

AN ORDINANCE
of the
CITY OF
MINNEAPOLIS

Council Member Reich presents the following ordinance:

Amending Title 17, of the Minneapolis Code of Ordinances relating to Streets and Sidewalks: Use of City Owned Infrastructure.

The City Council of The City of Minneapolis do ordain as follows:

Section 1. That Title 17 of the above entitled ordinance be amended by adding a new Chapter 451 to read as follows:

CHAPTER 451. USE OF CITY OWNED INFRASTRUCTURE.

451.10 DEFINITIONS.

(A) Except as provided in Subsection (B), in this chapter:

(1) “*applicant*” means a person who applies to use City infrastructure.

(2) “*attachment*” includes:

(a) on a pole, each aerial cable, together with its associated messenger cable, guy wire, anchors and other appurtenant and incidental facilities;

(b) in a conduit, each linear foot of occupancy of a City-owned conduit or duct by each cable or other attachment; and

(c) each antenna, transceiver, amplifier, repeater or other device or equipment of a user supported by, affixed to, contained in, or placed on or in a unit of City owned infrastructure.

(3) “*attachment permit*” means the permit for a user to place, install, construct, replace, move, remove, keep, maintain, operate, or use an attachment on or in City owned infrastructure under this chapter or a permit issued under this chapter.

(4) “*cable*” means a wire rope or a bound or sheathed assembly of conductors, wires, or fibers, including fiber optic cable, coaxial cable, and twisted pair copper cable. Each cable that is lashed to another cable or to a common messenger cable is a separate attachment.

(5) “*communications services provider*” means a user who provides or offers to provide cable, telecommunications, or video services pursuant to a franchise or a federal or state certificate or other authority and who has a right to use the City’s public right-of-way for the provision of those services under federal, state, or local law.

(6) “*Director*” means the Director of the Minneapolis Public Works Department or, unless the context indicates otherwise, the Director’s designees.

(7) “*Director of Public Works*” means the specific individual, who has been appointed Director of the Minneapolis Public Works Department, or in the case of such person’s absence from duties, the duly determined Acting Director of Public Works.

(8) “*user*” means a person who has been granted the right to install an attachment under this chapter.

(9) “*City*” means the City of Minneapolis.

(10) “*city owned infrastructure*” includes city owned facilities as defined specifically in the Minneapolis Pole Attachment Policy that are located in the public right of way. It does not mean poles or other structures owned by a city contractor. It does not mean State, County or other municipally or government entity owned infrastructure on City owned right of way. It does not mean infrastructure owned by a public utility. It does not mean infrastructure located outside of the public right of way.

(11) “*person*” has the meaning given in Section 3.60 of this code.

(B) If state law governing attachments to city-owned utility infrastructure provides a definition of “attachment” in conflict with and preemptive of the definition in this section, the state definition controls.

451.20 PURPOSE.

This chapter establishes a uniform policy for use of City owned infrastructure to enable the City to:

(1) permit fair, reasonable, and non-discriminatory access to the available capacity on City owned infrastructure located within the public right-of-way;

(2) safeguard the reliability and integrity of City owned infrastructure located in the public right of way;

(3) obtain fair compensation for the use of City owned infrastructure through fees and usage and other charges;

(4) comply with applicable and constitutional federal, state, and local regulation as applied to City owned infrastructure placed within the right of way;

(5) support cost-effective, optimal use of public resources and support economic development;

(6) manage the public right-of-way to protect the public health, safety, and welfare by minimizing the congestion, inconvenience, cost, visual impacts, deterioration, safety hazards and other adverse effects on the public right-of-way which could result from the construction, operation, and maintenance of additional structures constructed by service providers.

