

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.

INDEX

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.