



Shakopee City Code

SEC. 7.17. RIGHT-OF-WAY MANAGEMENT. (Added, Ord. 570, August 24, 2000)

Subd. 1. Findings, Purpose, and Intent. To provide for the health, safety and welfare of its citizens, and to ensure the integrity of its streets and the appropriate use of the rights-of-way, the City strives to keep its rights-of-way in a state of good repair and free from unnecessary encumbrances.

Accordingly, the City enacts this new Section of this code relating to right-of-way permits and administration. This Section imposes reasonable regulation on the placement and maintenance of facilities and equipment currently within the City's rights-of-way or to be placed therein at some future time. It is intended to complement the regulatory roles of state and federal agencies. Under this Section, persons excavating and obstructing the rights-of-way will bear financial responsibility for their work through the recovery of out-of-pocket and projected costs from persons using the public rights-of-way.

This Section shall be interpreted consistently with 1997 Session Laws, Chapter 123, substantially codified in Minnesota Statutes, Sections 237.16, 237.162, 237.163, 237.79, 237.81, and 238.086 (the "Act") and the other laws governing applicable rights of the City and users of the right-of-way. This Section shall also be interpreted consistent with Minnesota Rules 7819.0050 – 7819.9950 where possible. To the extent that any provision of this Section cannot be interpreted consistently with the Minnesota Rules, the interpretation most consistent with the Act and other applicable statutory and case law is intended.

Subd. 2. Election to Manage the Public Rights-of-Way. Pursuant to the authority granted to the City under state and federal statutory, administrative and common law, the City elects pursuant Minnesota Statutes, Section 237.163, Subdivision 2(b), to manage rights-of-way within its jurisdiction.

Subd. 3. Definitions. The following definitions apply in this Section of this code. References to "**subdivisions**" are unless otherwise specified references to subdivisions in this Section.

"**Abandoned Facility**" means a facility no longer in service or physically disconnected from a portion of the operating facility, or from any other facility, that is in use or still carries service. A facility is not abandoned unless declared so by the right-of-way user.

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

"**City**" means the City of Shakopee, Minnesota. For purposes of Subdivision 27, City means its elected officials, officers, employees and agents.

"**Commission**" means the Minnesota Public Utilities Commission.

"**Congested Right-of-Way**" means a crowded condition in the subsurface of the public right-of-way that occurs when the maximum lateral spacing between existing underground facilities does not allow for construction of new underground facilities without using hand digging to expose the existing lateral facilities in conformance with Minnesota Statutes, Section 216D.04, Subdivision 3, over a continuous length in excess of 500 feet.

"**Construction Performance Bond**" means any of the following forms of security provided at permittee's option:

1. Individual project bond;
2. Cash deposit;

3. Security of a form listed or approved under Minnesota Statutes, Section. 15.73, Subdivision;
4. Letter of Credit, in a form acceptable to the City;
5. Self-insurance, in a form acceptable to the City;
6. A blanket bond for projects within the City, or other form of construction bond, for a time specified and in a form acceptable to the City.

"Degradation" means a decrease in the useful life of the right-of-way caused by excavation in or disturbance of the right-of-way, resulting in the need to reconstruct such right-of-way earlier than would be required if the excavation or disturbance did not occur.

"Degradation Cost" subject to Minnesota Rules 7819.1100 means the cost to achieve a level of restoration as determined by the City at the time the permit is issued, not to exceed the maximum restoration shown in plates 1 to 13, set forth in Minnesota Rules, Parts 7819.9900 to 7819.9950.

"Degradation Fee" means the estimated fee established at the time of permitting by the City to recover costs associated with the decrease in the useful life of the right-of-way caused by the excavation, and which equals the degradation cost.

"Department" means the department of public works of the City.

"Department Inspector" means any person authorized by the City to carry out inspections related to the provisions of this Section.

"Director" means the Director of the Department of Public Works of the City, or Director's designee.

"Delay Penalty" is the penalty imposed as a result of unreasonable delays in right-of-way excavation, obstruction, patching, or restoration as established by permit.

"Emergency" means a condition that (1) poses a danger to life or health, or of a significant loss of property; or (2) requires immediate repair or replacement of facilities in order to restore service to a customer.

"Equipment" means any tangible asset used to install, repair, or maintain facilities in any right-of-way.

"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 this Section, must be obtained before a person may excavate in a right-of-way. An excavation permit allows the holder to excavate that part of the right-of-way described in such permit.

"Excavation Subdivision Permit Fee" means money paid to the City by an applicant to cover the costs as provided in Subdivision 12.

"Facility or Facilities" means tangible asset in the public right-of-way required to provide utility service. The term does not include facilities to the extent the location and relocation of such facilities are preempted by Minnesota Statutes, Section 161.45, governing utility facility placement in state trunk highways.

"Five-year Project Plan" shows projects adopted by the City for construction within the next five (5) years.

"High Density Corridor" means a designated portion of the public right-of-way within which telecommunications right-of-way users having multiple and competing facilities may be required to build and install facilities in a common conduit system or other common structure.

"Hole" means an excavation in the right-of-way, with the excavation having a length less than the width of the pavement or adjacent pavement.

"Local Representative" means a local person or persons, or designee of such person or persons, authorized by a registrant to accept service and to make decisions for that registrant regarding all matters within the scope of this Section.

