust doctrine.

G. Provide a separate mechanism to provide relief for those landowners who lack the financial means to remove encroaching structures.

We also recognize that some landowners may not have the financial means to remove structures within the required timeframe. How to aid or otherwise assist with those issues is beyond the scope of our undertaking, but we think that the problem will have to be addressed and that some creativity will be required to do so. While there are many possible solutions, the difficult aspect is defining and documenting financial hardship in a way that is not overly intrusive for a deserving applicant and yet does not become the exception that swallows the rule.

H. Prohibit the expansion of the footprint of any existing encroachment on a public right-of-way, whether historic or non-historic.

We believe the city needs to draw another bright line when it comes to expanding the footprint of existing encroachments. The city's encroachment ordinance and encroachment agreements should forbid such expansion and landowners who do violate that ban should be required to remove such violations at their own expense.

I. Create a timeline and path for the removal of non-historic encroachments on the public right-of-way for structures that are not used for human occupation.

We believe it is in the city's interests to create a direct path for the removal of encroaching structures of all types that are neither historic nor used for human habitation. We chose an intermediate timeline that requires their removal by the earlier of five years or the sale of the property.

J. Assure that permitted encroachments on public right-of-way are subject to encroachment agreements that state all necessary conditions of the agreement (provisions for removal, consequences for violation, etc.), and that are recorded and run with the land so as to apprise and bind any future purchasers to the agreement.

In our opinion, the most important feature of any encroachment agreement is that, rather than being a personal obligation of the landowner, it attaches to the land and becomes a part of the chain of title for an encroaching parcel. Its conditions, requirements, and remedies thereby bind a succession of landowners, not just the original one. Encroachment agreements thus can be drawn to exert forces to assure continuing compliance and those can reduce the overall incidence of encroachments.

- K. Provide a mechanism for landowners to install public amenities such as landscaping and permeable parking areas on abutting right-of-way without the need for an encroachment agreement or permit.**

Making provision for permitless public amenity encroachments imports past city informal practices into the encroachment ordinance and reduces burdens on both city staff and landowners. It also provides an incentive for landowners to beautify adjacent right-of-way, thereby serving the public good without requiring the city to allocate budgeted funds towards right-of-way beautification.

- L. Assure that permitted or permitless encroachments on the public right-of-way do not increase the city's potential liability for injury, death, or property damage arising from such encroaching structures.**

Insurance and indemnification requirements should be a part of every encroachment agreement. With respect to permitless public amenity encroachments, the city should impose insurance requirements if it can do so under Florida law, but in any case, it should manage the risks most likely to cause problems by imposing requirements on landowners that help control liability exposure (such as landscaping height and sight triangle specifications).

V. Recommendations

A. Create a simple framework to achieve goals.

1. At the time of ordinance enactment, grant a revocable, non-transferable permit for all fixed encroachments existing at the time of enactment.
 - Provide for the automatic revocation of the permit at the earlier of the sale of the property or the expiration of a grace period.
 - We recommend setting the grace period at five years.
 - Prohibit expansion of the footprints of existing encroachments, both historic and non-historic.
 - Require an affidavit of non-encroachment or an encroachment agreement for all building permits.⁹⁶
 - Steer landowners with encroaching historic or qualified non-historic structures into path 2 or 3 to obtain an encroachment agreement.

While granting an encroachment permit across the board may seem like grandfathering and thereby a permissive strategy, it's the potential revocation of the permit that gives this strategy power. Potential purchasers face the revocation of the initial encroachment permit upon their taking the property, and that is a burden on the property that should provide an incentive for the landowner to address the encroachment, either by getting a permanent encroachment agreement as a qualified structure or removing the encroachment before sale of the property. The grace period puts all those with encroaching structures on notice that they have a maximum of five years to get a permanent encroachment agreement as qualified structure, remove the encroachment, or face the prospect of the city removing it at the expense of the landowner.

Requiring an affidavit of non-encroachment in order to obtain a building permit provides another incentive to remedy the encroachment, either by removal at the time or by entering into an encroachment agreement appropriate to the nature of the structure. It is not the sledgehammer that some cities have employed (with astronomical fees), but it still has power.

