

ORDINANCE NO. 14,202

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, and amended by Ordinance No. 14,043, passed January 28, 2002, by amending Article IX, Right-of-Way Occupancy of Chapter 102, Streets, Sidewalks, Skywalks and other Public Places, amending Section 102-657 by amending the definition of Registrant; by adding and enacting a new Section 102-661.01 relating to the application of regulatory provisions of the ordinance to unregistered users and occupants of the right-of-way; by amending Section 102-710 to provide for the setting of administrative penalties in a schedule of administrative penalties to be adopted by council by resolution; by amending Section 102-711 to establish a plan review fee and to provide for the setting of permit fees and the plan review fee in a schedule of fees to be adopted by council by resolution; by amending Section 102-712 to repeal a reference to a street degradation fee; by amending Section 102-717 to provide for alternate forms of security in the amount of \$25,000 to secure restoration of city right-of-way by persons excavating therein; and by amending Sections 102-767 and 102-768 to clarify references to application fees for initial issuance and for renewal of right-of-way licenses and enacting a new Section 102-657.

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, and amended by Ordinance No. 14,043, passed January 28, 2002, is hereby amended by amending Article IX, Right-of-Way Occupancy of Chapter 102, Streets, Sidewalks, Skywalks and other Public Places, by amending Section 102-657 by amending the definition of Registrant; by adding and enacting a new Section 102-661.01 relating to the application of regulatory provisions of the ordinance to unregistered users and occupants of the right-of-way; by amending Section 102-710 to provide for the setting of administrative penalties in a schedule of administrative penalties to be adopted by council by resolution; by amending Section 102-711 to establish a plan review fee and to provide for the setting of permit fees and the plan review fee in a schedule of fees to be adopted by council by resolution; by amending Section 102-712 to repeal a reference to a street degradation fee; by amending Section 102-717 to provide for alternate forms of security in the amount of \$25,000 to

secure restoration of city right-of-way by persons excavating therein; and by amending Sections 102-767 and 102-768 to clarify references to application fees for initial issuance and for renewal of right-of-way licenses

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:

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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For purposes of the regulatory provisions of this article, as set forth in section 102-661.01, registrant includes any person who uses or occupies the right-of-way, regardless whether the city has implemented the registration provisions of this article, and regardless whether such person has registered with the city as required by this article.

Sec. 102-661.01. Application of regulatory provisions to unregistered users and occupants of the right-of-way.

The regulatory provisions of this division, and of division 2 of this article, including but not limited to sections 102-662 through 102-672, 102-674, 102-709, 102-720, 102-724, 102-725 and 102-726 shall apply to users and occupants of the right-of-way who fail to register as herein provided and required, and the city engineer shall enforce the regulatory provisions of this article as to such unregistered users and occupant; provided that the city engineer may in his or her discretion, after the required date of registration for any user or occupant of the right-of-way, refuse to issue right-of-way permits to such unregistered user or occupant, and may refuse to recognize the status of such person as a user or occupant of the right-of-way.

Sec. 102-710. Administrative penalties for scheduled violations.

(a) The city engineer is authorized to impose administrative penalties upon persons who commit the following violations of this article:

- (1) Failure to obtain permit
- (2) Failure to provide required notification of emergency trenching or excavations
- (3) Failure to provide required traffic control devices
- (4) Failure to restore as required
 - (5) Failure to properly secure steel plates
 - (6) Failure to provide required notification

for inspection by
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(7) Failure of
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(8) Failure to restore
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The administrative penalty for each violation shall be as provided in the schedule of administrative penalties adopted by the city council by resolution. 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 30 days of the issuance of the notice at the city's permit and development center.

(b) The administrative penalties set out in the schedule of administrative penalties shall be charged in lieu of the fines and penalties provided for in section 102-3, 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 102-3 is, in view of the particular circumstances of the case, necessary to achieve compliance with the requirements of this article. The city engineer shall maintain a record of all violations, administrative penalties charged or other enforcement actions taken and shall make available such performance record to the building official when refusal to issue a permit pursuant to section 102-713 is being contemplated. The applicant shall be liable for any and all costs incurred by the city because of such violations.