"Management Costs" means the actual costs the City incurs in managing its rights-of-way, including such costs, if incurred, as those associated with registering applicants; issuing, processing, and verifying right-of-way permit applications; inspecting job sites and restoration projects; maintaining, supporting, protecting, or moving user facilities during right-of-way work; determining the adequacy of right-of-way restoration; restoring work inadequately performed after providing notice and the opportunity to correct the work; and revoking right-of-way permits. Management costs do not include payment by a telecommunications right-of-way user for the use of the right-of-way, the fees and cost of litigation relating to the interpretation of Minnesota Session Laws 1997, Chapter 123; Minnesota Statutes, Sections 237.162 or 237.163 or any ordinance enacted under those sections, or the City fees and costs related to appeals taken pursuant to Subdivision 29 of this Section.

"Obstruct" means to place any tangible object in a right-of-way so as to hinder free and open passage over that or any part of the right-of-way.

"Obstruction Permit" means the permit which, pursuant to this Section, must be obtained before a person may obstruct a right-of-way, allowing the holder to hinder free and open passage over the specified portion of that right-of-way, for the duration specified therein, including a blanket permit for a period of time and for types of work specified by the Director, if deemed appropriate in Director's discretion.

"Obstruction Permit Fee" means money paid to the City by a permittee to cover the costs as provided in Subdivision 12.

"Patch or Patching" means a method of pavement replacement that is temporary in nature. A patch consists of (1) the compaction of the subbase and aggregate base, and (2) the replacement, in kind, of the existing pavement for a minimum of two (2) feet beyond the edges of the excavation in all directions. A patch is considered full restoration only when the pavement is included in the City's five (5) year project plan.

"Pavement" means any type of improved surface that is within the public right-of-way and that is paved or otherwise constructed with bituminous, concrete, aggregate, or gravel.

"Permit" has the meaning given "right-of-way permit" in Minnesota Statutes, Section 237.162.

"Permittee" means any person to whom a permit to excavate or obstruct a right-of-way has been granted by the City under this Section.

"Person" means an individual or entity subject to the laws and rules of this state, however organized, whether public or private, whether domestic or foreign, whether for profit or nonprofit, and whether natural, corporate, or political.

"Probation" means the status of a person that has not complied with the conditions of this Section.

"Probationary Period" means one (1) year from the date the permittee has been notified in writing that it has been placed on probation.

"Public Right-of-Way" has the meaning given it in Minnesota Statutes, Section 237.162, Subdivision 3.

"Registrant" means any person who (1) has or seeks to have its equipment or facilities 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 place its facilities or equipment in the right-of-way.

"Restore or Restoration" means the process by which an excavated right-of-way and surrounding area, including pavement and foundation, is returned to the same condition and life expectancy that existed before excavation.

"Restoration Cost" means the amount of money paid to the City by a permittee to achieve the level of restoration according to plates 1 to 13 of Minnesota Rule 7819.1100 Subpart 1, on file with the Director.

"Right-of-Way Permit" means either the excavation permit or the obstruction permit, or both, depending on the context, required by this Section.

"Right-of-Way User" means (1) a telecommunications right-of-way user as defined by Minnesota Statutes, Section 237.162, Subdivision 4; or (2) a person owning or controlling a facility in the right-of-way that is used or intended to be used for providing utility service, and who has a right under law, franchise, or ordinance to use the public right-of-way.

"Service or Utility Service" means and includes (1) services provided by a public utility as defined in Minnesota Statutes 216B.02, Subdivisions 4 and 6; (2) services of a telecommunications right-of-way user, including transporting of voice or data information; (3) services of a cable communications system as defined in Minnesota Statutes, Chapter 238.02, Subdivision 3; (4) natural gas or electric energy or telecommunications services provided by a local government unit; (5) services provided by a cooperative electric association organized under Minnesota Statutes, Chapter 308A; and (6) water, sewer, steam, cooling or heating services.

"Service Lateral" means an underground facility that is used to transmit, distribute, or furnish gas, electricity, communications, or water from a common source to an end-use customer. A service lateral is also an underground facility that is used in the removal of wastewater from a customer's premises. (Added, Ord. 760, May 25, 2006)

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

"Temporary Surface" means the compaction of subbase and aggregate base and replacement, in kind, of the existing pavement only to the edges of the excavation. It is temporary in nature except when the replacement is of pavement included in the City's two (2) year plan, in which case it is considered full restoration.

"Trench" means an excavation in the right-of-way, with the excavation having a length equal to or greater than the width of the pavement or adjacent pavement.

"Telecommunication Right-of-Way User" means a person owning or controlling a facility in the right-of-way, or seeking to own or control a facility in the right-of-way, that is used or is intended to be used for transporting telecommunication or other voice or data information. For purposes of this Section, a cable communication system defined and regulated under Minnesota Statutes, Chapter 238, and telecommunication activities related to providing natural gas or electric energy services whether provided by a public utility as defined in Minnesota Statutes, Section 216B.02, a municipality, a municipal gas or power agency organized under Minnesota Statutes, Chapters 453 and 453A, or a cooperative electric association organized under Minnesota Statutes, Chapter 308A, are not telecommunications right-of-way users for purposes of this Section.

"Two Year Project Plan" shows projects adopted by the City for construction within the next two (2) years.

Subd. 4. Administration. The Director is the principal City official responsible for the administration of the rights-of-way, right-of-way permits, and the ordinances related thereto. The Director may delegate any or all of the duties hereunder.

Subd. 5. Utility Coordination Committee. The City may create an advisory utility coordination committee. Participation on the committee is voluntary. It will be composed of any registrants that wish to assist the City in obtaining information and by making recommendations regarding use of the right-of-way, and to improve the process of performing construction work therein. The City may determine the size of such committee and shall appoint members from a list of registrants that have expressed a desire to assist the City.