⁹⁶ Affidavits affirming a lack of encroachments are a common feature of real estate closings, but some municipalities have adapted them to use with encroachment agreements and easements. See, e.g. [Johns Creek, Georgia](#) certification of non-encroachment in connection with the grant of easements.

2. Provide a path to convert the non-transferable permit to an encroachment agreement that runs with the land for qualifying historic structures.

The city's historic structures define Apalachicola and are part of its economic lifeblood. We believe that the protection of those structures achieves a public good that more than counterbalances the city's duty to safeguard public trust lands. As have many other historic cities, we think Apalachicola should allow encroaching historic structures to stand where they have long stood, and that the city should sanction those with recordable encroachment agreements that follow the land and assure that protection persists through successive owners.

With respect to those historic structures that require maintenance or are damaged or destroyed over the years, we think the city should adopt an approach similar to its treatment of "nonconforming historic structures" in the Land Development Code (LDC).

3. In recognition of the hardship attached to moving or removing a habitable structure, provide a path to convert the non-transferable permit to an encroachment agreement that runs with the land for existing non-historic structures that are used for human habitation.

Apalachicola's LDC calls for "limited" protection of non-historic structures, and we believe that philosophy has a place in the city's encroachment policies as well. If an encroaching non-historic dwelling is an existing part of the city's housing stock, then we think there is good cause to allow it to remain in place. Affordable housing is already a challenge in Apalachicola, and requiring expensive structural changes, or the moving or removal of habitable structures threatens both availability and affordability. Here again, we think that the public good outweighs the city's duty to safeguard public trust lands.

With respect to those non-historic structures that require maintenance or are damaged or destroyed over the years, we think the city should also adopt an approach like its treatment of "non-conforming non-historic structures" in the LDC .

4. Limit construction activities on structures not otherwise qualified under 2 or 3 above to such repairs and maintenance as are necessary to keep the structure in safe, usable condition until it is removed.

While removal is pending, protecting the health and safety of the public requires that those encroaching structures be kept in good repair. That repair obligation, however, should not be used to, for example, transform an encroaching shed into a granny cabin.

5. With respect to structures not otherwise qualified under 2 or 3 above, the encroachment permits of which have expired, provide for their removal at the expense of the landowner.

We have recommended that the city use a grace period to buffer the requirements of the encroachment ordinance. For the grace period to be effective, however, it needs to have a hard stop. For those cases of revocable permits where no action has been taken before a sale or by the end of the grace period, enforcement should commence as soon as practicable.

6. Prohibit unauthorized encroachments in the future.

- Going forward from the date of enactment, prohibit encroachment agreements with landowners who build encroaching structures without an encroachment agreement.
- Going forward from the date of enactment, require landowners to remove encroaching structures built without an encroachment agreement.

We believe the city should send a clear message that the "ask for forgiveness rather than permission" philosophy cannot apply to encroachments on public lands. This is, we think, another area where a bright line should be drawn.

7. Use strong encroachment agreements to do the bulk of the work.

- Potential purchasers may not be aware of ordinance requirements regarding encroachments.
- An encroachment agreement that runs with the land will come up as part of a title search.

An encroachment agreement that is properly structured to be a recordable obligation that attaches to the land not only can inform the decisions of the landowner regarding city right-of-way, but it also becomes a message to any subsequent purchaser. It is an opportunity to shape behavior, perhaps for decades to come. A strong encroachment agreement can also help the city in enforcing both the terms of the agreement and any city ordinances relating to it.⁹⁷

B. Create a class of "public amenity" encroachments that require no permit or encroachment agreement.

1. Codify existing practices regarding landscaping, permeable parking pads, etc.
2. Include measures to manage the city's exposure to liability from landowner additions, acts, or activities on the encroached right-of-way, such as references to standards for sight triangles, landscape plant heights, and insurance coverage (if possible).

⁹⁷ See [this](#) example of a strong encroachment agreement executed by the city of Orlando in connection with permission to occupy portions of an easement. The city established the right both to attach a lien to the single-family residence that encroached 2 1/2 feet into the easement, but also to remove the residence at the owner's expense should the terms of the agreement be violated. (the link is a downloadable PDF attachment from a commission meeting agenda).

See also this recordable [Fence Covenant and Restriction](#) from St. Cloud, Florida. It operates as an easement encroachment agreement that includes specifications regarding fence placement, etc., and also as an attestation of non-encroachment on the public right-of-way.

