



1 City of Racine, Wisconsin
2 COMMON COUNCIL

3 **AGENDA BRIEFING MEMORANDUM**

4 **COMMITTEE:** Finance and Personnel Committee/Common Council **LEGISLATION ITEM #:** 1336-18

5 **AGENDA DATE:** Finance and Personnel Committee – January 7, 2019

6 Common Council – January 8, 2019

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8 **DEPARTMENT:** City Attorney's Office

9 Prepared By: City Attorney Scott R. Letteney

10 Reviewed By: N/A

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12 **SUBJECT:** Proposed Ordinance XX-19 – Right of Way Obstructions and Encroachments

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14 **EXECUTIVE SUMMARY:** Agenda Item 1336-18 proposes an ordinance that would create Division 3, Right
15 of Way Obstructions and Encroachments, within Chapter 82, Sidewalks, Streets and Certain Other Public
16 Places, Article II, of the Municipal Code of the City of Racine. Generally, the proposed ordinance would
17 prohibit the encroachment upon or obstruction of any street, alley, sidewalk, public grounds, or land
18 dedicated to public use unless a permit for such encroachment or obstruction is granted by the City. The
19 proposed ordinance would also establish timing requirements for the review of applications for permits
20 for such encroachment or obstruction. The proposed ordinance also establishes permit fees specifically
21 for Small Wireless Facilities deploying within the City.

22 Because of a recent interpretation of federal law, as set forth in an Order issued by the Federal
23 Communications Commission, there is a short time frame in which this proposed ordinance may be
24 passed in order to have effect. As explained in detail, below, the proposed ordinance must be passed by
25 the Common Council no later than January 14, 2019.

26 The proposed ordinance will be before the Finance and Personnel Committee on Monday,
27 January 7, 2019, and before a special meeting of the Common Council on Tuesday, January 8, 2019.

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29 **BACKGROUND & ANALYSIS:**

30 By way of introduction, and as a very broad generalization, telecommunications in the
31 United States are the purview of the federal government. Because of a constitutional doctrine
32 known as “preemption,” state and local laws regulating telecommunications are “preempted”
33 by federal law. Therefore, any attempt by a state or local government to regulate matters
34 relating to telecommunications must strictly comply with federal law. In addition, provisions of
35 Wisconsin law also affect the way in which local governments may interact with
36 telecommunications providers.

37 To provide a thorough review of all federal telecommunications laws with which state
38 and local governments must comply would be unmanageable. However, Sections 253 and
39 332(c)(7) of the Communications Act, 47 United States Code (USC) §§ 253 and 332(c)(7), are
40 relevant to the impetus for Agenda Item 1336-18.

41 “In Sections 253(a) and 332(c)(7)(B) of the [Communications] Act, Congress determined
42 that state or local requirements that prohibit or have the effect of prohibiting the provision of
43 service are unlawful and thus preempted. Section 253(a) addresses ‘any interstate or intrastate
44 telecommunications service,’ while Section 332(c)(7)(B)(i)(II) addresses ‘personal wireless
45 services.’ Although the provisions contain identical ‘effect of prohibiting’ language, the Federal
46 Communications Commission (FCC) and different courts over the years have each employed
47 inconsistent approaches to deciding what it means for a state or local legal requirement to have
48 the ‘effect of prohibiting’ [personal wireless] services under these two sections of the
49 [Communications] Act. This has caused confusion among both providers and local governments
50 about what legal requirements are permitted under” federal law.¹

51 Recently, the FCC has addressed the effect of Sections 253 and 332(c)(7) given the
52 advent of 5G wireless service. According to the FCC, in its “Declaratory Ruling and Third Report and
53 Order,” WT Docket No. 17-79; WC Docket No. 17-84, entitled, *Accelerating Wireless Broadband
54 Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband
55 Deployment by Removing Barriers to Infrastructure Investment:*

56 America is in the midst of a transition to the next generation of wireless services, known
57 as 5G. These new services can unleash a new wave of entrepreneurship, innovation, and
58 economic opportunity for communities across the country. The FCC is committed to doing
59 our part to help ensure the United States wins the global race to 5G to the benefit of all
60 Americans. [The FCC’s] action is the next step in the FCC’s ongoing efforts to remove
61 regulatory barriers that would unlawfully inhibit the deployment of infrastructure
62 necessary to support these new services.

63 In the ruling, the FCC clarified a number of matters related to local governmental regulation of personal
64 wireless facilities infrastructure. Specifically, the FCC’s Order affects (1) a municipal government’s ability
65 to establish aesthetic standards for Small Wireless Facilities deploying within that municipality, (2) the

¹ Federal Communications Commission, “Declaratory Ruling and Third Report and Order,” WT Docket No. 17-79; WC Docket No. 17-84.

66 amount of time that a municipal government may take in reviewing permit applications for Small Wireless
67 Facilities, and (3) the fees that a municipal government may impose for the deployment of Small Wireless
68 Facilities. For shorthand, these are (1) aesthetic standards, (2), the “shot clock,” and (3) fees. (Yes, the
69 term “shot clock” is, in fact, the term used by the FCC when addressing the time permitted a municipal
70 government to review applications.) Also for shorthand, Small Wireless Facilities is referred to as Small
71 Cell.

