



AGENDA OF THE PLANNING
COMMISSION
CITY OF BIRCHWOOD VILLAGE
WASHINGTON COUNTY, MINNESOTA
April 26, 2018
7:00 P.M.

CALL TO ORDER

APPROVE AGENDA

REGULAR AGENDA

- A. Review/Approve March 22 AND 29, 2018 Meeting Minutes* (pp. 2-6)
- B. Building Permitting Procedures* (pp. 7-8)
 - 1. Discuss & Recommendation to City Council
- C. Consider Building Permit Escrow Fees / Ordinance Amendments for Damages to Public Property* (pp. 9-23)
 - 1. Discuss & Recommendation to City Council
- D. Discuss Amending Section 304 Zoning Code Variances and Appeals* (pp. 24-42)
 - 1. Discuss & Recommendation to City Council
- E. Discuss Small Cell Wireless Code* (pp. 43-138)
 - 1. Discuss & Recommendation to City Council

ADJOURN

* Denotes items that have supporting documentation provided

**CITY OF BIRCHWOOD VILLAGE
PLANNING COMMISSION MEETING
March 22, 2018**

MINUTES

COMMISSIONERS PRESENT: Chair Doug Danks, Vice Chair John Lund, John Winters and Jozsef Hegedus.

Absent: Randy Felt.

OTHERS PRESENT: Tobin Lay, Andy Sorenson, Allen Mitchell, Trilby White, Chris Sorenson, Mary Sorenson

Chair Doug Danks called the meeting to order at 7:00 pm

APPROVE AGENDA – John Lund motioned to approve the agenda. Jozsef Hegedus seconded. Motion passed.

REGULAR AGENDA

A. Review Variance Case No. 18-01-VB for 5 Oakridge Drive.

Motion was made to table the variance hearing. The application for the variance that was submitted was determined to be incomplete. Recommendation was made that Chris Sorenson request variance for addition over garage along with the variance on eyebrow. Amendment to motion made to meet again in one week on 3-29-2018. John Lund motioned, Jozsef Hegedus seconded. Motion passed.

B. Discuss Amending Section 304 Zoning Code, Variances and Appeals. 1:12

Alan Mitchell recommended Commissioners look at the League of MN Cities' model ordinance. Doug Danks agreed with the DNR's assessment of Section 304 and recommended keeping all of the criteria in 304.040.2 except c and adding missing language highlighted in the DNR's email (see packet). Commissioners tabled the item until April to allow time to review the League's model code.

C. Review/Approve January 25, 2018 Meeting Minutes.

John Winter motioned to approve. John Lund seconded. Motion passed.

D. Comp Plan Update.

Tobin gave overview.

E. Consider Building Permit Escrow Fees/Ordinance Amendments for Damages To Public Property.

Doug Danks suggested changing Road Escrow to Right-of-Way Escrow. He also suggested adding to building permit application-construction, landscape, soil, and excavation materials may not be stored or stockpiled on public streets, roadways or right-of-ways/or City property. Commissioners tabled the item until April.

ADJOURN

**MOTION WAS MADE BY COMMISSIONER LUND AND SECONDED BY COMMISSIONER WINTERS TO
ADJOURN THE MEETING. ALL AYES. MOTION PASSED. MEETING ADJOURNED AT 8:59 PM.**

**CITY OF BIRCHWOOD VILLAGE
PLANNING COMMISSION MEETING
March 29, 2018**

MINUTES

COMMISSIONERS PRESENT: Chair Doug Danks, Vice Chair John Lund, John Winters and Jozsef Hegedus.
Absent: Randy Felt.

OTHERS PRESENT: Tobin Lay, Alan Kantrud, Andy Sorenson, Chris Sorenson, Mary Sorenson, Trilby White

Chair Doug Danks called the meeting to order at 7:01 pm

APPROVE AGENDA – John Winters motioned to approve the agenda. John Lund seconded. Motion passed.

REGULAR AGENDA

A. Review Variance Case No. 18-01-VB for 5 Oakridge Drive.

Public hearing was held. Trilby White (3 Oakridge Drive) spoke, then Chris and Mary Sorenson; a resolution has been reached between the neighbors.

Commissioners discussed the variance request with Attorney Kantrud's guidance; worksheet of findings is attached.

John Winters Motioned to approve the variance request, John Lund seconded the motion. Motion passed all ayes.

ADJOURN

MOTION WAS MADE BY COMMISSIONER LUND AND SECONDED BY COMMISSIONER WINTERS TO ADJOURN THE MEETING. ALL AYES. MOTION PASSED. MEETING ADJOURNED AT 8:27 PM.



BIRCHWOOD VILLAGE

Variance Hearing Worksheet

Variance Case No. 18-01-VB: 5 Oakridge Drive

Date: March 29, 2018

#1: Is the request in harmony with the general purposes and intent of the ordinance? YES

The specific Ordinance states: 301.050.1 - a non-conforming use shall not be ... extended (either horizontally or vertically) ... unless such changes bring the non-conforming use into conformity with the Zoning Code; 302.020.1 - all structures must [meet or exceed] min. setback requirements; exceptions: ... setback requirements shall not apply to ... eaves [and] gutters, provided they do not project more than two (2) feet into a required yard setback; 302.020.2 - Min. setback requirements [for] all other lot lines [for] all other structures [is] 10 ft., the purpose of which is to: no purpose is provided for these ordinances.

The proposed variance is for: expanding the non-conforming use both vertically and horizontally. The vertical expansion is for construction of a master suite above the garage that will correct a design flaw in the original roof and eyebrow over the garage. The horizontal expansion is for construction of a new eyebrow/eave over the north side of the home. The existing foundation of the home is non-conforming because it extends at least three (3) feet into the side-yard setback; at seven (7) feet instead of the required ten (10). This non-conformance effects at least three (3) feet of the now completed 2nd story master suite above the garage and a now completed eyebrow/eave along the north side of the home.

This variance is in harmony with the purpose and intent of the specific Ordinance because: Master Suite Addition: no purpose is provided for the ordinance and the master suite is a reasonable addition and use of the house; Eyebrow Addition: would not be in harmony due to increasing a non-conforming use but for the fact that it breaks up the two story solid wall and is an aesthetic improvement.

#2: Would granting the variance be consistent with the comprehensive plan? YES

The Comprehensive Plan contains the following policies and goals regarding this request: Main Goals: #1) maintain residential nature of the community; Land Use Goals: #5) maintain a high quality and affordable residential environment, #6) ensure that all new housing conforms to the accepted standards of planning, design and construction, including standards that respect natural hydrology and unique physical features.

Granting the variance is consistent with the comprehensive plan because: the goals stated in the Comp Plan do not directly apply to this variance request.

#3: Practical Difficulties Test - STEP 1: are there unique circumstances to the property not created by the landowner? YES

There are circumstances unique to the property that would prevent compliance with the specific Ordinance because: Master Suite Addition: the existing house was built in a non-conforming way with the setback requirements. Eyebrow Addition: also has unique circumstances for the same reason. This eyebrow does increase the non-conformity but it breaks up the two story solid wall and is an aesthetic improvement.

#4: Practical Difficulties Test - STEP 2: would granting the variance allow the *essential character* of the locality to stay the same? **YES**

Granting the variance **will not** alter the essential character of the locality **because: Master Suite Addition: it is not out of scale, out of place, or otherwise inconsistent with the surrounding area. Eyebrow Addition: also will not alter for the same reasons and in fact will improve the essential character as it will break up the solid wall on the north side of the house.**

#5: Practical Difficulties Test - STEP 3: does the property owner propose to use the property in a *reasonable manner not permitted by the ordinance*? **YES**

The property owner **does** propose to use the property in a reasonable manner not permitted by the ordinance, given the purpose of the protections **because: Master Suite Addition: the purpose is a reasonable use - expansion of a living space above the garage is a reasonable use. But for the existing home being built non-conforming to the setback requirements, this addition would be permitted by the ordinance. Eyebrow Addition: also does for the same reasons. The eyebrow is additionally reasonable because it adds an aesthetic break to the solid wall on the north side of the house.**

What is your decision (Remember - ALL statutory criteria MUST be satisfied to approve)? **APPROVED**

MOTION WAS MADE BY COMMISSIONER WINTERS AND SECONDED BY COMMISSIONER HEGEDUS TO APPROVE THE VARIANCE IN WHOLE. ALL AYES. MOTION PASSED. (COMMISSIONER FELT WAS ABSENT).

MEMORANDUM



TO: Birchwood Planning Commission
FROM: Tobin Lay, City Administrator
SUBJECT: Building Permitting Procedures

Birchwood Village

Dear Commissioners,

During last month's variance hearing the Commission discussed with staff how a nonconforming structure was granted a building permit and Commissioners expressed a desire to discuss ways the permitting process could be improved to avoid this from occurring again.

Several City Council Members have expressed similar desires and have requested this topic be included in the upcoming City Council meeting. Specifically, the question has been raised by Mayor Wingfield why the following language was removed from Section 303 and whether it is feasible to add it back into Section 303:

Repealed Section 303.030. GENERAL ADMINISTRATION OF THE ZONING CODE. The City Clerk, in consultation with the Chairman of the Planning Commission, shall make all administrative determinations as to compliance with the Zoning Code, at the time when a building permit is sought. The Clerk may also forward a request for an administrative decision on interpretation of the Code to the entire Planning Commission. When making such administrative decisions, the Planning Commission cannot grant variances, which require hearings as described in Section 304. VARIANCES AND APPEALS.

Staff Recommendation

After consulting with the Building Official, Jack Kramer, I recommend that the repealed 303.030 language not be reinstated into City Code. Adding this extra requirement will impede the permitting approval process and discourage residents from obtaining permits for upgrades. The Chair/Commissioners would have to review the permit applications either monthly or as received – 1) waiting for a monthly review would be far too much of a delay for the applicants/contractors and 2) requiring the Chair to review applications as they are received would be far too burdensome for a volunteer position.

Another reason for my recommendation is that including this extra measure will not guarantee the desired results – the cost of the measure will out weight the benefit. An example of this point is the recent variance: despite my having consulted with the Building Official, City Attorney, City Engineer, and Planning Commission Chair, the nonconformance was not discovered until after the building permit was approved and the project started. There are a lot of requirements and nuances to the building code and reinstating the language from repealed 303.030 will not guarantee every nuance is detected during the review.

The following is what the Building Official offered on this idea:

The only real way to ensure that we do not encounter any missing zoning codes would be to develop a check list. This could be very difficult to develop due to the many ordinances. If this is a consideration I suggest offering the planning Commission to develop the list. This would prevent us from missing any possible codes ... if the planning commission wishes to review the permits that would be a slow process and could create some dissension with the residents and their contractors.

Request/Recommendation

Birchwood's permitting process should be reviewed and changes made to ensure better conformance with City Code. It is important that the right changes be made, however, that will offer equal or greater benefits than costs. As you may have already discussed repealed section 303.030 when you reviewed the Ordinance and recommended its repeal last year, staff requests Commissioners:

- 1) Discuss repealed Section 303.030; and
- 2) Discuss and recommend for City Council consideration, an appropriate fix to Birchwood's permitting process.

Thanks!

Regards,
Tobin Lay

MEMORANDUM



Birchwood Village

TO: Birchwood Planning Commission
FROM: Tobin Lay, City Administrator
SUBJECT: Building Permit Escrow Fees

Dear Commissioners,

Please continue discussion on this item started last month and tabled until April. At last month's meeting, Doug Danks recommended changing "road escrow" to "right-of-way escrow" and adding prohibitions on the building permit.

Procedural History

Several months ago, while discussing the Right-of-Way (ROW) Ordinance for City Council's approval, Commissioners acknowledge the Council's concern about local residents damaging City ROW's and/or streets during construction or improvement projects.

At that time, the Commission decided against putting language in the ROW Ordinance to address the issue and instead decided to determine other areas of the City Code to address this issue.

At the request of Chairperson Doug Danks, I have included this agenda item for you to begin discussing. Doug asks Commissioners to think about:

how to how to incorporate escrow or charges for disturbing city property related to homeowner construction/landscaping projects, along with restricting storage of building materials, landscaping materials, soil and stockpiled excavation material on city property.

Enclosed are 1) the existing City building permit and 2) escrow language from a City of Grant ROW ordinance. The Grant ROW material was tweaked by Mayor Wingfield for the purposes of the ROW Ord. discussion earlier this year and was provided to the Planning Commission last September. Much if the Grant ROW material will not apply as it may already be covered under the ROW Ordinance currently being considered by the City Council.

Request/Recommendation

Staff requests Commissioners:

- 1) Discuss ideas for mitigating damages to public property.

Thanks!

Regards,
Tobin Lay

**City of Birchwood Village
BUILDING PERMIT APPLICATION**

**Jack Kramer – Building Official
10090 Oakgreen Avenue North
Stillwater, MN 55082
Office Ph. # 651-351-5051
Pager # 651-847-9157**

**Two Sets of Plans Received: _____
Date Issued: _____
Permit No: _____**

Project Address: _____

Permit Applicant: _____ Phone No: _____

▪ Contractor License No: _____ Expiration Date: _____

Homeowner: _____ Phone No: _____

Permit For: _____ Valuation \$: _____

Sq. Feet: _____ Length: _____ Width: _____ Height: _____

Legal of Site Location: _____

PID#: _____

Road Escrow: _____

Proximity to Wetlands or Lakeshore: _____

Setbacks: Front Yard _____ Rear Yard _____ Side/s Yard _____

Septic Inspector Approval: _____ Fee \$: _____

Description of Work (attach a site plan) _____

Special Approvals	Required	Received	Not Required
Washington County			
Rice Creek Watershed			
City Council			
Building Commissioner			

Plan Check Fee	\$
City Fee	\$
Plan Reviewer Fee	\$
State Surcharge Fee	\$
Building Permit Fee	\$

***The City will hold applicant responsible for any damage to public streets & roadways in the course of construction, landscape, excavating, filing and grading operations.**

*** Any changes to this application will make the permit voidable unless amendments are approved by the City with prior consent. The applicant will provide (separate documents, surveys, and calculations) to the City with the building height, roof plane, grade plane, change in elevation, and impervious surface.**

Notice:

The applicant shall comply with all provisions of the State Building, Plumbing, Mechanical, Electrical, and Fire Codes, as well as all City Ordinances governing zoning and buildings. The State of Minnesota regulates all electrical work. The continued validity of this permit is contingent upon the applicant's compliance of all work done and materials used, with the plans and specifications herewith submitted, and with the applicable ordinances of the City.

***Under penalty of perjury all documents represented are true and correct representations of the actual building which will be built in conformance with such representation.**

Signature of Applicant: _____ Date: _____

CITY OF BIRCHWOOD VILLAGE FEE SCHEDULE—(amended)

ADDITIONAL CHARGES FOR ESCROW AMOUNTS

An escrow amount will be required at the time application fees and the application is received by the City's Consultant.

Subdivision	\$7000
Lot Split	N/A
Variance	\$3000
Conditional Use Permit (Amended and new)	\$3000
Conditional Use Permit (Renewal)	N/A
All Other Land uses	\$1000
Grading Permit Fees (under 100 cu. Yards)	\$200
(100+ cu. Yards)	\$3000

- * Unused escrow amounts will be returned to the applicant
- * For additional information, see also the Escrow Account Policies Form.

**CITY OF BIRCHWOOD VILLAGE
WASHINGTON COUNTY, MINNESOTA**

ORDINANCE 2017- _____

**An Ordinance Amending the City of Birchwood Village
Code of Ordinances
Enacting Chapter 309, Right-of-Way Land Use**

The City Council of the City of Birchwood Village, Washington County, Minnesota, does hereby ordain as follows:

SECTION 1. ENACTING OF CHAPTER 309 RIGHT-OF-WAY LAND USE

That City Code Chapter 309 is hereby ENACTED as follows:

309.010 Findings, Purpose, and Intent.

To provide for the health, safety and welfare of its citizens, and to ensure the integrity of its streets and the appropriate use of the rights-of-way, the city strives to keep its rights-of-way in good repair and free from unnecessary encumbrances. Accordingly, the city enacts this Section 1 of Chapter 309 of the Code establishing reasonable regulations concerning the placement and maintenance of facilities and equipment within the city's rights-of-way and obstructions of such rights-of-way.

This Section is intended to implement Minnesota Statutes Sections 237.162 and 237.163 Minnesota Rules 7819.0050-7819.9950, and other applicable laws governing use of rights-of-way. Pursuant to Minnesota Statutes, Sections 237.163 subdivision 2(b), and all authority granted to the city, the city hereby elects to manage rights-of-way within its jurisdiction.

309.020 Definitions.

Abandon Facility means a facility no longer in service or physically disconnected from a portion of the operating facility, or from any other facility, that is in use.

Applicant means any person that has applied for a permit to excavate or obstruct a right-of-way.

City means the City of Birchwood Village, Minnesota, its elected officials, officers, employees and agents.

Commission means the Minnesota Public Utilities Commission.

Construction Performance Bond means any of the following forms of security provided at a permittee's option:

- (1) Individual project bond;
- (2) Cash deposit;

- (3) Security of a form listed or approved under Minnesota Statutes, section 15.73, subdivision;
- (4) Letter of Credit, in a form acceptable to the city;
- (5) Self-insurance, in a form acceptable to the city;
- (6) A blanket bond for projects within the city, or other form of construction bond, for a time specific and in a form acceptable to the city.

Degradation means a decrease in the useful life of the right-of-way caused by excavation in or disturbance of the right-of-way, resulting in the need to reconstruct such right-of-way earlier than would be required if the excavation or disturbance did not occur.

Degradation Cost means the cost, subject to Minnesota Rules 7819.1100, to achieve a level of restoration as determined by the city at the time the permit is issued, not to exceed the maximum restoration shown in plates 1 to 13, set forth in Minnesota Rules parts 7819.9900 to 7819.9950.

Degradation Fee means the fee established by the city at the time of permitting in an amount estimated to recover the degradation cost.

Director means the City Engineer of the city, or his or her designee.

Delay Penalty is the penalty imposed as a result of unreasonable delays in right-of-way excavation, obstruction, patching, or restoration as established by permit.

Emergency means a condition that (1) poses a danger to life or health, or of a significant loss of property; or (2) requires immediate repair or replacement of facilities in order to restore service to a customer.

Equipment means any tangible asset used to install, repair, or maintain facilities in any right-of-way.

Excavate means to dig into or in any way remove or physically disturb or penetrate any part of a right-of-way.

Facility or Facilities means tangible asset in the public right-of-way required to provide utility service.

Local Representative means a local person authorized by a right-of-way user to accept service and to make decisions for that right-of-way user regarding all matters within scope of this Section 1.

Management Costs means the actual costs the city incurs in managing its rights-of-way, including costs associated with registering applicants; issuing, processing, and verifying right-of-way permit applications; inspecting job sites and restoration projects; maintaining, supporting, protecting, or moving user facilities during right-of-way work; determining the adequacy of right-of-way restoration; restoring work inadequately performed after providing notice and the opportunity to correct the work; and revoking right-of-way permits. Management costs do not include payment for the use of the right-of-way or the fees and costs of any litigation or appeals relating to this Section 1.

Obstruct means to place any tangible object in the right-of-way so as to hinder free and open passage over that or any part of the right-of-way.

Patch or Patching means a method of pavement replacement that is temporary in nature. A patch consists of (1) the compaction of the subbase and aggregate base, and (2) the replacement, in kind, of the existing pavement for a minimum of two feet beyond the edges of the excavation in all directions.

Pavement means any type of improved surface that is within the public right-of-way and that is paved or otherwise constructed with bituminous, concrete, aggregate, or gravel.

Permit has the meaning given "right-of-way permit" in Minnesota Statutes, section 237.162.

Permittee means any person to whom a permit to excavate or obstruct a right-of-way has been granted by the city under this Section 1.

Person means an individual or entity subject to the laws and rules of this state, however organized, whether public or private, whether domestic or foreign, whether for profit or nonprofit, and whether natural, corporate, or political.

Public Right-of-Way or Right-of-Way has the meaning given it in Minnesota Statutes, section 237.162, subdivision 3.

Restore or Restoration means the process by which an excavated right-of-way and surrounding area, including pavement and foundation, is returned to the same condition and life expectancy that existed before excavation.

Restoration Cost means the amount of money paid to the city by a right-of-way user to achieve the level of restoration according to plates 1 to 13 of Minnesota Rule 7819.1100 Subpart 1.

Right-of-Way User means any person who has or seeks to have its equipment or facilities located in any right-of-way.

Service or Utility Service means and includes (1) services provided by a public utility as defined in Minnesota Statutes 2168.02, subdivisions 4 and 6; (2) services of a telecommunications provided including transporting of voice or data information; (3) services of a cable communications system as defined in Minnesota Statutes, chapter 238.02, subdivision 3; (4) natural gas or electric energy or telecommunications services provided by a local government unit; (5) services provided by a cooperate electric association organized under Minnesota Statutes, chapter 308A.

Temporary Surface means the compaction of subbase and aggregate base and replacement, in kind, of the existing pavement only to the edges of the excavation. It is temporary in nature except when the replacement is of pavement included in the city's pavement management plan, in which case it is considered full restoration.

Trench means an excavation in the right-of-way, with the excavation having a length equal to or greater than the width of the pavement of adjacent pavement.

309.030 Administration

The City Engineer is the principal city official responsible for the administration of the rights-of-way, right-of-way permits, and the ordinances related thereto. The City Engineer may delegate any or all of the duties hereunder.

309.040 Conduct Prohibited.

Except as authorized pursuant to a permit issued by the city, no person shall:

- (a) Obstruct or excavate any right-of-way.
- (b) Place any equipment, facilities, or structures in any right-of-way.
- (c) Deposit snow or ice on any right-of-way.

- (d) Erect a fence or other barrier on or across any right-of-way.
- (e) Obstruct any ditch in or abutting a right-of-way.
- (f) Place any advertisement or sign other than a traffic control sign or other governmental sign in any right-of-way.
- (g) Deface, mar, damage or tamper with any sign, marker, signal, monument, equipment facility, structure, material, tools, or any appurtenance in any right-of-way.
- (h) Drive a vehicle over, through, around, or past any fence, barrier, sign, or obstruction erected to prevent traffic from passing over the right-of-way, or portion of the right-of-way .

309.050 Registration and Right-of-Way Occupancy.

(a) *Registration.* Each right-of-way user, including persons with installation and maintenance responsibilities by contract, lease, sublease or assignment, must register with the city. Registration will consist of providing registration information and paying a registration fee.

(b) *Registration prior to work.* No person may construct, install, repair remove, relocate any equipment or facilities or perform any other work in any right-of-way without first being registered with the city.

(c) *Exceptions.* Persons shall not be required to register, obtain permits or satisfy any other requirements under this Section for the following:

- (1) Construction and maintenance of driveways, sidewalks, curb and gutter, or parking lots pursuant to a driveway permit, except repairs or restoration necessitated by utility cuts or other work;
- (2) Snow removal activities;
- (3) Placement of flexible markers at the edge of the paved road to assist snow plow operators (metal posts are prohibited).

Nothing herein relieves a person from complying with the provisions of the Minnesota Statutes, chapter 216D, Gopher One Call Law.

309.060 Registration Information.

(a) *Information Required.* The information provided to the city at the time of registration shall include, but not be limited to:

- (1) The right-of-way user's name, Gopher One-Call registration certificate number, address and e-mail address if applicable, and telephone and facsimile numbers;
- (2) The name, address and e-mail address, if applicable, and telephone and facsimile numbers of local representative accessible for consultation at all times. Current contact information shall be provided at the time of registration.
- (3) A certificate of insurance or self-insurance:
 - i. Verifying that an insurance policy has been issued to the right-of-way user by an insurance company authorized to do business in the State of Minnesota, or a form of self-insurance acceptable to the city;
 - ii. Verifying that the right-of-way user is insured against claims for personal injury, including death, as well as claims for property damage arising out of the (i) use and occupancy of the right-of-way by the right-of-way user, its officers, agents, employees and permittees, and (ii) placement and use of facilities and equipment in the right-of-way by the right-of-way user, its officers, agents, employees and

- iii. Either naming the city as an additional insured or otherwise providing evidence satisfactory to the Administrator that the city is fully covered and will be defended;
- iv. Requiring that the city be notified thirty (30) days in advance of cancellation of the policy or material modification off a coverage term;
- v. Indicating comprehensive liability coverage, automobile liability coverage, workers' compensation and umbrella coverage established by the city in amounts sufficient to protect the city and the public and to carry out the purposes and policies of this Section.
- vi. Evidencing adequate third part claim coverage and city indemnification for all actions included in Minnesota Rule part 7819.1250.

- (4) Such evidence as the city may require to demonstrate that the person is authorized to do business in Minnesota.
- (5) Such evidence as the city may require to demonstrate that the person is authorized to use or occupy the right-of-way.

(b) *Notice of Changes.* The registrant shall keep all of the information listed above current at all times by providing to the city information as to changes within fifteen (15) days following the date on which the registrant has knowledge of any change.

309.070 Reporting Obligations.

(a) *Operations.* Each right-of-way user shall, at the time of registration and by December 1 of each year, file a construction and maintenance plan for underground facilities with the city. Such plan shall be submitted using a format designated by the city and shall contain the information determined by the city to be necessary to facilitate the coordination and reduction in the frequency of excavations and obstructions of rights-of-way.

- (b) *Plan.* The plan shall include, but not be limited to, the following information:
 - (1) The locations and the estimated beginning and ending dates of all projects to be commenced during the next calendar year (in this section, a "next-year project"); and
 - (2) To the extent known, the tentative locations and estimated beginning and ending dates for all projects contemplated for the five years following the next calendar year (in this section, a "five-year project").

(c) *Failure to Include Projects in Plan.* The city may deny an application for a right-of-way permit for failure to include a project in the plan submitted to the city for next-year projects unless the right-of-way user demonstrates that it used commercially reasonable efforts to identify the project. The city may annually produce for inspection a list of all planned projects for inspection.

309.080 Permit Requirement.

(a) *Permit Required.* A permit is required to excavate the right-of-way, to place equipment of facilities in or on the right-of-way, or to obstruct or otherwise hinder free and open passage over the right-of-way. The permit shall specify the extent and the duration of the work permitted.

(b) *Permit Extensions.* No person may excavate or obstruct the right-of-way beyond the date or dates specified in the permit unless (i) such person makes a supplementary application for another right-of-way permit before the expiration of the initial permit, and (ii) a new permit or permit extension is granted.

(c) *Delay Penalty.* In accordance with Minnesota Rule 7819.1000 subp. 3, the city may establish and impose a delay penalty for unreasonable delays in right-of-way excavation, obstruction, patching, or restoration. The delay penalty shall be established from time to time by city council resolution. A delay penalty will not be imposed for delays due to force majeure, including inclement weather, civil strife, acts of God, or other circumstances beyond the control of the applicant.

(d) *Permit Delay.* Permits issued under this Section shall be conspicuously displayed or otherwise available at all times at the indicated work site and shall be available for inspection by the city.

309.090 Permit Applications.

An application for a permit is made to the city. Right-of-way permit applications shall contain, and will only be considered complete upon compliance with the following:

(a) Registration with the city pursuant to this Section.

(b) Submission of a completed permit application form including all required attachments, and scaled drawings showing the location and area of the proposed project and the location of all known existing and proposed facilities.

(c) Payment of money due to the city for:

(1) Permit fees, estimated restoration costs and other management costs;

(2) Prior obstructions or excavations;

(3) Any undisputed loss, damage, or expense suffered by the city because of applicant's prior excavations or obstructions of the rights-of-way or any emergency actions taken by the city;

(4) Franchise fees or other charges, if applicable.

(d) Payment of disputed amounts due to the city by posting security or depositing in an escrow account an amount equal to at least 100% of the amount owing.

(e) Posting an additional or larger construction performance bond should the city deem the existing construction performance bond inadequate.

309.100 Issuance of Permit; Conditions.

(a) *Permit Issuance.* If the Applicant has satisfied the requirements of this Section 1, the city shall issue a permit.

(b) *Conditions.* The city may impose reasonable conditions upon the issuance of the permit and the performance of the applicant thereunder to protect the health, safety and welfare or when necessary to protect the right-of-way and its current use. The city may establish and define location and relocation requirements for equipment and facilities to be located in the right-of-way.

309.110 Permit Fee.

(a) *Fee Schedule and Fee Allocation.* The city's permit fees shall be designed to recover the city's actual costs and shall be based on an allocation among all users of the right-of-way, including the city.

(b) *Permit Fee Amount.* The city shall establish a permit fee sufficient to recover the following costs:

(1) The city's management costs;

(2) Degradation costs, if applicable

(c) *Payment of Permit Fees.* No permit shall be issued without payment of permit fees. Permit fees paid for a permit that the city has revoked for a breach are not refundable.

(d) *Application to Franchises.* Unless otherwise agreed to in a franchise, management costs may be charged separately from and in addition to the franchise fees imposed on a right-of-way user in the franchise.

309.120 Right-of-Way Patching and Restoration.

(a) *Timing.* The work to be done under a permit, and the required patching and restoration of the right-of-way, must be completed within the dates specified in the permit, increased by as many days as work could not be done because of circumstances beyond the control of the permittee.

(b) *Patching.* The permittee must patch its own work.

(c) *Restoration.* The city may choose either to have the permittee restore the surface and subgrading portions of right-of-way or the city may restore the surface portion of right-of-way itself. If the city restores the surface portion of right-of-way, permittee shall pay the costs thereof within thirty (30) days of billing. If, following such restoration, the pavement settles due to permittee's improper backfilling, the permittee shall pay to the city, within thirty (30) days of billing, all costs associated with correcting the defective work. If the permittee restores the right-of-way itself, it shall at the time of filing the permit application post a construction performance bond in accordance with the provisions of Minnesota Rule 7819.3000.

(d) *Degradation fee in Lieu of Restoration.* In lieu of right-of-way restoration, a right-of-way user may elect to pay a degradation fee in an amount identified by the city. However, the right-of-way user shall remain responsible for replacing and compacting the subgrade and aggregate base material in the excavation and degradation fee shall not include the cost to accomplish these responsibilities.

(e) *Standards.* The permittee shall perform patching and restoration according to the standards in Minnesota Rule 7819.1100, and with the materials specified by the city.

(f) *Duty to correct defects.* The permittee shall correct defects in patching, or restoration performed by permittee or its agents upon notification from the city, using the method required by the city.

(g) *Failure to restore.* If the permittee fails to restore the right-of-way in the manner and to the condition required by the city, or fails to satisfactorily and timely complete all restoration required by the city, the city shall notify the permittee in writing of the specific alleged failure or failures and shall allow the permittee ten (10) days from receipt of notice to cure said failure or failures. In the event the permittee fails to cure, the city may at its option perform the necessary work and permittee shall pay to the city, within thirty (30) days of billing, the cost of restoring the right-of-way. If permittee fails to pay as required, the city may exercise its rights under the construction performance bond.

309.130 Other Obligations.

(a) *Compliance with other laws.* Obtaining a right-of-way permit does not relieve permittee of its duty to obtain all other necessary permits, licenses, and authority and to apply all fees required by the city or other applicable rule, law or regulation. A permittee shall comply with all requirements of local, state and federal laws, including Minn. Statute 216D.01-.09 (Gopher One Call Excavation Notice System). A permittee shall perform all work in conformance with the applicable codes and established rules and regulations, and is responsible for all work done in the right-of-way pursuant to its permit, regardless of who does the work.

(b) *Prohibited Work.* Except in an emergency, and with the approval of the city, no right-of-way obstruction or excavation may be done when seasonally prohibited or when conditions are unreasonable for such work.

(c) *Interference with right-of-way.* A permittee shall not so obstruct or interfere with the natural passage of water through the gutters or other waterways. Private vehicles must be parked in conformance with city parking regulations. Unless specifically authorized by a permit, trucks must be loaded and unloaded within the defined permit area.

(d) *Traffic control.* A permittee shall implement traffic control measures in the area of the work and use traffic control procedures in accordance with the most recent manuals on uniform traffic control traffic control devices and traffic zone layouts published by the State of Minnesota.

309.140 Denial of Permit

The City may deny a permit for failure to meet the requirements and conditions of this Section, to protect the public health, safety, and welfare, or to protect the right-of-way and its current use.

309.150 Installation Requirements.

The installation of facilities in the right-of-way and associated excavation, backfilling, patching, and restoration work shall be done in conformance with Minnesota Rule 7819.1100 and other applicable local requirements.

309.160 Inspection.

(a) *Notice of completion.* When the work under any permit hereunder is completed, the permittee shall furnish a completion certificate in accordance with Minnesota Rule 7819.1300.

(b) *Site Inspection.* The permittee shall make the work site available to the city for inspection at all reasonable times during the execution of and upon completion of the work.

(c) *Authority of Director.* The director may order the immediate cessation of any work which poses a serious threat to the life, health, safety or well-being of the public, or order the permittee to correct work that does not conform to the terms of the permit or other applicable standards, conditions, or code. If the work failure is a "substantial breach" within the meaning of Minnesota Statute 237.163 subd. 4(c), the order shall state the failure to correct the violation will be cause for revocation of the permit after a specified period determined by the director. The permittee shall present proof to the director that the violation has been timely corrected. If the violation is not timely corrected, the director may revoke the permit.

309.170 Work Done without a Permit.

(a) *Emergency Situation.* Each right-of-way user shall immediately notify the director of any event regarding its facilities that the right-of-way user considers to be an emergency. The right-of-way user may take whatever actions are necessary to respond to the emergency. Within two (2) business days after the occurrence of the emergency the right-of-way user shall apply for the necessary permits and fulfill the rest of the requirements necessary to comply with this Section.

(b) If the city becomes aware of an emergency affecting facilities in the right-of-way, the city will attempt to contact the local representative of each potentially affected right-of-way user. The city may take whatever action it deems necessary to respond to the emergency, the cost of which shall be borne by affected right-of-way users.

