

ORDINANCE NO. 4-18

AN ORDINANCE TO ENACT A NEW CHAPTER OF THE MOUNTAIN LAKE, CODE OF ORDINANCES TO ADMINISTER AND REGULATE THE PUBLIC RIGHT-OF-WAY IN THE PUBLIC INTEREST, AND TO PROVIDE FOR THE ISSUANCE AND REGULATION OF RIGHT-OF-WAY PERMITS.

THE CITY COUNCIL OF MOUNTAIN LAKE, MINNESOTA ORDAINS:

Chapter 12 of Mountain Lake City Code of Ordinances (hereafter “this code”) is hereby adopted to read as follows:

Chapter 12

Right-of-Way Management

Sec. 1.01. Election to Manage the Public Rights of Way.

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

Sec. 1.02. Definitions.

The definitions included in Minnesota Statute Section 237.162, Minnesota Rules 7810.0100, subs. 1 through 23, and Minnesota Rules 7560.0100 subs. 1 through 12 are hereby adopted by reference and are incorporated into this chapter as if set out in full.

Sec. 1.03. Permit Requirement.

Subd. 1. *Permit Required.* Except as otherwise provided in this code, no person may obstruct or excavate any right of way or install or place facilities in the right of way without first having obtained the appropriate permit from the city.

- (a) *Excavation Permit.* An excavation permit is required to excavate that part of the right of way described in such permit and to hinder free and open passage over the specified portion of the right of way by placing facilities described therein, to the extent and for the duration specified therein.
- (b) *Obstruction Permit.* An obstruction permit is required to hinder free and open passage over the specified portion of right of way by placing equipment described therein on or over the right of way, to the extent and for the duration specified therein. An obstruction permit is not required if a person already possesses a valid excavation permit for the same project.
- (c) *Small Wireless Facility Permit.* A small wireless facility permit is required to place a new wireless support structure (collocate) in the right-of-way managed, with the exception that a permit is not required for the installation, placement, maintenance, operation, or replacement of micro wireless facilities suspended on cables strung

between existing utility poles in compliance with national safety codes.

- (d) *Small Wireless Special or Conditional Land Use Permit.* A special or conditional land use permit is required to install a new wireless support structure in a right-of-way where the underlying district or area is zoned for single-family residential use or is in a historic district established by federal or state law or city ordinance.

Subd. 2. *Permit Extensions.* No person may excavate or obstruct the right of way beyond the date or dates specified in the permit unless (i) such person makes a supplementary application for another right-of-way permit before the expiration of the initial permit, and (ii) a new permit or permit extension is granted.

Subd. 3. *Delay Penalty.* In accordance with Minnesota Rule 7819.1000, subp. 3 and notwithstanding Subd. 2 of this section, the city shall establish and impose a delay penalty for unreasonable delays in right-of-way excavation, obstruction, patching, or restoration. The delay penalty shall be established from time to time by city council resolution.

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

Sec. 1.04. Permit Applications.

Application for a permit shall contain, and will be considered complete only upon compliance with the requirements of the following provisions:

- (a) Submission of a completed permit application form, including all required attachments, and scaled drawings showing the location and area of the proposed project and the location of all known existing and proposed facilities, and the following information:
- (1) Each permittee's name, Gopher One-Call registration certificate number, address and email address, if applicable, and telephone and facsimile numbers.
 - (2) The name, address and email address, if applicable, and telephone and facsimile numbers of a local representative. The local representative or designee shall be available at all times. Current information regarding how to contact the local representative in an emergency shall be provided at the time of Application.
 - (3) A certificate of insurance or self-insurance:
 - i. Verifying that an insurance policy has been issued to the permittee by an insurance company licensed to do business in the state of Minnesota, or a form of self-insurance acceptable to the city.
 - ii. Verifying that the permittee is insured against claims for personal injury, including death, as well as claims for property damage arising out of the:
 - a) Use and occupancy of the right of way by the permittee, its

