



CONNECTING & INNOVATING
SINCE 1913

Model Right-of-Way Ordinance

Cooperative effort between
City Engineers Association of Minnesota
and League of Minnesota Cities

Revised 12/15/05

Model Right-of-Way Ordinance Summary

This revision of the model right-of-way ordinance modifies previous versions (most recently, the 1999 version) by adding provisions enforcing new city obligations to “mark and locate” utility service laterals located in the public right-of-way. (New provisions are identified in the ordinance by double underline.) The new obligations result from the adoption of new Minnesota Office of Pipeline Safety rules in the summer of 2005.

This revision is a collaborative effort between the League and Jim Strommen of the Kennedy & Graven law firm, on behalf of the Suburban Rate Authority.

Cities should also be aware that since its original development in the late 1990s, particular cities have adopted modified versions of this model ordinance to meet the unique needs and circumstances of their individual communities. Those modified versions may have also been influenced by the results of negotiations with representatives of the utility industry.

As an appendix to this document, we have included several pieces of information that we hope will make the task of right-of-way management easier. Included in the appendix are:

1. A short form of the ordinance for those communities that want to do less extensive right-of-way management.
2. A discussion and sample ordinance provision establishing fees.
3. A summary form of the ordinance for those cities wishing to publish a summary as provided by Minn. Stat. 412.191, subd. 4 or by city charter.
4. A model undergrounding ordinance.
5. The Minnesota Public Utilities Commission’s Public Rights-of-Way Standards rules.
6. The Minnesota Office of Pipeline Safety Excavation Notice System rules.

Questions or Information:

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Model Ordinance LMC/CEAM Right-of-Way Ordinance

City of _____, _____ County, Minnesota

An ordinance to enact a new Chapter
of the _____ Code of Ordinances
to administer and regulate the
public rights-of-way in the public interest, and to provide for the
issuance and regulation of right-of-way permits

THE COUNCIL OF _____ ORDAINS¹:

Chapter ___ of the _____ Code of Ordinances (hereafter “this Code”)² is hereby repealed in its entirety, and is replaced by the following new Chapter 1 (hereafter “this Chapter”), to read as follows:

Chapter 1 Right-of-Way Management

Sec. 1.01. 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 hereby enacts this new chapter of this code relating to right-of-way permits and administration. This chapter imposes reasonable regulation on the placement and maintenance of facilities and equipment currently within its rights-of-way or to be placed therein at some future

¹Enacting clauses are different in various charters. The statutory city enacting clause is used here.

²In most cases, there will be ordinances or legislative codes that will need to be amended or repealed because of inconsistency with the new regulations. One method is to repeal all those provisions and replace them with this ordinance.

time. It is intended to complement the regulatory roles of state and federal agencies. Under this chapter, persons excavating and obstructing the rights-of-way will bear financial responsibility for their work. Finally, this chapter provides for recovery of out-of-pocket and projected costs from persons using the public rights-of-way.

This chapter 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 chapter shall also be interpreted consistent with Minnesota Rules 7819.0050 – 7819.9950 where possible. To the extent any provision of this chapter cannot be interpreted consistently with the Minnesota Rules, that interpretation most consistent with the Act and other applicable statutory and case law is intended. This chapter shall not be interpreted to limit 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.

Sec. 1.02. 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 hereby elects, pursuant Minn. Stat. 237.163 subd. 2(b), to manage rights-of-way within its jurisdiction.

Sec. 1.03. Definitions.

The following definitions apply in this chapter of this code. References hereafter to “sections” are, unless otherwise specified, references to sections in this chapter. Defined terms remain defined terms, whether or not capitalized.

“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 _____, Minnesota. For purposes of section 1.28, “city” means its elected officials, officers, employees and agents.

“Commission” means the State 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:

- Individual project bond;
- Cash deposit;
- Security of a form listed or approved under Minn. Stat. Sec. 15.73, subd. 3;
- Letter of Credit, in a form acceptable to the city;
- Self-insurance, in a form acceptable to the city;
- F. 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. **(Note: If a city does not have a public works department, an equivalent department may be designated.)**

“Department Inspector” means any person authorized by the city to carry out inspections related to the provisions of this chapter.

“Director” means the director of the department of public works of the city, or her or his designee. **(Note: Some cities may prefer to use the term city rather than delegating responsibilities to a specific position.)**

“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 chapter, 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 permit fee” means money paid to the city by an applicant to cover the costs as provided in Section 1.12.

“Facility” or “Facilities” means any tangible asset in the right-of-way required to provide Utility Service.

“Five-year project plan” shows projects adopted by the city for construction within the next five 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 pavement, with the excavation having a length less than the width of the 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 chapter.

“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 Section 1.30 of this chapter.

“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 chapter, 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.

“Obstruction Permit Fee” means money paid to the city by a permittee to cover the costs as provided in Section 1.12

“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 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-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 chapter.

“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 chapter. **(Note: This paragraph is included as an option for your city.)**

“Probationary Period” means one year from the date that a person has been notified in writing that they have been put on probation. **(Note: This paragraph is included as an option for your city.)**

“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 Public Utilities Commission rules.

“Public Right-of-Way” means the area on, below, or above a public roadway, highway, street, cartway, bicycle lane or public sidewalk in which the city has an interest, including other dedicated rights-of-way for travel purposes and utility easements of the city. A right-of-way does not include the airwaves above a right-of-way with regard to cellular or other nonwire telecommunications or broadcast service. **(Note: this definition does not include other public grounds that may be the subject of other city requirements.)**

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

“Right-of-Way User” means (1) a telecommunications right-of-way user as defined by Minnesota Statutes, section 237.162, subd. 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” includes (1) those services provided by a public utility as defined in Minn. Stat. 216B.02, subs. 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 systems as defined in Minn. Stat. Chapter. 238; (4) natural gas or electric energy or telecommunications services provided by the city; (5) services provided by a cooperative electric association organized under Minn. Stat., Chapter 308A; and (6) water, and sewer, including service laterals, 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.