Apalachicola's informal practice of allowing landowners to landscape, add permeable parking and driveways, and otherwise beautify city right-of-way adjacent to their property is itself a best practice adopted by many communities. All it needs is authorization in the encroachment ordinance and some clarification as to details. Since sightline obstructions are a common cause of traffic accidents, we believe the city should emulate other municipalities in specifying or pointing to measures to preserve public safety for traffic and pedestrians using the right-of-way. We think it unlikely that the city can require certain types of liability insurance covering such encroachments but believe that possibility should be investigated.

c. Combine the provisions in Part 2 Article III of Chapter 36 of the Apalachicola Code of Ordinances (§§ 36-48 through 36-60) with new provisions relating to "fixed" or "permanent" encroachments to create a comprehensive ordinance governing right-of-way encroachments of all types.

1. Clarify that all the provisions under the combined ordinance are intended to protect and promote the public trust with respect to city-owned right-of-way.
2. Separate the policy guide called for in Goal B from the ordinance and make it accessible to everyone: building permit applicants, citizens inquiring about landscaping, prospective real estate purchasers, etc.

The addition of provisions relating to fixed encroachments to Apalachicola's existing provisions regarding temporary encroachments is an opportunity for the city to create a comprehensive ordinance modeled on the best practices from across the United States. We believe those practices should include specific references to the public trust, and the creation of a policy guide that sits beside the ordinance and is intended to aid lay citizens.

Fortunately, there are good models for creating such a combination. Attachment A, which contains a list of some of the ordinances consulted in the preparation of this memorandum, highlights a few of those ordinances from small and mid-sized municipalities that may be useful models in constructing a comprehensive ordinance.

