



**Roll Call Number**

**Agenda Item Number**

33

**Date** ..... August 5, 2020 reconvened from August 3, 2020 .....

An Ordinance entitled, "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 Chapter 102, Article IV, Sections 102-657, 102-660, 102-708, 102-711, 102-766, and 102-768 and by adding Section 102-766.02, relating to Right-Of-Way-Occupancy",

which was considered and voted upon for the first time under Roll Call No. 20- 1070 of June 22, 2020, and considered and voted upon for the second time under Roll Call No. 20- 1146 of July 13, 2020, again presented.

Moved by \_\_\_\_\_ that this ordinance do now pass.

ORDINANCE NO. \_\_\_\_\_

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
BOESEN				
GATTO				
GRAY				
MANDELBAUM				
VOSS				
WESTERGAARD				
TOTAL				

**CERTIFICATE**

I, P. Kay Cmelik, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

MOTION CARRIED

APPROVED

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Clerk

## ARTICLE IX. RIGHT-OF-WAY OCCUPANCY

### 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:

*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 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.

*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.

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

*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.

*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.

*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 that is reasonably related to the disruption or interruption of normal vehicular and/or pedestrian usage of the right-of-way.

*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.

*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.

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

*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:

- (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.

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, but excludes SWF permittees.

*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 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 right-of-way, which costs will not be allocable to particular users of the right-of-way, and which are not recovered through permit fees.~~

*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.

*Service or utility service* means and includes:

- (1) The services provided by a corporation organized for the purposes set forth in I.C. § 476.1 et seq., or provided by a public utility as therein defined; and
- (2) Those services for which cities have been granted franchising authority pursuant to I.C. § 364.2, including electric light and power, heating, telegraph, cable television, district telegraph and alarm, motorbus, trolley bus, street railway or other public transit, water works, or gasworks services provided to customers within the city.

*Small wireless facility* (“SWF”) means a wireless facility that meets the following requirements:

- (1) Each antenna is no more than six cubic feet in volume.
- (2)
  - (a) All other equipment associated with the small wireless facility is cumulatively no more than twenty-eight cubic feet in volume.
  - (b) For purposes of this subparagraph, volume shall be measured by the external displacement of the primary equipment enclosure, not the internal volume of such enclosure. An associated electric meter, concealment, telecommunications demarcation box, ground-based enclosures, battery backup power systems, grounding equipment, power transfer switch, cutoff switch, cable, conduit, and any equipment that is concealed from public view within or behind an existing structure or concealment may be located outside of the primary equipment enclosure and shall not be included in the calculation of the equipment volume.
- (3) The City has determined that the design and installation of the small wireless facility reasonably matches the aesthetics of an existing utility pole or wireless support structure that incorporates decorative elements.
- (4) The City has determined that the small wireless facility will not result in any noncompliance by the City with the federal Americans With Disabilities Act.
- (5) The City has determined that the small wireless facility will not impair, interfere with, or preclude the safe and effective use of facilities already located in the public right-of-way for pedestrian, vehicular, utility or other City public right-of-way purposes.

*Small wireless facility public right-of-way use permittee or SWF permittee* means any person to whom a small wireless facility public right-of-way use permit, also known as a SWF permit, has been issued by the city for the placement of a small wireless facility within the right-of-way in accordance with Division III of this Article.

*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* 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.

*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.

*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.

*Utility pole* means a pole or similar structure owned or installed by or on behalf of a SWF permittee that is designed specifically for and used to carry one or more small wireless facilities and/or transmission equipment or wires for wireless telecommunications service use and that meets the following requirements:

- (1) The utility pole does not exceed the greater of 10 feet in height above the tallest utility pole, as defined in Iowa Code Section 8C.2, existing on or before July 1, 2017, located within 500 feet of the proposed new, replacement, or modified utility pole, or 40 feet in height above ground level, unless a greater height is allowed by Chapter 102 of this Code.
- (2) Other than a utility pole replacing an existing pole, the utility pole is not located within an underground district designated by City Council resolution or ordinance prior to submittal of the pole application.
- (3) Other than a utility pole replacing an existing pole, the utility pole is not located within an area zoned and used for single-family residential use.
- (4) The City has determined that the utility pole will not result in any noncompliance by the City with the federal Americans With Disabilities Act.
- (5) The City has determined that the utility pole will not impair, interfere with, or preclude the safe and effective use of facilities already located in the public right-

of-way for pedestrian, vehicular, utility or other City public right-of-way purposes.

Unless otherwise described, for purposes of the Right-of-Way Management Ordinance, a “utility pole” is considered a “small wireless facility”.

(O.13,638; C00, § 102-657; O.14,043, 14,202, 15,386, 15,761)

**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 granted of record by the city, 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.

(O.13,638; C00, § 102-660; O.14,043, 14,314, 14,366, 15,386)

**Sec. 102-708. Permit applications; plans and specifications; insurance; indemnification.**

- (a) Before any permit required by this article 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 and the permit applicant has:
- (1) If required, registered with the department pursuant to section 102-660.
  - (2) 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 the following:
    - a. Prior obstruction or excavation permits;
    - b. Any loss, damage, or expense suffered by the city as a result of the applicant's prior excavations or obstructions of the rights-of-way or any emergency actions taken by the city in connection therewith;
    - c. Restoration of the right-of-way by the city or the city's contractor; and
    - d. ~~System management fees; and~~
    - e. ~~Fines assessed to the applicant pursuant to section 102-710.~~
  - (3) 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:
    - a. The place, extent and purpose of the contemplated work including the identity of and location in the right-of-way at which any excavation is to be made.
    - b. The time when the work is to be commenced and the time it is to be completed.
    - c. For whom and in connection with what abutting property, if any, the work is to be performed.
    - d. 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.
    - e. The name of the person or contractor who will do the work, the person who will be in charge thereof, and the public registration number issued by the state labor commissioner pursuant to I.C. ch. 91C for all contractors to be involved in the work for which the permit is sought.



