

ORDINANCE NO. 14,043

AN ORDINANCE to amend the Municipal Code of the City of Des Moines, Iowa, 2000, adopted by Ordinance No. 13,827, passed June 5, 2000, by repealing Sections 102-657, 102-660, 102-661 and 102-711 thereof and enacting new Sections 102-657, 102-660, 102-661 and 102-711, relating to the registration of right-of-way users, relating to the establishment of an annual right-of-way management fee to be charged to all users of city street right-of-way, and relating to permit fees to be charged to right-of-way users.

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

Section 1. That the Municipal Code of the City of Des Moines, Iowa, 2000, adopted by Ordinance No. 13,827, passed June 5, 2000, is hereby amended by repealing Sections 102-657, 102-660, 102-661 and 102-711 thereof and enacting new Sections 102-657, 102-660, 102-661 and 102-711, relating to right-of-way occupancy, as follows:

Sec. 102-657. Definitions.

The definitions in this section apply to divisions 1 through 3 of this article. References to sections are, unless otherwise specified, references to sections in this Code. Defined terms remain defined terms whether or not capitalized in the text. The following words, terms and phrases, when used in divisions 1 through 3 of this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Annual right-of-way management fee or ***annual management fee*** means the fee imposed on right-of-way users each year to recover right-of-way management program costs which will not be allocable to particular users of the right-of-way and which cannot be recovered through permit fees.

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

City cost or city cost component means the direct and indirect costs borne by the city for administration of public rights-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, recordkeeping, legal assistance, systems analysis, application processing and checking, issuing permits, inspecting job sites, creating and updating mapping systems, and including other costs the city may incur in managing and in performing all of the tasks required by this article.

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

City manager means the city manager 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 city engineering department.

Department inspector means any person authorized by the city engineer to carry out inspections related to divisions 1 and 2 of this article.

Disruptive cost or disruptive cost component means the cost the city will incur in managing the vehicular and/or pedestrian traffic which will be disrupted by excavation and/or obstruction activities in the right-of-way, 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 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.

Equivalent lineal feet means the unit of measurement for reporting right-of-way usage by right-of-way users, excluding service drops for customers and wires for street lights, for purposes of calculating the annual right-of-way management fee, with the method of measurement specified by the city

engineer as set forth on the right-of way usage reporting form.

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 regulations 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 divisions 1 and 2 of this article, 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 102-711.

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 granted a franchise for the use or occupancy of right-of-way in accordance with division 3 of this article.

High-intensity corridor means 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 a 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 the right-of-way or to whom the city grants a lease to

use or occupy the right-of-way in accordance with division 3 of this article.

Licensee means any person to whom the city has issued a license to use or occupy a right-of-way or to whom the city issues a license to use or occupy a right-of-way in accordance with division 3 of this article.

Local exchange area means an area, as established under regulations of the state, 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 or federal law and regulation.

Local representative means the person or designee of such person authorized by a registrant to accept service and to make decisions for that registrant regarding all matters within the scope of divisions 1 and 2 of this article.

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.

Non-allocable right-of-way management program costs or **non-allocable costs** means right-of-way management costs which will be incurred by the city, but which will not be allocable to particular users of the right-of-way and which cannot be recovered through permit fees.

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 divisions 1 and 2 of this article, 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 102-711.

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 division 2 of this article or a permit to excavate a right-of-way issued pursuant to the provisions of this article, as those provisions existed prior to 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 division 2 of this article or any person to whom a permit to excavate a right-of-way has been issued pursuant to the provisions of this article, as those provisions existed prior to 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 division 1 or 2 of this article.

Probationary period means the one-year period which commences on the date that a person has been notified in writing that he or she has been put on probation.

Registrant means any person who has registered as required under division 1 of this article due to the fact that the person:

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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 102-717.

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 article.

Right-of-way permit fee means either the excavation permit fee or the obstruction permit fee or both, depending on the content, required by divisions 1 and 2 of this article.

Right-of-way user means any person who has equipment located in any right-of-way, or who occupies or uses the right-of-way or any equipment in the right-of-way, and includes registrants, franchisees, licensees, lessees and unregistered users as herein defined.

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

System management fee means 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 that is located in public right-of-way and that 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; 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; 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.