Appendix A

Selected Municipal Ordinances Consulted

Highlighted ordinances may be useful for drafting language

City	State	URL
Akron	Colorado	https://codelibrary.amlegal.com/codes/akron_co/latest/akron_co/0-0-0-2605
Anchorage	Alaska	https://www.muni.org/Departments/parks/PRC/PRC%2007-102%20encroachment%20policy.pdf
Aspen	Colorado	https://www.aspen.gov/1405/Permanent-Revocable-Encroachment-License
Ashland	Oregon	https://www.ashland.or.us/Files/2009-29.pdf
Augusta	Georgia	https://www.augustaga.gov/DocumentCenter/View/14656/ARC_ROW_Encraochment_Guidlines_June_2021_No_attachment
Austin	Texas	https://library.municode.com/tx/Austin/codes/code_of_ordinances?nodeId=TIT14USSTPUPR_CH14-11USRI-W_ART1DIPUEARI-W_DIV1GEPR_S14-11-1APRE
Bear Valley	California	https://codelibrary.amlegal.com/codes/bearvalley/latest/bearvalley_ca/0-0-0-1765
Belmont	California	https://library.municode.com/ca/belmont/codes/code_of_ordinances?nodeId=CICO_CH22STSI_ARTIEN
Benicia	California	https://www.codepublishing.com/CA/Benicia/html/Benicia12/Benicia1212.html
Berkeley	California	https://berkeley.municipal.codes/BMC/16.18.060
Bethel Park	Pennsylvania	https://ecode360.com/29463015
Boca Raton	Florida	https://library.municode.com/fl/boca_raton/codes/code_of_ordinances?nodeId=VOII_CH19BURE_ARTIIIPEPNSACFE_DIV1PE_S19-77PURI-W
Bonita Springs	Florida	https://library.municode.com/fl/bonita_springs/codes/comprehensive_plan?nodeId=TREL_GOOBPO
Bonney Lake	Washington	https://cdn5-hosted.civicle.com/UserFiles/Servers/Server_15292413/File/Permitting/500.010%20Encroachment%20Policy%20-%20ADA.pdf
Boulder	Colorado	https://library.municode.com/co/boulder/codes/municipal_code?nodeId=TIT8PAOPSPSTPUWA_CH6PURI-WEAENREPELEVA_8-6-3PURI-WPUEAENPR
Boulder City	Nevada	https://library.municode.com/nv/boulder_city/codes/code_of_ordinances?nodeId=COOR_TIT9PUWAPR_CH15EN
Briarcliffe Acres	South Carolina	https://library.municode.com/sc/briarcliffe_acres/codes/code_of_ordinances?nodeId=COOR_CH24ROEN_ARTIEN
Bridgeport	West Virginia	https://codelibrary.amlegal.com/codes/bridgeport/latest/bridgeport_wv/0-0-0-7153
Brookfield	Illinois	https://library.municode.com/il/brookfield/codes/code_of_ordinances?nodeId=COOR_CH46STSI-W_ARTIISTSIUS
Brunswick	Georgia	https://library.municode.com/ga/brunswick/codes/code_of_ordinances?nodeId=PTIICO_CH19STSI_ARTIINGE_S19-13FESTETENSTSIETRO
Burlington	Iowa	https://www.burlingtoniowa.org/DocumentCenter/View/33/Encroachment-Policy-PDF?bidId=
Canon City	Colorado	https://library.municode.com/co/canon_city/codes/code_of_ordinances?nodeId=TIT12STSIUPL_CH12.12WOENPR_S12.12.050MIENICAGRE
Carmel	California	https://www.codepublishing.com/CA/CarmelbytheSea/#!/html/Carmel12/Carmel1208.html
Cascade Locks	Oregon	https://codelibrary.amlegal.com/codes/cascadelocks/latest/cascade_or/0-0-0-2429
Charleston	South Carolina	https://www.charleston-sc.gov/DocumentCenter/View/27799/Encroachment-Ordinance?bidId=
Charlotte	North Carolina	https://library.municode.com/nc/charlotte/codes/code_of_ordinances?nodeId=PTIICOOR_CH19STSIOTPUPL_ARTVIIIIBEN
Circle	Montana	https://codelibrary.amlegal.com/codes/circlemt/latest/circle_mt/0-0-0-2119
Colonial Heights	Virginia	https://ecode360.com/9339976?highlight=encroachment,encroachments&searchId=27485025000506534#9339976
Columbus	Georgia	https://library.municode.com/ga/columbus/codes/code_of_ordinances?nodeId=APXAUNDEOR_CH4GEDEST_ART2GEDEST_S4.2.22ENINPURI-W
Contra Costa	California	https://library.municode.com/co/minturn/codes/charter_and_municipal_code?nodeId=MUNICIPAL_CODE_CH11STSIUPUR_ART3ENOB
Cordova	Alaska	https://library.municode.com/ak/cordova/codes/code_of_ordinances?nodeId=TIT18ZO_CH18.85RI-WENPE
Des Moines	Iowa	https://library.municode.com/ia/des_moinnes/codes/code_of_ordinances?nodeId=MUCO_CH102STSIKOTPUPL_ARTVIIIEN_S102-603BAWADE

