



Mendocino County

Legislation Text

File #: 17-0304, **Version:** 1

To: Board of Supervisors Health, Safety, and Resources Committee

From: Transportation

Meeting Date: May 8, 2017

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Time Allocated for Item: 30 min

Agenda Title:

Discussion and Possible Direction to Staff Regarding Mendocino County Code Section 15.20 "Encroachment Upon County Highways" and Possible Encroachment Permit Policy Considerations (Referred from the March 7, 2017 Board of Supervisors Meeting)

Recommendation:

Receive information from staff and provide further direction to staff as appropriate.

Previous Board/Board Committee Actions:

On March 7, 2017, the Board of Supervisors referred this matter to Committee for review.

Summary of Referral:

Many jurisdictions require encroachment permit applicants to provide proof of liability insurance with their applications, which, to date, has not been a requirement by the County of Mendocino. Mendocino County Department of Transportation (MCDOT) has been asked to provide information for discussion on whether or not proof of insurance should be required of encroachment permit applicants. Currently, MCDOT evaluates encroachment permit applications using applicable policies and assesses the potential impact of proposed encroachments with regard to the County Road and the operation and safety of traffic. MCDOT can require an encroachment permit applicant to post a bond estimated to cover the cost of any repair or damage to County Road facilities during construction or maintenance activities covered by the permit. MCDOT currently only requires this when an applicant has shown a poor record of compliance or a lack of willingness to restore the County Road.

MCDOT's current encroachment permit process is modeled after Caltrans' permit process that does not require proof of liability insurance, with the exception of special events or commercial filming. Rather than an insurance requirement, Caltrans includes an indemnity clause in the Encroachment Permit General Provisions attached to each permit. This clause indemnifies and holds harmless the agency for any claims for damages that arise out of the permitted encroachment, both during the construction and after the work is complete. MCDOT also includes an indemnity clause in its General Provisions, which could be reviewed and amended as needed as an alternative or in addition to an insurance requirement.

Since this matter was referred to committee for review, MCDOT has done additional research. In a survey of

surrounding counties and municipalities, including Humboldt and Sonoma Counties and the City of Ukiah, among others, it was found that insurance requirements for encroachment permits are common, with levels of coverage requirements ranging from \$1,000,000 to \$2,000,000 per occurrence. Several jurisdictions, but not all, include an exemption for utilities installing or maintaining their facilities. Additionally, MCDOT sent a letter to annual permit holders requesting information on insurance coverage, and ability to include County of Mendocino as an additional insured if required, to which only a few responses were received. Of those responses, it appears most would be agreeable to such a requirement. One exception was Pacific Gas & Electric, who stated they would be able to provide a certificate of self-insurance but would be unable to include the County as an additional insured.

With respect to utilities, MCDOT does not specify utility construction standards, nor does it have the expertise to do so. Utilities using the right-of-way are solely responsible for the design, installation, construction, and maintenance of their facilities and bear all responsibility for their associated activities.

These utilities and contractors have public standing in the right-of-way by virtue of past franchise agreements with the County or because they became Special Districts recognized by the County with some form of past County procedures and consent. California Streets and Highways Code does give MCDOT the authority, through the permitting process, to set conditions for encroachment activities within the public right-of-way with regard to protecting the County Road and the operation and safety of traffic. MCDOT standards include trench restoration, minimum depth cover, and surface restoration. MCDOT does not supervise or manage permittee operations; they are solely responsible and liable for their activities. MCDOT only negotiates with utilities on changes to the placement of surface obstructions with regard to traffic operations and the permittee is subject to inspection and certification of compliance with road standards.

Although many large utilities and contractors may not be adversely affected by an insurance requirement, it is important to recognize that some small businesses, utilities or homeowners may be financially burdened as a fee is often required to add an additional insured to their policy. Additionally, as discussed by Supervisor Gjerde at the Board of Supervisors meeting on March 7, 2017, one potential concern is whether an insurance requirement might overburden residents, contractors and utilities and hinder their ability to conduct business or complete projects.

In consultations with Risk Management, it was recommended the County implement a policy to provide protection from liability related to encroachment permits, either by requiring insurance, reviewing and improving the current indemnification clause of the General Provisions, or both. Risk Analyst, Heather Correll, believes \$1,000,000 in liability coverage per occurrence would be sufficient and that requiring more than that would be excessive in most cases. Another option, as some jurisdictions have done, would be to allow the Road Commissioner (Director of Transportation) to set minimum limits as deemed necessary for individual projects, which Risk Management also feels would be appropriate. In any case, it is the opinion of Risk Management that the County would want to be named as additional insured on any required insurance policy. In the case of a self-insured entity, a letter of self-insurance, combined with an indemnification agreement, would be sufficient in place of an insurance certificate with the County named as additional insured.

It is also the opinion of County Counsel that the County would be within its legal limits to amend County Code to include an insurance requirement for encroachment permits. The County has an interest in seeing that it does not become liable to members of the public because of excavation and placement of facilities in a County road. Requiring insurance is one method of protection and is useful in that there is an automatic policy in place. Indemnification provisions are useful, but are only as financially strong as the person or entity signing the indemnification provision.

As many other jurisdictions have already adopted insurance requirements and without strong opposition or legal arguments in response to MCDOT's inquiries, it appears such a policy implementation is possible pending resolution of the policy issues mentioned above. MCDOT requests further direction on how to proceed on this

matter.

Supplemental Information Available Online at: N/A

Fiscal Impact:

Source of Funding: N/A

Budgeted in Current F/Y: N/A

Current F/Y Cost: N/A

Annual Recurring Cost: N/A

Supervisory District: All

CEO Liaison: Janelle Rau, Deputy CEO

CEO Review: Yes

Comments: