



KOUGA

local municipality

Good Governance through Service Excellence

**KOUGA MUNICIPALITY
DRAFT WAYLEAVE BY-LAW
FOR PUBLIC COMMENT**

**OPEN FOR INSPECTION AND COMMENTS FROM
15 SEPTEMBER 2022 – 14 OCTOBER 2022 AT 15H00**

KOUGA MUNICIPALITY: WAYLEAVE BY-LAW

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Purpose:

- A. To provide a regulatory authority for the application, construction, installation, implementation, and maintenance of fibre-optic and telecommunication infrastructure within the jurisdiction of the Kouga Local Municipality;
- B. To provide a formalized structure for the application for municipal permits and licenses to commence work and reserve control over telecommunication infrastructure, installed or brought onto municipal land or infrastructure
- C. To minimize damage to municipal infrastructure and services, and reduce the risk of injury and inconvenience caused to the community as a result of the construction or installation of fibre optic or telecommunication infrastructure installed or brought onto municipal land or infrastructure ; and
- D. To prescribe punitive measures for non-compliance with this by-law.

Preamble:

WHEREAS section 156(1) of the Constitution of the Republic of South Africa, 1996 confers on municipalities the executive authority and right to administer local government matters set out in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution;

WHEREAS Part B of Schedule 4 to the Constitution lists municipal planning as a local government matter;

WHEREAS section 156(1) of the Constitution provides that the municipality has executive authority in respect of and has the right to administer the local government matters as listed in Part B of Schedule 4 of the Constitution.

WHEREAS section 156(2) of the Constitution empowers municipalities to make and administer laws for the effective administration of matters that it has the right to administer;

WHEREAS Parliament has enacted the Spatial Planning and Land Use Management Act, 2013(Act 16 of 2013), the Eastern Cape Provincial Legislature has enacted the Eastern Cape Provincial Spatial Development Framework, and the Kouga Municipality has adopted a Spatial Development Framework, which among other things set out principles which apply to the use and development of land;

WHEREAS the Kouga Local Municipality intends to regulate construction works pursuant to the development and maintenance of telecommunication infrastructure within its geographical area of jurisdiction

WHEREAS telecommunications service providers and the Kouga Local Municipality need to work in cooperation to ensure that fibre optic and telecommunication infrastructure development conforms with the applicable statutory requirements and realization of the municipality's duties to the community, as a local government authority,

AND WHEREAS the Electronic Communications Act no.36 of 2005 provides for the granting of licences and new social obligations and makes provisions for the regulation of electronic communications services, electronic communication network services and broadcasting services.

AND NOW, THEREFORE, BE IT ENACTED by the Council of the Kouga Local Municipality, as follows:

CHAPTER 1: INTERPRETATION AND APPLICABILITY

1. Interpretation and definitions

In these by-laws, the following words shall have the following corresponding meaning:

"Applicant" means the person applying for a wayleave, who if granted will become the wayleave holder.

"Backfilling" refers to the replacement of the structural layers in the trench or excavation and includes the base, subbase, selected subgrade, and subgrade, but excludes the surfacing (see Reinstatement).

"Certificate of Completion" means the document issued by a suitably qualified Engineer as proof that Work in the public road reserves has been completed according to the specifications of this document.

"CIBD" means the Construction Industry Development Board established in terms of the Construction Industry Development Board Act, 2000 (Act No. 38 of 2000).

"Contractor" means a natural person or juristic entity that undertakes to provide building materials, plans, drawings, labour, and perform construction services pursuant to the work described in the wayleave application.

"Council" means the Kouga Municipal Council established by Provincial Notice No. 6770 of 2000 dated 1 October 2000, as amended, or its successor in title, and any committee or person to which or whom an instruction has been given or any power, function or duty has been delegated or sub-delegated in terms of, or as contemplated in, section 59 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000).

"Municipal Area" means the jurisdiction area of the Kouga Local municipality.

"Municipality" refers to the Kouga Local Municipality and includes the Council, any executive councillor, or committee established by the Municipality, or any employee thereof, or duly authorized agent thereof acting in connection with this By-Law by virtue of a power vested in the Municipality and delegated to such employee or agent.

"Municipal property" means land, structures, conduits, or any other material objects fixed to or positioned on, in or under land owned by the Municipality, including but not limited to:

(a) roads and road reserves;

- (b) pavements, curbs, pedestrian walks, and cycle paths;
- (c) drainage facilities;
- (d) underground ducts, pipes conduits and tunnels;
- (e) poles, gantries, signs, and similar structures;
- (f) other high sites such as water towers, buildings, masts, etc;
- (g) municipal water and sewer lines;
- (h) municipal utility facilities;
- (i) municipal traffic signals and signs;
- (j) street lighting poles and similar street installations including overhead cables;
- (k) trees on the municipal property;
- (l) land and buildings owned by the municipality; and
- (m) any other structure owned by the municipality.