“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-year plan, in which case it is considered full restoration.

“Trench” means an excavation in the pavement, with the excavation having a length equal to or greater than the width of the 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 chapter, a cable communication system defined and regulated under Minn. Stat. Chap. 238, and telecommunication activities related to providing natural gas or electric energy services whether provided by a public utility as defined in Minn. Stat. Sec. 216B.02, a municipality, a municipal gas or power agency organized under Minn. Stat. Chaps. 453 and 453A, or a cooperative electric association organized under Minn. Stat. Chap. 308A, are not telecommunications right-of-way users for purposes of this chapter.

“Two Year project Plan” shows projects adopted by the city for construction within the next two years.

Sec. 1.04 Administration.

The director³ 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.

Sec. 1.05. 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. **(Note: This is not required in the as part of state or federal law but is included as an option for your city.)**

Sec. 1.06. Registration and Right-of-Way Occupancy.

Subd. 1. Registration. Each person who occupies or 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

³The city manager would usually make the appointment. A council resolution should be used in the typical weak mayor, non-manager city. The mayor of strong mayor cities would typically make this appointment.

and paying a registration fee.

Subd. 2. *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.

Subd. 3. *Exceptions.* Nothing herein shall be construed to repeal or amend the provisions of a city ordinance permitting 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 planting or maintaining boulevard plantings or gardens 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 for planting or maintaining such boulevard plantings or gardens under this chapter. However, nothing herein relieves a person from complying with the provisions of the Minn. Stat. Chap. 216D, Gopher One Call Law.

Sec. 1.07. Registration Information.

Subd. 1. *Information Required.* The information provided to the city at the time of registration shall include, but not be limited to:

(a) Each registrant's name, Gopher One-Call registration certificate number, address and e-mail address, if applicable, and telephone and facsimile numbers.

(b) 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 available at all times. Current information regarding how to contact the local representative in an emergency shall be provided at the time of registration.

(c) A certificate of insurance or self-insurance:

(1) Verifying that an insurance policy has been issued to the registrant by an insurance company licensed to do business in the State of Minnesota, or a form of self-insurance acceptable to the city;

(2) 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;

(3) 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;

(4) Requiring that the city be notified thirty (30) days in advance of cancellation of the policy or material modification of a coverage term; and

(5) 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 chapter.

(d) The city may require a copy of the actual insurance policies.

(e) If the person is a corporation, a copy of the certificate is required to be filed under Minn. Stat. 300.06 as recorded and certified to by the Secretary of State.

(f) A copy of the person's order granting a certificate of authority from the Minnesota Public Utilities Commission or other applicable state or federal agency, where the person is lawfully required to have such certificate from said commission or other state or federal agency.

Subd. 2. *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.

Sec. 1.08. Reporting Obligations.

Subd. 1. *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:

(a) 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

(b) To the extent known, the tentative locations and estimated beginning and ending dates for all projects contemplated for the five years following the next calendar year (in this section, a “five-year project”).

The term “project” in this section shall include both next-year projects and five-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.

Subd. 2. *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.

Sec. 1.09. Permit Requirement.

Subd. 1. *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.

(a) ***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.

(b) ***Obstruction Permit.*** An obstruction permit is required by a registrant to hinder free and open passage over the specified portion of 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.

Subd. 2. *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.

Subd. 3. *Delay Penalty.* In accordance with Minnesota Rule 7819.1000 subp. 3 and notwithstanding subd. 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.

Subd. 4. *Permit Display.* Permits issued under this chapter shall be conspicuously displayed or otherwise available at all times at the indicated work site and shall be available for inspection by the city.

Sec. 1.10. 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: **[Note: Copy of model permit application is included at end of document.]**

- (a) Registration with the city pursuant to this chapter;
- (b) 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.
- (c) Payment of money due the city for:
 - (1) permit fees, estimated restoration costs and other management costs;
 - (2) prior obstructions or excavations;
 - (3) 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) franchise fees or other charges, if applicable.
- (d) Payment of disputed amounts due the city by posting security or depositing in an escrow account an amount equal to at least 110% of the amount owing.
- (e) 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.

Sec. 1.11. Issuance of Permit; Conditions.

Subd. 1. *Permit Issuance.* If the applicant has satisfied the requirements of this chapter, the city shall issue a permit.

Subd. 2. *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.

Sec. 1.12. Permit Fees. [Note: Sample fee schedules included in the appendix; also note that Minn. Rule 7819.1000 establishes requirements for establishing fees.]

Subd. 1. *Excavation Permit Fee.* The city shall establish an Excavation permit fee in an amount sufficient to recover the following costs:

- (a) the city management costs;

(b) degradation costs, if applicable.

Subd. 2. *Obstruction Permit Fee.* The city shall establish the obstruction permit fee and shall be in an amount sufficient to recover the city management costs.

Subd. 3. *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.

Subd. 4. *Non Refundable.* Permit fees that were paid for a permit that the city has revoked for a breach as stated in Section 1.22 are not refundable.

Subd. 5. *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.

Sec. 1.13. Right-of-Way Patching and Restoration.

Subd. 1. *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 Section 1.16.

Subd. 2. *Patch and Restoration.* Permittee shall patch its own work. The city may choose either to have the permittee restore the right-of-way or to restore the right-of-way itself.

