

CITY OF WINTHROP
ORDINANCE NUMBER
2019-129

**AN ORDINANCE ADDING CHAPTER 306 REGARDING RIGHT OF WAY
PERMITS AND ADMINISTRATION**

The City Council of the City of Winthrop Ordains:

Section 1. The Winthrop City Code Chapter 306 shall be added as follows:

306.01 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, utility easements and any other locations or to be placed therein at some future 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. This Chapter shall be interpreted consistently with Minnesota Statutes Chapters 237, and 238 (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.

306.2 Election to Manage the Public Rights-of-Way

Pursuant to the authority granted to the City under state and federal statutory, administrative and common law, the City hereby elects, pursuant Minn. Stat. 237.163 subd. 2(b), to manage rights-of-way within its jurisdiction.

306.3 Definitions.

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

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“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 its elected officials, appointed officials, officers, employees and agents.

“Commission” means the Minnesota Public Utilities Commission.

“Congested Right-of-Way” means a crowded condition in the subsurface of the public right-of-way that occurs when the maximum lateral spacing between existing underground facilities does not allow for construction of new underground facilities without using hand digging to expose the existing lateral facilities in conformance with Minnesota Statutes, section 216D.04. subdivision 3.

“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.

“Department” means the department of public works of the City or a department of the Light and Power Commission.

“Department Inspector” means any person authorized by the City.

“Director” means the director of the department of public works of the City, or her or his designee.

“Delay Penalty” is the penalty imposed as a result of unreasonable delays in right-of-way excavation, obstruction, patching, or restoration.

“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.

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

“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.

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“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.

“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.

“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.

“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.

“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 including those of the Light and Power Commission. A right-of-way does not include the airwaves above a right-of-way with regard to cellular or other non-wire telecommunications or broadcast service.

“Service” or “Utility Service” includes (1) those services provided by a public utility as defined in Minn. Stat. 216B.02, subds. 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 enduse customer. A service lateral is also an underground facility that is used in the removal of wastewater from a customer’s premises.

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“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.

“Utility” 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.

306.4 Administration.

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

306.5 Delay Penalty.

In accordance with Minnesota Rule 7819.1000 subd. 3 the City shall establish and impose a delay penalty for unreasonable delays in right-of-way excavation, obstruction, patching, restoration or undergrounding of utilities. The delay penalty shall be established from time to time by City Council resolution.

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306.6. 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.

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. If the City assigns a specific area, all utilities must locate their facilities in that area. 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. 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.

Subd. 4. Undergrounding. Unless otherwise agreed in a franchise between the applicable right-of-way user and the City, the Applicant's facilities in the right-of-way must be located or relocated and maintained underground in accordance with this subdivision.

(a) Purpose. The purpose of this subdivision is to promote the health, safety and general welfare of the public and is intended to foster (1) safe travel over the right-of-way, (2) nontravel related safety around homes and buildings where overhead feeds are connected and (3) orderly development in the city. Location and relocation, installation and reinstallation of Facilities in the right-of-way must be made in accordance with this subdivision.

(b) Undergrounding of Facilities. Facilities placed in the public right-of-way must be

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located, relocated and maintained underground pursuant to the terms and conditions of this subdivision and in accordance with applicable construction standards. This subdivision is intended to be enforced consistently with state and federal law regulating right-of-way users, specifically including but not limited to Minnesota Statutes, Sections 161.45, 237.162, 237.163, 300.03, 222.37, 238.084 and 216B.36 and the Telecommunications Act of 1996, Title 47, USC Section 253.

(c) Undergrounding of New Facilities. Consistent with the City's building specifications, any new facility, regardless of size or extent, or a permanent extension of facilities must be installed and maintained underground.

(d) Undergrounding of Permanent Replacement, Relocated or Reconstructed Facilities. A permanent replacement, relocation or reconstruction of a facility by a utility must be located and maintained underground, with due regard for seasonal working conditions. For purposes of this subdivision, 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 or improvement, repair or maintenance by the City or other local government unit of the right-of-way, utility easements or any other locations for a public project, (2) the public health or safety, or (3) the safety and convenience of travel over the right-of-way, utility easements or other locations.

(e) Retirement of Overhead Facilities. The City Council or the Light and Power Commission 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 subdivisions relating to new facilities and relating to replacement facilities of this ordinance. 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 or Light and Power Commission must consider section 306.6 Subd. 5 (a)(1-5) of this ordinance and make findings. Undergrounding may not take place until the City Council or the Light and Power Commission has, after hearing and notice, adopted a plan containing items (i) – (vi) of section 306.6 Subd. 5 (a)(5) of this ordinance. Subd. 5. 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

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necessary for the undergrounding required under the section 306.6 Subd. 4 (d) above entitled “Undergrounding of Permanent Replacement, Relocated or Reconstructed Facilities”.

(a) 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 or Light and Power Commission 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.

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

- (i) Timetable for the undergrounding.
- (ii) Designation of districts for the undergrounding unless, undergrounding plan is citywide.
- (iii) Exceptions to the undergrounding requirement and procedure for establishing such exceptions.
- (iv) Procedures for the undergrounding process, including but not limited to coordination with City projects and provisions to ensure compliance with nondiscrimination requirements under the law.
- (v) A financing plan for funding of the incremental costs if the City determine 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.
- (vi) Penalties or other remedies for failure to comply with the undergrounding.

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306.7 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 utility 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.

306.8 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.

306.9 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.

306.10 Indemnification and Liability

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

306.11 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 utility which 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.

306.12 Appeal.

A utility 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; may have the denial, revocation, fee imposition, or

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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.

306.13 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.”

Passed by the City Council of the City of Winthrop this 4th day of February 2019.

Signed _____,
Mayor

Attest _____
City Administrator

First Reading: February 4th, 2019
Second Reading/Adoption: March 4th, 2019
Publication: March 6th, 2019