"Person" shall be interpreted to refer to either a natural person or a juristic person.

"Qualified Engineer" means a person registered as a Professional Engineer/Technologist in terms of the Engineering Professions Act, 2000, who is registered with ECSA and appointed and funded by the Wayleave Holder to ensure compliance with the Conditions of Approval of the Wayleave.

"Public Road Reserve" means the full width of a public road and includes both the verge areas and the roadway.

"Reinstatement" refers to replacing the bituminous surfacing, paving blocks, or grass, as applicable, in the case of roads, footways, and verges.

"Service Agency" means any municipal department, other organ of state, public agency or company that utilizes municipal property to supply a public service.

"Service Coordinator" means the official appointed or otherwise delegated by the Council with the responsibility to carry out the administrative functions of receiving and processing applications for wayleaves, obtaining comments from the various internal and external service agencies, and following the decision by the Council, conveying this decision in writing to the applicant, namely to approve with conditions, or reject with reasons, any application, and to provide record-keeping of each application and installation, provided that this by-law will not be interpreted to prohibit the Council to delegate to the Service Coordinator the authority to decide on applications submitted in terms of this by-law.

"Service Information" means public service infrastructure positioned or installed above the ground, on the ground, and below the surface of municipal property, and includes electrical and gas infrastructure, road, stormwater, water infrastructure, sanitation services, environment facilities, or any other utilities or services.

"Site" means a property, which includes the area of any building, yard, courtyard, or garden on an erf and in relation to FAR, coverage and parking calculations, the whole of the area registered as an erf or other piece of land including the area of any servitude registered over such an erf or other piece of land.

"Wayleave" is an easement consisting of written approval and permission granted to carry out Work on Municipal Property. A Wayleave is issued by the responsible Service Coordinator. A Wayleave authorizes a Fibre Network Operator or a Telecommunication Provider to construct and install telecommunications services on Municipal land; and

"Work" refers specifically to construction or maintenance work done by a Contractor in respect of a Wayleave.

2. Application

This By-law applies to every person who carries out work in a road reserve of a municipal road and includes an internal municipal department, an organ of state other than the Municipality, a service agency, and a contractor.

CHAPTER 2: WAYLEAVES

3. Application process for the undertaking of work on municipal property

- (1) No person may undertake any work on municipal property unless that person has obtained a written wayleave approval from the Municipality before the undertaking of such work.
- (2) An application for a wayleave shall be made to the Municipality on the prescribed wayleave application form and upon payment of the prescribed fee.
- (3) The duly completed application form for a wayleave must be accompanied by –
 - (a) Confirmation of a written request made to the relevant department at the Municipality for Service Information at the geographical location where the work is intended to be undertaken;
 - (b) An acceptance of public liability and indemnification of the Municipality against all forms or risk pursuant to, or likely to result from, the undertaking of work described in the wayleave;
 - (c) Confirmation of public liability insurance cover by an approved registered financial services provider no older than 14 days from the date of the application, in an amount determined by the Municipality, in its discretion, having regard to –

- I. the nature and scope of the work,
- II. the proximity to public roads and private property,
- III. the risk of injury to the public, and
- IV. any other relevant factor,

which insurance cover shall remain active for the duration of the work;

- (d) A copy of the applicant company's registration documents depicting the current active directors or members (in the case of juristic persons), or a copy of the identity document of the applicant (in the case of natural persons);
- (e) A resolution by the board of directors of the applicant, resolving that the applicant intends to apply for a wayleave to undertake the work and authorizing a named individual to sign the necessary documents on behalf of the applicant (in the case of juristic entities);
- (f) Proof of the applicant's primary place of business (in the case of juristic entities), or place of residence (in the case of natural persons);
- (g) The particulars of the appointed Contractor, with proof of the Contractor's Construction Industry Development Board (CIDB) registration;
- (h) Proof that an environmental impact assessment as required in the National Environmental Management Act, 1998 (Act 107 of 1998) was undertaken, if applicable;
- (i) An assessment of the health and safety risks to the public and the particulars, including the contact details, of the representative responsible for ensuring that health and safety guidelines are being adhered to;
- (j) A detailed planning program for the work, including the commencement and completion dates for each phase of the work;
- (k) A site layout plan, engineering plans, proposed building plans indicating proposed services dimensioned from either erf boundary or curb line, and details of proposed and existing services and structures;
- (l) If the work is likely to have an impact on the flow of traffic, then a traffic control plan showing how vehicular and pedestrian traffic will be accommodated during the execution of the work; and
- (m) Proof of payment of the applicable fees and tariffs.