(c) *Non-Emergency Situation.* Except in an emergency, any person who, without first having obtained the necessary permit, obstructs or excavates a right-of-way must subsequently obtain a permit, pay an unauthorized work permit fee in an amount established from time to time by the city council, deposit with the city the fees necessary to correct any damage to the right-of-way and comply with all the requirements of this Section

309.180 Revocation of Permits.

(a) *Substantial Breach.* The city reserves its right to revoke any right-of-way permit, without a fee refund, if there is a substantial breach of the terms and conditions of any statute, ordinance, rule or regulation, or any material condition of the permit. A substantial breach by permittee shall include, but shall not be limited to, the following:

- (1) The violation of any material provision of a permit'
- (2) An evasion or attempt to evade any material provision of a permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the city or its citizens;
- (3) Any material misrepresentation of fact in the application for a permit;
- (4) The failure to complete work in a timely manner; or
- (5) The failure to correct, in a timely manner, work that does not conform to a condition indicated in an order issued by the director.

(b) *Written notice of breach.* If the city determines that the permittee has committed a substantial breach of term or condition of any statute, ordinance, rule regulation or any condition of the permit the city shall make a written demand upon the permittee to remedy such violation. The demand shall state that continued violations may be cause for revocation of the permit. A substantial breach, as stated above, will allow the city to place additional or revised conditions on the permit to mitigate and remedy the breach.

(c) *Response to notice of breach.* Within a time established by the director following permittee's receipt of notification of the breach, permittee shall provide the city with a plan to cure the breach, acceptable to the city. Permittee's failure to submit a timely and acceptable plan, or permittee's failure to timely implement the approved plan, shall be cause for immediate revocation of the permit.

(d) *Reimbursement of city costs.* If a permit is revoked, the permittee shall also reimburse the city for the city's reasonable costs, including restoration costs and the costs of collection and reasonable attorneys' fees incurred in connection with such revocation.

309.190 Mapping Data.

Each right-of-way user and permittee shall provide mapping informational a form required by the city in accordance with Minnesota Rules 7819.4000 and 7819.4100.

309.200 Relocation of Facilities.

A right-of-way user shall promptly and at its own expense, with due regard for seasonal working conditions, permanently remove and relocate its facilities in the right-of-way when it is necessary to prevent interference, and not merely for the convenience of the city, in connection with: (1) a present or future city use of the right-of-way for a public project; (2) the public health or safety; or (3) the safety and convenience of travel over the right-of-way.

309.210 Interference by Other Facilities.

When the city does work in the right-of-way and finds it necessary to maintain, support, or move a right-of-way user's facilities to carry out the work without damaging right-of-way user's facilities, the city shall notify the local representative as early as is reasonable possible. The city costs associated therewith will be billed to that right-of-way user and must be paid within thirty (30) days from the date of billing. Each right-of-way user shall be responsible for the cost of repairing any facilities in the right-of-way which it or its facilities damages.

309.220 Right-of-Way Vacation.

If the city vacates a right-of-way that contains the facilities of a right-of-way user, the right-of-way user's rights in the vacated right-of-way are governed by Minnesota Rules 7819.3200.

309.230 Indemnification and Liability.

By registering with the city, or by accepting a permit under this Section, a right-of-way user or permittee agrees to defend and indemnify the city in accordance with the provisions of Minnesota Rule 7819.1250.

309.240 Abandoned and Unusable Facilities.

(a) Discontinued Operations. A right-of-way user who has determined to discontinue all or a portion of its operations in the city must provide information satisfactory to the city that the right-of-way user's obligations for its facilities in the right-of-way under this Section have been lawfully assumed by another right-of-way user.

(b) Removal. Any right-of-way user who has abandoned facilities in any right-of-way shall remove it from that right-of-way if required in conjunction with other right-of-way repair, excavation, or construction, unless this requirement is waived by the city.

309.250 Appeal.

A right-of-way user that: (1) has been denied registration; (2) has been denied a permit; (3) has had a permit revoked; or (4) believes that the fees imposed are not in conformity with Minnesota Statute 237.163, Section 410.06 may have the denial, revocation, or fee imposition reviewed, upon written request, by the city council. The city council shall act on a timely written request at its next regularly scheduled meeting. A decision by the city council affirming the denial, revocation, or fee imposition will be in writing.

309.260 Reservation of Regulatory and Policy Powers.

A permittee's or right-of-way user's rights are subject to the regulatory and police power authority of the city to adopt and enforce general ordinances necessary to protect the health, safety and welfare of the public.

309.270 Severability.

If any section, subsection, sentence, clause, phrase, or portion of this Section 1 is for any reason held invalid or unconstitutional by any court, regulatory body or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions thereof.

309.280 Penalty.

Any person violating any provision of this Section 1 or any permit or order issued hereunder, shall, upon conviction thereof, be guilty of a misdemeanor punishable in accordance with Section 619 of the City Code.

SECTION 2. SEVERABILITY.

In the event that court of competent jurisdiction adjudges any part of this ordinance to be invalid, such judgment shall not affect any other provisions of this ordinance not specifically included within that judgment.

SECTION 3. EFFECTIVE DATE.

This ordinance takes effect upon its adoption and publication according to law.

WHEREUPON, a vote, being taken upon a motion by Councilmember _____ and seconded by Councilmember _____ ,

Voting AYE:

Voting NAY:

Whereupon said Ordinance was declared passed adopted this __day of _____, 2017.

Mary Wingfield, Mayor

Attest: Tobin Lay, City Administrator

MEMORANDUM



Birchwood Village

TO: Birchwood Planning Commission
FROM: Tobin Lay, City Administrator
SUBJECT: Amending Section 304 Variances and Appeals

Dear Commissioners,

Please continue last month's discussion on amending Section 304 Variances and Appeals. Last month, Doug Danks suggested making changes that align with the DNR's recommendation (see enclosed DNR email) but the Commission tabled further discussion to allow Commissioners time to review the League of MN Cities' model code (see enclosed model code).

The current criteria listed in Section 304.040.2 conflicts, at least in part, to new State requirements. Accordingly, Section 304 must be amended to align with the new state requirements.

As the body that preliminarily hears variance requests and makes recommendations on such to the City Council, it makes the most sense for these amendments to begin with the Planning Commission.

Please note that your amendments may be stricter than those required by the State but may NOT be more lenient.

At some point, and when the Planning Commission feels ready to do so, staff will invite the City Attorney to either attend a Commission meeting or review the Commission's recommendations in order to guide the Commission through this legal process.

Request/Recommendation

Staff requests Commissioners:

- 1) Review enclosed materials regarding this agenda item; and
- 2) Discuss appropriate amendments to Birchwood City Code Section 304 Variances and Appeals.

Thanks!

Regards,
Tobin Lay

Tobin Lay

From: Petrik, Daniel (DNR) [daniel.petrik@state.mn.us]
Sent: Monday, March 19, 2018 9:08 AM
To: Tobin Lay
Cc: Sorensen, Jenifer (DNR); Bauman, Matthew (DNR)
Subject: FW: Variance Elements
Attachments: Section 304 ZONING CODE VARIANCES AND APPEALS.pdf

Hi Tobin,

Jen forwarded your questions on variances to me. I'm glad you were able to attend one of our recent workshops on variances. Here some additional information that will hopefully clarify these questions for you.

The Minnesota Legislature update the variance criteria in 2010 that applies to ALL (not just shoreland) variance applications considered by cities and counties. The criteria are the same for cities and counties. You can find the city criteria in [Minn. Statutes Chapter 462.357 Subd. 6](#). These criteria are the "minimum standards" to use when evaluating variances, however, local governments can apply more strict standards and additional standards if they choose. The [DNR also has information explaining the variance](#) criteria and will be good background for you in considering how to update your variance criteria.

The key set of criteria are known of as practical difficulties and deal with:

- Reasonable manner not permitted by the ordinance
- Unique circumstances not created by the owner
- Essential character of the locality

Additionally, "economic considerations" alone cannot constitute practical difficulties

Additionally, the statute states that:

- Variances must be in harmony with the general purposes and intent of the ordinance
- Variances be consistent with the comprehensive plan, and

In your ordinance Section 304.040 2.

- Item a. is similar to the unique circumstances criterion, except item a. doesn't mention that the unique situation or peculiarity wasn't created by the owner. However, item b goes on to state that the conditions causing the need for the variance are not created by the applicant's action or solution, which is very good, especially including the applicant's solution and requiring the applicant to demonstrate no other reasonable solution exists.
- Item c. is not similar to any of the statutory criteria and is problematic as it appears to be a potential weakening of the statutory criteria. Using the general concept of rights is vague and therefore problematic in this item. The Supreme Court has held repeatedly that there are no regulatory takings of property rights as long as a reasonable use remains. Property owners are not entitled to the same rights to build a walk out home (for example) just because the neighbor has a walk out home, if building that walk out were to be in violation of the zoning ordinance.
- Item d. deals specifically with water drainage and is not similar to how the statutory criteria are worded, however, the DNR believes that how water moves across or through a site is an "essential character of the

locality.” In any case this would be viewed as a higher standard and within the power of local governments to include in their list of criteria.

- Item e. dealing with light and air are issues that the statute also refers to and is a good addition.
- Item f. is also a good clarifying item.
- Item g. is a good interpretation and application of the “economic considerations” standard from statute.
- Your criteria seems to be missing the “reasonable manner” and “essential character” practical difficulties criteria as well as the two additional provisions dealing with the ordinance and comprehensive plan. I’d suggest you amend your criteria to include these and to strongly consider removing item c. Also, statute states that **all** the criteria must be met in order to approve a variance. Your criteria implies that all must be met, but further clarification wouldn’t hurt.

Dan Petrik

Land Use Specialist | Shoreland and River Related Programs

Minnesota Department of Natural Resources

500 Lafayette Road

St. Paul, MN, 55155-4032

Phone: 651-259-5697

Fax: 651-296-1811

Email: daniel.petrik@state.mn.us



From: Sorensen, Jenifer (DNR)

Sent: Friday, March 16, 2018 5:17 PM

To: Petrik, Daniel (DNR) <daniel.petrik@state.mn.us>; Bauman, Matthew (DNR) <matthew.bauman@state.mn.us>

Subject: FW: Variance Elements

Dan or Matt –

Can either of you help me answer Tobin’s question (below)?

Thanks for your help on this –

Jen

Jenifer Sorensen

East Metro Area Hydrologist (Ramsey and Washington Counties)

Division of Ecological and Water Resources

Minnesota Department of Natural Resources

1200 Warner Road

St Paul, MN 55106
Phone: 651-259-5754
Email: jenifer.sorensen@state.mn.us

From: Tobin Lay [<mailto:Tobin.Lay@cityofbirchwood.com>]
Sent: Friday, March 16, 2018 5:03 PM
To: Sorensen, Jenifer (DNR) <jenifer.sorensen@state.mn.us>
Subject: Variance Elements

Hello Jenifer,

I have questions about the elements for granting a variance. In the recent DNR training that I went to, I was taught that the variance elements have changed for areas within the shoreland overlay. The new elements differ from the original elements required under Birchwood's variance ordinance and since most of Birchwood falls within the shoreland overlay, I'm concerned that our variance requirements might need updating.

Attached is Birchwood's variance code. The elements of I'm talking about are listed in 304.040.2. Will you please explain the 5 new variance elements for shoreland overlay and advise if those would conflict or supersede Birchwood's elements within the shoreland overlay area. What is the area that falls under the shoreland overlay? Thanks!

Tobin Lay
City Administrator/Clerk
City of Birchwood Village, MN
office: (651) 426-3403
fax: (651) 426-7747
email: tobin.lay@cityofbirchwood.com
website: <http://www.cityofbirchwood.com/>



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RELEVANT LINKS:

In re Livingood, 594 N.W.2d 889 (Minn. 1999).
CR Investments, Inc., v. Vill. of Shorewood, 304 N.W.2d 320 (Minn. 1981).

Minn. Stat. § 462.3595, subd. 4.

Northpointe Plaza v. City of Rochester, 465 N.W.2d 686 (Minn. 1991).
Snaza v. City of St Paul, 548 F 3d 1178 (8th Cir. 2008).
 Minn. Stat. § 462.3597.
 A.G. Op. 59-A-32 (February 27, 1990).

Upper Minnetonka Yacht Club v. City of Shorewood, 770 N.W. 2d 184 (Minn. Ct. App. 2009).

See LMC information memo, *Land Use Variances*.

Minn. Stat. § 462.354, subd. 6.
 See Section V-B-5 *Boards of Adjustment and Appeals*.

Krummenacher, v. City of Minnetonka, 783 N.W.2d 721 (Minn. 2010) (superseded by statute).
 Minn. Stat. § 462.357, subd. 6.
 See also LMC information memo, *Land Use Variances* for sample ordinance language.

Krummenacher, v. City of Minnetonka, 783 N.W.2d 721 (Minn. 2010) (superseded by statute).

When a local government denies a landowner a CUP without sufficient evidence to support its decision, a court can order the issuance of the permit subject to reasonable conditions.

Once a CUP is granted, a certified copy of the CUP (including a detailed list of all applicable conditions) must be recorded with the county recorder or the registrar of titles, and must include a legal description of the land.

CUPs are considered property interests that run with the land—that is, they pass from seller to buyer upon the sale or transfer of. For this reason, time restrictions on a CUP likely are invalid. In at least one instance, however, the courts has upheld the city’s decision to issue a time-limited CUP. If the city wishes to issue a time-limited CUP, the city should consult its city attorney.

Once issued, a CUP’s conditions cannot be unilaterally altered by the city, absent a violation of the CUP itself.

d. Requests for variances from the zoning ordinance

Variances serve as an exception to rules laid out in a zoning ordinance. They permit departures from strict enforcement of the ordinance as applied to a particular piece of property if strict enforcement would cause the owner “practical difficulties.” Variances generally allow deviations to physical standards (such as setbacks or height limits) and may not allow a use otherwise prohibited in the particular zoning district.

The law provides that the board of adjustment and appeals hear requests for variances. In many communities, the planning commission serves this function. Generally, an applicant may appeal the board’s decision to the city council. Under the statutory practical difficulties standard, a landowner is entitled to a variance if the facts satisfy the three-factor test of (1) reasonableness, (2) uniqueness, and (3) essential character.

The practical difficulties test resulted from a controversial divergence by the Minnesota Supreme Court, in 2010, from the traditional interpretation of this three-factor test (historically referred to as “undue hardship” test).

In *Krummenacher*, the Minnesota Supreme Court reviewed the statutory definition of “undue hardship” and held that the “reasonable use” prong of the “undue hardship” test was not whether the proposed use is reasonable, but rather whether there is a reasonable use of the property in the absence of the variance.

RELEVANT LINKS:

See LMC information memo,
[Land Use Variances](#).

Minn. Stat. § 462.354, subd.
6.

[Continental Prop. Group v. City of Wayzata](#), A15-1550 (Minn. Ct. App. April 18, 2016) (unpublished decision).

[City of Maplewood v. Valiukas](#), CO-96-1468 (Minn. Ct. App. Feb 11, 1997) (unpublished opinion).

[Mohler v. City of St. Louis Park](#), 643 N.W.2d 623 (Minn. Ct. App. 2002).
[Nolan v. City of Eden Prairie](#), 610 N.W.2d 697 (Minn. Ct. App. 2000).

In response to the Krummenacher case, the legislature, in 2011, changed the law back to interpreting “reasonable use” test in the same manner in place prior to the Krummenacher ruling. The 2011 law renamed the municipal variance standard from “undue hardship” to “practical difficulties,” and reinstated the familiar three-factor test of (1) reasonableness, (2) uniqueness, and (3) essential character. State law now allows variances when the applicant for the variance establishes that there are practical difficulties in complying with the zoning ordinance.

The practical difficulties factors include:

- The property owner proposes to use the property in a reasonable manner. This factor means that the landowner would like to use the property in a specific, reasonable way but cannot do so under the rules of the ordinance. It does not mean that the land cannot be put to any reasonable use whatsoever without the variance.
- The landowner’s situation arose out of circumstances unique to the property and not caused by the landowner. The uniqueness generally relates to the physical characteristics of the piece of property and economic considerations alone cannot create practical difficulties.
- The variance, if granted, will not alter the essential character of the locality. This factor generally contemplates whether the resulting structure will be out of scale, out of place, or otherwise inconsistent with the surrounding area.

Cities should grant variances when strict enforcement of a zoning ordinance causes practical difficulties. A landowner who purchased land knowing a variance would be necessary in order to make the property buildable is not barred from requesting a variance on the grounds the hardship was self-imposed. State law also requires granting “[v]ariances ...only ... when they are in harmony with the general purposes and intent of the ordinance and when the terms of the variance are consistent with the comprehensive plan.”

In granting a variance, the city may attach conditions, but the conditions must directly relate to and bear a rough proportionality to the impact created by the variance. For example, if the variance reduces side yard setbacks, it may be reasonable for a city to impose a condition of additional screening or landscaping to camouflage the structure built within the normal setback.

Cities enjoy broad discretion in denying a request for a variance, but the city must cite legally sufficient reasons for the denial. The board’s findings should detail the reasons for the denial or approval and the specify the facts upon which it based the decision. The findings must adequately address the statutory requirements.

RELEVANT LINKS:

Graham v. Itasca County Planning Comm'n, 601 N.W.2d 461 (Minn. Ct. App. 1999).

Stotts v. Wright County, 478 N.W.2d 802 (Minn. Ct. App. 1992).

City of North Oaks v. Sarpal, 797 N.W.2d 18 (Minn. 2011).

Mohler v. City of St. Louis Park, 643 N.W.2d 623 (Minn. Ct. App. 2002).

Minn. Stat. § 462.357, subd. 6.

Kismet Investors v. County of Benton, 617 N.W.2d 85 (Minn. 2000).

Kismet Investors v. County of Benton, 617 N.W.2d 85 (Minn. 2000).

Minn. Stat. § 462.357, subd. 6(2).

Minn. Stat. § 462.357.
Minn. Stat. § 462.358, subd. 2a.
Minn. Stat. § 15.99.

Best practice suggests seeking specific legal advice from the city attorney before making decisions on requests for variances.

An applicant for a variance is not entitled to a variance merely because similar variances were granted in the past, although, in granting variances, the city ought to be cautious about establishing precedent.

Error by city staff in approving plans does not entitle a person to a variance. While the result might be harsh, a municipality cannot be estopped from correctly enforcing a zoning ordinance, even if the property owner relies, to his or her detriment, on prior city action.

As discussed above, the most common requests for variances relate to physical conditions on the property. For example, setbacks and height restrictions. On occasion a city may receive requests for variances related to uses. For example, a request to use the property for a landscaping business out of a home in a residential district. Cities commonly refer to this as a use variance.

A city may not grant a use variance if the use is prohibited in a zoning district. This may occur when the local zoning ordinance specifically lists prohibited uses (such as industrial uses in a residential zone) or when a zoning ordinance lists permitted uses and then prohibits all uses not specifically listed.

A city may grant a use variance when the ordinance does not explicitly prohibit the use in the zoning district (including when the zoning ordinance is silent on the issue or when the use is explicitly allowed but limited by another portion of the ordinance). The requirements of unusual hardship and other statutory requirements still apply to use variances.

Finally, state statute creates two use variances that a city may always choose (but is not required) to permit through a variance. State statute specifically empowers cities to grant use variances for solar energy systems, where a variance is needed to overcome inadequate access to direct sunlight, and for the temporary use of a single-family residence as a two-family residence.

e. Requests for rezoning or zoning ordinance amendments

Cities have the authority to rezone (such as changing a designation from residential to mixed commercial) or otherwise amend the zoning regulations governing types of property (such as adding a permitted or conditional use). Because rezoning serves as an amendment to the actual zoning ordinance, all the procedures for amendments to the zoning ordinance apply.



INFORMATION MEMO

Land Use Variances

Learn about variances as a way cities may allow an exception to part of their zoning ordinance. Review who may grant a variance and how to follow and document the required legal standard of “practical difficulties” (before 2011 called “undue hardship”). Links to a model ordinance and forms for use with this law.

RELEVANT LINKS:

[Minn. Stat. § 462.357, subd. 6.](#)

[Minn. Stat. § 462.357, subd. 6.](#)

[Minn. Stat. § 462.357, subd. 6.](#)

I. What is a variance

A variance is a way that a city may allow an exception to part of a zoning ordinance. It is a permitted departure from strict enforcement of the ordinance as applied to a particular piece of property. A variance is generally for a dimensional standard (such as setbacks or height limits). A variance allows the landowner to break a dimensional zoning rule that would otherwise apply.

Sometimes a landowner will seek a variance to allow a particular use of their property that would otherwise not be permissible under the zoning ordinance. Such variances are often termed “use variances” as opposed to “area variances” from dimensional standards. Use variances are not generally allowed in Minnesota—state law prohibits a city from permitting by variance any use that is not permitted under the ordinance for the zoning district where the property is located.

II. Granting a variance

Minnesota law provides that requests for variances are heard by a body called the board of adjustment and appeals; in many smaller communities, the planning commission or even the city council may serve that function. A variance decision is generally appealable to the city council.

A variance may be granted if enforcement of a zoning ordinance provision as applied to a particular piece of property would cause the landowner “practical difficulties.” For the variance to be granted, the applicant must satisfy the statutory three-factor test for practical difficulties. If the applicant does not meet all three factors of the statutory test, then a variance should not be granted. Also, variances are only permitted when they are in harmony with the general purposes and intent of the ordinance, and when the terms of the variance are consistent with the comprehensive plan.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

III. Legal standards

When considering a variance application, a city exercises so-called “quasi-judicial” authority. This means that the city’s role is limited to applying the legal standard of practical difficulties to the facts presented by the application. The city acts like a judge in evaluating the facts against the legal standard. If the applicant meets the standard, then the variance may be granted. In contrast, when the city writes the rules in zoning ordinance, the city is exercising “legislative” authority and has much broader discretion.

A. Practical difficulties

“Practical difficulties” is a legal standard set forth in law that cities must apply when considering applications for variances. It is a three-factor test and applies to all requests for variances. To constitute practical difficulties, all three factors of the test must be satisfied.

1. Reasonableness

The first factor is that the property owner proposes to use the property in a reasonable manner. This factor means that the landowner would like to use the property in a particular reasonable way but cannot do so under the rules of the ordinance. It does not mean that the land cannot be put to any reasonable use whatsoever without the variance. For example, if the variance application is for a building too close to a lot line or does not meet the required setback, the focus of the first factor is whether the request to place a building there is reasonable.

2. Uniqueness

The second factor is that the landowner’s problem is due to circumstances unique to the property not caused by the landowner. The uniqueness generally relates to the physical characteristics of the particular piece of property, that is, to the land and not personal characteristics or preferences of the landowner. When considering the variance for a building to encroach or intrude into a setback, the focus of this factor is whether there is anything physically unique about the particular piece of property, such as sloping topography or other natural features like wetlands or trees.

RELEVANT LINKS:

[2011 Minn. Laws, ch. 19, amending Minn. Stat. § 462.357, subd. 6.](#)

[Krummenacher v. City of Minnetonka](#), 783 N.W.2d 721 (Minn. June 24, 2010).

[Minn. Stat. § 462.357 subd. 6.](#)
[Minn. Stat. § 394.27, subd. 7.](#)

See Section I, *What is a variance*.

See Section IV-A, *Harmony with other land use controls*.

3. Essential character

The third factor is that the variance, if granted, will not alter the essential character of the locality. Under this factor, consider whether the resulting structure will be out of scale, out of place, or otherwise inconsistent with the surrounding area. For example, when thinking about the variance for an encroachment into a setback, the focus is how the particular building will look closer to a lot line and if that fits in with the character of the area.

B. Undue hardship

“Undue hardship” was the name of the three-factor test prior to a May 2011 change of law. After a long and contentious session working to restore city variance authority, the final version of HF 52 supported by the League and allies was passed unanimously by the Legislature. On May 5, Gov. Dayton signed the new law. It was effective on May 6, the day following the governor’s approval. Presumably it applies to pending applications, as the general rule is that cities are to apply the law at the time of the decision, rather than at the time of application.

The 2011 law restores municipal variance authority in response to a Minnesota Supreme Court case, *Krummenacher v. City of Minnetonka*. It also provides consistent statutory language between city land use planning statutes and county variance authority, and clarifies that conditions may be imposed on granting of variances if those conditions are directly related to, and bear a rough proportionality to, the impact created by the variance.

In *Krummenacher*, the Minnesota Supreme Court narrowly interpreted the statutory definition of “undue hardship” and held that the “reasonable use” prong of the “undue hardship” test is not whether the proposed use is reasonable, but rather whether there is a reasonable use in the absence of the variance. The new law changes that factor back to the “reasonable manner” understanding that had been used by some lower courts prior to the *Krummenacher* ruling.

The 2011 law renamed the municipal variance standard from “undue hardship” to “practical difficulties,” but otherwise retained the familiar three-factor test of (1) reasonableness, (2) uniqueness, and (3) essential character. Also included is a sentence new to city variance authority that was already in the county statutes.

RELEVANT LINKS:

[Issuance of Variances](#), LMC model ordinance.

[Variance Application](#), LMC model form.
[Adopting Findings of Fact](#), LMC model resolution.

[Minn. Stat. § 462.357, subd. 6.](#)

See LMC information memo, [Taking the Mystery out of Findings of Fact](#).

[Minn. Stat. § 462.357, subd. 6.](#)

C. City ordinances

Some cities may have ordinance provisions that codified the old statutory language, or that have their own set of standards. For those cities, the question may be whether you have to first amend your zoning code before processing variances under the new standard. A credible argument can be made that the statutory language pre-empts inconsistent local ordinance provisions. Under a pre-emption theory, cities could apply the new law immediately without necessarily amending their ordinance first. In any regard, it would be best practice for cities to revisit their ordinance provisions and consider adopting language that mirrors the new statute.

The models linked at the left reflect the 2011 variance legislation. While they may contain provisions that could serve as models in drafting your own documents, your city attorney would need to review prior to council action to tailor to your city's needs. Your city may have different ordinance requirements that need to be accommodated.

IV. Other considerations

A. Harmony with other land use controls

The 2011 law also provides that: “Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the terms of the variance are consistent with the comprehensive plan.” This is in addition to the three-factor practical difficulties test. So a city evaluating a variance application should make findings as to:

- Is the variance in *harmony with* the purposes and intent of the ordinance?
- Is the variance *consistent with the comprehensive plan*?
- Does the proposal put property to use in a *reasonable manner*?
- Are there *unique circumstances* to the property not created by the landowner?
- Will the variance, if granted, alter the *essential character* of the locality?

B. Economic factors

Sometimes landowners insist that they deserve a variance because they have already incurred substantial costs or argue they will not receive expected revenue without the variance. State statute specifically notes that economic considerations alone cannot create practical difficulties. Rather, practical difficulties exist only when the three statutory factors are met.

RELEVANT LINKS:

[Minn. Stat. § 462.357, subd. 6.](#)

C. Neighborhood opinion

Neighborhood opinion alone is not a valid basis for granting or denying a variance request. While city officials may feel their decision should reflect the overall will of the residents, the task in considering a variance request is limited to evaluating how the variance application meets the statutory practical difficulties factors. Residents can often provide important facts that may help the city in addressing these factors, but unsubstantiated opinions and reactions to a request do not form a legitimate basis for a variance decision. If neighborhood opinion is a significant basis for the variance decision, the decision could be overturned by a court.

D. Conditions

A city may impose a condition when it grants a variance so long as the condition is directly related and bears a rough proportionality to the impact created by the variance. For instance, if a variance is granted to exceed an otherwise applicable height limit, any conditions attached should presumably relate to mitigating the effect of excess height.

V. Variance procedural issues

A. Public hearings

Minnesota statute does not clearly require a public hearing before a variance is granted or denied, but many practitioners and attorneys agree that the best practice is to hold public hearings on all variance requests. A public hearing allows the city to establish a record and elicit facts to help determine if the application meets the practical difficulties factors.

B. Past practices

While past practice may be instructive, it cannot replace the need for analysis of all three of the practical difficulties factors for each and every variance request. In evaluating a variance request, cities are not generally bound by decisions made for prior variance requests. If a city finds that it is issuing many variances to a particular zoning standard, the city should consider the possibility of amending the ordinance to change the standard.

RELEVANT LINKS:

[Minn. Stat. § 15.99.](#)

[Minn. Stat. § 15.99, subd. 2.](#)

See LMC information memo,
*Taking the Mystery out of
Findings of Fact.*

[Minn. Stat. § 15.99, subd. 2.](#)

Jed Burkett
LMCIT Land Use Attorney
jburkett@lmc.org
651.281.1247

C. Time limit

A written request for a variance is subject to Minnesota's 60-day rule and must be approved or denied within 60 days of the time it is submitted to the city. A city may extend the time period for an additional 60 days, but only if it does so in writing before expiration of the initial 60-day period. Under the 60-day rule, failure to approve or deny a request within the statutory time period is deemed an approval.

D. Documentation

Whatever the decision, a city should create a record that will support it. In the case of a variance denial, the 60-day rule requires that the reasons for the denial be put in writing. Even when the variance is approved, the city should consider a written statement explaining the decision. The written statement should explain the variance decision, address each of the three practical difficulties factors and list the relevant facts and conclusions as to each factor.

If a variance is denied, the 60-day rule requires a written statement of the reasons for denial be provided to the applicant within the statutory time period. While meeting minutes may document the reasons for denial, usually a separate written statement will need to be provided to the applicant in order to meet the statutory deadline. A separate written statement is advisable even for a variance approval, although meeting minutes could serve as adequate documentation, provided they include detail about the decision factors and not just a record indicating an approval motion passed.

VI. Variances once granted

A variance once issued is a property right that "runs with the land" so it attaches to and benefits the land and is not limited to a particular landowner. A variance is typically filed with the county recorder. Even if the property is sold to another person, the variance applies.

VII. Further assistance

If you have questions about how your city should approach variances under this statute, you should discuss it with your city attorney. You may also contact League staff.

2017 Minnesota Statute 462.357

Subd. 6. Appeals and adjustments.

Appeals to the board of appeals and adjustments may be taken by any affected person upon compliance with any reasonable conditions imposed by the zoning ordinance. The board of appeals and adjustments has the following powers with respect to the zoning ordinance:

(1) To hear and decide appeals where it is alleged that there is an error in any order, requirement, decision, or determination made by an administrative officer in the enforcement of the zoning ordinance.

(2) To hear requests for variances from the requirements of the zoning ordinance including restrictions placed on nonconformities. **Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the variances are consistent with the comprehensive plan. Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the zoning ordinance. "Practical difficulties," as used in connection with the granting of a variance, means that the property owner proposes to use the property in a reasonable manner not permitted by the zoning ordinance; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone do not constitute practical difficulties. Practical difficulties include, but are not limited to, inadequate access to direct sunlight for solar energy systems.** Variances shall be granted for earth sheltered construction as defined in section 216C.06, subdivision 14, when in harmony with the ordinance. **The board of appeals and adjustments or the governing body as the case may be, may not permit as a variance any use that is not allowed under the zoning ordinance for property in the zone where the affected person's land is located.** The board or governing body as the case may be, may permit as a variance the temporary use of a one family dwelling as a two family dwelling. **The board or governing body as the case may be may impose conditions in the granting of variances. A condition must be directly related to and must bear a rough proportionality to the impact created by the variance.**

304. ZONING CODE: VARIANCES AND APPEALS

304.010. BOARD OF APPEALS. The Planning Commission is hereby established as the Board of Appeals (Board). When acting as the Board, the Planning Commission will have the power to hear and advise the Council on the following matters:

1. Requests for variances from the literal provisions of the Zoning Code; and
2. Appeals in which it is alleged that there is an error in any administrative order, requirement, decision or determination made in the interpretation or enforcement of the Zoning Code.

304.020. PETITIONS FOR VARIANCES. The owner or owners of land to which the variance relates may file a petition for a variance with the Clerk. The petition shall be made on forms provided by the City Clerk. The petition shall be accompanied by plans described below and by all required fees. The City may require the petitioner to submit a certificate by a registered professional land surveyor verifying the location of all buildings, setbacks and building coverage, and certifying other facts that in the opinion of the City are necessary for evaluation of the petition.

304.030. APPEALS OF ADMINISTRATIVE DECISIONS. A person who deems himself aggrieved by an alleged error in any order, requirement, decision or determination made in the interpretation and enforcement of this ordinance, may appeal to the Board by filing a written appeal with the City Clerk within 30 days after the date of such order, requirement, decision or determination. The appeal shall fully state the order to be appealed and the relevant facts of the matter.

304.040. VARIANCE REQUIREMENTS AND CRITERIA. Petitions for Variances must include all Required Information and demonstrate that Criteria for each Variance are met.

1. Required Information.

- a. Legal description and address of parcel. Name, address, and phone number of applicant (and of the owner if owner is not the applicant).
- b. Plot plan drawn to scale. Elevation contour lines may be required.
- c. Plan showing existing and proposed new and changed structures on the lot. Existing structures on adjacent lots must also be shown.
- d. Evidence demonstrating compliance with the Rice Creek Watershed District's and other Governmental Units' regulations may be required. (See Section 303.040.)

2. Criteria for Granting a Variance. Variances may only be granted in Minnesota Statutes, Chapter 462.

Variances to the strict application of the provisions of the Code may be granted, however, no variance may be granted that would allow any use that is prohibited within the City. Conditions and safeguards may be imposed on the variances so granted. A variance shall not be granted unless the following criteria are met:

- a. Special conditions or circumstances exist which are peculiar to the land, structure, or building involved.
- b. The condition which result in the need for the variance were not created by the applicant's action or design solution. The applicant shall have the burden of proof for showing that no other reasonable design solution exists.
- c. The variance is proved necessary in order to secure for the applicant the right or rights that are enjoyed by other owners in the same area of the district.
- d. The granting of a variance will result in no increase in the amount of water draining from the property.
- e. Granting the variance will not impair an adequate supply of light and air to adjacent property, or unreasonably diminish or impair established property values within the surrounding area, or in any other respect impair the public health, safety, or welfare of the residents of the City.
- f. No variance shall be granted simply because there are no objections or because those who do not object out number those who do.
- g. Financial gain or loss by the applicant shall not be considered if reasonable use for the property exists under terms of the Zoning Code.