(a) ***City Restoration.*** If the city restores the 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.

(b) ***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.

(c) ***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 patching and the degradation fee shall not include the cost to accomplish these responsibilities.

Subd. 3. *Standards.* The permittee shall perform excavation, backfilling, patching and

restoration according to the standards and with the materials specified by the city and shall comply with Minnesota Rule 7819.1100.

Subd. 4. *Duty to Correct Defects.* The permittee shall correct defects in patching or restoration performed by permittee or its agents. The permittee upon notification from the city, shall correct all restoration work to the extent necessary, using the method required by the city. Said work shall be completed within five (5) calendar days of the 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 unseasonable or unreasonable under Section 1.16.

Subd. 5. *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 at its option may do such work. In that event the 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.

Sec. 1.14. Joint Applications.

Subd. 1. *Joint application.* Registrants may jointly apply for permits to excavate or obstruct the right-of-way at the same place and time.

Subd. 2. *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.

Subd. 3. *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 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.

Sec. 1.15. Supplementary Applications.

Subd. 1. *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.

Subd. 2. *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.

Sec. 1.16. Other Obligations.

Subd. 1. *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.

Subd. 2. *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.

Subd. 3. *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. 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.

Subd. 4. *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.

Sec. 1.17. Denial of Permit.

The city may deny a permit for failure to meet the requirements and conditions of this chapter 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.

Sec. 1.18. 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 Rules 7819.1100 and 7819.5000 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 these ordinances. Service lateral installation is further subject to those requirements and conditions set forth by the city in the applicable permits and/or agreements referenced in Section 1.23 subd. 2 of this ordinance.

Sec. 1.19. Inspection.

Subd. 1. *Notice of Completion.* When the work under any permit hereunder is completed, the permittee shall furnish a completion certificate in accordance Minnesota Rule 7819.1300.

Subd. 2. *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.

Subd 3. *Authority of Director.*

(a) 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.

(b) The director may issue an order to the permittee for any work that does not conform to the terms of the permit or other applicable standards, conditions, or codes. The order shall state that failure to correct the violation will be cause for revocation of the permit. Within ten (10) days after issuance of the order, the permittee shall present proof to the director that the violation has been corrected. If such proof has not been presented within the required time, the director may revoke the permit pursuant to Sec. 1.22.

Sec. 1.20. Work Done Without a Permit.

Subd. 1. *Emergency Situations.* Each registrant shall immediately notify the director of any event regarding its facilities that it 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 chapter for the actions it took in response to the emergency.

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.

Subd. 2. *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 and, as a penalty, pay double the normal fee for said permit, pay double all the other fees required by the city code, 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 chapter.

Sec. 1.21. 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.

Sec. 1.22. Revocation of Permits.

Subd. 1. ***Substantial Breach.*** The city reserves its right, as provided herein, 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:

- (a) The violation of any material provision of the right-of-way permit;
- (b) 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;
- (c) Any material misrepresentation of fact in the application for a right-of-way permit;
- (d) 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
- (e) The failure to correct, in a timely manner, work that does not conform to a condition indicated on an order issued pursuant to Sec. 1.19.

Subd. 2. *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, at its discretion, to place additional or revised conditions on the permit to mitigate and remedy the breach.

Subd. 3. *Response to Notice of Breach.* Within twenty-four (24) hours of receiving notification of the breach, permittee shall provide the city with a plan, acceptable to the city, that will cure the breach. Permittee's failure to so contact the city, or permittee's failure to timely submit an acceptable plan, or permittee's failure to reasonably implement the approved plan, shall be cause for immediate revocation of the permit. Further, permittee's failure to so contact the city, or permittee's failure to submit an acceptable plan, or permittee's failure to reasonably implement

the approved plan, shall automatically place the permittee on probation for one (1) full year. [Note: The concept of probation is included as an option. It is opposed by the utility industry.]

Subd. 4. Cause for Probation. From time to time, the city may establish a list of conditions of the permit, which if breached will automatically place the permittee on probation for one full year, such as, but not limited to, working out of the allotted time period or working on right-of-way grossly outside of the permit authorization.

Subd. 5. Automatic Revocation. If a permittee, while on probation, commits a breach as outlined above, permittee's permit will automatically be revoked and permittee will not be allowed further permits for one full year, except for emergency repairs.

Subd. 6. 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.

Sec. 1.23. Mapping Data.

Subd. 1. Information Required. Each registrant and permittee shall provide mapping information 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, owned 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 subsection shall be grounds for revoking the permit holder's registration.

Subd. 2. 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 requires it. Permittees or their subcontractors shall submit to the director evidence satisfactory to the director of the installed service lateral locations. Compliance with this subdivision 2 and with applicable Gopher State One Call law and Minnesota Rules governing service laterals install 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.

Sec. 1.24. Location and Relocation of Facilities.

Subd. 1. Placement, location, and relocation of facilities must comply with the Act, with other applicable law, and with Minnesota Rules 7819.3100, 7819.5000 and 7819.5100, to the extent the rules do not limit authority otherwise available to cities. **[Note: Cities wishing to require the undergrounding of utilities should adopt the separate undergrounding ordinance included in the appendix. Jim Strommen of Kennedy & Graven drafted the suggested undergrounding ordinance for the Suburban Rate Authority.]**

Subd. 2. *Corridors.* The city may assign a specific area within the right-of-way, or any particular segment thereof as may be necessary, for each type of facilities that is or, pursuant to current technology, the city expects will someday be located within the right-of-way. All excavation, obstruction, or other permits issued by the city involving the installation or replacement of facilities shall designate the proper corridor for the facilities at issue. **[Note: this is not intended to establish “high density corridor,” cities wishing to establish a high-density corridor should follow PUC rules.]**

Any registrant who has facilities in the right-of-way in a position at variance with the corridors established by the city shall, no later than at the time of the next reconstruction or excavation of the area where the facilities are located, move the facilities to the assigned position within the right-of-way, unless this requirement is waived by the city for good cause shown, upon consideration of such factors as the remaining economic life of the facilities, public safety, customer service needs and hardship to the registrant.

