

ORDINANCE NO. 15,761

AN ORDINANCE to amend the Municipal Code of the City of Des Moines, Iowa, 2000, adopted by Ordinance No. 13,827, passed June 5, 2000, as heretofore amended, by amending Sections 102-657, 102-659, 102-665, 102-666, 102-668, 102-670, 102-673, 102-707, 102-711, 102-761, 102-763, 102-764, 102-765, 102-766.01, 102-768, 102-769, 102-770, and 102-772, and adding and enacting new Sections 102-762.01 and 102-803, relating to small wireless facility permits.

Be It Ordained by the City Council of the City of Des Moines, Iowa:

Section 1. That the Municipal Code of the City of Des Moines, Iowa, 2000, adopted by Ordinance No. 13,827, passed June 5, 2000, as heretofore amended, is hereby amended by amending Sections 102-657, 102-659, 102-665, 102-666, 102-668, 102-670, 102-673, 102-707, 102-711, 102-761, 102-763, 102-764, 102-765, 102-766.01, 102-768, 102-769, 102-770, and 102-772, and adding and enacting new Sections 102-762.01 and 102-803 relating to small wireless facility permits, as follows:

Sec. 102-657. Definitions.

The definitions in this section apply to divisions 1 through 3 of this article. References to sections are, unless otherwise specified, references to sections in this Code. Defined terms remain defined terms whether or not capitalized in the text. The following words, terms and phrases, when used in divisions 1 through 3 of this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Registrant means any person who has registered as required under division 1 of this article due to the fact that the person:

- (1) Has or seeks to have its equipment located in any right-of-way; or
- (2) In any way occupies or uses or seeks to occupy or use the right-of-way or any equipment located in the right-of-way.

For purposes of the regulatory provisions of this article, as set forth in section 102-661.01, registrant includes any person who uses or occupies the right-of-way, regardless whether the city has implemented the registration provisions of this article, and regardless whether such person has registered with the city as required by this article, but excludes SWF permittees.

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

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

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

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

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

- (5) The City has determined that the utility pole will not impair, interfere with, or preclude the safe and effective use of facilities already located in the public right-of-way for pedestrian, vehicular, utility or other City public right-of-way purposes.

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

Cross reference(s)--Definitions generally, § 1-2.

Sec. 102-659. Utility coordination committee.

There is created a utility coordination committee. This committee shall be mandatory and advisory to the city engineer. It shall be composed of all registrants and SWF permittees to assist the city in establishing appropriate policies and procedures for regulating the use of rights-of-way to preserve and maximize its asset value to all users, to improve the coordination of work performed in the rights-of-way, and to improve the quality of construction work performed therein.

Sec. 102-665. Relocation or removal of equipment; payment of city costs due to improper location of equipment.

- (a) Under this article, the city engineer shall order the removal or relocation of equipment, as he or she deems appropriate, if the city engineer determines at any time that:
- (1) A registrant's or permittee's continued use of the public right-of-way will unduly burden the city or the public in its use of that property;
 - (2) The public right-of-way which the registrant or permittee is using or occupying will be required for municipal purposes;
 - (3) The registrant's or permittee's equipment at a particular location will interfere with:
 - a. A present or future city use of the right-of-way;
 - b. A public improvement undertaken or to be undertaken by the city;
 - c. An economic development project in which the city has an interest or investment; or
 - d. The public's safety or convenience in using the right-of-way for ordinary travel; or
 - (4) The public health, safety and welfare requires it.
- (b) Registrants under this division, permittees under division 2 of this article, and franchisees, licensees, and lessees under division 3 of this article whose equipment is located in the right-of-way in a position at variance with the corridors established in the city's utility accommodation and street restoration specifications, or at variance with the location specified therefor by the city engineer, or aboveground in an area which the city council has designated as part of the underground district pursuant to amendment of the definition thereof found at section 1-2, shall, no later than at the time of next reconstruction or excavation by the department of the area where its equipment is located or sooner if ordered by the city, move that equipment to its assigned location within the right-of-way, unless this requirement is waived by the city.
- (c) Registrants under this division, permittees under division 2 of this article, and franchisees, licensees, and lessees under division 3 of this article shall promptly and at their own

expense, with due regard for seasonal working conditions, permanently remove their equipment or relocate their equipment within the right-of-way, whenever the city engineer orders such removal or relocation, and shall at their sole expense restore the right-of-way to its proper and required condition pursuant to the city's utility accommodation and street restoration specifications.

- (d) If a city work crew or a city contractor encounters equipment in the right-of-way (i) in a location other than the location specified therefor in the city's utility accommodation and street restoration specifications, or (ii) in a location other than the location specified therefor by the city engineer, or (iii) in a location other than the location shown on the maps filed in the office of the city engineer by the person owning or operating that equipment; and if such improper location of equipment prevents the performance of city operations or activities or prevents or delays the performance of work under contract, the registrant, permittee, franchisee, licensee, or lessee whose improperly placed equipment occasioned such delay in performance or nonperformance shall be required to reimburse the city for all outlay and expense thereby incurred by the city.
- (e) Nothing contained in this division shall be construed to prevent the city council from exercising the right of the city to change the boundaries to increase or decrease the size of the underground district.
- (f) The removal or relocation of SWF permittees' equipment shall be subject to the terms of the SWF permit.

Sec. 102-666. Preexcavation equipment location.