72 When the FCC issued its order on September 26, 2018, it set an effective date of January 14, 2019.
73 A number of large municipalities and related litigants appealed the Order and requested a stay. Therefore,
74 its actual effect, and its effective date, had been uncertain. In fact, appeals of the Order still continue.
75 However, on December 10, 2018, the FCC clarified its Order. The FCC affirmed that the shot clock and the
76 fee provisions in its Order take effect on January 14, 2019. However, the aesthetic standards provisions
77 do not take effect until April 15, 2019.

78 As to the shot clock, when reviewing applications for permits for the deployment of Small Cell,
79 municipalities may take no more than 60 days (after the application is complete and fees are paid) to
80 review Small Cell proposed to be added to existing structures, and 90 days (after the application is
81 complete and fees are paid) to review Small Cell applications for new structures.

82 As to fees, municipalities may impose fees that are a reasonable approximation of the
83 municipality’s costs in reviewing applications, which costs themselves must be reasonable and are non-
84 discriminatory. The FCC has gone so far, in its Order, to set forth what it believe are reasonable fees. These
85 are: \$500 for a single application that includes up to five Small Wireless Facilities and an additional \$100
86 for each Small Wireless Facility beyond five for collocation on existing facilities, \$1,000 for an application
87 for a new structure intended to support one or more Small Wireless Facilities, and \$270 per Small Wireless
88 Facility per year for all recurring fees, including any possible right-of-way access fee or fee for attachment
89 to municipally-owned structures in the right-of-way.

90 As to aesthetic standards, may only enforce only enforce aesthetic, undergrounding and spacing
91 standards that are reasonable, no more burdensome than those applied to other types of infrastructure
92 deployments, and objective and published in advance.

93 Again, as to the shot clock and fee provisions, a municipality must have such standards in place
94 no later than January 14, 2019. As to the aesthetic standards, a municipality must have such standards in
95 place no later than April 15, 2019.

96 The pendency and immediacy of the FCC’s Order, triggered a review by the City’s administration
97 and staff of the City’s ordinances and procedures that could be affected by the FCC’s Order. While zoning
98 and aesthetic standards are ripe for attention and will be addressed, with the time available, consideration
99 of access to and encroachment upon the City’s rights-of-way is the issue with which direction may be
100 given.

101 In that light, together with direction from Mayor Mason, City Administrator Palenick, City
102 Development Director Connolly, and Public Works Commissioner Yehlen, I drafted a proposed ordinance
103 for your deliberation. That proposed ordinance is attached hereto.

104 The proposed ordinance would create Division 3, Right of Way Obstructions and Encroachments,
105 within Chapter 82, Sidewalks, Streets and Certain Other Public Places, Article II, of the Municipal Code of
106 the City of Racine. Generally, the proposed ordinance would prohibit the encroachment upon or

107 obstruction of any street, alley, sidewalk, public grounds, or land dedicated to public use unless a permit
108 for such encroachment or obstruction is granted by the City. There are exceptions for such uses as
109 marquees, awnings, mailboxes, fire hydrants, and several others.

110 The procedures is set forth in the draft ordinance, so I will not address it at length here. However,
111 a person or entity who desires to encumber the City's rights-of-way above grade must apply for a permit.
112 There is a fee that must be paid and a staff review of the application. (This is similar to the requirement
113 and process for a street opening permit to be granted for a person or entity who desires to access the
114 rights-of-way at or below grade.)

115 While the proposed ordinance would relate to any request to encroach upon or obstruct of the
116 City's rights-of-way—irrespective of the type if use requested—as drafted the proposed ordinance
117 addresses the shot clock and fee provisions for small cell deployment. It establishes the 60-day and 90-
118 day time limits for application review, as described above. It also establishes the small cell permit fees as
119 declared to be presumptively reasonable by the FCC.

120 The proposed ordinance does not establish fees for uses other than small cell. However, it
121 provides for such fees to be established.

122 Further, the proposed ordinance does no establish aesthetic standards for encroachment upon
123 or obstruction of the City's rights-of-way. However, it anticipates the establishment of such standards.
124 Again, for small cell, such aesthetic standards must be in place no later than April 15, 2019.

125 Certainly, the administration and staff understand that a request for an ordinance to be passed in
126 this short time frame, i.e., no later than January 14, 2019, is unusual. The Common Council's calendar
127 since December 10, 2018, and the uncertain timing of the FCC's Order have led us here.

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129 **BUDGETARY IMPACT:** The fiscal effect will depend upon the number of applications for right-of-way
130 permits.

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132 **OPTIONS/ALTERNATIVES:** Decline to approve the proposed ordinance before the January 14, 2019,
133 deadline. Modify provisions of the ordinance.

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135 **RECOMMENDED ACTION:** Approve the proposed ordinance before the January 14, 2019, deadline.

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137 **ATTACHMENT(S):** Proposed ordinance to create Chapter 82 - Sidewalks, Streets and Certain Other Public
138 Places, Article II - Streets, Division 3.- Right of Way Obstructions and Encroachments of the Municipal
139 Code of the City of Racine, Wisconsin.