451.30 RESTRICTIONS ON USE OF CITY OWNED INFRASTRUCTURE.

(A) *The right to use City owned infrastructure not granted by franchise.* The eligibility of a person to apply for or use City owned infrastructure is governed by this chapter. The grant of a franchise pursuant to the City Charter, the grant of permits pursuant to Chapter 429 and 430 of this Code or the grant of rights under other authority provided by this Code is not a grant of an

attachment permit or authorization for the use of City owned infrastructure without compliance with this chapter.

(B) *Authority of the Director as to City owned infrastructure.* The Director shall operate, maintain, and control City owned infrastructure, and administer this chapter. The Director shall develop non-discriminatory policies and regulations to implement, administer, and enforce this chapter, which shall become effective following approval by the City Council. The Director may delegate the operation, maintenance, or control of specific types or units of City owned infrastructure to another City department or unit if the Director determines it is in the best interests of the City.

(C) *Priority of usage.* The City has priority of use of City owned infrastructure.

(D) *Reservation and restrictions.*

(1) The City retains the exclusive use of:

- (a) Any pole, truss, arm or other structure that supports traffic signal equipment,
- (b) Any street light pole less than 25 feet high,
- (c) Variable message signs,
- (d) City owned conduit ,
- (e) City owned infrastructure not on, in or over the public right of way, and
- (f) Any City owned structure on right of way not listed specifically in the Minneapolis Pole Attachment Policy.

The Director may permit third party use of reserved City owned infrastructure only in exceptional cases, upon terms and conditions determined by the Director.

(2) The Director may determine that, in addition to the infrastructure listed in paragraph 1 above, certain classes of City owned infrastructure or specific units of City owned infrastructure are necessary for City's exclusive use due to legal, mechanical, structural, safety, environmental, service, or other requirements, and are unavailable for use by another person.

(3) City owned infrastructure is the property of the City and a payment made by a user does not create a right, title, or interest in City owned infrastructure for the use.

(4) This chapter does not require the City to replace, upgrade, or alter existing City owned infrastructure to create additional capacity for an attachment. The City retains complete discretion as to use of City owned infrastructure as to both current and subsequent requests to use any particular item of City owned infrastructure, including requests for co-location or modification. Decisions regarding the use of City owned infrastructure, pursuant to this Chapter, are discretionary proprietary decisions as to proper use of City owned infrastructure placed within the right of way and are not regulatory decisions.

(E) *Unauthorized use prohibited.* An applicant, user, or other party does not have the right to place an attachment on City owned infrastructure except as authorized by the Director. If an unauthorized attachment is discovered, the Director may remove the unauthorized attachment from City owned infrastructure without incurring liability to the owner, and at the owner's sole expense, if the owner of the unauthorized attachment does not:

- (1) remove the unauthorized attachment within 3 business days; or
- (2) apply for permission to have the attachment on City owned infrastructure within 3 business days, including payment of applicable charges or penalties.

An attachment can be removed immediately if necessary to protect public safety or prevent imminent damage to City owned infrastructure.

451.40 FEES AND CHARGES.

(A) Except as otherwise provided by this section, the City Council shall establish fees and charges under this chapter by separate ordinance or by separate resolution.

(B) A charge established under this chapter may not exceed the maximum amount permitted by applicable law.

(C) Filing fees and usage charges shall be calculated and applied in a consistent manner for all similarly situated users. If state law or regulation preempts a filing fee or usage charge under this chapter, the filing fee and usage charge collected by the City shall be the maximum amount permitted by state law or regulation.

451.50 APPLICATION TO USE CITY OWNED INFRASTRUCTURE.

(A) *Authorized user.* Unless otherwise required by law, only a person who holds a valid permit, franchise or license to use or cross a City street, highway, or right- of-way will be granted an attachment permit for on City owned infrastructure. An applicant's use of City owned infrastructure is limited to the purposes specified in the applicant's franchise, permit or license. An attachment used for a purpose not authorized by an applicant's permit, franchise or license is an unauthorized attachment. A person who applies to use City owned infrastructure for a private purpose will not be granted an attachment permit.