Destin	Florida	https://library.municode.com/search?stateId=9&clientId=1929&searchText=encroachment&contentType=CODES
Dublin	Ohio	https://codelibrary.amlegal.com/codes/dublin/latest/dublin_oh/0-0-0-93405
Dubuque	Iowa	https://codelibrary.amlegal.com/codes/dubuqueia/latest/dubuque_ia/0-0-0-6736
Duck	North Carolina	https://codelibrary.amlegal.com/codes/duck/latest/duck_nc/0-0-0-8601
Edina	Minnesota	https://library.municode.com/mn/edina/codes/code_of_ordinances?nodeId=SPBLADERE_CH34TE
Edmonds	Washington	https://www.codepublishing.com/WA/Edmonds/html/Edmonds18/Edmonds1870.html
Elizabethtown	Kentucky	https://codelibrary.amlegal.com/codes/elizabethtownky/latest/elizabethtown_ky/0-0-0-2334
El Mirage	California	https://codelibrary.amlegal.com/codes/elmirage/latest/elmirage_az/0-0-0-3540
Encinitas	California	https://library.qcode.us/lib/encinitas_ca/pub/municipal_code/item/title_15-chapter_15_08-15_08_020
Ennis	Texas	https://library.municode.com/tx/ennis/codes/code_of_ordinances?nodeId=PTIICO_CH16STSIOTPUPLCE_ARTIVLI_S16-66DE
Fargo	North Dakota	https://download.fargond.gov/0/encroachment_policy_2019-06-21.pdf
Fernandina Beach	Florida	https://library.municode.com/fl/fernandina_beach/codes/code_of_ordinances?nodeId=PTIICOOR_CH70STSIOTPUPL_ARTIINGE_S70-2ENPURI-W
Ferndale	Washington	https://www.codepublishing.com/WA/Ferndale/html/Ferndale12/Ferndale1222.html
Fillmore	Utah	https://codelibrary.amlegal.com/codes/fillmoreut/latest/fillmore_ut/0-0-0-1823
Folsom	California	https://www.codepublishing.com/CA/Folsom/html/Folsom12/Folsom1220.html#12.20.030
Fort Wayne	Indiana	https://www.cityoffortwayne.org/publicworks/right-of-way.html
Frederick	Maryland	https://www.cityoffrederickmd.gov/DocumentCenter/View/10175/ROW-Encroachment-Agreement_2021?bidId= https://ecode360.com/28968901?highlight=encroached,encroaching,encroachment,encroachments&searchId=27484934052379669#28968901
Fredericksburg	Virginia	https://ecode360.com/28968901?highlight=encroached,encroaching,encroachment,encroachments&searchId=27484934052379669#28968901
Glendale	California	https://library.qcode.us/lib/glendale_ca/pub/municipal_code/item/title_12-chapter_12_08-12_08_037
Gloucester	Massachusetts	https://library.municode.com/ma/gloucester/codes/code_of_ordinances?nodeId=PTIICOOR_CH21STSIOTPUPL_ARTIINGE_S21-12EN
Grant Park	Illinois	https://codelibrary.amlegal.com/codes/grantparkil/latest/grantpark_il/0-0-0-3603
Greenville	South Carolina	https://library.municode.com/sc/greenville/codes/code_of_ordinances?nodeId=COOR_CH36STSIOTPUPL_ARTIINGE_S36-1EN
Henderson	Nevada	https://www.cityofhenderson.com/home/showpublisheddocument?id=2522
Hermosa Beach	California	http://online.encodeplus.com/regs/hermosabeach-ca/doc-viewer.aspx?secid=1598&keywords=encroached%2Cencroaches%2Cencroaching%2Cencroach#secid-1596
Highland	Illinois	https://library.municode.com/il/Highland/codes/code_of_ordinances?nodeId=COOR_CH62STSIOTPUPL_ARTIHIENOB
Jackson	Wyoming	https://www.jacksonwy.gov/DocumentCenter/View/283/Title-12---Streets-and-Other-Public-Places-PDF
Johns Creek	Georgia	https://www.johnscreekga.gov/JCGA/Media/PDF-PW/ROW/owner-affidavit-individual.pdf
Key West	Florida	https://library.municode.com/fl/key_west/codes/comprehensive_plan?nodeId=CH2TREL_S2-ITRGOOBIMPO_GOAL_2-1TR_OBJECTIVE_2-1.2RI-WAC
Kyle	Texas	https://www.cityofkyle.com/sites/default/files/fileattachments/city_engineer/page/11361/1104_encroachment.pdf
Lafayette	California	https://www.lovelafayette.org/city-hall/city-departments/engineering/permits-agreements/encroachments
Laguna Hills	California	https://www.codepublishing.com/CA/LagunaHills/html/LagunaHills12/LagunaHills1212.html
Lanark	Illinois	https://codelibrary.amlegal.com/codes/lanarkil/latest/lanark_il/0-0-0-6929
Las Vegas	Nevada	http://www5.lasvegasnevada.gov/sirepub/cache/2/vzsqxyhq0jw1eqevk4idily/1574528211022022115125928.PDF https://cityofls.net/Portals/0/Files/Public-Works/Encroachment-Policy_2021-09-21_Res21-21.pdf?ver=Bo7ZAI_WUzj3rhHGqgsUvA%3D%3D
Lee Summit	Missouri	https://cityofls.net/Portals/0/Files/Public-Works/Encroachment-Policy_2021-09-21_Res21-21.pdf?ver=Bo7ZAI_WUzj3rhHGqgsUvA%3D%3D
Lemoore	California	https://codelibrary.amlegal.com/codes/lemooreca/latest/lemoore_ca/0-0-0-5329#JD_7-12C-1
Loveland	Colorado	https://library.municode.com/co/loveland/codes/code_of_ordinances?nodeId=TIT12STSIUPL_CH12.16USRI-W
Mancos	Colorado	https://library.municode.com/co/mancos/codes/municipal_code?nodeId=CH11STSIUPUR_ART6EN_S11-6-30WOENTOPR