"AMENDED BY ORDINANCE 2005-1; APRIL 12, 2005."

304.050. HEARING AND RECOMMENDATION BY THE BOARD.

1. Within 60 days after the City Clerk determines that a variance petition is complete, and all required fees and information, including plans, drawings and surveys, have been received, or within 60 days after the filing of an appeal of an administrative decision, the Board shall conduct a public hearing and after hearing the oral and written views of all interested persons, the Board shall make its recommendation by a majority vote at the same meeting or at a specified future meeting thereof.

304.060. NOTICE OF HEARINGS.

1. Notice of variance hearings shall be mailed not less than ten (10) days before the date of the hearing to the person who filed the petition for variance, to the Minnesota Department of Natural Resources, and to each owner of property situated wholly or partially within 200 feet of the property lines to which the variance relates.

2. A notice of hearing for appeals of administrative decisions shall be published in the official newspaper of the City not less than ten days before the hearing. A notice shall also be mailed to the appellant.

3. No new notice need be given for any hearing which is continued by the Board to a specified future date.

304.070. FINAL DECISION. The Council shall decide all petitions for variance and appeals. The decision shall be made not later than 30 days after the date of the hearing. .

304.080. FORM OF ACTION TAKEN AND RECORD THEREOF. The Council shall maintain a record of its proceedings relative to the petition for variance or appeal which shall include the minutes of its meetings and final order concerning the variance petition or appeal of administrative decision. When applicable, notice of the final order shall be sent to the Minnesota Department of Natural Resources within ten (10) days.

304.090. REVOCATION. A violation of any condition set forth or required in granting a variance shall be a violation of this Code and automatically terminates the variance. A variance shall become null and void one year after it was granted, unless made use of within the year or such longer period prescribed by the Council.

Issuance of Variances, LMC Model Ordinance

League staff thoughtfully develops models for a city's consideration. Models should be customized as appropriate for an individual city's circumstances in consultation with the city's attorney. Helpful background information on this model may be found in the Information Memo "[Land Use Variances.](#)"

ORDINANCE NO. _____

AN ORDINANCE PROVIDING FOR THE ISSUANCE OF VARIANCES WITHIN THE CITY OF _____

The City Council of _____, Minnesota ordains:

SECTION 1. BOARD OF APPEALS AND ADJUSTMENTS

SUBD. 1. The Planning Commission shall be the Board of Appeals and Adjustments for this city, and as provided by Minn. Stat. Sec. 462.354, subd. 2 shall have the powers granted under Minn. Stat. Sec. 462.357, subd. 6, as they may be amended from time to time.

SECTION 2. VARIANCES

SUBD. 1. Pursuant to Minn. Stat. Sec. 462.357, subd. 6, as it may be amended from time to time, the Planning Commission, acting as a Board of Appeals and Adjustments, may issue variances from the provisions of this zoning code. A variance is a modification or variation of the provisions of this zoning code as applied to a specific piece of property.

SUBD. 2.

A. Variances shall only be permitted

- i. when they are in harmony with the general purposes and intent of the ordinance and
- ii. when the variances are consistent with the comprehensive plan.

B. Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the zoning ordinance.

SUBD. 3. "Practical difficulties," as used in connection with the granting of a variance, means that

- i. the property owner proposes to use the property in a reasonable manner not permitted by the zoning ordinance;
- ii. the plight of the landowner is due to circumstances unique to the property not created by the landowner; and
- iii. the variance, if granted, will not alter the essential character of the locality.
- iv. Economic considerations alone do not constitute practical difficulties. Practical difficulties include, but are not limited to, inadequate access to direct sunlight for solar energy systems.

SUBD. 4. Variances shall be granted for earth sheltered construction as defined in section 216C.06, subdivision 14, when in harmony with the ordinance. The board of appeals and adjustments may not permit as a variance any use that is not allowed under the zoning ordinance for property in the zone where the affected person's land is located. The board may permit as a variance the temporary use of a one family dwelling as a two family dwelling. The board may

impose conditions in the granting of variances. A condition must be directly related to and must bear a rough proportionality to the impact created by the variance.

SECTION 3. EFFECTIVE DATE

SUBD. 1. This ordinance becomes effective from and after its passage and publication.

Passed by the City Council of _____, Minnesota this _____ day of Month, Year.

Mayor

Attested:

City Clerk

MEMORANDUM



Birchwood Village

TO: Birchwood Planning Commission
FROM: Tobin Lay, City Administrator
SUBJECT: Small Cell Wireless Code

Dear Commissioners,

As promised, the League of Minnesota Cities has put out model code and collocation agreement to regulate small cell wireless in City right-of-ways. There are a lot of materials on this complex topic. I have enclosed some of the many resources from the League for your review and discussion. I encourage you to review the additional resources provided by the League referenced and linked in the enclosed materials – I can provide these materials for future discussions if requested.

The League's model code is couched in their model Right-Of-Way Ordinance (ROW) so you will have to pick out the sections relevant to small cell towers and equipment. I have also enclosed Birchwood's ROW Ordinance for your comparison. You have NOT been requested to amend the non-small cell wireless sections of Birchwood's ROW Ordinance BUT feel free to recommend any changes to any section of the Ordinance and/or to recommend a new Telecommunications ordinance. Also enclosed are sample telecommunication ordinances from other metro cities that were referenced by the League.

This topic is probably far too complex to tackle in one meeting so I recommend Commissioners review the enclosed materials, the referenced links, and begin discussing the general desires of the Commission. Once Commissioners are ready, I can invite City Attorney Kantrud to guide you through putting your recommended ordinance(s) and collocation agreement together.

Request/Recommendation

Staff requests Commissioners:

- 1) Review enclosed materials regarding ROW and/or Small Cell Wireless; and
- 2) Discuss appropriate amendments to Birchwood City Code Section 309 and/or new sections.

Thanks!

Regards,
Tobin Lay



**2017 Telecommunications Right-of-Way User Amendments
Permitting Process for Small Wireless Facilities**

Publication Date: August 1, 2017

Revised November 29, 2017

(For information on related federal laws see LMC Information Memo “[Cell Towers, Small Cell Technologies, and Distributed Antenna Systems](#)”)

Introduction:

On May 30, 2017, Gov. Dayton signed into law a bill¹ amending Minnesota’s Telecommunications Right-of-Way User Law². The amendments cleared up any confusion about whether wireless providers are treated the same as other telecommunications right-of-way users under state law, but created a separate, streamlined permitting system for placement of small wireless facilities on city-owned structures in rights of way. Most of the bill provisions became effective on May 31, 2017, with the exception that the prohibition on moratoria does not take effect until January 1, 2018 for those cities that did not have a right-of-way ordinance in place on or before May 18, 2017, to give those cities an opportunity to enact an ordinance regulating their public rights-of-way. Also, the amendments allow cities to enter collocation agreements with telecommunications right-of-way users, if they choose, as long as the collocation agreement for small wireless facilities is made available in a substantially complete form no later than six months after the effective date of this act or three months after receiving a small wireless facility permit application from a wireless service provider.

Where can I read the new law?

Until revisions of the state statute occur to include bills passed this session, cities can find the amendments at [2017 Laws, Chapter 94](#).

Does the law require cities to do anything differently when regulating wireless providers attaching their equipment to city structures in the rights of way?

Yes, the amendments create a separate permit process for small wireless facilities. The below checklist was prepared to serve as a guide for cities to use when amending existing telecommunications ordinances, but does not necessarily cover all nuances of the new law and should not replace working with city attorneys to draft or amend existing ordinances.

What is the purpose of Minnesota’s Telecommunication Right-of-Way User Law?

¹ Chapter 94, Article 9 of the 2017 Regular Session, effective May 31, 2017.

² Minn. Stat. §§ 237.162, 237.163.

In 1997, the Minnesota Legislature recognized the need for a state law providing local government units with the authority to regulate the use of public rights of way by telecommunications right-of-way users. The resulting Minnesota Telecommunications Right-of-Way User Law allows telecommunications right-of-way users to construct, maintain, and operate conduit, cable, switches (and now small wireless facilities), and related appurtenances and facilities along, across, upon, above, and under any public right of way, but subjects those users to local regulations by cities to manage their rights of way and to recover management costs.

Can a city manage its right of way without doing anything?

No, the city must adopt an enabling ordinance. A local government unit is not required to manage its rights of way, but most want to do so. As such, the local government authority must pass an ordinance exercising this authority. Many cities find that having a separate telecommunications right-of-way user ordinance (in addition to a general right-of-way ordinance) allows for better regulation of cell towers, small cell and other telecommunications equipment.

Did the amendments in the 2017 laws impact all telecommunications right-of-way users?

Some of the amendments impacted cities' regulations on all telecommunications right-of-way users, but the amendments also created a distinct set of regulations specifically for placement of small wireless facilities. With respect to the regulations that apply to all telecommunications right-of-way users, the law:

- ✓ Requires all telecommunications right-of-way users seeking to excavate or obstruct a public right of way to obtain a right-of-way permit to do so.
- ✓ Requires a telecommunications right-of-way user using, occupying, or seeking to use or occupy a public right of way for providing telecommunications services to register with the local government unit by providing the local government unit with specific information (set forth in the statute), and including authorization for periodic updates.
- ✓ Requires telecommunications right-of-way users to submit plans for construction and major maintenance, to provide reasonable notice of projects that may require excavation and obstruction of public rights of way.
- ✓ Provides for restoration by the telecommunication right-of-way user after excavation occurs, either in the form of doing the restoration work or reimbursing the local governmental unit for the cost of the restoration work.
- ✓ Allows recovery of right-of-way management costs through a fee for registration, a fee for each right-of-way permit or, when appropriate, a fee applicable to a telecommunications right-of-way user when that user causes the local government unit to incur costs because of actions or inactions of that user.

Can a city charge a fee for using the right of way?

Yes, because when cities manage rights of way, they incur costs. However, when cities charge right-of-way users, the fees must be calculated on a competitively neutral basis, and based on the actual costs incurred by the city in managing the public right of way. A fee for the cost of managing the right-of-way should reflect an allocation among all users of the public right-of-way, including the city itself.

Can a city charge rent if a right-of-way user places equipment in the right of way?

Yes. Nothing in the law prohibits a city from charging rent for the placement of technology or equipment by a telecommunications right-of-way user on a city owned structure. However, cities are limited in the amount

of rent they can charge for collocation of small wireless facilities on city-owned structures. Fee limitations are described in the statute.

If a city does not have an ordinance, can it pass a moratorium on processing any applications it receives until it can pass an ordinance?

Probably not. The law prohibits cities from establishing a moratorium with respect to filing, receiving, or processing applications for right-of-way or small wireless facility permits, or for issuing or approving right-of-way or small wireless facility permits. However, for cities that did not have an ordinance enabling it to manage its right-of-way before or on May 18, 2017, the prohibition on moratoria does not take effect until January 1, 2018, giving those cities an opportunity to enact an ordinance regulating its public rights-of-way.

Can a city still deny applications for siting of telecommunications equipment in its right of way?

Generally, yes, however, any denial or revocation of either a right-of-way permit or a small wireless facility permit must be done in writing and must document the basis for the denial, including the health, safety and welfare reasons for the denial. The local government unit must notify the telecommunications right-of-way user, in writing, within three business days of the decision to deny or revoke a permit. If the city denies a permit application, the telecommunications right-of-way user may cure the deficiencies identified by the local government unit and resubmit its application. If the telecommunications right-of-way user resubmits the application within 30 days of receiving written notice of the denial, the city may not charge an additional filing or processing fee. The local government unit must approve or deny the revised application within 30 days after the submission of the revised application, or it is deemed granted.

Can cities treat the siting of all cell equipment the same?

It depends. If the city plans to regulate cell sitings and require telecommunications right-of-way users to get permits, then the 2017 amendments to the law create a separate permit system for small wireless facility technology that places additional limitations on a city's ability to regulate those specific types of technology.

Does the new law mean our city cannot enter into a separate agreement with telecommunications right-of-way users who want to place equipment on city owned structures?

The amendments do not require cities to have separate agreements, and some cities may choose to put these provisions in their ordinance or permit instead. For cities that want a separate 'collocation agreement' in place, they must develop and make that collocation agreement available no later than six months after May 31, 2017 (the effective date of the act) or three months after receiving a small wireless facility permit application from a wireless service provider. "Collocate" or "collocation" means to install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure that is owned privately or by a local government unit. The template of the agreement must be made available in a substantially complete form. The parties to the separate small wireless facility collocation agreement always may incorporate additional mutually agreed upon terms and conditions. Also, the law now clearly classifies any small wireless facility collocation agreement between a local government unit and a wireless service provider as public data accessible to the public under Minnesota's Data Practices Law.

What type of equipment is subject to the special requirements on small cell technology?

The statute defines type of equipment, which include:

“Small wireless facility”:

(1) A wireless facility that meets both following qualifications:

(i) Each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all its exposed elements could fit within an enclosure of no more than six cubic feet.

(ii) All other wireless equipment associated with the small wireless facility, excluding electric meters, concealment elements, telecommunications demarcation boxes, battery backup power systems, grounding equipment, power transfer switches, cutoff switches, cable, conduit, vertical cable runs for the connection of power and other services, and any equipment concealed from public view within or behind an existing structure or concealment, is in aggregate no more than 28 cubic feet in volume.

(2) A micro wireless facility.

“Wireless support structure” means a new or existing structure in a public right of way designed to support or capable of supporting small wireless facilities, as reasonably determined by a local government unit.

“Collocate” or “collocation” means to install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure that is owned privately or by a local government unit.

What additional requirements must cities consider to comply with Minnesota’s Telecommunications Right-of-Way User Law, as amended?

The law sets forth specific requirements related to placement of small wireless facilities or installation of new wireless support structures. The below information highlights items cities will want to consider when drafting an ordinance or amending an existing ordinance. Again, cities should work with their city attorneys to ensure full compliance with the law. Also, cities should be mindful of the potential applicability of Section 6409(a) of the Middle Class Tax Relief and Joe Creation Act of 2012, codified at 47 U.S.C. § 1455, to collocations.

<p>NEW STATE LAW REQUIREMENTS</p> <p>GOVERNING PLACEMENT OF SMALL WIRELESS FACILITIES IN RIGHTS OF WAY</p> <p>If a city decides to regulate or require permits for placement of a new wireless support structure or collocation of a small wireless facility, then the city should be aware that:</p> <p><input type="checkbox"/> Small wireless facilities and wireless support structures are a permitted use, except that in districts zoned as single-family residential use or district identified as historic (either</p>
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by federal law or ordinance), a local government unit can require a conditional use permit.

- Cities must not require an applicant for a small wireless facility permit to provide any information that the applicant previously had provided to the city in a different application for a small wireless permit (which the applicant must identify by specific reference number).
- Cities must not require an application to provide information that is not reasonably necessary to review a permit application for compliance with generally applicable and reasonable health, safety, and welfare regulations, or to demonstrate compliance with applicable Federal Communications Commission regulations governing radio frequency exposure, or other information required by this section.
- Permits for small cell facility collocation or placement of a new wireless support structure must specify that the term of a small wireless facility permit equals the length of time that small wireless facility is in use, unless the permit is revoked under this section.
- The total application fee for a small wireless facility permit must comply with the statutory requirement regarding costs related to the permit.
- The city must allow applicants for small wireless facility permits to file a consolidated permit application to collocate up to 15 small wireless facilities (or a greater number if agreed to by a local government unit), provided that all the small wireless facilities in the application are located within a two-mile radius, consist of substantially similar equipment, and are to be placed on similar types of wireless support structures.
- The city has 90 days after the date a small wireless facility permit application is filed to issue or deny the permit, or the permit is automatically issued. *Keep in mind that this time frame may be shorter if the federal Middle Class Tax Relief and Joe Creation Act of 2012, codified at 47 U.S.C. § 1455 applies.
- To toll the 90-day clock, the city must provide a written notice of incompleteness to the applicant within 30 days of receipt of the application, identifying all missing documents or information, and providing the applicant with a time to cure that complies with the statute³. Remember to also consult
- If the city receives applications within a single seven-day period from one or more applicants seeking approval of permits for more than 30 small wireless facilities, the city may extend the 90-day deadline by an additional 30 days. If a city elects to invoke this extension, it must inform in writing any applicant to whom the extension will be applied.
- A city cannot require placement of small wireless facilities on any specific wireless support structure other than the one proposed in the permit application.

³Minn. Stat. §237.163, Subd. 3c(b).

- A city must not limit the placement of *small wireless facilities*, either by minimum separation distances between small wireless facilities or maximum height limitations, except that each wireless support structure installed in the right of way after the effective date of this act shall not exceed 50 feet above ground level (unless the local government unit agrees to a greater height).
- A city can set forth in its ordinance separation requirements for placement of wireless support structures in relation to other wireless support structures.
- A city still may deny permit for health, safety, and welfare reasons or for noncompliance with decorative wireless support structures or signs.
- A city cannot require a person to pay a small wireless facility permit fee, obtain a small wireless facility permit, or enter into a small wireless facility collocation agreement solely in order to conduct routine maintenance of a small wireless facility; replace a small wireless facility with a new facility that is substantially similar or smaller in size, weight, height, and wind or structural loading; or install, place, maintain, operate, or replace micro wireless facilities suspended on cables strung between existing utility poles in compliance with national safety codes.
- A city cannot require an applicant to apply for or enter any individual license, franchise, or other agreement with the local government unit or any other entity, other than the optional standard small wireless facility collocation agreement.
- A city may require notice of any work that will obstruct a public right of way.

OPTIONAL PROVISIONS FOR SMALL WIRELESS FACILITIES

- A city is not required to have a separate agreement, but can choose to enter collocation agreements with applicants locating small wireless facilities onto city owned structures to address terms and conditions of the use of the structures. If a city chooses to do so, then it must make the agreement available to the public in a substantially complete format no later than six months after the effective date or three months after receiving a small wireless facility permit application from a wireless service provider. The League now has a model [Small Wireless Facility Collocation Agreement](#) available for members' use. It is important to consult with the city's attorney when entering such an agreement.

- A city may elect to charge each small wireless facility attached to a wireless support structure owned by the local government unit a fee (rental fee), in addition to other fees or charges allowed under the law, consisting of: (1) up to \$150 per year for rent to occupy space on a wireless support structure; (2) up to \$25 per year for maintenance associated with the space occupied on a wireless support structure; and (3) an additional monthly fee for electricity used to operate a small wireless facility, if not purchased directly from a utility, at the rate set forth in the statute.⁴

⁴ Minn. Stat. 237.163, Subd. 6 (d).



INFORMATION MEMO

Cell Towers, Small Cell Technologies & Distributed Antenna Systems

Learn about large and small cell tower deployment and siting requests for small cell, small wireless and distributed antenna systems (DAS) technology. Better understand the trend of the addition of DAS, small wireless or small cell equipment on existing utility equipment. Be aware of common gaps in city zoning, impact of federal and state law, reasons for collocation agreements and some best practices for dealing with large and small cell towers, small wireless facilities and DAS.

RELEVANT LINKS:

[47 U.S.C. § 253](#) (commonly known as Section 253 of Telecommunications Act).

[47 U.S.C. § 332](#) (commonly known as Section 332 of Telecommunications Act).

[FCC Website](#).



[47 U.S.C. § 253](#) (commonly known as Section 253 of Telecommunications Act).

[47 U.S.C. § 332](#) (commonly known as Section 332 of Telecommunications Act).

I. Deployment of large cell towers or antennas

A cell site or cell tower creates a “cell” in a cellular network and typically supports antennas plus other equipment, such as one or more sets of transceivers, digital signal processors, control electronics, GPS equipment, primary and backup electrical power and sheltering. Only a finite number of calls or data can go through these facilities at once and the working range of the cell site varies based on any number of factors, including height of the antenna. The Federal Communications Commission (FCC) has stated that cellular or personal communications services (PCS) towers typically range anywhere from 50 to 200 feet high.

The emergence of personal communications services, the increased number of cell providers, and the growing demand for better coverage have spurred requests for new cell towers, small cell equipment, and distributed antenna systems (DAS) nationwide. Thus, some cellular carriers, telecommunications wholesalers or tower companies, have attempted to quickly deploy telecommunications systems or personal wireless service facilities, and, in doing so, often claim federal law requires cities to allow construction or placement of towers, equipment, or antennas in rights of way. Such claims generally have no basis. Although not completely unfettered, cities can feel assured that, in general, federal law preserves local zoning and land use authority.

A. The Telecommunications Act and the FCC

The Telecommunications Act of 1996 (TCA) represented America’s first successful attempt to reform regulations on telecommunications in more than 60 years, and was the first piece of legislation to address internet access. Congress enacted the TCA to promote competition and higher quality in American telecommunications services and to encourage rapid deployment of new telecommunications technologies.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

RELEVANT LINKS:

[FCC website interpreting Telecommunications Act of 1996.](#)

[47 U.S.C. § 253 \(Section 253 of Telecommunications Act\).](#)

[47 U.S.C. § 332\(c\)\(7\).](#)

[FCC 09-99, Declaratory Ruling \(Nov. 18, 2009\).](#)

[47 U.S.C. § 253\(c\)\(e\) \(Section 253 of Telecommunications Act\).](#)

[47 U.S.C. § 332\(c\)\(7\).](#)

[FCC 09-99, Declaratory Ruling \(Nov. 18, 2009\).](#)

[Sprint Spectrum v. Mills, 283 F.3d 404 \(2nd Cir. 2002\).](#)

[USCOC of Greater Missouri v. Vill. Of Marlborough, 618 F.Supp.2d 1055 \(E.D. Mo. 2009\).](#)

[FCC 09-99, Declaratory Ruling \(Nov. 18, 2009\).](#)

The FCC is the federal agency charged with creating rules and policies under the TCA and other telecommunications laws.

The FCC also manages and licenses commercial users (like cell providers and tower companies), as well as non-commercial users (like local governments). As a result, both the TCA and FCC rulings impact interactions between the cell industry and local government.

The significant changes in the wireless industry and its related shared wireless infrastructures, along with consumer demand for fast and reliable service on mobile devices, have fueled a frenzy of requests for large and small cell/DAS site development and/or deployment. As a part of this, cities find themselves facing cell industry arguments that federal law requires cities to approve tower siting requests.

Companies making these claims most often cite Section 253 or Section 332 of the TCA as support. Section 253 states “no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Section 332 has a similar provision ensuring the entry of commercial mobile services into desired geographic markets to establish personal wireless service facilities.

These provisions should not, however, be read out of context. When reviewing the relevant sections in their entirety, it becomes clear that federal law does not pre-empt local municipal regulations and land use controls. Specifically, the law states “[n]othing in this section affects the authority of a state or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way ...” and that “nothing in this chapter shall limit or affect the authority of ... local government ... over decisions regarding the placement, construction, and modification of personal wireless service facilities”.

Courts consistently have agreed that local governments retain their regulatory authority and, when faced with making decisions on placement of towers, antenna or *new* telecommunication service equipment on city facilities, they generally have the same rights that private individuals have to deny or permit placement of a cellular tower on their property. This means cities can regulate and permit placement of towers and other personal wireless service facilities, including, in most situations (though some state law restrictions exist regarding regulations of small wireless support structures), controlling height, exterior materials, accessory buildings, and even location. Cities should be careful to make sure that local regulations don't have the effect of completely banning all cell towers or personal wireless service facilities. Such regulation could run afoul of federal law (not to mention state law as well).

RELEVANT LINKS:

[Vertical Broadcasting v. Town of Southampton](#), 84 F. Supp.2d 379 (E.D.N.Y. 2000).

[Paging v. Bd. of Zoning Appeals for Montgomery Cty.](#), 957 F.Supp. 805 (W.D. Va. 1997).

[Letter from Minnesota Department of Commerce to Mobilitie.](#)

[Minn. Stat. § 237.162](#)
[Minn. Stat. § 237.163](#)
Chapter 94, Art. 9, 2017
Regular Session.

[Minnesota Public Utilities Commission, Meeting Agenda \(Nov. 3, 2016\).](#)

[Minn. Stat. § 237.162.](#)
[Minn. Stat. § 237.163](#)
Chapter 94, Art. 9, 2017
Regular Session.

Some cellular companies try to gain unfettered access to city right of way by claiming they are utilities. The basis for such a claim usually follows one of two themes—either that, as a utility, federal law entitles them to entry; or, in the alternative, under the city’s ordinances, they get the same treatment as other utilities. Courts have rejected the first argument of entitlement, citing to the specific directive that local municipalities retain traditional zoning discretion.

B. State law

In the alternative, the argument that a city’s local ordinances include towers as a utility has, on occasion and in different states, carried more weight with a court. To counter such arguments, cities may consider specifically excluding towers, antenna, small cell, and DAS equipment from their ordinance’s definition of utilities. The Minnesota Department of Commerce, in a letter to a wireless infrastructure provider, cautioned one infrastructure company that its certificate of authority to provide a local niche service did not authorize it to claim an exemption from local zoning. The Minnesota Department of Commerce additionally requested that the offending company cease from making those assertions.

In Minnesota, to clear up confusion about whether wireless providers represent telecommunications right-of-way users under state law and to address concerns about deployment of small wireless technology, the Legislature amended Minnesota’s Right-of-Way User statutes, or Minnesota ROW Law, in the 2017 legislative session to specifically address small wireless facilities and the support structures on which those facilities may attach.

Because of these amendments, effective May 31, 2017 additional specific state statutory provisions apply when cities, through an ordinance, manage their rights of way, recover their right-of-way management costs (subject to certain restrictions), and charge rent for attaching to city-owned structures in public rights of way. Rent, however, is capped for collocation of small wireless facilities. State law defines “collocate” or “collocation” as a means to install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure that is owned privately or by a local government unit.

The Minnesota ROW Law allows cities to require telecommunications right-of-way users to get a permit for use of the right of way; however, it creates a separate permitting structure for the siting of small wireless facilities.

RELEVANT LINKS:

[USCOC of Greater Missouri v. Vill. Of Marlborough](#), 618 F.Supp.2d 1055 (E.D. Mo. 2009).

[Minnesota Towers Inc. v. City of Duluth](#), 474 F.3d 1052 (8th Cir. 2007).

[NE Colorado Cellular, Inc. v. City of North Platte](#), 764 F.3d 929 (8th Cir. 2014) (denial of CUP for tower must be “in writing” but need not be a separate finding from the reasons in the denial).

[Smith Comm. V. Washington Cty, Ark.](#), 785 F.3d 1253 (8th Cir. 2015) (substantial evidence' analysis involves whether the local zoning authority's decision is consistent with the applicable local zoning requirements and can include aesthetic reasons).

[FCC 09-99, Declaratory Ruling](#), Nov. 18, 2009.

[Tower and Antenna Siting FAQ sheet from FCC.](#)

[T-Mobile West V. Crow](#), No. CV08-1337 (D. AZ. Dec. 16, 2009).

Because of the recent significant changes in the state law and the specific requirements for deployment of small wireless facilities that do not apply to other telecommunications right-of-way users, cities should work with their city attorneys to review and update their ordinances.

C. Limitations on cities' authority

1. Federal law

Although federal law expressly preserves local governmental regulatory authority, it does place several substantive and procedural limits on that authority. Specifically, a city:

- Cannot unreasonably discriminate among providers of functionally equivalent services.
- Cannot regulate those providers in a manner that prohibits or has the effect of prohibiting the provision of telecommunications services or personal wireless services.
- Must act on applications within a reasonable time.
- Must document denial of an application in writing supported by “substantial evidence.”

Proof that the local zoning authority's decision furthers the applicable local zoning requirements or ordinances satisfies the substantial evidence test. Municipalities cannot cite environmental concerns as a reason for denial, however, when the antennas comply with FCC rules on radio emissions. In the alternative, cities can request proof of compliance with the FCC rules.

Bringing an action in federal court represents the recourse available to the cellular industry if challenging the denial of a siting request under federal law. Based on the limitations set forth in the federal law on local land use and zoning authority, most often, when cities deny siting requests, the challenges to those denials claim one of the following:

- The municipal action has the effect of “prohibiting the provision of personal wireless service.”
- The municipal action unreasonably discriminates among providers of functionally equivalent services (i.e., cell providers claiming to be a type of utility so they can get the same treatment as a utility under city ordinance).

RELEVANT LINKS:

[Minn. Stat. § 237.162](#)
[Minn. Stat. § 237.163](#)
[Chapter 94, Art. 9, 2017](#)
Regular Session.

See further discussion of
state law restrictions in
Section II-A, below

[Minnesota Towers Inc. v. City of Duluth](#), 474 F.3d 1052 (8th Cir. 2007). [Smith Comm. V. Washington City, Ark.](#), 785 F.3d 1253 (8th Cir. 2015).

[Voicestream PCSII Corp. v. City of St. Louis](#), No. 4:04CV732 (E.D.Mo. August 3, 2005) (city interpretation of city ordinance treats communication facility as a utility).

[USCOC of Greater Missouri v. Vill. Of Marlborough](#), 618 F.Supp2d 1055, 1064 (E.D. Mo. 2009) (TCA explicitly contemplates some discrimination amount providers of functionally equivalent services).

2. State law

In addition to mirroring some of the federal law requirements, such as the requirement of equal treatment of all like providers, state law permits cities, by ordinance, to further regulate “telecommunications right-of-way users.”

Minnesota’s Telecom ROW Law expressly includes wireless service providers as telecommunications right-of-way users, making the law applicable to the siting of both large and small, wire-lined or wireless telecommunications equipment and facilities, in the rights of way.

State law places additional restrictions on the permitting and regulating of small wireless facilities and wireless support structure placement. Accordingly, cities should work with city attorneys when drafting, adopting, or amending their ordinance. The Telecom ROW Law still expressly protects local control, allowing cities to deny permits for reasonable public health, welfare, and safety reasons, with no definitions of or limitations on what qualifies as health, welfare, and safety reasons.

D. Court decisions

The 8th U.S. Circuit Court of Appeals (controlling law for Minnesota) recognizes that cities do indeed retain local authority over decisions regarding the placement and construction of towers and personal wireless service facilities.

The 8th Circuit also has heard cases where a carrier or other telecommunications company argued they are a utility and should be treated as such under local ordinances. Absent a local ordinance that includes this type of equipment within its definition of utilities, courts do not necessarily deem cell towers or other personal communications services equipment functionally equivalent to utilities.

Additionally, courts have found that the federal law anticipates some disparate application of the law, even among those deemed functionally equivalent. For example, courts determined it reasonable to consider the location of a cell tower when deciding whether to approve tower construction (finding it okay to treat different locations differently), so long as cities do not allow one company to build a tower at a specific location at the exclusion of other providers.

RELEVANT LINKS:

For regulation of telecommunications right-of-way users, see Appendix A, Sample Ordinances and Agreements.

[Minn. Stat. 237.163, Subd. 2 \(f\), Chapter 94, Art. 9, 2017 Regular Session.](#)



E. City approaches

Regulation of placement of cell towers and personal wireless services can occur through an ordinance. The Minnesota ROW Law provides cities with comprehensive authority to manage their rights of way. With the unique application of federal law to telecommunications and the recent changes to state law, along with siting requests for locations both in and out of rights of way, many cities find having a separate telecommunications right-of-way user ordinance (in addition to a right-of-way ordinance) allows cities to better regulate towers and other telecommunications equipment, as well as collocation of small wireless facilities and support structures.

Some cities also have modified the definitions in their ordinances to exclude cell towers, telecommunications, wireless systems, DAS, small cell equipment, and more from utilities to counter the cell industry’s requests for equal treatment or more lenient zoning under the city’s zoning ordinances.

In addition to adopting specific regulations, many city zoning ordinances recognize structures as conditional uses requiring a permit (or many of these regulations include a provision for variances, if needed). While cities may require special permits or variances to their zoning for siting of large cell facilities, under state law, small wireless facilities and wireless support structures accommodating those small wireless facilities are deemed a permitted use. The only exception to the presumed, permitted use for small wireless is that a city may require a special or conditional land use permit to install a new wireless support structure in a residentially zoned or historic district. Cities will want to review their zoning to make sure it complies with the Minnesota ROW Law.

II. Deployment of small cell technologies and DAS

Small cell equipment and DAS both transmit wireless signals to and from a defined area to a larger cell tower. They are often installed at sites that support cell coverage either within a large cell area that has high coverage needs or at sites within large geographic areas that have poor cell coverage overall.

RELEVANT LINKS:



[Minn. Stat. § 237.162.](#)
[Minn. Stat. § 237.163.](#)
[Chapter 94, Art. 9, 2017 Regular Session.](#)
See Appendix A, Sample Ordinances and Agreements.

See League [FAQ on Minnesota 2017 Telecommunication Right of Way User Amendments](#) (July 2017).

See Appendix A, Sample Ordinances and Agreements

Situational needs dictate when cell providers use small cell towers, as opposed to DAS technology. Generally, cell providers install small cell towers when they need to target specific indoor or outdoor areas like stadiums, hospitals, or shopping malls. DAS technology, alternatively, uses a small radio unit and an antenna (that directly link to an existing large cell tower via fiber optics). Installation of a DAS often involves cell providers using the fiber within existing utility structures to link to its larger cell tower. Cities sometimes are asked to provide the power needed for the radios, which the city can negotiate into the leasing agreement with the cell provider.

A. Additional zoning and permitting needs under state law

Historically, many cities' ordinances address large cell sites, but not small cell towers or DAS. With the recent changes to state law, cities should work with their city attorney to review their ordinances in consideration of the new statutory permit process for the siting of small wireless facilities.

