

ORDINANCE NO. 13,638

AN ORDINANCE to amend the Municipal Code of Des Moines, 1991, adopted by Ordinance No. 11,651, passed April 15, 1991, as heretofore amended by repealing Sections 23-53 through 23-67.02 thereof and enacting new Sections 23-53 through 23-67, and adding and enacting Sections 23-53.01 through 23-53.31 and Sections 23-63.01 and 23-63.02 and Sections 23-64.01 through 23-64.09 and Sections 23-66.01 through 23-66.15, all relating to the regulation and management of private use of public rights-of-way.

Be It Ordained by the City Council of the City of Des Moines, Iowa:

Section 1. That the Municipal Code of Des Moines, 1991, adopted by Ordinance No. 11,651, passed April 15, 1991, and amended by Ordinance No. 11,711, passed September 9, 1991, and amended by Ordinance No. 11,993, passed June 6, 1993, and amended by Ordinance No. 13,010, passed March 28, 1994, be and is hereby amended by repealing Sections 23-53 through 23-67.02 thereof and enacting new Sections 23-53 through 23-67, and adding and enacting Sections 23-53.01 through 23-53.31 and Sections 23-63.01 and 23-63.02 and Sections 23-64.01 through 23-64.09 and Sections 23-66.01 through 23-66.15, all relating to the regulation and management of private use of public rights-of-way, as follows:

SUBCHAPTER 4. USE AND OCCUPANCY OF PUBLIC RIGHT-OF-WAY FOR PRIVATE OR COMMERCIAL PURPOSES

ARTICLE I. ADMINISTRATION OF PUBLIC RIGHT-OF-WAY

23-53. LEGISLATIVE FINDINGS; STATEMENT OF PURPOSE AND INTENT. The city council of the city of Des Moines, Iowa makes the following findings and adopts the following statement of purposes:

- (a) The city's street and alley rights-of-way are owned or held by the city primarily for the purpose of pedestrian and vehicular passage and for the city's provision of essential public safety services, including police, fire, and emergency medical response services, and public health services, including sanitary sewer, water, and storm drainage services.
- (b) Pedestrian and vehicular passage, and the aforementioned public safety and public health services, should in all cases be considered and treated as the dominant and preeminent uses of public rights-of-way.
- (c) All other uses of public rights-of-way, including use for the provision of utility services, private communication services, and private utility services, must in all cases be subordinate to the use of the rights-of-way for pedestrian and vehicular passage and for the provision of the aforementioned public safety and public health services.
- (d) In order to provide for the health, safety and well-being of its citizens, as well as to insure the structural integrity of its streets and the use of the rights-of-way, the city strives to keep its right-

of-way in a state of good repair and free from unnecessary encumbrances. Although the general population bears the financial burden for the upkeep of the rights-of-way, a primary cause for the early and excessive deterioration of its rights-of-way is their frequent excavation by persons whose equipment is located therein.

(e) Right-of-way obstructions disrupt the flow of vehicular and pedestrian traffic and are a source of frustration for merchants, business owners and the general population who either incur travel delays due to such obstructions, or who must change travel plans to avoid such obstructions. Persons whose equipment is located within the right-of-way are a primary cause of these frequent obstructions.

(f) The city recognizes that it holds the rights-of-way 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 acquire, build, and maintain the right-of-way. It also recognizes that some persons, by placing their equipment in the right-of-way and charging the citizens of the city for goods and services delivered thereby, are using for private gain this property held by the city 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.

(g) In response to the foregoing findings, the city council hereby amends subchapter 11 of chapter 23 of the city code, by enacting new articles I and II thereof, relating to right-of-way administration and right-of-way permits, and article III thereof relating to franchises, licenses, or leases for use of city rights-of-way. The city council explicitly finds and declares that this ordinance enacting said new articles I and II impose reasonable regulations on the placement and maintenance of equipment currently within city rights-of-way or to be placed therein at some future time. Under this ordinance, persons disturbing and obstructing the rights-of-way will bear a fair share of the financial responsibility for their integrity. This ordinance also provides for the recovery of out-of-pocket and projected costs from persons using the public rights-of-way. Finally, this ordinance provides for uniform procedures and standards for the franchising, licensing, and leasing of rights-of-way for private or commercial use.

(h) Public interest and welfare. The city council finds that it is in the public interest to provide for the payment of right-of-way permit fees by all persons using and occupying the right-of-way for the purpose of operating their businesses. This provides equity by requiring all users of the right-of-way to pay compensation to the city so that it may recoup the costs imposed on the city attributable to such use.

(i) Legislative power. In these situations, the city council desires to exercise its lawful police power and common law authority, and all statutory authority which is available to it, including, but not limited to, the powers conferred on it under its charter and under the city code of Iowa, chapters 362 through 392 of the Code of Iowa. The city council finds and determines that the public interest will be best protected by adopting this ordinance regulating the use and occupancy of public right-of-way, conditioned upon the payment of right-of-way permit fees.

(j) Not a franchise or license. The city council does not intend in this ordinance to provide for the creation or establishment of a franchise or license for general and long term use of the right-of-

way by any person, nor does the council intend to provide for the creation or establishment of a permit for general or long term use of the right-of-way, except as to limited, short term right-of-way permits provided for in section 23-53.31 of article II hereof.

(k) The city council recognizes that this ordinance represents a significant departure from existing city policies and procedures regarding the regulation of private use of city rights-of-way. The city council further recognizes that city staff charged with enforcing the ordinance will require a significant amount of time to fully implement it, and that those regulated by the ordinance will likewise require a significant amount of time to familiarize themselves with the ordinance and its requirements and to come into compliance therewith. Accordingly, this ordinance provides in detail for the phased implementation of its provisions. The city manager and city engineer are hereby directed, during the implementation phase, to give those regulated by the ordinance advice, assistance, and adequate opportunity to comply with its requirements. The city manager and city engineer are further hereby charged with the responsibility of developing and promulgating implementation regulations consistent with the phased implementation provisions of this ordinance. Furthermore, the city engineer is hereby directed to periodically report to this city council on the status and progress of implementation, to report to the city council any unanticipated problems in implementing the ordinance, and to report to the city council and seek formal approval of any changes to or delays in the implementation schedule.

23-53.01. DEFINITIONS.

The following definitions apply to the provisions of articles I through III of this subchapter. References to "sections" are, unless otherwise specified, references to sections in the Des Moines city code. Defined terms remain defined terms whether or not capitalized in the text.

Applicant means any person requesting permission to excavate or obstruct a right-of-way.

City means the city of Des Moines, Iowa.

City cost or **city cost component** means the direct and indirect costs borne by the city for administration of public right-of-way, including but not limited to pavement management, traffic management, risk management, financial management, cost recovery, recovery of revenue lost due to street occupancy, infrastructure oversight, budget analysis, record keeping, legal assistance,

systems analysis, and application processing and checking, issuing permits, inspecting job sites, creating and updating mapping systems, and including other costs the city may incur in managing the provisions of, and in performing all of the tasks required by, this subchapter.

City engineer means the city engineer, as director of the engineering department of the city, or his/her designee.

City manager means the city manager of the city of Des Moines, Iowa, or his or her designee.

Communications system means any telephone or telegraph system or any other system of cables, wires, fibers, or conduits, and any related equipment, facilities, manholes or overhead poles, operated and maintained for communications purposes, or operated for the purpose of transmitting data, but excluding cable television systems franchised to provide that service by the city.

Customer means any person who purchases any utility services provided by a utility or any other person occupying or using the right-of-way.

Degradation or degradation cost component means the accelerated depreciation 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 did not occur.

Department means the engineering department of the city.

Department inspector means any person authorized by the city engineer to carry out inspections related to the provisions of articles I and II of this subchapter.

Disruptive cost or disruptive cost component is the cost of the adverse impact on the citizens of the city and others who are required to alter travel route and times resulting from right-of-way obstructions, and may also include compensation to the city for loss of revenues, including but not limited to the loss of parking revenues due to loss of access to parking spaces or facilities.

Downtown business district means the portion of the city of Des Moines lying within and bounded by the following: On the East by Southeast Fourteenth Street; on the North by Interstate 235 (McVicar Freeway); on the West by Fleur Drive; and on the South by the Raccoon and Des Moines Rivers.

Emergency means a condition that poses a clear and immediate danger to life or health, or of a significant loss of property, or which prevents the performance of, or threatens to cause a delay in the performance of, vital city operations or activities.

Equipment means any tangible thing located in any right-of-way, including underground and in-ground irrigation facilities and site plan approved tree wells, but excluding street trees required pursuant to city subdivision regulation and other ornamental plantings.

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

Excavation permit means the permit which, pursuant to articles I and II of this subchapter, must be obtained before a person may excavate a right-of-way.

Excavation permit fee means money paid to the city by an applicant for an excavation permit to cover the costs as provided in section 23-56.01.

Franchisee means any person who has been granted a franchise by the city for the use or occupancy of right-of-way, or who is hereafter granted a franchise for the use or occupancy of right-of-way in accordance with the provisions of article III of this subchapter.

High intensity corridor is a corridor where the city engineer has determined that no new utilities can be installed in the right-of-way, until such time as a public common corridor can be developed and a management fee for its cost recovery can be adopted.

In, when used in conjunction with right-of-way, means over, above, in, within, on or under a right-of-way.

Lessee means any person to whom the city has granted a lease to use or occupy right-of-way, or to whom the city hereafter grants a lease to use or occupy right-of-way in accordance with the provisions of article III of this subchapter.

Licensee means any person to whom the city has issued a license to use or occupy right-of-way, or to whom the city hereafter issues a license to use or occupy right-of-way in accordance with the provisions of article III of this subchapter.

Local exchange area means an area, as established under regulations of the state of Iowa, in which intra-area communications service is provided by an incumbent local exchange carrier and/or a competitive local exchange service provider or carrier, as such entities are defined and regulated pursuant to state of Iowa or federal law and regulation.

Local representative means the person or persons, or designee of such person or persons, authorized by a registrant to accept service and to make decisions for that registrant regarding all matters within the scope of articles I and II of this subchapter.

Long distance carrier means the operator of a long distance system.

Long distance system means a communications system furnishing communications services between stations located in different local exchange areas.

Obstruct means to impede the free and unrestricted use of the right-of-way by others or to place any tangible object upon the surface of a right-of-way so as to hinder free and open passage over that or any part of the right-of-way, or so as to effectively impede the free and unrestricted use of the right-of-way by others. **Obstruction permit** means the permit which, pursuant to articles I and II of this subchapter, must be obtained before a person may obstruct a right-of-way.

Obstruction permit fee means money paid to the city by an applicant for an obstruction permit to cover the costs as provided in section 23-56.01.

Outlay and expense or **all outlay and expense** means the full and actual costs and expenses incurred by the city, including interest, benefits and overhead where applicable, and including but not limited to all contract or employee expense, all equipment usage or rental, materials,

testing, outside experts, attorneys fees (including overhead expenses of the city's staff attorneys), and all costs and expenses of litigation as they are incurred by the city.

Permit or **right-of-way permit** means a permit to excavate or obstruct a right-of-way issued by the city pursuant to the provisions of article II of this subchapter, or a permit to excavate a right-of-way issued pursuant to the provision of chapter 23, subchapter 4, sections 23-53 through 23-67.02 thereof, as those provisions existed prior to their amendment pursuant to Ordinance No. 13,638, enacted on September 14, 1998.

Permittee means any person to whom a permit to excavate or obstruct a right-of-way has been issued by the city pursuant to the provisions of article II of this subchapter, or any person to whom a permit to excavate a right-of-way has been issued pursuant to the provision of chapter 23, subchapter 4, sections 23-53 through 23-67.02 thereof, as those provisions existed prior to their amendment pursuant to Ordinance No. 13,638, enacted on September 14, 1998.

Person means any natural or corporate person, business association or other business entity including, but not limited to, a partnership, a sole proprietorship, a political subdivision, a public or private agency of any kind, a utility, a successor or assign of any of the foregoing, or any other legal entity.

Probation means the status of a person that has not complied with the conditions of articles I or II of this subchapter. **Probationary period** means the one year period which commences on the date that a person has been notified in writing that they have been put on probation.

Registrant means any person that has registered as required under article I of this subchapter due to the fact that the person

(1) has or seeks to have its equipment located in any right-of-way, or

(2) in any way occupies or uses, or seeks to occupy or use, the right-of-way or any equipment located in the right-of-way.

Registration Fee means money paid to the city by a registrant.

Restoration means the process by which an excavated or obstructed right-of-way is returned to its proper and required condition pursuant to the city's utility accommodation and street restoration specifications.

Restoration fee means an amount of money paid to the city by a permittee to cover the cost of restoration as provided and required in section 23-63.

Right-of-way means the surface and space above and below any public street, boulevard, road, highway, freeway, lane, alley, court, sidewalk, parkway, tunnel, viaduct, or bridge which has been officially dedicated for public travel and which has traditionally been used for the provision of utility services to the public, in which the city has an interest in law or in equity, whether held in fee or other estate or interest, or as a trustee for the public, Provided, however, that skywalks,

sidewalks within public cemeteries, and sidewalks and trails within public parks and on river levees, shall not be considered right-of-way available for private or commercial use under this subchapter.

Right-of-way permit fee means either the excavation permit fee or the obstruction permit fee, or both, depending on the content, required by articles I and II of this subchapter.

Service or utility service means and includes

(1) the services provided by a corporation organized for the purposes set forth in chapter 476 of the Iowa Code (1997), or provided by a public utility as therein defined; and

(2) those services for which cities have been granted franchising authority pursuant to section 364.2 of the Iowa Code, including electric light and power, heating, , telegraph, cable television, district telegraph and alarm, motor bus, trolley bus, street railway or other public transit, waterworks, or gasworks services provided to customers within the city.

Supplementary application means an application made to excavate or obstruct more of the right-of-way than allowed in, or to extend the duration of, a permit that has already been issued.

System management costs are those costs which the city incurs in planning, designing, constructing and maintaining of a high intensity corridor.

System management fee is the fee imposed on users of a high intensity corridor to recoup those costs which the city incurs in planning, designing, constructing and maintaining of the high intensity corridor.

System or utility system means all equipment which a person has which is located in public right-of-way and which is used to provide a service either to the person or to others as part of the person's business.

Transfer means the sale, assignment, or conveyance, in whole or in part, of a registrant's, franchisee's, or licensee's equipment in the right-of-way to another person; or the sale, assignment, or conveyance, in whole or in part, of a registrant's, franchisee's, or licensee's business, whether pursuant to sale, merger, or reorganization, to another person; or the sale, assignment, or conveyance, in whole or in part, of a franchisee's franchise or a licensee's license to another person.

Transferee means the person to whom a registrant's, franchisee's, or licensee's equipment in the right-of-way is sold, assigned, or conveyed, in whole or in part; or to whom a registrant's, franchisee's, or licensee's business is sold, assigned, or conveyed, in whole or in part ; or to whom a franchisee's franchise or a licensee's license is sold, assigned, or conveyed, in whole or in part.

Underground district means the territory in the city embraced within the following described boundaries: the territory on the west side of the Des Moines River beginning at the point of

intersection of the west bank of the Des Moines River with the easterly extension of the south line of the first east/west alley south of Court Avenue; thence westerly along the westerly extension of the south line of said alley to the east right-of-way line of Fifth Avenue; thence southerly along the east right-of-way line of Fifth Avenue to the southeast corner of the intersection of Fifth Avenue and Cherry Street; thence westerly along the south right-of-way line of Cherry Street to the southwest corner of the intersection of Cherry Street and Ninth Street; thence northerly along the west right-of-way line of Ninth Street to the northwest corner of the intersection of Ninth Street and Grand Avenue; thence easterly along the north right-of-way line of Grand Avenue to the west bank of the Des Moines River; thence southerly along the west bank of the Des Moines River to the point of beginning; and the territory on the east side of the Des Moines River beginning at the point of intersection of the east bank of the Des Moines River with the north right-of-way line of East Grand Avenue; thence easterly along the north right-of-way line of East Grand Avenue to the northeast corner of the intersection of East Grand Avenue and vacated East Ninth Street; thence southerly along the east right-of-way line of vacated East Ninth Street to the intersection of the east right-of-way line of vacated East Ninth Street and the easterly extension of the south line of the first vacated east/west alley lying south of East Court Avenue; thence westerly along the westerly extension of the south line of said alley to the east bank of the Des Moines River; thence northerly along the east bank of the Des Moines River to the point of beginning. Nothing contained in this article shall be construed to prevent the city council from exercising the right of the city to change the boundaries to increase or decrease the size of the underground district.