Martinez	California	https://library.municode.com/ca/martinez/codes/code_of_ordinances?nodeId=CD_ORD_TIT12CIREPR_IEN
Mattoon	Illinois	https://codelibrary.amlegal.com/codes/mattoon/latest/mattoon_il/0-0-0-24600
Menomonie	Wisconsin	https://codelibrary.amlegal.com/codes/menomoniewi/latest/menomonie_wi/0-0-0-4545
Mercer Island	Washington	https://www.mercerisland.gov/sites/default/files/fileattachments/planning/page/1831/encroachmentapp.pdf
Metropolis	Illinois	https://codelibrary.amlegal.com/codes/metropolis/latest/metropolis_il/0-0-0-2732
Miamisburg	Ohio	https://codelibrary.amlegal.com/codes/miamisburg/latest/miamisburg_oh/0-0-0-12905
Midway	Kentucky	https://codelibrary.amlegal.com/codes/midway/latest/midway_ky/0-0-0-3152
Milwaukee	Wisconsin	https://city.milwaukee.gov/ImageLibrary/Groups/ccClerk/Ordinances/Volume-2/CH245.pdf
Minneapolis	Minnesota	https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT5BUCO_CH95PREN_ARTIGE
Mint Hill	North Carolina	https://library.municode.com/nc/mint_hill/codes/code_of_ordinances?nodeId=PTI1UNDEFOR_ART4ZO_S4_3COZO
Minturn	Colorado	https://library.municode.com/co/minturn/codes/charter_and_municipal_code?nodeId=MUNICIPAL_CODE_CH11STSIPUPR_ART11SNRE
Moore Haven	Florida	https://library.municode.com/fl/moore_haven/codes/code_of_ordinances?nodeId=PTIIGELE_CH66LADE_PT3DEDEIMST_ARTVTRSY_S66-27RI-W
Mt. Shasta	California	https://www.codepublishing.com/CA/MtShasta/html/MtShasta12/MtShasta1234.html
Murrieta	California	https://codelibrary.amlegal.com/codes/murrieta/latest/murrieta_ca/0-0-0-23445
Nantucket	Massachusetts	https://www.nantucket-ma.gov/DocumentCenter/View/18808/Encroachment-Policy-PDF
National City	California	https://library.municode.com/ca/national_city/codes/code_of_ordinances?nodeId=CD_ORD_TIT13STSIPUPL_CH13.12ENPEIN_MAREFASTRI-WOTUPUR
New Orleans	Louisiana	https://library.municode.com/la/new_orleans/codes/code_of_ordinances?nodeId=PTIICOOR_CH146STSOTPUPL_ARTXIIIENUPPR
New Smyrna Beach	Florida	https://library.municode.com/fl/new_smyrna_beach/codes/code_of_ordinances?nodeId=PTIICOOR_CH70STSOTPUPL_ARTIIST_S70-38OBENPUST
Newport Beach	California	https://www.newportbeachca.gov/government/departments/public-works/development-services/permits/encroachment-permits
Norfolk County	California	https://www.norfolkcounty.ca/government/clerk-council-services/encroachment-agreements/
Newport Beach	California	https://www.newportbeachca.gov/home/showdocument?id=2426
Newport Beach	Oregon	https://www.newportoregon.gov/dept/adm/documents/newportmunicipalcode.pdf
New Smyrna Beach	Florida	https://library.municode.com/fl/new_smyrna_beach/codes/code_of_ordinances?nodeId=PTIICOOR_CH70STSOTPUPL_ARTIIST_S70-38OBENPUST
Norwood	Ohio	https://codelibrary.amlegal.com/codes/norwood/latest/norwood_oh/0-0-0-28287
Oakbrook Terrace	Illinois	https://codelibrary.amlegal.com/codes/oakbrookterrace/latest/oakbrookterrace_il/0-0-0-52154
Okotoks	California	https://www.okotoks.ca/sites/default/files/2021-06/CMD%20P%203.8%20Encroachment%20Policy.pdf
Orange	California	https://library.qcode.us/lib/orange_ca/pub/municipal_code/item/title_12-chapter_12_64?view=all#title_12-chapter_12_64-12_64_010
Orinda	California	https://library.municode.com/ca/orinda/codes/code_of_ordinances?nodeId=TIT12STSIPUPL_CH12.08EN_ART1PERE_12.08.040ENPE
Palatka	Florida	https://library.municode.com/FL/Palatka/codes/Code_of_Ordinances?nodeId=PTIIMUCO_CH79TE
Park City	Utah	https://d3n9y02raazwpg.cloudfront.net/parkcity/5a800aaa-f031-11e9-9542-0050569183fa-01133467-6d34-44a8-a801-0746aa501208-1596236468.pdf
Palm Springs	California	https://www.palmspringsca.gov/government/departments/engineering-services/engineering-design/encroachment-agreements
Palo Alto	California	https://codelibrary.amlegal.com/codes/paloalto/latest/paloalto_ca/0-0-0-69087
Pasadena	Texas	https://library.municode.com/tx/pasadena/codes/code_of_ordinances?nodeId=COORPATE_CH32STSI_ARTVIIRI-WMA_S32-111EFDA
Payette	Idaho	https://www.cityofpayette.com/vertical/sites/%7B44867065-4476-41DD-91A9-F7FF564B033D%7D/uploads/1292_Policy_Governign_The_Management_Of_Right_Of_Way_Provision_Of_Telecommunication.pdf
Pflugerville	Texas	http://online.encodeplus.com/regs/pflugerville/search.aspx?keywords=encroach&x=11&y=19&cp=1&p=1&s=0
Pinellas Park	Florida	https://library.municode.com/fl/pinellas_park/codes/code_of_ordinances?nodeId=CO_CH14CIRI-W
Pinckneyville	Illinois	https://codelibrary.amlegal.com/codes/pinckneyville/latest/pinckneyville_il/0-0-0-3863