Cities can charge rent (up to a cap for small wireless siting) under the statute for placement of cell technology or DAS on existing or newly installed support structures, like poles or water towers; and, also, can enter into a separate agreement to address issues not covered by state law or ordinance. Cities should work with their city attorney to get assistance with drafting these agreements and any additional documents, like a bill of sale (for transfer of pole from carrier to city), if necessary.

The terms and conditions of these agreements, called collocation agreements, for siting of small wireless facilities, most likely will mirror agreements formerly referred to as master licensing agreements, often including provisions such as:

- Definitions of scope of permitted uses.
- Establishment of right-of-way rental fee (note statutory limitations).
- Protection of city resources.
- Provision of contract term (note statutory limitations).
- Statement of general provisions.
- Maintenance and repair terms.
- Indemnity provisions.
- Insurance and casualty.
- Limitation of liability provision.
- Terms for removal.

RELEVANT LINKS:

[Minn. Stat. § 237.162](#)
[Minn. Stat. § 237.163](#)
Chapter 94, Art. 9, 2017
Regular Session.

See League [FAQ on Minnesota 2017 Telecommunication Right of Way User Amendments](#) (July 2017).

State law does not require a separate agreement, and some cities have chosen to put these provisions in their ordinance or permit instead. For cities that choose to have a separate agreement in place, they must develop and make that agreement publicly available no later than November 31, 2017 (six months after the effective date of this act) or three months after receiving a small wireless facility permit application from a wireless service provider. The agreement must be made available in a substantially complete form; however, the parties to the small wireless facility collocation agreement can incorporate additional mutually agreed upon terms and conditions. The law classifies any small wireless facility collocation agreement between a local government unit and a wireless service provider as public data, not on individuals, making those agreements accessible to the public under Minnesota's Data Practices Law.

Additionally, the new amendments to Minnesota's Telecom ROW Law set forth other requirements that apply only to small cell wireless facility deployment. The 2017 amendments changed Minnesota's ROW Law significantly, the details, of which, can be found in the League's [FAQ on Minnesota 2017 Telecommunication Right of Way User Amendments](#) (July 2017). However, after the amendments, the law now generally provides:

- A presumption of permitted use in all zoning districts, except in districts zoned residential or historical districts.
- The requirement that cities issue or deny small wireless facility requests within 90 days, with a tolling period allowed upon written notice to the applicant, within 30 days of receipt of the application.
- An allowance to batch applications (simultaneously submit a group of applications), with the limitation to not exceed 15 small wireless requests for substantially similar equipment on similar types of wireless support structures within a two-mile radius.
- Rent not to exceed \$150 per year with option of an additional \$25 for maintenance and allowances for electricity, if cities do not require separate metering.
- The limitation that cities cannot ask for information already provided by the same applicant in another small cell wireless facility application, as identified by the applicant, by reference number to those other applications.
- A restriction that the height of wireless support structures cannot exceed 50 feet, unless the city agrees otherwise.
- A restriction that wireless facilities constructed in the right of way may not extend more than 10 feet above an existing wireless support structure in place.

RELEVANT LINKS:

[47 U.S.C. § 332](#) (commonly known as Section 332 of Telecommunications Act).

[FCC 09-99, Declaratory Ruling](#) (Nov. 18, 2009).

[FCC 14-153, Report & Order](#) (October 21, 2014).

[Minn. Stat. § 237.163, Subd. 3a\(f\), Chapter 94, Art. 9](#), 2017 Regular Session.

See Appendix A, Sample Ordinances and Agreements.

- A prohibition on moratoriums with respect to filing, receiving, or processing applications for right-of-way or small wireless facility permits; or issuing or approving right-of-way or small wireless facility permits. For cities that did not have a right-of-way ordinance in place on or before May 18, 2017, the prohibition on moratoria does not take effect until January 1, 2018, giving those cities an opportunity to enact an ordinance regulating its public rights-of-way.

NOTE: These additional state law requirements do NOT apply to collocation on structures owned, operated maintained or served by municipal utilities. Also, the small wireless statutory requirements do not invalidate agreements in place at the time of enactment of the 2017 amendments (May 31, 2017).

The siting of DAS or new small cell technologies also must comply with the same restrictions under federal law that apply to large cell sitings. Specifically, a city:

- May not unreasonably discriminate among providers of functionally equivalent services.
- May not regulate in a manner that prohibits or has the effect of prohibiting the provision of personal wireless services.
- Must act on applications within a reasonable time.
- Must make any denial of an application in writing supported by substantial evidence in a written record.

Because of the complexities in the state law and the overlay of federal regulations, some cities have found it a best practice to adopt or amend a telecommunications right-of-way ordinance separate from their general right-of-way management ordinance. Cities that do not choose to adopt separate ordinances, at a minimum, should work with their attorney to review and amend their existing right-of-way ordinances, if necessary, to accommodate for telecommunications right-of-way users and the recent state law amendments for small wireless facilities. For example, since state law now recognizes small wireless facilities as a permitted use, zoning ordinances that require conditional use permits for these facilities likely will need amending.

Since wireless providers seek to attach their small cell and DAS equipment to city-owned structures, many cities choose to have a separate agreement in place to address terms and conditions not included in ordinances or permits. If the city chooses to do so, the law requires the city to have these agreements available in a substantial form so applicants can anticipate the terms and conditions. Again, cities should work with the city attorney to draft a template agreement governing attachment of wireless facilities to municipally owned structures in the right of way.

RELEVANT LINKS:

[Section 6409\(a\) of the Middle Class Tax Relief and Joe Creation Act of 2012, codified at 47 U.S.C. § 1455.](#)

[FCC Public Notice AD 12-2047](#) (January 25, 2013).

[FCC 14-153, Report & Order](#) (October 21, 2014).

[FCC Public Notice AD 12-2047](#) (January 25, 2013).

[FCC Public Notice AD 12-2047](#) (January 25, 2013).

[City of Arlington Texas, et. al. V. FCC, et. al.](#), 133 S.Ct. 1863, 1867 (2013) (90 days to process collocation application and 150 days to process all other applications, relying on §332(c)(7)(B)(ii)).

This model ordinance and other information can be found at [National Association of Counties Website](#).

With the nationwide trend encouraging deployment of these new technologies, if a city denies an application, it must do so in writing and provide detailed reasonable findings that document the health, welfare, and safety reasons for the denial. With the unique circumstances of each community often raising concerns about sitings, cities may benefit from proactively working with providers.

B. Modifications of existing telecommunication structures

If a siting request proposes *modifications to and/or collocations of wireless transmission equipment on existing FCC-regulated towers or base stations*, then federal law further limits local municipal control. Specifically, federal law requires cities to grant requests for modifications or collocation to existing *FCC-regulated structures* when that modification would not “substantially change” the physical dimensions of the tower or base station.

The FCC has established guidelines on what “substantially change the physical dimensions” means and what constitutes a “wireless tower or base station.”

Once small cell equipment or antennas gets placed on that pole, then the pole becomes a telecommunication structure subject to federal law and FCC regulations. Accordingly, after allowing collocation once, the city then must comply with the more restrictive federal laws that allow modifications to these structures that do not substantially change the physical dimensions of the pole, like having equipment from the other cell carriers.

Under this law, it appears cities cannot ask an applicant who is requesting modification for documentation information other than how the modification impacts the physical dimensions of the structure. Accordingly, documentation illustrating the need for such wireless facilities or justifying the business decision likely cannot be requested. Of course, as with the other siting requests, state and local zoning authorities must take prompt action on these siting applications for wireless facilities (60-day shot clock rule).

Two wireless industry associations, the WIA (formerly known as the PCIA) and CTIA, collaborated with the National League of Cities, the National Association of Counties, and the National Association of Telecommunications Officers and Advisors to: (1) develop a model ordinance and application for reviewing eligible small cell/DAS facilities requests under federal law; (2) discuss and distribute wireless siting best practices; (3) create a checklist that local government officials can use to help streamline the review process; and (4) hold webinars regarding the application process.

RELEVANT LINKS:

[Minn. Stat. § 237.163, Subd. 2\(d\), Chapter 94, Art. 9, 2017 Regular Session.](#)

III. Moratoriums

The cellular industry often challenges moratoriums used to stall placement of cell towers, as well as small cell/DAS technology, until cities can address regulation of these structures. Generally, these providers argue that these moratoriums do one of the following:

- Prohibit or have the effect of prohibiting the provision of personal wireless services.
- Violate federal law by failing to act on an application within a reasonable time.

State law now prohibits moratoriums with respect to: (1) filing, receiving, or processing applications for right-of-way or small wireless facility permits; or (2) issuing or approving right-of-way or small wireless facility permits. For cities that did not have an ordinance enabling it to manage its right-of-way on or before May 18, 2017, the prohibition on moratoria does not take effect until January 1, 2018, giving those cities an opportunity to enact an ordinance regulating its public rights-of-way.

IV. Conclusion

With the greater use of calls and data associated with mobile technology, cities likely will see more new cell towers, as well as small cell technology/DAS requests. Consequently, it would make sense to proactively review city regulations to ensure consistency with federal and state law, while still retaining control over the deployment of structures and the use of rights of way.

Appendix A: Sample Ordinances and Sample Agreements

<p>Many cities address cell towers in their ordinances already. For informational purposes only, the links below reference some telecommunications facilities ordinances in Minnesota. PLEASE NOTE, these ordinances reflect each city's unique circumstances and may pre-date the 2017 Legislative Session which, then, would not have considered the amendments to Minn. Stat. §§ 237.162, 237.163 when drafted.</p>
<h3>Sample Telecommunications Ordinances</h3>
<p>Revised Model Right-of-Way Ordinance</p>
<p>City of Edina (predates 2017 amendments) Ordinance: (Chapter 34: Telecommunications)</p>
<p>City of Brainerd Memo to Planning Commission from City Planner, July 13, 2017 Re: Draft Ordinance: Section 35: Antennas and Towers</p>
<p>City of Minneapolis Ordinance: (Amendment to Ordinance to accommodate Small Cell/DAS equipment) CPED Staff Report, City of Minneapolis regarding Amendment</p>
<p>City of Bloomington Ordinance: (Part II City Code, Chapter 17: Streets and Rights-of-Way) Ordinance: (No. 2017-16, Amending Section 14.03 of the City Code Concerning the Permit Fee) Permit: Small Cell Permit</p>

<h3>Sample Collocation Agreement for DAS/Small Call</h3>
<p>Texas City Attorney Association Addendum to Local Gov. Code, Chapter 283</p>
<p>San Antonio, Texas</p>
<p>Boston, Massachusetts</p>
<p>San Francisco, California</p>
<p>League of Minnesota Cities Model Small Wireless Facility Collocation Agreement</p>

League Publishes New Model Collocation Agreement

The emergence of personal communications services and the growing demand for better coverage have spurred requests for new cell towers, small cell equipment, and antenna systems. Cities have regulatory authority to make decisions on the placement of towers and antennas and other wireless facilities on city structures. Under a new law, the city can also enter into “collocation” agreements with telecommunications companies.

The League has developed a new model agreement to assist cities in developing a collocation agreement for telecommunications companies that wish to place small wireless facilities on the city’s wireless support structures in the city’s right of way. As with all agreements, the city should work with its staff and the city attorney to develop a final agreement.

- [Access the Model Small Wireless Facility Collocation Agreement](#)

New state law addresses small cell wireless deployment

In 2017, the Minnesota Legislature revised Minnesota Statutes, sections 237.162 and 237.163 to address concerns about deployment of small wireless facilities and the support structures on which those facilities may attach. A city may require a telecommunications right-of-way user to obtain a permit to place a new wireless support structure or collocate a small wireless facility in a public right of way managed by the city. See [2017 Session Laws, Chapter 94, article 9](#).

“Collocate” or “collocation” means to install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure that is owned privately or by a city or other local government unit.

A city has authority to manage its public rights of way and to recover its right-of-way management costs. Historically, the city could pass an ordinance to require a telecommunications company seeking to occupy a public right of way to obtain a right-of-way permit and to comply with the city’s right-of-way conditions.

Additional requirements

Under the 2017 law, a city now has additional requirements for permitting collocations of small wireless facilities in a public right of way managed by the city on existing or new support structures. Among other things, a permit must be processed on a nondiscriminatory basis and within a certain time period. Subject to certain conditions, an applicant may file a consolidated permit application to collocate up to 15 small wireless facilities or a greater number if agreed to by the city.

The 2017 law also authorizes cities to develop a collocation agreement no later than November 30, 2017, or three months after receiving a small wireless facility permit application from a wireless service provider. The collocation agreement must be “substantially complete.” However, the city and

the telecommunications provider may incorporate additional terms and conditions mutually agreed upon.

The collocation requirements do not apply to placements of small wireless facilities on “a wireless support structure owned, operated, maintained, or served by a municipal electric utility.”

More resources

For more information about telecommunications right-of-way users, see these League information memos:

- [Telecommunications Right-of-Way User Amendments of 2017 \(pdf\)](#)
- [Cell Towers, Small Cell Technologies & Distributed Antenna Systems \(pdf\)](#)

If you have questions about the LMC model agreement, contact LMC Risk Management Attorney Chris Smith at csmith@lmc.org or (651) 281-1269. For additional information about cell towers and permitting, contact LMC Research Attorney Pamela Whitmore at pwhitmore@lmc.org or (651) 281-1224.

Small Wireless Facility Collocation Agreement, LMC Model Contract

League models are thoughtfully developed by our staff for a city's consideration. Models should be customized as appropriate for an individual city's circumstances in consultation with the city's attorney. Helpful background information on this model may be found in the League Information Memo [Cell Towers, Small Cell Technology and Distributed Antenna Systems](#).



This icon marks places where the city must customize the model. They offer additional provisions, optional language, or comments for your consideration. The icon, and language you do not wish to include, should be deleted from this model before use. Make other changes, as needed, to customize the model for your city.

City of _____, Minnesota Small Wireless Facility Collocation Agreement

This Small Wireless Facility Collocation Agreement (the "Agreement") is made this _____ day of _____, 20_____, between the City of _____, a Minnesota local government unit, with its principal offices located at _____ in _____, Minnesota 5_____, ("Lessor) and _____, with its principal offices located at _____ in _____, _____ ("Lessee"). Lessor and Lessee are collectively referred to as the "Parties" or individually as a "Party."

WHEREAS, the Federal Communications Act of 1934, as amended, authorizes Lessor to manage and control access to and use of public rights-of-way within city limits; and

WHEREAS, Lessor has elected to manage its rights-of-way as authorized by Minnesota Statutes, Sections 237.162-.163 and Lessor's municipal code of ordinances (the "Code"); and

WHEREAS, this Agreement shall apply to the collocation of Small Wireless Facilities (as hereinafter defined). "Collocate" or "collocation" means to install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing Wireless Support Structure (as hereinafter defined) that is owned privately or by a local government unit; and

WHEREAS, a "Small Wireless Facility" means: (1) a wireless facility, as defined by Minnesota Statutes, Section 237.162, subd. 13, that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all its exposed elements could fit within an enclosure of no more than six cubic feet; and (ii) all other wireless equipment associated with the small wireless facility, excluding electric meters, concealment elements, telecommunications demarcation boxes, battery backup power systems, grounding equipment, power transfer switches, cutoff switches, cable, conduit, vertical cable runs for the connection of power and other services, and any equipment concealed from public view within or behind an existing structure or concealment, is in aggregate no more than 28 cubic feet in volume; or (2) a micro wireless facility as defined by Minnesota Statutes, Section 237.162, subd. 14; and

WHEREAS, Lessor owns or controls existing structures in the public right-of-way that are designed to support or determined by Lessor as capable of supporting a Small Wireless Facility ("Wireless Support Structure"), which are located within the geographic area of a license held by Lessee to provide wireless services; and

WHEREAS, Lessor has elected to set forth the terms and conditions of collocation on its Wireless Support Structures, and Lessee desires to install, maintain and operate Small Wireless Facilities on Lessor's Wireless Support Structures; and

WHEREAS, Lessor and Lessee desire to enter into this Agreement to define the general terms and conditions which will govern their relationship with respect to the particular sites at which Lessee will collocate its Small Wireless Facilities on Lessor's Wireless Support Structures; and

WHEREAS, Lessee shall compensate Lessor for the collocation of Small Wireless Facilities on Lessor's Wireless Support Structures. The fees imposed by Lessor are (1) based on the actual costs incurred by Lessor in managing the public rights-of-way; (2) based on an allocation among all users of the public rights-of-way, including Lessor, which shall reflect the proportionate costs imposed Lessor by each of the various types of uses of the public rights-of-way; (3) imposed on a competitively neutral basis; and (4) imposed in a manner so that above ground uses of public rights-of-way do not bear costs incurred by the local government unit to regulate underground uses of public rights-of-way; and

WHEREAS, Lessor and Lessee acknowledge that they will enter into an agreement supplement ("Supplement") in substantially the form attached hereto as Exhibit A, with respect to each particular Wireless Support Structure on which Lessee will collocate; and

WHEREAS, this Agreement is not exclusive and Lessor reserves the right to grant permission to other eligible and qualified entities to collocate Small Wireless Facilities in Lessor's rights-of-way.

NOW THEREFORE, in consideration of the mutual covenants contained herein, the Parties agree as follows:

1. **PREMISES.** Pursuant to all of the terms and conditions of this Agreement and the applicable Supplement, Lessor agrees to lease to Lessee certain space described in the applicable Supplement upon Lessor's Wireless Support Structure in the public right-of-way (Lessor's Wireless Support Structure, personal property, public right-of-way and surrounding real property are hereinafter sometimes collectively referred to as the "Property"), for the installation, operation and maintenance of Small Wireless Facilities; together with the non-exclusive right of ingress and egress from a public right-of-way, seven (7) days a week, twenty four (24) hours a day, over, under and through the Property to and from the Premises (as hereinafter defined) for the purpose of installation, operation and maintenance of Lessee's Small Wireless Facilities. The space leased by Lessor to Lessee described in the applicable Supplement is hereinafter collectively referred to as the "Premises." The Premises may include, without limitation, certain space on the ground (the "Equipment Space") on the Property, and space on the Wireless

Support Structure sufficient for the installation, operation and maintenance of antennas and other equipment (the “Antenna Space”) as described in the Supplement. Notwithstanding anything in the Supplement to the contrary, the Premises under each Supplement shall include such additional space necessary for the installation, operation and maintenance of wires, cables, conduits, and pipes (the “Cabling Space”) running between and among the various portions of the Premises and to all necessary electrical and telephone utility, cable, and fiber sources located within the Property. If there are not sufficient electric and telephone utility, cable, or fiber sources located on the Property, Lessor agrees to grant Lessee, or the local utility, or fiber or cable provider, upon Lessee’s approval, the right to install any utilities, cable, and fiber on, through, over, and under other properties owned or controlled by Lessor necessary for Lessee to operate its communications facility, provided the location of those utilities, cable, and fiber shall be as reasonably designated by Lessor. Lessor’s approval shall not be unreasonably withheld.

2. PLANS AND DRAWINGS. Before receiving approval from Lessor to install a Small Wireless Facility on Lessor’s Wireless Support Structures in public rights-of-way, Lessee shall submit to the Director of Public Works or the Director’s designee, detailed construction plans and drawings for each individual location, together with maps, showing specifically the Wireless Support Structures to be used, the number and character of the attachments to be placed on such Wireless Support Structures, equipment necessary for the use, proposed replacement of existing Wireless Support Structures, any additional Wireless Support Structures which may be required and any new installations for transmission conduit, pull boxes, and related appurtenances. The Director or the Director’s designee shall determine whether to give Lessee permission to proceed with the work as proposed by Lessee. Lessee shall perform all work at its own expense and make attachments in such manner as to not interfere with the services of Lessor.

3. CONDITION OF PROPERTY; ENGINEERING STUDY. Any expenses necessary to make the Premises ready for Lessee’s construction of its improvements shall be the responsibility of Lessee. Lessee must obtain and submit to Lessor a structural engineering study carried out by a qualified structural engineer showing the Wireless Support Structure and foundation is able to support the proposed Small Wireless Facility. Lessor makes no warranties or representations, express or implied, including warranties of merchantability or fitness for a particular use, except those expressly set forth in this Agreement.

4. USE OF PUBLIC RIGHTS-OF-WAY.

A. Lessor hereby grants to Lessee the right to use the municipal public right-of-way for the installation, maintenance and operation of Lessee’s communications equipment in and on the Wireless Support Structure located within the public right-of-way.

B. All communications equipment shall be installed in accordance with applicable Laws (as hereinafter defined) and Lessee shall comply with all laws, ordinances, rules and regulations adopted by Lessor. Within the public rights-of-way, the location of the communications equipment shall be subject to the reasonable and proper regulation, direction and control of the Lessor, or the official to whom such duties have

been delegated by Lessor. Lessee shall have no ownership interest in any Wireless Support Structure owned by Lessor.

C. Lessee and its authorized contractors shall give Lessor reasonable notice of the dates, location, and nature of all work to be performed on its communications equipment within the public rights-of-way. This Agreement shall allow Lessee to perform all work on Lessee's communications equipment within the public rights-of-way, and to park vehicles in the streets and other public rights-of-way when necessary for the installation, replacement, abandonment, operation or maintenance of Lessee's communications equipment. Following completion of work in the public rights-of-way, Lessee shall repair any affected public rights-of-way as soon as possible, but no later than the time frame established in the applicable Supplement. No street, alley, highway, or public place shall be encumbered for a longer period than shall be reasonably necessary to execute the work authorized by the applicable Supplement and this Agreement.

D. Any damages to Lessor's Wireless Support Structures, equipment thereon or other infrastructure caused by Lessee's installation or operations shall be repaired or replaced at Lessee's sole cost and to Lessor's reasonable satisfaction.

5. STRUCTURE RECONDITIONING, REPAIR, REPLACEMENT.

A. From time to time, if Lessor paints, reconditions, or otherwise improves or repairs the Wireless Support Structure in a substantial way ("Reconditioning Work"), Lessor shall reasonably cooperate with Lessee to carry out Reconditioning Work activities in a manner that minimizes interference with Lessee's approved use of the Premises.

B. Prior to commencing Reconditioning Work, Lessor shall provide Lessee with not less than ninety (90) days' prior written notice. Upon receiving that notice, it shall be Lessee's sole responsibility to provide adequate measures to cover or otherwise protect Lessee's equipment from the consequences of the Reconditioning Work, including but not limited to paint and debris fallout. Lessor reserves the right to require Lessee to remove all of Lessee's equipment from the Wireless Support Structure and Premises during Reconditioning Work, provided the requirement to remove Lessee's equipment is contained in the written notice required by this Section.

C. During Lessor's Reconditioning Work, Lessee may maintain a temporary communications facility on the Property, or after approval by Lessor, on any land owned or controlled by Lessor in the vicinity of the Property. If the Property will not accommodate Lessee's temporary communications facility, or if the Parties cannot agree on a temporary location, the Lessee, at its sole option, shall have the right to terminate the applicable Supplement upon thirty (30) days written notice to Lessor.

D. Lessee may request a modification of Lessor's procedures for carrying out Reconditioning Work in order to reduce the interference with Lessee's use of the Premises. If Lessor agrees to the modification, Lessee shall be responsible for all reasonable incremental cost related to the modification.

E. If Lessor intends to replace a Wireless Support Structure (“Replacement Work”), Lessor shall provide Lessee with at least ninety (90) days' written notice to remove its equipment. Lessor shall also promptly notify Lessee when the Wireless Support Structure has been replaced and Lessee may re-install its equipment. During Lessor's Replacement Work, Lessee may maintain a temporary communications facility on the Property, or after approval by Lessor, on any land owned or controlled by Lessor in the vicinity of the Property. If the Property will not accommodate Lessee's temporary communications facility or if the Parties cannot agree on a temporary location, the Lessee, at its sole option, shall have the right to terminate the applicable Supplement upon thirty (30) days written notice to Lessor.

F. If Lessor intends to repair a Wireless Support Structure due to storm or other damage (“Repair Work”), Lessor shall notify Lessee to remove its equipment as soon as possible. In the event of an emergency, Lessor shall contact Lessee by telephone prior to removing Lessee’s Equipment. Once the Wireless Support Structure has been replaced or repaired, Lessor will promptly notify Lessee it can reinstall its equipment. During Lessor’s Repair Work, Lessee may maintain a temporary communications facility on the Property, or after approval by Lessor, on any land owned or controlled by Lessor in the vicinity of the Property. If the Property will not accommodate Lessee's temporary communications facility, or if the Parties cannot agree on a temporary location, or if the Pole(s) cannot be repaired or replaced within thirty (30) days, Lessee, at its sole discretion, shall have the right to terminate the applicable Supplement upon thirty (30) days’ written notice to Lessor. However, at Lessee's sole option, within thirty (30) days after the casualty damage, Lessor must provide Lessee with a replacement Supplement to lease space at a new location upon which the Parties mutually agree. The monthly rental payable under the new replacement Supplement will not be greater than the monthly rental payable under the terminated Supplement.

G. If Lessee’s installation requires a new Wireless Support Structure to be constructed or an existing Wireless Support Structure to be replaced by Lessee (the “Replacement Wireless Support Structure”) then, any such Replacement Wireless Support Structure, shall be deemed to be a fixture on the Property and the Replacement Wireless Support Structure shall be and remain the property of the Lessor, without further consideration to or from Lessor. Upon completion of Lessee’s installation, Lessor shall be responsible for any and all costs relating to the operation, maintenance, repair and disposal of the Replacement Wireless Support Structure, unless such costs are due to the improper or negligent installation by Lessee or contractor hired by Lessee. If the Replacement Wireless Support Structure replaces an existing structure, then also as part of Lessee’s installation, Lessee shall remove, dispose, salvage and or discard the existing structure at Lessee’s sole discretion.

6. TERM; RENTAL.



Pursuant to Minnesota Statutes, Section 237.163, subd. 6(g), a city may elect to charge each Small Wireless Facility attached to a Wireless Support Structure owned by the city a fee “up to” the amounts listed below. Most cities will likely charge the maximum amount.

Each Supplement shall be effective as of the date of execution by both Parties (the "Effective Date"), at which time rental payments shall commence and be due at a total annual rental of \$175.00 (the "Annual Rental"), representing \$150.00 per year for rent to occupy space on a Wireless Support Structure and \$25.00 per year for maintenance associated with the space occupied on a wireless support structure. Consistent with Minnesota Statutes Sections 237.162-.163, the term of each Supplement shall be equal to the length of time that the Small Wireless Facility is in use (the "Term"), unless the Supplement is terminated pursuant to this Agreement. The annual rental for each Supplement shall be set forth in the Supplement and shall be paid in advance annually on each anniversary of the Effective Date, in advance, to the payee designated by Lessor in the Supplement, or to such other person, firm or place as Lessor may, from time to time, designate in writing. Upon agreement of the Parties, Lessee may pay rent by electronic funds transfer. Lessor hereby agrees to provide to Lessee the reasonable documentation required for Lessee to pay all rent payments due to Lessor.

7. ELECTRICAL.



Pursuant to Minnesota Statutes, Section 237.163, subd. 6(g), a city may elect to charge each Small Wireless Facility attached to a Wireless Support Structure owned by the city an electricity use fee "up to" the amounts listed below. Most cities will likely charge the maximum amount.

Lessor shall, at all times during the Term of each Supplement, provide electrical service and telephone service access within the Premises. As provided by Minnesota Statutes Sections 237.162-.163, an monthly fee for electricity used to operate the Small Wireless Facility, if not purchased directly from a utility, shall be added to the annual rent due under each Supplement at the rate of:

- A. \$73.00 per radio node less than or equal to 100 max watts;
- B. \$182.00 per radio node over 100 max watts; or
- C. The actual costs of electricity, if the actual costs exceed the amount in item (A) or (B).

The amount of any such annual fee shall be set forth in each Supplement.

Lessee shall be permitted at any time during the Term of each Supplement, to install, maintain, and/or provide access to and use of, as necessary (during any power interruption at the Premises), a temporary power source and a temporary installation of any other services and equipment required to keep Lessee's communications facility operational, along with all related equipment and appurtenances within the Premises, or elsewhere on the Property in such locations as reasonably approved by Lessor. Lessee shall have the right to install conduits connecting the temporary power source, and the temporary installation of any other services and equipment required to keep Lessee's communications facility operational, and related appurtenances to the Premises.

Alternatively, Lessee may purchase electricity directly from a utility provider.

8. ENGINEERING COSTS. The Parties acknowledge and agree that, pursuant to Minnesota Statutes, Sections 237.162-.163, Lessor may charge the actual costs of the initial engineering and preparatory construction work associated with Lessee's collocation in the form of a onetime, nonrecurring, commercially reasonable, nondiscriminatory, and competitively

neutral charge. Lessee shall pay such reasonable costs within sixty (60) days of receipt of an invoice that itemizes the costs.

9. USE. Lessee shall use the Premises for the purpose of constructing, maintaining, repairing and operating Small Wireless Facilities and uses incidental thereto. Lessee shall have the right, without any increase in rent, to replace or repair its utilities, fiber or cable, equipment, antennas and/or conduits or any portion thereof, and the frequencies over which the equipment operates. Any additions or material modifications shall require Lessor's approval and may be subject to an increase in rent if allowed by law.

10. GOVERNMENTAL APPROVALS; PERMITS. It is understood and agreed that Lessee's ability to use the Premises is contingent upon Lessee obtaining all of the certificates, permits and other approvals (collectively the "Government Approvals") that may be required by any Federal, State or Local authorities, as well as a satisfactory structural analysis that will permit Lessee use of the Premises as set forth above. Lessor shall cooperate with Lessee in its effort to obtain the Governmental Approvals, and shall take no action which would adversely affect the status of the Property with respect to the proposed use thereof by Lessee. Lessee shall have the right to terminate the applicable Supplement if: (i) any of the applications for Governmental Approvals is finally rejected; (ii) any Governmental Approval issued to Lessee is canceled, expires, lapses, or is otherwise withdrawn or terminated by governmental authority; (iii) Lessee determines that the Governmental Approvals may not be obtained in a timely manner; (iv) Lessee determines that the Premises is no longer technically compatible for its use; or (v) Lessee, in its sole discretion, determines that the use of the Premises is obsolete or unnecessary. Notice of Lessee's exercise of its right to terminate shall be given to Lessor in accordance with the notice provisions set forth in Paragraph 20 and shall be effective upon the mailing of that notice by Lessee, or upon such later date as designated by Lessee. All rentals paid to the termination date shall be retained by Lessor. Upon such termination, the applicable Supplement shall be of no further force or effect except to the extent of the representations, warranties, and indemnities made by each Party to the other thereunder. Otherwise, the Lessee shall have no further obligations for the payment of rent to Lessor for the terminated Supplement.

11. INDEMNIFICATION. To the fullest extent permitted by law, Lessee agrees to defend, indemnify and hold harmless Lessor, and its employees, officials, and agents from and against all claims, actions, damages, losses and expenses, including reasonable attorney fees, arising out of Lessee's negligence, misconduct, or Lessee's failure to perform its obligations under this Agreement. Lessee's indemnification obligation shall apply to Lessee's contractors, subcontractors, or anyone directly or indirectly employed or hired by Lessee, or anyone for whose acts Lessee may be liable. Lessor will provide Lessee with prompt, written notice of any written claim covered by this indemnification provision; provided that any failure of Lessor to provide any such notice, or to provide it promptly, shall not relieve Lessee from its indemnification obligations in respect of such claim, except to the extent Lessee can establish actual prejudice and direct damages as a result thereof. Lessor will cooperate with Lessee in connection with Lessee's defense of such claim. Lessee shall not settle or compromise any such claim or consent to the entry of any judgment without the prior written consent of Lessor and

without an unconditional release of all claims by each claimant or plaintiff in favor of Lessor. The indemnity obligation shall survive the completion or termination of this Agreement.

12. INSURANCE.



The insurance requirements below are suggested minimum amounts. A city may modify these requirements.

A. **Waiver of Subrogation.** To the extent allowed by law, Lessee hereby waives and release any and all rights of action for negligence against Lessor which may hereafter arise on account of damage to Lessee's property, resulting from any fire, or other casualty of the kind covered by standard fire insurance policies with extended coverage, regardless of whether or not, or in what amounts, such insurance is now or hereafter carried by Lessee. This waiver and release shall apply between the Parties and shall also apply to any claim asserted as a right of subrogation. All such policies of insurance obtained by Lessee concerning its property shall waive the insurer's right of subrogation against Lessor.

B. **General Liability.** Lessee agrees that at its own cost and expense, it will maintain commercial general liability insurance with limits not less than \$2,000,000 per occurrence; \$4,000,000 annual aggregate, for bodily injury (including death) and for damage or destruction to property. The policy shall cover liability arising from premises, operations, products-completed operations, personal injury, advertising injury, and contractually assumed liability. Lessee shall add the Lessor as an additional insured.

C. **Automobile Liability.** Lessee shall maintain commercial automobile liability Insurance, including owned, hired, and non-owned automobiles, with a minimum combined single liability limit of \$2,000,000 per occurrence.

D. **Workers' Compensation.** Lessee agrees to provide workers' compensation insurance for all its employees in accordance with the statutory requirements of the State of Minnesota. Lessor shall also carry employers' liability insurance with minimum limits as follows: \$500,000 for bodily injury by disease per employee; \$500,000 aggregate for bodily injury by disease; and \$500,000 for bodily injury by accident.

E. **Additional Insurance Conditions.**

(i) Lessee shall deliver to Lessor a certificate of insurance as evidence that the above coverages are in full force and effect.

(ii) Lessee's policies shall be primary insurance and non-contributory to any other valid and collectible insurance available to Lessor with respect to any claim arising under this Agreement.

(iii) Lessee's policies and certificate of insurance shall contain a provision that coverage afforded under the policies shall not be cancelled without at least thirty (30) days' advanced written notice to Lessor, or ten (10) days' written notice for non-payment of premium.