officers, agents, employees, and permittees, and

- b) Placement and use of facilities and equipment in the right of way by the permittee, its officers, agents, employees, and permittees, including, but not limited to, protection against liability arising from completed operations, damage of underground facilities, and collapse of property;
 - iii. Naming the city as an additional insured as to whom the coverages required herein are in force and applicable and for whom defense will be provided as to all such coverages;
 - iv. Requiring that the city be notified thirty (30) days in advance of cancelation of the policy or material modification of a coverage term;
 - v. Indicating comprehensive liability coverage, automobile liability coverage, workers' compensation and umbrella coverage established by the city in amounts sufficient to protect the city and the public and to carry out the purposes and policies of this chapter.
- (4) A copy of the actual insurance policies.
- (5) If the person is a corporation, a copy of the certificate required to be filed under Minn. Stat. 300.06 as recorded and certified to by the Secretary of State.
- (6) A copy of the person's order granting a certificate of authority from the Minnesota Public Utilities Commission or other applicable state or federal agency, where the person is lawfully required to have such certificate from said commission or other state or federal agency.

(b) A Small Wireless Facility Permit applicant may file a consolidated Small Wireless Permit Application to collocate up to 15 small wireless facilities provided that all the small wireless facilities in the application:

- (1) are located within a two-mile radius;
- (2) consist of substantially similar equipment; and
are to be placed on similar types of wireless support structures.
- (3) The City may approve a permit for some small wireless facilities and deny a permit for others, but the City may not use denial of one or more permits as a basis to deny all the small wireless facilities in the application.

(c) Payment of money due the city for

- (1) permit fees, estimated restoration costs and other management costs,
- (2) any undisputed loss, damage, or expense suffered by the city because of applicant's prior excavations or obstructions of the rights-of-way or any emergency actions taken by the city;
- (3) franchise fees, or other charges, if applicable.

(4) inspection fees, if applicable and if not included in the permit fee.

Sec. 1.05. Issuance of Permit; Conditions.

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

Subd. 2. *Permit Conditions Generally.* The city may impose reasonable conditions upon the issuance of the permit and the performance of the applicant thereunder to protect the health, safety, and welfare or when necessary to protect the right of way and its current use. In addition, a permittee shall comply with all requirements of local, state, and federal laws, including but not limited to Minnesota Statutes Section 216D.01 - .09 (Gopher One Call Excavation Notice System) and Minnesota Rules, Chapter 7560.

Subd. 3. *Additional Small Wireless Facility Conditions.* In addition to subdivision 2, the erection or installation of a wireless support structure, or the collocation of a small wireless facility, shall be subject to the following conditions:

- (a) A small wireless facility shall only be collocated on the particular wireless support structure, under those attachment specifications, and at the height indicated in the applicable permit application.
- (b) No new wireless support structure installed within the right-of-way shall exceed 50 feet in height without the city's written authorization, and further provided that an applicant may replace an existing wireless support structure exceeding 50 feet in height with a structure of the same height subject to such conditions or requirements as may be imposed in the applicable permit.
- (c) No wireless facility may extend more than 10 feet above its wireless support structure.
- (d) Where an applicant proposes to install a new wireless support structure in the right-of-way, the city may impose separation requirements between such support structures and any existing wireless support structure or other facilities in and around the right-of-way.
- (e) Where an applicant proposes collocation on a decorative wireless support structure, sign or other structure not intended to support small wireless facilities, the city may impose reasonable requirements to accommodate the particular design, appearance or intended purpose of such structure.
- (f) Where an applicant proposes to replace a wireless support structure, the city may impose reasonable restocking, replacement, or relocation requirements on the replacement of such structure.
- (g) The execution of a Small Wireless Facility Collocation Agreement that incorporates any additional terms and conditions mutually agreed upon by the city and the applicant. A small wireless facility collocation agreement is considered public data not on individuals and is accessible to the public under section 13.03. Issuance of a small wireless facility permit does not supersede, alter or affect any then-existing agreement between the city and applicant.