Subd. 3. *Nuisance.* One year after the passage of this chapter, any facilities found in a right-of-way that have not been registered shall be deemed to be a nuisance. The city may exercise any remedies or rights it has at law or in equity, including, but not limited to, abating the nuisance or taking possession of the facilities and restoring the right-of-way to a useable condition.

Subd. 4. *Limitation of Space.* To protect health, safety, and welfare, or when necessary to protect the right-of-way and its current use, the city shall have the power to prohibit or limit the placement of new or additional facilities within the right-of-way. In making such decisions, the city shall strive to the extent possible to accommodate all existing and potential users of the right-of-way, but shall be guided primarily by considerations of the public interest, the public's needs for the particular utility service, the condition of the right-of-way, the time of year with respect to essential utilities, the protection of existing facilities in the right-of-way, and future city plans for public improvements and development projects which have been determined to be in the public interest.

Sec. 1.25 Pre-excavation Facilities Location.

In addition to complying with the requirements of Minn. Stat. 216D.01-.09 (“One Call Excavation Notice System”) before the start date of any right-of-way excavation, each registrant who has facilities or equipment in the area to be excavated shall mark the horizontal and vertical placement of all said facilities. Any registrant whose facilities are less than twenty (20) inches below a concrete or asphalt surface shall notify and work closely with the excavation contractor

to establish the exact location of its facilities and the best procedure for excavation.

Sec. 1.26. Damage to Other Facilities.

When the city does work in the right-of-way and finds it necessary to maintain, support, or move a registrant's facilities to protect it, the city shall notify the local representative as early as is reasonably possible. The 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 damage. Each registrant shall be responsible for the

cost of repairing any damage to the facilities of another registrant caused during the city's response to an emergency occasioned by that registrant's facilities.

Sec. 1.27. 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.

Sec. 1.28. Indemnification and Liability

By registering with the city, or by accepting a permit under this chapter, a registrant or permittee agrees to defend and indemnify the city in accordance with the provisions of Minnesota Rule 7819.1250.

Sec. 1.29. Abandoned and Unusable Facilities.

Subd. 1. *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 chapter have been lawfully assumed by another registrant.

Subd. 2. *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.

Sec. 1.30. Appeal.

A right-of-way user that: (1) has been denied registration; (2) has been denied a permit; (3) has had a permit revoked; (4) believes that the fees imposed are not in conformity with Minn. Stat. § 237.163, Subd. 6; or (5) disputes a determination of the director regarding Section 1.23 subd. 2 of this ordinance may have the denial, revocation, fee imposition, or decision reviewed, upon written request, by the city council. The city council shall act on a timely written request at its next regularly scheduled meeting, provided the right-of-way user has submitted its appeal with sufficient time to include the appeal as a regular agenda item. 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.

Sec. 1.31. Severability.

If any portion of this chapter is for any reason held invalid by any court 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. Nothing in this chapter precludes the city from requiring a franchise agreement with the applicant, as allowed by law, in addition to requirements set forth herein.

SAMPLE PERMIT APPLICATION

[Not included in electronic version of ordinance.]

APPENDIX

Model Ordinance LMC/CEAM Right-of-Way Ordinance

[Short Form]

City of _____, _____ County, Minnesota

An ordinance to enact a new Chapter
of the _____ Code of Ordinances
to administer and regulate the
public right-of-way in the public interest, and to provide for the
issuance and regulation of right-of-way permits

THE COUNCIL OF _____ ORDAINS⁴:

Chapter ___ of _____ Code of Ordinances (hereafter “this Code”)⁵ is hereby repealed in its entirety, and is replaced by the following new Chapter 1 (hereafter “this Chapter”), to read as follows:

Sec. 1.01. Election to Manage the Public Right-of-Way

In accordance with the authority granted to the city under state and federal statutory, administrative and common law, the city hereby elects pursuant to this chapter to manage rights-of-way within its jurisdiction.

Sec. 1.02. Definitions.

The definitions included in Minnesota Statute Section 237.162, Minnesota Rules 7819.0100 subps. 1 through 23, and Minnesota Rules 7560.0100 subps. 1 through 12 are hereby adopted by reference and are incorporated into this chapter as if set out in full.

Sec. 1.03. Permit Requirement.

⁴Enacting clauses are different in various charters. The statutory city enacting clause is used here.

⁵In most cases, there will be ordinances or legislative codes that will need to be amended or repealed because of inconsistency with the new regulations. One method is to repeal all those provisions and replace them with this ordinance.

Subd. 1. *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 permit from the city.

(a) ***Excavation Permit.*** An excavation permit is required 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.

(b) ***Obstruction Permit.*** An obstruction permit is required to hinder free and open passage over the specified portion of 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.

Subd. 2. *Permit Extensions.* No person may excavate or obstruct the right-of-way beyond the date or dates specified in the permit unless such person (i) 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.

Subd. 3. *Delay Penalty.* In accordance with Minnesota Rule 7819.1000 subp. 3, and notwithstanding subd. 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.

Subd. 4. *Permit Display.* Permits issued under this chapter shall be conspicuously displayed or otherwise available at all times at the indicated work site and shall be available for inspection by the director.