- (a) In addition to complying with the requirements of I.C. § 480.1 et seq., pertaining to one-call excavation notice system before the start date of any right-of-way excavation, each registrant, permittee, SWF permittee, franchisee, licensee, or lessee who has equipment located in the area to be excavated shall be responsible to mark the horizontal and approximate vertical placement of all such equipment.
- (b) Any registrant, permittee, SWF permittee, franchisee, licensee, or lessee whose equipment is less than 20 inches below a concrete or asphalt surface shall notify and work closely with the excavation contractor in an effort to establish the exact location of its equipment and the best procedure for excavation.

Sec. 102-668. Right-of-way vacation.

If the city vacates a right-of-way wherein a franchisee's licensee's, or SWF permittee's equipment is located, the city may in its discretion reserve, to and for itself and all franchisee's licensee's or SWF permittee's having equipment in the vacated right-of-way, the right to install, maintain and operate any equipment in the vacated right-of-way and to enter upon such right-of-way at any time for the purpose of reconstructing, inspecting, maintaining or repairing the equipment. If the vacation requires the relocation of the equipment of a registrant under this division or of a permittee under division 2 of this article, and:

- (1) If the vacation proceedings are initiated by that registrant or permittee, the registrant or permittee must pay the relocation costs; or

- (2) If the vacation proceedings are initiated by the city or by another governmental entity, the registrant or permittee must pay the relocation costs unless otherwise agreed to by the city or such other governmental entity.

Sec. 102-670. No special duty created.

Divisions 1 through 3 of this article are enacted to protect the general health, welfare, and safety of the public at large, and no special duty is created as to any registrant, permittee, SWF permittee, franchisee, licensee, or lessee by the enactment of this article or by acceptance of registration, by issuance of a permit or license, or by grant of a franchise or lease.

Sec. 102-673. Reservation of regulatory and police powers.

- (a) The city, by registering a person under section 102-660 or by issuing of a right-of-way permit under division 2 of this article or a license or SWF permit under division 3 of this article or by granting a franchise or a lease under division 3 of this article, does not surrender or to any extent lose, waive, impair, or lessen the lawful powers and rights which it has or which may be vested in the city under the state constitution, state law, and the city Charter to regulate the use of the right-of-way by such persons. All such persons, by registration or by acceptance of a right-of-way permit, SWF permit, franchise, license, or lease are deemed and shall be held to agree that all lawful powers and rights, regulatory power, or police power, or otherwise as are or may be from time to time vested in or reserved to the city, shall be in full force and effect and subject to the exercise thereof by the city at any time. All such persons are further deemed to acknowledge that their rights are subject to the regulatory and police powers of the city to adopt and enforce general ordinances necessary to the safety and welfare of the public and are deemed to have agreed to comply with all applicable general laws and ordinances enacted by the city pursuant to such powers.
- (b) Any conflict between the provisions of a registration or of a right-of-way permit, SWF permit, franchise, license, or lease and any other lawful exercise of the city's regulatory or police powers shall be resolved in favor of the city's exercise of its lawful powers.

Sec. 102-707. Permits required.

- (a) Except as otherwise provided in this article, no person shall excavate or obstruct any right-of-way without first obtaining an excavation permit, obstruction permit, tree well permit, or irrigation system permit, as described in this subsection, from the city engineer issued pursuant to this division.
 - (1) *Excavation permit.* An excavation permit is a permit which allows the holder to excavate in a specified city right-of-way and to hinder free and open passage over and use of the specific portion of right-of-way by placing equipment described therein, to the extent and for the duration specified therein.
 - (2) *Obstruction permit.* An obstruction permit is a permit which allows the holder to hinder free and open passage over and use of the specified portion of the right-of-way by placing equipment described therein on the right-of-way for the duration specified therein.

- (3) *Tree well permit.* A tree well permit is a permit which allows the holder to construct a tree well in the right-of-way in the area between the property line and the back of the curb, provided such tree well has been approved as part of a site plan.
- (4) *Irrigation system permit.* An irrigation system permit is a permit which allows the holder to construct an irrigation system or any part thereof in the right-of-way immediately adjacent to the permit holder's abutting property.
- (b) No person may excavate or obstruct the right-of-way beyond the date specified in the permit unless such person:
 - (1) Makes a supplementary application for another right-of-way permit before the expiration of the initial permit; and
 - (2) A new permit or permit extension is issued.
- (c) It shall be the responsibility of the owner or occupant of the abutting property to protect and maintain a treewell or irrigation system which it constructs or installs in the city right-of-way. Neither the city nor any other person, firm or governmental entity having utility, traffic control or telecommunications equipment in the city right-of-way where a treewell or irrigation system is situated shall have any duty to protect, repair or restore such treewell or irrigation system if same is destroyed, damaged, disturbed or adversely impacted due to the repair, maintenance or replacement of any such equipment. Persons installing tree wells or irrigation systems in the right-of-way pursuant to a permit issued under this section shall acquire no right or interest in the right-of-way allowing the continued use of the right-of-way for such purpose, nor shall such persons be entitled to make claim against the city or any other person, firm or governmental entity having utility, traffic control or telecommunications equipment in the city right-of-way due to damage, disruption or removal of such facilities. Tree wells and irrigation systems placed in the right-of-way pursuant to permit issued under this section shall be considered emplaced in the right-of-way at the city's sufferance and shall be subject to the city's right to remove or disrupt the tree well or irrigation system with or without prior notice to the permit holder, during the course of constructing, repairing, maintaining, or replacing any city equipment or other facilities in the right-of-way, whether such work is performed by city work crews or city contractors.
- (d) Except as otherwise provided in this article, no person shall occupy any portion of the right-of-way or obtain an obstruction permit or excavation permit for the purpose of providing or maintaining ongoing utility services without first obtaining a franchise, license, or SWF permit from the city.