Subd. 4. *Payment of Rent.*

- (a) For collocations of small wireless facilities, the city can, either in its permit or in a standard collocation agreement, require annual rental payments for the small wireless collocations of up to:

- a. \$150 per year for rent to collocate on the city structure.
 - b. \$25 per year for maintenance associated with the collocation.
 - c. A monthly fee for electrical service as follows:
 - i. \$73 per radio node less than or equal to 100 maximum watts;
 - ii. \$182 per radio node over 100 maximum watts; or
 - iii. The actual cost of electricity if the actual cost exceeds the foregoing
- (b) For collocations or placements, other than of small wireless facilities, the city can charge a mutually agreed upon rent reached between the city and the applicant.

Subd. 5. *Trenchless Excavation.* As a condition of all applicable permits, permittees employing trenchless excavation methods, including but not limited to horizontal directional drilling, shall follow all requirements set forth in Minnesota Statutes, Chapter. 216D and Minnesota Rules Chapter 7560, and shall require potholing or open cutting over existing underground utilities before excavating as determined by the city.

Sec. 1.06. Timeline for Action on Permit Applications.

Subd. 1. *Denial in General.* The city may deny a permit for failure to meet the requirements and conditions of this chapter or if the city determines that the denial is necessary to protect the health, safety, and welfare or when necessary to protect the right-of-way and its current use.

Subd. 2. *Procedure for Denial on Permits other than Small Wireless Facilities Permits.* The denial of a permit must be made in writing and must document the basis for the denial. The city must notify the applicant or right-of-way user in writing within three business days of the decision to deny a permit. If an application is denied, the right-of-way user may address the reasons for denial identified by the city and resubmit its application. If the application is resubmitted within 30 days of receipt of the notice of denial, no additional application fee shall be imposed. The city must approve or deny the resubmitted application within 30 days after submission.

Subd. 3. *Procedure for Denial on Small Wireless Facilities Permits.* The city shall approve or deny a small wireless facility permit application within 90 days after filing of such application, unless the collocation is on a support structure that already qualifies as an existing wireless tower or base station under Section 6409(a), codified at 47 U.S.C. 1455(a), which, in those instances, the city shall approve or deny the small wireless facility permit within 60 days. The small wireless facility permit, and any associated building permit application, shall be deemed approved if the city fails to approve or deny the application within the review periods established in this section.

Subd. 4. *Tolling of Deadline on Small Wireless Facility Permit.* The deadline for action on a small wireless facility permit application may be tolled if:

- a) The city receives applications from one or more applicants seeking approval of permits for more than 30 small wireless facilities within a seven-day period. In such case, the city may extend the deadline for all such applications by 30 days and shall inform the affected applicant in writing of such extension.

- b) The applicant fails to submit all required documents or information and the city provides written notice of incompleteness to the applicant within 30 days of receipt the application. Upon submission of additional documents or information, the city shall have ten days to notify the applicant in writing of any still-missing information.
- c) The city and a small wireless facility applicant agree in writing to toll the review period.

Sec. 1.07. Permit Fees.

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

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

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

Subd 3. *Small Wireless Facility Permit Fee.* The city shall impose a one-time small wireless facility permit fee at the time of approval of the collocation application in an amount sufficient to recover:

- (a) management costs;
- (b) restoration costs or degradation fee, if applicable,
- (c) inspection fees, if applicable,
- (d) city engineering, make-ready, and construction costs associated with collocation of small wireless facilities.

The city will not impose a small wireless facility permit fee for any of the following activities:

- (1) routine maintenance of a small wireless facility;
- (2) replacement of a small wireless facility with a new facility that is substantially similar or smaller in size, weight, height, and wind or structural loading than the small wireless facility being replaced; or
- (3) installation, placement, maintenance, operation, or replacement of micro wireless facilities that are suspended on cables strung between existing utility poles in compliance with national safety codes

Subd. 4. *Payment of Permit Fees.* No excavation permit or obstruction permit shall be issued without payment of excavation or obstruction permit fees. The city may allow applicant to pay such fees within thirty (30) days of billing.