Sec. 1.04. Permit Applications.

Application for a permit shall contain, and will be considered complete only upon compliance with the requirements of the following provisions: [**Note: Copy of Model permit application is included at end of document.**]

(a) Submission of a completed permit application form, including all required attachments, scaled drawings showing the location and area of the proposed project and the location of all known existing and proposed facilities, and the following information:

(1) Each permittee'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 available 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:

(1) Verifying that an insurance policy has been issued to the permittee by an insurance company licensed to do business in the State of Minnesota, or a form of self insurance acceptable to the director;

(2) Verifying that the permittee 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 permittee, its officers, agents, employees and permittees, and (ii) placement and use of facilities and equipment in the right-of-way by the permittee, 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;

(3) 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;

(4) Requiring that the director be notified thirty (30) days in advance of cancellation of the policy or material modification of a coverage term;

(5) Indicating comprehensive liability coverage, automobile liability coverage, workers compensation and umbrella coverage established by the director in amounts sufficient to protect the city and the public and to carry out the purposes and policies of this chapter.

(6) The city may require a copy of the actual insurance policies.

(7) If the person is a corporation, a copy of the certificate required to be filed under Minn. Stat. 300.06 as recorded and certified to by the Secretary of State.

(8) A copy of the person's order granting a certificate of authority from the Minnesota Public Utilities Commission or other applicable state or federal agency, where the person is lawfully required to have such certificate from said commission or other state or federal agency.

(b) Payment of money due the city for

(1) permit fees, estimated restoration costs and other management costs,

(2) prior obstructions or excavations;

(3) 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) franchise fees or other charges, if applicable.

Sec. 1.05. Issuance of permit; conditions.

Subd. 1. *Permit Issuance.* If the applicant has satisfied the requirements of this chapter, the director shall issue a permit.

Subd. 2. *Conditions.* The director 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. In addition, 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.

Subd. 3. *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 City.

Sec. 1.06. Permit Fees. (Note: Sample fee schedules included in the appendix) The city shall establish an Excavation permit fee in an amount sufficient to recover the following costs:

- (a) the city management costs;
- (b) degradation costs, if applicable.

Subd. 2. *Obstruction Permit Fee.* The city shall establish the obstruction permit Fee and shall be in an amount sufficient to recover the city management costs.

Subd. 3. *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.

Subd. 4. *Non refundable.* Permit fees that were paid for a permit that the director has revoked for a breach as stated in Section 1.21 are not refundable.

Subd. 5. *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. 6. All permit fees shall be established consistent with the provisions of Minnesota Rule 7819.100.

Sec. 1.07. Right-of-Way Patching and Restoration.

Subd. 1. *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 unseasonable or unreasonable under Section 1.15.

Subd. 2. *Patch and Restoration.* Permittee shall patch its own work. The city may choose either to have the permittee restore the right-of-way or to restore the right-of-way itself.

(a) ***City Restoration.*** If the city restores the 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 having to correct the defective work.

(b) ***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 Rules 7819.3000.

(c) ***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 patching and the degradation fee shall not include the cost to accomplish these responsibilities.

Subd. 3. *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

Subd. 4. *Duty to correct defects.* The permittee shall correct defects in patching, or restoration performed by permittee or its agents. Permittee upon notification from the director, correct all restoration work to the extent necessary, using the method required by the director. Said work shall be completed within five (5) calendar days of the receipt of the notice from the director, not including days during which work cannot be done because of circumstances constituting force majeure or days when work is prohibited as unseasonable or unreasonable under Section 1.15.

Subd. 5. *Failure to Restore.* If the permittee fails to restore the right-of-way in the manner and to the condition required by the director, or fails to satisfactorily and timely complete all restoration required by the director, the director at its option may do such work. In that event the 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.

Sec. 1.08. Supplementary Applications.

Subd. 1. *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.

Subd. 2. *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.

Sec. 1.09. Denial of permit.

The city may deny a permit for failure to meet the requirements and conditions of this chapter 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.

Sec. 1.10. 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 Rules 7819.1100 and other applicable local requirements, in so far as they are not inconsistent with the Minnesota Statutes Secs. 237.162 and 237.163.

Sec. 1.11. Inspection.

Subd. 1. *Notice of Completion.* When the work under any permit hereunder is completed, the permittee shall furnish a completion certificate in accordance Minnesota Rules 7819.1300.

Subd. 2. *Site Inspection.* Permittee shall make the work-site available to city personnel and to all others as authorized by law for inspection at all reasonable times during the execution of and upon completion of the work.

Subd 3. *Authority of Director.*

(a) 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.

(b) The director may issue an order to the permittee for any work that does not conform to the terms of the permit or other applicable standards, conditions, or codes. The order shall state that failure to correct the violation will be cause for revocation of the permit. Within ten (10) days after issuance of the order, the permittee shall present proof to the director that the violation has been corrected. If such proof has not been presented within the

required time, the director may revoke the permit pursuant to Sec. 1.21.

Sec. 1.12. Work Done Without a permit.

Subd. 1. *Emergency Situations.* Each person with facilities in the right-of-way shall immediately notify the city of any event regarding its facilities that it considers being an emergency. The owner of the facilities may proceed to take whatever actions are necessary to respond to the emergency. Within two business days after the occurrence of the emergency the owner 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 chapter for the actions it took in response to the Emergency.

If the city becomes aware of an emergency regarding facilities, the city will attempt to contact the local representative of each facility owner 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 person whose facilities occasioned the emergency.

Subd. 2. *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, and as a penalty pay double the normal fee for said permit, pay double all the other fees required by this code, 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 chapter.