4. Additional requirements for wayleave applications for telecommunication mast constructions and fibre-optic cable infrastructure installations

(1) Applications for the installation or construction of telecommunication masts infrastructure shall be accompanied, in addition to the items listed in section (3) above, by the following-

- (a) A zoning certificate, if necessary;
- (b) The site coordinates;
- (c) A radiation frequency report by a qualified person and approved by ICASA;
- (d) A copy of the title deed of the property on which the TMI is to be constructed or installed;
- (e) A copy of the lease agreement, if the property is leased;
- (f) Comments by the residents of the neighboring properties, if the TMI is to be constructed or installed in an urban area;
- (g) Proof of authorization by the SA Aviation Authority, if necessary;
- (h) Proof of authorization by the South African Heritage Resources Agency, if the intended telecommunication masts infrastructure is located next to Heritage sites;
- (i) A zoning certificate, if necessary;
- (j) A letter of consent by the School Governing Body, if constructed or installed on school property; and
- (k) A letter of consent from the Tribal Authority, if constructed or installed on tribal land.

(2) Applications for the deployment of fibre-optic cable infrastructure shall be accompanied, in addition to the items listed in section (3) above, by the following -

- (a) The applicant's ICASA Class Electronic Communication Network Services (CECNS) license;
- (b) The applicant's ICASA Electronic Communication Services (ECS) license;
- (c) Proof that the applicant has informed all active fibre network operator licensees of its wayleave application; and

- (d) Proof of expertise and experience regarding the construction, maintenance, and operation of fibre-optic networks, if requested.

5. Wayleave approval, commencement of work, and post-work reporting

- (1) The Municipality may, after receipt of an application, grant a wayleave on such conditions and with such directions as it may deem necessary, which may include:
 - a) A description of the work to be done, with or without limitations, and the required specifications as to its quality;
 - b) The timeframe within which work must be done;
 - c) The days and times during which any work or certain work may or may not take place;
 - d) Geographical location of the work to be done;
 - e) The manner and method of doing any sub-surface work;
 - f) The provision of access crossings for vehicles and pedestrians;
 - g) Additional health and safety requirements;
 - h) A prohibition on the use of certain types of mechanical trenching equipment;
 - i) The display of signage by the wayleave holder, stating the name of the wayleave holder and its appointed Contractor, with contact details;
 - j) The phasing of the work program;
 - k) The provision of warning signs, barriers, and hoarding around the work;
 - l) The execution of any preliminary works and crosscuts to establish the precise position of existing services when information on such services is unclear;
 - m) The provision of storage for rubble, sand, or soil during the work;
 - n) The presence of a supervisor; or where necessary, a Professional Engineer, on the site of the work;
 - o) Further indemnification of the Municipality or specific insurance against appreciable risks associated with the work;
 - p) Specific conditions required by service agencies;

- a) Reinstatement requirements; and
 - r) Payment of refundable security deposit or provision of a guarantee issued by a registered financial services provider for the duration of the work, equal to no less than 10 (ten) percent of the total estimated project value, as security for the risk of damage to municipal property or to rectify any unsatisfactory reinstatement.
- (2) Before the commencement of work, but after the wayleave has been granted, the applicant must-
- (a) Collect the wayleave from the Municipality, and the person collecting the wayleave shall provide proof of authority to collect the wayleave on behalf of the applicant, unless the person collecting the wayleave is positively identified as the applicant;
 - (b) At its own cost, give prior notice to residents, businesses, and other concerns in the path of or adjacent to the work, who are likely to be affected by the work, providing details of the extent, duration, and precise location of the intended work; and
 - (c) If applicable, provide a physical plan of the work including the intended placement of any wires, cables, pipes, tubes, or the like, and the coordinates of the beginning, end, and all bend points in between, in the electronic file format required by the Municipality from time to time.
- (3) Upon completion of the work, the Municipality must be provided with-
- (a) The Geographical Information System (GIS) coordinates of the installed infrastructure and electronic copies of the drawings of the work done;
 - (b) A signed confirmation by the Municipal official appointed as the Director of Infrastructure & Engineering, stating that the work was carried out to completion and is of a satisfactory standard; and
 - (c) A request for the refund of the deposit, if applicable, accompanied by the banking details on a company letterhead or a bank stamped bank statement.

6. General provisions in respect of executing work pursuant to a wayleave

- (1) A wayleave holder shall commence work within 60 (sixty) days from the date of receiving the wayleave approval.