Unused equipment means equipment located in the right-of-way which has remained unused for six months or more and for which the registrant is unable to provide proof that it has either a plan to begin using that equipment within the next twelve (12) months or a potential purchaser or user of that equipment for the same purpose. Unused equipment shall not be deemed to include equipment which is installed as back-up equipment to be used in the event of damage to or outage of equipment which is being used, or which is installed to provide capacity to meet future service needs.

Utility accommodation and street restoration specifications means the Utility Accommodation and Street Restoration Specifications approved by the Des Moines City Council on June 24, 1991, pursuant to Roll Call No. 91-2686.

23-53.02. ADMINISTRATION.

The city engineer, as the director of the engineering department, shall be the principal city official responsible for the administration of the rights-of-way; of registration by users of the right-of-way; of right-of-way permits; of the franchising, licensing, and leasing of the use of rights-of-way; and of all City Code provisions and ordinances relating thereto. The city engineer may delegate any or all of his/her duties hereunder.

23-53.03. UTILITY COORDINATION COMMITTEE.

There is hereby created a utility coordination committee. This committee shall be voluntary and advisory to the city engineer. It shall be composed of any registrants who wish to assist the city

in establishing appropriate policies and procedures for regulating the use of right-of-way to preserve and maximize its asset value to all users, to improve the coordination of work performed in the right-of-way, and to improve the quality of construction work performed therein. The city engineer shall determine the size of such committee.

23-53.04. PERSONS SUBJECT TO REGISTRATION, PERMITTING AND LICENSING REQUIREMENTS; CERTAIN FRANCHISEES EXEMPT FROM REGISTRATION AND PERMIT FEE REQUIREMENTS; GOVERNMENTAL ENTITIES AND AGENCIES EXEMPT FROM LICENSING REQUIREMENTS; PHASED IMPLEMENTATION OF PROVISIONS.

(a) Effective on and after January 1, 1999, each person who occupies, uses, or seeks to occupy or use, the right-of-way or any equipment located in the right-of-way, or who has, or seeks to have, equipment located in any right-of-way shall register with the department. No person may construct, install, repair, remove, or relocate equipment located in any right-of-way, or perform any other work on or use any equipment or any part thereof located in any right-of-way, without first being registered with the department. Effective on and after January 1, 1999, no person shall obstruct or excavate in any street right-of-way without obtaining appropriate permits as required by article II of this subchapter.

(b) Effective on and after January 1, 1999, no person shall construct a tree well in any right-of-way unless such tree well is shown in an approved site plan and a permit for same has been obtained pursuant to the requirements of article II of this subchapter.

(c) Effective on and after January 1, 1999, no person shall construct an irrigation system in any right-of-way unless a permit for same has been obtained pursuant to the requirements of article II of this subchapter.

(d) Effective on and after January 1, 1999, no person shall plant a street tree or any ornamental plantings in the right-of-way unless a permit for same has been obtained pursuant to the requirements of chapter 25 of this city code. Persons constructing or maintaining tree wells or irrigation systems in the right-of-way, or planting or maintaining street trees or ornamental plantings in the right-of-way, shall not be deemed to use or occupy the right-of-way for purposes of this article and shall not be required to register such use.

(e) Effective on and after January 1, 1999, a person having a franchise from the city for the provision of a utility service shall be required to register and pay a registration fee as provided in this article, and shall be required to obtain right-of-way permits and pay right-of-way permit fees to excavate in or obstruct the right-of-way as provided in article II of this subchapter, but provided that if such franchise provides for the payment of a franchise fee, the franchisee shall not be required to pay such registration or permit fees.

(f) Effective on and after January 1, 1999, city utilities and enterprises which occupy and use right-of-way for the provision of municipal utility and enterprise services city shall be required to register and pay registration fees as provided in this article, and shall be required to obtain right-of-way permits and pay right-of-way permit fees to excavate in or obstruct the right-of-way as

provided in article II of this subchapter. Effective on and after January 1, 1999, city work crews and city contractors performing work in the right-of-way on behalf of the city shall be required to obtain right-of-way permits and pay right-of-way permit fees to excavate in or obstruct the right-of-way as provided in article II of this subchapter.

(g) Effective on and after January 1, 1999, governmental entities or agencies of the federal government, the state of Iowa, or Polk County which occupy and use right-of-way for the provision of communications or utility services for governmental purposes shall be required to comply with the registration requirements of this article, except the insurance and bonding requirements associated therewith. Effective on and after January 1, 1999, such governmental entities and agencies shall be required to obtain right-of-way permits and pay right-of-way permit fees to excavate in or obstruct the right-of-way as provided in article II of this subchapter. Such governmental entities or agencies shall be exempt from the licensing requirements of article III of this subchapter.

(h) Until January 1, 1999, every person who seeks authorization to excavate in a public right-of-way shall comply with the provisions of chapter 23, subchapter 4 of the City Code, sections 23-53, 23-54, 23-55, 23-57, 23-58, 23-59, 23-63, and 23-67.01 thereof, as those provisions existed prior to the enactment of Ordinance No. 13,638 on September 14, 1998.

23-53.05. RESERVED.

23-53.06. REGISTRATION; INFORMATION REQUIRED FROM REGISTRANT; REGISTRANT REQUIRED TO PROVIDE CERTIFICATE OF INSURANCE; REGISTRANT REQUIRED TO PAY REGISTRATION FEE.

(a) Registration will consist of completing a registration form and providing registration information to and as required by the city engineer, providing evidence of insurance, and making payment of a registration fee.

(b) The information provided to the department at the time of registration shall include, but not be limited to:

(1) Each registrant's name, 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 a local representative. The local representative shall be available at all times. Current information regarding how to contact the local representative in an emergency shall be provided at the time of registration.

(3) If the registrant is a corporation, a copy of the certificate required to be filed under chapter 490 of the Code of Iowa, as recorded and certified to by the secretary of state.

The registrant shall keep all of the information listed above current at all times by immediately providing to the department information of proposed or approved changes therein.

(c) Each registrant shall be required to provide a certificate of insurance to the department at the time and to complete that part of the registration form pertaining to insurance and liability. The certificate of insurance shall:

(1) verify that an insurance policy has been issued to the registrant by an insurance company licensed to do business in the State of Iowa;

(2) 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 right-of-way by the registrant, its officers, agents, employees and permittees, and

(ii) construction, reconstruction, repair, maintenance, replacement, monitoring, locating, and use of equipment in the right-of-way by the registrant, its officers, agents, employees and permittees, including, but not limited to, protection against liability arising from completed operations, damage of underground equipment and collapse of property;

(3) name the city as an additional insured as to whom the coverages required herein are in force and applicable and for whom defense will be provided as to all such coverages;

(4) require that the city engineer be notified thirty (30) days in advance of cancellation of the policy; and

(5) indicate comprehensive liability coverage, automobile liability coverage and umbrella coverage.

The amount of insurance to be required in each instance shall be determined by the city engineer by reference to a "schedule of insurance coverages required for registered equipment", which shall be developed and periodically updated, and approved by the city council by resolution.

(d) Each person required to register under section 23-53.04 hereof shall be required to pay a registration fee to cover the city's cost of administering the registration system and its cost of maintaining the mapping and/or GIS data required to be submitted by registrants. The registration fee shall be based, in part, upon the size of a registrant's system located in the public right-of-way, and upon the cost of maintaining the registration system. The amount of the registration fee to be paid in each instance shall be determined by the city engineer by reference to a "registration fee schedule", which shall be developed and periodically updated, and approved by the city council by resolution.

(e) The requirement to pay a registration fee shall take effect at such time as the city council adopts a resolution approving the registration fee schedule.

23-53.07. REGISTRANT REPORTING OBLIGATIONS.

(a) **Operations.** A registrant which intends to construct or emplace new equipment in the right-of-way or which intends to undertake a major maintenance project, shall, on or before April 1, 1999 and by April 1 of each succeeding year, file a construction and major maintenance plan with the department. Such plan shall be submitted using a format designated or approved by the city engineer and shall contain the information determined by the city engineer 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:

(1) the specific locations and the beginning and ending dates of all projects to be commenced during the next calendar year (in this section, a "next-year project"); and

(2) the tentative locations and beginning and ending dates for all projects contemplated for the two year period following the next calendar year (in this section, a "two-year project").

The term "project" in this section shall include both next-year projects and two-year projects. By January 1 of each year the department will have available for inspection in its offices a composite list of all projects of which it has been informed in the annual plans. All registrants are responsible for keeping themselves apprized of the current status of this list.

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

(b) **Registrants limited to projects identified in construction and major maintenance plan.**

A registrant which does not file a construction and major maintenance plan with the department as above provided may be denied right-of-way permits to construct or emplace new equipment, or to engage in major maintenance of existing equipment, in the right-of-way during the two year period succeeding the date upon which such plan was due. A registrant which seeks to undertake a project to construct or emplace new equipment in the right-of-way, or to undertake a major maintenance project as to existing equipment, which project is not identified in the construction and major maintenance plan for the year in which the registrant seeks to undertake the project, may be denied a right-of-way permit for such project. This provision shall not apply to emergency repair projects or utility service extension projects which the registrant could not have anticipated for inclusion in its construction and major maintenance plan.

(c) **Information to be updated annually.** Each registrant is required to maintain such records of the location of its equipment in the rights-of-way within the city, and such other records as the city engineer may require, as will permit and enable the proper and efficient enforcement of the provisions of this subchapter. Each registrant shall annually make such reports, in such form as the city engineer may require. Each registrant shall annually certify that the records on file in the city engineer's office are accurate and complete. If the city engineer determines that information contained in such records is erroneous, he/she may require the registrant to conduct an independent audit of such records at the registrant's expense to verify the accuracy and completeness of same.

(d) Registrants which own or occupy buildings abutting a city right-of-way on either side thereof, and which have or desire to establish utility or telecommunications connections between such buildings, and whose utility or telecommunications equipment is or will be contained within ducts or tunnels which cross, rather than run parallel in, city rights-of-way, or which have or will have less than 300 lineal feet of such ducts or tunnels in city rights-of-way, are exempt from the requirement of submitting construction and major maintenance plans with respect to (1) the construction of ducts or tunnels for such equipment, (2) the maintenance of equipment within such ducts or tunnels, and (3) the placement of additional utility or telecommunications equipment (pipes, wires, or cables) within such ducts or tunnels.

23-53.08. REGISTRANTS TO PROVIDE MAPPING DATA.

Effective on and after June 1, 1999, each registrant shall provide to the department information indicating the horizontal and vertical locations, relative to the boundaries of the right-of-way, of all equipment which it owns or over which it has control and which is located in any right-of-way. With respect to equipment which was in place as of December 31, 1998, the registrant may satisfy this requirement by providing copies of maps showing equipment locations which were developed and kept by the registrant in the ordinary course of business, provided that if such maps do not show the location of all such existing equipment, the registrant will be required to field locate equipment not shown on such maps and provide mapping data for such equipment. With respect to equipment which the registrant places within the right-of-way after December 31, 1998, the registrant shall provide mapping data with the specificity and in the format required by the department for inclusion in the mapping system used by the department, as more specifically provided in the City's Utility Accommodation and Street Restoration Specifications.

Within six (6) months of the acquisition, installation, or construction of additional equipment or any relocation, abandonment, or disuse of existing equipment, each registrant shall supplement the mapping information required herein.

Mapping data provided to the city by registrants shall be for the exclusive use of the city in administering the use and occupancy of the public right-of-way within the city, and shall not be provided to or relied on by any person for any other purpose. Persons working in the right-of-way shall be required to make use of the State of Iowa "One Call" system for utility locates, and shall not be entitled to rely on city mapping data for that purpose. At the request of any registrant, any information requested from the department with respect to the location or type of equipment which that registrant maintains or plans to install in the right-of-way, which qualifies as "trade-secret" information under Chapter 550 of the Iowa Code, shall be treated as trade-secret information in accordance with Chapter 22 of the Iowa Code, Examination of Public Records.

A registrant's provision of mapping data to the city as herein required shall not relieve the registrant of its obligation to provide utility accommodation information to the city upon request or direction of the city engineer. Utility accommodation information is such information which is not required to be filed with the city, but may be necessary from time to time for the city to carry out its duties, including but not limited to information regarding the depth and location of a registrant's equipment in the right-of-way with respect to known monuments or other utility equipment; information regarding the type of equipment in place in the right-of-way, the general

type of service it provides, and a general description of the customers it serves; and information with respect to the age and service life of equipment in place in the right-of-way.

23-53.09. LOCATION OF EQUIPMENT; UNDERGROUND AND ABOVE GROUND LOCATION; HIGH DENSITY CORRIDORS; EQUIPMENT NOT PROPERLY LOCATED DECLARED A NUISANCE.

(a) **Underground.** Within the underground district, all cables, wires, fibers, pipes and conduits in connection with any utility system shall be placed underground, except where above ground connection to buildings or other locations above ground is reasonably necessary. Such above ground connection shall be by means of poles located, as far as reasonably practicable, within alleys.

(b) **Above ground.** Outside the underground district, cables, wires, fibers, pipes and conduits in connection with any utility system may be placed either underground or on poles above ground, except for those instances in which undergrounding is required pursuant to the city's subdivision or site plan requirements as expressed in this city code. No such poles shall be installed or erected, and no license or permit for same shall be issued, until the city engineer has approved the proposed location of such poles.

(c) **High density corridors.** The city engineer shall assign specific corridors within the right-of-way, or any particular segment thereof as may be necessary, for each type of equipment that is or, pursuant to current technology, that the city engineer expects will someday be located within the right-of-way. Registrants shall, when installing or replacing equipment in the right-of-way, place and locate such equipment in the appropriate corridor, either as provided in the city's utility accommodation and street restoration specifications, or as ordered by the city engineer. Excavation and obstruction permits issued by the department, involving the installation or replacement of equipment in the right-of-way, may designate the proper corridor for the equipment, and permittees shall be required to install or place such equipment in the location therein specified.

(d) **Nuisance.** Effective on and after June 1, 1999, any equipment found in a right-of-way which has not been registered, or which is found

(1) in a location other than the location specified therefor in the city's utility accommodation and street restoration specifications, or

(2) in a location other than the location specified therefor by the city engineer, or

(3) in a location other than the location shown on the maps filed in the office of the city engineer by the person owning or operating that equipment,

shall be deemed to be a nuisance, and the city may exercise any remedies or rights it has at law or in equity, including, but not limited to bringing an action for nuisance abatement, pursuant to section 17-1.02 of the city code, in which the city may seek the abatement of the nuisance or authority to take possession of the equipment.

(e) **Limitation of Space.** The city engineer shall have the power to prohibit or limit the placement of new or additional equipment within the right-of-way if there is insufficient space to accommodate all of the requests of registrants or persons to occupy and use the right-of-way. In making such decisions, the city engineer shall strive to the extent possible to accommodate all existing and potential users of the right-of-way, but shall be guided primarily by considerations of the public interest, the public's need for the particular utility service, the condition of the right-of-way, the time of year with respect to essential utilities, the protection of existing equipment in the right-of-way, and future city plans for public improvements and developmental projects which have been determined to be in the public interest.

23-53.10. RELOCATION OR REMOVAL OF EQUIPMENT; PAYMENT OF COSTS INCURRED BY THE CITY DUE TO IMPROPER LOCATION OF EQUIPMENT.