Sec. 1.13. 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 director of the accurate information as soon as this information is known.

Sec. 1.14. Revocation of Permits.

Subd. 1. *Substantial Breach.* The city reserves its right, as provided herein, 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:

- (a) The violation of any material provision of the right-of-way permit;
- (b) 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;
- (c) Any material misrepresentation of fact in the application for a right-of-way permit;
- (d) 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 permittees control; or

(e) The failure to correct, in a timely manner, work that does not conform to a condition indicated on an order issued pursuant to Sec. 1.18.

Subd. 2. *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 might be cause for revocation of the permit. A substantial breach, as stated above, will allow the city, at its discretion, to place additional or revised conditions on the permit to mitigate and remedy the breach.

Subd. 3. *Response to Notice of Breach.* Within twenty-four (24) hours of receiving notification of the breach, permittee shall provide the city with a plan, acceptable to the city, which will cure the breach. Permittee's failure to so contact the city, or the permittee's failure to submit an acceptable plan, or permittee's failure to reasonably implement the approved plan, shall be cause for immediate revocation of the permit.

Subd. 4. *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.

Sec. 1.15. Mapping Data.

Subd. 1. *Information Required.* Each permittee shall provide mapping information required by the city in accordance with Minnesota Rules 7819.4000 and 7819.4100.

Subd. 2. *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 city reasonably requires it. Permittees or their subcontractors shall submit to the city evidence of the installed service lateral locations. Compliance with this subdivision 2 and with applicable Gopher State One Call law and Minnesota Rules governing service laterals install 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 city shall reasonably determine the appropriate method of providing such information. 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.

Sec. 1.16. Location of Facilities.

Subd. 1. Placement, location, and relocation of facilities must comply with the act, with other applicable law, and with Minnesota Rules 7819.3100, 7819.5000 and 7819.5100, to the extent the rules do not limit authority otherwise available to cities. **[Note: Cities wishing to require the undergrounding of utilities should adopt the separate undergrounding ordinance included with appendix]**

Subd. 2. Corridors. The city may assign specific corridors within the right-of-way, or any particular segment thereof as may be necessary, for each type of facilities that is or, pursuant to current technology, the city expects will someday be located within the right-of-way. All excavation, obstruction, or other permits issued by the city involving the installation or replacement of facilities shall designate the proper corridor for the facilities at issue.

Subd. 3. Limitation of Space. To protect health, safety, and welfare or when necessary to protect the right-of-way and its current use, the director shall have the power to prohibit or director shall strive to the extent possible to accommodate all existing and potential users of the right-of-way, but shall be guided primarily by considerations of the public interest, the public's needs for the particular utility service, the condition of the right-of-way, the time of year with respect to essential utilities, the protection of existing facilities in the right-of-way, and future city plans for public improvements and development projects which have been determined to be in the public interest.

Sec. 1.17. Damage to Other Facilities.

When the city does work in the right-of-way and finds it necessary to maintain, support, or move facilities to protect it, the director shall notify the local representative as early as is reasonably possible and placed as required. The costs associated therewith will be billed to that facility owner and must be paid within thirty (30) days from the date of billing. Each facility owner shall be responsible for the cost of repairing any facilities in the right-of-way which it or its facilities damages. Each facility owner shall be responsible for the cost of repairing any damage to the facilities of another caused during the city's response to an emergency occasioned by that owner's facilities.

Sec. 1.18. Right-of-Way Vacation.

Reservation of right. If the city vacates a right-of-way that contains facilities, the facility owner's rights in the vacated right-of-way are governed by Minnesota Rules 7819.3200.

Sec. 1.19. Indemnification and Liability

By applying for and accepting a permit under this chapter, a permittee agrees to defend and indemnify the city in accordance with the provisions of Minnesota Rule 7819.1250.

Sec. 1.20. Abandoned Facilities.

Removal of Abandoned Facilities. Any person who has abandoned facilities in any right-of-way

shall remove them from that right-of-way if required in conjunction with other right-of-way repair, excavation, or construction, unless the director waives this requirement.

Sec. 1.21. Appeal.

A right-of-way user that: (1) has been denied registration; (2) has been denied a permit; (3) has had permit revoked; (4) believes that the fees imposed are invalid; or (5) disputes a determination of the city regarding Section 1.23 subd. 2 of this ordinance, may have the denial, revocation, fee imposition, or decision 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 writing and supported by written findings establishing the reasonableness of the decision.

Sec. 1.22. Reservation of Regulatory and Police Powers.

A permittee'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.

SAMPLE RIGHT-OF-WAY PERMIT FEE SCHEDULE

The attached document is a fee schedule prepared by the City of Bloomington to support their right-of-way permit fee system. Under Minnesota Statute Sections 237.162 and .163, as well as applicable Minnesota Public Utilities Commission Rules, right-of-way permit fees must be based on the city's actual right-of-way management costs. Accordingly, the attached fee schedule looks at the various city activities associated with the registration and permit process. It then estimates the time associated with performing those various activities. Finally, it applies an hourly rate to each of the activities to arrive at the appropriate permit charge. Obviously the time and hourly rate will vary from city to city. However, the methodology used is a sound one and may help you arrive at a defensible fee system.