(B) *Application process.* An applicant must file an application with the City to use City owned infrastructure as prescribed by the Director. Subject to the availability of City owned infrastructure capacity, the Director shall consider each application on a first come, first served basis. If an application cannot be approved as presented, the Director may approve a conditional application.

(C) *Denial of an application.*

(1) The Director may deny an application for an attachment if:

(a) the applicant fails to submit a complete application;

(b) the applicant fails to supplement its application with additional information or otherwise cooperate with the City as requested in the evaluation of the application;

(c) the applicant fails to pay the filing fee;

(d) the applicant fails to submit a structural engineering analysis by a Minnesota registered professional engineer certifying that the pole or other structure that is proposed to support the attachment can reasonably support the proposed attachment considering the conditions of the street, the anticipated hazards from traffic to be encountered at the location and considering the wind, snow, ice and other conditions reasonably anticipated at the proposed location;

(e) the Director determines in the Director's judgment that the proposed attachment may be of excessive size or weight or would, in the opinion of the Director, otherwise subject City owned infrastructure to unacceptable levels of additional stress;

(f) the Director reasonably determines in the Director's judgment that the proposed attachment may jeopardize the reliability or integrity of the electric system or of individual units of City owned infrastructure, or violate generally applicable engineering principles;

(g) the proposed attachment would present a safety hazard;

(h) approval would impair the City's ability to operate or maintain City owned infrastructure in a reasonable manner as determined in the discretion of the Director;

- (i) there is insufficient capacity or placement of the attachment would violate the National Electric Safety Code or the City's standard design criteria, and the City infrastructure cannot reasonably be modified or enlarged at the cost of the applicant;
 - (j) the applicant is not in compliance with any provision of this chapter; or
 - (k) the applicant fails or refuses to sign a written agreement presented by the Director to the applicant intended to assist with the implementation of the provisions of this chapter, intended to assist with the implementation of the policies and regulations developed by the Director pursuant to Section 451.30 (B) of this Code and intended to preserve the City's right to exclusive control of its City owned infrastructure placed within the right of way.
- (2) If an application is denied, the Director shall notify the applicant in writing of the reason for the denial. If an application is denied, an applicant may file a new application that corrects the reason for the denial. If an application is denied, applicant may appeal the denial to the Director of Public Works no later than the 30th day after the date of the denial as prescribed by the Director. The Director of Public Works may appoint a specific staff member or third party to make a report and recommendation regarding the matter to the Director of Public Works. If the Director of Public Works upholds an original decision which denies an applicant all or substantially all requested attachment rights, the applicant may appeal to the City Council under Section 451.70 (*Appeal to the City Council*).
- (D) *Additional costs*. The applicant or user is responsible for all costs as determined by the City to replace, enlarge, or upgrade City owned infrastructure to accommodate the applicant's or user's proposed attachment.
- (E) *Permit Requirements*. (1) An applicant or user must pay the estimated usage charges for the first year of use in advance when the applicant obtains the permit.
- (2) A user may not change the number, kind, location of attachments, the method of construction or installation, or the use of the attachments authorized under a permit without the prior written consent of the Director.
- (3) Termination, revocation, or expiration of a user's franchise, permit or license to use a City street, highway, or right-of-way automatically terminates the user's attachment permit without further action by the City or notice to user.

451.60 USER'S DUTIES AND RESPONSIBILITIES.

(A) *Compliance with law*. A use shall comply with all applicable federal, state, and local laws, rules, and regulations, City policies, the National Electrical Code, the National Electrical Safety Code, and applicable industry standards.

(B) *Operational and maintenance requirements*.

(1) A user shall install, and continuously operate and maintain an approved attachment to prevent interference with the City's facilities, the City's use of City owned infrastructure, or the facilities or operations of other users.

(2) A user may not construe a contract, permit, correspondence, or other communication as affecting a right, privilege or duty previously conferred or imposed by the City to or on another person. The City reserves the right to continue or extend a right, privilege, or duty or to contract with additional users without regard to resulting economic competition.