(a) If the city engineer determines at any time

(1) that a registrant's or permittee's continued use of public right-of-way will unduly burden the city or the public in its use of that property; or

(2) that the public right-of-way which the registrant or permittee is using or occupying will be required for municipal purposes; or

(3) that the registrant's or permittee's equipment at a particular location will interfere with:

(i) a present or future city use of the right-of-way, or

(ii) a public improvement undertaken or to be undertaken by the city, or

(iii) an economic development project in which the city has an interest or investment, or

(iv) the public's safety or convenience in using the right-of-way for ordinary travel; or

(4) that the public health, safety and welfare requires it;

the city engineer shall order the removal or relocation of said equipment as he or she deems appropriate.

(b) Registrants under this article, permittees under article II of this subchapter, and franchisees, licensees, and lessees under article III of this subchapter, whose equipment is located in the right-of-way in a position at variance with the corridors established in the city's utility accommodation and street restoration specifications, or at variance with the location specified therefor by the city engineer, or aboveground in an area which the city council has designated as part of the underground district pursuant to amendment of the definition thereof found at section 23-53.01, shall, no later than at the time of next reconstruction or excavation by the department of the area where its equipment is located, or sooner if ordered by the city, move that equipment to its assigned location within the right-of-way, unless this requirement is waived by the city.

(c) Registrants under this article, permittees under article II of this subchapter, and franchisees, licensees, and lessees under article III of this subchapter shall promptly and at their own expense, with due regard for seasonal working conditions, permanently remove their equipment, or relocate same within the right-of-way, whenever the city engineer orders such removal or relocation, and shall at its sole expense restore the right-of-way to its proper and required condition pursuant to the city's utility accommodation and street restoration specifications.

(d) In the event that a city work crew or a city contractor encounters equipment in the right-of-way

(1) in a location other than the location specified therefor in the city's utility accommodation and street restoration specifications, or

(2) in a location other than the location specified therefor by the city engineer, or

(3) in a location other than the location shown on the maps filed in the office of the city engineer by the person owning or operating that equipment,

and in the event that such improper location of equipment prevents the performance of city operations or activities, or prevents or delays the performance of work under contract, the registrant, permittee, franchisee, licensee, or lessee whose improperly placed equipment occasioned such delay in performance or non-performance shall be required to reimburse the city for all outlay and expense thereby incurred by the city.

(e) Nothing contained in this article shall be construed to prevent the city council from exercising the right of the city to change the boundaries to increase or decrease the size of the underground district.

23-53.11. PRE-EXCAVATION EQUIPMENT LOCATION.

In addition to complying with the requirements of chapter 480 of the Iowa Code ("One Call Excavation Notice System") before the start date of any right-of-way excavation, each registrant, permittee, franchisee, licensee, or lessee who has equipment located in the area to be excavated shall be responsible to mark the horizontal and approximate vertical placement of all said equipment.

Any registrant, permittee, franchisee, licensee, or lessee whose equipment is less than twenty (20) inches below a concrete or asphalt surface shall notify and work closely with the excavation contractor in an effort to establish the exact location of its equipment and the best procedure for excavation.

23-53.12. DAMAGE TO OTHER EQUIPMENT.

When any city department performs work in the right-of-way and finds it necessary to maintain, support, or move a registrant's, permittee's, franchisee's, licensee's, or lessee's equipment in order to protect it, the costs associated therewith will be billed to that person and must be paid within

thirty (30) days from the date of billing. In such event, the city engineer or city department performing such work shall notify the affected registrant, permittee, franchisee, licensee, or lessee, informing such person of the action it intends to take with respect to such equipment and affording such person the opportunity to review and comment on the action proposed to be taken. If circumstances permit it, the city engineer or city department performing the work may allow the affected registrant, permittee, franchisee, licensee, or lessee to take the action necessary to maintain, support, or move its equipment.

Each registrant, permittee, franchisee, licensee, or lessee shall be responsible for the cost of repairing any equipment in the right-of-way which it or its equipment damages. Each registrant, permittee, franchisee, licensee, or lessee shall be responsible for the cost of repairing any damage to the equipment of another registrant, permittee, franchisee, licensee, or lessee occurring during the city's response to an emergency occasioned by that registrant's equipment.

23-53.13. RIGHT-OF-WAY VACATION.

If the city vacates right-of-way wherein a franchisee's equipment is located, the city may in its discretion reserve, to and for itself and all franchisee's having equipment in the vacated right-of-way, the right to install, maintain and operate any equipment in the vacated right-of-way and to enter upon such right-of-way at any time for the purpose of reconstructing, inspecting, maintaining or repairing the same. If the vacation requires the relocation of the equipment of a registrant under this article or of a permittee under article II of this subchapter, and

(1) if the vacation proceedings are initiated by that registrant or permittee, the registrant or permittee must pay the relocation costs; or

(2) if the vacation proceedings are initiated by the city or by another governmental entity, the registrant or permittee must pay the relocation costs unless otherwise agreed to by the city or such other governmental entity.

23-53.14. INDEMNIFICATION AND LIABILITY.

By reason of the acceptance of a registration or the grant of a right-of-way permit, the city does not assume any liability

(1) for bodily or other injuries to any individual or person, for damage to property, including loss of use thereof, or for loss of service claims; or

(2) for claims or penalties of any sort resulting from the installation, presence, maintenance, or operation of equipment by registrants or activities of registrants; or

(3) for damage to the registrant's or permittee's equipment, or for damage to the equipment of another registrant or permittee.

Registrants, by registering with the department, and permittees, by accepting a permit under this article or article II of this subchapter, shall be required, and shall be deemed to have agreed, to

release from all claims, and to defend, indemnify, and hold the city harmless from all outlay and expense, and from claims and suits for damages of any kind, arising out of the construction, presence, installation, maintenance, repair or operation of its equipment in the right-of-way, or out of any activity undertaken by it in or near a right-of-way, whether or not any act or omission complained of is authorized, allowed, or prohibited by a right-of-way permit. Each registrant or permittee shall further be required to agree, and shall be deemed to have agreed, that it will not bring or cause to be brought, any action, suit or other proceeding claiming damages, or seeking any other relief against the city on any claim, nor shall it bring or cause to be brought, any action, suit or other proceeding for any award arising out of the presence, installation, maintenance or operation of its equipment, or any activity undertaken by it in or near a right-of-way, whether or not the act or omission complained of is authorized, allowed or prohibited by a right-of-way permit. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to a registrant, to a permittee, or to the city; and the registrant or permittee, 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 in its own behalf.

23-53.15. NO SPECIAL DUTY CREATED.

Articles I through III of this subchapter are enacted to protect the general health, welfare, and safety of the public at large, and no special duty is created as to any registrant, permittee, franchisee, licensee, or lessee by the enactment of this subchapter, or by acceptance of registration, by issuance of a permit or license, or by grant of a franchise or lease.

23-53.16. ABANDONED AND UNUSED EQUIPMENT.

(a) A registrant, franchisee, or licensee which has determined to discontinue its operations in the city, in whole or in part, or which has discontinued use of part or all of its equipment in the right-of-way, must either:

(1) Provide information satisfactory to the city engineer that its obligations for its equipment in the right-of-way under this article and article II have been lawfully assumed by another registrant, franchisee, or licensee; or

(2) Submit to the city engineer a proposal and instruments for transferring ownership of its equipment to the city. If a registrant, franchisee, or licensee proceeds under this clause, the city may, at its option:

(a) assume ownership of and responsibility for the equipment, or

(b) refuse transfer of ownership to the city and require the registrant, at its own expense, to remove the equipment.

(b) A registrant, franchisee, or licensee who fails to comply with the preceding paragraph, and whose equipment remains unused for a period of two (2) years shall be deemed to have abandoned such equipment. Equipment of a registrant, franchisee, or licensee which fails to comply with the preceding paragraph and which, for two (2) years, remains unused shall be

deemed to be abandoned. Abandoned equipment is deemed to be a nuisance. The city may, with respect to abandoned equipment which is deemed a nuisance, exercise any remedies or rights it has at law or in equity, including, but not limited to:

(1) bringing an action for nuisance abatement, pursuant to section 17-1.02 of the city code, in which the city may seek the abatement of the nuisance and/or authority to take possession of the equipment; or

(2) requiring removal of the equipment by the registrant, franchisee, or licensee.

Any registrant, franchisee, or licensee who has unused equipment in any right-of-way shall remove it from the right-of-way during the next scheduled excavation, unless this requirement is waived by the city engineer.

(c) A registrant, franchisee, or licensee who abandons or ceases use of its equipment as above provided, and whose proposal to transfer such equipment to the city is accepted by the city, shall nonetheless be allowed to remove wires or cables from underground conduits and to remove movable equipment from underground vaults or handholes if the city engineer determines that such removal can be accomplished without damaging such conduits or vaults, and provided such removal can be accomplished without extensive excavation or long term obstruction of the right-of-way. Such removal shall be accomplished pursuant to appropriate right-of-way permits, which may include conditions regarding the manner of removal and schedule for removal.

23-53.17 SALE, ASSIGNMENT, OR CHANGE IN USE OF REGISTRANT'S EQUIPMENT OR BUSINESS PROHIBITED WITHOUT CITY'S CONSENT.

(a) A registrant shall not transfer its equipment located in the right-of-way or its business to any other person without giving the city engineer 90 (ninety) days prior written notice of such proposed transfer, and without obtaining the prior consent of the city to such transfer. In such notice, the registrant shall clearly identify the proposed transferee, giving the name and address of a representative of the transferee who is authorized to discuss and provide information to the city regarding said transfer. As a condition of such consent, the proposed transferee shall be required to register and to indicate its proposed use of public right-of-way as provided in section 23-53.04 of this subchapter. The city may refuse consent to a proposed transfer if it determines that the proposed transferee lacks the expertise, experience, financial resources or sufficient personnel required to maintain the registered equipment and/or the right-of-way associated therewith, or if the proposed transferee's right to use or occupy city right-of-way has previously been revoked, cancelled, or terminated, or if said right is then under suspension, or if the proposed transferee is then in default of any of its obligations under this subchapter. The transferee of a registrant's equipment or business, or license shall not be entitled to enter upon public rights-of-way for the purpose of operating or maintaining the equipment registered hereunder unless and until it completes the formal transfer of such equipment or business, and obtains the city's consent to such transfer.

Notwithstanding the foregoing, no transfer of a registrant's business shall be deemed to have occurred for purposes of this provision in those instances in which a registrant is a publicly held

entity whose stock is traded on recognized stock exchanges, and where transfer of ownership of the business has effectively occurred due to stock sales or trading in the open market. However, in the event of a merger, consolidation, transfer or disposal of substantially all of such a registrant's assets, the city shall, upon written notice to the registrant, have the right, in its sole discretion and without cause or further showing, to order the registrant to cease its use and occupancy of the right-of-way. Upon notice to the city by such a registrant of such merger, consolidation, transfer or disposal of its assets, the city shall have six months within which to order the registrant to cease its use and occupancy of the right-of-way.

(b) A registrant shall not change the use of its equipment without giving the city 90 (ninety) days prior written notice of such proposed change in use, and without obtaining the prior written consent of the city engineer to such transfer. In such notice, the registrant shall clearly and completely set forth the proposed change in use of equipment, how it would be accomplished, including any excavations required to accomplish such change, and projections as to the future maintenance implications of such change in use. In such notice, the registrant shall also provide the name and address of a representative of the registrant who is authorized to discuss and provide information to the city regarding such change in use of equipment. The city engineer's consent to such change in use may be withheld if he/she determines that the proposed use of the equipment at that location would be incompatible with or would likely damage or endanger other uses of the right-of-way, would involve a higher level of maintenance activities than the present use, would involve more street excavation or greater traffic disruption than the present use, or would be otherwise inappropriate.

(c) In lieu of the provisions of this section, the consent to transfer provisions of section 23-66.12 of this subchapter shall apply to registrants whose use of right-of-way has been authorized pursuant to a franchise, license, or lease.

23-53.18 RESERVATION OF REGULATORY AND POLICE POWERS.

The city by registering a person under section 23-53.04 of this article, or by issuing of a right-of-way permit under article II hereof or a license under article III hereof, or by granting a franchise or a lease under article III hereof, does not surrender or to any extent lose, waive, impair, or lessen the lawful powers and rights, which it has now or may be hereafter vested in the city under the Iowa Constitution, the Iowa Code, and the Charter of the city of Des Moines to regulate the use of the right-of-way by such persons; and all such persons, by registration, or by acceptance of a right-of-way permit, franchise, license, or lease are deemed and shall be held to agree that all lawful powers and rights, regulatory power, or police power, or otherwise as are or the same may be from time to time vested in or reserved to the city, shall be in full force and effect and subject to the exercise thereof by the city at any time. All such persons are further deemed to acknowledge that their rights are subject to the regulatory and police powers of the city to adopt and enforce general ordinances necessary to the safety and welfare of the public and are deemed to have agreed to comply with all applicable general laws and ordinances enacted by the city pursuant to such powers.

Any conflict between the provisions of a registration or of a right-of-way permit, franchise, license, or lease and any other present or future lawful exercise of the city's regulatory or police powers shall be resolved in favor of the city's exercise of its lawful powers.

23-53.19 SEVERABILITY.

If any section, subsection, sentence, clause, phrase, or portion of this article or of articles II or III of this subchapter 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. If a regulatory body or a court of competent jurisdiction should determine by a final, non-appealable order that any registration or permit issued under this article or article II of this subchapter or any portions thereof is illegal or unenforceable, then any such registration or permit granted or deemed to exist hereunder shall be considered as a revocable registration or permit, terminable by either party without cause upon giving sixty (60) days written notice to the other party. The requirements and conditions of such a revocable registration or permit shall be the same requirements and conditions as set forth in the registration or permit, respectively, except for conditions relating to the term of the permit and the right of termination. If a registration or permit shall be considered revocable as provided herein, the registrant or permittee must acknowledge the authority of the city council to issue such revocable registration or permit and the power to revoke it.

23-53.20 PROVISIONS OF EXISTING FRANCHISES PREVAIL.

In the event that a conflict of language occurs between the provisions of this subchapter and an existing franchise, or between the provisions of this subchapter and an existing lease of vacated right-of-way, the conflict shall be resolved by honoring the terms of the franchise or lease until it expires.

23-53.21. CONSTRUCTION OF SUBCHAPTER.

Nothing in this subchapter shall be construed as an acquiescence in, or ratification of, the occupancy or use of any public right-of-way in the city by any person now occupying the same without legal right, nor shall this subchapter be construed as conferring the right to occupy or use any public right-of-way within the city upon any such person now illegally or without authority occupying the same.

23-53.22 through 23-53.29 RESERVED

ARTICLE II. RIGHT-OF-WAY PERMITS

23-53.30. PERMITTEES NOT TO INTERFERE WITH USE OF THE RIGHT-OF-WAY FOR TRAVEL AND FOR PROVISION OF PUBLIC SAFETY AND PUBLIC HEALTH SERVICES.

When working in public rights-of-way, permittees under this article shall not unreasonably interfere with the safety, health, and convenience of the public in the public's use thereof for ordinary travel, nor shall they interfere with public safety or public health services provided by the city of Des Moines to its residents by means of the public rights-of-way.

23-53.31. PERMITS REQUIRED.

(a) Except as otherwise provided in this subchapter, no person shall excavate or obstruct any right-of-way without first obtaining an excavation permit, obstruction permit, treewell permit, or irrigation system permit, as hereafter described, from the city engineer issued pursuant to this article.

(1) **Excavation permit.** An excavation permit is a permit which allows the holder to excavate in specified city right-of-way and to hinder free and open passage over and use of the specific portion of right-of-way by placing equipment described therein, to the extent and for the duration specified therein.

(2) **Obstruction permit.** An obstruction permit is a permit which allows the holder to hinder free and open passage over and use of the specified portion of right-of-way by placing equipment described therein on the right-of-way for the duration specified therein.