RIGHT-OF-WAY FEES & CHARGES
COST ESTIMATES FOR FEES

1. **Registration Fee**

	Time Involved (<u>Hour</u>)	X	<u>\$ Per Hour</u>	=	Cost (\$)
Administration	0.25	X	40	=	\$ 10.00
Review	0.50	X	40	=	20.00
Recording	0.25	X	40	=	<u>10.00</u>
Total Cost					\$ 40.00
Proposed Fee					= <u>\$ 40.00</u>

2. **Excavation Permit Fees**

A) Hole

Administration	0.25	X	40	=	\$ 10.00
Verification					
1) Plan Review	0.50	X	45	=	22.50
2) Inspection					
a) Location before work	0.50	X	30	=	15.00
b) Compliance during work	0.50	X	30	=	15.00
c) Completion after work	0.50	X	30	=	15.00
d) Reinspection	0.25	X	40	=	10.00
3) Testing Result Review					
a) Compaction	0.083	X	40	=	3.33
b) Material	0.083	X	40	=	3.33
4) Mapping					
a) Review data	0.25	X	45	=	11.25

b) Transfer to Autocad	0.25	X	45	=	11.25
c) Insert to overlay to tie in	0.25	X	45	=	<u>11.25</u>
Total Cost					\$127.91
Proposed Fee					<u>\$125.00</u>

B) Emergency Hole

Administration	0.25	X	40	=	\$ 10.00
Inspection after completion	1.50	X	30	=	<u>45.00</u>
Total Cost					\$55.00
Proposed Fee					<u>\$55.00</u>

C) Trench

Administration	0.25	X	40	=	\$ 10.00
Verification					
1) Plan Review	1.50	X	45	=	\$ 67.50
2) Inspection					
a) Location before work	0.50	X	30	=	15.00
b) Compliance during work	1.50	X	30	=	45.00
c) Completion after work	1.50	X	30	=	45.00
d) Reinspection	0.75	X	40	=	30.00
3) Testing Result Review					
a) Compaction	0.083	X	40	=	3.33
b) Material	0.083	X	40	=	3.33
4) Mapping					
a) Review data	0.50	X	45	=	22.25
b) Transfer to Autocad	0.25	X	45	=	11.25
c) Insert to overlay to tie in	0.50	X	45	=	<u>22.25</u>
Total Cost					<u>\$275.40</u>

The average trench is 330 lin. ft. past the width of a hole. Therefore, the number of 100 lin. ft. (or portion thereof) units is 4. The cost per 100 lin. ft. unit is $275.40 / 4 = \$68.85/100'$ unit.

Proposed Fees = **\$ 70.00/100 lin.**
ft.
(Plus Hole Fee)

3. Obstruction Permit Fee

A) Administration	0.25	X	40	=	\$ 10.00
B) Recording	0.25	X	40	=	10.00
C) Review	0.75	X	45	=	<u>33.75</u>

Minimum Base Coat \$ 53.75

Proposed Base Fee **\$ 50.00**

Plus additional fee based on length

Inspection

1) Compliance during work	1.50	X	30	=	\$ 45.00
2) Completion after	0.25	X	30	=	<u>7.50</u>

Additional fee on assumed 1000 lin. ft. permit = \$ 52.50

Additional cost per lineal foot = \$52.50 / 1000 = 0.0525

Proposed Fee = \$50.00 plus 0.05 lin. ft.

4. Permit Extension Fee

A) Administration	0.25	X	40	=	\$ 10.00
B) Recording	0.083	X	40	=	3.33
C) Review	1.0	X	40	=	<u>40.00</u>

Total Cost = \$ 53.33

Proposed Fee = **\$ 55.00**

5. Delay Penalty

A) Administration	1.5	X	40	=	\$ 60.00
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For up to 3 days of non-completion and non-prior notice before specified completion date.

After 3 days, an additional charge of \$10/day will be levied.

Total Penalty Charge = **\$ 60.00**
(Up to 3 days late)

Each day late over 3 days = **\$ 60.00**
Plus 10.00/Day

Model Ordinance LMC/CEAM Right-of-Way Ordinance

Form for Summary Publication

City of _____, _____ County, Minnesota

A summary of an ordinance to enact a new Chapter
of the _____ Code of Ordinances
to administer and regulate the
public rights-of-way in the public interest, and to provide for the
issuance and regulation of Right-of-Way Permits

1. The City Council has adopted a lengthy ordinance administering and regulating the public rights-of-way in the public interest and providing for issuance and regulation of right-of-way permits. The purpose of this summary is to inform the public of the intent and effect of the ordinance and to publish only a summary of the ordinance with the full ordinance being on file in the office of the City Clerk during regular office hours.
2. The City Code of Ordinances is amended by adding a new chapter _____. The new chapter provides essentially as follows:

Sec. 1.01. Findings, Purpose, and Intent

Clarifies the reason and the need for the city to more effectively manage the public rights-of-way

Sec. 1.02. Election to Manage the Public Rights-of-Way

Clarifies the intent of the Council to manage the public rights-of-way pursuant to and in accordance with the authority given by the State Legislature in Minn. Stat. Secs. 237.162 and 163.

Sec. 1.03 Definitions

Certain words in the ordinance are defined here. This section also incorporates definitions adopted by the Minnesota Public Utilities Commission in state rules.

Secs. 1.06 Registration and Right-of-Way Occupancy and Sec. 1.07 Registration Information

Requires those using and occupying the public rights-of-way to register with the city and

provide basic essential information.

Sec. 1.08. Reporting Obligations

Defines some minimum reporting obligations for utilities planning to do work in the public rights-of-way, including schedules for anticipated work.

Sec. 1.09. Permit Requirement, Sec. 1.10 Permit Applications, Sec. 1.11 Issuance of Permit; Conditions, and Sec. 1.12 Permit Fees

Describes the requirements for obtaining a permit and paying appropriate permit fees before excavating or in any way obstructing the public rights-of-way.

Sec. 1.13. Right-of-Way Patching and Restoration

Contains the requirements for restoring the public rights-of-way after excavation and adopts the restoration standards contained in Minnesota Public Utilities Commission rules.

