

Open Space Inspection
Revised Preferred Policy
February 2010

Categories of Encroachment

Category A has been slightly revised to incorporate language provided from the Village attorney. Beginning in May, the Village will re-inspect all 16 of the currently identified Category A encroachments to ensure that they pose the level of liability as indicated by the below criteria.

Category A – Major Encroachments

- Injurious to public health and safety
- Negative impact on surrounding residents and the public
- Negative affect on adjacent property values
- Prohibits overland flow – adverse effects on water drainage
- Significant liability risk for the Village and property owners
- Limits Village access and/or maintenance of the open space
- Represents a significant investment

Examples include:

Fishing pier in Village detention pond
Platform and wall that obstructs overland flow
Permanent play structure near pond or on Village owned land
Large berm that diverts stormwater into neighbors yard

Category B – Intermediate Encroachments

- Limited impact on others
- No impact on adjacent property values
- Does not impeded overland flow
- May pose a small liability concern

Examples include:

Small or nonpermanent play structures
Vegetable garden structure with low walls
Outdoor landscape furniture like benches

Category C – Minor Encroachments

- Minimal to no impact on others
- Removable or temporary structures
- Little to no Liability
- Minimal investment
- Minimal partial encroachment

Examples Include:

*Decorative landscaping and gardens without structures
Non-permanent garden decoration
Horseshoe pits, potted plants, birdbaths*

Preferred Policy Alternative – Enforcement and Licensing

Category A Enforcement – Required Removal of Encroachment

The Village Attorney recommends the following enforcement process for Category A encroachments.

1. The Village will send a certified initial letter to the property owner demanding prompt removal of the encroachment and repair or restoration of the Village property within 90 days.
2. After 90 days, the Village will re-inspect the encroachments and issue ticket/citation as allowed per Village Code, imposing fines for each day the encroachment exists.
3. If the encroachment is not removed after 15 days of fines, the Village will remove the encroachment or file a complaint in Circuit Court of injunction, trespass and ejection.

Category B and C Enforcement – Removal Request with Licensing Option

Amnesty Period: All properties with encroachments as recorded by the Village through the end of 2009 are covered under the amnesty period, which provides a licensing option for property owners with a B or C encroachment (subject to license agreement with the Village). All properties with encroachments as recorded by the Village after 2009 are required to remove the encroachment per the enforcement guidelines outlined above for Category A encroachments. Open space inspections after 2009 will occur on a complaint driven basis only, coordinated through the Development Services Department. No properties with encroachments on lands purchased with State funds or grants are eligible for licensing due to the legal requirements attached to the funding. Examples of these properties include Stellwagen Farm, Schumack Farm and Timberlake.

Enforcement Process for Category B and C Encroachments

1. The Village will send a certified initial letter to property owner regarding the encroachment that will include at a minimum the following information:
 - Inspection Memo and Photos
 - Form for resident to choose removal or licensing option
 - Opportunity for Appeal
 - 90 day response period, after which the Village will pursue removal of the encroachment.
2. The Village will track property owner responses using a database in order to determine what licenses need to be issued, what encroachments were removed and who did not respond.

- If a property owner selects removal of the encroachment, the Village will re-inspect properties to ensure that encroachments were removed.
 - If encroachment is removed – file will be closed.
 - If encroachment is not removed, a follow up certified letter will be sent offering licensing or removal within 90 days.
 - If issue still not resolved, fine will be issued.

- If the property owner appeals the encroachment claim, the Village will re-inspect the properties and may require a survey to accurately locate the property line.
 - Property owners will be responsible for staking property line and providing plat of survey.
 - Village will re-evaluate encroachment

- If the property owner selects licensing, the Village will:
 - Work with the Village attorney to prepare a draft license agreement for the property.
 - Work with the property owner to ensure that the license is signed, attorney fees are paid, licensing fees are paid and a current certificate of insurance is on file.
 - Renew licenses with property owners on an annual basis.
 - Re-inspect properties with licenses on a yearly basis to ensure that the level of encroachment has not increased.
 - If encroachment has not increased, license will be renewed.
 - If encroachment has increased, license will be revoked and removal of encroachment required.

The attached draft license includes many of the details that will be part of any agreement between the Village and the property owner. Any encroachments licensed by the Village will be reinspected on a yearly basis to confirm that the encroachment has not increased in severity. The property owner will have to pay the annual licensing fee and also provide a certificate of insurance to the Village covering the encroachment. The Village retains the right to request the removal of the encroachment at any time, for any reason, during the license period.

As stated previously, no new encroachments are eligible for licensing and the Village will pursue removal of all future encroachments per the guidelines set forth above for Category A encroachments. Licensing is only available to Category B and C encroachments as recorded by the Village at the end of 2009, as long as those encroachments are not on land funded by state monies or grants.