Subd. 6. Registration and Right-of-Way Occupancy.

- A. Registration.** Each person who occupies, uses, or seeks to occupy or use, the right-of-way or place any equipment or facilities in or on the right-of-way, including persons with installation and maintenance responsibilities by lease, sublease or assignment, must register with the City. Registration will consist of providing application information and paying a registration fee.
- B. Registration Prior to Work.** No person may construct, install, repair, remove, relocate, or perform any other work on, or use any facilities or any part thereof in any right-of-way without first being registered with the City.
- C. Exceptions.** Nothing in this Section shall be construed to repeal or amend the provisions of a City ordinance establishing the rights of and limitations placed on persons to plant or maintain boulevard plantings or gardens in the area of the right-of-way between their property and the street curb. Persons shall not be deemed to use or occupy the right-of-way, and shall not be required to obtain any permits or satisfy any other requirements under this Section for the following:
 - 1. Planting or maintaining boulevard plantings or gardens;
 - 2. Other surface landscaping works;
 - 3. Maintenance of driveways and parking lots unless such maintenance requires excavation work in the right-of-way; (Amended, Ord. 578, September 14, 2000)
 - 4. Construction or maintenance of street furnishings, bus stop benches, shelters, or posts and pillars;
 - 5. Snow removal activities;
 - 6. Construction and maintenance of irrigation systems provided that the system does not connect directly to water mains in the right-of-way.

Nothing herein relieves a person from complying with the provisions of the Minnesota Statutes, Chapter 216D, Gopher One Call Law.

Subd. 7. Registration Information.

- A. Information Required.** The information provided to the City at the time of registration shall include, but not be limited to:
 - 1. Each registrant's name, Gopher One-Call registration certificate number, address and e-mail address if applicable, and telephone and facsimile numbers.

2. The name, address and e-mail address, if applicable, and telephone and facsimile numbers of a local representative. The local representative or designee shall be accessible for consultation at all times. Current information regarding how to contact the local representative in an emergency shall be provided at the time of registration.
 3. A certificate of insurance or self-insurance:
 - a. Verifying that an insurance policy has been issued to the registrant by an insurance company authorized to do business in the State of Minnesota, or a form of self insurance acceptable to the City;
 - b. Verifying that the registrant is insured against claims for personal injury, including death, as well as claims for property damage arising out of the (i) use and occupancy of the right-of-way by the registrant, its officers, agents, employees and permittees, and (ii) placement and use of facilities and equipment in the right-of-way by the registrant, its officers, agents, employees and permittees, including, but not limited to, protection against liability arising from completed operations, damage of underground facilities and collapse of property;
 - c. Either naming the City as an additional insured as to whom the coverages required herein are in force and applicable and for whom defense will be provided as to all such coverages or otherwise providing evidence satisfactory to the Director that the City is fully covered and will be defended through registrant's insurance for all actions included in Minnesota Rule, Part 7819.1250;
 - d. Requiring that the City be notified thirty (30) days in advance of cancellation of the policy or material modification of a coverage term;
 - e. Indicating comprehensive liability coverage, automobile liability coverage, workers compensation and umbrella coverage established by the City in amounts sufficient to protect the City and the public and to carry out the purposes and policies of this Section.
 4. The City may require a copy of the actual insurance policies if necessary to ensure the Director that the policy provides adequate third party claim coverage and City indemnity and defense coverage for all actions included in the indemnity required by Minnesota Rule, Part 7819.1250.
 5. Such evidence as the Director may require that the person is authorized to do business in Minnesota.
- B. Notice of Changes.** The registrant shall keep all of the information listed above current at all times by providing to the City information as to changes within fifteen (15) days following the date on which the registrant has knowledge of any change.

Subd. 8. Reporting Obligations.

- A. Operations.** Each registrant shall, at the time of registration and by December 1 of each year, file a construction and major maintenance plan for underground facilities with the City. Such plan shall be submitted using a format designated by the City and shall contain the information determined by the City to be necessary to facilitate the coordination and reduction in the frequency of excavations and obstructions of rights-of-way.

The plan shall include, but not be limited to, the following information:

1. The locations and the estimated beginning and ending dates of all projects to be commenced during the next calendar year (in this section, a "next-year project"); and
2. To the extent known, the tentative locations and estimated beginning and ending dates for all projects contemplated for the five (5) years following the next calendar year (in this section, a "five (5) year project").

The term "**project**" in this section shall include both next-year projects and five (5) year projects.

By January 1 of each year the City will have available for inspection in the City's office a composite list of all projects of which the City has been informed of the annual plans. All registrants are responsible for keeping themselves informed of the current status of this list. Thereafter, by February 1, each registrant may change any project in its list of next-year projects, and must notify the City and all other registrants of all such changes in said list. Notwithstanding the foregoing, a registrant may at any time join in a next-year project of another registrant listed by the other registrant.

- B. Additional Next-Year Projects.** Notwithstanding the foregoing, the City will not deny an application for a right-of-way permit for failure to include a project in a plan submitted to the City if the registrant has used commercially reasonable efforts to anticipate and plan for the project.

Subd. 9. Permit Requirement.