Sec. 102-711. Permit fees; management fees.

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- (j) *Management fee.* On or before January 1st of each year, all right-of-way users required to pay a management fee shall make a detailed report to the city engineer on the right-of-way usage reporting form provided by the city for that purpose, setting forth the amount of equipment that each such user has in city street rights-of-way, measured in equivalent lineal feet and/or on a per-unit basis, as applicable and as instructed on such form. The management fee shall be expressed in (i) cents per equivalent lineal foot of equipment to be charged to all users with more than one linear foot of equipment in city rights-of-way, and (ii) price per unit of equipment to be charged to all users with unit-based equipment in city rights-of-way. The management fee to be charged to each user shall be determined by

multiplying that user's number of equivalent lineal feet of equipment in City right-of-way by the per equivalent lineal foot fee amount set forth in the approved schedule of management fees, and/or by multiplying that user's number of units of equipment in city right-of-way by the per-unit fee amount set forth in the approved schedule of management fees. The city engineer shall report and invoice the management fee so calculated to each right-of-way user each year and each user's management fee shall be due and payable within sixty (60) calendar days of the date on the invoice. Right-of-way users that are not required to pay a management fee include SWF permittees, permittees that do not use equipment in the right-of-way other than for the purposes of installation or maintenance thereof; franchisees that do not pay a franchise fee to the city; public utilities operating within right-of-way by easement granted of record by the city; and the city's stormwater management utility whose equipment constitutes part of the right-of-way infrastructure.

**DIVISION 3. FRANCHISE, LICENSE OR SMALL WIRELESS FACILITY PUBLIC
RIGHT-OF-WAY USE (SWF) PERMIT FOR RIGHT-OF-WAY USE**

Sec. 102-761. Franchise, license or SWF permit required.

- (a) Except as otherwise provided in this article, no person shall occupy or use public right-of-way on a citywide basis for the purpose of providing utility services to private customers without first obtaining a franchise from the city as provided and required by I.C. § 364.2, or obtaining a SWF permit from the city, unless such utility service is provided by a governmental entity having jurisdiction and authority to provide such service within the city.
- (b) Except as otherwise provided in this article, no person shall occupy or use any portion of the right-of-way for the purpose of operating or conducting a private business without first obtaining a license from the city.
- (c) The city shall not grant, issue, or enter into any franchise, license or SWF permit that grants or allows exclusive use or occupancy of the right-of-way. Any person seeking a franchise or license for use of city right-of-way shall register with the city engineer as provided in sections 102-660 and 102-661. Any person seeking a franchise, license, or SWF permit for use of city right-of-way shall make application for a franchise, license, or SWF permit, as applicable, as provided in this division.
- (d) An application for a franchise, license, or SWF permit for occupancy or use of a right-of-way shall be filed with the city engineer on a form provided by the city and shall include all registration information required to be submitted pursuant to section 102-661, if applicable.

Sec. 102-762.01. Persons eligible for issuance of SWF permit.

The following persons shall not be eligible for the grant of a franchise or a license, but shall instead be eligible for the issuance of a SWF permit for the use of the right-of-way in accordance with Iowa Code Chapter 8C and in accordance with all zoning and design requirements of this code:

- (1) Any person, and/or any person acting on behalf of another person, engaged in the business of providing wireless telecommunications services or the wireless telecommunications infrastructure required for wireless telecommunications services and who submits an application in accordance with this Article and/or in accordance with Chapter 134 of this code, as applicable, for the purpose of installing a small wireless facility, a utility pole, or both in the right-of-way.

Sec. 102-763. Persons eligible for issuance of license.

- (a) The following persons shall not be eligible for the grant of a franchise or SWF permit, but shall instead be eligible for the issuance of a license for the use of the right-of-way at the discretion of the city engineer:
 - (1) a. A person who provides or proposes to provide utility services to all residents within the city or to all residents within a given part thereof but who intends to utilize for that purpose only certain street or alley rights-of-way constituting only a small portion of the street or alley rights-of-way within the city or within that part of the city; or
 - b. A person who the city determines can provide such service by utilizing only certain street or alley rights-of-way constituting only a small portion of the street or alley rights-of-way within the city or within a given part of the city.
- (2) The owner of two or more properties which abut a street or alley right-of-way on either side thereof and which properties are zoned for multifamily, commercial, or industrial use, who desires to use such street and/or alley right-of-way to provide a private service connection between two or more buildings or facilities located on such properties.
- (3) The owner of two or more properties within the boundaries of the city, which properties are used collectively as a campus for residential, business, and/or educational purposes, who desires to use the streets and/or alleys connecting said properties to provide a private service connection not to exceed a four-block radius or 10,000 equivalent linear feet between two or more buildings or facilities located on such properties.
- (4) A person who provides or proposes to provide wholesale services and/or support to its customers or clients who use the person's equipment and facilities within the city right-of-way. Upon request by such person for license, or for license renewal or license amendment increasing the equivalent linear footage of the person's equipment within the right-of-way existing on the effective date of the ordinance from which this section derives by ten percent or greater, the city engineer shall review the then-anticipated cost of relocation and removal of the person's proposed equipment and restoration of the city right-of-way due to said relocation or removal, and prior to issuing such license, or renewal or amendment, the city engineer may, in his or her sole discretion, require such person to make payment to the city of an upfront deposit payment or to post a performance and maintenance bond in the amount as more fully described in subsection (a)(5)(d) of this section, and to be used as more fully described in subsection (a)(5)(d) of this section. Nothing set forth herein relieves such person of its obligation to additionally pay applicable fees, or to remove and/or relocate its equipment following its license term and/or

renewal(s) thereof following city engineer order, or to otherwise comply with all provisions of this code applicable to such person's use of the city right-of-way.