13. LIMITATION OF LIABILITY. Except for indemnification obligations pursuant to Paragraph 11, neither Party shall be liable to the other, or any of their respective agents, representatives, employees for any lost revenue, lost profits, loss of technology, rights or services, incidental, punitive, indirect, special or consequential damages, loss of data, or interruption or loss of use of service, even if advised of the possibility of such damages, whether under theory of contract, tort (including negligence), strict liability or otherwise.

14. INTERFERENCE. Lessee shall obtain a radio frequency interference study carried out by an independent professional radio frequency engineer showing that Lessee's intended use will not interfere with any current communication facilities which are located on or near a Wireless Support Structure. Lessee shall not transmit or receive radio waves at the Premises until such evaluation has been satisfactorily completed and approved by lessor. Lessee agrees to install equipment of the type and frequency which will not cause harmful interference which is measurable in accordance with then existing industry standards to any equipment of Lessor or other tenants of the Property which existed on the Property prior to the date the applicable Supplement is executed by the Parties. In the event any after-installed Lessee's equipment causes such interference, and after Lessor has notified Lessee of such interference, Lessee will take all commercially reasonable steps necessary to correct and eliminate the interference, including but not limited to, at Lessee's option, powering down such interfering equipment and later powering up such interfering equipment for intermittent testing. If the interference continues for a period in excess of 48 hours following such notification, Lessor shall have the right to require Lessee to reduce power, and/or cease operations until such time Lessee can make repairs to the interfering equipment. In no event will Lessor be entitled to terminate a Supplement or relocate the Equipment as long as Lessee is making a good faith effort to remedy the interference issue. Lessor agrees that Lessor and/or any other users of the Property who currently have or in the future take possession of the Property will be permitted to install only such equipment that is of the type and frequency which will not cause harmful interference which is measurable in accordance with then existing industry standards to the then existing equipment of Lessee. If Lessee determines, in its reasonable discretion, that Lessor's equipment or any other user's equipment permitted by Lessor is causing interference, Lessor shall, upon written communication from Lessee to Lessor take all reasonable steps necessary to correct and eliminate the interference, including causing other users causing such interference to correct and eliminate the interference. If the interference continues for a period in excess of 48 hours following the notification, Lessor shall, or shall require any other user to, reduce power and/or cease operations until such time as Lessor, or the other user, can make repairs to the interfering equipment. The Parties acknowledge that there will not be an adequate remedy at law for noncompliance with the provisions of this Paragraph and therefore, either Party shall have the right to equitable remedies, such as, without limitation, injunctive relief and specific performance.

15. REMOVAL. Lessee shall, within sixty (60) days after expiration of the Term, or any earlier termination of a Supplement, or an abandonment of it facilities, remove its equipment, conduits, fixtures and all personal property and restore the Premises to its original condition, reasonable wear and tear excepted, at Lessee's sole cost and expense. Lessor agrees and acknowledges that all of the equipment, conduits, fixtures and personal property of Lessee shall remain the personal property of Lessee and Lessee shall have the right to remove the same

at any time during the Term, whether or not said items are considered fixtures and attachments to real property under applicable Laws. If the time for removal causes Lessee to remain on the Premises after termination of the Supplement, Lessee shall pay rent at the then-existing monthly rate, until such time as the removal of the equipment, fixtures and all personal property are completed. If Lessee fails to remove its facilities within the required time period, Lessor reserves the right to remove the facilities and charge Lessee for the full cost of the removal and storage charges.

16. RIGHTS UPON SALE. If, at any time during the Term of any Supplement, Lessor decides: (i) to sell or transfer all or any part of the Property or the Wireless Support Structure thereon to a purchaser other than Lessee, or (ii) to grant to a third party by easement or other legal instrument an interest in that portion of the Property occupied by Lessee, or a larger portion thereof, for the purpose of operating and maintaining communications facilities or the management thereof, that sale or grant of an easement or interest therein shall be subject to the Supplement, and any such purchaser or transferee must recognize Lessee's rights hereunder and under the terms of the affected Supplement(s). If Lessor completes any such sale, transfer, or grant described in this paragraph without executing an assignment of the Supplement in which the third party agrees in writing to assume all obligations of Lessor under the Supplement, then Lessor shall not be released from its obligations to Lessee under the Supplement, and Lessee shall have the right to look to Lessor and the third party for the full performance of the Supplement.

17. QUIET ENJOYMENT AND REPRESENTATIONS. Lessor covenants that Lessee, on paying the rent and performing the covenants herein and in a Supplement, shall peaceably and quietly have, hold and enjoy the Premises. Lessor represents and warrants to Lessee as of the execution date of each Supplement, and covenants during the Term, that Lessor is has good and sufficient title and interest to the Property, and has full authority to enter into and execute the Supplement. Lessor further covenants during the Term that there are no liens, judgments or impediments of title on the Property, or affecting Lessor's title to the same and that there are no covenants, easements or restrictions that prevent or adversely affect the use or occupancy of the Premises by Lessee as provided in this Agreement and in the applicable Supplement(s).

18. ASSIGNMENT. This Agreement and each Supplement under it may be sold, assigned or transferred by the Lessee without any approval or consent of the Lessor to the Lessee's principal, affiliates, subsidiaries of its principal, or to any entity which acquires all or substantially all of Lessee's assets in the market defined by the FCC in which the Property is located by reason of a merger, acquisition or other business reorganization. As to other parties, this Agreement and each Supplement may not be sold, assigned or transferred without the written consent of the Lessor, which consent will not be unreasonably withheld, delayed or conditioned.

19. NOTICES. All notices hereunder must be in writing and are validly given if sent by certified mail, return receipt requested, or by commercial courier, provided the courier's regular business is delivery service and provided further that it guarantees delivery to the

addressee by the end of the next business day following the courier's receipt from the sender, addressed as follows or to any other address that the Party to be notified may have designated:

Lessor: City of _____
Attention: _____

_____, Minnesota 5_____

Lessee: _____

Notice shall be effective upon actual receipt or refusal as shown on the receipt obtained pursuant to the foregoing.

20. **DEFAULT.** If there is a breach by a Party with respect to any of the provisions of this Agreement, or under the provisions of an individual Supplement, the non-breaching Party shall give the breaching Party written notice of that breach. After receipt of the written notice, the breaching Party shall have thirty (30) days in which to cure the breach, provided the breaching Party shall have such extended period as may be required beyond the thirty (30) days if the breaching Party commences the cure within the thirty (30) day period and thereafter continuously and diligently pursues the cure to completion, but in no event more than ninety (90) calendar days after receipt of written notice. The non-breaching Party may not maintain any action or effect any remedies for default against the breaching Party unless and until the breaching Party has failed to cure the breach within the time periods provided in this Paragraph. Notwithstanding the foregoing to the contrary, it shall be a default under this Agreement, or under an individual Supplement if Lessor fails, within five (5) days after receipt of written notice of such breach, to perform an obligation required to be performed by Lessor, and if the failure to perform that obligation interferes with Lessee's ability to conduct its business in the Premises; provided, however, that if the nature of Lessor's obligation is such that more than five (5) days after notice is reasonably required for its performance, then it shall not be a default under this Agreement or the applicable Supplement if performance is commenced within such five (5) day period and thereafter diligently pursued to completion, but in no event more than fifteen (15) calendar days after receipt of written notice. Lessor and Lessee agree that a default under an individual Supplement does not constitute a default under this Agreement

21. **DISPUTE RESOLUTION.** Subject to the provisions of Paragraph 20, the Parties shall cooperate and use their best efforts to ensure that the various provisions of the Agreement are fulfilled. The Parties agree to act in good faith to undertake resolution of disputes, in an equitable and timely manner and in accordance with the provisions of this Agreement. If disputes cannot be resolved informally by the Parties, the following procedures shall be used:

A. Whenever there is a failure between the Parties to resolve a dispute on their own, the Parties shall first attempt to mediate the dispute. The parties shall agree upon a mediator, or if they cannot agree, shall obtain a list of court-approved mediators from the _____ County District Court Administrator and select a mediator by

alternately striking names until one remains. Lessor shall strike the first name followed by Lessee, and shall continue in that order until one name remains.

B. If the dispute is not resolved within thirty (30) days after the end of mediation proceedings, the Parties may pursue any legal or equitable remedy.

22. CASUALTY. In the event of damage by fire or other casualty to the Property that cannot reasonably be expected to be repaired within forty-five (45) days following same or, if the Property is damaged by fire or other casualty so that such damage may reasonably be expected to disrupt Lessee's operations at the Premises for more than forty-five (45) days, then Lessee may, at any time following such fire or other casualty, provided Lessor has not completed the restoration required to permit Lessee to resume its operation at the Premises, terminate the Supplement upon fifteen (15) days' prior written notice to Lessor. Any such notice of termination shall cause the Supplement to expire with the same force and effect as though the date set forth in such notice were the date originally set as the expiration date of the Supplement and the Parties shall make an appropriate adjustment, as of such termination date, with respect to payments due under the Supplement. Notwithstanding the foregoing, the rent shall abate during the period of repair following such fire or other casualty in proportion to the degree to which Lessee's use of the Premises is impaired.

23. APPLICABLE LAWS. Laws means any and all laws, regulations, ordinances, resolutions, judicial decisions, rules, permits and approvals applicable to the subject of this Agreement or Lessee's use that are in force during the term of this Agreement, as lawfully amended including, without limitation, Lessor's city Code. Lessee and Lessor shall comply with all applicable Laws. This Agreement does not limit any rights Lessee may have in accordance with Laws to install its own poles in the right of way or to attach Lessee's equipment to third-party poles located in the right of way. This Agreement shall in no way limit or waive either party's present or future rights under Laws. If, after the date of this Agreement, the rights or obligations of either Party are materially altered, preempted, or superseded by changes in Laws, the parties agree to amend the Agreement and/or Supplement to reflect the change in Laws.

24. GOVERNMENT DATA. The Parties acknowledge and agree that this Agreement is considered public data not on individuals and is accessible to the public under Minnesota Statutes, Section 13.03. Lessee and Lessor agrees to abide by the applicable provisions of the Minnesota Government Data Practice Act, Minnesota Statutes, Chapter 13, and all other applicable state or federal rules, regulations or orders pertaining to privacy or confidentiality.

25. GENERAL PROVISIONS.

A. Entire Agreement. This Agreement supersedes any prior or contemporaneous representations or agreements, whether written or oral, between the Parties and contains the entire agreement.

B. Captions. Captions contained in this Agreement are for reference only, and therefore, have no effect in construing this Agreement.

C. Ambiguities. If any term of this Agreement is ambiguous, it shall not be construed for or against any Party on the basis that the Party did or did not write it.

D. Amendments. Any modification or amendment to this Agreement shall require a written agreement signed by both Parties.

E. Third Party Rights. This Agreement is not a third party beneficiary contract and shall not in any respect whatsoever create any rights on behalf of any person or entity not expressly a party to this Agreement.

F. Nondiscrimination. In the hiring of employees or contractors to perform work under this Agreement, Lessee shall not discriminate against any person by reason of any characteristic or classification protected by State or Federal law.

G. Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Minnesota. The venue for all proceedings related to this Agreement shall be in _____ County, Minnesota.

H. Waiver. The failure of either Party to insist upon strict performance of any of the terms or conditions of this Agreement or the waiver by either Party of any breach or failure to comply with any provision of this Agreement by the other Party shall not be construed as, or constitute a continuing waiver of such provision or a waiver of any other breach of or failure to comply with any other provision of this Agreement.

I. Force Majeure. Except for payment of sums due, neither Party shall be liable to the other or deemed in default under this Agreement, if and to the extent that a Party's performance is prevented by reason of force majeure. "Force majeure" includes war, an act of terrorism, fire, earthquake, flood and other circumstances which are beyond the control and without the fault or negligence of the Party affected and which by the exercise of reasonable diligence the Party affected was unable to prevent.

J. Further Assurances. From and after the execution of this Agreement, the parties shall fully cooperate with each other and perform any further act(s) and execute and delivers any further documents which may be necessary in order to carry out the purposes and intentions of this Agreement.

K. Savings Clause. If any court finds any portion of this Agreement to be contrary to law, invalid, or unenforceable, the remainder of the Agreement will remain in full force and effect.

L. Counterparts. This Agreement may be signed in counterparts, each of which shall be deemed an original, and which taken together shall be deemed to be one and the same document.

IN WITNESS WHEREOF, the Parties, have caused this Agreement to be approved on the date above.

Lessor:
City of _____

By: _____

Name: _____
Its: Mayor

Date: _____

By: _____

Name: _____
Its: City Clerk

Date: _____

Lessee:

By: _____

Name: _____
Its: _____

Date: _____

EXHIBIT A
COLLOCATION AGREEMENT SUPPLEMENT

This Collocation Agreement Supplement (“Supplement”), is made this _____ day of _____, 20_____ between the City of _____, a Minnesota local government unit, with its principal offices located at _____ in _____, Minnesota 5_____, (“Lessor” and _____, with its principal offices located _____ in _____, _____, (“Lessee”).

1. **SMALL WIRELESS FACILITY COLLOCATION AGREEMENT.** This Supplement is a Supplement as referenced in that certain Small Wireless Facility Collocation Agreement between the City of _____ and _____, dated _____, 20_____, (the “Agreement”). All of the terms and conditions of the Agreement are incorporated herein by reference and made a part hereof without the necessity of repeating or attaching the Agreement. In the event of a contradiction, modification or inconsistency between the terms of the Agreement and this Supplement, the terms of this Supplement shall govern. Capitalized terms used in this Supplement shall have the same meaning described for them in the Agreement unless otherwise indicated herein.

2. **PREMISES.** Lessor hereby leases to Lessee certain spaces on and within Lessor's Property located at _____, including the location of the Wireless Support Structure on the Property is shown on Exhibit 1 attached hereto and made a part hereof. The Equipment Space, Antenna Space and Cabling Space are as shown on Exhibit 2, attached hereto and made a part hereof.

 *Insert the site address in the blank.*

3. **TERM.** The Effective Date and the Term of this Supplement shall be as set forth in the Agreement.

4. **CONSIDERATION.** Rent under this Supplement shall be \$175.00 per year, payable to the City of _____ at _____ as set forth in the Agreement

 *Insert the city address in the second blank.*

If Lessor is providing electricity pursuant to Paragraph 7 of the Agreement, an annual electrical service fee shall be added to the annual rent due under this Supplement.

5. **SITE SPECIFIC TERMS.**

 *In this section include any site-specific terms, including whether Lessee will be installing a Replacement Wireless Support Structure.*

IN WITNESS WHEREOF, the Parties, have caused this Agreement to be approved on the date above.

Lessor:
City of _____

By: _____

Name: _____
Its: Mayor

Date: _____

By: _____

Name: _____
Its: City Clerk

Date: _____

Lessee:

By: _____

Name: _____
Its: _____

Date: _____

EXHIBIT 1
Site Plan of Property

EXHIBIT 2

Equipment Space (if any), Antenna Space and Cabling Space

Chapter 34 - TELECOMMUNICATIONS

ARTICLE I. - IN GENERAL

Secs. 34-1—34-18. - Reserved.

ARTICLE II. - ANTENNAS AND TOWERS

DIVISION 1. - GENERALLY

Sec. 34-19. - Purpose and objectives.

- (a) The purposes and objectives of this article are to provide for the safe installation of antennas, dish antennas and towers and to minimize the adverse aesthetic impact of antennas, dish antennas and towers on surrounding properties, while permitting reasonable reception and transmission of signals from antennas, dish antennas and towers without excessive costs on the owners of antenna, dish antennas and towers and to facilitate wireless telecommunications services to residents and business. To lessen the adverse aesthetic impact on surrounding properties because of the unsightly nature of antennas, dish antennas and towers, and preserve the high quality residential character of the city, and to ensure that antennas, dish antennas and towers are installed in a manner that can withstand high winds and other adverse weather conditions and do not constitute a nuisance or pose a safety concern, the council has determined to impose size, height, location and installation restrictions and requirements on antennas, dish antennas and towers. The different size and shapes of antennas, dish antennas and towers results in different degrees of adverse aesthetic impact on surrounding properties and different safety concerns. Because of the different aesthetic impacts and safety concerns, this article imposes different location, size, height and installation restrictions and requirements for antennas, dish antennas and towers. In particular, this article imposes different restrictions and requirements for dish antennas. The size and shape of dish antennas make them more obtrusive and less likely to blend in with their surroundings which results in a greater adverse aesthetic impact on surrounding properties than antennas and towers and the shape of dish antennas makes them subject to a high amount of wind force because the dish shape will trap wind, with the larger the dish or higher the supporting structure resulting in greater wind force on the base of the structure. In determining these differing restrictions and requirements the council has considered what size and height is necessary for an antenna, dish antenna and tower to provide quality use and afford reasonable reception and transmittal of signals and believes that the location, size, height and installation restrictions and requirements of this article permit antennas, dish antennas and towers to reasonably receive and transmit their intended signals and do not impose excessive costs on owners of antennas, dish antennas and towers.
- (b) This article also provides a process for considering modifications to the requirements of this article in order to provide suitable sites for towers and antennas and encourage innovation in tower and antenna designs while protecting other properties in the vicinity from the adverse aesthetic impact of towers and antennas.

(Code 1970; Code 1992, § 815.01; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008)

Sec. 34-20. - Definitions.

Words and phrases used in this article which are defined in chapter 36 shall be construed in this article according to their definitions contained in chapter 36. The following words and terms shall have the following meanings in this article:

Antenna.

- (1) The term "antenna" means equipment used for transmitting or receiving telecommunication, television or radio signals, which is located on the exterior of, or outside of, any building or structure.
- (2) The term "antenna" does not include dish antennas.

Collocate or *collocation* means to install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure that is owned privately or by a local government unit.

Commercial use antenna or tower means an antenna or tower erected for a personal wireless telecommunication service or for any other purpose other than for the private use and enjoyment of the owner of the tower or antenna and the premises upon which it is located, including amateur radio antennas and antennas receiving television signals for personal use.

Dish antenna means a parabolic-shaped antenna (including all supporting apparatus) which is used for transmitting or receiving telecommunication, television or radio signals, which is located on the exterior of, or outside of, any building or structure.

Height means the vertical distance from the tower's, antenna's or dish antenna's point of contact with the ground, or rooftop to its highest point, including all attachments and supporting apparatus.

Micro wireless facility means a small wireless facility that is no larger than 24 inches long, 15 inches wide, and 12 inches high, and whose exterior antenna, if any, is no longer than 11 inches.

Personal wireless telecommunication service means licensed commercial wireless services including:

- (1) Cellular;
- (2) Personal communication services (PCS);
- (3) Specialized mobile radio (SMR);
- (4) Enhanced mobilized radio (ESMR);
- (5) Paging; and
- (6) Similar services that are marketed to the general public.

Public utility.

- (1) The term "public utility" means persons, corporations or governments supplying gas, electric, transportation, water, sewer or land line telephone service to the general public.
- (2) The term "public utility" does not mean, for purposes of this article, personal wireless telecommunication service facilities.

Small wireless facility means:

- (1) A wireless facility that meets both of the following qualifications:
 - a. Each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all its exposed elements could fit within an enclosure of no more than six cubic feet; and
 - b. All other wireless equipment associated with the small wireless facility, excluding electric meters, concealment elements, telecommunications demarcation boxes, battery backup power systems, grounding equipment, power transfer switches, cutoff switches, cable, conduit, vertical cable runs for connection of power and other services, and any equipment concealed from public view within or behind an existing structure or concealment, is in aggregate no more than 28 cubic feet in volume; or
- (2) A micro wireless facility.

Tower means any pole, spire or structure, or any combination thereof, including all supporting lines, cables, wires and braces, intended primarily for the purpose of mounting an antenna or dish antenna.

Wireless facility means equipment at a fixed location that enables the provision of wireless services between user and equipment and a wireless service network, including: (1) equipment associated with wireless service; (2) a radio transceiver, antenna, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration; and (3) a small wireless facility. Wireless facility does not include: (1) wireless support structures, (2) wireline backhaul facilities, or (3) coaxial or fiber-optic cables between utility poles or wireless support structures, or that are not otherwise immediately adjacent to or directly associated with a specific antenna.

Wireless service means any service using licensed or unlicensed wireless spectrum, including the use of Wi-Fi whether at a fixed location or by means of a mobile device, that is provided using wireless facilities. Wireless service does not include services regulated under Title VI of the Communications Act of 1934, as amended, including a cable service under United States Code, title 47, section 522 clause (6).

Wireless support structure means a new or existing structure in a public right-of-way designed to support or capable of supporting small wireless facilities, as reasonably determined by the city.

Wireline backhaul facility means a facility used to transport communications data by wire from a wireless facility to a communications network.

(Code 1970; Code 1992, § 815.02; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008; [Ord. No. 2017-12](#), § 10, 11-8-2017)

Sec. 34-21. - Interpretation.

It is not the intention of this article to interfere with, abrogate or annul any covenant or other agreement between parties. Where this article imposes a greater restriction upon the use of premises for antennas, dish antennas or towers than are imposed or required by other sections of this Code, rules, regulations or permits, or by covenants or agreements, the provisions of this article shall govern.

(Code 1970; Code 1992, § 815.13; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008)

Secs. 34-22—34-45. - Reserved.

DIVISION 2. - PERMIT

Sec. 34-46. - Required; exemptions.

No antenna, dish antenna or tower of any kind shall be erected, constructed or placed, or re-erected, reconstructed or replaced, anywhere within the city without first making an application for and obtaining a permit from the city. Provided, however, no permit shall be required for the following:

- (1) Dish antennas not greater than nine square feet in cross sectional area, which do not exceed six feet in height.
- (2) All towers or other antennas which do not exceed six feet in height.
- (3) Antennas, dish antennas and towers erected or constructed by the city for city purposes.

- (4) Structures and facilities directly related to the provision of services by a public utility, including, but not limited to, water towers, lights, signals, power and telephone poles and poles supporting emergency warning devices.
- (5) Wireless support structures and small wireless facilities located in the public right-of-way. These facilities are regulated under chapter 24.

(Code 1970; Code 1992, § 815.03; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008; [Ord. No. 2017-12](#), § 11, 11-8-2017)

Sec. 34-47. - Application; issuance; fee.

Application for a permit required by this article shall be made to the building official in the same manner, and containing the same information, as for a building permit pursuant to article III of chapter 10. The application shall be accompanied by the fee set forth in section 2-724. Such permit shall be issued by the building official.

(Code 1970; Code 1992, § 815.04; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008)

Sec. 34-48. - General requirements.

All antennas, dish antennas and towers, for which a permit is required, shall comply with the following requirements:

- (1) *Compliance with applicable provisions.* All applicable provisions of article III of chapter 10, including wind loading requirements set forth in the state building code.
- (2) *Grounding.* Antennas, dish antennas and towers shall be grounded for protection against a direct strike by lightning and shall comply, as to electrical wiring and connections, with all applicable provisions of this Code and state law.
- (3) *Proximity to power lines.* No antenna, dish antenna or tower shall exceed a height equal to the distance from the base of the antenna, dish antenna or tower to the nearest overhead electrical power line (except individual service drops), less five feet. Monopoles designed to comply with the wind loading requirements of the International Building Code need not conform to the requirements of this subsection.
- (4) *Protection from climbing.* Antennas, dish antennas or towers shall be protected to discourage climbing by unauthorized persons.
- (5) *Restrictions on attachments.* No antenna, dish antenna or tower shall have affixed to it any signs, banners or placards of any kind, (except one sign not over ten square inches in area may be affixed indicating the name of the manufacturer or installer) nor shall any lights, reflectors, flashers or other illuminating devices be affixed except as required by the Federal Aviation Administration or Federal Communications Commission.
- (6) *Prohibited attachments.* No tower shall have constructed on it, or attached to it, in any way, any platform, catwalk, crow's nest or similar structure, except structures necessary for the maintenance of antennas.
- (7) *Construction material restrictions.* All towers shall be constructed of corrosive-resistant steel or other corrosive-resistant, noncombustible materials. Towers shall not be constructed or made of wood, including timbers or logs.

- (8) *Prohibited extensions.* No part of any antenna, dish antenna or tower, nor any lines, cables, equipment, wires or braces used in connection with any tower or antenna shall, at any time, extend across or over any part of a street, sidewalk or alley.
- (9) *Design of personal wireless communication service towers.* Personal wireless communication service towers shall be of a monopole design and shall blend into the surrounding environment through the use of color, camouflaging and other architectural treatment
- (10) *Antennas attached to buildings.* Antennas which are attached to any facade of a building or structure shall as closely as possible match the color of the underlying building material.
- (11) *Interference with public safety telecommunications.* No new or existing telecommunications service shall interfere with public safety telecommunications.

(Code 1970; Code 1992, § 815.05; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008)

Secs. 34-49—34-69. - Reserved.

DIVISION 3. - REGULATIONS AND REQUIREMENT

Sec. 34-70. - Location and screening.

- (a) *Setbacks.* No part of any tower, dish antenna or antenna shall be constructed, located or maintained, at any time, permanently or temporarily, within any setback required by chapter 36 for an accessory building or structure for the zoning district in which the antenna, dish antenna or tower is located.
- (b) *Additional restrictions for towers and antennas in excess of 30 feet in height.* The following minimum distance shall be provided between towers which exceed 30 feet in height and the buildable area of the nearest lot in the R-1 or PRD-1 district which is used for residential purposes:

Tower Height	Minimum Distance
75 feet or less	Four times the heights of the tower/antenna
More than 75 feet	Six times the height of the tower/antenna

- (c) *Additional restrictions for R-1 and R-2 districts.* In addition to the requirements of subsections (a) and (b) of this section, the following requirements apply to lots in the R-1 and R-2 districts, as established by chapter 36, other than lots in the R-1 district developed with a conditional use:
 - (1) Dish antennas.
 - a. Dish antennas greater than nine square feet in cross section area shall not be located on the roof or exterior wall of a principal or accessory building.
 - b. Dish antennas shall only be located in the rear yard.
 - (2) All antennas and towers, including dish antennas.
 - a. No antenna, dish antenna or tower shall be located in the front yard.

- b. No antenna, dish antenna or tower shall be constructed, located or maintained, at any time, permanently or temporarily, closer to the allowed buildable area of a principal building on any adjacent lot than it is to the principal building on the lot on which it is located.
- (d) *Screening for dish antennas.* The building official may require, as a condition to a permit, that a dish antenna installed in a nonresidential district be screened from residential districts located within 100 feet of the dish antenna. Such required screening shall comply with the requirements of article XII, division 5, subdivision 3 of chapter 36.
- (e) *Proximity to other towers.* No personal wireless telecommunications service tower in excess of 50 feet in overall height shall be erected within 1,000 feet of any other personal wireless telecommunication service tower exceeding 50 feet in overall height. It is the intent of this provision to encourage the collocation of telecommunication facilities on the same tower or on existing buildings or other structures thereby reducing the number of towers in the city.
- (f) *Commercial use towers and antennas prohibited in the R-1, R-2, PRD-1 and PRD-2 districts.* Subject to the requirements of this article, towers and antennas of all kinds may be erected in the R-1, R-2, PRD-1 and PRD-2 districts only for the private telecommunication use of the residents of the premises. This prohibition does not apply to properties in these districts developed with conditional uses, publicly owned property, cemeteries and golf courses.
- (g) *Commercial use towers prohibited in other residential districts.* Towers and ground-mounted antennas may be erected in the PRD-3, PRD-4, PRD-5, PSR-3 and PSR-4 districts only for the private telecommunication use of the residents of the premises. Subject to the requirements of this article, commercial use antennas may be affixed to buildings in these districts.

(Code 1970; Code 1992, § 815.06; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008)

Sec. 34-71. - Height restrictions.

- (a) *Certain residential districts.* In the R-1, R-2, PRD-1 and PRD-2 districts, except lots developed with conditional uses, as established by chapter 36, publicly owned property or golf courses:
 - (1) Except as provided in subsection (d) of this section, no ground-mounted antenna, ground-mounted tower or ground-mounted tower with an antenna shall exceed 30 feet in height.
 - (2) Towers and antennas mounted on or attached to a building or structure shall not extend higher than 18 feet above the highest point of the building or structure.
 - (3) Dish antennas shall not be in excess of 12 feet in height.
- (b) *Certain residential and nonresidential districts.* In the PRD-3, PRD-4; PRD-5; PSR-3, PSR-4; MDD-3, MDD-4, MDD-5, MDD-6; POD-1; PCD-1, PCD-2, PCD-4; APD and RMD districts, and on lots in the R-1 district developed with conditional uses, publicly owned property or golf courses:
 - (1) No ground-mounted antenna, ground-mounted tower or ground-mounted tower with an antenna shall exceed 75 feet in height.
 - (2) Roof-mounted antennas and towers shall not extend higher than 18 feet above the highest point of the building or structure.
 - (3) Dish antennas shall have an overall height of no more than 18 feet.
- (c) *PCD-3, POD-2 and PID districts.* In the PCD-3, POD-2 and PID districts, as established by chapter 36:
 - (1) No ground-mounted antenna, ground-mounted tower or ground-mounted tower with antenna shall exceed 125 feet in height.

- (2) Roof-mounted antennas and towers shall have a height of no more than 18 feet above the highest point of the building or structure.
- (3) Dish antennas shall have an overall height of no more than 18 feet.
- (d) *Amateur radio antennas.* In accordance with the Federal Communications Commission's preemptive ruling PRB-1, towers and antennas erected for the primary purpose of supporting amateur radio communications may exceed the height restrictions of subsection (a) of this section, but shall not exceed 65 feet in height.

(Code 1970; Code 1992, § 815.07; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008)

Sec. 34-72. - Collocation requirements.

No permit shall be issued for a personal wireless communication service tower measuring 75 feet or more in height, unless the tower is designed in all respects to accommodate facilities for at least one additional user. Such towers must be designed to allow for the rearrangement of antennas to accommodate new antennas mounted on the tower.

(Code 1970; Code 1992, § 815.08; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008)

Sec. 34-73. - Existing antennas and towers.

Existing antennas, dish antennas and towers, which do not conform to or comply with this article, are subject to the following provisions:

- (1) *Use and replacement.* Existing antennas, dish antennas and towers may continue to be used for the purposes now used and as now existing, except as provided in subsection (2) of this section, but may not be replaced, expanded, enlarged or added to in any way without complying in all respects with this article, except that antennas may be replaced, without so complying, provided the new antenna or dish antenna fully complies with the provisions of this article.
- (2) *Destroyed or damaged antennas, dish antennas or towers.* If an antenna, dish antenna or tower is damaged or destroyed due to any reason or cause whatsoever, the same may be repaired and restored to its former use, location and physical dimensions upon obtaining a building permit, but without otherwise complying with this article. Provided, however, that if the cost of repairing or restoring such damaged or destroyed antenna, dish antenna or tower would be 50 percent or more, as estimated by the building official, of the cost of purchasing and erecting a new antenna, dish antenna or tower of like kind and quality and to the former use, physical dimensions and location, then the antenna, dish antenna or tower may not be repaired or restored except in full compliance with this article.

(Code 1970; Code 1992, § 815.09; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008)

Sec. 34-74. - Number of antennas, dish antennas and towers in residential districts.

No more than one exempt antenna, as provided in section 34-46, one dish antenna requiring a permit under the provisions of this article, and one tower with antennas shall be allowed at any one time on any lot in a residential district used for residential purposes.

(Code 1970; Code 1992, § 815.10; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008)

Sec. 34-75. - Modifications.

A modification to any requirements of this article shall be processed in the manner as a variance as set forth in section 36-68(a)(1). If the requested modification pertains to the requirements of section 34-70(b) or (e), the zoning board of appeals shall, in addition to other facts and circumstances, find the following:

- (1) The proposed location is essential for the operation of the telecommunications system, as determined by a qualified professional engineer.
- (2) Existing towers or other structures in the vicinity cannot accommodate the proposed communication facilities due to inadequate structural capacity, as documented by a qualified professional engineer.
- (3) Existing towers or other structures in the vicinity cannot accommodate the proposed communication facilities due to interference with existing or planned communication facilities, as documented by a qualified professional engineer.
- (4) Existing towers or other structures in the vicinity cannot accommodate the proposed communication facilities due to inadequate height, as documented by a qualified engineer.
- (5) Owners of existing towers or other structures in the vicinity have denied permission to locate the proposed communication facilities on such existing towers or other structures.
- (6) The proposed tower or antenna has been designed to reduce or eliminate adverse effects on adjoining properties including visual obtrusiveness.

(Code 1970; Code 1992, § 815.11; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008)

Sec. 34-76. - Abandoned antennas, dish antennas and towers; removal.

Any antenna, dish antenna or tower which is not used for 12 successive months shall be deemed abandoned and may be required to be removed in the same manner and pursuant to the same procedures as for dangerous or substandard buildings established by section 23-45, Minn. Stats. § 463.15 et seq., and the state building code.

(Code 1970; Code 1992, § 815.12; Ord. No. 812, 6-10-1971; Ord. No. 812-A1, 6-17-1981; Ord. No. 812-A2, 6-12-1985; Ord. No. 815, 8-26-1992; Ord. No. 1992-3, 11-2-1992; Ord. No. 1997-5, 8-18-1997; Ord. No. 2004-4, 4-29-2004; Ord. No. 2008-03, 3-3-2008)

**AN ORDINANCE
OF THE
CITY OF
MINNEAPOLIS**

By Reich

Amending Title 20, Chapter 535 of the Minneapolis Code of Ordinances relating to Zoning Code: Regulations of General Applicability.

The City Council of the City of Minneapolis do ordain as follows:

Section 1. That Section 535.480 of the above-entitled ordinance be amended to read as follows:

535.480. - Definitions. As used in this article, the following words shall mean:

Base unit. An unstaffed single story structure or weatherproofed cabinet used to house radio frequency transmitters, receivers, power amplifiers, signal processing hardware and related equipment.