- A. Permit Required.** Except as otherwise provided in this code, no person may obstruct or excavate any right-of-way without first having obtained the appropriate right-of-way permit from the City to do so.
1. **Excavation Permit.** An excavation permit is required by a registrant to excavate that part of the right-of-way described in such permit and to hinder free and open passage over the specified portion of the right-of-way by placing facilities described therein, to the extent and for the duration specified therein.
 2. **Obstruction Permit.** An obstruction permit is required by a registrant to hinder free and open passage over the specified portion of the right-of-way by placing equipment described therein on the right-of-way, to the extent and for the duration specified therein. An obstruction permit is not required if a person already possesses a valid excavation permit for the same project.
- B. Permit Extensions.** No person may excavate or obstruct the right-of-way beyond the date or dates specified in the permit unless (i) such person makes a supplementary application for another right-of-way permit before the expiration of the initial permit, and (ii) a new permit or permit extension is granted.
- C. Delay Penalty.** In accordance with Minnesota Rule 7819.1000 Subp. 3 and notwithstanding Subdivision 2 of this Section, the City shall establish and impose a delay penalty for unreasonable delays in right-of-way excavation, obstruction, patching, or restoration. The delay penalty shall be established from time to time by City Council resolution. A delay penalty will not be imposed for delays due to force majeure, including inclement weather, civil strife, acts of God, or other circumstances beyond the control of the applicant.
- D. Permit Display.** Permits issued under this Section shall be conspicuously displayed or

otherwise available at all times at the indicated work site and shall be available for inspection by the City.

Subd. 10. Permit Applications. Application for a permit is made to the City. Right-of-way permit applications shall contain, and will be considered complete only upon compliance with the requirements of the following provisions:

1. Registration with the City pursuant to this Section;
2. Submission of a completed permit application form, including all required attachments, and scaled drawings showing the location and area of the proposed project and the location of all known existing and proposed facilities.
3. Payment of money due the City for:
 - a. permit fees, estimated restoration costs and other management costs;
 - b. prior obstructions or excavations;
 - c. any undisputed loss, damage, or expense suffered by the City because of applicant's prior excavations or obstructions of the rights-of-way or any emergency actions taken by the City;
4. Payment of disputed amounts due the City by posting security or depositing in an escrow account an amount equal to at least 100% of the amount owing.

Posting an additional or larger construction performance bond for additional facilities when applicant requests an excavation permit to install additional facilities and the City deems the existing construction performance bond inadequate under applicable standards.

Subd. 11. Issuance of Permit; Conditions.

- A. **Permit Issuance.** If the applicant has satisfied the requirements of this Section, the City shall issue a permit.
- B. **Conditions.** The City may impose reasonable conditions upon the issuance of the permit and the performance of the applicant thereunder to protect the health, safety and welfare or when necessary to protect the right-of-way and its current use.

Subd. 12. Permit Fees.

- A. **Fee Schedule and Fee Allocation.** The City's permit fee schedule shall be available to the public and established in advance where reasonably possible. The permit fees shall be designed to recover the City's actual costs incurred in managing the right-of-way and shall be based on an allocation among all users of the right-of-way, including the City.
- B. **Excavation Permit Fee.** The City shall establish an excavation permit fee in an amount sufficient to recover the following costs:
 1. the City management costs;
 2. degradation costs, if applicable.
- C. **Obstruction Permit Fee.** The City shall establish the obstruction permit fee and shall be in an amount sufficient to recover the City management costs.

- D. **Payment of Permit Fees.** No excavation permit or obstruction permit shall be issued without payment of excavation or obstruction permit fees. The City may allow applicant to pay such fees within thirty (30) days of billing, or on some other payment plan agreed to by the Director at Director's discretion.
- E. **Non Refundable.** permit fees that were paid for a permit that the City has revoked for a breach as stated in Subdivision 22 are not refundable.
- F. **Application to Franchises.** Unless otherwise agreed to in a franchise, management costs may be charged separately from and in addition to the franchise fees imposed on a right-of-way user in the franchise.

Subd. 13. Right-of-Way Patching and Restoration.

- A. **Timing.** The work to be done under the excavation permit, and the patching and restoration of the right-of-way as required herein, must be completed within the dates specified in the permit, increased by as many days as work could not be done because of circumstances beyond the control of the permittee or when work was prohibited as unseasonal or unreasonable under Subdivision 16.
- B. **Patch and Restoration.** Permittee must patch its own work. The City may choose either to have the permittee restore the surface and subgrading portions of right-of-way or to restore the surface portion of right-of-way itself.
 - 1. **City Restoration.** If the City restores the surface portion of right-of-way, permittee shall pay the costs thereof within thirty (30) days of billing. If, following such restoration, the pavement settles due to permittee's improper backfilling, the permittee shall pay to the City, within thirty (30) days of billing, all costs associated with correcting the defective work.
 - 2. **Permittee Restoration.** If the permittee restores the right-of-way itself, it shall at the time of application for an excavation permit post a construction performance bond in accordance with the provisions of Minnesota Rule 7819.3000.
 - 3. **Degradation Fee in Lieu of Restoration.** In lieu of right-of-way restoration, a right-of-way user may elect to pay a degradation fee. However, the right-of-way user shall remain responsible for replacing and compacting the subgrade and aggregate based material in the excavation and the degradation fee shall not include the cost to accomplish these responsibilities.
- C. **Standards.** The permittee shall perform patching and restoration according to the standards and with the materials specified by the City and shall comply with Minnesota Rule 7819.1100.
- D. **Duty to Correct Defects.** The permittee shall correct defects in patching, or restoration performed by permittee or its agents. Upon notification from the City, permittee shall correct all restoration work to the extent necessary, using the method required by the City. Unless otherwise agreed to by the Director, said work shall be completed within five (5) calendar days of receipt of the notice from the City, not including days during which work cannot be done because of circumstances constituting force majeure or days when work is prohibited as unseasonal or unreasonable under Subdivision 16.
- E. **Failure to Restore.** If the permittee fails to restore the right-of-way in the manner and to the condition required by the City, or fails to satisfactorily and timely complete all restoration required by the City, the City shall notify the permittee in writing of the specific alleged failure or failures and shall allow the permittee ten (10) days from receipt of said written notice to cure said failure or failures, unless otherwise extended by the Director. In

the event the permittee fails to cure, the City may at its option perform the necessary work and permittee shall pay to the City, within thirty (30) days of billing, the cost of restoring the right-of-way. If permittee fails to pay as required, the City may exercise its rights under the construction performance bond.