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 engineer and shall be in an amount sufficient to recover the following costs:

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In addition, the city engineer may in appropriate circumstances include a degradation cost component in the calculation of excavation permit fees, 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; 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.* 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 fee for a follow-up inspection, conducted to obtain or confirm compliance with a specification, regulation, permit condition or city engineer's order, after a permittee is informed of a violation thereof, 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 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 in 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) *Plan review fee.* A plan review fee shall be charged to any person or permit applicant who submits plans and specifications for review by the city as required by Section 102-708. The plan review fee is intended to recover the salary, benefit, and overhead costs to the city of the city employees reviewing such plans and specifications, and

shall be based on the size of the area proposed to be excavated. The plan review fee shall be in the amount set in the schedule of fees adopted by the city council by resolution.

(h) *Payment of plan review fee.* If the plans and specifications are submitted for review and approval prior to application for an excavation permit, the plan review fee shall be paid prior to the City Engineer's approval of such plans and specifications, or prior to city's acceptance of the permit application. If the plans and specifications are submitted for review as part of an application for an excavation permit, the plan review fee shall be paid prior to issuance of the permit.

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

(j) *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.

(k) *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.

(l) *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.

(m) *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.

(n) *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. 102-712. Issuance of permits.

(a) Except as otherwise provided in this section, when the application made in accordance with sections 102-708 and 102-709 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 article 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 ensure 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 article. 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. In such instances 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 in such instances upon determining that one or more of the following conditions exists:

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**Sec. 102-717. Right-of-way restoration;
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form of security required.**

(a) *Restoration required.* The work to be done under an excavation permit issued pursuant to this article and the restoration of the right-of-way as required in this division 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 48 months thereafter.

(b) *Performance and maintenance bond.* An applicant for an excavation permit shall at the time of application for an excavation permit 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 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.

(c) *Bond condition.* The bond shall be conditioned upon:

(1) The faithful performance of the right-of-way restoration work required under this article, 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 article, 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 such 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 such failure or neglect, or fails to pay the maintenance costs incurred by the city, the right-of-way 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 \$25,000.00, to secure the applicant's performance of all restoration work which the applicant will become responsible for during the next 12-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 the applicant's performance as provided in subsection (c) of this section. If the costs as certified by the city engineer during such year are less than such letter of credit, certificate or 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 such 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 article 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 for licensed plumbing contractors.* A licensed plumbing contractor may satisfy the requirements of subsections (a) through (d) of this section by maintaining on file with the department a performance and maintenance bond in the amount of \$5000.00 for the period running concurrently with the plumbing contractor's license issued pursuant to chapter 26 of this Code, so long as such bond specifically provides coverage for any and all street excavations undertaken pursuant to this article 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 provided in this section 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 30 days of billing. If, during the 48 months following such restoration, the pavement settles due to the permittee's improper backfilling, the permittee shall pay to the city, within 30 days of billing, the cost of repairing the pavement.

(g) *Restoration by permittee.* An applicant for an excavation permit who has been determined qualified to perform right-of-way restoration work as provided in this section and who 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 preexcavation 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 48 months following its completion. During this 48-month period, the permittee shall, upon notification from the department, correct all restoration work to the extent necessary using the method required by the department. Such 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 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.

Sec. 102-767. Application for initial issuance of a license; registration required.

A person desiring to obtain a license as required in this division shall register such proposed use and occupancy of public right-of-way pursuant to division 1 of this article, shall make application for a license for such use and occupancy as provided in this article, and shall pay an application fee for initial issuance of the license. The application fee for initial issuance of a license and any future changes thereto shall be effective upon its inclusion in a schedule of fees adopted 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:

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Sec. 102-768. Issuance and renewal of licenses; license revocation and cancellation.

(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 subsection (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 subsection (g) of this section.

- a. 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 application fee for renewal of the license. The renewal application fee and any future changes thereto shall be effective upon its inclusion in a schedule of fees adopted by the city council by resolution. The renewal application shall be filed with the city engineer not less than 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 the public right-of-way to determine the licensee's continued compliance with the requirements stated in subsections (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 the public right-of-way comply with all requirements stated in subsections (c) and (e) of this section, the city engineer may renew the license for an additional term of up to five 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 subsections (c) and (e) of this section, the city engineer shall give notice of intent not to renew the license as provided in subsection (g) of this section. If 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.

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 A. Daniels, Mayor

Attest:

I, Diane Rauh, 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. 03-083), passed by the City Council of said City at a meeting held January 6, 2003 signed by the Mayor on January 6, 2003 and published as provided by law in the Des Moines Register on January 10, 2003 Authorized by Publication Order No. 3531.

Diane Rauh, City Clerk