(5) A person who provides or proposes to provide a private service connection that does not cross a street or alley right-of-way between two or more buildings or facilities on either side thereof in accordance with subsection (a)(2) of this section, or that exceeds a four-block radius or 10,000 equivalent linear feet in accordance with subsection (a)(3) of this section, and who, in the discretion of the city engineer, fulfills all of the following criteria:

- a. Owns a minimum of one property used for non-residential purposes within the boundaries of the city, as determined by the records of the county assessor and/or auditor within which county the property is located, for the duration of the initial license term and renewal(s) thereof; and
- b. Provides a broad based public benefit to the city and its residents in the form of economic activity, and/or job creation, and/or the promotion of the health, safety or welfare of the city's residents; and
- c. Does or will own the proposed equipment within the right-of-way, and whose proposed use of the right-of-way has a minimal current impact and minimal anticipated future impact on such right-of-way, and of the use thereof by the city or other parties allowed by the city pursuant to this article; and
- d. Prior to license issuance, or to license renewal or amendment increasing the equivalent linear footage of the person's equipment within the right-of-way existing on the effective date of the ordinance from which this section derives by ten percent or greater, either pays to the city an upfront deposit payment or posts a performance and maintenance bond in the full amount recommended by the city engineer, including the anticipated cost of relocation and removal of such person's proposed equipment, plus the anticipated cost of restoration of the right-of-way due to said relocation or removal in the greater of the amount of \$25,000.00 or the amount calculated pursuant to the city's utility accommodation and street restoration specifications and in accordance with the current restoration cost schedule established by resolution of the city council. Said deposit payment shall be held in separate account by the city, and any interest gained thereon shall be paid to the city. Said bond shall be in a form approved by the city engineer and city legal department, subject to the requirements of section 102-717(b)-(c) of this code, and issued and/or renewed for the duration of the license issued pursuant to this section and all renewal(s) thereof and for a forty-eight (48) month period following termination of such license and renewal(s). Upon request by such person for license renewal or amendment, the city engineer shall review the amount of the deposit or bond, as applicable, and the then-anticipated cost of relocation and removal of such person's equipment and restoration of the city right-of-way due to said relocation or removal, and prior to issuing such renewal or amendment the city engineer may, in his or her sole discretion, require such person to pay additional funds to the deposit or increase the amount of the bond, as

applicable, to account for inflation or other factors. Following full removal by such person of all of its equipment from the right-of-way and restoration thereof to the satisfaction of the city engineer, as required at the end of the license term or renewal(s) thereof or by order of the city engineer, then the deposit shall be reimbursed by the city to such person or the surety on the bond shall be released, as applicable. If such person fails to remove all of its equipment from the right-of-way and restore the right-of-way to the satisfaction of the city engineer at the end of the license term or renewal(s) thereof or following order of the city engineer, the deposit shall be deemed forfeited and shall not be returned to such person or the surety on the bond shall not be released, as applicable. Such forfeited deposit or unreleased bond may be used by the city to pay and/or reimburse all of the city's costs related to the removal or relocation of such person's equipment from the right-of-way and restoration of the right-of-way, or such forfeited deposit may be transferred to a general account to be used by the city, when and as determined in the sole discretion of the city engineer, to pay and/or reimburse all of the city's costs related to the removal or relocation of any abandoned equipment in the right-of-way and restoration of the right-of-way associated with any city project or city repair or maintenance activity. Nothing set forth herein relieves such person of its obligation to additionally pay applicable fees, or to remove and/or relocate its equipment following its license term and/or renewal(s) thereof or following city engineer order, or to otherwise comply with all provisions of this code applicable to such person's use of the city right-of-way.

- (b) Appeals of the city engineer's decisions regarding eligibility for the issuance of a license for the use of the right-of-way may be made pursuant to section 102-802 of this code.

Sec. 102-764. Authority to issue license and SWF permit; form of license and SWF permit.

- (a) Licenses and SWF permits required by this division shall be issued by the city engineer. The city engineer shall review each application and shall issue each license or SWF permit which he or she determines to be in compliance with the requirements of this division and any other applicable legal requirements. In issuing a license, the city engineer may require a change in the proposed location of the licensee's equipment where necessary to avoid interference with other equipment placed within the public right-of-way.
- (b) Licenses issued pursuant to this division shall be in writing, shall be executed by the licensee, and shall not take effect until approved by the legal department. The form of licenses to be issued pursuant to this division shall be uniform, but shall be subject to periodic review and modification.
- (c) SWF permits issued pursuant to this division shall be in writing, uniform, and subject to periodic review and modification.

Sec. 102-765. Limit on term of franchises and SWF permits; limit on initial or renewal term of licenses.