Subd. 14. Joint Applications.

- A. Joint Application.** Registrants may jointly apply for permits to excavate or obstruct the right-of-way at the same place and time.
- B. Shared Fees.** Registrants who apply for permits for the same obstruction or excavation, which the City does not perform, may share in the payment of the obstruction or excavation permit fee. In order to obtain a joint permit, registrants must agree among themselves as to the portion each will pay and indicate the same on their applications.
- C. With City Projects.** Registrants who join in a scheduled obstruction or excavation performed by the City, whether or not it is a joint application by two (2) or more registrants or a single application, are not required to pay the excavation or obstruction and degradation portions of the permit fee, but a permit would still be required.

Subd. 15. Supplementary Applications.

- A. Limitation on Area.** A right-of-way permit is valid only for the area of the right-of-way specified in the permit. No permittee may do any work outside the area specified in the permit, except as provided herein. Any permittee which determines that an area greater than that specified in the permit must be obstructed or excavated must before working in that greater area (i) make application for a permit extension and pay any additional fees required thereby, and (ii) be granted a new permit or permit extension.
- B. Limitation on Dates.** A right-of-way permit is valid only for the dates specified in the permit. No permittee may begin its work before the permit start date or, except as provided herein, continue working after the end date. If a permittee does not finish the work by the permit end date, it must apply for a new permit for the additional time it needs, and receive the new permit or an extension of the old permit before working after the end date of the previous permit. This supplementary application must be submitted before the permit end date.

Subd. 16. Other Obligations.

- A. Compliance With Other Laws.** Obtaining a right-of-way permit does not relieve permittee of its duty to obtain all other necessary permits, licenses, and authority and to pay all fees required by the City or other applicable rule, law or regulation. A permittee shall comply with all requirements of local, state and federal laws, including but not limited to Minnesota Statutes, Section 216D.01-.09 (Gopher One Call Excavation Notice System) and Minnesota Rules, Chapter 7560. A permittee shall perform all work in conformance with all applicable codes and established rules and regulations, and is responsible for all work done in the right-of-way pursuant to its permit, regardless of who does the work. (Amended, Ord. 760, May 25, 2006)
- B. Prohibited Work.** Except in an emergency, and with the approval of the City, no right-of-way obstruction or excavation may be done when seasonally prohibited or when conditions are unreasonable for such work.
- C. Interference with Right-of-Way.** A permittee shall not so obstruct a right-of-way that the natural free and clear passage of water through the gutters or other waterways shall be interfered with, unless otherwise approved by the Director. Private vehicles of those doing work in the right-of-way may not be parked within or next to a permit area, unless parked

in conformance with City parking regulations. The loading or unloading of trucks must be done solely within the defined permit area unless specifically authorized by the permit.

- D. **Trenchless Excavation.** As a condition of all applicable permits, permittees employing trenchless excavation methods, including but not limited to Horizontal Directional Drilling, shall follow all requirements set forth in Minnesota Statutes, Chapter 216D and Minnesota Rules Chapter 7560, and shall require potholing or open cutting over existing underground utilities before excavating, as determined by the director. Trenchless excavations deeper than four (4) feet will not be permitted without written approval from the Director. (Added, Ord. 760, May 25, 2006)
- E. **Traffic Control.** A permittee shall implement traffic control measures in the area of the work and shall use traffic control procedures in accordance with the most recent manuals on uniform traffic control, traffic control devices and traffic zone layouts published by the State of Minnesota. (Amended, Ord. 760, May 25, 2006)

Subd. 17. Denial of Permit. The City may deny a permit for failure to meet the requirements and conditions of this Section or if the City determines that the denial is necessary to protect the health, safety, and welfare or when necessary to protect the right-of-way and its current use.

Subd. 18. Installation Requirements. The excavation, backfilling, patching and restoration, and all other work performed in the right-of-way shall be done in conformance with Minnesota Rule 7819.1100 and other applicable local requirements, in so far as they are not inconsistent with the Minnesota Statutes, Sections 237.162 and 237.163. Installation of service laterals shall be performed in accordance with Minnesota Rules, Chapter 7560 and this Section. Service lateral installation is further subject to those requirements and conditions set forth by the City in the applicable permits, City Specifications, City Design Criteria, and agreements referenced in Subdivision 23 of this Section. (Amended, Ord. 760, May 25, 2006)

Subd. 19. Inspection.

- A. **Notice of Completion.** When the work under any permit hereunder is completed, the permittee shall furnish a completion certificate in accordance with Minnesota Rule 7819.1300.
- B. **Site Inspection.** Permittee shall make the work-site available to the City and to all others as authorized by law for inspection at all reasonable times during the execution of and upon completion of the work.
- C. **Authority of Director.**
 - 1. At the time of inspection the Director may order the immediate cessation of any work which poses a serious threat to the life, health, safety or well-being of the public.
 - 2. The Director may issue an order to the permittee to correct any work that does not conform to the terms of the permit or other applicable standards, conditions, or code. If the work failure is a "substantial breach" within the meaning of Minnesota Statutes, Section 237.163, Subdivision 4(c), the order shall state that failure to correct the violation will be cause for revocation of the permit after a specified period determined by the Director. The permittee shall present proof to the Director that the violation has been corrected within the time period set forth by the Director in the order. Such proof shall be provided no later than the next business day following the day of completion. If such proof has not been presented within the required time, the Director may revoke the permit pursuant to Subdivision 22.