Subd. 5. *Non-Refundable.* Permit fees that were paid for a permit that the city has revoked for a breach as stated in Section 1.14 are not refundable.

Subd. 6. *Application to Franchises.* For right-of-way users subject to a franchise, management costs may be charged separately from and in addition to the franchise fees imposed on a right-of-way user in the franchise, unless otherwise agreed to in the franchise.

Subd. 7. Rules. All permit fees shall be established consistent with the provisions of Minnesota Rule 7819.1000, when applicable.

Sec. 1.08. Right-of-Way Patching and Restoration.

Subd. 1. Timing. The work to be done under the excavation permit, and the patching and restoration of the right-of-way as required herein, must be completed within the dates specified in the permit, increased by as many days as work could not be done because of circumstances beyond the control of the permittee or when work was prohibited as unseasonable or unreasonable.

Subd. 3. Standards. The permittee shall perform patching and restoration according to the standards and with the materials specified by the city and shall comply with Minnesota Rule 7819.1100

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

Subd. 5. Failure to Restore. If the permittee fails to restore the right-of-way in the manner and to the condition required by the city, or fails to satisfactorily and timely complete all restoration required by the city, the city at its option may do such work. In that event the permittee shall pay to the city, within thirty (30) days of billing, the cost of restoring the right-of-way. If permittee fails to pay as required, the city may exercise its rights under the construction performance bond.

Section 1.09. Permit Limitations.

Subd. 1. Limitation on Area. A right-of-way permit is valid only for the area of the right-of-way specified in the permit. No permittee may do any work outside the area specified in the permit, except as provided herein. Any permittee which determines that an area greater than that specified in the permit must be obstructed or excavated must before working in that greater area

- a) make application for a permit extension and pay any additional fees required thereby, and
- b) be granted a new permit or permit extension.

Subd. 2. Obstruction from Small Wireless Facility Work. City will not require an additional small wireless facility permit fee or require a new collocation agreement for routine maintenance of a small wireless facility, for replacement of a small wireless facility with a new facility that is substantially similar or smaller in size, weight, height, and wind or structural loading than the small wireless facility being replaced; or for installation, placement, maintenance, operation, or replacement of micro wireless facilities that are suspended on cables strung between existing utility poles in compliance with national safety codes. The city may require advance notification, however, of these activities if the work will obstruct the public right-of-way.

Subd. 3. Limitation on Dates. A right-of-way permit is valid only for the dates specified in the permit. For a Small Wireless Facility Permit, the term of the permit is equal to the length of time

that the small wireless facility is in use, unless the permit is revoked under this section. No permittee may begin its work before the permit start date or, except as provided herein, continue working after the end date. If a permittee does not finish the work by the permit end date, it must apply for a new permit for the additional time it needs, and receive the new permit or an extension of the old permit before working after the end date of the previous permit. This supplementary application must be submitted before the permit end date.

Section 1.10. Installation Requirements.

The excavation, backfilling, patching and restoration, and all other work performed in the right-of-way shall be done in conformance with Minnesota Rules 7819.1100, when applicable, and other local requirements, when applicable, and in so far as they are not inconsistent with the Minnesota Statutes Sections 237.162 and 237.163.

Section 1.11. Inspection

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

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

Subd. 3. *Authority of City.*

- a) At the time of inspection, the city may order the immediate cessation of any work, which poses a serious threat to the life, health, safety, or well-being of the public.
- b) The city may issue an order to the permittee for any work that does not conform to the terms of the permit or other applicable standards, conditions, or codes. The order shall state that failure to correct the violation will be cause for revocation of the permit. Within ten (10) days after issuance of the order, the permittee shall present proof to the city that the violation has been corrected. If such proof has not been presented within the required time, the city may revoke the permit pursuant to Sec. 1.215

Sec. 1.12. Work Done Without a permit.