Pittsburgh	Pennsylvania	https://pittsburghpa.gov/domi/encroachment
Plymouth	Minnesota	https://library.municode.com/mn/plymouth/codes/code_of_ordinances?nodeId=CICO_CHVIIIRI-WMA_S800COSTALPUGR_800.02PURI-WRE
Portland	Oregon	https://www.portland.gov/sites/default/files/2022/trn-8.08-encroachment-manual.pdf
Quincy	Florida	https://library.municode.com/fl/quincy/codes/code_of_ordinances?nodeId=PTIICOOR_CH62STSIOTPUPL_ARTIINGE_S62-9ENSTSI
Raleigh	North Carolina	https://library.municode.com/nc/raleigh/codes/code_of_ordinances?nodeId=DIVICOGGEOR_PT12LIRE_CH1STPUWA_ARTASTO BEN
Riverbank	California	https://codelibrary.amlegal.com/codes/riverbank/latest/riverbank_ca/0-0-0-25405
Roanoke	Virginia	https://www.roanokeva.gov/DocumentCenter/View/3602/Encroachment-Permit-Application?bidId=
Rockledge	Florida	https://library.municode.com/fl/rockledge/codes/code_of_ordinances?nodeId=PTIICOOR_CH18STSIRI-WOTPUP
Ross	California	https://www.townofross.org/sites/default/files/fileattachments/town_council/meeting/619/agenda-item-18-ordinance-638-right-of-way.pdf
Saginaw	Michigan	https://codelibrary.amlegal.com/codes/saginaw/latest/saginaw_mi/0-0-0-4594
Saint Matthews	Kentucky	https://codelibrary.amlegal.com/codes/stmatthews/latest/stmatt_ky/0-0-0-1817
Salt Lake City	Utah	https://codelibrary.amlegal.com/codes/saltlakecityut/latest/saltlakecity_manual_ut/0-0-0-7675
San Bernadino	California	https://library.municode.com/ca/grand_terrace/codes/municipal_code?nodeId=TIT12STSIUPUL_CH12.10REENPE
San Diego	California	https://docs.sandiego.gov/municode/MuniCodeChapter12/Ch12Art09Division07.pdf
San Francisco	California	https://www.sfpublicworks.org/services/permits/major-encroachment
San Jose	California	https://library.municode.com/ca/san_jose/codes/code_of_ordinances?nodeId=TIT13STSIUPUL_CH13.37ENPE_PT3PETECO_13_37.310ENTECO
San Rafael	California	https://library.municode.com/ca/san_rafael/codes/code_of_ordinances?nodeId=TIT11PUWO_CH11.04ENPURI-W_11.04.040.070MIENPEELEN
Sarasota	Florida	https://www.sarasotafl.gov/home/showdocument?id=2724
Sausalito	California	https://www.codepublishing.com/CA/Sausalito/html/Sausalito10/Sausalito1056.html
Savannah	Georgia	https://www.savannahga.gov/DocumentCenter/View/20066/Application-Individually-Owned-Property?bidId=
Sea Pines	South Carolina	https://www.seapinesliving.com/process-for-encroachment-request-for-real-estate-closings/
Sierra Vista	Arizona	https://codelibrary.amlegal.com/codes/sierravista/latest/sierravista_az/0-0-0-16621