Subd. 20. Work Done Without a Permit.

- A. Emergency Situations.** Each registrant shall immediately notify the Director of any event regarding its facilities that the registrant considers to be an emergency. The registrant may proceed to take whatever actions are necessary to respond to the emergency. Excavators' notification to Gopher State One Call regarding an emergency situation does not fulfill this requirement. Within two (2) business days after the occurrence of the emergency the registrant shall apply for the necessary permits, pay the fees associated therewith and fulfill the rest of the requirements necessary to bring itself into compliance with this Section for the actions it took in response to the emergency. (Amended, Ord. 760, May 25, 2006)

If the City becomes aware of an emergency regarding a registrant's facilities, the City will attempt to contact the local representative of each registrant affected, or potentially affected, by the emergency. In any event, the City may take whatever action it deems necessary to respond to the emergency, the cost of which shall be borne by the registrant whose facilities occasioned the emergency.

- B. Non-Emergency Situations.** Except in an emergency, any person who, without first having obtained the necessary permit, obstructs or excavates a right-of-way must subsequently obtain a permit, pay an unauthorized work permit fee in an amount established from time to time by the City Council, deposit with the City the fees necessary to correct any damage to the right-of-way and comply with all of the requirements of this Section.

Subd. 21. Supplementary Notification. If the obstruction or excavation of the right-of-way begins later or ends sooner than the date given on the permit, permittee shall notify the City of the accurate information as soon as this information is known.

Subd. 22. Revocation of Permits.

- A. Substantial Breach.** The City reserves its right to revoke any right-of-way permit, without a fee refund, if there is a substantial breach of the terms and conditions of any statute, ordinance, rule or regulation, or any material condition of the permit. A substantial breach by permittee shall include, but shall not be limited to, the following:
1. The violation of any material provision of the right-of-way permit;
 2. An evasion or attempt to evade any material provision of the right-of-way permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the City or its citizens;
 3. Any material misrepresentation of fact in the application for a right-of-way permit;
 4. The failure to complete the work in a timely manner; unless a permit extension is obtained or unless the failure to complete work is due to reasons beyond the permittee's control; or
 5. The failure to correct, in a timely manner, work that does not conform to a condition indicated on an order issued pursuant to Subdivision 19.C.2.

- B. Written Notice of Breach.** If the City determines that the permittee has committed a substantial breach of a term or condition of any statute, ordinance, rule, regulation or any condition of the permit the City shall make a written demand upon the permittee to remedy such violation. The demand shall state that continued violations may be cause for revocation of the permit. A substantial breach, as stated above, will allow the City to place additional or revised conditions on the permit to mitigate and remedy the breach.
- C. Response to Notice of Breach.** Within a time established by the Director following permittee's receipt of notification of the breach, permittee shall provide the City with a plan to cure the breach, acceptable to the City. Permittee's failure to submit a timely and acceptable plan, or permittee's failure to timely implement the approved plan, shall be cause for immediate revocation of the permit. Further, permittee's failure to contact the City, or permittee's failure to submit an acceptable plan, or permittee's failure to reasonably implement the approved plan, may result in probation for up to one (1) full year.
- D. Cause for Probation.** The City may establish a list of conditions of the permit, that if breached will be grounds to place the permittee on probation. The City shall not enforce a probation program unless and until it has established such conditions, which it may amend from time to time.
- E. Reimbursement of City Costs.** If a permit is revoked, the permittee shall also reimburse the City for the City's reasonable costs, including restoration costs and the costs of collection and reasonable attorneys' fees incurred in connection with such revocation.

Subd. 23. Mapping Data.

- A. Information Required.** Each registrant and permittee shall provide mapping information in a form required by the City in accordance with Minnesota Rules 7819.4000 and 7819.4100. Within ninety (90) days following completion of any work pursuant to a permit, the permittee shall provide the director accurate maps and drawings certifying the "as-built" location of all equipment installed, owed and maintained by the permittee. Such maps and drawings shall include the horizontal and vertical location of all facilities and equipment and shall be provided consistent with the City's electronic mapping system, when practical or as a condition imposed by the director. Failure to provide maps and drawings pursuant to this paragraph shall be grounds for revoking the permit holder's registration. (Amended, Ord. 760, May 25, 2006)
- B. Service Laterals.** All permits issued for the installation or repair of service laterals, other than minor repairs as defined in Minnesota Rules 7560.0150 Subpart 2, shall require the permittee's use of appropriate means of establishing the horizontal locations of installed service laterals and the service lateral vertical locations in those cases where the Director reasonably required it. Permittees or their subcontractors shall submit to the Director evidence satisfactory to the Director of the installed service lateral locations. Compliance with this paragraph and with applicable Gopher State One Call law and Minnesota Rules governing service laterals installed after December 31, 2005 shall be a condition of any City approval necessary for 1) payments to contractors working on a public improvement project including those under Minnesota Statutes, Chapter 429 and 2) City approval of performance under development agreements, or other subdivision or site plan approval under Minnesota Statutes, Chapter 462. The Director shall reasonably determine the appropriate method of providing such information to the City. Failure to provide prompt and accurate information on the service laterals installed may result in the revocation of the permit issued for the work or for future permits to the offending permittee or its subcontractors. (Added, Ord. No. 760, May 25, 2006)

Subd. 24. Undergrounding.