(3) **Treewell permit.** A treewell permit is a permit which allows the holder to construct a treewell in the right-of-way in the area between the property line and the back of curb, provided such treewell has been approved as part of a site plan.

(4) **Irrigation System permit.** An irrigation system permit is a permit which allows the holder to construct an irrigation system or any part thereof in the right-of-way immediately adjacent to the permit holder's abutting property.

(b) No person may excavate or obstruct the right-of-way beyond the date or dates specified in the permit unless such person

(1) makes a supplementary application for another right-of-way permit before the expiration of the initial permit; and

(2) a new permit or permit extension is issued.

(c) Persons installing treewells or irrigation systems in the right-of-way pursuant to a permit issued under this section shall acquire no right or interest in the right-of-way allowing the continued use of the right-of-way for said purpose, nor shall such persons be entitled to make claim against the city due to damage, disruption or removal of such facilities by the city or its contractors. Treewells and irrigation systems placed in the right-of-way pursuant to permit issued under this section shall be considered emplaced in the right-of-way at the city's sufferance, and shall be subject to the city's right to remove or disrupt same, with or without prior notice to the permit holder, during the course of constructing, repairing, maintaining, or replacing any city

equipment or other facilities in the right-of-way, whether such work is performed by city work crews or city contractors.

(d) Except as otherwise provided in this subchapter, no person shall occupy any portion of the right-of-way for the purpose of providing ongoing utility services on other than a temporary basis as provided in an obstruction permit or excavation permit, without first obtaining a franchise, license, or lease from the city.

(e) Subsections (a) through (c) of this section shall be effective on and after January 1, 1999.

23-54. RIGHT-OF-WAY PERMIT APPLICATIONS; INFORMATION REQUIRED; PLANS AND SPECIFICATIONS; HOLD HARMLESS AND INDEMNITY; PERSON TO WHOM PERMIT IS ISSUED.

(a) Before any permit required by this subchapter shall be issued, an application shall be made to the city engineer. A permit application will be accepted only if all of the following conditions have been met by the permit applicant:

(1) The applicant has, if required, registered with the department pursuant to division I, section 23-53.04 of this subchapter;

(2) The applicant has fulfilled all obligations related to prior permits, including but not limited to the restoration of the right-of-way, and payment to the city of all money due for:

(i) prior obstruction or excavation permits;

(ii) any loss, damage, or expense suffered by the city as a result of applicant's prior excavations or obstructions of the rights-of-way or any emergency actions taken by the city in connection therewith;

(iii) restoration of the right-of-way by the city or the city's contractor;

(iv) system management fees; and

(v) fines assessed to the applicant pursuant to section 23-56.

(3) The applicant has submitted a completed permit application form, which includes

(i) all required attachments, and

(ii) scaled drawings showing the location and area of the proposed project and the location of all existing and proposed equipment;

and which states or identifies the following:

(i) The place, extent and purpose of the contemplated work including the identity of and location(s) in the right-of-way at which any excavation is to be made;

(ii) The time when the work is to be commenced and the time it is to be completed;

(iii) For whom and in connection with what abutting property, if any, the work is to be performed ;

(iv) To what street main, if any, the sewer, water, or gas connection is to be made, or to what electric or telephone line, if any, the electric or telephone connection is to be made;

(v) The name of the person(s) or contractor(s) who will do the work, the person who will be in charge thereof, and the public registration number(s) issued by the state of Iowa labor commissioner pursuant to chapter 91C, Code of Iowa for all contractors to be involved in the work for which the permit is sought.

(4) The applicant has provided as-built maps or GIS mapping data for all equipment which it has placed in the right-of-way in the past.

(5) The applicant has corrected deficiencies, if any, in prior restoration work performed by it.

(b) Plans and specifications shall be filed with an application for a permit to make an excavation involving the construction or installation of equipment within the right-of-way. Plans and specifications shall be in sufficient detail to identify the exact type or types of equipment to be constructed or installed in the right-of-way, and the horizontal and vertical location of such equipment within the right-of-way, with respect to right-of-way/property lines and established monuments, which location shall be established on said plans according to available existing records.

Except where plans and specifications have been provided to the city pursuant to an application for grading permit under §2-205.31 of this code, or pursuant to the requirements of chapter 26 of this code, detailed plans and specifications shall not be required for individual excavations, such as individual water, sewer, gas, electric, or telephone connections to a building. Unless a regulation approved and issued by the city engineer provides otherwise, a simple sketch on the application form provided by the city, including the dimensions of the proposed excavation in reference to permanent landmarks, shall be provided for individual excavations.

(c) If an applicant for an excavation permit is not qualified to perform right-of-way restoration work as provided in section 23-63 of this article, the application shall contain a stipulation that the applicant shall immediately notify the city engineer upon completion of the work done in connection with the excavation as is required in this subchapter and that the applicant shall pay the costs the city incurs in the refilling, replacement of pavement, and restoration and maintenance of the right-of-way by the city work crews or contractor working on behalf of the city, which costs shall be based upon the square footage of improved street which is disturbed by such excavation, the type or amount of materials required to restore the street surface, and the future maintenance cost for the affected right-of-way due to degradation associated with the

excavation thereof. The restoration costs to be paid in each instance shall be determined by the city engineer by reference to a "restoration cost schedule", which shall be developed and updated as needed prior to each construction season, and approved by the city council by resolution.

(d) Applications for excavation permits shall be accompanied by an insurance certificate as required by section 23-55 of this article and by a performance and maintenance bond or other form or security as required by section 23-63 of this article, unless such certificate and bond have been previously filed with the department and are still in effect.

(e) Except as otherwise provided in section 23-65 of this subchapter, all applications for a permit under this subchapter shall contain a stipulation that the applicant shall indemnify and hold harmless the city from any and all costs, expenses or liability for damages or injuries to persons or property or liability of any kind whatsoever arising from or growing out of any excavation or trench or surface restoration for which the permit is issued pursuant to this subchapter.

(f) Permits for the construction or installation of equipment in the right-of-way, which is to be owned or operated by a franchised or licensed utility, shall be issued in the name of the franchisee or licensee. Permits for the construction or installation of equipment in the right-of-way, which is to be owned by the Des Moines Water Works, may be issued either in the name of the Water Works or in the name of its contractor. Permits for the construction or installation of equipment in the right-of-way, which is to be owned by a city utility or enterprise, may be issued either in the name of the municipal utility or enterprise or in the name of its contractor. Permits for the construction or installation of equipment in the right-of-way, which is to be owned or operated by an abutting property owner, may in the city engineer's discretion be issued either in the name of the abutting property owner or the abutting property owner's contractor. Permits for construction in the right-of-way of underground sewer, water, gas, electric, or telephone connections to an abutting property shall be issued in the name of the abutting property owner's contractor.

(g) Subsections (a) through (f) of this section shall be effective on and after January 1, 1999.

23-55. LIABILITY INSURANCE.

(a) Before any permit required by this subchapter shall be issued, there shall be placed on file in the office of the city engineer a certificate of insurance evidencing the existence of insurance deemed adequate by the city to cover the risk presented by the work being undertaken in the right-of-way. The amount and type of insurance to be required in each instance shall be determined by the city engineer by reference to a "schedule of insurance coverages required for permitted activities", which shall be developed and periodically updated, and approved by the city council by resolution. The insurance shall include the city as a named insured and shall be issued by an insurance company licensed to do business in the State of Iowa. When the applicant is required by the terms of the permit and the provisions of this subchapter to fill and restore the excavation or trench, the insurance shall remain in effect until the maintenance period provided for in this subchapter has expired. It shall provide that the insurance during such period may not be canceled or terminated except after the city engineer has received thirty days written notice of the cancellation or termination, or until the work under the permit has been completed.

(b) The provisions of this section shall not apply where indemnification and hold harmless have been provided to the city by the Des Moines Waterworks pursuant to the requirements of chapter 8 of this code, or by a franchised utility pursuant to the requirements of chapter 26 of this code, or by a registrant pursuant to article I of this subchapter.

(c) Subsections (a) and (b) of this section shall be effective on and after January 1, 1999.

23-56. ADMINISTRATIVE PENALTIES FOR SCHEDULED VIOLATIONS.

(a) The following schedule of administrative penalties for violations of this subchapter shall be charged:

VIOLATION PENALTY/DAY

1. Failure to obtain permit \$100
2. Failure to provide required notification
of emergency trenching or excavations \$ 50
3. Failure to provide required traffic
control devices \$100
4. Failure to restore as required \$ 50
5. Failure to properly secure steel plates \$ 75
6. Failure to provide required notification
for inspection by plumbing inspector \$ 75
7. Failure of restoration within the
maintenance period \$100
8. Failure to restore street cuts within
the period provided in the permit. \$100

Notice of violation with the applicable penalty for such violation noted thereon shall be issued by the city engineer to the violator. Penalties shall be paid in full within thirty days of the issuance of the notice at the city's permit and development center.

(b) The administrative penalties set out in subsection (a) of this section shall be charged in lieu of the fines and penalties provided for in section 23-2.04 of this subchapter, unless the violator

refuses to correct the violation and pay the scheduled administrative penalty, or the city engineer determines that immediate enforcement action by misdemeanor or municipal infraction prosecution pursuant to section 23-2.04 is, in view of the particular circumstances of the case, necessary to achieve compliance with the requirements of this subchapter. The city engineer shall maintain a record of all violations, administrative penalties charged or other enforcement action taken and shall make available such performance record to the building official when refusal to issue a permit pursuant to section 23-59 of this subchapter is being contemplated. The applicant shall be liable for any and all costs incurred by the city because of such violations.

23-56.01 PERMIT FEES; SYSTEM MANAGEMENT FEE.

(a) **Excavation permit fee.** The excavation permit fee shall be determined by the city engineer shall be in an amount sufficient to recover the following costs:

- (1) the city cost component, the disruptive cost component, and the inspection cost component;
- (2) the GIS cost component, which is the cost of creating and maintaining information on a Geographical Information System ("GIS") mapping system; and
- (3) the degradation cost component, which is to recover the accelerated depreciation of the right-of-way which will result from the excavation to take place thereon.

Such fee shall, in part, be based on the size of the area to be excavated or impacted by the excavation, the duration that the area will be unavailable for public use, and the amount of vehicular, bicycle, and pedestrian traffic that is disrupted thereby, and such other factors as the city engineer shall deem appropriate.

(b) **Obstruction permit fee.** The obstruction permit fee shall be determined by the city engineer and shall be in an amount sufficient to recover the following costs:

- (1) the city cost component, the disruptive cost component, and the inspection cost component;
- (2) the GIS cost component, which is the cost of creating and maintaining information on a Geographical Information System ("GIS") mapping system.

Such fee shall, in part, be based on the size of the area to be obstructed or impacted by the obstruction, the duration that the area will be unavailable for public use, and the amount of vehicular, bicycle, and pedestrian traffic that is disrupted thereby, and such other factors as the city engineer shall deem appropriate.

(c) **System management fee.** The system management fee for high intensity corridors shall be established by the city engineer in an amount sufficient to recover the city's cost for planning, designing, constructing and maintaining the high intensity corridors.

(d) **Computation of disruptive cost component.** The disruptive cost is a financial incentive to permittees to minimize their obstruction and use of right-of-way and to get in and out as quickly

as possible. The city engineer shall determine the disruptive cost component of the fees for excavation and obstruction by using economic and accounting principles. Fees may vary from one location to another based on the size of the area to be obstructed, the duration that the right-of-way or parts of it will be unavailable for public use and travel, the proximity of businesses and enterprises which rely in whole or in part on access by members of the public or the delivery of supplies or raw materials, the importance of the particular right-of-way to the traveling public, the use of the particular right-of-way for emergency vehicles and the availability of alternate routes, the traffic volumes carried by the particular right-of-way, and the amount of vehicular, bicycle, and pedestrian traffic that is reasonably likely to be disrupted thereby.

(e) **Computation of inspection cost component.** A schedule of fees for inspection services shall be developed by the city engineer to recover the costs incurred by the department in having its inspectors conduct inspections of street restoration work undertaken in connection with excavation permits issued to permittees. The base fee for an inspection shall be expressed in said schedule as a per square foot fee for the area to be excavated or obstructed, or impacted by excavation or obstruction. The fees for follow-up inspections, conducted after a permittee is informed of a violation of a specification or regulation in order to obtain compliance therewith, shall be expressed in said schedule as hourly rates which are to be based on the salary, benefit, and overhead costs to the city of the inspectors providing follow-up inspection services. Follow-up inspection services shall be charged to permittees on the basis of the number of hours of inspector time spent providing follow-up inspection services with respect to work performed in connection with each permit, multiplied by the applicable hourly rates on the schedule.

(f) **Payment of permit fees.** Permit fees, computed as above provided by the city engineer, shall be paid by the permittee prior to issuance of the excavation or obstruction permit, unless in the discretion of the city engineer permission is given to pay such fee within thirty (30) days after billing therefor by the city.

(g) **Fees doubled during probation.** All permit fees shall be doubled during a probationary period.

(h) All fees collected under this article and article I of this subchapter, with the exception of that portion of said fees attributable to indirect costs incurred by the city for administrative services, shall be accumulated in a separate fund for the exclusive purpose of administering and maintaining the city's right-of-way infrastructure and associated appurtenances.

(i) Permit fees which were paid in connection with a permit which the city engineer has revoked for a breach as provided in section 23-64.09 are not refundable.

(j) The permit fees to be paid in each instance shall be determined by the city engineer by reference to a "schedule of permit fees", which shall be developed in conformance with the requirements of Chapter 480A of the Iowa Code, shall be updated as needed prior to each construction season, and shall be approved by the city council by resolution.

(k) Subsections (a) through (j) of this section shall be effective on and after January 1, 1999.

23-57. ISSUANCE OF PERMIT.

(a) Except as otherwise provided in this section, when the application made in accordance with sections 23-54 and 23-55 of this subchapter shall be approved and the certificate of insurance and the street excavation bond, or receipt of deposit in lieu of bond by the city treasurer as provided for in this subchapter shall be approved and placed on file in the office of the city engineer, the excavation permit or obstruction permit, as the case may be, shall be issued to the applicant to allow for the particular work specified in the application to commence. The city engineer may impose conditions, restrictions, or requirements upon the issuance of the permit and the performance of the applicant thereunder in order to protect the public health, safety and welfare, to insure the structural integrity of the right-of-way, to maximize efficient use of the right-of-way, to protect the property and safety of other users of the right-of-way, and to minimize the disruption and inconvenience to the traveling public, which conditions, restrictions, or requirements shall be stated on the face of the permit, or communicated to the permittee in writing by the city engineer. The permit shall specifically state that it is issued subject to all stipulations of the applicant made in applying for the permit, and that the work shall be done in accordance with the detailed plans and specifications approved in connection with the application, and in accordance with any and all further conditions, restrictions, or requirements stated on the permit.

(b) Immediate notice shall be given to the city engineer whenever emergency work must be commenced prior to application for a permit under this subchapter. Such notice shall be given no later than upon the first business day after commencement of such emergency work and application for an excavation permit shall be made within three business days of the commencement of the work.

(c) Except as otherwise provided in this subsection, a permit shall not be issued to excavate in a permanently improved street within the first four years following completion and acceptance by the city council of the improvement project. Applicants shall determine and submit for approval of the city engineer alternative methods of making the utility service connections; provided, however, the city engineer may give written permission for a street excavation permit to be issued upon determining that one or more of the following conditions exists:

(1) an emergency endangering life or property exists which warrants allowing the requested excavation;

(2) an interruption of essential utility service is threatened unless the requested excavation is allowed;

(3) the public work for which the excavation is requested is mandated by city, state or federal legislation;

(4) there is no other reasonable means of providing utility service to a property except by allowing the requested excavation; or

(5) the requested excavation is in the best interest of the general public.

A permit may not be issued pursuant to this subsection until a street degradation fee in the amount set forth in the schedule of fees developed by the city engineer and approved by the city council has been paid by the applicant, which fee shall be deposited with funds collected and held pursuant to section 21-56 of this code for street improvements.