Communication antenna. A device intended for receiving or transmitting television, radio, digital, microwave, cellular, personal communication service (PCS), paging or similar forms of wireless electronic communication, including but not limited to directional antennas such as panels, microwave dishes and satellite dishes, and omni-directional antennas, such as whip antennas.

Communication antenna, façade mounted. A communication antenna mounted on the façade of a structure such as a building, water tower, clock tower, steeple, stack, ~~or existing light pole, traffic signal davit~~ or communication tower.

~~*Public safety communication system.* A communication system owned or operated by a governmental entity such as a law enforcement agency, public works department, municipal transit authority or medical facility.~~

Communication tower or antenna, rooftop mounted. A communication tower or antenna located on the roof of a structure such as a building, water tower, clock tower, penthouse or similar structure.

Communication tower. Any pole, spire, structure or combination thereof, including supporting lines, cables, wires, braces and mast, designed and constructed primarily for the purpose of supporting one (1) or more antennas, including self supporting lattice towers, guyed towers or monopole towers. A communication tower may include, but not be limited to, radio and television transmission towers, microwave towers, common carrier towers, cellular telephone towers and personal communication service towers.

Communication tower, monopole. A communication tower consisting of a single pole, constructed without guyed wires and anchors.

Communication tower and antenna height. The height of a freestanding communication tower and antenna shall be measured as the distance from ground level to the highest point on the tower, including the antenna. The height of a rooftop communication antenna shall be measured as the distance from the point where the base of the tower and antenna is attached to the roof, to the highest point on the supporting structure, including the antenna.

Institutional use. Educational facilities, parks, cemeteries, golf courses, sport arenas, religious institutions, athletic fields and publicly owned property.

Publicly owned property. Land, buildings or structures owned by any governmental body or public agency including city, county, state or federally owned properties, other than public rights-of-way.

Public safety communication system. A communication system owned or operated by a governmental entity such as a law enforcement agency, public works department, municipal transit authority or medical facility.

Transmission equipment. Any equipment that facilitates transmission for wireless communication, including, but not limited to, radio transceivers, antennas and other relevant equipment associated with and necessary to their operation, including coaxial or fiber-optic cable, and regular and backup power supply.

Section 2. That Section 535.490 of the above-entitled ordinance be amended to read as follows:

535.490. - Permitted uses exempt from administrative review and approval.

Notwithstanding any other provisions to the contrary, communication towers and antennas designed for private reception of television and radio signals, used for amateur or recreational purposes, and façade mounted communication antennas attached to existing city-owned light poles and traffic signal davits in public rights of way, shall be permitted in all districts, provided such antennas and towers comply with the standards of section 535.540, Chapter 451 of the Minneapolis Code of Ordinances, and the following:

- (1) Notwithstanding the height limitations of the zoning district, freestanding towers and antennas shall not exceed thirty-five (35) feet in height and rooftop mounted antennas shall not exceed fifteen (15) feet in height.
- (2) Antennas shall not exceed one (1) meter in diameter in the residence and office residence districts and two (2) meters in diameter in all other districts.
- (3) Towers and antennas shall not be located in any required front, side or rear yard, nor shall they be located between a principal building and a required front or side yard.
- (4) Only one (1) freestanding tower and antenna shall be allowed per residential zoning lot.

Section 3. That Section 535.520 of the above-entitled ordinance be amended to read as follows:

535.520. - Conditional uses. (a) *In general.* The following communication towers, antennas and base units may be allowed as a conditional use, subject to the provisions of Chapter 525, Administration and Enforcement, and sections 535.530 and 535.540

- (1) Freestanding communication towers and antennas, including antennas mounted on light poles and similar structures ~~that are not façade mounted~~, provided that towers and antennas located in the residence and office residence districts shall be located on institutional use sites of not less than twenty thousand (20,000) square feet. Freestanding communication towers and antennas shall be prohibited in the downtown area bounded by the Mississippi River, I-35W, I-94, and I-394/Third Avenue North (extended to the river) except that antennas may be mounted to light poles existing on the effective date of this ordinance.
- (2) Rooftop mounted communication towers and antennas exceeding fifteen (15) feet in height.
- (3) Communication towers and antennas designed for private reception of television and radio signals and used for amateur or recreational purposes which exceed thirty-five (35) feet in height if freestanding or fifteen (15) feet in height if rooftop mounted, or antennas which exceed one (1) meter in diameter in the residence and office residence districts or two (2) meters in diameter in all other districts.
- (4) Communication towers and antennas that use any portion of a structure, other than the roof or penthouse, for structural support and do not meet the definition of a façade mounted communication antenna.

(b) *Exceptions.* The uses listed below shall be exempt from the provisions of this section as follows:

- (1) *Communication antennas and transmission equipment mounted to city owned light poles or traffic signal davits in public rights-of-way for which a valid attachment permit has been granted pursuant to Chapter 451 of the Minneapolis Code of Ordinances.*

Section 4. That Section 535.540 of the above-entitled ordinance be amended to read as follows:

535.540. - Development standards for all permitted and conditional communication towers, antennas and base units. In addition to the standards of sections 535.490, 535.500 and 535.530 above, all communication towers, antennas and base units shall be subject to the following standards:

- (1) *Encroachments and setbacks.*
 - a. The tower site and setback shall be of adequate size to contain guyed wires, debris and the tower in the event of a collapse.
 - b. Communication towers shall maintain a minimum distance from the nearest residential structure equal to twice the height of the tower. For the

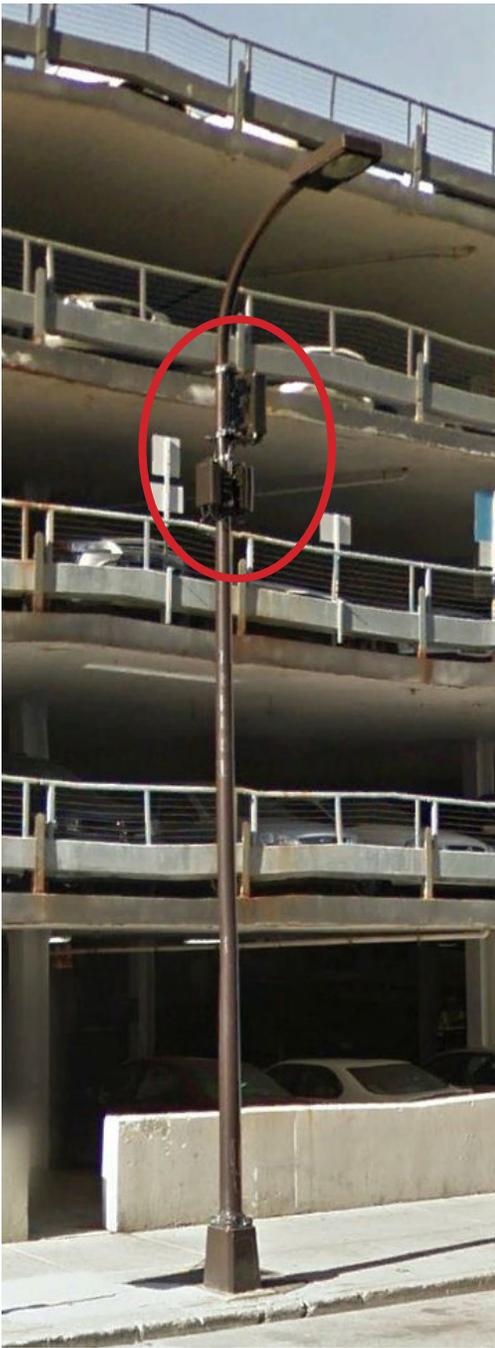
purposes of this article, residential structures shall also include any parking structure attached to a principal residential structure.

- c. No part of any communication tower, antenna, base unit, equipment, guyed wires or braces shall extend across or over any part of a public right-of-way, except communication antennas and transmission equipment mounted to city-owned light poles or traffic signal davits in public rights of way for which a valid attachment permit has been granted pursuant to Chapter 451 of the Minneapolis Code of Ordinances.
 - d. Communication towers, antennas and base units shall comply with applicable regulations as established by the Federal Aviation Administration.
 - e. Communication towers, antennas and base units shall comply with the minimum yard requirements of the district in which they are located.
- (2) *Compatibility with nearby properties.* Communication towers, antennas and base units shall utilize building materials, colors and textures that are compatible with the existing principal structure and that effectively blend the tower facilities into the surrounding setting and environment to the greatest extent possible. Metal towers shall be constructed of, or treated with, corrosive resistant material. Outside of the industrial districts, unpainted, galvanized metal, or similar towers shall be prohibited, unless a self-weathering tower is determined to be more compatible with the surrounding area.
- (3) *Screening and landscaping.* A screening and landscaping plan designed to screen the base of the tower and the base unit shall be submitted. The plan shall show location, size, quantity and type of landscape materials. Landscape materials shall be capable of screening the site all year. One (1) row of evergreen shrubs or trees capable of forming a continuous hedge at least six (6) feet in height within two (2) years of planting shall be provided to effectively screen the base of the tower and the base unit, except for towers and antennas designed for private reception of television and radio signals and used for amateur or recreational purposes, and light poles and traffic signal davits in public rights-of-way that support communication antennas and transmission equipment. A maintenance plan for the landscape materials shall also be submitted. The city planning commission may consider the substitution of other architectural screening plans such as a decorative fence or masonry wall in lieu of planted materials.
- (4) *Rooftop mounted towers and antennas.* Rooftop mounted communication towers and antennas shall not be located on residential structures less than fifty (50) feet in height, except for towers and antennas designed for private reception of television and radio signals and used for amateur or recreational purposes.
- (5) *Façade mounted antennas.*
- a. *Mounted on freestanding towers and poles.* A façade mounted antenna shall not extend above the façade of the tower or pole on which it is mounted, but otherwise may project outward beyond such façade.

b. Mounted on city-owned light poles or traffic signal davits in public rights of way. A façade mounted antenna on an existing city-owned light pole or traffic signal davit shall comply with the standards of Chapter 451 of the Minneapolis Code of Ordinances. Such antennas and transmission equipment shall be painted to match the structure to which they are mounted and shall be designed to minimize the visibility of cables and other appurtenances.

~~b.c.~~ *Mounted on all other structures.* A façade mounted antenna shall be mounted flush against the structure on which it is mounted and shall not extend beyond the façade of such structure, except that antennas designed for private reception of television and radio signals, used for amateur or recreational purposes, may extend above the façade of the structure.

- (6) *Base units.* Base units shall not exceed five hundred (500) square feet of gross floor area. The city may require as a condition of approval that base units be located underground.
- (7) *Security.* All sites shall be reasonably protected against unauthorized climbing. The bottom of the tower, measured from ground level to twelve (12) feet above ground level, shall be designed in a manner to discourage unauthorized climbing.
- (8) *Signage.* Advertising or identification of any kind on towers, antennas and base units shall be prohibited, except for applicable warning and equipment information signage required by the manufacturer or by federal, state or local regulations.
- (9) *Lighting.* Communication towers and antennas shall not be illuminated by artificial means, except when mounted on an existing light pole or where the illumination is specifically required by the Federal Aviation Administration or other federal, state or local regulations.
- (10) *Heritage Preservation Ordinance compliance.* Communication towers and antennas proposed for any locally designated historic structures or locally designated historic districts shall be subject to all requirements of the city's Heritage Preservation Ordinance.
- (11) *Radio frequency emissions and noninterference.* The applicant shall comply with all applicable Federal Communication Commission standards.
- (12) *Public safety communication system.* The location of the proposed antenna, if located on publicly owned property, shall not be needed for use by the public safety communication system, or if needed, it shall be determined by the director of the property services division of the finance department that co-location of the proposed antenna with a public safety antenna is agreeable.



Currently at corner of 9th St S and Lasalle Ave in downtown Minneapolis





DAS and small cell antennas in other settings

Right of Way Regulation, LMC / Suburban Rate Authority / City Engineers Association of Minnesota Model Ordinance

The League acknowledges the generosity of the Kennedy and Graven law firm for their substantial assistance in updating this model to recognize wireless providers as telecommunications rights of way users.

League models are thoughtfully developed by our staff for a city’s consideration. Models should be customized as appropriate for an individual city’s circumstances in consultation with the city’s attorney. Helpful background information on this model may be found in the LMC Information Memo [Regulating City Rights of Way](#).



This icon marks comments or offers that will help you decide on different possible approaches offered in the ordinance. Delete them (and this legend) before adopting your customized ordinance.

ORDINANCE NO. ____

CITY OF ____, ____, COUNTY, MINNESOTA

AN ORDINANCE TO ENACT A NEW CHAPTER OF THE CODE OF ORDINANCES TO ADMINISTER AND REGULATE THE PUBLIC RIGHTS OF WAY IN THE PUBLIC INTEREST, AND TO PROVIDE FOR THE ISSUANCE AND REGULATION OF RIGHT OF WAY PERMITS.

THE CITY COUNCIL OF THE CITY OF ____, ____, COUNTY, MINNESOTA ORDAINS:



Enacting clauses are different in various charters. The statutory city enacting clause is used here.

Chapter ____ of the Code of Ordinances (hereafter “this Code”) is hereby repealed in its entirety, and is replaced by the following new Chapter 1 (hereafter “this Chapter”), to read as follows:



In most cases, there will be ordinances or legislative codes that will need to be amended or repealed because of inconsistency with the new regulations. One method is to repeal all those provisions and replace them with this ordinance.

Chapter 1

Right of Way Management

Sec. 1.01. Findings, Purpose, and Intent.

To provide for the health, safety, and welfare of its citizens, and to ensure the integrity of its streets and the appropriate use of the rights of way, the city strives to keep its rights of way in a state of good repair and free from unnecessary encumbrances.

Accordingly, the city hereby enacts this new chapter of this code relating to right of way permits and administration. This chapter imposes reasonable regulation on the placement and maintenance of facilities and equipment currently within its rights of way or to be placed therein at some future time. It is intended to complement the regulatory roles of state and federal agencies. Under this chapter, persons excavating and obstructing the rights of way will bear financial responsibility for their work. Finally, this chapter provides for recovery of out-of-pocket and projected costs from

persons using the public rights of way.

This chapter shall be interpreted consistently with 1997 Session Laws, Chapter 123, substantially codified in Minn. Stat. §§ 237.16, 237.162, 237.163, 237.79, 237.81, and 238.086 (the “Act”) and 2017 Minn. Laws, ch. 94, art. 9, amending the Act, and the other laws governing applicable rights of the city and users of the right of way. This chapter shall also be interpreted consistent with Minn. R. 7819.0050–7819.9950 and Minn. R., ch. 7560 where possible. To the extent any provision of this chapter cannot be interpreted consistently with the Minnesota Rules, that interpretation most consistent with the Act and other applicable statutory and case law is intended. This chapter shall not be interpreted to limit the regulatory and police powers of the city to adopt and enforce general ordinances necessary to protect the health, safety, and welfare of the public.

Sec. 1.02. Election to Manage the Public Rights of Way

Pursuant to the authority granted to the city under state and federal statutory, administrative and common law, the city hereby elects, pursuant to Minn. Stat. 237.163 subd. 2(b), to manage rights of way within its jurisdiction.

Sec. 1.03. Definitions.

The following definitions apply in this chapter of this code. References hereafter to “sections” are, unless otherwise specified, references to sections in this chapter. Defined terms remain defined terms, whether or not capitalized.

Abandoned Facility. A facility no longer in service or physically disconnected from a portion of the operating facility, or from any other facility, that is in use or still carries service. A facility is not abandoned unless declared so by the right of way user.

Applicant. Any person requesting permission to excavate or obstruct a right of way.

City. The city of ____, Minnesota. For purposes of section 1.29, city also means the City’s elected officials, officers, employees, and agents.

Collocate or Collocation. To install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure or utility pole that is owned privately, or by the city or other governmental unit.

Commission. The State Public Utilities Commission.

Congested Right of Way. A crowded condition in the subsurface of the public right of way that occurs when the maximum lateral spacing between existing underground facilities does not allow for construction of new underground facilities without using hand digging to expose the existing lateral facilities in conformance with Minn. Stat. § 216D.04, subd. 3, over a continuous length in excess of 500 feet.

Construction Performance Bond. Any of the following forms of security provided at permittee’s option:

- Individual project bond;
- Cash deposit;

- Security of a form listed or approved under Minn. Stat. § 15.73, subd. 3;
- Letter of Credit, in a form acceptable to the city;
- Self-insurance, in a form acceptable to the city;
- A blanket bond for projects within the city, or other form of construction bond, for a time specified and in a form acceptable to the city.

Degradation. A decrease in the useful life of the right of way caused by excavation in or disturbance of the right of way, resulting in the need to reconstruct such right of way earlier than would be required if the excavation or disturbance did not occur.

Degradation Cost. Subject to Minn. R. 7819.1100, means the cost to achieve a level of restoration, as determined by the city at the time the permit is issued, not to exceed the maximum restoration shown in plates 1 to 13, set forth in Minn. R., parts 7819.9900 to 7819.9950.

Degradation Fee. The estimated fee established at the time of permitting by the city to recover costs associated with the decrease in the useful life of the right of way caused by the excavation, and which equals the degradation cost.

Department. The department of public works of the city.



Note: If a city does not have a public works department, an equivalent department may be designated.

Director. The director of the department of public works of the city, or her or his designee.



Note: Some cities may prefer to use the term city rather than delegating responsibilities to a specific position.

Delay Penalty. The penalty imposed as a result of unreasonable delays in right of way excavation, obstruction, patching, or restoration as established by permit.

Emergency. A condition that (1) poses a danger to life or health, or of a significant loss of property; or (2) requires immediate repair or replacement of facilities in order to restore service to a customer.

Equipment. Any tangible asset used to install, repair, or maintain facilities in any right of way.

Excavate. To dig into or in any way remove or physically disturb or penetrate any part of a right of way.

Excavation permit. The permit which, pursuant to this chapter, must be obtained before a person may excavate in a right of way. An Excavation permit allows the holder to excavate that part of the right of way described in such permit.

Excavation Permit Fee. Money paid to the city by an applicant to cover the costs as provided in Section 1.13.

Facility or Facilities. Any tangible asset in the right of way required to provide Utility Service.

Five-Year Project Plan. Shows projects adopted by the city for construction within the next five years.

High Density Corridor. A designated portion of the public right of way within which telecommunications right of way users having multiple and competing facilities may be required to build and install facilities in a common conduit system or other common structure.

Hole. An excavation in the pavement, with the excavation having a length less than the width of the pavement.

Local Representative. A local person or persons, or designee of such person or persons, authorized by a registrant to accept service and to make decisions for that registrant regarding all matters within the scope of this chapter.

Management Costs. The actual costs the city incurs in managing its rights of way, including such costs, if incurred, as those associated with registering applicants; issuing, processing, and verifying right of way or small wireless facility permit applications; inspecting job sites and restoration projects; maintaining, supporting, protecting, or moving user facilities during right of way work; determining the adequacy of right of way restoration; restoring work inadequately performed after providing notice and the opportunity to correct the work; and revoking right of way or small wireless facility permits. Management costs do not include payment by a telecommunications right of way user for the use of the right of way, unreasonable fees of a third-party contractor used by the city including fees tied to or based on customer counts, access lines, or revenues generated by the right-of-way or for the city, the fees and cost of litigation relating to the interpretation of Minnesota Session Laws 1997, Chapter 123; Minn. Stat. §§ 237.162 or 237.163; or any ordinance enacted under those sections, or the city fees and costs related to appeals taken pursuant to Section 1.31 of this chapter.

Obstruct. To place any tangible object in a right of way so as to hinder free and open passage over that or any part of the right of way.

Obstruction Permit. The permit which, pursuant to this chapter, must be obtained before a person may obstruct a right of way, allowing the holder to hinder free and open passage over the specified portion of that right of way, for the duration specified therein.

Obstruction Permit Fee. Money paid to the city by a permittee to cover the costs as provided in Section 1.13.

Patch or Patching. A method of pavement replacement that is temporary in nature. A patch consists of (1) the compaction of the subbase and aggregate base, and (2) the replacement, in kind, of the existing pavement for a minimum of two feet beyond the edges of the excavation in all directions. A patch is considered full restoration only when the pavement is included in the city's five-year project plan.

Pavement. Any type of improved surface that is within the public right of way and that is paved or otherwise constructed with bituminous, concrete, aggregate, or gravel.

Permit. Has the meaning given “right of way permit” in Minn. Stat. § 237.162.

Permittee. Any person to whom a permit to excavate or obstruct a right of way has been granted by the city under this chapter.

Person. An individual or entity subject to the laws and rules of this state, however organized, whether public or private, whether domestic or foreign, whether for profit or nonprofit, and whether natural, corporate, or political.

Probation. The status of a person that has not complied with the conditions of this chapter.



Note: This paragraph is included as an option for your city)

Probationary Period. One year from the date that a person has been notified in writing that they have been put on probation.



Note: This paragraph is included as an option for your city.

Registrant. Any person who (1) has or seeks to have its equipment or facilities located in any right of way, or (2) in any way occupies or uses, or seeks to occupy or use, the right of way or place its facilities or equipment in the right of way.

Restore or Restoration. The process by which an excavated right of way and surrounding area, including pavement and foundation, is returned to the same condition and life expectancy that existed before excavation.

Restoration Cost. The amount of money paid to the city by a permittee to achieve the level of restoration according to plates 1 to 13 of Minnesota Public Utilities Commission rules.

Public Right of Way or Right of Way. The area on, below, or above a public roadway, highway, street, cartway, bicycle lane, or public sidewalk in which the city has an interest, including other dedicated rights of way for travel purposes and utility easements of the city. A right of way does not include the airwaves above a right of way with regard to cellular or other non-wire telecommunications or broadcast service.



Note: this definition does not include other public grounds that may be the subject of other city requirements.

Right of Way Permit. Either the excavation permit or the obstruction permit, or both, depending on the context, required by this chapter.

Right of Way User. (1) A telecommunications right of way user as defined by Minn. Stat., § 237.162, subd. 4; or (2) a person owning or controlling a facility in the right of way that is used or intended to be used for providing utility service, and who has a right under law, franchise, or ordinance to use the public right of way.

Service or Utility Service. Includes (1) those services provided by a public utility as defined in Minn. Stat. 216B.02, subds. 4 and 6; (2) services of a telecommunications right of way user, including transporting of voice or data information; (3) services of a cable communications systems as defined in Minn. Stat. ch. 238; (4) natural gas or electric energy or

telecommunications services provided by the city; (5) services provided by a cooperative electric association organized under Minn. Stat., ch. 308A; and (6) water, and sewer, including service laterals, steam, cooling, or heating services.

Service Lateral. An underground facility that is used to transmit, distribute or furnish ‘gas, electricity, communications, or water from a common source to an end-use customer. A service lateral is also an underground facility that is used in the removal of wastewater from a customer’s premises.

Small Wireless Facility. A wireless facility that meets both of the following qualifications:

- (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or could fit within such an enclosure; and
- (ii) all other wireless equipment associated with the small wireless facility provided such equipment is, in aggregate, no more than 28 cubic feet in volume, not including electric meters, concealment elements, telecommunications demarcation boxes, battery backup power systems, grounding equipment, power transfer switches, cutoff switches, cable, conduit, vertical cable runs for the connection of power and other services, and any equipment concealed from public view within or behind an existing structure or concealment.

Supplementary Application. An application made to excavate or obstruct more of the right of way than allowed in, or to extend, a permit that had already been issued.

Temporary Surface. The compaction of subbase and aggregate base and replacement, in kind, of the existing pavement only to the edges of the excavation. It is temporary in nature except when the replacement is of pavement included in the city’s two-year plan, in which case it is considered full restoration.

Trench. An excavation in the pavement, with the excavation having a length equal to or greater than the width of the pavement.

Telecommunications Right of Way User. A person owning or controlling a facility in the right of way, or seeking to own or control a facility in the right of way that is used or is intended to be used for providing wireless service, or transporting telecommunication or other voice or data information. For purposes of this chapter, a cable communication system defined and regulated under Minn. Stat. ch. 238, and telecommunication activities related to providing natural gas or electric energy services, a public utility as defined in Minn. Stat. § 216B.02, a municipality, a municipal gas or power agency organized under Minn. Stat. ch. 453 and 453A, or a cooperative electric association organized under Minn. Stat. ch. 308A, are not telecommunications right of way users for purposes of this chapter except to the extent such entity is offering wireless service.

Two Year Project Plan. Shows projects adopted by the city for construction within the next two years.

Utility Pole. A pole that is used in whole or in part to facilitate telecommunications or electric

service.

Wireless Facility. Equipment at a fixed location that enables the provision of wireless services between user equipment and a wireless service network, including equipment associated with wireless service, a radio transceiver, antenna, coaxial or fiber-optic cable, regular and backup power supplies, and a small wireless facility, but not including wireless support structures, wireline backhaul facilities, or cables between utility poles or wireless support structures, or not otherwise immediately adjacent to and directly associated with a specific antenna.

Wireless Service. Any service using licensed or unlicensed wireless spectrum, including the use of Wi-Fi, whether at a fixed location or by means of a mobile device, that is provided using wireless facilities. Wireless service does not include services regulated under Title VI of the Communications Act of 1934, as amended, including cable service.

Wireless Support Structure. A new or existing structure in a right-of-way designed to support or capable of supporting small wireless facilities, as reasonably determined by the city.

Sec. 1.04 Administration.

The director is the principal city official responsible for the administration of the rights of way, right of way permits, and the ordinances related thereto. The director may delegate any or all of the duties hereunder.



The city manager would usually make the appointment. A council resolution should be used in the typical weak mayor, non-manager city. The mayor of strong mayor cities would typically make this appointment.

Sec. 1.05. Utility Coordination Committee.

The city may create an advisory utility coordination committee. Participation on the committee is voluntary. It will be composed of any registrants that wish to assist the city in obtaining information and, by making recommendations regarding use of the right of way, and to improve the process of performing construction work therein. The city may determine the size of such committee and shall appoint members from a list of registrants that have expressed a desire to assist the city.



Note: This is not required as part of state or federal law but is included as an option for your city.

Sec. 1.06. Registration and Right of Way Occupancy.

Subd. 1. Registration. Each person who occupies or uses, or seeks to occupy or use, the right of way or place any equipment or facilities in or on the right of way, including persons with installation and maintenance responsibilities by lease, sublease, or assignment, must register with the city. Registration will consist of providing application information.

Subd. 2. Registration Prior to Work. No person may construct, install, repair, remove, relocate, or perform any other work on, or use any facilities or any part thereof, in any right of way without first being registered with the city.

Subd. 3. Exceptions. Nothing herein shall be construed to repeal or amend the provisions of a city ordinance permitting persons to plant or maintain boulevard plantings or gardens in the area of the right of way between their property and the street curb. Persons planting or maintaining

boulevard plantings or gardens shall not be deemed to use or occupy the right of way, and shall not be required to obtain any permits or satisfy any other requirements for planting or maintaining such boulevard plantings or gardens under this chapter. However, nothing herein relieves a person from complying with the provisions of the Minn. Stat. ch. 216D, Gopher One Call Law.

Sec. 1.07. Registration Information.

Subd. 1. Information Required. The information provided to the city at the time of registration shall include, but not be limited to:

- (a) Each registrant's name, Gopher One-Call registration certificate number, address and email address, if applicable, and telephone and facsimile numbers.
- (b) The name, address, and email address, if applicable, and telephone and facsimile numbers of a local representative. The local representative or designee shall be available at all times. Current information regarding how to contact the local representative in an emergency shall be provided at the time of registration.
- (c) A certificate of insurance or self-insurance:
 - (1) Verifying that an insurance policy has been issued to the registrant by an insurance company licensed to do business in the state of Minnesota, or a form of self-insurance acceptable to the city;
 - (2) Verifying that the registrant is insured against claims for personal injury, including death, as well as claims for property damage arising out of the (i) use and occupancy of the right of way by the registrant, its officers, agents, employees, and permittees, and (ii) placement and use of facilities and equipment in the right of way by the registrant, its officers, agents, employees, and permittees, including, but not limited to, protection against liability arising from completed operations, damage of underground facilities, and collapse of property;
 - (3) Naming the city as an additional insured as to whom the coverages required herein are in force and applicable and for whom defense will be provided as to all such coverages;
 - (4) Requiring that the city be notified thirty (30) days in advance of cancellation of the policy or material modification of a coverage term; and
 - (5) Indicating comprehensive liability coverage, automobile liability coverage, workers' compensation and umbrella coverage established by the city in amounts sufficient to protect the city and the public and to carry out the purposes and policies of this chapter.
 - (6) The city may require a copy of the actual insurance policies.
 - (7) If the person is a corporation, a copy of the certificate is required to be filed under state law as recorded and certified to by the secretary of state.
 - (8) A copy of the person's order granting a certificate of authority from the Minnesota Public Utilities Commission or other authorization or approval from the applicable state or federal agency to lawfully operate, where the person is lawfully required to have such authorization or approval from said commission or other state or federal agency.

Subd. 2. Notice of Changes. The registrant shall keep all of the information listed above current at all times by providing to the city information as to changes within fifteen (15) days following

the date on which the registrant has knowledge of any change.

Sec. 1.08. Reporting Obligations.

Subd. 1. Operations. Each registrant shall, at the time of registration and by December 1 of each year, file a construction and major maintenance plan for underground facilities with the city. Such plan shall be submitted using a format designated by the city and shall contain the information determined by the city to be necessary to facilitate the coordination and reduction in the frequency of excavations and obstructions of rights of way.

The plan shall include, but not be limited to, the following information:

- (a) The locations and the estimated beginning and ending dates of all projects to be commenced during the next calendar year (in this section, a “next-year project”); and
- (b) To the extent known, the tentative locations and estimated beginning and ending dates for all projects contemplated for the five years following the next calendar year (in this section, a “five-year project”).

The term “project” in this section shall include both next-year projects and five-year projects.

By January 1 of each year, the city will have available for inspection in the city’s office a composite list of all projects of which the city has been informed of the annual plans. All registrants are responsible for keeping themselves informed of the current status of this list.

Thereafter, by February 1, each registrant may change any project in its list of next-year projects, and must notify the city and all other registrants of all such changes in said list. Notwithstanding the foregoing, a registrant may at any time join in a next-year project of another registrant listed by the other registrant.

Subd. 2. Additional Next-Year Projects. Notwithstanding the foregoing, the city will not deny an application for a right of way permit for failure to include a project in a plan submitted to the city if the registrant has used commercially reasonable efforts to anticipate and plan for the project.

Sec. 1.09. Permit Requirement.

Subd. 1. Permit Required. Except as otherwise provided in this code, no person may obstruct or excavate any right of way, or install or place facilities in the right of way, without first having obtained the appropriate right of way permit from the city to do so.

- (a) *Excavation Permit.* An excavation permit is required by a registrant to excavate that part of the right of way described in such permit and to hinder free and open passage over the specified portion of the right of way by placing facilities described therein, to the extent and for the duration specified therein.
- (b) *Obstruction Permit.* An obstruction permit is required by a registrant to hinder free and open passage over the specified portion of right of way by placing equipment described therein on the right of way, to the extent and for the duration specified therein. An obstruction permit is not required if a person already possesses a valid excavation permit for the same project.

- (c) *Small Wireless Facility Permit.* A small wireless facility permit is required by a registrant to erect or install a wireless support structure, to collocate a small wireless facility, or to otherwise install a small wireless facility in the specified portion or the right of way, to the extent specified therein, provided that such permit shall remain in effect for the length of time the facility is in use, unless lawfully revoked.

Subd. 2. Permit Extensions. No person may excavate or obstruct the right of way beyond the date or dates specified in the permit unless (i) such person makes a supplementary application for another right of way permit before the expiration of the initial permit, and (ii) a new permit or permit extension is granted.

Subd. 3. Delay Penalty. In accordance with Minn. Rule 7819.1000 subp. 3 and notwithstanding subd. 2 of this Section, the city shall establish and impose a delay penalty for unreasonable delays in right of way excavation, obstruction, patching, or restoration. The delay penalty shall be established from time to time by City Council resolution.

Subd. 4. Permit Display. Permits issued under this chapter shall be conspicuously displayed or otherwise available at all times at the indicated work site and shall be available for inspection by the city.

Sec. 1.10. Permit Applications.

Application for a permit is made to the city. Right of way permit applications shall contain, and will be considered complete only upon compliance with, the requirements of the following provisions:



Note: See Information Memo “Regulating City Rights of Way” for information and links to sample permit application.

- (a) Registration with the city pursuant to this chapter.
- (b) Submission of a completed permit application form, including all required attachments, and scaled drawings showing the location and area of the proposed project and the location of all known existing and proposed facilities.
- (c) Payment of money due the city for:
 - (1) permit fees, estimated restoration costs, and other management costs;
 - (2) prior obstructions or excavations;
 - (3) any undisputed loss, damage, or expense suffered by the city because of applicant’s prior excavations or obstructions of the rights of way or any emergency actions taken by the city;
 - (4) franchise fees or other charges, if applicable.
- (d) Payment of disputed amounts due the city by posting security or depositing in an escrow account an amount equal to at least 110 percent of the amount owing.
- (e) Posting an additional or larger construction performance bond for additional facilities when applicant requests an excavation permit to install additional facilities and the city deems the existing construction performance bond inadequate under applicable standards.

Sec. 1.11. Issuance of Permit; Conditions.

Subd. 1. Permit Issuance. If the applicant has satisfied the requirements of this chapter, the city shall issue a permit.

Subd. 2. Conditions. The city may impose reasonable conditions upon the issuance of the permit and the performance of the applicant thereunder to protect the health, safety, and welfare or when necessary to protect the right of way and its current use. In addition, a permittee shall comply with all requirements of local, state, and federal laws, including but not limited to Minn. Stat. §§ 216D.01 - .09 (Gopher One Call Excavation Notice System) and Minn. R., ch. 7560.