- A. Purpose.** The purpose of this Subdivision 24 is to promote the health, safety and general welfare of the public and is intended to foster (i) safe travel over the right-of-way, (ii) non-travel related safety around homes and buildings where overhead feeds are connected and (iii) orderly development in the City. Location and relocation, installation and reinstallation of facilities in the right-of-way must be made in accordance with this Subdivision. This Subdivision is intended to be enforced consistently with state and federal law regulating right-of-way users, specifically including but not limited to Minnesota Statutes, Sections 161.45, 237.162, 237.163, 300.03, 222.37, 238.084 and 216B.36 and the Telecommunications Act of 1996, Title 47, U.S.C. Section 253.
- B. Undergrounding of Facilities.** Facilities newly installed, constructed or otherwise placed in the public right-of-way or in other public property held in common for public use must be located and maintained underground pursuant to the terms and conditions of this Section and in accordance with applicable construction standards, subject to the exceptions below. Above-ground installation, construction, modification, or replacement of meters, gauges, transformers, street lighting, pad mount switches, capacitor banks, re-closers and service connection pedestals shall be allowed. The requirements of this Subdivision shall apply equally outside of the corporate limits of the City coincident with City jurisdiction of platting, subdivision regulation or comprehensive planning as may now or in the future be allowed by law.
- C. Exceptions to Undergrounding.** The following exceptions to the strict application of this Subdivision shall be allowed upon the conditions stated:
- 1. Transmission Lines.** Above-ground installation, construction, or placement of those facilities commonly referred to as "high voltage transmission lines" upon which a conductor's normal operating voltage equals or exceeds 23,000 volts (phase to phase) shall be allowed only by prior approval of the Council; provided, however, that sixty (60) days prior to commencement of construction of such a project, the City shall be furnished notice of the proposed project and, upon request, the right-of-way user involved shall furnish all relevant information regarding such project to the City. This provision shall not be construed as waiving the requirements of any other ordinance or regulation of the City as the same may apply to any such proposed project.
 - 2. Technical and Economic Feasibility.** Above-ground installation, construction, or placement of facilities shall be allowed in residential, commercial and industrial areas where the Council, following consideration and recommendation by the Planning Commission, finds that:
 - a.** Underground placement would place an undue financial burden upon the landowner, ratepayers, or right-of-way user or would deprive the landowner of the preservation and enjoyment of substantial property rights; or,
 - b.** Underground placement is impractical or not technically feasible due to topographical, subsoil or other existing conditions which adversely affect underground facilities placement.
 - 3. Temporary Service.** Above-ground installation, construction, or placement of temporary service lines shall only be allowed:

- a. During new construction of any project for a period not to exceed twenty-four (24) months;
 - b. During an emergency in order to safeguard lives or property within the City;
 - c. For a period of not more than seven (7) months when soil conditions make excavation impractical.
- D. Undergrounding of Permanent Replacement, Relocated or Reconstructed Facilities.** If the City finds that one (1) or more of the purposes set forth in Subdivision 24.A. would be promoted, the City may require a permanent replacement, relocation or reconstruction of a facility of more than 300 feet to be located, and maintained underground, with due regard for seasonal working conditions. For purposes of this Section, reconstruction means any substantial repair of or any improvement to existing facilities. Undergrounding may be required whether a replacement, relocation or reconstruction is initiated by the right-of-way user owning or operating the facilities, or by the City in connection with (1) the present or future use by the City or other local government unit of the right-of-way or other public ground for a public project, (2) the public health or safety, or (3) the safety and convenience of travel over the right-of-way.
- E. Retirement of Overhead Facilities.** The City Council may determine whether it is in the public interest that all facilities within the City, or facilities within certain districts designated by the City, be permanently placed and maintained underground by a date certain or target date, independently of undergrounding required pursuant to Section 24.B. of this Code (new facilities) and Subdivision 24.D. (replacement facilities). The decision to underground must be preceded by a public hearing, after published notice and written notice to the utilities affected. (Two (2) weeks published: thirty (30) days written.) At the hearing the Council must consider items 1. – 4. in Subdivision 24.G. of this Section and make findings. Undergrounding may not take place until City Council has, after hearing and notice, adopted a plan containing items 1. – 6. of Subdivision 24.H. of this Section.
- F. Public Hearings.** A hearing must be open to the public and may be continued from time to time. At each hearing any person interested must be given an opportunity to be heard. The subject of the public hearings shall be the issue of whether facilities in the right-of-way in the City, or located within a certain district, shall all be located underground by a date certain. Hearings are not necessary for the undergrounding required under Subdivisions 24.B. and D. of this Section.
- G. Public Hearing Issues.** The issues to be addressed at the public hearings include but are not limited to:
- 1. The costs and benefits to the public of requiring the undergrounding of all facilities in the right-of-way.
 - 2. The feasibility and cost of undergrounding all facilities by a date certain as determined by the City and the affected utilities.
 - 3. The tariff requirements, procedure and rate design for recovery or intended recovery of incremental costs for undergrounding by the utilities from ratepayers within the City.
 - 4. Alternative financing options available if the City deems it in the public interest to require undergrounding by a date certain and deems it appropriate to participate in the cost otherwise borne by the ratepayers.

Upon completion of the hearing or hearings, the City Council must make written findings on whether it is in the public interest to establish a plan under which all facilities will be underground, either citywide or within districts designated by the City.