Unregistered right-of-way user or **unregistered user** means any person who has equipment located in any right-of-way, or who occupies or uses the right-of-way or any equipment in the right-of-way, but is not registered as required by section 102-661.

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 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 backup 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 city council on June 24, 1991, pursuant to roll call no. 91-2686.

Sec. 102-660. Persons subject to and exempt

from registration, permitting, licensing and reporting requirements.

(a) 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. All such registrations shall be filed with the city on or before the registration deadline established by the city council by resolution, notice of which deadline shall be published in advance thereof in a newspaper of general circulation in Polk County. No person may, after the registration deadline, 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. No person shall obstruct or excavate in any street right-of-way without obtaining appropriate permits as required by division 2 of this article.

(b) 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 such has been obtained pursuant to division 2 of this article.

(c) No person shall construct an irrigation system in any right-of-way unless a permit for such has been obtained pursuant to division 2 of this article.

(d) No person shall plant a street tree or any ornamental plantings in the right-of-way unless a permit for such has been obtained pursuant to chapter 122 of this 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 division and shall not be required to register such use.

(e) A person having a franchise from the city for the provision of a utility service shall be required to register as provided in this

division, report the equivalent lineal feet of utility equipment they have in city street rights-of-way and pay an annual management fee, obtain right-of-way permits and pay right-of-way permit fees to excavate in or obstruct the right-of-way, all as provided in division 2 of this article.

However, if such franchise provides for the payment of a franchise fee, the franchisee shall not be required to pay such annual management fee or permit fees.

(f) City utilities and enterprises which occupy and use right-of-way for the provision of municipal utility and enterprise services, including sanitary sewer and water service, shall be required to register as provided in this division, and pay annual management fees, obtain right-of-way permits and pay right-of-way permit fees to excavate in or obstruct the right-of-way as provided in division 2 of this article. City work crews and city contractors performing work in the right-of-way on behalf of the city directed at the construction, maintenance, or repair

of traffic control signs and signals, storm drainage sewers, street and sidewalk surfaces and other street appurtenances, shall be exempt from the permitting requirements of division 2 of this article, and shall not be required to report the equivalent lineal feet of such facilities in city street right-of-way for purposes of calculating an annual management fee. Utility company work crews and contractors performing work in the right-of-way directed at the construction, maintenance, or repair of street lights shall be exempt from the permitting requirements of division 2 of this article, and shall not be required to include such facilities in their report of equivalent lineal feet of equipment in city street right-of-way for purposes of calculating their annual management fee.

(g) Governmental entities or agencies of the federal government, the state, or the 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 division, except the insurance and bonding requirements associated therewith. Such governmental entities and agencies shall be required to pay annual management fees and obtain right-of-way permits and pay right-of-way permit fees to excavate in or obstruct the right-of-way as provided in division 2 of this article. Such governmental entities or agencies shall be exempt from the licensing requirements of division 3 of this article.

Sec. 102-661. Registration.

(a) For the purposes of this article, registration will consist of completing a registration form and providing registration information to and as required by the city engineer, and providing evidence of insurance.

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

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The registrant shall keep all of the information listed in this subsection 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 of registration and to complete that part of the registration form pertaining to insurance and liability. The certificate of insurance shall:

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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.

Sec. 102-711. Permit fees; management fees.

(a) *Excavation permit fee.* An excavation permit fee shall be charged to every person who makes application to excavate in the right-of-way. The excavation permit fee shall be determined by the city

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(b) *Obstruction permit fee.* An obstruction permit fee shall be charged to every person who makes application to undertake activities in the right-of-way which will result in the obstruction of vehicular or pedestrian traffic. The obstruction permit fee shall be determined by the city engineer and shall be in an amount sufficient to recover the following costs:

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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; 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 the cost the city will incur in managing the vehicular and/or pedestrian traffic which will be disrupted by excavation and/or obstruction activities in the right-of-way. 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; the amount of vehicular, bicycle, and pedestrian traffic that is reasonably likely to be disrupted thereby; the traffic control measures and activities which the city will have to undertake to appropriately manage the disruption of traffic, including maintenance of special traffic control signage or signals, and the provision of traffic control personnel; and the loss of revenues to the city, including but not limited to the loss of parking revenues due to loss of access to parking spaces or facilities.