**LICENSE AGREEMENT FOR USE OF A VILLAGE _____
FOR CONSTRUCTION OF A PRIVATE _____ AT _____**

This License Agreement is entered into by and between _____, _____, Orland Park, Illinois (the "Licensee"), and the VILLAGE OF ORLAND PARK, 14700 S. Ravinia Avenue, Orland Park, Illinois, an Illinois home-rule municipal corporation (the "Licensor").

WHEREAS, Licensee is the Owner of a parcel of real property in Orland Park, Illinois, commonly known as _____, Orland Park, Illinois, legally described as follows:

P.I.N. _____; and

WHEREAS, Licensor is the Owner of a _____ located within its municipal boundaries and commonly known as _____, which is adjacent to the Licensee's property; and

WHEREAS, the current measurement of the _____ adjoining Licensee's property; and

WHEREAS, the Licensee desires to obtain, and the Licensor desires to grant, permission to _____ adjacent to Licensee's property (the "Premises"), subject to the terms and conditions set forth below; and

WHEREAS, Licensee desires to use the _____ for _____ subject to the terms and conditions set forth below; and

WHEREAS, the Licensor desires to allow Licensee to utilize the Premises for such purposes, subject to the terms and conditions set forth below in this License Agreement; and

WHEREAS, the Licensor, in its sole discretion, may determine in the future to utilize its _____, including the Premises, for any municipal purpose, and the Licensee agrees that said _____ shall be removed at Licensee's cost and that Licensee will not be allowed exclusive use of said _____ in the event that this Agreement is terminated by Licensor; and

WHEREAS, the Licensor, a home rule Illinois municipal corporation, has the authority to enter into this License Agreement pursuant to its home rule powers as provided by Article VII, Sections 6 and 10(a) of the Illinois Constitution of 1970, and finds that entering into this Agreement is in the best interests of the Village of Orland Park, its residents, and the general public.

NOW, THEREFORE, in consideration of the mutual covenants expressed herein, Licensor and Licensee agree as follows:

1. **Premises:** Licensor grants a License to Licensee for use of a Village _____, commonly known as _____ in Orland Park, Illinois (hereinafter referred to as the "Premises"). The Premises are as marked on the diagram attached hereto as EXHIBIT A and made a part hereof.
2. **Term:** The term of this License shall be ten (10) years, commencing on the date on which the last of the parties signs this License Agreement. This Agreement shall terminate upon expiration of the ten-year period unless sooner terminated by the Licensor.
3. **License Fee:** The annual fee for the Premises shall be seventy-five dollars (\$75.00) for the term of the Agreement.
4. **Use:** The Licensee may construct a _____ upon the Premises for _____. No other structures or improvements shall be allowed to be constructed on the Premises. Said _____ located on the Premises shall conform to all zoning, licensing, and other code provisions and regulations of the Village of Orland Park, unless a variation is granted to Licensee.
5. **Assignment or Transfer:** This License is personal to Licensee, and Licensee shall not assign or transfer this License Agreement without the express prior written consent of the Corporate Authorities of the Village of Orland Park, which may be withheld for any reason in the discretion of the Corporate Authorities of the Village of Orland Park.
6. **Maintenance:** Licensee accepts the Premises in "As Is, Where Is" condition as of the effective date of this License, and acknowledges that upon delivery of possession of the Premises to Licensee the same was in good order, condition and repair.

Licensee shall, at his/her/their sole cost and expense, be responsible for any and all costs of installing and removing (if necessary), the _____ on the Premises undertaken pursuant to this License Agreement, all maintenance and upkeep of the Premises during the term of this License Agreement, and any and all repairs or damage to the Premises arising from the use, misuse or damage to same by Licensee, their successors, assigns, and the public. Upon termination of this License Agreement by lapse of time or by its termination by Licensor at any time, Licensee shall promptly re-deliver possession of the Premises, with the _____ removed, to Licensor in good order, condition and repair.

7. Removal: Licensor reserves the right to reassert its right of entry upon the Premises at any time and for any purpose whatsoever. Should Licensor determine that the License is no longer in its best interest, the License will be terminated, and any structures erected thereon, including _____, or other improvements, must be promptly removed by Licensee at his/her/their cost.

8. Governmental Regulations: Licensee shall comply with all applicable requirements of federal, state and local regulatory authorities, including the applicable provisions of the Village Code and Village Land Development Code, with respect to the installation of a _____, and use of the Premises.