Simi Valley	California	https://library.municode.com/ca/simi_valley/codes/code_of_ordinances?nodeId=TIT5PUWE_CH35WITEFA_5-35.01PUIN
South Boston	Virginia	https://library.municode.com/va/south_boston/codes/code_of_ordinances?nodeId=PTIICOOR_CH46STSIOTPUPL_ARTIIEIN
Spokane	Washington	https://my.spokanecity.org/smc/?Chapter=12.02
Star City	West Virginia	https://codelibrary.amlegal.com/codes/starcity/latest/starcity_wv/0-0-0-6865
St. Cloud	Florida	https://www.stcloudfl.gov/DocumentCenter/View/29629/Fence-Covenant-and-Restriction-Easement?bidId=
Taft	California	https://codelibrary.amlegal.com/codes/taftca/latest/taft_ca/0-0-0-1032
Thousand Oaks	California	https://codelibrary.amlegal.com/codes/thousandoaks/latest/thousandoaks_ca/0-0-0-8020
Titusville	Florida	https://library.municode.com/fl/titusville/codes/code_of_ordinances?nodeId=PTIICOOR_CH17STSIOTPUPL_ARTIINGE_S17-1ENPURI-W
Twisp	Washington	https://www.codepublishing.com/WA/Twisp/html/Twisp12/Twisp1226.html
Vero Beach	Florida	https://library.municode.com/fl/vero_beach/codes/code_of_ordinances?nodeId=PTIILADERE_TITVIIIADE_CH71PURI-W_ARTIINGE_S71.03EN
Victor	Colorado	https://library.municode.com/co/victor/codes/municipal_code?nodeId=CD_ORD_CH11STSIUPUR_ART3ENINPURI-W
Virginia Beach	Virginia	https://library.municode.com/va/virginia_beach/codes/code_of_ordinances?nodeId=CO_CH33STSI_ARTVIENINPUSOTPUWAP_LPR_S33-113PRAPALEN
Wake Forest	North Carolina	https://www.wakeforestnc.gov/sites/default/files/uploads/public-works/business_row_policy.pdf
Wasilla	Alaska	https://wasilla.municipal.codes/WMC/12.16
Wayne	Michigan	https://codelibrary.amlegal.com/codes/wayne/latest/wayne_mi/0-0-0-41463

Webster City	Iowa	https://webstercity.com/government/departments/planning-zoning-inspection/inspection/encroachment-policy/#
Williamsburg	Virginia	https://library.municode.com/va/williamsburg/codes/code_of_ordinances?nodeId=PTIITHCO_CH15STSI_ARTIINGE_S15-1ENERPOFEBUET
Winner	South Dakota	https://codelibrary.amlegal.com/codes/winnersd/latest/winner_sd/0-0-0-2376
Winston-Salem	North Carolina	https://library.municode.com/nc/winston-salem/codes/code_of_ordinances?nodeId=PTIICOOR_CH74STSI_ARTIIIOB_S74-103ENAGPERENODAEN
Winthrop Harbor	Illinois	https://codelibrary.amlegal.com/codes/winthropharbor/latest/winthropharbor_il/0-0-0-37298
Whittier	California	https://library.municode.com/ca/whittier/codes/code_of_ordinances?nodeId=TIT12STSIPUPL_CH12.20ENEX
Worthington	Indiana	https://codelibrary.amlegal.com/codes/worthingtonin/latest/worthington_in/0-0-0-1965