

ORDINANCE NO. 15,386

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, as heretofore amended, by amending Sections 102-657, 102-660, 102-711 and 102-766, relating to right-of-way management fees.

WHEREAS, on September 14, 1998, by Roll Call No. 98-2883, the City Council of the City of Des Moines, Iowa approved Ordinance No. 13,638, enacting the City of Des Moines Right-of-Way Management Ordinance, since recodified as Chapter 102, Article IX of the Des Moines Municipal Code, relating to City right-of-way occupancy and regulation and management thereof; and

WHEREAS, said Ordinance was amended on January 6, 2003, by Roll Call No. 03-083, approving Ordinance No. 14,202 to further define and identify the manner and type of right-of-way regulation and management to be undertaken by the City; and

WHEREAS, pursuant to the Right-of-Way Management Ordinance, as amended, the City has been charged with collecting permit fees for excavations and obstructions within the City right-of-way, private license fees from private-entity right-of-way users, and right-of-way management fees as allowed under Iowa Code Chapter 480A from public-entity right-of-way users; and

WHEREAS, the Iowa Supreme Court ruling in Kragnes v. City of Des Moines, 801 N.W.2d 492 (Iowa 2012), identified and recognized certain actual costs incurred by City of Des Moines in regulating and managing the City right-of-way including degradation costs, construction costs, operating costs, disruption costs and various other costs, which costs are incurred due to the usage of the City right-of-way by private-entity and public-entity users for electric, gas, water, sewer, storm water, cable, phone, gas pipeline and private communications/fiber purposes; and

WHEREAS, in accordance with said ruling, the City commissioned a study to determine actual right-of-way management costs incurred versus the current amount of recovery of said costs

pursuant to the fee structure set forth in the Right-of-Way Management Ordinance, which study demonstrated a significant annual loss to the City between the costs incurred versus the amounts recovered for right-of-way users and reconciled at an average cost to the City of \$0.35 per equivalent lineal foot of right-of-way usage; and

WHEREAS, the City Council has determined that the Right-of-Way Management Ordinance should be revised to allow for recovery of incurred costs as set forth in the above-referenced Kragnes ruling, to eliminate private license fees in favor of charging right-of-way management fees to all right-of-way users, to add fees attributable to per-unit usage of the right-of-way, and to make other related revisions.

NOW, THEREFORE, 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, as heretofore amended, is hereby amended by amending Sections 102-657, 102-660, 102-711 and 102-766, relating to right-of-way management fees, 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:

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**City cost** or **city cost component** means the direct and indirect costs borne by the city for management of public rights-of-way, including but not limited to pavement management, traffic management, risk management, financial management, cost recovery, infrastructure oversight, budget analysis, recordkeeping, legal assistance, systems analysis, application processing and checking, issuing permits, inspecting job sites, creating and updating mapping systems, degradation costs, construction costs, operating costs, disruptive costs, and including other costs the city may incur in managing public rights-of-way and in performing all of the tasks required by this article.

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**City utilities** or **city enterprises** means any city-owned and/or city-operated utility other than the city stormwater management utility.

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**Disruptive cost or disruptive cost component** means the cost the city will incur that is reasonably related to the disruption or interruption of normal vehicular and/or pedestrian usage of the right-of-way.

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**License fee** means right-of-way management fee.

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**Right-of-way management fee or management fee (or annual right-of-way management fee or annual management fee)** means the fee imposed on right-of-way users each year to recover reasonable costs incurred by the city in managing its public right-of-way, which costs are not allocable to particular users of the right-of-way, and which are not recovered through permit fees.

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**Unit or unit of equipment** means utility equipment placed in the right-of-way at individual location(s) and that is not part of and/or is measured separately from a lineal-footage equipment system.

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**Cross reference(s)**--Definitions generally, § 1-2.

**Sec. 102-660. Persons subject to registration, permitting and licensing.**

- (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. 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. 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 or 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 either a permit for such has been obtained pursuant to chapter 122 of this Code or a garden lease has been obtained pursuant to chapter 74 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, or a franchise or similar rights from the state of Iowa, for the use of city right-of-way for the provision of a utility service shall be required to register as provided in this division, and pay a management fee, 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. However, if such franchise provides for the payment of a franchise fee, the franchisee shall not be required to pay such management fee or permit fees in addition to the franchise fee.
- (f) City utilities and enterprises and public utilities which occupy and use right-of-way, other than by easement, for the provision of utility and enterprise services shall be required to

register as provided in this division and pay management fees. All city utilities and enterprises and public utilities which occupy and use right-of-way shall 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. Work crews and contractors performing work in the right-of-way on behalf of the city and/or public utility 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 division 2 of this article.

- (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 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. 102-711. Permit fees; management fees.**

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- (d) *Computation of disruptive cost component for permitting purposes.* The disruptive cost is the cost the city will incur in managing the vehicular and/or pedestrian traffic which will be disrupted by permitted 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 permits 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.

