

Civic Agenda: How rights of way work in Whatcom County

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By JACK LOUWS — COURTESY TO THE BELLINGHAM HERALD

Last month I wrote to you about the bridges of Whatcom County. This month I'm going to focus on an aspect of county government about which citizens commonly have questions. That is the public right of way (ROW), associated roads and how they relate to their adjoining properties. Let's start by understanding what ROW is, and isn't, how it came to be, and how it is separate from the physical roadway.

The modern concept of ROW dates back to English common law where the king had only right of passage over his subject's property. This common law rule was soon recognized and applied by American courts, including the Supreme Court in 1832, establishing that when a public road is created the owner parts with the right of passage for the public but does not part with the ownership of the underlying property and associated rights (timber, mineral, grazing, etc).

The county is the steward of the public trust for this right of passage. The corridor of this public right of passage is commonly called the "right of way". In addition to the right of passage, other public uses can include utilities such as sewer, water, phone and power as well as drainage facilities such as culverts, levees, ditches and detention ponds.

A common misconception is that the physical roadway constitutes the limits of the ROW. The ROW is just that, a right, not a physical entity. The roadway is the physical public improvement made within the ROW. That means the county has exercised its ROW by construction, maintenance and operation of a road or other feature for public use.

Any portion of the ROW not being utilized by this public use is considered "unimproved ROW." This unimproved ROW is available for use by the land owner as long as it does not preclude the future public use. This means that abutting landowners can landscape, garden or have other uses that do not require any additional permitting by the county and do not create a permanent impediment to future public use. Many persons are surprised when they realize that portions of their front yards are actually unimproved ROW. This means they not only have use of this area but are required to maintain it. For example, the county does not mow the portion of their lawn that is within the unimproved ROW. This also means that the public does not have the right to access this area; it is still the private front yard of the land owner until such time as the county exercises its ROW.

The first ROW's in the Oregon territory, Washington territory, and finally the state of Washington were created through petition and establishment. Landowners petitioned the board of county supervisors to design and create a road over their property for public use. This process is considered a grant of a 60-foot width ROW corridor unless the petition specifically states a different width. In the early history of county governments most of these roads were created to transport produce and livestock to and from market. ROW's can also be acquired by the county through the dedication of ROW to the county when land is subdivided. This is a common practice in counties today.

If additional ROW along an existing county road is required for reconstruction or re-alignment of the roadway, it is commonly purchased from a willing seller or by court-ordered sale through condemnation. ROW also can be acquired through legal proceedings in superior court such as prescription or quiet title. These methods are essentially acquiring the ROW through continual historic public use.

It is also common that portions of previously established ROW can be re-established by one of the above methods. An example of this is a portion of Birch Bay Drive.

This ROW was originally established in 1877 as County Road No. 22, known as the Semiahmoo Post Road. It was originally established as a 30-foot-wide corridor. This was subsequently re-established in 1884 as County Road No. 46 with a 60-foot ROW corridor. This ROW was mapped and monumented in 1916. These monuments were recovered and re-established in 1930, 1974 and 2012.

Whatcom County currently operates and maintains 941.41 miles of public roadway within improved ROW. There is nearly as many miles of unimproved ROW reserved for future public use.

In 2012 Whatcom County reviewed, issued and inspected 1,051 permits to allow for private construction within ROW. These range from something as simple as construction of a new driveway to connect to an existing road to as complex as new roadways being constructed by a developer to be dedicated to the county upon completion. These permits are referred to as "Revocable Encroachment Permits" and can be obtained from Public Works, Engineering Services Division, located at the county facility at the corner of Northwest Avenue and Smith Road.

The term "revocable" means that if the public roadway needs to be re-constructed or re-aligned, the private construction allowed under the permit will not preclude the public use of the ROW.

Per Washington state law the county engineer is the office of record for all documents related to ROWs and county roads, including their establishment. Your county engineer and staff are there to help you determine how much ROW the county has abutting your property, how it came into existence, and provide all appropriate recorded documents.

If you have any questions regarding the Whatcom County transportation system please visit our website at whatcomcounty.us (on the home page select "General Government Services" and then "Roads/Public Works"). You also can contact the Public Works Department at 360-676-6692 or the county engineer, Joe Rutan, at 360-715-7450.

Next month I'll be providing a summary of my state of the county remarks. You can contact my office at 360-676-6717 or by email: jlouws@co.whatcom.wa.us.

This is one of a series of monthly Civic Agenda reports The Bellingham Herald invited Whatcom County Executive Jack Louws to provide to share updates about Whatcom County issues and projects. He invites citizens to contact him at 360-676-6717 or jlouws@co.whatcom.wa.us.