- (4) Provided as-built maps or GIS mapping data for all equipment which it has placed in the right-of-way in the past.
- (5) 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 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 such plans according to available existing records. Except where plans and specifications have been provided to the city pursuant to an application for a grading permit under section 42-87 or pursuant to the requirements of articles II and III of chapter 110 of this Code and articles IV, V and VI of chapter 118 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 102-717, 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 and that the applicant shall pay the actual costs that 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 billed to the applicant following completion of the right-of-way restoration work and paid by the applicant in accordance with section 102-717(f) of this code.
- (d) Applications for obstruction and excavation permits shall be accompanied by an insurance certificate as required by section 102-709, unless such certificate has been previously filed with the department and is still in effect. Applications for excavation permits, and obstruction permits when required as provided for in section 102-717(i), shall further be accompanied by a surety or performance and maintenance bond or other form or security as required by section 102-717, as applicable, unless such bond has been previously filed with the department and is still in effect.
- (e) Except as otherwise provided in section 102-730, all applications for a permit under this article 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 article.
- (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 city 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.

(C42, § 84-2; C54, C62, § 54-65; O.7397; C75, C79, C85, § 23-54; O.11,711; C91, § 23-54; O.11,993, 13,638; C00, § 102-708; O.15,092, 15,188)

**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:

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

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:

- (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; 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 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.

- (de) *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.
- (ef) *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.
- (gf) *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.
- (gh) *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.
- (hi) *Fees doubled during probation.* All permit fees shall be doubled during a probationary period.

- (ji) ~~Management fee. On or before 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 SWF permittees, permittees that do not use equipment in the right-of-way other than for the purposes of installation or maintenance thereof; franchisees that do not 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.~~
- ~~(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.~~
- (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.~~

(O.13,638; C00, § 102-711; O.14,043, 14,202, 14,463, 15,386, 15,761)

#### **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) Reserved.~~
- (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.

- (df) ~~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.
- (he) 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.

(C91, § 23-66.08; O.13,638, C00, § 102-766; O.15,386, 15,421, 15,422)

#### **Sec. 102-766.02. Reporting requirements.**

On or before January 1<sup>st</sup> of each year, all licensees 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.

#### **Sec. 102-768. Issuance and renewal of licenses and SWF permits; 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.
- (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 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.

(c) In determining the length of the term of an initial or a 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) There is insufficient space in the right-of-way to accommodate the proposed use, given the other existing uses thereof;
- (2) 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 the right-of-way;
- (3) Such use is incompatible with adjacent public or private uses of that right-of-way;
- (4) 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) 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 the licensee's failure to comply with any of the requirements stated in subsection (e) of this section, the city engineer shall give notice of intent to revoke such license as provided in subsection (g) of this section.

(e) The following shall constitute grounds for refusal to issue or renew a license, or for revocation of a license for use or occupancy of public right-of-way:

- (1) The licensee's failure to observe or comply with any of the following:
  - a. 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
  - b. The licensee is current in the payment of license fees, if applicable, and the licensee has made such payments fully and when due.
- (2) The licensee's commission of any of the following acts:
  - a. 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 the public right-of-way or in connection with its use of public right-of-way; or
  - b. 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) The city engineer shall give notice of intent to cancel such license as provided in subsection (g) of this section if during the term of any license the city engineer determines that:
  - (1) The licensee's continued use of the public right-of-way will unduly burden the city or the public in its use of that property;
  - (2) The public right-of-way for which the license was issued will be required for municipal purposes during the term of the license;
  - (3) The licensee's equipment at a particular location will interfere with:
    - a. A present or future city use of the right-of-way;
    - b. A public improvement undertaken or to be undertaken by the city;
    - c. An economic development project in which the city has an interest or investment; or
    - d. The public's safety or convenience in using the right-of-way for ordinary travel;
  - (4) The public health, safety and welfare requires it; or
  - (5) The continued existence of the license is not in the city's best interests.
- (g) Notice of intent not to issue a license for use of the 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 30 days after submission of the application. Notice of intent not to renew a license for use of the 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 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 102-802. 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 specified in the city engineer's written decision upon the 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 the 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 the 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 division 4 of this article.
- ~~(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, such 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.~~



- (ij) Notwithstanding the notice and hearing requirements of subsection (g) of this section, the city engineer may in emergency circumstances order the immediate relocation or removal of equipment from the right-of-way and may, upon the licensee's failure to comply with such order, immediately remove, relocate, or take possession of such equipment at the licensee's expense.
- (jk) SWF permit applications shall be subject to denial in accordance with the provisions of Iowa Code Section 8C.7A and 8C.7C. SWF permits shall be subject to revocation and/or cancellation in the event that the SWF permittee fails to comply with all provisions set forth in the SWF permit, or as otherwise set forth in Iowa Code Chapter 8C. A SWF permit may be modified upon City approval following written application by a SWF permittee, or in accordance with the following when applicable:
  - (1) If the city undertakes any maintenance, public improvement project, or reconstruction of property or equipment which requires the modification, relocation, or reconstruction of the small wireless facility or utility pole, in which event such work and the costs thereof shall be the responsibility of the building permittee or its successor.
  - (2) If a project is undertaken necessitating the modification, relocation, or reconstruction of the small wireless facility or utility pole for a private commercial purpose, in which event the city may require the owner or successor to modify, relocate, or reconstruct the small wireless facility or new utility pole upon prepayment of the costs of such work by the private commercial entity whose project facilitates the need for such work.

(C91, § 23-66.10; O.13,638; C00, § 102-768; O.14,202, 15,761)