(d) Subsections (a) through (c) of this section shall be effective on and after January 1, 1999.

23-58. RESERVED.

23-59. REFUSAL TO ISSUE PERMIT.

Effective on and after January 1, 1999, the city engineer may refuse to issue the permits provided for in this subchapter to any former permit holder who has intentionally violated the provisions of this code relating to excavations in or obstruction of any public right-of-way, or failed to conform to the requirements of any previously issued permit, or violated the orders or instructions of city officials issued pursuant to this subchapter.

23-60. RECORD TO BE KEPT; INFORMATION.

The department shall keep a duplicate copy of each permit issued as above provided corresponding to each original permit issued, and shall provide a copy of each such permit to the city permit and development center for filing with the detailed plans and specifications as approved by city staff. Permits shall be regularly numbered in the order issued. Each permit shall contain the name of the person to whom it is issued, the location of the premises, the purpose of any excavation and the time at which work under it shall be commenced and completed. The permit shall not take effect until the time stated therein, nor shall any work be done under it until such time. The permit shall expire at the time stated thereon for completion unless an extension is granted in writing by the city engineer, provided, however, that the obligation to restore the right-of-way, and the obligation to provide and maintain insurance and bonds to the city in connection with such work, shall remain in effect until restoration of the right-of-way is completed. This section shall be effective on and after January 1, 1999.

23-61. ON-SITE EXHIBIT OF PERMIT; CONTRACTOR IDENTIFICATION SIGNAGE.

(a) One copy of the permit required by this subchapter shall be kept and exhibited at every work site for which an excavation permit has been issued for a period of five days or more.

(b) Any person performing work pursuant to an excavation permit shall display their name, address, and telephone number on all motor vehicles and equipment, (including tractors, trailers, and wheeled equipment capable of being driven or towed on the street) which are utilized in performing such work.

This provision shall not apply to personal or privately owned vehicles used solely to transport workers to a job site, or to rental vehicles or equipment utilized in performing the work, if the

name, address, and telephone number of the rental company appears on such vehicles or equipment.

Utility service companies which provide such service to residential, commercial, and industrial customers on a city-wide basis, and whose customer or emergency service telephone number is published in a Des Moines telephone directory and is available to Des Moines residents without long distance charge, need only display the name of the company on company-owned vehicles and equipment utilized in performing work in the right-of-way. Contractors and their subcontractors working in the right-of-way on behalf of such utility service companies shall display their name, address, and telephone number on all motor vehicles and equipment as above required.

(c) Such information shall be exhibited in at least two locations on the vehicle, and shall be either a temporary magnetic or permanent decal or painted lettering of a type and size, and with a contrasting color, rendering it legible from a distance of not less than 50 feet.

23-62. COORDINATION WITH PAVING PROJECT.

If the application is for the purpose of making an excavation or trench in any street ordered by the city council to be permanently improved, the applicant shall promptly notify the city engineer of the issuance of the permit so that the excavation or trenching can be coordinated with the work of the paving project as the city engineer deems appropriate. Work under such permit shall in no event commence before the requirements of this subsection are satisfied.

23-63. RIGHT-OF-WAY RESTORATION; PERFORMANCE AND MAINTENANCE BOND OR OTHER FORM OF SECURITY REQUIRED.

(a) **Restoration Required.** The work to be done under an excavation permit issued pursuant to this subchapter, and the restoration of the right-of-way as required herein, must be completed within the dates specified in the permit. In addition to its own work, the permittee must restore, or pay for the restoration of, the general area of the work, and the surrounding areas, including the paving and its foundations, to its proper and required condition in accordance with the city's utility accommodation and street restoration specifications, unless the city engineer deems other or additional specifications must be utilized in order to secure proper restoration. Further, the permittee shall inspect the area of the work and use reasonable care to maintain the same condition for forty-eight (48) months thereafter. (b) **Performance and maintenance bond.** An applicant for an excavation permit shall at the time of application for an excavation permit:

(1) Post a performance bond in an amount determined by the city engineer to be sufficient to cover the cost of restoring the right-of-way to its proper and required condition pursuant to the city's utility accommodation and street restoration specifications and in accordance with the current restoration cost schedule established by resolution of the city council. If at the conclusion of the forty-eight (48) month period after completion of the restoration of the right-of-way, the department determines that the right-of-way has been properly restored, the surety on the performance bond shall be released.

(2) Make an advance payment equivalent to ten (10) percent of the aforementioned bond or letter of credit to cover the estimated inspection costs which it will incur for inspections of the excavation permit site during the reconstruction and for a period of forty-eight (48) months after completion of the restoration.

(c) **Condition of the bond.** The bond shall be conditioned upon

(1) the faithful performance of the right-of-way restoration work required under this subchapter, or payment of the restoration costs incurred by the city; and

(2) the faithful performance of the terms of the permit, the provisions of this subchapter, and any other requirements provided by law.

If the applicant fails or neglects to properly restore the right-of-way to its proper condition within the time for completion set forth in the permit, or within a reasonable time after notice by the city engineer of said failure or neglect, or fails to pay the restoration costs incurred by the city, or fails or neglects to properly maintain the right-of-way to its proper condition within a reasonable time after notice by the city engineer of said failure or neglect, or fails to pay the maintenance costs incurred by the city, then the same shall be restored or maintained by the city and the costs thereof, as certified by the city engineer, shall be promptly paid by the applicant or bonding company as the case may be.

(d) **Alternate forms of security.** In lieu of filing a performance bond in connection with each excavation permit application, an applicant may, in the discretion of the city engineer, be allowed to post with the city treasurer an alternate form of security in the form of an annual performance bond, letter of credit, certificate of deposit, or certified check in an amount deemed sufficient by the city engineer, but in no event less than \$10,000.00 (ten thousand dollars), to secure the applicant's performance of all restoration work which the applicant will become responsible for during the next 12 (twelve) month period in accordance with the current restoration cost schedule established by resolution of the city council upon the recommendation of the city engineer. Such alternate form of security shall be conditioned upon applicant's performance as provided in subparagraph (c) of this section. If the costs as certified by the city engineer during said year are less than such letter of credit, certificate of deposit, or certified check, or if the maintenance period provided for in the permit has expired with the applicant having satisfied all of its restoration and maintenance responsibilities, the balance thereof shall upon request be returned to the applicant. If it appears to the city engineer at any time after issuance of a permit that the security so provided by letter of credit, certificate of deposit, or certified check is inadequate to secure the performance of all such restoration work, the city engineer may require the permittee to increase such security. If the costs during said year exceed the amount of such additional security provided by letter of credit, certificate of deposit, or certified check, the applicant shall be required to pay such difference to the city. Such excess costs shall be paid before any subsequent application by the applicant for a permit under this subchapter may be processed by the department. If the city incurs any outlay and expense in collecting its costs from the applicant, such outlay and expense shall be paid by the applicant or bonding company in addition to other amounts due.

(e) Bond requirement for licensed plumbing contractors.

A licensed plumbing contractor may satisfy the requirements of subsections (a) through (e) of this section by maintaining on file with the department a performance and maintenance bond in the amount of \$5000 for the period running concurrently with the plumbing contractor's license issued pursuant to chapter 8 of this code, so long as such bond specifically provides coverage for any and all street excavations undertaken pursuant to this subchapter during such period, unless the city engineer determines such bond amount is insufficient to cover the anticipated cost of restoration of the right-of-way for which the permit is sought.

(f) Restoration by City or City Contractor. If an applicant for an excavation permit has not qualified to perform right-of-way restoration work as hereafter provided, or if a qualified applicant chooses to have the city or the city's contractor restore the right-of-way, it shall pay the costs thereof within thirty (30) days of billing. If, during the forty-eight (48) months 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, the cost of repairing said pavement.

(g) Restoration by Permittee. An applicant for an excavation permit which has been determined qualified to perform right-of-way restoration work as hereafter provided, and which intends to itself restore the right-of-way, shall so indicate in its application for an excavation permit. The permittee shall perform the work in accordance with the city's utility accommodation and street restoration specifications, unless the city engineer deems other or additional specifications must be utilized in order to secure proper restoration. The city engineer shall have the authority to prescribe the manner and extent of the restoration, and may do so in written procedures of general application or on a case-by-case basis. The city engineer in exercising this authority shall be guided by the following standards and considerations: the number, size, depth and duration of the excavations, disruptions or damage to the right-of-way; the pre-excavation condition of the right-of-way; the remaining life-expectancy of the right-of-way affected by the excavation; whether the relative cost of the method of restoration to the permittee is in reasonable balance with the prevention of the accelerated depreciation of the right-of-way that would otherwise result from the excavation, disturbance or damage to the right-of-way; and the likelihood that the particular method of restoration would be effective in slowing the degradation of the right-of-way that would otherwise take place. Methods of restoration may include, but are not limited to, patching, replacement of the right-of-way base, and milling and overlay of the entire area of the right-of-way affected by the work.

By choosing to restore the right-of-way itself, the permittee guarantees its work and shall maintain it for forty-eight (48) months following its completion. During this forty-eight (48) month period, it shall, upon notification from the department, correct all restoration work to the extent necessary using the method required by the department. Said work shall be completed within the period of time allotted therefor as set forth in the notice from the department. If the permittee fails to restore the right-of-way in the manner and to the condition required by the department, or fails to satisfactorily and timely complete all repairs required by the department, the city, at its option, may do such work or cause its contractor to do such work. In that event, the permittee shall pay to the city, within thirty (30) days of billing, all costs incurred by the city in restoring the right-of-way.

(h) **Identity of person performing restoration work.** Any person restoring a permanently improved street shall provide permanent identification of the person performing the restoration work and the month and year such work was performed by imprint or medallion within the restored surface, as provided in the city's utility accommodation and street restoration specifications.

(i) Subsections (a) through (h) of this section shall be effective on and after January 1, 1999.

23-63.01 QUALIFICATION TO PERFORM RIGHT-OF-WAY RESTORATION WORK.

(a) Upon application by any person, firm, or corporation owning or operating a utility service, or by any person, firm, or corporation licensed as a plumber or plumbing contractor by the city, or by any contractor seeking to become qualified to perform right-of-way restoration work under city contract, the city engineer shall determine the qualifications of such applicant to perform right-of-way restoration work as provided in section 23-63 hereof. In determining if an applicant is qualified to perform right-of-way restoration work, the city engineer may consider any of the following factors, which the applicant shall be obligated to demonstrate to the satisfaction of the city engineer:

(1) The financial responsibility of the applicant;

(2) The city's past record of transactions and experience with the applicant, including the quality of workmanship on past right-of-way restoration projects; the number of liens, claims or complaints filed regarding such past projects; and the number of repairs made on prior right-of-way restoration projects involving that applicant;

(3) The adequacy of the applicant's equipment and materials;

(4) The competency and experience of the applicant's managerial and supervisory personnel in performing right-of-way restoration work;

(5) The applicant's demonstrated ability to complete performance of right-of-way restoration work or work of a similar nature.

(b) The city engineer may decline to qualify an applicant for the performance of right-of-way restoration work if the city engineer determines that the applicant has not demonstrated satisfactory compliance with the above referenced criteria, or if the city engineer determines that the applicant has:

(1) Without good cause therefor failed to carry on or complete prior right-of-way restoration work or work of a similar nature in an acceptable manner, or refused to comply with a written order of the engineer with regard thereto within a reasonable time, or

(2) Failed to perform prior right-of-way restoration work or work of a similar nature in reasonably close conformity with the plans and specifications therefor, or in reasonably close

conformity with the city's design standards or the city's utility accommodation and street restoration specifications, or

(3) Failed or refused to remove and replace materials or work found by the city engineer not to be in reasonably close conformity with the plans and specifications or city's utility accommodation and street restoration specifications, as applicable, or failed to correct such material or work so as to cause such materials or finished product to be reasonably acceptable work, or

(4) Offered or given gifts or gratuities to employees of the city in violation of state law or has had as its employee a person who was at the time also an employee of the city.

(c) In the event the city engineer determines not to qualify an applicant to perform right-of-way restoration work, the city engineer shall so notify the affected applicant. The notice shall set forth the reasons supporting the city engineer's determination not to qualify the applicant, and shall indicate that the city engineer's determination shall be considered final unless the applicant files a written request for review with the city manager within thirty days of applicant's receipt of notice thereof. Said notice shall be sent to the applicant by certified mail, return receipt requested.

(d) Upon written request of the applicant received within thirty days of mailing of the notice provided in (c) above, the city manager shall schedule and hold a hearing thereon, as provided in section 23-67.01. At such hearing, the applicant may present evidence or argument why it should be qualified to perform right-of-way restoration work.

(e) Subsections (a) through (d) of this section shall be effective on and after January 1, 1999.

23-63.02 DISQUALIFICATION OF PERSON PREVIOUSLY QUALIFIED TO PERFORM RIGHT-OF-WAY RESTORATION WORK.

(a) Upon a determination by the city engineer that a person, firm, or corporation previously qualified to perform right-of-way restoration work has failed to meet any of the criteria set forth in section 23-63.01(a), or has failed to perform as provided in section 23-63.01(b), the city engineer may disqualify such person, firm, or corporation from the further performance of such work, as hereafter provided. Upon making said determination, the city engineer shall give notice to the affected party of his/her determination, and shall therein set forth the reasons supporting disqualification and the proposed period for disqualification, and shall indicate the city engineer's determination shall be considered final unless the applicant files a written request for review with the city manager within thirty days of applicant's receipt of notice thereof.

(b) Upon written request of the affected party received within thirty days after the affected party's receipt of the notice provided in (a) above, the city manager shall schedule and hold a hearing thereon, as provided in section 23-67.01. At such hearing, the affected party may present evidence or argument why it should not be disqualified from performance of right-of-way restoration work.

(c) Subsections (a) and (b) of this section shall be effective on and after January 1, 1999.

23-64 JOINT APPLICATIONS.

Registrants are encouraged to make joint application for permits to excavate or obstruct the right-of-way at the same place and time. Registrants who join in and during a scheduled obstruction or excavation performed by the city or a city contractor, whether or not it is a joint application by two (2) or more registrants or a single application, are not required to pay the obstruction and degradation portions of the permit fee. Registrants who apply for permits for the same obstruction or excavation, which is not performed by the city or a city contractor, 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. This section shall be effective on and after January 1, 1999.

23-64.01 SUPPLEMENTARY APPLICATIONS.

A right-of-way permit is valid only for the area of the right-of-way specified in the permit. No permittee may perform any work outside the area specified in the permit, except as provided herein. Any permittee which determines that an area greater than that specified in the permit must be obstructed or excavated must, before working in that area:

- (a) make application for a permit extension and pay any additional fees necessitated thereby, and
- (b) be issued a new permit or permit extension.

A right-of-way permit is valid only for the dates specified in the permit. No permittee may begin its work before the permit start date or, except as provided herein, continue working after the end date. If a permittee does not finish the work by the permit end date, it must make application for a new permit for the additional time it needs, and receive the new permit or an extension of the old permit before working after the end date of the previous permit. This supplementary application must be submitted and completed before the permit end date. This section shall be effective on and after January 1, 1999.

23-64.02 PERMITTEE'S OTHER OBLIGATIONS.

Obtaining a right-of-way permit does not relieve a permittee of its duty to obtain all other necessary permits, licenses, and authority and to pay all fees required by any other city, county, state, or federal rules, laws or regulations.

A permittee shall comply with all requirements of local, state and federal laws, including chapter 480 of the Iowa Code, "Underground Facilities Information" (One Call Excavation Notice System).

A permittee shall perform all work in conformance with all applicable codes and established rules and regulations, and is responsible for all work done in the right-of-way pursuant to its permit, regardless of who performs the work.

Except in the case of an emergency, and with the approval of the city engineer, no right-of-way obstruction or excavation may be performed when seasonally prohibited or when conditions are unreasonable for such work.

A permittee shall not so obstruct a right-of-way that the natural free and clear passage of water through the gutters or other waterways shall be interfered with.