- (a) No franchise for use of the public right-of-way shall be granted for a term in excess of 25 years.
- (b) No license for use of the public right-of-way issued by the city engineer shall be issued or renewed for a term in excess of five years.
- (c) Every license issued by the city prior to July 1, 1998 for use or occupancy of public rights-of-way shall terminate on the date provided in the license, or if no such termination is provided in the license, the license shall terminate on the earlier of the tenth anniversary of its issuance or July 1, 2008.
- (d) SWF permits shall not be limited in duration, provided, however, that the construction of a small wireless facility or a utility pole permitted by SWF permit shall commence no later than two years following the date that the permit is issued, or two years after any appeals related thereto are exhausted.

Sec. 102-766.01. Access to equipment trenches and ducts.

- (a) Franchisees and licensees may be requested by the city to provide access to equipment trenches or ducts at locations designated by the city in order for the city to install city equipment therein. Such installation shall be undertaken so as not to impact the applicable franchisee's or licensee's equipment or use of the trench or duct. Such access shall be at no cost to the city; shall not require separate access agreement; shall not occur until at least ninety (90) calendar days' notice is given by the city to the applicable franchisee or licensee; and shall not occur until approval by the applicable franchisee or licensee is granted, which approval shall not be unreasonably withheld. Franchisees and licensees shall be obligated to respond to the city's notice requesting access within thirty (30) calendar days from the date stated on such notice, and if approved, the applicable franchisee or licensee shall be required to cooperate with the city to coordinate the access within a reasonable timeframe.
- (b) In the event of an emergency relating to a building permit, the city shall contact the owner of the small wireless facility and/or utility pole, as applicable, at issue and provide the owner with a reasonable opportunity, given the nature of the emergency, to alleviate such emergency or participate with the city to make any repairs necessary to alleviate such emergency. If the owner of the small wireless facility and/or utility pole, as applicable, does not respond in a timely manner, as determined by the city given the nature of the emergency, the city may remove or make alterations to the small wireless facility as necessary to ensure public safety. For purposes of this subsection, "emergency" means exigent and extraordinary circumstances under which the physical or electrical failure of a utility pole, wireless support structure, or small wireless facility threatens imminent physical harm to persons or there is a substantial likelihood of imminent and significant harm to property.

Sec. 102-768. Issuance and renewal of licenses and SWF permits; revocation and cancellation.

- (a) Prior to the initial issuance of a license for use or occupancy of public right-of-way, the city engineer shall conduct a review of the licensee's background to determine the licensee's ability to meet the requirements stated in subsection (e) of this section. If on the basis of such review the city engineer determines that it would not be appropriate to issue the license, the city engineer shall give notice of intent not to issue the license as provided in subsection (g) of this section.
- (b) To obtain renewal of a license, the licensee shall file a renewal application with the city engineer on the form provided by the city and pay an application fee for renewal of the license. The renewal application fee and any future changes thereto shall be effective upon its inclusion in a schedule of fees adopted by the city council by resolution. The renewal application shall be filed with the city engineer not less than 180 days prior to the expiration of the initial or any renewal term of the license. Upon receipt of the renewal application, the city engineer shall conduct a review of the licensee and the licensee's prior use of the public right-of-way to determine the licensee's continued compliance with the requirements stated in subsections (c) and (e) of this section. If on the basis of such review the city engineer determines that the licensee and the licensee's prior use of the public right-of-way comply with all requirements stated in subsections (c) and (e) of this section, the city engineer may renew the license for an additional term of up to five years. If on the basis of such review the city engineer determines that the licensee and the licensee's use of public right-of-way do not comply with one or more of the requirements stated in subsections (c) and (e) of this section, the city engineer shall give notice of intent not to renew the license as provided in subsection (g) of this section. If a licensee holds multiple licenses for use or occupancy of various rights-of-way within the city for the same or similar purpose, the licensee shall be required to renew all such licenses under a single license at such time as the earliest issued license expires.
- (c) In determining the length of the term of an initial or a renewal license, the city engineer shall take into consideration the likelihood that the city will require the use of the licensed right-of-way for municipal purposes or that such use of the licensed right-of-way will unduly burden the city or the public in its use of the licensed right-of-way during the proposed term of the license. A license shall not be issued or renewed if the city engineer determines that any of the following conditions exist in the right-of-way proposed for licensing:
 - (1) There is insufficient space in the right-of-way to accommodate the proposed use, given the other existing uses thereof;
 - (2) The proposed private utility service connection would interfere with or conflict with existing or planned city equipment or utility equipment located or to be located in the right-of-way;
 - (3) Such use is incompatible with adjacent public or private uses of that right-of-way;
 - (4) Such use would involve an unacceptably high frequency of repair or maintenance to the private utility service equipment thereby requiring excessive excavation in or obstruction of the right-of-way; or
 - (5) The construction or installation of such private utility service equipment would interfere with a public improvement undertaken or to be undertaken by the city or

with an economic development project in which the city has an interest or investment.