(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 such schedule as a per square foot fee for the area to be excavated or obstructed or impacted by excavation or obstruction. The fees for followup 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 such schedule as hourly rates which are to be based on the salary, benefit, and overhead costs to the city of the inspectors providing followup inspection services. Followup inspection services shall be charged to permittees on the basis of the number of hours of inspector time spent providing followup 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 provided in

this section 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 30 days after billing therefor by the city.

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

(h) Annual management fee. In January of each year, all right-of-way users required to pay an annual management fee, as provided in section 102-660, shall make a detailed report to the city engineer on the right-of-way usage reporting form provided by the city for that purpose, setting forth the amount of equipment that each such user has in city street rights-of-way, measured in equivalent lineal feet as instructed on such form. In March of each year, the city engineer shall submit to the city council a right-of-way management program budget, showing the anticipated revenues from right-of-way permit fees in the next fiscal

year, as well as the amount of non-allocable program costs which the city will incur, but which will not be allocable to particular users of the right-of-way and which cannot be recovered through permit fees as provided in this section. The city engineer shall also calculate and submit to the city council, as part of the budget for the right-of-way management program, an annual management fee to recover the non-allocable program costs. The annual management fee shall be expressed in cents per equivalent lineal foot of equipment to be charged to all users with equipment in city rights-of-way. The annual management fee to be charged to each user shall be determined by multiplying that user's number of equivalent lineal feet of equipment in City right-of-way by the per equivalent lineal foot fee amount set forth in the approved program budget. The city engineer shall report the annual management fee so calculated to each right-of-way user on or before May 1st of each year and each user's annual management fee shall be due and payable

on and as of July 1st of the fiscal year succeeding the approval and calculation of the annual management fee as above provided. An annual management fee shall be calculated for franchisees which pay a franchise fee to the city, but such franchisees shall not be required to pay such annual management fee in addition to the franchise fee.

(i) *Engineer's authority to estimate equivalent lineal footage of non-reporting user; penalty for under-reporting right-of-way usage.* The failure of the city engineer to send a right-of-way usage reporting form to a right-of-way user shall not excuse such user from the requirement of making such report as herein required. As to any right-of-way user who fails to complete or return a right-of-way usage reporting form as herein required by February 1, 2002, the city engineer is authorized to calculate the equivalent lineal feet of equipment that such user has in city street right-of-way upon such basis as the city engineer determines is fair and rational, and

to utilize the number of equivalent lineal feet so determined in the calculation of such user's annual management fee. The city engineer is further authorized to verify reported right-of-way usage by right-of-way users by any means the city engineer determines to be fair and rational. As to those right-of-way users who under-report by more than 5% their equivalent lineal feet of right-of-way usage, the city engineer is authorized to recalculate such usage and such user's annual management fee, and such users shall be required to immediately pay any balance in charges owing, with interest thereon at the rate of 7% per annum, since the due date of the annual management fee for such user.

(j) *Fees accumulated in separate fund.* All fees collected under this article and division 1 of this article, with the exception of that portion of such 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. As to any franchisee which pays a franchise fee to the city, the amount of the annual right-of-way management fee calculated for that franchisee by the city engineer shall be deducted from the franchise fee paid each year by the franchisee and shall be accumulated in the separate fund provided for in this paragraph.

(k) *Refund after revocation of permit.* Permit fees which were paid in connection with a permit which the city engineer has revoked for a breach as provided in section 102-729 are not refundable.

(l) *Schedule of fees.* 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 I.C. ch. 480A, shall be updated as needed prior to each construction season, and shall be approved by the city council by resolution.

Sec. 2. 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, Deputy City Attorney

Preston Daniels, Mayor

Attest:

I, Donna Boetel-Baker, City Clerk of the City of Des Moines, Iowa, hereby certify that the above and foregoing is a true copy of an ordinance (Roll Call No. 02-256), passed by the City Council of said City at a meeting held January 28, 2002, signed by the Mayor on January 28, 2002, and published as provided by law in the Business Record on February 11, 2002. Authorized by Publication Order No. 3105.

Donna Boetel-Baker, MMC City Clerk