(3) A user shall trim trees, with the appropriate permissions of the Minneapolis Park and Recreation Board, as necessary for the safe and reliable operation, use, and maintenance of the

user's attachments, as prescribed by the standards promulgated by the Minneapolis Park and Recreation Board, the city arborist, the Director or other authority.

(4) A user may not co-lash or co-locate attachments without the prior written consent of the Director and subject to the conditions the Director reasonably requires.

(5) A user is solely responsible for the risk and expense of installation, operation, and maintenance of the user's attachments. The City does not warrant or represent that the City owned infrastructure is suitable for placement of a user's attachments. A user shall submit a structural engineering analysis by a Minnesota registered professional engineer certifying that the pole or other structure that is proposed to support the attachment can reasonably support the proposed attachment considering the conditions of the street, the anticipated hazards from traffic to be encountered at the location and considering the wind, snow, ice and other conditions reasonably anticipated at the proposed location. A user shall inspect the City owned infrastructure on which the user's attachments will be placed and shall base its determination of the suitability of the City owned infrastructure for user's purposes on such inspection, on the a structural engineering analysis by a Minnesota registered professional engineer certifying that the pole or other structure that is proposed to support the attachment can reasonably support the proposed attachment considering the conditions of the street, the anticipated hazards from traffic to be encountered at the location and considering the wind, snow, ice and other conditions reasonably anticipated at the proposed location. and upon such further information as the user determines is relevant. A user must accept the City owned infrastructure "as is" and "where is" and assumes all risks related to the use. The City is not liable for any damage to attachment(s) due to an event of damage to the pole or premises.

(6) If the Director determines that a user's attachments impair the safety or structural integrity of City owned infrastructure, the Director may require the user, at user's sole expense and risk, to change, move, remove, or rearrange the attachments. The Director may also require a user to move or rearrange its attachments to maximize the available useable infrastructure and accommodate the attachments of an additional user, unless the movement or rearrangement of attachments materially impairs the use or function of the existing user's system. An existing user is only required to comply with this paragraph if the additional user agrees to compensate the existing user for its actual costs to move or rearrange attachments. If a user fails or refuses to comply with the Director's request to change, move, remove or rearrange any of its attachments, the attachments become unauthorized. The City may change, move, remove, or rearrange an unauthorized attachment without liability to user and at user's sole cost.

(7) The Director may inspect, at any time, the construction or installation of a user's attachments on City owned infrastructure. If the Director determines that a user's installation or construction may violate this chapter, the National Electric Code, the National Electric Safety Code, the City's standards for the City owned infrastructure involved, or the conditions of the user's application or permit, the Director may immediately suspend the user's construction or installation activities. The Director shall send written notice to the user not later than the third business day after a suspension identifying the alleged violation. A suspension under this paragraph is effective until the user corrects the alleged violation, at the user's sole expense. A user may appeal a suspension under this subsection to the Director of Public Works.

(8) A user may not transfer, assign, convey, or sublet an attachment permit without Director's prior written consent. A transfer, assignment, conveyance, or subletting of an attachment permit without the Director's prior written consent is not binding on the City.

(9) As a condition of the user having its facilities in City right of way and on City owned infrastructure placed within the right of way the user agrees to and shall, to the extent permitted by law, defend, indemnify and hold harmless the City, its employees, officers, agents and contractors against any claim of liability or loss of any kind, including administrative orders and regulations, and specifically including, without limitation, any claim of liability or loss from personal injury or property damage resulting from or arising out of the presence of user's equipment in City right of way or on City owned infrastructure placed within the right of way and also as to any willful misconduct of the user, its employees, contractors or agents, except to the extent such claims or damages may be due to or caused by the willful misconduct of the City, or its employees, officers, contractors or agents.