Subd. 3. Small Wireless Facility Conditions. In addition to subdivision 2, the erection or installation of a wireless support structure, the collocation of a small wireless facility, or other installation of a small wireless facility in the right-of-way, shall be subject to the following conditions:

- (a) A small wireless facility shall only be collocated on the particular wireless support structure, under those attachment specifications, and at the height indicated in the applicable permit application.
- (b) No new wireless support structure installed within the right-of-way shall exceed 50 feet in height without the city's written authorization, provided that the city may impose a lower height limit in the applicable permit to protect the public health, safety and welfare or to protect the right-of-way and its current use, and further provided that a registrant may replace an existing wireless support structure exceeding 50 feet in height with a structure of the same height subject to such conditions or requirements as may be imposed in the applicable permit.
- (c) No wireless facility may extend more than 10 feet above its wireless support structure.
- (d) Where an applicant proposes to install a new wireless support structure in the right-of-way, the city may impose separation requirements between such structure and any existing wireless support structure or other facilities in and around the right-of-way.
- (e) Where an applicant proposes collocation on a decorative wireless support structure, sign or other structure not intended to support small wireless facilities, the city may impose reasonable requirements to accommodate the particular design, appearance or intended purpose of such structure.
- (f) Where an applicant proposes to replace a wireless support structure, the city may impose reasonable restocking, replacement, or relocation requirements on the replacement of such structure.

Subd. 4. Small Wireless Facility Agreement. A small wireless facility shall only be collocated on a small wireless support structure owned or controlled by the city, or any other city asset in the right-of-way, after the applicant has executed a standard small wireless facility collocation agreement with the city. The standard collocation agreement may require payment of the following:

- (a) Up to \$150 per year for rent to collocate on the city structure.
- (b) \$25 per year for maintenance associated with the collocation;
- (c) A monthly fee for electrical service as follows:
 1. \$73 per radio node less than or equal to 100 maximum watts;
 2. \$182 per radio node over 100 maximum watts; or
 3. The actual costs of electricity, if the actual cost exceed the foregoing.

The standard collocation agreement shall be in addition to, and not in lieu of, the required small wireless facility permit, provided, however, that the applicant shall not be additionally required

to obtain a license or franchise in order to collocate. Issuance of a small wireless facility permit does not supersede, alter or affect any then-existing agreement between the city and applicant,

Sec. 1.12 Action on Small Wireless Facility Permit Applications.

Subd. 1. *Deadline for Action.* The city shall approve or deny a small wireless facility permit application within 90 days after filing of such application. The small wireless facility permit, and any associated building permit application, shall be deemed approved if the city fails to approve or deny the application within the review periods established in this section.

Subd. 2. *Consolidated Applications.* An applicant may file a consolidated small wireless facility permit application addressing the proposed collocation of up to 15 small wireless facilities, or a greater number if agreed to by a local government unit, provided that all small wireless facilities in the application:

- (a) are located within a two-mile radius;
- (b) consist of substantially similar equipment; and
- (c) are to be placed on similar types of wireless support structures.

In rendering a decision on a consolidated permit application, the city may approve some small wireless facilities and deny others, but may not use denial of one or more permits as a basis to deny all small wireless facilities in the application.

Subd. 3. *Tolling of Deadline.* The 90-day deadline for action on a small wireless facility permit application may be tolled if:

- (a) The city receives applications from one or more applicants seeking approval of permits for more than 30 small wireless facilities within a seven-day period. In such case, the city may extend the deadline for all such applications by 30 days by informing the affected applicants in writing of such extension.
- (b) The applicant fails to submit all required documents or information and the city provides written notice of incompleteness to the applicant within 30 days of receipt the application. Upon submission of additional documents or information, the city shall have ten days to notify the applicant in writing of any still-missing information.
- (c) The city and a small wireless facility applicant agree in writing to toll the review period.

Sec. 1.13. Permit Fees.



Note: Minn. Rule 7819.1000 establishes requirements for establishing fees.

Subd. 1. *Excavation Permit Fee.* The city shall impose an excavation permit fee in an amount sufficient to recover the following costs:

- (a) the city management costs;
- (b) degradation costs, if applicable.

Subd. 2. *Obstruction Permit Fee.* The city shall impose an obstruction permit fee in an amount sufficient to recover the city management costs.

Subd 3. *Small Wireless Facility Permit Fee.* The city shall impose a small wireless facility permit fee in an amount sufficient to recover:

- (a) management costs, and;

- (b) city engineering, make-ready, and construction costs associated with collocation of small wireless facilities.

Subd. 4. *Payment of Permit Fees.* No excavation permit or obstruction permit shall be issued without payment of excavation or obstruction permit fees. The city may allow applicant to pay such fees within thirty (30) days of billing.

Subd. 5. *Non Refundable.* Permit fees that were paid for a permit that the city has revoked for a breach as stated in Section 1.23 are not refundable.

Subd. 6. *Application to Franchises.* Unless otherwise agreed to in a franchise, management costs may be charged separately from and in addition to the franchise fees imposed on a right of way user in the franchise.

Sec. 1.14. Right of Way Patching and Restoration.

Subd. 1. *Timing.* The work to be done under the excavation permit, and the patching and restoration of the right of way as required herein, must be completed within the dates specified in the permit, increased by as many days as work could not be done because of circumstances beyond the control of the permittee or when work was prohibited as unseasonal or unreasonable under Section 1.17.

Subd. 2. *Patch and Restoration.* Permittee shall patch its own work. The city may choose either to have the permittee restore the right of way or to restore the right of way itself.

- (a) ***City Restoration.*** If the city restores the right of way, permittee shall pay the costs thereof within thirty (30) days of billing. If, following such restoration, the pavement settles due to permittee's improper backfilling, the permittee shall pay to the city, within thirty (30) days of billing, all costs associated with correcting the defective work.
- (b) ***Permittee Restoration.*** If the permittee restores the right of way itself, it shall at the time of application for an excavation permit post a construction performance bond in accordance with the provisions of Minn. Rule 7819.3000.
- (c) ***Degradation Fee in Lieu of Restoration.*** In lieu of right of way restoration, a right of way user may elect to pay a degradation fee. However, the right of way user shall remain responsible for patching and the degradation fee shall not include the cost to accomplish these responsibilities.

Subd. 3. *Standards.* The permittee shall perform excavation, backfilling, patching, and restoration according to the standards and with the materials specified by the city and shall comply with Minn. Rule 7819.1100.

Subd. 4. *Duty to Correct Defects.* The permittee shall correct defects in patching or restoration performed by permittee or its agents. The permittee upon notification from the city, shall correct all restoration work to the extent necessary, using the method required by the city. Said work shall be completed within five (5) calendar days of the receipt of the notice from the city, not including days during which work cannot be done because of circumstances constituting force majeure or days when work is prohibited as unseasonable or unreasonable under Section 1.17.

Subd. 5. *Failure to Restore.* If the permittee fails to restore the right of way in the manner and to the condition required by the city, or fails to satisfactorily and timely complete all restoration required by the city, the city at its option may do such work. In that event the permittee shall pay to the city, within thirty (30) days of billing, the cost of restoring the right of way. If permittee fails to pay as required, the city may exercise its rights under the construction performance bond.

Sec. 1.15. Joint Applications.

Subd. 1. *Joint application.* Registrants may jointly apply for permits to excavate or obstruct the right of way at the same place and time.

Subd. 2. *Shared fees.* Registrants who apply for permits for the same obstruction or excavation, which the city does not perform, may share in the payment of the obstruction or excavation permit fee. In order to obtain a joint permit, registrants must agree among themselves as to the portion each will pay and indicate the same on their applications.

Subd. 3. *With city projects.* Registrants who join in a scheduled obstruction or excavation performed by the city, whether or not it is a joint application by two or more registrants or a single application, are not required to pay the excavation or obstruction and degradation portions of the permit fee, but a permit would still be required.

Sec. 1.16. Supplementary Applications.

Subd. 1. *Limitation on Area.* A right of way permit is valid only for the area of the right of way specified in the permit. No permittee may do any work outside the area specified in the permit, except as provided herein. Any permittee which determines that an area greater than that specified in the permit must be obstructed or excavated must before working in that greater area (i) make application for a permit extension and pay any additional fees required thereby, and (ii) be granted a new permit or permit extension.

Subd. 2. *Limitation on Dates.* A right of way permit is valid only for the dates specified in the permit. No permittee may begin its work before the permit start date or, except as provided herein, continue working after the end date. If a permittee does not finish the work by the permit end date, it must apply for a new permit for the additional time it needs, and receive the new permit or an extension of the old permit before working after the end date of the previous permit. This supplementary application must be submitted before the permit end date.

Sec. 1.17. Other Obligations.

Subd. 1. *Compliance with Other Laws.* Obtaining a right of way permit does not relieve permittee of its duty to obtain all other necessary permits, licenses, and authority and to pay all fees required by the city or other applicable rule, law or regulation. A permittee shall comply with all requirements of local, state and federal laws, including but not limited to Minn. Stat. §§ 216D.01-.09 (Gopher One Call Excavation Notice System) and Minn. R., ch. 7560. A permittee shall perform all work in conformance with all applicable codes and established rules and regulations, and is responsible for all work done in the right of way pursuant to its permit, regardless of who does the work.

Subd. 2. *Prohibited Work.* Except in an emergency, and with the approval of the city, no right of way obstruction or excavation may be done when seasonally prohibited or when conditions are unreasonable for such work.

Subd. 3. *Interference with Right of Way.* A permittee shall not so obstruct a right of way that the natural free and clear passage of water through the gutters or other waterways shall be interfered with. Private vehicles of those doing work in the right of way may not be parked within or next to a permit area, unless parked in conformance with city parking regulations. The loading or unloading of trucks must be done solely within the defined permit area unless specifically authorized by the permit.

Subd. 4. *Trenchless excavation.* As a condition of all applicable permits, permittees employing trenchless excavation methods, including but not limited to Horizontal Directional Drilling, shall follow all requirements set forth in Minn. Stat. ch. 216D and Minn. R., ch. 7560 and shall require potholing or open cutting over existing underground utilities before excavating, as determined by the director.

Sec. 1.18. Denial or Revocation of Permit.

Subd. 1. *Reasons for Denial.* The city may deny a permit for failure to meet the requirements and conditions of this chapter or if the city determines that the denial is necessary to protect the health, safety, and welfare of the public or when necessary to protect the right of way and its current use.

Subd. 2. *Procedural Requirements.* The denial or revocation of a permit must be made in writing and must document the basis for the denial. The city must notify the applicant or right-of-way user in writing within three business days of the decision to deny or revoke a permit. If an application is denied, the right-of-way user may address the reasons for denial identified by the city and resubmit its application. If the application is resubmitted within 30 days of receipt of the notice of denial, no additional application fee shall be imposed. The city must approve or deny the resubmitted application within 30 days after submission.

Sec. 1.19. Installation Requirements.

The excavation, backfilling, patching and restoration, and all other work performed in the right of way shall be done in conformance with Minn. R. 7819.1100 and 7819.5000 and other applicable local requirements, in so far as they are not inconsistent with the Minn. Stat., §§ 237.162 and 237.163. Installation of service laterals shall be performed in accordance with Minn. R., ch 7560 and these ordinances. Service lateral installation is further subject to those requirements and conditions set forth by the city in the applicable permits and/or agreements referenced in Section 1.23 subd. 2 of this ordinance.

Sec. 1.20. Inspection.

Subd. 1. *Notice of Completion.* When the work under any permit hereunder is completed, the permittee shall furnish a completion certificate in accordance Minn. Rule 7819.1300.

Subd. 2. *Site Inspection.* Permittee shall make the work site available to the city and to all others as authorized by law for inspection at all reasonable times during the execution of and

upon completion of the work.

Subd 3. Authority of Director.

- (a) At the time of inspection, the director may order the immediate cessation of any work which poses a serious threat to the life, health, safety, or well-being of the public.

- (b) The director may issue an order to the permittee for any work that does not conform to the terms of the permit or other applicable standards, conditions, or codes. The order shall state that failure to correct the violation will be cause for revocation of the permit. Within ten (10) days after issuance of the order, the permittee shall present proof to the director that the violation has been corrected. If such proof has not been presented within the required time, the director may revoke the permit pursuant to Sec. 1.23.

Sec. 1.21. Work Done Without a Permit.

Subd. 1. Emergency Situations. Each registrant shall immediately notify the director of any event regarding its facilities that it considers to be an emergency. The registrant may proceed to take whatever actions are necessary to respond to the emergency. Excavators' notification to Gopher State One Call regarding an emergency situation does not fulfill this requirement. Within two (2) business days after the occurrence of the emergency, the registrant shall apply for the necessary permits, pay the fees associated therewith, and fulfill the rest of the requirements necessary to bring itself into compliance with this chapter for the actions it took in response to the emergency.

If the city becomes aware of an emergency regarding a registrant's facilities, the city will attempt to contact the local representative of each registrant affected, or potentially affected, by the emergency. In any event, the city may take whatever action it deems necessary to respond to the emergency, the cost of which shall be borne by the registrant whose facilities occasioned the emergency.

Subd. 2. Non-Emergency Situations. Except in an emergency, any person who, without first having obtained the necessary permit, obstructs or excavates a right of way must subsequently obtain a permit and, as a penalty, pay double the normal fee for said permit, pay double all the other fees required by the city code, deposit with the city the fees necessary to correct any damage to the right of way, and comply with all of the requirements of this chapter.

Sec. 1.22. Supplementary Notification.

If the obstruction or excavation of the right of way begins later or ends sooner than the date given on the permit, permittee shall notify the city of the accurate information as soon as this information is known.

Sec. 1.23. Revocation of Permits.

Subd. 1. Substantial Breach. The city reserves its right, as provided herein, to revoke any right of way permit without a fee refund, if there is a substantial breach of the terms and conditions of any statute, ordinance, rule or regulation, or any material condition of the permit. A substantial breach by permittee shall include, but shall not be limited to, the following:

- (a) The violation of any material provision of the right of way permit.
- (b) An evasion or attempt to evade any material provision of the right of way permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the city or its citizens.
- (c) Any material misrepresentation of fact in the application for a right of way permit.
- (d) The failure to complete the work in a timely manner, unless a permit extension is obtained or unless the failure to complete work is due to reasons beyond the permittee's control.
- (e) The failure to correct, in a timely manner, work that does not conform to a condition indicated on an order issued pursuant to Sec. 1.20.

Subd. 2. *Written Notice of Breach.* If the city determines that the permittee has committed a substantial breach of a term or condition of any statute, ordinance, rule, regulation, or any condition of the permit, the city shall make a written demand upon the permittee to remedy such violation. The demand shall state that continued violations may be cause for revocation of the permit. A substantial breach, as stated above, will allow the city, at its discretion, to place additional or revised conditions on the permit to mitigate and remedy the breach.

Subd. 3. *Response to Notice of Breach.* Within twenty-four (24) hours of receiving notification of the breach, permittee shall provide the city with a plan, acceptable to the city, that will cure the breach. Permittee's failure to so contact the city, or permittee's failure to timely submit an acceptable plan, or permittee's failure to reasonably implement the approved plan, shall be cause for immediate revocation of the permit. Further, permittee's failure to so contact the city, or permittee's failure to submit an acceptable plan, or permittee's failure to reasonably implement the approved plan, shall automatically place the permittee on probation for one (1) full year. Icon



Note: The concept of probation is included as an option. It is opposed by the utility industry.

Subd. 4. *Cause for Probation.* From time to time, the city may establish a list of conditions of the permit, which if breached will automatically place the permittee on probation for one full year, such as, but not limited to, working out of the allotted time period or working on right of way grossly outside of the permit authorization.

Subd. 5. *Automatic Revocation.* If a permittee, while on probation, commits a breach as outlined above, permittee's permit will automatically be revoked and permittee will not be allowed further permits for one full year, except for emergency repairs.

Subd. 6. *Reimbursement of city costs.* If a permit is revoked, the permittee shall also reimburse the city for the city's reasonable costs, including restoration costs and the costs of collection and reasonable attorneys' fees incurred in connection with such revocation.

Sec. 1.24. Mapping Data.

Subd. 1. *Information Required.* Each registrant and permittee shall provide mapping information required by the city in accordance with Minn. R. 7819.4000 and 7819.4100. Within ninety (90) days following completion of any work pursuant to a permit, the permittee shall provide the director accurate maps and drawings certifying the "as-built" location of all equipment installed, owned, and maintained by the permittee. Such maps

and drawings shall include the horizontal and vertical location of all facilities and equipment and shall be provided consistent with the city's electronic mapping system, when practical or as a condition imposed by the director. Failure to provide maps and drawings pursuant to this subsection shall be grounds for revoking the permit holder's registration.

Subd. 2. Service Laterals. All permits issued for the installation or repair of service laterals, other than minor repairs as defined in Minn. R. 7560.0150, subp. 2, shall require the permittee's use of appropriate means of establishing the horizontal locations of installed service laterals and the service lateral vertical locations in those cases where the director reasonably requires it. Permittees or their subcontractors shall submit to the director evidence satisfactory to the director of the installed service lateral locations. Compliance with this subdivision 2 and with applicable Gopher State One Call law and Minnesota Rules governing service laterals installed after Dec. 31, 2005, shall be a condition of any city approval necessary for:

- a) payments to contractors working on a public improvement project, including those under Minn. Stat. ch. 429, and
- b) city approval under development agreements or other subdivision or site plan approval under Minn. Stat. ch. 462. The director shall reasonably determine the appropriate method of providing such information to the city. Failure to provide prompt and accurate information on the service laterals installed may result in the revocation of the permit issued for the work or future permits to the offending permittee or its subcontractors.

Sec. 1.25. Location and Relocation of Facilities.

Subd. 1. Placement, location, and relocation of facilities must comply with the Act, with other applicable law, and with Minn. R. 7819.3100, 7819.5000, and 7819.5100, to the extent the rules do not limit authority otherwise available to cities.



Note: Cities wishing to require the undergrounding of utilities should add the following language to this right of way ordinance and adopt a separate undergrounding ordinance. See Information Memo, "Regulating City Rights of Way" for information on undergrounding and a link to a model ordinance. Subdivision numbering in this section must be adjusted accordingly if the undergrounding provision is included.

Subd. 2. Undergrounding. Unless otherwise agreed in a franchise or other agreement between the applicable right of way user and the City, Facilities in the right of way must be located or relocated and maintained underground in accordance with Section _____ of the City Code.

Subd. 2. Corridors. The city may assign a specific area within the right of way, or any particular segment thereof as may be necessary, for each type of facility that is or, pursuant to current technology, the city expects will someday be located within the right of way. All excavation, obstruction, or other permits issued by the city involving the installation or replacement of facilities shall designate the proper corridor for the facilities at issue.



Note: this is not intended to establish a "high-density corridor." Cities wishing to establish a high-density corridor should follow PUC rules.

Any registrant who has facilities in the right of way in a position at variance with the corridors established by the city shall, no later than at the time of the next reconstruction or excavation of the area where the facilities are located, move the facilities to the assigned position within the right of way, unless this requirement is waived by the city for good cause shown, upon consideration of such factors as the remaining economic life of the facilities, public safety, customer service needs, and hardship to the registrant.

Subd. 3. Nuisance. One year after the passage of this chapter, any facilities found in a right of way that have not been registered shall be deemed to be a nuisance. The city may exercise any remedies or rights it has at law or in equity, including, but not limited to, abating the nuisance or taking possession of the facilities and restoring the right of way to a useable condition.

Subd. 4. Limitation of Space. To protect the health, safety, and welfare of the public, or when necessary to protect the right of way and its current use, the city shall have the power to prohibit or limit the placement of new or additional facilities within the right of way. In making such decisions, the city shall strive to the extent possible to accommodate all existing and potential users of the right of way, but shall be guided primarily by considerations of the public interest, the public's needs for the particular utility service, the condition of the right of way, the time of year with respect to essential utilities, the protection of existing facilities in the right of way, and future city plans for public improvements and development projects which have been determined to be in the public interest.

Sec. 1.26 Pre-Excavation Facilities Location.

In addition to complying with the requirements of Minn. Stat. 216D.01-.09 (“One Call Excavation Notice System”) before the start date of any right of way excavation, each registrant who has facilities or equipment in the area to be excavated shall mark the horizontal and vertical placement of all said facilities. Any registrant whose facilities are less than twenty (20) inches below a concrete or asphalt surface shall notify and work closely with the excavation contractor to establish the exact location of its facilities and the best procedure for excavation.

Sec. 1.27. Damage to Other Facilities.

When the city does work in the right of way and finds it necessary to maintain, support, or move a registrant's facilities to protect it, the city shall notify the local representative as early as is reasonably possible. The costs associated therewith will be billed to that registrant and must be paid within thirty (30) days from the date of billing. Each registrant shall be responsible for the cost of repairing any facilities in the right of way which it or its facilities damage. Each registrant shall be responsible for the cost of repairing any damage to the facilities of another registrant caused during the city's response to an emergency occasioned by that registrant's facilities.

Sec. 1.28. Right of Way Vacation.

Reservation of right. If the city vacates a right of way that contains the facilities of a registrant, the registrant's rights in the vacated right of way are governed by Minn. R. 7819.3200.

Sec. 1.29. Indemnification and Liability

By registering with the city, or by accepting a permit under this chapter, a registrant or permittee agrees to defend and indemnify the city in accordance with the provisions of Minn. Rule 7819.1250.

Sec. 1.30. Abandoned and Unusable Facilities.

Subd. 1. Discontinued Operations. A registrant who has determined to discontinue all or a portion of its operations in the city must provide information satisfactory to the city that the registrant’s obligations for its facilities in the right of way under this chapter have been lawfully assumed by another registrant.

Subd. 2. Removal. Any registrant who has abandoned facilities in any right of way shall remove it from that right of way if required in conjunction with other right of way repair, excavation, or construction, unless this requirement is waived by the city.

Sec. 1.31. Appeal.

A right of way user that: (1) has been denied registration; (2) has been denied a permit; (3) has had a permit revoked; (4) believes that the fees imposed are not in conformity with Minn. Stat. § 237.163, subd. 6; or (5) disputes a determination of the director regarding Section 1.24, subd.2 of this ordinance may have the denial, revocation, fee imposition, or decision reviewed, upon written request, by the City Council. The City Council shall act on a timely written request at its next regularly scheduled meeting, provided the right of way user has submitted its appeal with sufficient time to include the appeal as a regular agenda item. A decision by the City Council affirming the denial, revocation, or fee imposition will be in writing and supported by written findings establishing the reasonableness of the decision.

Sec. 1.32 Reservation of Regulatory and Police Powers

A permittee’s rights are subject to the regulatory and police powers of the city to adopt and enforce general ordinances as necessary to protect the health, safety, and welfare of the public.

Sec. 1.33. Severability.

If any portion of this chapter is for any reason held invalid by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions thereof. Nothing in this chapter precludes the city from requiring a franchise agreement with the applicant, as allowed by law, in addition to requirements set forth herein.

Passed by the City Council of _____ this _____ day of Month, Year.

Mayor

Attest:

City Clerk

309. PUBLIC RIGHT-OF-WAY

309.010 **FINDINGS, PURPOSE AND INTENT.**

The City of Birchwood Village holds the ROW within its geographical boundaries as an asset in trust for its citizens. The City and other public entities have invested millions of dollars in public funds to build and maintain the ROW. It also recognizes that some persons, by placing their equipment in the ROW and charging the citizens of the City for goods and services delivered thereby, are using this property held for the public good. Although such services are often necessary or convenient for the citizens, such persons receive revenue and/or profit through their use of public property. Although the installation of such service delivery facilities are in most cases necessary and proper use of the ROW, the City must regulate and manage such uses.

To provide for the health, safety and well-being of its citizens and to ensure the structural integrity of its streets and the appropriate use of ROW, the City strives to keep its ROW in a state of good repair and free from unnecessary encumbrances. Although the general population bears the financial burden for the upkeep of the ROW, one of the causes for the early and excessive deterioration of its ROW is frequent excavation or other intrusions into its sub-surface area. This Ordinance allows for the imposition of reasonable fees and regulates the placement and maintenance of equipment currently within its ROW or to be placed therein at some future time. It is intended to complement the regulatory roles of state, federal and other agencies. Under this Ordinance, persons disturbing and obstructing the ROW will bear a fair share of the financial responsibility for its integrity. This Ordinance also provides for recovery of the City's costs associated with managing its ROW.

309.020 **EXEMPTIONS.**

The provisions and requirements of this ordinance shall not apply to inter-governmental entities that have Joint Powers Agreements with the City or other ROW users exempted by the statutes of the state of Minnesota or as identified herein.

309.030 **DEFINITIONS.**

The following words, terms and phrases, as used herein, have the following meanings:

1. **Abandoned Facility** – (1) a facility no longer in service and physically disconnected from a portion of the operating facility, or from any other facility, that is in use or still carries service; or (2) a facility that is deemed abandoned by the ROW user.
2. **Applicant** – Any person requesting permission to excavate or obstruct a ROW.
3. **City** – The City of Birchwood Village, Minnesota.
4. **City Engineer** – That person or persons appointed, directed and empowered by the City of Birchwood Village to administrate the management of the Office of the Right-of-Way Engineer and those necessary responsibilities empowered by the City ROW Ordinance.

5. **City Management Costs** – The actual costs incurred by the City for public ROW management; and includes such costs, if incurred, as those associated with registering applicants; issuing, processing and verifying ROW or small wireless facility permit applications; inspecting job sites and restoration projects; maintaining, supporting, protecting or moving user equipment during public ROW work; determining the adequacy of ROW restoration; restoring work inadequately performed after providing notice and the opportunity to correct the work; and revoking ROW or small wireless facility permits.
6. **Degradation** – A decrease in the useful life of the ROW caused by excavation in or disturbance of the ROW, resulting in the need to reconstruct such ROW earlier than would be required if the excavation or disturbance did not occur.
7. **Degradation Fee** – The estimated fee established at the time of permitting by the city to recover costs associated with the decrease in the useful life of the ROW caused by the excavation, and which equals the degradation cost. This fee does not include the cost of patching, which is the sole responsibility of the ROW user.
8. **Delay Penalty** – The penalty imposed as a result of unreasonable delays in right of way excavation, obstruction, patching, or restoration as established from time to time by city council resolution.
9. **Emergency** – A condition that (1) poses a clear and immediate danger to life or health, or of a significant loss of property; or (2) requires immediate repair or replacement in order to restore service to a customer.
10. **Equipment** – Any tangible asset used to install, repair or maintain facilities in any ROW.
11. **Excavate** – To dig into remove or physically disturb or penetrate any part of a ROW.
12. **Excavation Permit** – A permit that must be obtained before a person may excavate in a ROW. An excavation permit allows the holder to excavate only in that part of the ROW described in the permit.
13. **Facility or Facilities** – Any tangible asset in the ROW required to provide utility service. The term does not include facilities to the extent the location and relocation of such facilities are preempted by Minnesota Statute section 161.45, governing utility facility placement in state trunk highways.
14. **Franchise Agreement** – Any agreement that contemplates work with tangible assets or equipment in the ROW for the purpose of providing utility service to the general public having been previously approved by the city by written agreement, contract or by franchise ordinance.
15. **Hole** – An excavation having a length on the long side that is less than 2 times the dimension of the width of the excavation and that conforms to O.S.H.A. standards.
16. **Obstruct** – To place any tangible object in a public ROW so as to hinder free and open passage over that or any part of the ROW for an aggregate period of five (5) hours or more in conjunction with the issuance of a ROW permit.
17. **Obstruction Permit** – A permit that must be obtained before a person may obstruct a ROW, allowing the holder to hinder free and open passage over the specified portion of that ROW by placing equipment described therein on the

- ROW for the duration specified in the permit.
18. **Patch or Patching** – A method of pavement replacement that is considered temporary in nature. A patch consists of (1) the compaction of the sub base and aggregate base, and (2) the replacement in kind, to match the existing pavement. A patch shall be considered “full restoration” only if the pavement replacement is certified by the City Engineer as such upon completion.
 19. **Permit Holder** – Any person to whom an Excavation Permit, an Obstruction Permit, or a Small Wireless Facility Permit to excavate, obstruct, or place equipment or facilities in a ROW has been granted by the City under this Ordinance.
 20. **Person** – A private individual or entity subject to all laws and rules of this state, however organized, whether public or private, whether domestic or foreign, whether for profit or nonprofit, and whether natural, corporate, or political.
 21. **Registrant** – Any person who digs, excavates, or intrudes in a ROW or has or seeks to have its facilities or equipment located in any ROW for temporary or permanent placement.
 22. **Restoration or “Full Restoration”** – The process by which the ROW and surrounding area, including pavement, foundation, and turf areas is returned to the same or better condition and life expectancy that existed immediately before excavation.
 23. **Restoration Cost** – The amount of money paid to the City by a permit holder to cover the cost of having the city perform the work to achieve the required level of restoration.
 24. **ROW** – (Right-of-Way) - The area on, below, or above a public roadway, highway, street, cart way, bicycle lane, and public sidewalk in which the City has an interest, including other dedicated ROW for travel purposes and/or utility easements of the City.
 25. **ROW Permit** – Either an excavation permit or obstruction permit, or both, depending on the context required by this Ordinance.
 26. **ROW User** – (1) a telecommunications ROW user as defined by Minnesota Statutes, Section 237.162, subdivision 4; or (2) a person owning or controlling a facility in the public ROW that is used or is intended to be used for providing utility service and who has a right under the law, franchise, or ordinance to use the public ROW.
 27. **Small Wireless Facility**. – A wireless facility that meets both of the following qualifications:
 - i. each antenna is located inside an enclosure of no more than six cubic feet in volume or could fit within such an enclosure; and
 - ii. all other wireless equipment associated with the small wireless facility provided such equipment is, in aggregate, no more than 28 cubic feet in volume, not including electric meters, concealment elements, telecommunications demarcation boxes, battery backup power systems, grounding equipment, power transfer switches, cutoff switches, cable, conduit, vertical cable runs for the connection of power and other services, and any equipment concealed from public view within or behind an existing structure or concealment.

28. **Trench** – An excavation having a length that is in excess of two (2) times the width of the excavation for the sections of roadway where the work is occurring, including a directional bore.
29. **Service or Utility Services** – Services provided by: (1) a public utility as defined in Minnesota Statutes, section 216B.02; (2) services of a telecommunications ROW user, including the transporting of voice or data information;; (3) services provided by a cable communications system as defined in Minnesota Statutes, Chapter 238;(4) natural gas or electric energy or telecommunications services provided by a local government unit; (5)services provided by a cooperative electric association organized under Minnesota Statutes, chapter 308A; and (6) water, sewer, steam, cooling, heating services, community television antenna system, fire and alarm communications, storm sewer, light, or power services including wind generation.
30. **Wireless Telecommunication Facility** – A tangible asset used to provide wireless telecommunication or data services, including all antennas, support devices, equipment including ground equipment, associated cables, and attachments.

309.035 **ADMINISTRATION.**

The City Engineer is the principal city official responsible for the administration of the rights-of-way, right-of-way permits, and the ordinances related thereto. The City Engineer may delegate any or all of the duties hereunder, with the express written consent of the City Council.

309.040 **REGISTRATION.** No person shall construct, install, repair, remove, relocate or perform any work within any ROW without first being registered pursuant to this Section. No person may construct, install, repair, remove, relocate, or perform any other work on, or use any facility or any part thereof, in any right of way without first being registered by the City.

309.041 **Registration Application.** The registrant shall provide the following information at the time of registration on a form provided by the City:

1. Registrant's name, address, telephone number, facsimile number and Gopher One Call registration certificate number if required by state law.
2. Name, address, telephone number and facsimile number of the person responsible for fulfilling the obligations of the registrant.
3. Unless exempted by previous or existing agreements or ordinance, a current Certificate of Insurance from a company licensed to do business in the State of Minnesota providing minimum coverage in the following amounts:

GENERAL LIABILITY:

Public Liability, including premises, products and complete operations
 Bodily Injury Liability - \$1,000,000 each person, \$3,000,000 each occurrence
 Property Damage Liability - \$3,000,000 each occurrence
 In lieu of (1) & (2): All Combined - \$3,000,000 single limit

COMPREHENSIVE:

Automobile Liability Insurance, including owned, non-owned and hired vehicles.

Bodily Injury Liability - \$1,000,000 each person, \$3,000,000 each occurrence

Property Damage Liability - \$3,000,000 each occurrence

In lieu of (1) and (2) Bodily Injury and Property Damage Combined - \$3,000,000 single limit. Such certificate shall verify that the registrant is insured against claims for personal injury, including death, as well as claims for property damage arising out of the (i) use and occupancy of the ROW by the registrant, its officers, agents, employees and permit holders, and (ii) placement and use of equipment or facilities in the ROW by the registrant, its officers, agents, employees and permit holders, including but not limited to, protection against liability arising from completed operations, damage of underground equipment and collapse of property. Such certificate shall also name the City as an additional insured as to whom the coverage required herein are in force and applicable and for whom defense will be provided as to all such coverage. Such certificate shall require that the City be notified thirty (30) days prior to cancellation of the policy.

4. A 24 hour emergency number.
5. An acknowledgment by the registrant of the indemnification pursuant to this Code.
6. Such additional information as the City may require.

309.042 **Notice of Changes.** The registrant shall keep all of the information listed above current at all times by providing to the City information as to changes within fifteen (15) days following the date on which the registrant has knowledge of any change.

309.043 **Franchisee Reporting Obligations.** Each registrant shall, at the time of registration and by December 1 of each year, file a construction and major maintenance plan for underground facilities with the City. Such plan shall be submitted using a format designated by the City and shall contain the information determined by the City to be necessary to facilitate the coordination and reduction in the frequency of excavations and obstructions of rights of way. The plan shall include, but not be limited to, the following information:

- (a) The locations and the estimated beginning and ending dates of all projects to be commenced during the next calendar year (in this section, a “next-year project”); and
- (b) To the extent known, the tentative locations and estimated beginning and ending dates for all projects contemplated for the five years following the next calendar year (in this section, a “five-year project”).