- (d) If during the term of any license the city engineer determines that the license should be revoked due to the licensee's failure to comply with any of the requirements stated in subsection (e) of this section, the city engineer shall give notice of intent to revoke such license as provided in subsection (g) of this section.
- (e) The following shall constitute grounds for refusal to issue or renew a license, or for revocation of a license for use or occupancy of public right-of-way:
 - (1) The licensee's failure to observe or comply with any of the following:
 - a. The licensee's use or prior use of public right-of-way has been conducted in full and timely compliance with all laws and regulations applicable thereto, and the licensee has complied fully and in a timely manner with the requirements of any previously issued license, and with the orders or instructions of city officials issued pursuant to this chapter; or
 - b. The licensee is current in the payment of license fees, if applicable, and the licensee has made such payments fully and when due.
 - (2) The licensee's commission of any of the following acts:
 - a. The licensee has made a misleading statement or a material misrepresentation in connection with an application for initial issuance or renewal of a license, in connection with its registration of its use of the public right-of-way or in connection with its use of public right-of-way; or
 - b. The licensee has transferred or attempted to transfer its equipment, its business, or its license to another person or has made a change in use of its equipment, without giving the city notice thereof and obtaining city consent thereto.
- (f) The city engineer shall give notice of intent to cancel such license as provided in subsection (g) of this section if during the term of any license the city engineer determines that:
 - (1) The licensee's continued use of the public right-of-way will unduly burden the city or the public in its use of that property;
 - (2) The public right-of-way for which the license was issued will be required for municipal purposes during the term of the license;
 - (3) The licensee's equipment at a particular location will interfere with:
 - a. A present or future city use of the right-of-way;
 - b. A public improvement undertaken or to be undertaken by the city;
 - c. An economic development project in which the city has an interest or investment; or
 - d. The public's safety or convenience in using the right-of-way for ordinary travel;
 - (4) The public health, safety and welfare requires it; or
 - (5) The continued existence of the license is not in the city's best interests.
- (g) Notice of intent not to issue a license for use of the public right-of-way shall be given to the applicant, either by certified mail, return receipt requested, or by actual service or delivery thereof, which notice shall be given not more than 30 days after submission of the application. Notice of intent not to renew a license for use of the public right-of-way shall be given to the licensee, either by certified mail, return receipt requested, or by actual service or delivery thereof, which notice shall be given not more than 90 days after

submission of the renewal application. Notice of intent to revoke or cancel a license shall also be given to the licensee. The notice shall set forth the grounds for refusal to issue or renew or for revocation or cancellation and shall inform the applicant or licensee of the right to an appeal hearing upon request. Such request for hearing shall be filed in writing with the city manager, and the hearing shall be scheduled and held as provided in section 102-802. At the hearing, the applicant or licensee shall have the burden of establishing that the grounds asserted in the notice do not exist.

- (h) Upon the effective date of revocation or cancellation as provided in the city engineer's notice thereof, or upon the effective date specified in the city engineer's written decision upon the licensee's appeal, the licensee shall be required to cease its use and occupancy of the right-of-way or to remove or relocate its equipment therefrom, as provided in the notice or decision. Equipment not removed or relocated from the right-of-way as required in such notice or order shall be considered a nuisance and may be removed, relocated, or taken possession of by the city, at the licensee's expense. Except in emergency circumstances, the requirement to relocate, remove, or cease use of equipment shall be suspended during the pendency of any appeal taken by a licensee pursuant to division 4 of this article.
- (i) If a license is refused or cancelled upon the basis that the city property licensed or proposed for licensing is or will be required for municipal purposes, the applicant or licensee shall not be entitled to appeal. However, in that event, the licensee shall be entitled to a partial refund of the annual fee already paid, such refund to be computed on the basis of 1/12 of the required annual fee multiplied by the number of unexpired whole months of the year remaining in the license term. In all other cases where a license is not issued or renewed or is revoked, no refund of any portion of the required annual fee shall be paid to the licensee.
- (j) Notwithstanding the notice and hearing requirements of subsection (g) of this section, the city engineer may in emergency circumstances order the immediate relocation or removal of equipment from the right-of-way and may, upon the licensee's failure to comply with such order, immediately remove, relocate, or take possession of such equipment at the licensee's expense.
- (k) SWF permit applications shall be subject to denial in accordance with the provisions of Iowa Code Section 8C.7A and 8C.7C. SWF permits shall be subject to revocation and/or cancellation in the event that the SWF permittee fails to comply with all provisions set forth in the SWF permit, or as otherwise set forth in Iowa Code Chapter 8C. A SWF permit may be modified upon City approval following written application by a SWF permittee, or in accordance with the following when applicable:
 - (1) If the city undertakes any maintenance, public improvement project, or reconstruction of property or equipment which requires the modification, relocation, or reconstruction of the small wireless facility or utility pole, in which event such work and the costs thereof shall be the responsibility of the building permittee or its successor.
 - (2) If a project is undertaken necessitating the modification, relocation, or reconstruction of the small wireless facility or utility pole for a private commercial purpose, in which event the city may require the owner or successor to modify, relocate, or reconstruct the small wireless facility or new utility pole upon prepayment of the costs of such work by the private commercial entity whose project facilitates the need for such work.

Sec. 102-769. Failure to secure, renew or comply.

- (a) Any person who fails to secure a franchise, license, or SWF permit required under this division or any franchisee, licensee, or SWF permittee who fails to comply with the requirements of the respective franchise, license, or SWF permit, or this division, or with any other applicable legal requirements shall, upon notification of such violation by the city engineer, immediately act either to abate the violation or to cease its use and occupancy of the right-of-way and remove its equipment or system from the right-of-way.
- (b) The city reserves the right either to remove or to disconnect and render inoperative any equipment or system in the right-of-way under franchise or license which is used or maintained contrary to this article; provided, however, that the city will give written notice of its intent to take such action, including the date upon which such action will be taken, to the affected franchisee or licensee not less than seven days prior to taking such action.

Sec. 102-770. Transfer of franchise, license, business, or equipment without city's consent; change in use of equipment without city's consent.