Private vehicles may not be parked within or adjacent to a permit area. The loading or unloading of trucks adjacent to a permit area is prohibited unless specifically authorized by the permit.

This section shall be effective on and after January 1, 1999.

23-64.03 DENIAL OF PERMIT.

(a) **Mandatory denial.** Except in the case of an emergency, no right-of-way permit will be issued:

- (1) To any person required by section 23-53.04 to be registered who has not done so;
- (2) To any person required by Section 23-53.07 to file an annual report but has failed to do so;
- (3) For any next-year project not listed in the construction and major maintenance plan, and not exempted from such requirement, pursuant to section 23-53.07;
- (4) For any project which requires the excavation of any portion of a permanently improved street which was constructed or reconstructed within the preceding four (4) years, unless the city engineer has given permission for the issuance of the permit for such project pursuant to section 23-57(c);
- (5) To any person who has failed within the past three (3) years to comply, or is presently not in full compliance, with the requirements of articles I through III of this subchapter;
- (6) To any person who has outstanding debt owed to the city;
- (7) To any person as to whom there exists grounds for the revocation of a permit under section 24-64.09; and
- (8) If, in the discretion of the city engineer, the issuance of a permit for the particular date and/or time would cause a conflict or interfere with an exhibition, celebration, festival, or any other event. The city engineer, in exercising this discretion, shall be guided by the safety and convenience of ordinary travel of the public over the right-of-way, and by considerations relating to the public health, safety and welfare.

(b) **Permissive denial.** The city engineer may deny a permit in order to protect the public health, safety and welfare, to prevent interference with the safety and convenience of ordinary travel over the right-of-way, or when necessary to protect the right-of-way and its users. In determining

to deny a permit, the city engineer may, in his/her discretion, consider one or more of the following factors: the extent to which right-of-way space where the permit is sought is available; the competing demands for the particular space in the right-of-way; the availability of other locations in the right-of-way or in other rights-of-way for the equipment of the particular company; the applicability or ordinance or other regulations of the right-of-way that affect location of equipment in the right-of-way; the degree of compliance of the applicant with the terms and conditions of its franchise, license or lease, articles I and II of this subchapter, and other applicable ordinances and regulations; the degree of disruption to surrounding communities and businesses that will result from the use of that part of the right-of-way; the condition and age of the right-of-way, and whether and when it is scheduled for total or partial reconstruction; and the balancing of the costs of disruption to the public and damage to the right-of-way, against the benefits to that part of the public served by the expansion into additional parts of the right-of-way.

(c) **Discretionary Issuance.** Notwithstanding the provisions of subsections (a) and (b) of this section, the city engineer may issue a permit in any case where the permit is necessary (a) to prevent substantial economic hardship to a customer of the permit applicant, or (b) to allow such customer to materially improve its utility service, or (c) to allow a new economic development project.

(d) Subsections (a) through (c) of this section shall be effective on and after January 1, 1999.

23-64.04 CONSTRUCTION AND INSTALLATION REQUIREMENTS; CERTIFICATION BY PERMITTEE.

(a) When working in public rights-of-way, permittees under this article shall not unreasonably interfere with the safety, health, and convenience of the public in the public's use thereof for ordinary travel along and over the rights-of-way, nor shall they interfere with public safety or public health services provided by the city of Des Moines to its residents by means of the public rights-of-way.

(b) All work performed in the right-of-way by a registrant or permittee, including but not limited to the construction, installation, repair, maintenance, or replacement of equipment, shall be done in conformance with the city's utility accommodation and street restoration specifications. Equipment shall be constructed or installed in the right-of-way at a location as required by section 23-53.09, subsections (1) through(3) thereof, and shall be constructed as shown, and placed in the location as shown, on the plans and specifications therefor submitted in connection with the permit application, unless the permittee makes a written request to the city engineer to approve a change in location of such equipment. In no event shall equipment be constructed or installed in the right-of-way at a location other than that shown on the plans and specifications without the prior written consent of the city engineer.

(c) Within thirty (30) days after completing the construction or installation of any equipment for which a permit was required, the permittee shall certify to the city engineer, on a form provided for that purpose by the department, that the equipment was constructed or installed at the location shown on the plans and specifications therefor submitted with the permit application, or

at the alternate location approved by the city engineer. This requirement shall be in addition to the requirement stated in section 23-53.08 that mapping data be supplemented within six (6) months after completion of the construction or installation of such equipment.

(d) Equipment constructed or installed at a location other than shown on the plans and specifications, or at a location other than the alternate location approved by the city engineer, shall be subject to immediate removal or relocation at the direction of the city engineer.

(e) No person shall leave or keep open any excavation or vault on, in or under any right-of-way. All excavations and vaults shall be protected in accordance with the city's utility accommodation and street restoration specifications.

(d) Subsection (c) of this section shall be effective on and after January 1, 1999.

23-64.05 INSPECTION.

When the work under any permit hereunder is completed, the permittee shall notify the city engineer.

The permittee shall make the work site available to the department inspector and to all others as authorized by law for inspection at all reasonable times during the execution and upon completion of the work.

At the time of inspection, the department inspector may order the immediate cessation of any work which poses a serious threat to the life, health, safety or well-being of the public.

The department inspector may issue an order to the registrant for any work which does not conform to the applicable standards, conditions or codes. The order shall state that failure to correct the violation will be cause for revocation of the permit. Within ten (10) days after issuance of the order, the registrant shall present proof to the city engineer that the violation has been corrected. If such proof has not been presented within the required time, the city engineer may revoke the permit pursuant to section 23-64.09.

This section shall be effective on and after January 1, 1999.

23-64.06 WORK DONE WITHOUT A PERMIT.

(a) **Emergency situations.** Each registrant shall immediately notify the city engineer or the city engineer's designee of any event regarding its equipment which it considers to be an emergency. The registrant may proceed to take whatever actions are necessary in order to respond to the emergency. Within two (2) business days after the occurrence of the emergency, the registrant shall apply for the necessary right-of-way permits, pay the fees associated therewith and fulfill the rest of the requirements necessary to bring itself into compliance with articles I and II of this subchapter for the actions it took in response to the emergency. If a storm, flood, or other city-wide emergency event causes system-wide damages to the equipment of a utility service company, requiring emergency repairs without obtaining the necessary right-of-way permits, the

city council may, upon request by the company sustaining such damage, waive or modify the requirement that permits be obtained after the making of emergency repairs in response to such event.

In the event that the city engineer becomes aware of an emergency regarding a registrant's equipment, the department may attempt to contact the local representative of each registrant affected, or potentially affected, by the emergency. In any event, the department may take whatever action it deems necessary in order to respond to the emergency, the cost of which shall be borne by the registrant whose equipment occasioned the emergency.

(b) **Non-emergency situations.** Except in the case of an emergency, any person who obstructs or excavates a right-of-way without a permit must subsequently obtain a permit, pay double the normal fee for said permit, pay double all the other fees required by the city code, deposit with the department the fees necessary to correct any damage to the right-of-way and comply with all of the requirements of articles I and II of this subchapter. In lieu of requiring such person to pay double the fees as herein provided, the city engineer may assess an administrative penalty against such person as provided in section 23-56(a).

(c) Subsections (a) and (b) of this section shall be effective on and after January 1, 1999.

23-64.07 SUPPLEMENTARY NOTIFICATION BY PERMITTEE.

If the obstruction or excavation of the right-of-way begins later or ends sooner than the date given on the permit, permittee shall notify the department of the accurate information as soon as this information is known. If the obstruction of a right-of-way is of a shorter duration than that estimated on the permit application, the department will, upon request, refund or credit to the permittee a proportionate amount from that part of the permit fee which was based on the duration of the obstruction. This section shall be effective on and after January 1, 1999.

23-64.08 REVOCATION OF PERMITS.

Permittees hold right-of-way permits as a privilege and not as a right. The city reserves the right, as provided herein, to revoke any right-of-way permit, without fee refund, in the event of a substantial breach of the terms and conditions of any statute, ordinance, rule or regulation, or any 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 the right-of-way permit;
- (2) An evasion or attempt to evade any material provision of the right-of-way permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the city or its citizens;
- (3) Any material misrepresentation of fact in the application for a right-of-way permit;
- (4) The failure to maintain the required bonds and/or insurance;

(5) The failure to complete the work in a timely manner; or

(6) The failure to correct a condition indicated on an order issued pursuant to section 23-64.06.

If the city engineer determines that the permittee has committed a substantial breach of a term of condition of any statute, ordinance, rule, regulation or any condition of the permit, the city engineer 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. Further, a substantial breach, as stated above, will allow the city engineer, at his/her discretion, to place additional or revised conditions on the permit.

Within twenty-four (24) hours of receiving notification of the breach, the permittee shall contact the city engineer with a plan, acceptable to the city engineer, for its correction. Permittee's failure to so contact the city engineer, or the permittee's failure to submit an acceptable plan, or permittee's failure to reasonably implement the approved plan, shall be cause for immediate revocation of the permit. Further, permittee's failure to so contact the city engineer, or the permittee's failure to submit an acceptable plan, or permittee's failure to implement the approved plan, shall automatically place the permittee on probation for one full year. From time to time, the city engineer may establish a list of permit conditions which, if breached, will automatically place the permittee on probation for one full year, such as, but not limited to, working out of the allotted time period or working on right-of-way grossly outside of the permit.

If a permittee, while on probation, commits a breach as outlined above, permittee's permit will automatically be revoked and permittee will not be allowed further permits for one full year, except for emergency repairs.

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.

This section shall be effective on and after January 1, 1999.

23-64.09 CITY'S REMEDIES NOT EXCLUSIVE.

The remedies provided in articles I through III of this subchapter and in other chapters in the city code are not exclusive or in lieu of other rights and remedies that the city may have at law or in equity. The city is hereby authorized to seek legal and equitable relief for actual or threatened injury to the public rights-of-way, including damages to the rights-of-way, whether or not caused by a violation of any of the provisions of this subchapter or other provisions of the city code.

23-65. DUTY TO DEFEND, INDEMNIFY, AND HOLD HARMLESS.

Except where the duty to defend, indemnify, and hold the city harmless has been undertaken by the Des Moines Waterworks pursuant to the requirements set out in chapter 8 of this code, or by a utility pursuant to the requirements set out in chapter 26 of this code, every applicant for a right-of-way permit shall execute, as part of its permit application, an agreement to defend,

indemnify, and hold harmless the city from any and all costs, expenses, or liability for damages or injuries to persons or property or liability of any kind whatsoever arising from or growing out of any obstruction, excavation, or restoration work within the right-of-way by the applicant for which a permit is required pursuant to this subchapter.

23-66. SEWER AND WATER CONNECTIONS.

All excavations for sewer and water connections shall be left unfilled and the connections left exposed until inspected by the building official. Any person making any excavation for such connections shall notify the building official at the time the connection is completed in order that it may be properly inspected before the work of refilling is commenced.

23-66.01. TUNNELING.

No person, firm, or corporation shall tunnel under the surface of any right-of-way in the city for the purpose of making any gas, sewer, water, steam heating pipe, underground electric, telecommunications, telephone, or cable television connection without special permission from the city engineer.

23-66.02. TRAFFIC CONTROL DEVICES, LIGHTING AND PLATING.

(a) The public shall be protected at all excavations or trenches or open vaults in the right-of-way by the placement of proper traffic control devices, lighting and plating as specified in the Iowa Manual on Uniform Traffic Control Devices and applicable provisions of the city's utility accommodation and street restoration specifications.

(b) Every person making such an excavation or trench shall maintain any and all protection required under subsection (a) of this section until the trench or excavation has been refilled and the street, pavement, sidewalk or curb has been restored to its proper condition as provided in the city's utility accommodation and street restoration specifications.

ARTICLE III - FRANCHISE, LICENSE OR LEASE REQUIRED FOR PRIVATE OR COMMERCIAL USE OF RIGHT-OF-WAY

23-66.03. FRANCHISE, LICENSE OR LEASE REQUIRED.

(a) Except as otherwise provided in this subchapter, no person shall occupy or use public right-of-way on a city-wide basis for the purpose of providing utility services to private customers without first obtaining a franchise from the city as provided and required by section 364.2 of the Iowa Code, unless such utility service is provided by a governmental entity having jurisdiction and authority to provide such service within the city.

(b) Except as otherwise provided in this subchapter, no person shall occupy or use any portion of the right-of-way for the purpose of operating or conducting a private business, on other than a

temporary basis as provided in an obstruction permit or excavation permit, without first obtaining a license or lease from the city.

(c) The city shall not grant, issue, or enter into any franchise, license or lease that grants or allows exclusive use or occupancy of the right-of-way. Any person seeking a franchise, license, or lease for use of city right-of-way shall register with the city engineer as provided in sections 23-53.04 through 23.53.06 of the city code and shall make application for a franchise, license, or lease as hereafter provided.

(d) An application for a franchise, license, or lease for occupancy or use of right-of-way shall be filed with the city engineer on a form provided by the city and shall include all registration information required to be submitted pursuant to section 23.53.06 of the city code.

23-66.04. GRANT OF FRANCHISE; PERSONS ELIGIBLE; FRANCHISE REQUIRED.

(a) Franchises will be granted in accordance with the procedures provided therefor in chapter 364 of the 1997 Code of Iowa, or any successor provision thereto. The terms and conditions of a franchise shall be subject to negotiation between the franchise applicant and the city, and shall be incorporated into the form of an ordinance. A franchise shall not be considered to have been granted by the city unless and until the form and provisions of the franchise ordinance have been approved and adopted by the city council, the grant of the franchise has been approved by the electorate of the city at an election, and the franchise has been duly recorded, all as required by Chapter 364 of the Iowa Code, or successor provision thereto. The proposal to grant a franchise shall not be submitted at an election until the city council has duly passed and approved the ordinance containing the proposed franchise.

(b) A franchise will be granted only in those instances in which the following conditions are met:

(1) the franchise applicant provides or proposes to provide a utility service to all of the residents of the city of Des Moines, or to all of the residents within a given area of the city;

or

(2) the franchise applicant provides or proposes to provide utility service within the city of Des Moines, or within a given part thereof, and is by law required to provide universal service within its service area;

and

(1) the franchise applicant proposes that it be authorized to utilize any and all street and alley rights-of-way of way within the city, or within a given part thereof, for the purpose of providing such service; or

(2) the city council determines that the franchise applicant will ultimately require authorization to utilize any and all street and alley rights-of-way of way within the city, or within a given part thereof, for the purpose of providing such service;

and the franchise applicant has obtained a certificate of public convenience and necessity from the Iowa utilities board for the provision of that service, if required, and has met all other legal requirements to provide the utility service.

(c) Persons providing utility services, except local exchange telephone services, on the effective date of this provision-

(1) which are not franchised by the city of Des Moines,

and

(2) which possess a certificate of public convenience and necessity from the Iowa utilities board for the provision of that service, if required,

or

(3) which provide utility service to all or a substantial proportion of the residents of the city of Des Moines, or to all or a substantial proportion of the residents of a given part of the city of Des Moines,

and

(4) which utilize all or a substantial proportion of the street and/or alley rights-of-way within the city, or within a given part of the city, for the purpose of providing such service,

shall be required to obtain a franchise for the continued provision of that utility service and for the continued use and occupancy of city street rights-of-way for that purpose.

(d) Pursuant to 1998 Iowa Acts, Chapter 1148, section 1 thereof (Acts of the 77th General Assembly), persons providing local exchange telephone service under the circumstances identified in subparagraph (c) above shall be exempt from the obligation to obtain a franchise as therein provided, but shall be required to obtain a communications system license, all as provided and required in this article and in chapter 26, subchapter 2, article II of this city code.