The City will have available for inspection in its office a composite list of all known or planned projects that have been adopted for the next calendar year. All registrants are responsible for keeping themselves informed of the current status of this

improvement list. Each registrant must notify the City immediately of any change in its list of planned projects.

309.044 **EXCEPTIONS.** The following are not subject to the requirements of this Section:

1. Person or Persons planting or maintaining pre-approved boulevard surface plantings or gardens.
2. Person or Persons installing mail boxes or private sidewalk from street or curb to dwelling or commercial structure.
3. Person or Persons engaged in commercial or private snow removal activities.
4. Person or Persons installing street furnishings.
5. Person or Persons installing irrigation systems.
6. City of Birchwood Village
7. Persons acting as agents, contractors or subcontractors for a registrant who has properly registered in accordance with this Section.

309.050 **MAPPING DATA.**

A. **Information Required.** Each registrant shall provide mapping as required by the City and which shall include the following information:

1. Location and approximate depth of registrant's mains, cables, conduits, switches and related equipment and facilities, with the location based on:
 - a. offsets from property lines, distances from the centerline of the public ROW and curb lines as determined by the City; or
 - b. Washington County Coordinate System; or
 - c. Any other system agreed upon by the ROW user and the City;
2. The type and size of the utility;
3. A description showing above-ground appurtenances;
4. A legend explaining symbols, characters, abbreviations, scale and other data shown on the map; and
5. Any facilities to be abandoned, if applicable, in conformance with Minnesota Statutes, Section 216D.04, subdivision 3.

B. **Submittal Requirement.**

1. Within two (2) years after the effective date of this ordinance, all telecommunication ROW users shall submit comprehensive detailed maps for review, if available, in accordance with Subsection (a) of this Section, for all facilities and equipment installed, used or abandoned within the public ROW.
2. Subsequent to providing the required comprehensive facility map, interim mapping data shall be submitted by all registrants for all equipment and facilities which are to be installed or constructed after the effective date of this ordinance at such time as permits are sought pursuant to this ordinance.

C. **Trade Secret Information.** At the request of any registrant, information requested by the City which qualifies as "trade secret" data under Minnesota Statutes, Sec. 13.37(b) shall be treated as trade secret information as detailed

therein.

309.060 **PERMIT REQUIREMENT.** Except as otherwise provided in this ordinance, no person may obstruct or excavate any right of way, or install or place facilities in the right of way, without first having obtained the appropriate permit from the City to do so.

- A. *Excavation Permit.* An excavation permit is required by a registrant to excavate that part of the right of way described in such permit and to hinder free and open passage over the specified portion of the right of way by placing facilities described therein, to the extent and for the duration specified therein.
- B. *Obstruction Permit.* An obstruction permit is required by a registrant to hinder free and open passage over the specified portion of right of way by placing equipment described therein on the right of way, to the extent and for the duration specified therein. An obstruction permit is not required if a person already possesses a valid excavation permit for the same project.
- C. *Small Wireless Facility Permit.* A small wireless facility permit is required by a registrant to erect or install a wireless support structure, to collocate a small wireless facility, or to otherwise install a small wireless facility in the specified portion or the right of way, to the extent specified therein, provided that such permit shall remain in effect for the length of time the facility is in use, unless lawfully revoked.

309.061 **PERMIT APPLICATION.** An application for a ROW permit shall be made on forms provided by the City and shall be accompanied by the following:

- A. Scaled drawings showing the location of all known existing facilities and improvements proposed by the applicant. The applicant will be requested to submit in English measurement two (2) paper copies at 1" = 50' scale plans at the smallest and/or one (1) copy in Auto CAD format (Washington County Coordinate system) with X, Y, Z dimensions to foot accuracy electronic plan. All plans must be dimensional and show existing utilities, curb and gutter, sidewalks, bikeways, signal poles, driveways, boxes, relevant structures, property lines and corners and property addresses.
- B. A description of the methods that will be used for installation of any facilities or equipment.
- C. A proposed schedule for all work.
- D. The location of any public streets, sidewalks or alleys that will be temporarily closed to traffic during the work and proposed detour route with appropriate signage.
- E. A description of methods for restoring any public facilities disrupted by the work.
- F. Any other information reasonably required by the City.
- G. The application shall be accompanied by the permit fee set forth by the City from time to time.

309.062 **SECURITY.** A performance bond and cash deposit in an amount determined by the City shall be required from each applicant. The applicant, at its option, may post security sufficient to cover all projects contemplated for the current calendar year. The performance bond must be approved by the City Attorney. Security required pursuant to this section shall be conditioned that the holder will perform the work in accordance with this Ordinance and applicable regulations and will pay to the City any costs incurred by the City in performing work pursuant to this Ordinance. Said conditions will indemnify and save the City and its officers, agents and employees harmless against any and all claims, judgment or other costs arising from any excavation and related work covered by the ROW permit. And to include further indemnification by reason of any accident or injury to persons or property through the fault of the permit holder, either for improperly fencing and guarding the excavation or for any other injury resulting from the negligence or willful actions of the permit holder. The bond or any unused portions of a cash deposit shall be released by the City upon completion of the work and compliance with all conditions imposed by the ROW permit. For permits allowing excavations within public streets, such bond or unused part of a cash deposit shall be held for a period of twenty-four (24) months to guarantee adequacy of all restoration work.

309.063 **PERMIT CONDITIONS.** The City shall grant a permit upon finding the work will comply with the requirements of this Ordinance. The City may impose reasonable conditions upon the issuance of the permit and the performance of the applicant thereunder to protect the public health, safety and welfare, to insure the structural integrity of the ROW, to insure completion of restoration of the ROW within a specified period, to protect the property and safety of other users of the ROW and to minimize the disruption and inconvenience to the traveling public. If it is determined by the City Engineer that the proposed ROW intrusion or use is not in the best interest of the city and no agreement or alternative compromise solution is feasible, the applicant may appeal the Engineer's decision to the Birchwood Village City Council for final disposition in accordance with section 309.150. If the applicant's ROW permit application is terminated at any given level, the City may at its discretion elect to grant a partial refund of fees that may have been paid but shall not disburse any part of the basic Registration Fee or more than 50% of the Permit Fee. No permit shall be issued to any person who has failed to register pursuant to this code.

309.064 **Small Wireless Facility Conditions.** In addition to section 309.063, the erection or installation of a wireless support structure, the collocation of a small wireless facility, or other installation of a small wireless facility in the right-of-way, shall be subject to the following conditions:

- (a) A small wireless facility shall only be collocated on the particular wireless support structure, under those attachment specifications, and at the height indicated in the applicable permit application.
- (b) No new wireless support structure installed within the right-of-way shall exceed 50 feet in height without the city's written authorization, provided that the city

may impose a lower height limit in the applicable permit to protect the public health, safety and welfare or to protect the right-of-way and its current use, and further provided that a registrant may replace an existing wireless support structure exceeding 50 feet in height with a structure of the same height subject to such conditions or requirements as may be imposed in the applicable permit.

- (c) No wireless facility may extend more than 10 feet above its wireless support structure.
- (d) Where an applicant proposes to install a new wireless support structure in the right-of-way, the city may impose separation requirements between such structure and any existing wireless support structure or other facilities in and around the right-of-way.
- (e) Where an applicant proposes collocation on a decorative wireless support structure, sign or other structure not intended to support small wireless facilities, the city may impose reasonable requirements to accommodate the particular design, appearance or intended purpose of such structure.
- (f) Where an applicant proposes to replace a wireless support structure, the city may impose reasonable restocking, replacement, or relocation requirements on the replacement of such structure.

309.065

EXCEPTIONS. No permit shall be required for the following:

- A. Approved surface landscaping work.
- B. Approved private sidewalks, street furnishings, posts and pillars.
- C. Snow removal activities.
- D. Irrigation systems provided that the system does not connect directly to water mains in the ROW installed at the property owner's risk.
- E. Activities of the City of Birchwood Village.
- F. If granted approval by the city, piercing or drilling a street or sidewalk/trail pavement for the purpose of exploratory examination or utility depth determination.

309.070

STANDARDS FOR CONSTRUCTION OR INSTALLATION.

- A. **General Standards.** The permit holder shall comply with the following standards, to the extent consistent with applicable Minnesota rules, when performing the work authorized under the permit:
 - 1. Take such precautions as are necessary to avoid creating unsanitary or unsafe conditions. Observe and comply with all laws, rules and regulations of the State and local governments.
 - 2. Conduct the operations and perform the work in a manner as to insure the least obstruction to and interference with traffic.
 - 3. Take adequate precautions to insure the safety of the general public and those who require access to abutting property.
 - 4. Notify adjoining property owners prior to commencement of work which may disrupt the use of and access to such adjoining properties.
 - 5. Comply with the Minnesota Manual of Uniform Traffic Control Devices at all times during construction or installation.

6. Exercise precaution at all times for the protection of persons, including employees and property.
7. Protect and identify excavations and work operations with barricade flags and if required, by flagmen in the daytime and by warning lights at night.
8. Provide proper trench protection as required by O.S.H.A.
9. Protect the root growth of trees and shrubbery.
10. Where possible, provide for space in the installation area for other telecommunication ROW users and companies that install facilities in public ROW.
11. Maintain maximum access to all properties and cross streets as possible during construction operations and maintain emergency vehicle access at all times.
12. Maintain planned alignment and grade unless otherwise authorized by the City. Field changes not approved by the City will require removal and reconstruction.
13. During trenching of facilities, a warning tape must be placed at a depth of twelve (12) inches above all copper cables with over two hundred (200) pairs and above any fiber facilities.
14. Beneath concrete or bituminous paved road surfaces, directional bore facilities shall be installed in conduit of a type approved by the city.
15. The placing of all telecommunications facilities must comply with the National Electric Safety Code, as incorporated by reference in Minn. Stat. Sec. 326.243.
16. Locate all property lines near ROW lines and replace any disturbed property corner markers or judicial monuments. A Minnesota licensed surveyor must be used in the replacement of disturbed property corners markers or judicial monuments.
17. Excavations, trenches and jacking pits off the roadway or adjacent to the roadway or curbing shall be sheathed and braced depending upon location and soil stability and as directed by the City.
18. Excavating trenches and jacking pits shall be protected when unattended to prevent entrance of surface drainage.
19. All backfilling materials must be placed in 6 inch lifts (maximum) at optimum moisture and compacted with the objective of attaining ninety-five percent (95%) of Standard Proctor Density. Compaction shall be accomplished with hand, pneumatic or vibrating compactors as appropriate.
20. Backfill material shall be subject to the approval of the City. The City may permit backfilling with the material from the excavation provided such material is granular in nature and acceptable to the City.
21. Compacted backfill shall be brought to bottom of the gravel of the approved street section.
22. Street and pedestrian traffic shall be maintained throughout construction unless provided otherwise by the permit.
23. No road surface damaging lugs, cleats or equipment may be used or driven upon paved city street surfaces.
24. Dirt, trash or other debris must be periodically removed during construction.

25. Other reasonable standards and requirements of the City.
- B. Standards for Installation of Underground Utilities.** The permit holder shall comply with the following standards when installing facilities underground:
1. Underground facilities must be placed as far off the roadway as possible to provide access from outside of the paved area.
 2. Buried fiber facilities shall be at a minimum depth of three (3) feet and a maximum depth of four (4) feet unless an alternate location is approved by the City. Buried copper facilities beneath concrete or bituminous paved road surfaces must be placed at no less than three (3) feet but no more than four (4) feet deep. Other buried copper facilities must be placed at a minimum depth of thirty (30) inches and a maximum depth of four (4) feet.
 3. Crossing of streets and hard surfaced driveways shall be directional bored unless otherwise approved by the City.
 4. If construction is open cut, the permit holder must install the visual tracers approximately twelve (12) inches above buried facilities. If other construction methods are used, substitute location methods will be considered.
 5. The permit holder shall register with Gopher State One Call and comply with the requirements of that system.
 6. Compaction in trench backfill material shall be ninety-five percent (95%) of the standard proctor density and copies of test results shall be submitted to the City. All tests and their locations shall be determined by the City. Tests must be conducted by an independent testing firm approved by the City. Street pavement replacement will not be permitted until sub-base densities are approved by the city. Testing shall be required at the discretion of the City engineer. Street Pavement structure and materials shall be as specified by the city and re-paved. All pavement replacement shall be done in the presence of a City inspector with certified pavement material to City specifications.
 7. The facilities shall be located so as to avoid traffic signals and signs which are generally placed a minimum of five (5) feet behind the curb.
 8. When utilizing trenchless installation methods to cross an area in which a municipal utility is located, and/or when directed by the City, the permit holder shall excavate an observation hole over the utility to ensure that the City utility is not damaged. Observation holes shall not be backfilled until viewed and approved by the city ROW Inspector.
 9. All junction boxes or access points shall be located no closer than ten (10) feet from municipal fire hydrants, valves, manholes, lift stations or catch basins unless an alternate location is approved by the City.
 10. Underground facilities shall not be installed between a hydrant and auxiliary valve.
 11. Underground facilities shall not be installed within five (5) feet of hydrants, valves, lift stations or manholes in areas where utility easements exist beyond the ROW. In those areas in which no utility easement exists, placement of an underground facility shall be between the edge of pavement and no closer than three (3) feet to an existing municipal utility

appurtenance unless approved by the City.

12. In areas where an extensive effort to determine the location of municipal utility lines will be required to accommodate the installation of private facilities, the City's representative for Gopher State One Call must be contacted by the permit holder two (2) weeks prior to the beginning of the work to schedule meetings.
13. Buried telecommunication facilities must have a locating wire or conductive shield, except for di-electric cables.
14. Buried fiber facilities must be placed in a conduit of a type determined by the ROW user unless the permit holder obtains a waiver from the City.

C. **Standards for Installation of Overhead Facilities.** The permit holder shall comply with the following standards when installing facilities overhead:

1. All wires must be in compliance with the National Electric Safety Code and at a location that does not interfere with traffic signals, overhead signs, or street lights.

D. **Standards for Wireless Telecommunication Facilities.**

1. **Purpose.** The City of Birchwood Village desires high quality wireless communication services to accommodate the needs of residents and businesses. At the same time, the City strives to minimize the negative impacts that wireless telecommunication facilities can have on aesthetics and public safety. Due to the many services that must be delivered within its limited area, the City also strives to avoid unnecessary encumbrances within the public ROW. The City allows and regulates wireless telecommunication facilities outside of the public ROW through performance standards and height limits. The purpose of this Section is to regulate wireless telecommunication facilities within the public ROW in a manner that balances desire for service with aesthetic, public safety, and ROW flexibility concerns.

Public ROW are appropriate locations for wireless telecommunication facilities that present minimal impacts (i.e. small pole attachments that do not require new poles, do not require pole extensions, and do not have associated ground mounted equipment). Wireless telecommunication facilities that require greater heights than can be afforded by existing poles in the public ROW and that require ground-mounted equipment are more appropriately sited outside the public ROW in accordance with adopted performance standards of this Code. However, the City recognizes that as wireless technology advances, some residential areas of the City may be hard to serve with wireless technology due to the lack of acceptable siting alternatives in the immediate vicinity. In such areas, where no alternative non-ROW locations are available, wireless telecommunication facilities that require pole extensions and ground equipment will be allowed in the public ROW subject to the requirements of this Section which are meant to protect the public health, safety, and welfare.

2. **Wireless Telecommunication Facilities as Pole Attachments.** Wireless telecommunication facilities that comply with the following requirements

may be attached to existing public utility structures within the ROW after issuance of a small wireless facility permit.

- a. The wireless telecommunication facility shall not extend above the top of the existing public utility structure and the height of the existing public utility structure shall not be increased to accommodate the wireless telecommunication facility.
 - b. If the public utility structure must be replaced to structurally accommodate the wireless telecommunication facility, the replacement public utility structure height shall not exceed the existing public utility structure height and the replacement public utility structure diameter shall not exceed the existing public utility structure diameter by more than 50 percent.
 - c. The wireless telecommunication facility shall not be larger than three (3) cubic feet and shall have no individual surface larger than four (4) square feet.
 - d. The wireless telecommunication facility shall not extend outward from the existing pole or tower or arm thereof by more than two and one half (2 1/2) feet, except that an antenna one half inch in diameter or less may extend an additional six inches.
 - e. The wireless telecommunication facility shall include no ground mounted equipment.
 - f. The wireless telecommunication facility shall not interfere with public safety communications and shall meet the requirements of this Ordinance.
 - g. Wireless telecommunication facilities in the ROW shall be removed and relocated at City request subject to the provisions of this Ordinance.
 - h. The wireless telecommunication facility shall not block light emanating from the public utility structure and shall not otherwise interfere with the original use of the public utility structure.
3. **Wireless Telecommunication Facilities as Pole Extensions or with Ground Mounted Equipment.** Wireless telecommunication facilities that require increased public utility structure height or that have ground mounted equipment may be erected in the public ROW only when in compliance with the following provisions and after issuance of a small wireless facility permit or excavation permit:
- a. The applicant shall demonstrate to the satisfaction of the City or his/her designee that the wireless telecommunication facility cannot be placed in a complying location outside the ROW within one quarter (1/4) mile of the proposed location.
 - b. The replacement public utility structure, including lightning rods and all other attachments, shall not exceed the height of the existing public utility structure by more than fifteen (15) feet. Once the height of a public utility structure has been increased under the provisions of this Section, the height shall not be further increased.
 - c. The replacement public utility structure diameter shall not exceed the existing public utility structure diameter by more than fifty (50) percent.

- d. The wireless telecommunication facility shall not extend outward from the public utility structure by more than two (2) feet.
 - e. If feasible and desirable, as determined by the City, the replacement public utility structure shall match the original and surrounding public utility structures in materials and color.
 - f. The wireless telecommunication facility shall not interfere with public safety communications and shall meet the requirements of this Ordinance.
 - g. A small wireless facility or excavation permit for a wireless telecommunication facility that has ground mounted equipment will be issued only if the City finds the following:
 - i. the ground mounted equipment will not disrupt traffic or pedestrian circulation;
 - ii. the ground mounted equipment will not create a safety hazard;
 - iii. the location of the ground mounted equipment minimizes impacts on adjacent property; and,
 - iv. the ground mounted equipment will not adversely impact the health, safety, or welfare of the community.
 - h. Ground mounted equipment associated with the wireless telecommunication facility shall meet the following performance standards:
 - i. be set back a minimum of ten (10) feet from the edge of street or curb line;
 - ii. be separated from a sidewalk by a minimum of three (3) feet;
 - iii. be set back a minimum of fifty (50) feet from the nearest intersecting ROW line;
 - iv. be separated from the nearest ground mounted wireless telecommunication equipment installation on the same block face by a minimum of 330 feet unless the equipment is placed underground;
 - v. if located adjacent to residential uses, ground mounted equipment shall be limited to three (3) feet in height above grade and twenty seven (27) cubic feet in cumulative size;
 - vi. if located adjacent to non-residential uses, ground mounted equipment shall be limited to five (5) feet in height above grade and eighty-one (81) cubic feet in cumulative size;
 - vii. ground mounted equipment located outside the public ROW shall conform to the requirements of this Ordinance
 - viii. vegetative or other screening compatible with the surrounding area shall be provided around the ground mounted equipment if deemed necessary by the City.
 - i. Wireless telecommunication facilities in the ROW shall be removed and relocated at City request subject to the provisions of this Ordinance.
4. **New Poles.** The construction in the ROW of a new pole to support wireless telecommunication facilities is not allowed, except as a replacement of an existing public utility structure subject to the requirements of this Section.

5. **Charges.** In addition to the permit fees required by the City, the City reserves the right to charge telecommunication providers for their use of the public ROW to the extent that such charges are allowed under state or Federal law. Telecommunication providers shall be responsible for payment of property taxes attributable to their equipment in the public ROW.

309.071 **TIMELINESS OF WORK.** The work to be done under the permit and the patching and restoration of the ROW as required herein, must be completed within the dates specified in the permit. It may be increased by as many days as work could not be done because of circumstances beyond the control of the permit holder or when work was prohibited as unseasonable or unreasonable.

309.072 **PERMIT EXTENSION.** No person may excavate or obstruct the ROW beyond the date or dates specified in the permit or do any work outside the area specified in the permit unless such person makes a supplementary application before the expiration of the permit. Payment of all fees for an extension of the permit is required before extension may be granted by the City; If the work could not be completed because of circumstances beyond the control of the permit holder or the work was delayed or prohibited by unseasonable or unreasonable conditions, the City may grant and extend the completion date of the work.

309.073 **DELAY PENALTY.** Notwithstanding Subsection (b) of this Section, the City may impose a delay penalty where excavating or obstruction work in the ROW is not completed within the time specified if no permit extension application has been made prior to the expiration date of the permit. A delay penalty will not be imposed if the delay is due to circumstances beyond the control of the applicant, including without limitation inclement weather, acts of God, or civil strife.

309.080 **PATCHING OR FULL RESTORATION OF ROW.**
The permit holder shall patch its own work. In lieu of ROW restoration, a ROW user may elect to pay a degradation fee as determined by the City.

- A. **City Restoration.** If the City restores the ROW, the permit holder shall pay the costs thereof within thirty (30) days of billing. If, during the twenty-four (24) months following such surface restoration, the pavement settles due to the permit holder's improper backfilling and compaction, the permit holder shall pay to the City, within thirty (30) days of billing, all costs associated with having to correct the defective work.
- B. **Permit Holder Restoration.** If, within twelve (12) months after completion of restoration of the ROW, the City determines the ROW has been properly restored, the security posted by the permit holder as required by section 309.062 will be released.
- C. **Standards.** The permit holder shall perform patching and restoration to the satisfaction of the City Engineer.
- D. **Guarantees.** If the permit holder performs the restoration work, the permit holder shall guarantee such work and its maintenance for twelve (12) months

following its completion. During this twelve (12) month period it shall, upon notification from the City, promptly and within 7 working days from receipt of notification, correct all faulty restoration work to the extent necessary, using the method required by the City or its Engineer.

If a permit holder fails to act within the 7 working day period the City shall at its discretion have the work performed and the security shall be used to reimburse the City for its actual and administrative costs associated with the correction(s).

309.090

JOINT APPLICATIONS.

- A. **Joint Application.** Registrants may jointly apply for permits to excavate or obstruct the ROW at the same place and time.
- B. **Shared Fees.** Registrants who apply for permits for the same obstruction or excavation may share in the payment of the obstruction or excavation permit fee. Registrants must agree among themselves as to the portion each will pay and indicate the same on their applications.

309.100

OTHER OBLIGATIONS.

- A. **Compliance With Other Laws.** The permit holder must obtain all other necessary permits, licenses and approvals and pay all fees required. The permit holder shall comply with all requirements of local, state and federal laws, including Minn. Stat. Secs. 216D.01-.09 ("One Call Excavation Notice System"). A permit holder shall perform all work in conformance with all applicable codes and established rules and regulations and is responsible for all work done in the ROW pursuant to its permit, regardless of who does the work.
- B. **Prohibited Work.** Except in an emergency, and with the approval of the City, no ROW excavation or obstruction may be done when seasonally prohibited or when conditions are unreasonable for such work.
- C. **Interference with ROW.** A permit holder shall not so obstruct a ROW that the natural free and clear passage of water through the gutters or other waterways is or would be interfered with. Any physical observation of such obstruction shall be grounds to revoke a permit.

309.110

DENIAL OF PERMIT.

The City may deny a permit based on any of the following grounds:

- A. Failure to register pursuant to requirements of this Ordinance.
- B. The applicant is subject to revocation of a prior permit issued pursuant to this Ordinance.
- C. The proposed schedule for work would conflict or interfere with an exhibition, celebration, festival or any other similar event.
- D. The proposed schedule conflicts with scheduled or total or partial reconstruction of the ROW.
- E. The City determines that the applicant will not be able to comply with the requirements of this Ordinance.

F. The City determines that denial is necessary to protect the health, safety and welfare of the public or protect the ROW and its current use.

309.111 **PROCEDURAL REQUIREMENTS.** The denial or revocation of a permit must be made in writing and must document the basis for the denial. The city must notify the applicant or right-of-way user in writing within three business days of the decision to deny or revoke a permit. If an application is denied, the right-of-way user may address the reasons for denial identified by the city and resubmit its application. If the application is resubmitted within 30 days of receipt of the notice of denial, no additional application fee shall be imposed. The city must approve or deny the resubmitted application within 30 days after submission.

309.120 **EMERGENCIES AND WORK DONE WITHOUT A PERMIT.**
Each registrant shall immediately notify the City and all other affected parties or property owners of any event regarding its facilities, which it considers to be an emergency. The registrant may proceed to take whatever actions are necessary to respond to the emergency. If the registrant has not been issued the required permit, the registrant shall, within two (2) business days after the occurrence of the emergency, apply for the necessary permits, pay the permit fees (where necessary) and fulfill the remaining requirements necessary to bring itself into compliance with this Ordinance for the actions it took in response to the emergency.

If the City becomes aware of an emergency regarding a registrant's facilities, the City shall attempt to contact the local representative of each registrant affected, or potentially affected, by the emergency. The City may take whatever action deemed necessary to respond to the emergency, the cost of which shall be borne by the registrant whose facilities occasioned the emergency.

Except in an emergency, any person who, without first having obtained the necessary permit, obstructs or excavates a ROW must subsequently obtain a permit and (where appropriate) as a penalty, pay twice the normal fee for the permit and shall deposit with the City the fees determined to correct any damage to the ROW.

309.130 **INSPECTION.**
A. **Site Inspection.** The permit holder shall make the work site available to the City and to all others authorized by law for inspection at all reasonable times during the execution of and upon completion of the work.
B. **Authority of City**
1. At the time of inspection, the City may order the immediate cessation of any work which poses a serious threat to the life, health, safety or well-being of the public.
2. The City may issue a stop work order to the permit holder for any work which does not conform to the terms of the permit or other applicable standards, conditions or codes. The order shall state that failure to correct the violation within a stated deadline will be cause for revocation of the permit. If the violation is not corrected within the stated deadline, the City

may revoke the permit.

309.140

REVOCAION OF PERMITS.

- A. **Substantial Breach.** The City may revoke a ROW permit, without a fee refund, if there is a substantial breach of the terms or conditions of any statute, this Code, rule or regulation, or any condition of the permit. A substantial breach by a permit holder shall include, but not limited to, the following:
 - 1. The violation of any material provision of the permit.
 - 2. Any material misrepresentation of fact in the application for a permit.
 - 3. The failure to maintain the required bonds or other security and insurance.
 - 4. The failure to complete the work in a timely manner.
 - 5. The failure to correct, in a timely manner, work that does not conform to applicable standards, conditions or codes, upon inspection and notification by the City of the faulty condition.
 - 6. An evasion or attempt to evade any material provision of the ROW permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the city or its citizens.
 - 7. The failure to comply with the terms and conditions of any applicable federal, state and local laws, rules and regulations, including any provision of this Ordinance.
- B. **Notice of Breach.** If the City determines that a permit holder has committed a substantial breach of a term or condition of any statute, this Ordinance, rule or regulation or any condition of the permit, the City shall make a written demand upon the permit holder to remedy such violation within a reasonable period of time or be subject to potential revocation of the permit. The City may impose additional or revised conditions on the permit to mitigate or remedy the breach.
- C. **Reimbursement of City Costs.** If a permit is revoked, the permit holder shall reimburse the City for its reasonable costs, including restoration costs and the costs of collection and reasonable attorney fees incurred in connection with the revocation.

309.150

APPEAL.

- A. **Filing of Appeal. Notwithstanding other appellate processes in chapter 303 or 304,** any person aggrieved by, (i) the denial of a permit application; (ii) the denial of a registration; (iii) the revocation of a permit, or (iv) the application of the fee schedule imposed by this Code, may appeal to the City Council by filing a written notice of appeal with the City Administrator-Clerk. Said notice must be filed within twenty (20) days of receipt of written notice of the action causing the appeal.
- B. **Notice of Hearing.** The City Council shall hear the appeal at its next regularly scheduled meeting, unless the time is extended by agreement of the parties. Notice of the date, time, place and purpose of the hearing shall be mailed to the appellant.
- C. **Hearing and Decision.** The City Council shall, at the hearing, consider any evidence offered by the appellant, the City and any other person wishing to be heard. The Council shall issue a written decision within thirty (30) days of the

completion of the hearing. A decision by the governing body affirming the denial, revocation, or fee imposition must be in writing and supported by written findings establishing the reasonableness of the decision.

- 309.160 **DUMPSTERS/PORTABLE-ON-DEMAND STORAGE (POD UNITS).**
The placement of dumpsters or POD units in the street portion of the ROW is not allowed. Dumpsters or POD units may be placed within the boulevard or driveway portions of the ROW provided that they do not obstruct pedestrian traffic along sidewalks or trails and the boulevard is restored to previous conditions. In extraordinary circumstances, the City Engineer may make exceptions to this provision and applicant shall be subject to the permitting and fee requirements of this ordinance.
- 309.170 **RELOCATION OF FACILITIES.**
A ROW user shall promptly and at its own expense, with due regard for seasonal working conditions, remove and relocate its facilities in the ROW when it is necessary to prevent interference or obstruction, but not merely for the convenience of the City, in connection with: (1) a present or future City use of the ROW for a public project or facility, (2) the public health or safety; or (3) the safety and convenience of travel over the ROW. The ROW user shall restore any ROW to the condition it was in prior to removal and relocation.
- 309.180 **DAMAGE TO OTHER FACILITIES.**
When the City does work in the ROW and finds it necessary to maintain, support, or move registrant's facilities to protect those facilities, the City shall notify the registrant as soon as possible. The costs associated therewith shall be billed to the registrant and must be paid within thirty (30) days from the date of billing. Each registrant shall be responsible for the cost of repairing any facilities in the ROW that the registrant damages. Each registrant shall be responsible for the cost of repairing any damage to the facilities of another registrant caused during the City's response to an emergency occasioned by that registrant's facilities.
- 309.190 **ROW VACATION.**
A. **Reservation of Right.** If the City vacates a ROW which contains the equipment or facilities of a registrant or permit holder, and if the vacation does not require the relocation of the registrant's or permit holder's equipment or facilities, the City shall reserve, to and for itself and all registrants or permit holders having equipment and facilities in the vacated ROW, a public easement for the right to install, maintain and operate any equipment and facilities in the vacated ROW and to enter upon such ROW at any time for the purpose of reconstruction, inspecting, maintaining or repairing the same.
B. **Relocation of Facilities.** If the vacation requires the relocation of the registrant's or permit holder's equipment or facilities; and (i) if the vacation proceedings are initiated by the registrant or permit holder, the registrant or permit holder must pay the relocation costs; or (ii) if the vacation proceedings are initiated by the City, the registrant or permit holder must pay the relocation

costs unless otherwise agreed to by the City and the registrant or permit holder; or (iii) if the vacation proceedings are initiated by a person or persons other than the registrant or permit holder, such person or persons must pay the relocation costs.

309.200 **ABANDONED AND UNUSABLE EQUIPMENT AND FACILITIES.**

- A. **Discontinued Operations.** A registrant who has determined to discontinue all or a portion of its operations in the City must provide information satisfactory to the City that the registrant's obligations for its facilities in the ROW under this chapter have been lawfully assumed by another registrant.
- B. **Removal of Abandoned Facilities.** Any registrant who has abandoned facilities in any ROW shall remove them from that ROW to the extent such facilities interfere with another ROW repair, excavation, or construction, unless this requirement is waived by the City.

309.210 **INDEMNIFICATION AND LIABILITY.**

By registering with the City or by accepting a permit granted under this Ordinance, a registrant or permit holder agrees as follows:

- A. **Limitation of Liability.** By reason of the acceptance of a registration or the grant of a ROW permit, the City does not assume any liability (i) for injuries to persons, damage to property or loss of service claims by parties other than the registrant or the City, or (ii) for claims or penalties of any sort resulting from the installation, presence, maintenance or operation of equipment or facilities by registrants or permit holders or activities of registrants or permit holders.
- B. **Indemnification.** A registrant or permit holder shall indemnify, keep and hold the City, its officials, employees and agents, free and harmless from any and all costs, liabilities, and claims for damages of any kind arising out of the construction, presence, installation, maintenance, repair or operation of its equipment and facilities, or out of any activity undertaken in or near a ROW, whether or not any act or omission is authorized, allowed or prohibited by a ROW permit. The registrant or permit holder does not indemnify the City for its own negligence except for claims arising out of or alleging the City's negligence in issuing the permit or in failing to properly or adequately inspect or enforce compliance with a term, condition or purpose of a permit. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the registrant, permit holder or the City, and the registrant or permit holder, in defending any action on behalf of the City, shall be entitled to assert in any action every defense or immunity that the City could assert on its own behalf.

If the registrant or permit holder is required to indemnify and defend, it shall thereafter have control of the litigation, but the registrant or permit holder may not settle the litigation without the consent of the City. Such consent will not be unreasonably withheld.

309.220 **FRANCHISE HOLDERS.**

If there is a conflict in language between the franchise of a person holding a franchise agreement with the City or the Water Service Agreement (White Bear Lake) with the City and this Ordinance, the terms of the franchise or Water Service Agreement shall prevail.

309.230 **SEVERABILITY.**

If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

APPENDIX I ESSENTIAL MUNICIPAL SERVICES

Special conditions and provisions to regulate and control ROW intrusions by essential service providers for which previous agreements or ordinances have been enacted and approved by the City in concurrence with the respective service providers.

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Participating Municipal Provider:

City of White Bear Lake
White Bear Township

EFFECTIVE DATE: This ordinance becomes effective on the date of its publication, or upon the publication of a summary of the ordinance as provided by M.S. § 412.191, subd. 4, as it may be amended from time to time, which meets the requirements of M.S. § 331A.01, subd. 10, as it may be amended from time to time.

ADOPTED BY ORDINANCE 2017-10-02; February 13, 2018.