Sec. 1.17. Denial of Permit

Specifies the grounds for denying a right-of-way permit.

Sec. 1.18. Installation Requirements

Specifies that the installation of utility facilities in the public rights-of-way shall comply with city requirements and applicable rules of the Minnesota Public Utilities Commission.

Sec. 1.22. Revocation of Permits

Describes the grounds and procedures for revoking right-of-way permits.

Sec. 1.23. Mapping Data

Adopts rules of the Minnesota Public Utilities Commission describing the mapping information that must be provided by those placing utility facilities in the public rights-of-way.

Sec. 1.24. Location and Relocation of Facilities

Describes the requirement regarding location of utilities and further adopts Minnesota Public Utilities Commission rules regarding the circumstances when utilities can be forced to relocate their facilities.

Sec. 1.28. Indemnification and Liability

Specifies the circumstances in which those placing facilities in the public rights-of-way will be required to defend and indemnify the city for actions brought against the city.

Sec. 1.30. Appeal

Describes the process for challenging a city's decision involving application of this ordinance.

3. The City Council has determined that publication of the title and summary of the rights-of way management ordinance as set forth in this summary will clearly inform

the public of the intention and effect of the ordinance. The Council also directs that only the title and this summary be published. A copy of the entire text of the ordinance shall be posted in the _____ library.

Adopted by the City Council of _____ on this _____ day of _____.

[Prepared by Jim Strommen of Kennedy & Graven]

The following are some suggested ordinance provisions to address undergrounding rights available to cities under Minnesota law and in light of the NSP v. City of Oakdale decision, filed by the Minnesota Court of Appeals on February 2, 1999 and not appealed by NSP.

As a result of the Oakdale decision, cities may require undergrounding of electric distribution lines either through the exercise of police power or franchise right. The case does not give authority to require undergrounding of the higher voltage transmission lines, and by implication in the enabling statute, Minnesota Statutes, Section 216B.36, would not be allowed under Minnesota law. Though the Oakdale case does not deal with telecommunication lines, the opinion and relevant statutory and case law would support the same right to require undergrounding under the city's police power. The Oakdale decision further holds that as an exercise of police power, the city need not reimburse the utility for the added cost of undergrounding. The utility must comply and bear the cost of compliance. The utility may seek recovery of the cost from the ratepayers through the tariffs or some other form approved by the Public Utilities Commission.

The language suggested below covers undergrounding in three distinct contexts: new lines for new development; utility or city projects causing the need for facility repair or relocation; and a plan to underground all utility lines over a period of time. The right to require all facilities to be underground by a reasonable date certain appears supportable under Oakdale. Cities have a restricted right to require undergrounding in the interest of safety and the general welfare.

Note that the League of Minnesota Cities Model Right-of-Way Ordinance, Section 1.24, subdivision 1, deals with location of facilities. If your city has adopted the Model and intends to have a comprehensive undergrounding ordinance, we suggest that the following be added to section 1.24 of the ordinance.

Subd. 5 *Undergrounding*. Unless otherwise agreed in a franchise between the applicable right-of-way user and the City, Facilities in the right-of-way must be located or relocated and maintained underground in accordance with Section _____ of the City Code.

In accordance with the codification of a given city, the following is a sample, comprehensive approach to undergrounding of facilities.

Purpose. The purpose of this section 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 section.

Definitions. The terms used in this section have the meanings given them.

Commission. “Commission” means the Minnesota Public Utilities Commission.

Facility. “Facility” 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. Facility does not mean electric transmission lines, as distinguished from electric distribution lines.

Public right-of-way. “Public right-of-way” has the meaning given it in Minnesota Statutes, section 237.162, subdivision 3.

Right-of-way user. “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.

Utility service. “Utility service” means and includes: (1) service provided by a public utility as defined in Minnesota Statutes, Section 216B.02, subdivisions 4 and 6; (2) services of a telecommunications right-of-way user, including the transporting of voice or data information; (3) services provided by a cable communications system as defined in Minnesota Statutes, Section 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.

Undergrounding of Facilities. Facilities placed in the public right-of-way must be located, relocated and maintained underground pursuant to the terms and conditions of this section and in accordance with applicable construction standards. This section 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, USC Section 253.

Undergrounding of New Facilities. A new facility or a permanent extension of facilities must be

installed and maintained underground when supplied to:

- (a) a new installation of buildings, signs, streetlights or other structures;
- (b) a new subdivision of land; or
- (c) a new development or industrial park containing new commercial or industrial buildings.

Undergrounding of Permanent Replacement, Relocated or Reconstructed Facilities. A permanent replacement, relocation or reconstruction of a facility of more than 300 feet must 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 is 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 for a public project, (2) the public health or safety, or (3) the safety and convenience of travel over the right-of-way.

Retirement of Overhead Facilities. The city council may determine whether it is in the public interest that all facilities within the city, or 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 sections -----(new Facilities) and -----(replacement facilities) of this code. The decision to underground must be preceded by a public hearing, after published notice and written notice to the utilities affected. (Two weeks published: 30 days written.) At the hearing the council must consider item (1) – (4) in section ____ of this code and make findings. Undergrounding may not take place until city council has, after hearing and notice, adopted a plan containing items (1) – (6) of section _____ of this code.

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 sections _____ and _____ of the city code.

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.

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, 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, 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.

Minnesota Public Utilities Commission Right-of-Way Rules

Located on Web at: [<http://www.revisor.leg.state.mn.us/arule/7819/>]

Utility Marking Rule: [<http://www.revisor.leg.state.mn.us/arule/7560/>]