23-66.05. PERSONS ELIGIBLE FOR ISSUANCE OF LICENSE

(a) (1) Persons which on the effective date of this provision provide, or propose to provide, utility services to all residents within the city of Des Moines, or to all residents within a given part thereof, but which intend to utilize for that purpose only certain street or alley rights-of-way constituting only a small portion of the street or alley rights-of-way within the city, or within that part of the city, or

(2) persons which the city determines can provide said service by utilizing only certain street or alley rights-of-way constituting only a small portion of the street or alley rights-of-way within the city, or within a given part of the city,

shall not be eligible for the grant of a franchise, but shall instead be eligible for the issuance of a license for the use of said right-of-way.

(b) The owner of two or more properties which abut a street or alley right-of-way on either side thereof, and which properties are zoned for multi-family, commercial, or industrial use, who desire to use such street and/or alley right-of-way to provide a private utility service connection between two or more buildings or facilities located on said properties, shall be eligible for the issuance of a license for such use.

23-66.06. AUTHORITY TO ISSUE LICENSE; FORM OF LICENSE AND TERM.

(a) Licenses required by this article shall be issued by the city engineer. The city engineer shall review each application and shall issue each license which he or she determines to be in compliance with the requirements of this article and any other applicable legal requirements. In issuing a license, the city engineer may require a change in the proposed location of the licensee's equipment where necessary to avoid interference with other equipment placed within the public right-of-way.

(b) Licenses issued pursuant to this article shall be in writing, shall be executed by the licensee, and shall not take effect until approved by the legal department. The form of license to be issued pursuant to this article shall be uniform, but shall be subject to periodic review and modification.

23-66.07. LIMIT ON TERM OF FRANCHISES; LIMIT ON INITIAL OR RENEWAL TERM OF LICENSES AND LEASES.

(a) No franchise for use of the public right of way shall be granted for a term in excess of twenty-five (25) years.

(b) No license for use of the public right of way hereafter issued by the city engineer shall be issued or renewed for a term in excess of five (5) years.

(c) Every license issued by the city prior to July 1, 1998 for use or occupancy of public rights-of-way shall terminate on the date provided in the license, or if no such termination is provided in the license, the license shall terminate on the earlier of the tenth anniversary of its issuance or July 1, 2008.

23-66.08. COMPENSATION REQUIRED; FRANCHISE, LICENSE, AND LEASE FEES.

(a) No franchise or lease for use of public right-of-way shall be granted, and no license for the use of public right-of-way shall be issued, without requiring the grantee or licensee thereof to compensate the city for such use by payment of a reasonable and competitively neutral fee.

(b) All new franchises granted by the city shall require the franchisee to pay an annual franchise fee. The franchise fee shall be provided for in the franchise ordinance.

(c) A license fee shall, to the extent allowed by the Constitution and laws of Iowa, be assessed on all new licenses for use or occupancy of right of way upon and after the city council's approval by resolution of a schedule of license fees for use of city right-of-way. The schedule of fees for use of city right-of-way shall reflect the diminution in the functional utility of the right-of-way for use by the city, and shall be based upon such factors as the value or rental value of private property abutting the right-of-way to be used, and the licensee's avoided cost in using city right-of-way as opposed to establishing a private right-of-way for the licensed use upon abutting private property. The schedule of fees for use of city right-of-way shall establish such fees in terms of per linear foot charges for right-of-way used, and assuming a use width of not more than 10 feet, with the schedule reflecting the per foot value of such right-of-way in identified segments of the city.

(d) A lease fee shall be assessed on all new leases for use or occupancy of right of way. The lease fee shall in each instance be established and provided for in the lease approved by the city council.

(e) In addition to being required to pay franchise, license, or lease fees, franchisees, licensees, and lessees may, to the extent allowed by the provisions of Chapter 480A of the Iowa Code, be required to provide in-kind services as compensation for such use, including but not limited to

(1) the installation by the franchisee, licensee, or lessee of city equipment in the trenches excavated by, or in the duct banks constructed by, the franchisee, licensee, or lessee, and/or

(2) access to said trenches or ducts so that the city can install its equipment therein.

Franchisees, licensees, and lessees which provide such services as utility services, as herein defined, may, to the extent allowed by Chapter 480A of the Iowa Code, also be required to provide) access at no cost to the services provided by the franchisee, licensee, or lessee at a location to be designated by the city, or the equivalent value of the service to be provided at said location.

(f) Franchise, license, and lease fees shall be paid at the city treasurer's office. The acceptance of any such fee payment by the city shall not be construed as an acknowledgment that the amount paid is the correct amount due, nor shall such acceptance of payment be construed as a release of any claim which the city may have for additional sums due and payable. Franchisees and licensees shall within 90 days of the close of the license or fiscal year, as the case may be, provide the city with an annual audit of the fees paid to the city during the reporting period indicating that the fee paid the city during that period is equal to the franchise or license fee due for such period. In the event that such audit results in a determination that an additional amount of franchise or license fee is owing to the city for the prior year, such additional amount shall be due and payable immediately, together with interest at the rate of ten percent (10%) per year calculated from the due dates for the franchise or license fee payments in question. The city manager may waive the audit requirement when he/she determines that the license or franchise fee amount owing to the city is too minimal to justify audit.

(g) The licensee or lessee shall pay interest at the rate of ten percent (10%) per year on any overdue license or lease fee calculated from the due date of the fee.

(h) Nothing in this article shall be construed to limit the liability of a franchisee, licensee, or lessee for all applicable federal, state and local taxes.

(i) Nothing in this article shall be construed to prevent the city council from exercising the right of the city to change the amount of any of the fees required by this article.

23-66.09. APPLICATION FOR INITIAL ISSUANCE OF A LICENSE; REGISTRATION REQUIRED.

A person desiring to obtain a license as hereinabove required shall register such proposed use and occupancy of public right-of-way pursuant to article I of this subchapter, shall make application for a license for such use and occupancy as hereinafter provided in this subchapter, and shall pay an administrative application fee. The administrative application fee, and any future changes thereto, shall be effective upon approval of the amount thereof by the city council by resolution. The application for initial issuance of a license shall be filed with the city engineer not less than 60 days prior to the proposed effective date of the license, and shall be filed upon a form provided by the city for that purpose. The application shall include, at a minimum, the following information:

- (1) The name, address and telephone number of the applicant.
- (2) The name, address and telephone number of a responsible person whom the city may notify or contact at any time or in case of emergency concerning the equipment or utility system.
- (3) A statement of the purpose for the equipment or system proposed for installation in public right-of-way, the type of service it will provide, and the intended customers which it will serve.
- (4) Any additional information which the city engineer in his or her discretion may require.

23-66.10. ISSUANCE AND RENEWAL OF LICENSES; RENEWAL WHERE LICENSEE HOLDS MULTIPLE LICENSES; DETERMINATION OF INITIAL OR RENEWAL TERM OF LICENSE; REFUSAL TO ISSUE OR RENEW LICENSE; LICENSE REVOCATION AND CANCELLATION; NOTICE AND HEARING.

(a) Prior to the initial issuance of a license for use or occupancy of public right-of-way, the city engineer shall conduct a review of the licensee's background to determine the licensee's ability to meet the requirements stated in paragraph (e) of this section. If on the basis of such review the city engineer determines that it would not be appropriate to issue the license, the city engineer shall give notice of intent not to issue the license as provided in paragraph (g) of this section.

(b) To obtain renewal of a license, the licensee shall file a renewal application with the city engineer on the form provided by the city and pay an administrative renewal application fee. The

administrative renewal application fee, and any future changes thereto, shall be effective upon approval of the amount thereof by the city council by resolution.

The renewal application shall be filed with the city engineer not less than one hundred eighty (180) days prior to the expiration of the initial or any renewal term of the license. Upon receipt of the renewal application, the city engineer shall conduct a review of the licensee and the licensee's prior use of public right-of-way to determine the licensee's continued compliance with the requirements stated in sections (c) and (e) of this section. If on the basis of such review the city engineer determines that the licensee and the licensee's prior use of public right-of-way comply with all requirements stated in paragraphs (c) and (e) of this section, the city engineer may renew the license for an additional term of up to five (5) years. If on the basis of such review the city engineer determines that the licensee and the licensee's use of public right-of-way do not comply with one or more of the requirements stated in paragraphs (c) and (e) of this section, the city engineer shall give notice of intent not to renew the license as provided in paragraph (g) of this section.

In the event a licensee holds multiple licenses for use or occupancy of various rights-of-way within the city for the same or similar purpose, the licensee shall be required to renew all such licenses under a single license at such time as the earliest issued license expires.

(c) In determining the length of the term of an initial or renewal license, the city engineer shall take into consideration the likelihood that the city will require the use of the licensed right-of-way for municipal purposes, or that such use of the licensed right-of-way will unduly burden the city or the public in its use of the licensed right-of-way, during the proposed term of the license. A license shall not be issued or renewed if the city engineer determines that any of the following conditions exist in the right-of-way proposed for licensing:

- (1) that there is insufficient space in said right-of-way to accommodate the proposed use, given the other existing uses thereof; or
- (2) that the proposed private utility service connection would interfere with or conflict with existing or planned city equipment or utility equipment located, or to be located in, said right-of-way; or
- (3) that such use is incompatible with adjacent public or private uses of that right-of-way; or
- (4) that such use would involve an unacceptably high frequency of repair or maintenance to the private utility service equipment thereby requiring excessive excavation in or obstruction of the right-of-way; or
- (5) that the construction or installation of such private utility service equipment would interfere with a public improvement undertaken or to be undertaken by the city, or with an economic development project in which the city has an interest or investment.

(d) If during the term of any license the city engineer determines that the license should be revoked due to licensee's failure to comply with any of the requirements stated in paragraphs (e)

of this section, the city engineer shall give notice of intent to revoke such license as provided in paragraph (g) of this section.

(e) The licensee's failure to observe or comply with any of the following requirements shall constitute grounds for refusal to issue or renew, or for revocation of, a license for use or occupancy of public right-of-way:

(1) the licensee's use or prior use of public right-of-way has been conducted in full and timely compliance with all laws and regulations applicable thereto, and the licensee has complied fully and in a timely manner with the requirements of any previously issued license, and with the orders or instructions of city officials issued pursuant to this chapter; or

(2) the licensee is current in the payment of license fees, if applicable, and the licensee has made such payments fully and when due.

The licensee's commission of any of the following acts shall constitute grounds for refusal to issue or renew, or for revocation of, a license for use or occupancy of public right-of-way:

(1) the licensee has made a misleading statement or a material misrepresentation in connection with an application for initial issuance or renewal of a license, in connection with its registration of its use of public right-of-way, or in connection with its use of public right-of-way; or

(2) the licensee has transferred or attempted to transfer its equipment, its business, or its license to another person, or has made a change in use of its equipment, without giving the city notice thereof and obtaining city consent thereto.

(f) If during the term of any license the city engineer determines

(1) that the licensee's continued use of public right-of-way will unduly burden the city or the public in its use of that property, or

(2) that the public right-of-way for which the license was issued will be required for municipal purposes during the term of the license, or

(3) that the licensee's equipment at a particular location will interfere with:

(i) a present or future city use of the right-of-way, or

(ii) a public improvement undertaken or to be undertaken by the city, or

(iii) an economic development project in which the city has an interest or investment, or

(iv) the public's safety or convenience in using the right-of-way for ordinary travel, or

(4) that the public health, safety and welfare requires it, or

(5) that the continued existence of said license is not in the city's best interests,

the city engineer shall give notice of intent to cancel such license as provided in paragraph (g) of this section.

(g) Notice of intent not to issue a license for use of public right-of-way shall be given to the applicant, either by certified mail, return receipt requested, or by actual service or delivery thereof, which notice shall be given not more than thirty (30) days after submission of the application. Notice of intent not to renew a license for use of public right-of-way shall be given to the licensee, either by certified mail, return receipt requested, or by actual service or delivery thereof, which notice shall be given not more than ninety (90) days after submission of the renewal application. Notice of intent to revoke or cancel a license shall also be given to the licensee. The notice shall set forth the grounds for refusal to issue or renew, or for revocation or cancellation, and shall inform the applicant or licensee of the right to an appeal hearing upon request. Such request for hearing shall be filed in writing with the city manager, and the hearing shall be scheduled and held, as provided in section 23.67.01. At the hearing, the applicant or licensee shall have the burden of establishing that the grounds asserted in the notice do not exist.

(h) Upon the effective date of revocation or cancellation as provided in the city engineer's notice thereof, or upon the effective date thereof specified in the city engineer's written

decision upon licensee's appeal, the licensee shall be required to cease its use and occupancy of the right-of-way, or to remove or relocate its equipment therefrom, as provided in said notice or decision. Equipment not removed or relocated from the right-of-way as required in such notice or order shall be considered a nuisance, and may be removed, relocated, or taken possession of by the city, at licensee's expense. Except in emergency circumstances, the requirement to relocate, remove, or cease use of equipment shall be suspended during the pendency of any appeal taken by a licensee pursuant to article IV of this subchapter.

(i) If a license is refused or cancelled upon the basis that the city property licensed or proposed for licensing is or will be required for municipal purposes, the applicant or licensee shall not be entitled to appeal. However, in that event, the licensee shall be entitled to a partial refund of the annual fee already paid, said refund to be computed on the basis of 1/12 of the required annual fee multiplied by the number of unexpired whole months of the year remaining in the license term. In all other cases where a license is not issued or renewed, or is revoked, no refund of any portion of the required annual fee shall be paid to the licensee.

(j) Notwithstanding the notice and hearing requirements of paragraph (g) above, the city engineer may in emergency circumstances order the immediate relocation or removal of equipment from the right-of-way, and may upon licensee's failure to comply with such order immediately remove, relocate, or take possession of such equipment at licensee's expense.

23-66.11. FAILURE TO SECURE, RENEW, OR COMPLY WITH FRANCHISE, LICENSE, OR LEASE.

(a) Any person who fails to secure a franchise, license, or lease required under this article, or any franchisee, licensee, or lessee who fails to comply with the requirements of their respective

franchise, license, or lease, or this article, or with any other applicable legal requirements shall, upon notification of such violation by the city engineer, immediately act either to abate the violation or to cease its use and occupancy of the right-of-way and remove its equipment or system from the right-of-way.

(b) The city reserves the right either to remove or to disconnect and render inoperative any equipment or system in the right-of-way under franchise, license, or lease which is used or maintained contrary to the provisions of this subchapter, provided, however, that the city will give written notice of its intent to take such action, including the date upon which such action will be taken, to the affected franchisee, licensee, or lessee not less than seven days prior to taking such action.

23-66.12. TRANSFER OF FRANCHISE, LICENSE, LEASE, BUSINESS, OR EQUIPMENT PROHIBITED WITHOUT CITY'S CONSENT; CHANGE IN USE OF EQUIPMENT PROHIBITED WITHOUT CITY'S CONSENT.

(a) A franchise granted by the city council pursuant to this article shall not be transferred to any other person without the prior consent of the city council. A franchisee shall not transfer its franchise, its business, or its equipment in the right-of-way to another person without giving the city council 90 (ninety) days prior written notice of such proposed transfer, and without the prior consent of the city council. In such notice, the franchisee shall clearly identify the proposed transferee, giving the name and address of a representative of the transferee who is authorized to discuss and provide information to the city regarding said transfer. The city council may, as a condition of its consent to such transfer, require the transferee to make application for a franchise as provided in section 23-67.11 of this article, and to register its proposed use of public right-of-way as provided in section 23-53.04 of this article. Upon receipt of the such application by a transferee, the city engineer shall conduct a review of the transferee and its prior and proposed use of public right-of-way to determine the transferee's compliance or ability to comply with the requirements stated in paragraphs (c) and (e) of section 23-66.10, and shall report the results of such investigation to the city council. The city council may refuse consent to a proposed franchise transfer if it determines that the proposed transferee lacks the expertise, experience, financial resources or sufficient personnel required to maintain the franchised equipment and/or the right-of-way associated therewith, or if the city has previously revoked or cancelled a franchise or license, or terminated a lease, held by the proposed transferee, or if the proposed transferee is then in default of any of its obligations under this subchapter. In the event a franchise includes provisions regarding transfer which are more specific than those included in this subsection, the more specific provisions of the franchise shall prevail over the provisions of this subsection. (b) A license issued or a lease granted pursuant to this article shall not be transferred to any other person without the prior written consent of the city engineer. A licensee or lessee shall not transfer its license or lease, its business, or its equipment in the right-of-way to another person without giving the city engineer 90 (ninety) days prior written notice of such proposed transfer, and without the prior written consent of the city engineer. In such notice, the licensee or lessee shall clearly identify the proposed transferee, giving the name and address of a representative of the transferee who is authorized to discuss and provide information to the city regarding said transfer. The city engineer may, as a condition of consent to such transfer, require the transferee to make application for such license or lease as hereinabove provided, and to

register its proposed use of public right-of-way as provided in section 23-53.04 of this City Code. Upon receipt of the such application by a transferee, the city engineer shall conduct a review of the transferee and its prior and proposed use of public right-of-way to determine the transferee's compliance or ability to comply with the requirements stated in paragraphs (c) and (e) of section 23-66.10. The city engineer may refuse consent to a proposed transfer if he/she determines that the proposed transferee lacks the expertise, experience, financial resources or sufficient personnel required to maintain the equipment and/or the right-of-way associated therewith, or if the city has previously revoked or cancelled a franchise or license, or terminated a lease, held by the proposed transferee, or if the proposed transferee is then in default of any of its obligations under this subchapter.

