



AGENDA OF THE PLANNING
COMMISSION
CITY OF BIRCHWOOD VILLAGE
WASHINGTON COUNTY, MINNESOTA
May 24, 2018
7:00 P.M.

CALL TO ORDER

APPROVE AGENDA

REGULAR AGENDA

- A. Review/Approve April 26, 2018 Meeting Minutes (provided at meeting)
- B. Consider Building Permit Escrow Fees / Ordinance Amendments for Damages to Public Property* (pp. 2-16)
 - 1. Discuss & Recommendation to City Council
- C. Discuss Amending 301.050 Non-Conforming Uses* (pp. 17-20)
 - 1. Discuss & Recommendation to City Council
- D. Discuss Amending Section 304 Zoning Code Variances and Appeals* (pp. 21-23)
 - 1. Discuss & Recommendation to City Council
- E. Discuss Small Cell Wireless Code (see April 26, 2018 packet)
 - 1. Discuss & Recommendation to City Council

ADJOURN

* Denotes items that have supporting documentation provided

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 two months ago and tabled twice. City Council is expecting a recommendation from the Commission on this subject soon. The Council is only required to wait 60 days for the Commission's recommendation and may move forward without a recommendation after 60 days. During the March 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	\$

Notice:

***The City and its representatives accept no responsibility for errors and/or damages caused due to incomplete and/or inaccurate information herein. It is the responsibility of the applicant to ensure the accuracy and completeness of this information.**

***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.**

***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 the applicant declares that the information provided in and enclosed herewith is complete and all documents represented are true and correct representations of the actual project/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: 301.050 Non-Conforming Uses

Dear Commissioners,

The City Council discussed your recommendation at their last meeting regarding 415 Wildwood non-conforming use lot. After reviewing the Commission's recommendation along with the recommendations from Attorney Kantrud, Engineer Thatcher, and Building Official Kramer, the Council agreed with your recommendation and approved the issuance of a building permit without a variance.

The City Council took note of Attorney Kantrud's comment about the poor construction of 301.050, which governs non-conforming uses. Mayor Wingfield has independently searched for a solution and is suggesting we adopt a version of Roseville's code (attached). I have forwarded this proposal to Attorney Kantrud and hope to receive his comments/recommendations before your meeting to aid you in your discussion of this agenda item.

Request/Recommendation

Staff requests Commissioners:

- 1) Please review Section 301.050 and the proposed amendment (repeal and replace) and
- 2) Provide a recommendation to City Council accordingly.

Thanks!

Regards,
Tobin Lay

ORDINANCE 2018-05-02

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

**AN ORDINANCE REPEALING AND REPLACING
NON-CONFORMING USES IN CITY CODE**

The City Council of the City of Birchwood Village hereby ordains that Section 300.020.34 of Chapter 300 (Land Use) and Section 301.050 of Chapter 301 (Zoning Code: General Provisions) of the Municipal Code of the City of Birchwood Village are hereby repealed and replaced as follows:

SECTION 300: LAND USE

300.020.34 Non-Conforming Use. **Non-Conforming Pre-Existing Structure or Use:** Any building or structure which was legally existing on January 1, 1975, or authorized by variance thereafter, which would not conform to the applicable conditions if the building or structure were to be erected under this Code. Such a structure or use may be continued but may not be extended, expanded, intensified, or changed unless to a conforming use. **Non-Conforming Illegal Structure, Use, or Lot:** A lot, building, structure, premises, or use illegally established when it was initiated, created, or constructed, which did not conform with the applicable conditions or provisions of the City Code for the area in which the structure or use is located.

SECTION 301: ZONING CODE: GENERAL PROVISIONS

301.050. NON-CONFORMING USES.

1. **Definition:** A non-conforming use or structure. See definition in Section 300.020.
2. **Existing Structures or Uses:** A pre-existing non-conforming use or structure may be continued but may not be extended, expanded, intensified or changed, unless to a conforming use. Exceptions include:
 - a. An expansion of a pre-existing residential principal or accessory structure in an R-1 or R-2 zoning district which maintains the same property line setbacks and structure separations provided there is no further encroachment of any non-conforming structural dimension or increase in the non-conformity of use of the land.
 - b. A pre-existing principal or accessory structure, including expansion thereof, in which a property line setback dimension has been made substandard by eminent domain or other formal public agency action. Such a structure shall be considered a legally conforming structure. All future additions to the structure or use shall meet the current required setback from the revised property or easement line.