H. Undergrounding Plan. If the Council finds that it is in the public interest to underground all or substantially all facilities in the public right of way or in non-right-of-way public ground, the Council must establish a plan for such undergrounding. The plan for undergrounding must include at least the following elements:

1. Timetable for the undergrounding.
2. Designation of districts for the undergrounding unless the undergrounding plan is citywide.
3. Exceptions to the undergrounding requirement and procedure for establishing such exceptions.
4. Procedures for the undergrounding process, including but not limited to coordination with City projects and provisions to ensure compliance with non-discrimination requirements under the law.
5. A financing plan for funding of the incremental costs if the City determines that it will finance some of the undergrounding costs, and a determination and verification of the claimed additional costs to underground incurred by the utility.
6. Penalties or other remedies for failure to comply with the undergrounding.

I. Facilities Location.

1. In addition to complying with the requirements of Minnesota Statutes, Sections 216D.01-.09 ("One Call Excavation Notice System"), before the start date of any right-of-way excavation, each registrant who has facilities located in the area to be excavated shall mark the horizontal placement of all said facilities. To the extent its records contain such information, each registrant shall provide information regarding the approximate vertical location of its facilities to excavators upon request. Nothing in this subsection is meant to limit the rights, duties, and obligations of facility owners or excavators as set forth in Minnesota Statutes, Sections 216D.01-.09. Any right-of-way user whose facility is less than twenty (20) inches below a concrete or asphalt surface shall notify and work closely with the excavation contractor in an effort to establish and mark the exact horizontal and vertical location of its facility and the best procedure for excavation.
2. All facilities shall be placed in appropriate portions of right-of-way so as to cause minimum conflict with other underground facilities. When technically appropriate, all utilities shall be installed, constructed or placed within the same trench.

- J. **Developer Responsibility.** All owners, platters, or developers are responsible for complying with the requirements of this Subdivision, and prior to final approval of any plat or development plan, shall submit to the Director written instruments from the appropriate right-of-way users showing that all necessary arrangements with said users for installation of such facilities have been made.

Subd. 25. Relocation of Facilities. A right-of-way user shall promptly and at its own expense, with due regard for seasonal working conditions, permanently remove and relocate its facilities in the right-of-way when it is necessary to prevent interference, and not merely for the convenience of the City, in connection with: (1) a present or future City use of the right-of-way for a public project; (2) the public health or safety; or (3) the safety and convenience of travel over the right-of-way.

Subd. 26. Interference By Other Facilities. When the City does work in the right-of-way in its governmental right-of-way management function and finds it necessary to maintain, support, or move a registrant's facilities to carry out the work without damaging registrant's facilities, the City shall notify the local representative as early as is reasonably possible. The City costs associated therewith will be billed to that registrant and must be paid within thirty (30) days from the date of billing. Each registrant shall be responsible for the cost of repairing any facilities in the right-of-way which it or its facilities damages.

Subd. 27. Right-of-Way Vacation – Reservation of Right. If the City vacates a right-of-way that contains the facilities of a registrant, the registrant's rights in the vacated right-of-way are governed by Minnesota Rules 7819.3200.

Subd. 28. Indemnification and Liability. By registering with the City, or by accepting a permit under this Section, a registrant or permittee agrees to defend and indemnify the City in accordance with the provisions of Minnesota Rule 7819.1250.

Subd. 29. Abandoned and Unusable Facilities.

- A. **Discontinued Operations.** A registrant who has determined to discontinue all or a portion of its operations in the City must provide information satisfactory to the City that the registrant's obligations for its facilities in the right-of-way under this Section have been lawfully assumed by another registrant.
- B. **Removal.** Any registrant who has abandoned facilities in any right-of-way shall remove it from that right-of-way if required in conjunction with other right-of-way repair, excavation, or construction, unless this requirement is waived by the City.

Subd. 30. Appeal. A right-of-way user that: (1) has been denied registration; (2) has been denied a permit; (3) has had permit revoked; or (4) believes that the fees imposed are not in conformity with Minnesota Statutes, Section 237.163, Subdivision 6; or (5) disputes a decision of the Director regarding the mapping data required by Subdivision 23 of this Section may have the denial, revocation, decision, or fee imposition reviewed, upon written request, by the City Council. The City Council shall act on a timely written request at its next regularly scheduled meeting. A decision by the City Council affirming the denial, revocation, or fee imposition will be in writing and supported by written findings establishing the reasonableness of the decision. (Amended, Ord. 760, May 25, 2006)

Subd. 31. Reservation of Regulatory and Police Powers. A permittee's or registrant's rights are subject to the regulatory and police powers of the City to adopt and enforce general ordinances necessary to protect the health, safety and welfare of the public.

Subd. 32. Severability. If any section, subsection, sentence, clause, phrase, or portion of this Section is for any reason held invalid or unconstitutional by any court or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions thereof. If a regulatory body or a court of competent jurisdiction should determine by a final, non-appealable order that any permit, right or registration issued under this Section or any portions of this Section is illegal or unenforceable, then any such permit, right or registration granted or deemed to exist hereunder shall be considered as a revocable permit with a mutual right in either party to terminate without cause upon giving sixty (60) days written notice to the other. The requirements and conditions of such a revocable permit shall be the same requirements and conditions as set forth in the permit, right or registration, respectively, except for conditions relating to the term of the permit and the right of termination. Nothing in this Section precludes the City from requiring a franchise agreement with the applicant, as allowed by law, in addition to requirements set forth herein.