- (2) Wayleaves are not transferable to third parties. Any person who attempts to sell or in any way transfer a wayleave to another party without the Municipality's prior written consent shall be guilty of an offense.
- (3) A Wayleave approval will only be issued once all the requirements have been complied with and will be subject to any conditions imposed by the Municipality.
- (4) Only the work determined in the wayleave granted by the Municipality in terms of subsection (1) may be undertaken by the holder of the wayleave and it may only be undertaken at the location described in the wayleave.
- (5) Should the project / proposed work exceed the time frames for which the wayleave is valid, the wayleave holder may make a request for an extension in writing to the Municipal official appointed as the Senior Manager: Infrastructure & Engineering.
- (6) Where installed Telecommunication Infrastructure requires the supply of electricity, the Telecommunication Provider must apply to the Municipality for the installation of a metered electricity point, which consumption charges shall be billed monthly to the wayleave holder's account.
- (7) The Municipality shall exercise its lien in terms of Section (12) of this by-law as security, should a wayleave holder default on electricity account payments.

7. Termination or suspension of a wayleave

- (1) A wayleave may be suspended or terminated at any time by the Municipality if-
 - (a) the wayleave holder acts or has acted beyond the scope or in contravention of a condition to the wayleave or any provision of this by-law;
 - (b) the wayleave holder has failed to adhere to the predetermined timeframes due to its own willful misconduct or negligence, or the Contractor does not possess the necessary skill, expertise, or experience to carry out the work; or
 - (c) the work has been carried out in such a reckless or negligent manner that it has caused or is likely to cause injury to any person or undue burden on the flow of traffic that could and should otherwise have been avoided.
- (2) Should the wayleave be suspended or terminated as contemplated in subsection (1) above, then the Municipality will, in its discretion, be entitled to:

- (a) Direct that defective work be rectified by the wayleave holder before proceeding with any further construction;
- (b) Undertake the completion of the work or request that a third party complete the work;
- (c) Do remedial works to work done where the quality of the work is below the standards imposed by the municipality or any other applicable legislation;
- (d) Recover the cost of such remedial work or the cost of completing the work from any security deposit paid to the municipality, or if such security deposit is insufficient, from the wayleave holder any amount necessary for the recovery of the reasonable costs incurred by the Municipality; and
- (e) Reject any future applications submitted by the person whose wayleave was suspended or terminated.

8. Emergency repairs

- (1) In the event that the Municipality undertakes any emergency repairs or maintenance to Service Infrastructure, and during the course of effecting such emergency repairs cause damage to any infrastructure, cables, conduits, pipes or electrical wiring of a private owner, then the Municipality shall be indemnified against liability by such private owner for losses incurred resulting from such damage, unless the damage was caused due to gross negligence or positive intent on the part of the Municipality's employees or duly authorized agents.
- (2) In the event that a private owner of any infrastructure, cables, conduits, pipes or electrical wiring needs to perform emergency repairs or maintenance, the process prescribed in section (2) above may be waived by the Municipality, provided that: -
 - (a) The private owner was previously a wayleave holder;
 - (b) The tradesman or Contractor provides a certificate setting out the urgency, scope and nature of the repairs; and
 - (c) The Municipality is satisfied that the private owner or the public may likely suffer unnecessary and undue hardship should the requirements contained in section (2) not be waived.

CHAPTER 3: GENERAL PROVISIONS

9. Fees, Penalties, and Fines

- (1) The municipality will publish from time to time, and make available upon request, tariffs prescribed by the council for any fees and levies payable in terms of this by-law.
- (2) A wayleave Administration Fee will be applicable in terms of the Council Approved Tariff System. Payment of the Administrative fee must be made up front with submission of the Wayleave application, with all other fees payable upon wayleave approval.
- (3) Any person who fails to comply with the conditions contained in a wayleave, or who constructs or excavates on any municipal property without being in possession of a valid wayleave shall be guilty of an offense.
- (4) Any person who is convicted of an offense under this by-law is liable to –
 - (a) A fine;
 - (b) A period of imprisonment; or
 - (c) Both a fine and a period of imprisonment.
- (5) When determining an appropriate sanction, every meter of trench excavated or cut exceeding five meters shall be an aggravating factor.

10. Municipality's *lien* over equipment to recover losses

The Municipality shall have a common law *lien* over all equipment installed, constructed, deployed on or below the surface of municipal property, which *lien* may be exercised by removing and selling any equipment on such property to recover a debt arising from non-payment of amounts owing to the Municipality for outstanding rates and taxes, electricity, fees, or any fines imposed due to a contravention of this by-law.

11. Appeals

Any person may appeal against any decision taken under this By-Law by giving written notice of the appeal in accordance with the provisions of section 62 of the Municipal Systems Act, 2000, as amended.

12. Short title and commencement

This By-law shall be known as the Kouga Municipality: Wayleave By-law, and shall come into operation on the date of publication thereof in the *Provincial Gazette*.