3. **Damaged Non-Conforming Structures:** Any non-conforming structure damaged to an extent of not more than fifty percent (50%) of its reproduction cost by fire, flood, explosion or other casualty may be reconstructed and used as before if such reconstruction is completed within six (6) months of the casualty. If the damage to the structure is greater than fifty percent (50%) of the replacement cost of the structure at the time of loss, as determined by the City Council, the reconstruction shall be in accordance with this Code.
4. **Discontinued Non-Conforming Use:** Whenever a non-conforming use shall have been discontinued for a period of twelve (12) months, it shall not return to the original or any other use which is non-conforming.
5. **Maintenance of Non-Conforming Structures:** Normal maintenance of a structure containing or which is a non-conforming use is permitted, including necessary nonstructural repairs and incidental alterations which do not expand the foundation and/or building size, increase the building occupancy or parking demand, or intensify the non-conformity of the structure or use.
6. No provision of this section shall be interpreted as negating the provisions of 302.015 (Undersized Lots).

EFFECTIVE DATE: This Ordinance shall be in full force and effect from and after its passage and approval and publication as required by law.

Adopted by the City of Birchwood Village City Council this 10th day of July, 2018

Attest:

Mary Wingfield
Mayor

Tobin Lay
City Administrator-Clerk

300.020. DEFINITIONS. For the purpose of Chapters 300 through 399 certain terms and words are hereby defined as follows:

...

34. Non-Conforming Use. Any building, structure or use of land lawfully in existence as of January 1, 1975, or authorized by variance thereafter, which does not conform with the January 1, 1975, Zoning Code, as the same may be amended from time to time.

301.050. NON-CONFORMING USES. A non-conforming use may be continued so long as it remains otherwise lawful, subject to the provisions of paragraphs (1) through (7) below, in order to ensure that the non-conforming use will not be intensified and that, over time, the non-conforming use will, where possible, be brought into conformity with the Zoning Code.

1. A non-conforming use shall not be enlarged, modified, changed, extended (either horizontally or vertically) or structurally altered, unless such changes bring the non-conforming use into conformity with the Zoning Code.(Exception: A non-conforming use, lawfully located within 60% of all required setbacks, may be structurally altered if the alterations do not change the horizontal or vertical dimensions of the structure and otherwise conform to the Zoning Code.)

2. A non-conforming use shall not be moved to any other part of the parcel of land upon which the same was constructed unless the move would bring the structure and its use into conformity with the Zoning Code.

3. If a non-conforming use is damaged or destroyed to an extent of 50% or more of its replacement cost for any reason (including remodeling or rebuilding), according to the estimate of the building inspector as approved by the City Council, any reconstruction must conform to the provisions of the Zoning Code. (Exception: If the non-conforming use that is to be reconstructed came into being as the result of a previously granted variance, the Council, after review, may continue the variance if the owner demonstrates that the conditions under which that variance was granted continue to exist.)

4. Normal maintenance of a structure that represents a non-conforming use is permitted, including necessary non structural repairs and incidental alterations which do not physically extend or intensify the non-conforming use.

5. Notwithstanding paragraph (1) above, a structure representing a non-conforming use may be expanded, provided:

a. That such expansion does not increase the non-conformity in any dimension (vertical or horizontal), does not create a new non-conforming use, and in itself conforms with the Zoning Code; and

b. The sum of the setbacks on either side of the structure is not LESS than 20 feet.

6. When any non conforming use of land or of a building or structure shall be abandoned or discontinued for a period in excess of one year, such land, building, or structure shall thereafter be used only as allowed by this Code.

7. No provision of this section shall be interpreted as negating the provisions of 302.015 (Undersized Lots).

MEMORANDUM



Birchwood Village

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

Dear Commissioners,

Based on last month's discussions regarding amending variance provisions in Section 304, please see the following request.

Request/Recommendation

Staff requests Commissioners:

- 1) Review enclosed amendments to Section 304 based on your discussions last month; and
- 2) Discuss and make final recommendations for City Council.

Thanks!

Regards,
Tobin Lay

ORDINANCE 2018-04-01

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

AN ORDINANCE AMENDING VARIANCE PROVISIONS IN CITY CODE

The City Council of the City of Birchwood Village hereby ordains that Chapter 304 (Variances and Appeals) of the Municipal Code of the City of Birchwood Village is hereby amended to read as follows:

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

...

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

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:

SUBD. 1.

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

- i. Special conditions or circumstances exist which are peculiar to the land, structure, or building involved.
- ii. 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.
- ~~iii. 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.~~

- iii. The granting of a variance will result in no increase in the amount of water draining from the property.
- iv. 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.
- v. No variance shall be granted simply because there are no objections or because those who do not object outnumber those who do.
- vi. Financial gain or loss by the applicant shall not be considered if reasonable use for the property exists under terms of the Zoning Code.

EFFECTIVE DATE: This Ordinance shall be in full force and effect from and after its passage and approval and publication as required by law.

Adopted by the City of Birchwood Village City Council this 12th day of June, 2018

Mary Wingfield
Mayor

Attest:

Tobin Lay
City Administrator-Clerk