9. Indemnity/Hold Harmless: Licensee shall protect, indemnify, save and hold forever harmless Licensor and/or its officers, appointed and elected officials, Village President and Board of Trustees, employees, volunteers, attorneys and agents from and against any and all liabilities, obligations, claims, damages, penalties, causes of action, costs and expenses (including reasonable attorney's fees and costs of defense) brought by any person, including Licensee and his/her/their officers, officials, employees, contractors, subcontractors, volunteers and agents, arising out of, connected with, or in any way associated with Licensee's use of the Premises, any of the Licensor's property, or with this License Agreement.

10. Insurance: Licensee warrants that he/she/they will maintain homeowner's insurance coverage with property damage, personal injury and death coverage in an amount not less than \$500,000.00 during the term of this Agreement, and that such policy shall cover the Premises for which this Agreement grants Licensee the License.

The insurance coverage of Licensee shall name the Village of Orland Park and its officers, appointed and elected officials, Village President and Board of Trustees, employees, volunteers, attorneys and agents as additional insureds. Licensee shall keep a current certificate of insurance showing the premium has been paid in full on file with the Village of Orland Park at all times during the term of this Agreement.

11. Binding: This License Agreement shall be binding upon, apply to and inure to the benefit of Licensee and Licensor only.

12. Effective Date: This License Agreement shall become effective upon the date of execution by the last of the parties as set forth below.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

VILLAGE OF ORLAND PARK

Orland Park, Illinois

By: _____

Its: _____

Date: _____

Date: _____

Attest:

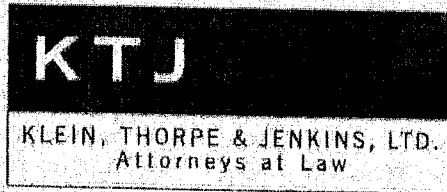
Attest:

By: _____

By: _____

Date: _____

Date: _____



20 N. Wacker Drive, Ste 1660
Chicago, Illinois 60606-2903
T 312 984 6400 F 312 984 6444

DD 312 984 6408
ekfrier@ktjlaw.com

15010 S. Ravinia Avenue, Ste 10
Orland Park, Illinois 60462-5353
T 708 349 3888 F 708 349 1506

www.ktjlaw.com

January 25, 2010

Ms. Kimberly T. Flom
Department of Development Services
Village of Orland Park
14700 S. Ravinia Avenue
Orland Park, Illinois 60462

Re: **Encroachments Upon Village Owned Property,
Easements or Rights-of-Way**

Dear Kimberly:

You have provided me with extensive material, including photographs and inspection reports, documenting nearly 100 instances where property owners adjacent to Village property (such as water detention areas, open space sites, rights-of-way and easements) have built structures upon Village property or otherwise encroached upon Village property for their personal use. These encroachments are as serious as retaining walls, berms, fishing piers and permanent play structures and as minor as birdbaths, landscaping and gardens. Pursuant to Village guidelines, you and the Department staff have categorized these encroachments as A, B or C encroachments with Category A being the most serious of encroachments affecting adjacent property values, creating significant Village liability concerns due to health and safety issues or adversely affecting proper stormwater drainage. The least offensive encroachments are Category C which involve removable or temporary facilities, little or no Village liability concerns and no adverse impact on nearby property owners.

The question you have posed is what, if anything, should be done by the Village to either totally eliminate the encroachments or allow some (the least offensive) to remain in place under certain conditions. I checked with a number of the municipalities represented by our firm and reviewed their policies and procedures for dealing with this issue. Of course, there is no uniform or standard procedure and a variety of remedies are utilized by these communities. Based on my review, it is my suggestion that there be some minor adjustments or revisions to the three categories, and the category will govern what remedy should be undertaken.

The highest priority (Category A) should be reserved for those encroachments that should not be allowed and must be removed. The encroachments in this Category involve:

- a) Those that are clearly injurious to public health and safety;
- b) Adverse effects on water drainage or create potential flooding;

Ms. Kimberly T. Flom

Page 2

January 25, 2010

- c) Demonstrable adverse effects on adjacent property values;
- d) Significant liability risk for the Village as owners of the property.

Remedies:

- a) Initial letter to the property owner demanding prompt removal of the encroachment and repair or restoration of the Village property;
- b) Ticket/citation imposing fines for each day the encroachment exists (Village Code, Title 3, Chapters 1 and 2);
- c) Complaint filed in Circuit Court for injunction, trespass and ejectment demanding removal of the encroachment and damages;
- d) If the only Village concern is the potential for Village liability, the Village could sell the area of encroachment to the property owner or license the area whereby the property owner assumes all liability and risk associated with the encroachment.

The next category in order of priority would be Category B encroachments which involve none of the Category A factors but still result in some risk of liability to the Village. In such cases, a subjective judgment must be made as to whether the encroachment warrants removal or whether a license agreement with the property owner would be appropriate. Such a license agreement would not only require the licensee (property owner) to assume all risk and liability associated with the encroachment but would require the property owner to completely remove the encroachment and restore the property to its original condition upon notice from the Village. Such a license agreement would need to be recorded so that future property owners would be aware of the encroachments and their obligations under the license.