(c) The transferee of a franchisee's, licensee's, or lessee's equipment, business, franchise, license, or lease shall not be entitled to enter upon public rights-of-way for the purpose of operating or maintaining such equipment unless and until it completes the formal transfer of such equipment, business, franchise, license, or lease, and obtains the city's consent to such transfer.

(d) A franchisee, licensee, or lessee shall not change the use of its equipment without giving the city 90 (ninety) days prior written notice of such proposed change in use. In such notice, the franchisee, licensee, or lessee shall clearly and completely set forth the proposed change in use of equipment, how it would be accomplished, including any excavations required to accomplish such change, and projections as to the future maintenance implications of such change in use. Any proposed change in use of a franchisee's, licensee's, or lessee's equipment shall require the prior approval of the city engineer. Such approval may be withheld if the city engineer determines that the proposed use of the equipment at that location would be incompatible with or would likely damage or endanger other uses of the right-of-way, would involve a higher level of maintenance activities than the present use, would involve more street excavation or greater traffic disruption than the present use, or would be otherwise inappropriate.

(e) Notwithstanding the foregoing, no transfer of a franchisee's, licensee's, or lessee's business shall be deemed to have occurred for purposes of this provision in those instances in which the franchisee, licensee, or lessee is a publicly held entity whose stock is traded on recognized stock exchanges, and where transfer of ownership of the business has effectively occurred due to stock sales or trading in the open market. However, in the event of a merger, consolidation, transfer or disposal of substantially all of such a franchisee's, licensee's, or lessee's assets, or assignment of its interest in a franchise, license, or lease granted or issued by the city hereunder, the city shall, upon written notice to the franchisee, licensee, or lessee, have the right, in its sole discretion and without cause or further showing, to terminate the franchise, license, or lease. Upon notice to the city by such a franchisee, licensee, or lessee of such merger, consolidation, transfer or disposal of its assets or assignment of its interest in a franchise, license, or lease granted or issued by the city, the city shall have six months within which to terminate the franchise, license, or lease. The provisions of a franchise or of a franchise regulatory ordinance with respect to the merger, consolidation, transfer or disposal of substantially all of the franchisee's assets, or assignment of its interest in a franchise, shall control over this provision.

(f) Notwithstanding the foregoing, in approving the lease of any vacated city right-of-way, the city council may provide for the

lessee's transfer or assignment of the leasehold interest without the prior consent of the city. Leases of vacated city right-of-way in existence on the date of adoption of this section, which provide for the lessee's transfer or assignment of its leasehold interest without the prior consent of the city, or which have a different consent requirement than is herein provided, shall remain in effect, may be renewed, and shall prevail over the consent to transfer provisions of this section.

(g) Notwithstanding the foregoing, the city engineer's consent shall not be required for the transfer of a license issued pursuant to this article if such transfer is contemporaneous with and incidental to the transfer of two or more parcels of real estate from one person or entity to another person or entity, if the improvements on said parcels are interconnected by the licensed equipment for the purposes of providing integrated internal communications, electrical, heating or cooling services to the improvements on said parcels, and if the licensed equipment will continue to be utilized for the same purpose or purposes after the transfer is completed; Provided, however, that the transferee shall notify the city engineer of such transfer within 30 days after its completion and shall provide evidence satisfactory to the city engineer that it has complied with the provisions of this subsection and has assumed all obligations of the transferor with respect to said license.

23-66.13. AMENDMENT TO LICENSE.

In the event that a licensee with a current license proposes to expand, reduce, relocate or modify any portion of its equipment or system within public right-of-way, the licensee shall file an application for an amendment to its current license with the city engineer, and shall pay the administrative application fee as provided in section 23-67.15 of this article. An application for an amendment to a current license shall include relevant new information of the type required in connection with the initial application for a license. The amended license shall be issued by the city engineer in the same manner as the original license. However, if the amendment involves only one or more new hook-on connections to the licensed utility system, and if the new connections will be made entirely through existing underground utility conduit or ducts so as not to require any excavation in the public right-of-way, or by means of overhead wires or cables between existing utility poles, then the licensee shall not be required to pay an additional administrative fee as part of the application for amendment.

23-66.14. REGULATIONS.

(a) No license required under this article, or amendment to such license, shall be issued for any equipment or system until the required fees have been paid, and until a complete application has been filed with and approved by the city engineer.

(b) The licensee's equipment or system shall be installed or constructed in accordance with applicable industry standards, the city's utility accommodation and street restoration specifications, and the terms and conditions imposed by the city.

(c) If it becomes necessary to excavate or obstruct any public right-of-way in connection with the installation, construction, reconstruction, repair, operation, disconnection or removal of a

licensee's equipment or system, the licensee shall first obtain a permit from the city to do so in accordance with article II of this subchapter.

(d) The licensee shall maintain its equipment and all parts of its system in good condition, order and repair.

(e) The licensee shall be responsible for repairing or reimbursing other licensed or franchised utilities, or other persons or entities lawfully using the right-of-way, for any damage to their property caused by negligence of the licensee, or its agents, employees or contractors, in connection with the installation, construction, reconstruction, repair, operation, disconnection or removal of the licensee's equipment or system.

(f) No license required under this article shall be issued to authorize placement of a utility system in any space which is required for public use.

23-66.15. HOLD HARMLESS.

It shall be a term and condition of any license issued pursuant to this article that, as part of the consideration supporting the issuance of such license and the city's permission thereby to occupy and use the public right-of-way of the city, the licensee shall agree to indemnify, protect, save and hold harmless and defend the city from and against any and all liability, losses and damages to property, or bodily injury or death to any person, including payments made under workers' compensation laws, arising out of or in any way connected with the installation, construction, reconstruction, repair, operation, disconnection or removal of the licensee's licensed communications system. The licensee shall pay all reasonable expenses incurred by the city in defending itself with regard to any of the aforementioned claims, including all out-of-pocket expenses such as attorneys' fees and the value of any services rendered by the city legal department or any other officers or employees of the city. If any litigation on account of any such claims shall be commenced against the city, and upon receipt by the licensee of written notice of such litigation from the city, the licensee shall defend the same at its own cost and expense. The record of any judgment rendered against the city on account of such claims shall be conclusive as against the licensee and shall entitle the city to recover the full amount thereof with interest and costs and attorneys' fees incurred by the city. The right of action therefor shall accrue to the city as soon as judgment shall have been rendered. The city shall fully cooperate with the licensee's defense of any such claim or action.

23-67. through 23-67.02. REPEALED by Ord. No. 13,638.

ARTICLE IV - APPEALS.

23-67. APPEALS TO CITY COUNCIL.

(a) Any person or entity which is aggrieved by a decision of the department or of the city engineer with respect to the denial of registration, or with respect to the denial or revocation of a right-of-way permit, or which believes that the fees imposed on such person or entity pursuant to

this subchapter 4 do not conform to the requirements of Chapter 480A of the 1997 Code of Iowa, may request in writing that such denial, revocation, or fee imposition be reviewed by the city council.

(b) Such person or entity shall file its written request for review with the city clerk within thirty days after the occurrence complained of, and shall set forth therein the factual and legal basis for its objection to the action taken by the department or city engineer. The city council shall render its decision in writing on such request for review within sixty days after the timely filing of the request for review as above provided. Such written decision shall be mailed to the party or parties requesting review.

(c) If the city council affirms the decision or action complained of, and if the appealing person or entity is still aggrieved by such decision or action, the appealing person or entity may do either of the following:

(1) With the consent of the city council, have the matter finally resolved by binding arbitration. Binding arbitration shall be before an arbitrator agreed to by both the city council and the appealing person or entity. If the parties are unable to agree on an arbitrator, the matter shall be resolved by a three-person arbitration panel made up of one arbitrator selected by the city council, one arbitrator selected by the appealing person or entity, and one arbitrator selected by the other two arbitrators. The cost and expense of a single arbitrator shall be borne equally by the city and the appealing person or entity. If a three-person arbitration panel is selected, each party shall bear the expense of its own arbitrator and the parties shall jointly and equally bear the cost and expense of the third arbitrator, and of the arbitration. Each party to the arbitration shall pay its own costs, disbursements, and attorney fees.

(2) Bring an action for declaratory ruling in district court to review the decision of the city council.

23-67.01. APPEALS TO CITY MANAGER.

(a) Any person or entity which is aggrieved by a decision or action of the department or of the city engineer with respect to any other matter covered or regulated by the provisions of this subchapter 4 may request in writing that such decision or action be reviewed by the city manager. Upon receipt of such request, the city manager may undertake to make a determination of the appeal, or may assign the appeal to an administrative hearing officer for determination.

(b) Such person or entity shall file its written request for review with the city manager's office within thirty days after the occurrence or action complained of, and shall set forth therein the factual and legal basis for its objection to the decision made or action taken by the department or city engineer. The city manager shall render a decision in writing on such request for review within sixty days after the timely filing of the request for review as above provided. Such written decision shall be mailed to the party or parties requesting review or participating in the hearing.

- (c) If the city manager or hearing officer affirms the decision or action complained of, and if the appealing person or entity is still aggrieved by such decision or action, the appealing person or entity may make further appeal to the city council as provided in section 23-67 hereof.
- (d) If the city council affirms the decision or action complained of, and if the appealing person or entity is still aggrieved by such decision or action, the appealing person or entity may bring an action for declaratory ruling in district court to review the decision of the city council.

ARTICLE V - IMPLEMENTING REGULATIONS.

23-67.05 CITY ENGINEER AUTHORIZED TO PROMULGATE IMPLEMENTING REGULATIONS.

The city engineer is authorized to develop, as he/she determines necessary and expedient, regulations to implement the provisions of this subchapter, including but not limited to regulations relating to the application of the obstruction permitting requirement to routine utility or building maintenance activities and minor utility service connections, regulations relating to the requirement that detailed plans and specifications or sketches be submitted as part of excavation permit applications, and regulations further deferring the effective date of particular provisions of this subchapter.

23-67.06 PROCEDURE FOR PROMULGATION OF IMPLEMENTING REGULATIONS.

- (a) Regulations proposed by the city engineer shall be in writing and shall be promulgated as follows and in the order listed:
 - (1) The city engineer shall file said proposed regulation with the city clerk.
 - (2) The city clerk shall publish notice of intent to approve the regulation and of the time and place of a public hearing thereon, including therein a description of the regulation and its proposed effective date, and stating that it is on file in the office of the city clerk.
 - (3) The city engineer shall promulgate the proposed regulation among the members of any class of right-of-way users which will be directly and particularly affected by a proposed regulation.
 - (4) The city engineer shall notify the city council of the proposed effective date of the regulation and provide a copy thereof to the city council for its review.
 - (5) The city engineer shall hold a public hearing on the proposed regulation.
 - (6) After council review of the proposed regulation, the city engineer shall formally approve and issue the regulation and cause the city clerk to publish it prior to its effective date as provided by Section 362.5 of the Iowa Code.

The city engineer's failure to promulgate a proposed regulation to a member of a class of right-of-way users which will be directly and particularly affected by a proposed regulation shall not impair the effect of the regulation.

(b) If, upon its review of a regulation proposed by the city engineer as above provided, the city council determines that such regulation is inconsistent with the provisions of this chapter of the city code, or is inconsistent with any applicable state or federal law or regulation, or is otherwise objectionable, the city council may direct that the proposed regulation shall not be published and shall not take effect. Regulations approved by the by the city engineer shall be effective upon their publication.

23-67.07. LEGAL EFFECT OF REGULATIONS APPROVED BY THE CITY ENGINEER.

Regulations approved by the city engineer, after promulgation, public hearing, and council review as above provided, shall have the effect of law. Any person, firm, or corporation who fails to perform an act required by such regulations, or who commits an act prohibited by such regulations, shall be guilty of a misdemeanor punishable as provided by section 1-11 of the city code, or shall be guilty of a municipal infraction punishable by a civil penalty as provided by section 1-11 of the city code.

Sec. 2. SEVERABILITY

If any of the provisions of this ordinance are for any reason declared illegal or void, then the lawful provisions of the ordinance, which are severable from said unlawful provisions, shall be and remain in full force and effect, the same as if the ordinance contained no illegal or void provisions.

Sec. 3. REPEALER.

All ordinances or parts of ordinances, and all sections or subsections of the City Code, in conflict with the provisions of this ordinance are hereby repealed. Except as hereafter provided, Subchapter 4 of Chapter 23 of the City Code is repealed upon publication of this ordinance. The following enumerated existing sections and subsections of Subchapter 4 of Chapter 23 of the City Code shall remain in effect until, and shall be repealed effective upon, the dates hereafter indicated.

SECTION REPEAL DATE

Section 23-53 January 1, 1999

Section 23-54 January 1, 1999

Section 23-55 January 1, 1999

Section 23-57 January 1, 1999

Section 23-58 January 1, 1999

Section 23-59 January 1, 1999

Section 23-63 January 1, 1999

Section 23-67.01 January 1, 1999

Sec. 4. EFFECTIVE DATE.

This ordinance shall be published immediately, and, with the exception of those provisions hereafter enumerated, the provisions of this ordinance shall be effective upon publication. The following provisions of this ordinance, referencing the new articles, sections, and subsections of the City Code hereby enacted, shall become effective on the dates hereafter indicated:

ARTICLE I. ADMINISTRATION OF PUBLIC RIGHT-OF-WAY.

SECTION EFFECTIVE DATE

Section 23-53.04(a)-(g) January 1, 1999

Section 23-53.07 April 1, 1999

Section 23-53.08 June 1, 1999

Section 23-53.09(4) June 1, 1999

ARTICLE II. RIGHT-OF-WAY PERMITS

SECTION EFFECTIVE DATE

Section 23-53.31(a) through (c) January 1, 1999

Section 23-54 (a) through (f) January 1, 1999

Section 23-55 (a) and (b) January 1, 1999

Section 23-56.01(a) through (j) January 1, 1999

Section 23-57 (a) through (c) January 1, 1999

Section 23-59 January 1, 1999

Section 23-60 January 1, 1999

Section 23-63 (a) through (h) January 1, 1999

Section 23-63.01(a) through (d) January 1, 1999

Section 23-63.02(a) and (b) January 1, 1999

Section 23-64 January 1, 1999

Section 23-64.01 January 1, 1999

Section 23-64.02 January 1, 1999

Section 23-64.03(a) through (c) January 1, 1999

Section 23-64.04(c) January 1, 1999

Section 23-64.05 January 1, 1999

Section 23-64.06(a) and (b) January 1, 1999

Section 23-64.07 January 1, 1999

Section 23-64.08 January 1, 1999

Sec. 5. This ordinance shall be in full force and effect from and after its passage and publication as provided by law.

FORM APPROVED:

Terrence L. Timmins

City Solicitor