(10) The City shall not be liable to the user, or any of its respective agents, representatives, or employees for any lost revenue, lost profits, loss of technology, use of rights or services, incidental, punitive, indirect, special or consequential damages, loss of data, or interruption or loss of use of service, even if the City has been advised of the possibility of such damages, whether under theory of contract, tort (including negligence), strict liability or otherwise that is related to, arises out of, flows from or is, in some part, caused by user's attachment to or use of City owned infrastructure.

(C) Termination.

(1) The City may immediately suspend the permission of a user to make new or additional attachments if the user materially fails to comply with the terms of its franchise, permit or license, or if the City provides written notice to the user. If the user fails to cure the default on or before the 60th day after receipt of the notice, the City may terminate the user's attachment permit.

(2) A user shall immediately begin removal of its attachments after termination of a user's attachment permit for violations of the terms of a franchise, permit, license or other authority, a voluntary termination by a user, or a termination by the City for cause. Unless the Director grants an extension of time, a user must remove all attachments not later than the 60th day after the effective date of termination.

(3) After termination of a user's attachment permit, the user must comply with the terms of this chapter, the user's franchise, permit, license, or other authority until all attachments are removed.

(4) A user may appeal the termination of its attachment permit in accordance with Sections 451.50 (*Application to Use Utility Infrastructure*) and 451.70 (*Appeal to City Council*). While an appeal is pending, a user may continue to use its existing attachments but may not make, change, move, rearrange, construct, or install an additional attachment.

451.70 APPEAL TO CITY COUNCIL.

(A) If an applicant has been denied attachment rights substantially in their entirety under Section 451.50 (*Application to Use Utility Infrastructure*), or if a user's attachment permit has been terminated substantially in their entirety under Section 451.60 (*User's Duties and Responsibilities*), the applicant or user may appeal the denial to the city council. A person must file a written notice of appeal to the city council and with the Director no later than the 20th day after the date of the Director of Public Work's denial of the applicant or user's appeal. The notice of appeal shall include:

- (1) the name, address, and telephone number of the appellant;
 - (2) the name, address and telephone number of any current users of the specific item of infrastructure occupied by, or proposed to be occupied by, the appellant;
 - (3) the decision being appealed;
 - (4) the date of the decision being appealed; and
 - (5) the basis of the appeal, including a concise statement describing the reasons the appellant believes it was wrongfully denied an attachment permit or its attachment permit was wrongfully terminated.
- (B) Upon receipt of a notice of appeal, the Director shall schedule a hearing before the appropriate City Council committee, and notify the appellant and any current users of the specific item of infrastructure occupied by, or proposed to be occupied by, the appellant of the time and date of the hearing by first class mail at least ten days before the date of the hearing. The appellant is the only party to the appeal.
- (C) The appellant has the burden of proof to establish that the decision being appealed is incorrect and in the case of a decision requiring discretion or judgment, that the decision is an abuse of discretion.
- (D) The City Council shall decide preliminary issues, including a request for postponement or continuance, or questions of appellant's standing to bring an appeal, before the hearing is opened.
- (E) The city council may approve, modify, or overrule the Director's decision. The City Council shall consider the grounds for denial in Section 451.50 (*Application to Use Utility Infrastructure*) in its determination of an appeal of the denial of attachment rights. Council shall consider the grounds for termination in Section 451.50 (*Application to Use Utility Infrastructure*) and 451.60 (*User's Duties and Responsibilities*) in its determination of an appeal of the termination of attachment.

451.80 UNAUTHORIZED ATTACHMENTS PROHIBITED.

- (A) No person shall knowingly affix, install, place, attach, maintain, or fail to remove an unauthorized attachment to City owned infrastructure or other property of the City on demand by the City or any authorized representative thereof.
- (B) No person shall use an attachment on City owned infrastructure or other property of the City to provide a service not authorized by a City franchise, permit, license, or other authority.
- (C) Each unauthorized attachment or use is a separate offense. Each day a violation of this chapter continues is a separate offense.