Subd. 1. *Emergency Situations.* Each person with facilities in the right-of-way shall immediately notify the city of any event regarding its facilities that it considers being an emergency. The owner of the facilities may proceed to take whatever actions are necessary to respond to the emergency. Within two business days after the occurrence of the emergency the owner shall apply for the necessary permits, pay the fees associated therewith and fulfill the rest of the requirements necessary to bring itself into compliance with this chapter for the actions it took in response to the emergency.

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

Subd. 2. *Non-Emergency Situations.* Except in an emergency, any person who, without first having obtained the necessary permit, obstructs or excavates a right-of-way must subsequently obtain a permit, and as a penalty pay double the normal fee for said permit, pay double all the other fees required by this code, deposit with the city the fees necessary to correct any damage to the right-of-way and comply with all the requirements of this chapter.

Sec. 1.13. Supplementary Notification.

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

Sec. 1.14. Revocation of Permit

Subd. 1. *Substantial Breach.* The city reserves its right, as provided herein, to revoke any right-of-way permit, without a fee refund, if there is a substantial breach of the terms and conditions of any statute, ordinance, rule or regulation, or any material condition of the permit. A substantial breach by permittee shall include, but shall not be limited to, the following:

- a) The violation of any material provision of the right-of-way permit;
- b) An evasion or attempt to evade any material provision of the right-of-way permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the city or its citizens;
- c) Any material misrepresentation of fact in the application for a right-of-way permit;
- d) The failure to complete the work in a timely manner; unless a permit extension is obtained or unless the failure to complete work is due to reasons beyond the permittees control; or
- e) The failure to correct, in a timely manner, work that does not conform to a condition of the permit

Subd. 2. *Written Notice of Breach.* If the city determines that the permittee has committed a substantial breach of a term or condition of any statute, ordinance, rule, regulation or any condition of the permit the city shall make a written demand upon the permittee to remedy such violation. The demand shall state that continued violations might be cause for revocation of the permit.

Subd. 3. *Procedural Requirements.* If the city decides to revoke the permit, the revocation must be made in writing and must document the basis for the revocation. The city must notify the right-of-way user in writing within three business days of the decision to revoke a permit.

Subd. 4. *Reimbursement of City Costs.* If a permit is revoked, the permittee shall also reimburse the city for the city's reasonable costs, including restoration costs and the costs of collection and reasonable attorneys' fees incurred in connection with such revocation.

Subd. 5. *Limitation of Space.* Subject to Minnesota Statutes Section 237.163, 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 deny permits and the city shall strive to the extent possible to accommodate all existing and potential users of the right-of-way, but shall be guided primarily by considerations of the public interest, the public's needs for the particular utility service, the condition of the right-of-way, the time of year with respect to essential utilities, the protection of existing facilities in the right-of-way, and future city plans for public improvements and development projects which have been determined to be in the public interest.

Sec. 1.15. Damage to Other Facilities.

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

Sec. 1.16. Right-of-Way Vacation.

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

Sec. 1.17. Indemnification and Liability.

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

Sec. 1.18. Abandoned Facilities.

Removal of Abandoned Facilities. Any person who has abandoned facilities in any right-of-way shall remove them from that right-of-way if required in conjunction with other right-of-way repair, excavation, or construction, unless the city waives this requirement.

Sec. 1.19. Appeal.

A right-of-way user that: (1) has been denied a permit; (2) has had permit revoked; or (3) believes that the fees imposed are invalid may have the denial, revocation, or fee imposition reviewed, upon written request, by the City council. The city council shall act on a timely written request at its next regularly scheduled meeting. A decision by the city council affirming the denial, revocation, or fee imposition will be writing and supported by written findings establishing the reasonableness of the decision.

Sec. 1.20. Reservation of Regulatory and Police Powers.

A permittee's rights are subject to the regulatory and police powers of the city to adopt and enforce general ordinances necessary to protect the health, safety and welfare of the public.

Passed by the City Council of Mountain Lake, Minnesota this 4th day of December, 2018.

Mayor

Attest:

City Administrator