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- (j) *Management fee.* By January 1<sup>st</sup> of each year, all right-of-way users required to pay a management fee 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 and/or on a per-unit basis, as applicable and as instructed on such form. The management fee shall be expressed in (i) cents per equivalent lineal foot of equipment to be charged to all users with more than one linear foot of equipment in city rights-of-way, and (ii) price per unit of equipment to be charged to all users with unit-based equipment in city rights-of-way. The 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 schedule of management fees, and/or by multiplying that user's number of units of equipment in city right-of-way by the per-unit fee amount set forth in the approved schedule of management fees. The city engineer shall report and invoice the management fee so calculated to each right-of-way user each year and each user's management fee shall be due and payable within sixty (60) calendar days of the date on the invoice. Right-of-way users that are not required to pay a management fee include permittees that do not use equipment in the right-of-way other than for the purposes of installation or maintenance thereof; franchisees that pay a franchise fee to the city; public utilities operating within right-of-way by easement granted of record by the city; and the city's stormwater management utility whose equipment constitutes part of the right-of-way infrastructure.

- (k) Engineer's authority to waive the annual usage reporting requirement for ROW users; *engineer's authority to estimate equivalent lineal footage and/or number of units of non-reporting user; penalty for under-reporting right-of-way usage.* For any year as to which the city engineer determines that the relative change in right-of-way usage by all right-of-way users is insufficient to materially affect the calculation of the management fee as to individual users, the city engineer may waive such annual reporting requirement as set forth in subparagraph (j) above and may utilize the usage reported by right-of-way users for the most recent prior year in which all users were required to report. Such waiver shall be reported to all right-of-way users in lieu of sending a right-of-way usage reporting form to such users. As to any year in which right-of-way usage reporting is not so waived, 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 the January 1<sup>st</sup> deadline, the city engineer is authorized to calculate the equivalent lineal feet of equipment and/or number of units of equipment, as applicable, 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 and/or number of units, as applicable, so determined in the calculation of such user's 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 and/or number of units of equipment within city right-of-way, the city engineer is authorized to recalculate such usage and such user's 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 management fee for such user.
- (l) *Fees accumulated in separate fund.* All fees collected under this article and division 1 of this article shall be accumulated in a separate fund and may be used or distributed from said fund for any purpose at the city's discretion, including but not limited to reimbursement and/or payment of the city's administrative costs of the right-of-way management program, capital improvement projects or debt service payments associated with right-of-way maintenance and improvements, and other direct and indirect costs incurred by the city in managing the right-of-way. As to any franchisee which pays a franchise fee to the city, the amount of the 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.

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(n) *Schedule of fees.*

- (1) 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.
- (2) The management fees to be paid in each instance shall be determined by the city engineer by reference to a schedule of management fees, which shall be developed in conformance with the requirements of I.C. ch. 480A, shall be updated as needed based on city engineer review of all costs incurred by the city in the management of right-of-way, but not less than once every five (5) calendar years, and shall be approved by the city council by resolution.

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Division 3. Franchise or License  
for Right-of-Way Use  
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**Sec. 102-766. Compensation required; franchise and management fees.**

- (a) No franchise 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 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) All licenses granted by the city shall require the licensee to pay a right-of-way management fee. The management fee shall be calculated as provided for in the schedule of management fees developed and approved in accordance with section 102-711 of this article.
- (d) In addition to being required to pay franchise and management fees, franchisees and licensees may, to the extent allowed by I.C. § 480A.1 et seq., be required to provide in-kind services as compensation for such use, including but not limited to access to such trenches or ducts so that the city can install its equipment therein. Franchisees and licensees who provide such services as utility services, as defined in this article, may, to the extent allowed by I.C. § 480A.1 et seq., also be required to provide access at no cost to the services provided by the franchisee or licensee at a location to be designated by the city, or the equivalent value of the service to be provided at such location.
- (e) Franchise and management 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 date of a written request from the city engineer, 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 management fee due for such period. If such audit results in a determination that an additional amount of franchise or management 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 per year calculated from the due dates for the franchise or management fee payments in question. The city manager may waive the audit requirement when he or she

determines that the management or franchise fee amount owing to the city is too minimal to justify audit.

- (f) The licensee shall pay interest at the rate of ten percent per year on any overdue management fee calculated from the due date of the fee.
- (g) Nothing in this division shall be construed to limit the liability of a franchisee or licensee for all applicable federal, state and local taxes.
- (h) Nothing in this division 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 division.

Section 2. This ordinance shall be in full force and effect as of January 1, 2018, at which time Sections 102-657, 102-660, 102-711 and 102-766, or the applicable portions thereof, in effect as of the date of publication of this ordinance shall be repealed and replaced with the above amendments thereto.

FORM APPROVED:

Glenna K. Frank, Assistant City Attorney

T. M. Franklin Cownie, 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. 15-1270), passed by the City Council of said City at a meeting held July 27, 2015 signed by the Mayor on July 27, 2015 and published and provided by law in the Business Record on August 14, 2015. Authorized by Publication Order No. 9206.

Diane Rauh, City Clerk