- (a) A franchise granted by the city council pursuant to this division shall not be transferred to any other person without the prior consent of the city council. A franchisee shall not transfer its franchise, its business, or its equipment in the right-of-way to another person without giving the city council 90 days' prior written notice of such proposed transfer and without the prior consent of the city council. In such notice the franchisee shall clearly identify the proposed transferee, giving the name and address of a representative of the transferee who is authorized to discuss and provide information to the city regarding the transfer. The city council may, as a condition of its consent to such transfer, require the transferee to make application for a franchise as provided in section 102-767 of this division and to register its proposed use of the public right-of-way as provided in section 102-660 of this article. Upon receipt of the such application by a transferee, the city engineer shall conduct a review of the transferee and its prior and proposed use of the public right-of-way to determine the transferee's compliance or ability to comply with the requirements stated in subsections 102-768(c) and (e), and shall report the results of such investigation to the city council. The city council may refuse consent to a proposed franchise transfer if it determines that the proposed transferee lacks the expertise, experience, financial resources or sufficient personnel required to maintain the franchised equipment and/or the right-of-way associated therewith, or if the city has previously revoked or cancelled a franchise or license or terminated a lease held by the proposed transferee, or if the proposed transferee, is then in default of any of its obligations under this article. If a franchise includes provisions regarding transfer which are more specific than those included in this subsection, the more specific provisions of the franchise shall prevail over the provisions of this subsection.
- (b) A license issued or a lease granted pursuant to this division shall not be transferred to any other person without the prior written consent of the city engineer. A licensee or lessee shall not transfer the license or lease, the business, or the equipment in the right-of-way to another person without giving the city engineer 90 days' prior written notice of such proposed transfer and without the prior written consent of the city engineer. In such notice, the licensee or lessee shall clearly identify the proposed transferee, giving the name and

address of a representative of the transferee who is authorized to discuss and provide information to the city regarding the transfer. The city engineer may, as a condition of consent to such transfer, require the transferee to make application for such license or lease as provided in this division and to register its proposed use of the public right-of-way as provided in section 102-660 of this article. Upon receipt of the such application by a transferee, the city engineer shall conduct a review of the transferee and the prior and proposed use of public right-of-way to determine the transferee's compliance or ability to comply with the requirements stated in subsections 102-768(c) and (e). The city engineer may refuse consent to a proposed transfer if he or she determines that the proposed transferee lacks the expertise, experience, financial resources or sufficient personnel required to maintain the equipment and/or the right-of-way associated therewith, or if the city has previously revoked or cancelled a franchise or license or terminated a lease held by the proposed transferee, or if the proposed transferee is then in default of any of its obligations under this article.

- (c) The transferee of a franchisee's or licensee's equipment, business, franchise, or license shall not be entitled to enter upon public rights-of-way for the purpose of operating or maintaining such equipment unless and until it completes the formal transfer of such equipment, business, franchise or license and obtains the city's consent to such transfer.
- (d) A franchisee, licensee, or SWF permittee shall not change the use of its equipment without giving the city 90 days' prior written notice of such proposed change in use. In such notice, the franchisee, licensee, or SWF permittee shall clearly and completely set forth the proposed change in use of equipment, how it would be accomplished, including any excavations required to accomplish such change, and projections as to the future maintenance implications of such change in use. Any proposed change in use of a franchisee's, licensee's, or SWF permittee's equipment shall require the prior approval of the city engineer. For franchisees and licensees, such approval may be withheld if the city engineer determines that the proposed use of the equipment at that location would be incompatible with or would likely damage or endanger other uses of the right-of-way, would involve a higher level of maintenance activities than the present use, would involve more street excavation or greater traffic disruption than the present use, or would be otherwise inappropriate. For SWF permittees, such approval may be withheld if the city engineer determines that the proposed use of the equipment at that location is subject to denial in accordance with the provisions of Iowa Code Section 8C.7A and/or 8C.7C.
- (e) Notwithstanding the foregoing, no transfer of a franchisee's, licensee's, or SWF permittee's business shall be deemed to have occurred for purposes of this subsection when the franchisee, licensee, or SWF permittee is a publicly held entity whose stock is traded on recognized stock exchanges, and where transfer of ownership of the business has effectively occurred due to stock sales or trading in the open market. However, if a merger, consolidation, transfer or disposal of substantially all of such a franchisee's, licensee's assets occurs, or if there is an assignment of its interest in a franchise or license granted or issued by the city under this division, the city shall, upon written notice to the franchisee or licensee have the right, in its sole discretion and without cause or further showing, to terminate the franchise or license. Upon notice to the city by such a franchisee or licensee of such merger, consolidation, transfer or disposal of its assets or assignment of its interest in a franchise, license, or lease granted or issued by the city, the city shall have six months within which to terminate the franchise or license. The provisions of a franchise or of a

franchise regulatory ordinance with respect to the merger, consolidation, transfer or disposal of substantially all of the franchisee's assets or assignment of its interest in a franchise shall control over this subsection.