Finally, there are minor encroachments (Category C) which involve none of the Category A or B factors and present little or no liability risk to the Village. In such cases, the license would be the appropriate step to take if the property owner is unwilling to remove the encroachment at this time.

The Village must be consistent in its approach to these encroachments, and in all cases either compel removal, sell the subject area to the property owner or license the area to the property owner. It is important to note here that the Village property encroached upon be identified as owned outright by the Village, right-of-way or easement. The reason is that only property owned by the Village in fee is saleable by the Village, while right-of-way or easement areas cannot be sold. Additionally, a license may not be permissible, and the encroachment must

Ms. Kimberly T. Flom

Page 3

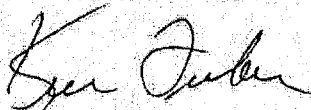
January 25, 2010

be removed because to allow the encroachment to remain would violate the terms of the easement (such as a conservation easement) or dedication (such as solely for open space or park purposes) or might jeopardize the tax exempt status of the property. Also, for future consideration, you may wish to require that the boundaries of all property conveyed or dedicated to the Village be clearly marked by fences, signs, etc., to let adjacent property owners know where their property limits are.

I trust the above outlines suggested ways to deal with these encroachments. Should you have any further questions, feel free to call me at any time.

Very truly yours,

KLEIN, THORPE AND JENKINS, LTD.



E. Kenneth Friker

K T JKLEIN, THORPE & JENKINS, LTD.
Attorneys at Law20 N. Wacker Drive, Ste 1660
Chicago, Illinois 60606-2903
T 312 984 6400 F 312 984 6444DD 312 984 6408
ekfrier@ktjlaw.com15010 S. Ravinia Avenue, Ste 10
Orland Park, Illinois 60462-5353
T 708 349 3888 F 708 349 1506

www.ktjlaw.com

February 3, 2010

Ms. Kimberly T. Flom
Department of Development Services
Village of Orland Park
14700 S. Ravinia Avenue
Orland Park, Illinois 60462**Re: Encroachments Upon Village Owned Property,
Easements or Rights-of-Way**

Dear Kim:

Following up on my conversation Monday with Bob Sullivan regarding clarifying the opinions expressed in my January 25, 2010, letter on the above matter, I would strongly advise the removal of all encroachments which increase the Village's general liability, adversely affect storm water/drainage flow or which adversely affect market values of nearby properties. As to the liability issue, although the Village is protected to a point by its general liability insurance coverage, this is very expensive coverage and any additional claims might well raise the Village's premium costs. Examples of these kinds of potentially high liability encroachments are recreation equipment, gazebos, retaining walls and piers or other structures extended into retention ponds. Now that most if not all existing encroachments have been photographed and documented in the Village's files, the Village can be said to have actual knowledge of these encroachments thereby subjecting the Village to potential liability should an accident occur due to the encroachments. If such encroachments are not actually known to the Village but are in existence for a significant period of time, say over one year, the Village can be held to have "constructive" notice, meaning the hazardous condition has been there long enough for the Village to have known about it. Under existing Illinois case law, liability can be found on the part of a municipality if the Village had either actual or constructive notice of the condition.

As to encroachments which are deemed to be non-hazardous with little or no potential Village liability (such as a garden or minor landscaping and plantings), the idea of a license agreement with the property owner is the best approach as it shifts any liability to the property owner and requires removal of the encroachment by the owner upon reasonable written notice from the Village. Although in my prior letter, I mentioned the possibility of a sale of the area of encroachment to the property owner, this would most likely be a solution in only those rare cases where the property was not dedicated or conveyed to the Village for specified purposes or if the property was not purchased by the Village for open space or conservation purposes.

My recommendation is that a policy be developed for dealing with all known encroachments so that no precedent can be set. Either the encroachment must be removed or a license agreement entered into. Once exceptions are made and encroachments are allowed to exist, the Village would be subject to a claim of "selective enforcement." This would thwart the

Ms. Kimberly T. Flom

Page 2

February 3, 2010

Village's efforts and result in the liability concerns we are seeking to avoid. Keep in mind, although most encroachments are caused by property owners immediately adjoining the Village property, it is just as likely that an owner, seeing his/her neighbor allowed to encroach, could appropriate Village property for his/her own use blocks away. The precedent has then been set.

Please contact me if any additional information or clarification is desired.

Very truly yours,

KLEIN, THORPE AND JENKINS, LTD.



E. Kenneth Friker

cc: Bob Sullivan, Director of Planning