- (f) Notwithstanding the foregoing, in approving the lease of any vacated city right-of-way, the city council may provide for the lessee's transfer or assignment of the leasehold interest without the prior consent of the city. Leases of vacated city right-of-way in existence on the effective date of the ordinance from which this section derives which provide for the lessee's transfer or assignment of its leasehold interest without the prior consent of the city, or which have a different consent requirement than is provided in this division, shall remain in effect, may be renewed, and shall prevail over the consent to transfer provisions of this section.
- (g) Notwithstanding the foregoing, the city engineer's consent shall not be required for the transfer of a license issued pursuant to this division if such transfer is contemporaneous with and incidental to the transfer of two or more parcels of real estate from one person or entity to another person or entity; if the improvements on such parcels are interconnected by the licensed equipment for the purposes of providing integrated internal communications, electrical, heating or cooling services to the improvements on such parcels; and if the licensed equipment will continue to be utilized for the same purpose or purposes after the transfer is completed. However, the transferee shall notify the city engineer of such transfer within 30 days after its completion and shall provide evidence satisfactory to the city engineer that it has complied with this subsection and has assumed all obligations of the transferor with respect to the license.
- (h) SWF permittees shall notify the city engineer within 60 days of any transfer of business and/or equipment ownership described in this section. The person to whom the business and/or equipment ownership is transferred shall be subject to all terms set forth in the initially issued SWF permit and subject to compliance with this code.

Sec. 102-772. Duties of licensee and SWF permittee.

- (a) No license or SWF permit required under this division or amendment to such license shall be issued for any equipment or system until the required fees have been paid and until a complete application has been filed with and approved by the city engineer.
- (b) The licensee's equipment or system shall be installed or constructed in accordance with applicable industry standards, the city's utility accommodation and street restoration specifications, and the terms and conditions imposed by the city. The SWF permittee's equipment shall be designed, installed and constructed in accordance with the requirements of the SWF permit and of Iowa Code Section 8C.7A and 8C.7C, as applicable, including but not limited to the following requirements:
 - (1) The design and installation of any proposed small wireless facility reasonably matches the aesthetics of an existing utility pole or wireless support structure that incorporates decorative elements.
 - (2) For any proposed wireless facility to be mounted, installed, maintained, modified, operated or replaced on or adjacent to a new or replacement utility pole, such pole shall be of a similar appearance as an existing utility pole and located within a 500-foot radius of the existing utility pole. For purposes of this subsection, "utility pole" is as defined in Iowa Code Section 8C.2.

- (3) Any proposed small wireless facility will not result in any noncompliance by the City with the federal Americans With Disabilities Act.
- (4) Any proposed small wireless facility will not impair, interfere with, or preclude the safe and effective use of facilities already located in the public right-of-way for pedestrian, vehicular, utility or other City public right-of-way purposes.
- (5) Any proposed utility pole does not exceed the greater of 10 feet in height above the tallest utility pole, as defined in Iowa Code Section 8C.2, existing on or before July 1, 2017, located within 500 feet of the proposed new, replacement, or modified utility pole, or 40 feet in height above ground level, unless a greater height is allowed by Chapter 102 of this Code.
- (6) Other than a utility pole replacing an existing pole, any proposed utility pole is not located within an underground district designated by City Council resolution or ordinance prior to submittal of the pole application.
- (7) Other than a utility pole replacing an existing pole, the utility pole is not located within an area zoned and used for single-family residential use.
- (c) If it becomes necessary to excavate or obstruct any public right-of-way in connection with the installation, construction, reconstruction, repair, operation, disconnection or removal of a licensee's or SWF permittee's equipment or system, the licensee or SWF permittee shall first obtain a permit from the city to do so in accordance with division 2 of this article.
- (d) The licensee or SWF permittee shall maintain its equipment and all parts of its system in good condition, order and repair.
- (e) The licensee or SWF permittee shall be responsible for repairing or reimbursing other licensed or franchised utilities or other persons or entities lawfully using the right-of-way for any damage to their property caused by negligence of the licensee or its agents, employees or contractors in connection with the installation, construction, reconstruction, repair, operation, disconnection or removal of the licensee's equipment or system.
- (f) No license or SWF permit required under this division shall be issued to authorize placement of a utility system in any space which is required for public use.

Sec. 102-803. Appeals relating to small wireless facility public right-of-way use (SWF) permits.

In lieu of the appeal processes set forth in Sections 102-801 and 102-802, the following process shall be followed for appeals relating to SWF permits:

- (1) A party aggrieved by the final action of the city, either by its affirmative action on a permit, term or condition, or rate, or by its inaction, may bring an action for review in any court of competent jurisdiction, except that if the final action of the city was the denial of a conditional or special use permit pursuant to chapter 134 of this code, the party must first seek review under Iowa Code Section 414.10 and chapter 134 of this code if deemed applicable by the city's community development director and if permitted under federal law.
- (2) If a SWF permittee and the city cannot resolve a dispute relating to emergency action as set forth in section 102-766.01 above, any party may file an action concerning an alleged violation under section 102-766.01 or under Iowa Code Section 8C.7B in the district court for the county in which the violation is alleged to have occurred, for any appropriate remedy, including the removal of a small

wireless facility deemed by the court to be in violation of Iowa Code Chapter 8C or the Iowa electrical safety code. However, this section shall not preclude a party from bringing an action pursuant to the Iowa electrical safety code or 47 CFR Section 1.1401 et seq.

Section 2. This ordinance shall be in full force and effect from and after its passage and publication as provided by law.

FORM APPROVED:

Glenna K. Frank, Assistant City Attorney

T. M. Franklin Cownie, Mayor

Attest:

I, Diane Rauh, City Clerk of the City of Des Moines, Iowa, hereby certify that the above and foregoing is a true copy of an ordinance (Roll Call No. 19-0574), passed by the City Council of said City at a meeting held April 8, 2019 signed by the Mayor on April 8, 2019 and published and provided by law in the Des Moines Register on April 12, 2019. Authorized by Publication Order No. 10625.

Diane Rauh, City Clerk