

Ordinance XX-19 – Right of Way Obstructions and Encroachments

An ordinance to create Chapter 82. - Sidewalks, Streets and Certain Other Public Places, Article II. - Streets, Division 3. - Right of Way Obstructions and Encroachments of the Municipal Code of the City of Racine, Wisconsin.

The Common Council of the City of Racine, Wisconsin, do ordain as follows:

Part 1: Create Chapter 82. - Sidewalks, Streets and Certain Other Public Places, Article II. - Streets, Division 3. - Right of Way Obstructions and Encroachments of the Municipal Code of the City of Racine, Wisconsin by adding the following sections:

DIVISION 4. - RIGHT OF WAY OBSTRUCTIONS AND ENCROACHMENTS

Sec. 82-90. - Definitions.

The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

Antenna means an apparatus designed for the purpose of emitting radiofrequency radiation, to be operated or operating from a fixed location pursuant to Federal Communications Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under 47 CFR Part 15.

Antenna equipment means equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when collocated on a structure, is mounted or installed at the same time as such antenna.

Antenna facility means an antenna and associated antenna equipment.

Collocation means mounting or installing an antenna facility on a pre-existing structure, and/or modifying a structure for the purpose of mounting or installing an antenna facility on that structure.

Facility or personal wireless service facility means an antenna facility or a structure that is used for the provision of personal wireless service, whether such service is provided on a stand-alone basis or commingled with other wireless communications services.

Small wireless facility, consistent with 47 CFR 1.1312(e)(2), means a facility that meets each of the following conditions:

- (1) The structure on which antenna facilities are mounted—
 - (i) Is 50 feet or less in height, or
 - (ii) Is no more than 10 percent taller than other adjacent structures, or

- (iii) Is not extended to a height of more than 10 percent above its preexisting height as a result of the collocation of new antenna facilities; and
- (2) Each antenna (excluding associated antenna equipment) is no more than three cubic feet in volume; and
- (3) All antenna equipment associated with the facility (excluding antennas) are cumulatively no more than 28 cubic feet in volume; and
- (4) The facility does not require antenna structure registration under 47 CFR Part 17;
- (5) The facility is not located on Tribal lands, as defined under 36 CFR § 800.16(x); and
- (6) The facility does not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in 47 CFR 1.1307(b)

Structure means a pole, tower, base station, or other building, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service, whether on its own or comingled with other types of services.

Sec. 82-91. - Obstructions and Encroachments Prohibited.

No person shall encroach upon or obstruct or encumber any street, alley, sidewalk, public grounds, or land dedicated to public use, or any part thereof, or permit such encroachment or encumbrance to be placed or remain on any public way adjoining the premises of which he is the owner or occupant, except as provided in sections 82-92 and 82-93.

Sec. 82-92. - Exceptions.

The prohibition contained in section 82-91 shall not apply to:

- (1) Street encroachments authorized in accordance with sections 18-154, 82-40, and 102-56.
- (2) Marquees, awnings, canopies, and signs authorized in accordance with chapter 114.
- (3) Official signage, official traffic control devices, and utilities owned or leased by the city.
- (4) Private mailboxes installed to meet United States Postal Service regulations.
- (5) Obstructions or encroachments lawfully existing prior to [INSERT ORDINANCE EFFECTIVE DATE].
- (6) Temporary encroachments or obstructions authorized by permit granted pursuant to Wis. Stat. § 66.0425, Wis. Stats.

Sec. 82-93. – Permit Required.

No person shall establish any above grade use or installation, encroachment, or obstruction of the right-of-way without authority from the common council or written permission of the commissioner of public works prior to such installation, use, encroachment or obstruction being

established. Additionally, if such activities involve trees, no such activities shall be performed without authority from the city forester, pursuant to section 102-26, et seq.

(1) Application requirements.

- (a) An above grade right-of-way permit application shall be filed with the commissioner of public works.
- (b) The applicant shall pay an above grade right-of-way permit fee. The above grade right-of-way permit fee shall be in the amount as established by resolution of the common council, and may be amended from time to time. Such fee shall not exceed a reasonable approximation of actual costs incurred, shall be limited to objectively reasonable costs, and shall be uniform for similarly situated users of the right-of-way in similar situations. In addition, a professional fee charge back agreement shall be signed to ensure compliance with Racine ordinance that professional fees incurred by the city to review said applications are paid and the permit fee shall be established with this actual professional fee cost recovery in mind, to avoid excess cost recovery.
 - 1. Notwithstanding anything else contained herein, the above grade right-of-way permit fees for Small Wireless Facilities shall be no greater than the presumptively reasonable fees permissible under 47 USC 253 and 332(c)(7). As of [INSERT ORDINANCE EFFECTIVE DATE] such fees are:
 - a. Non-Recurring/Collocation – \$500 for a single application that includes up to five Small Wireless Facilities and an additional \$100 for each Small Wireless Facility beyond five,
 - b. Non-Recurring/Non-Collocation – \$1,000 for an application for a new structure intended to support one or more Small Wireless Facilities
 - c. \$270 per Small Wireless Facility per year for all recurring fees, including any possible right-of-way access fee or fee for attachment to municipally-owned structures in the right-of-way.
- (c) The applicant shall provide a detailed plan with structural engineering, scale drawings, visual rendering, and survey showing the exact location, size, appurtenances, and or attachments of the equipment or structure to be placed in the right-of-way, along with the exact location of all streets, sidewalks, utilities, trees, and any other obstructions in the vicinity of the proposed installation, and the location of structures on abutting properties.
- (d) The applicant shall provide a detailed report describing potential adverse effect and hazards to the public from said equipment or structure and its effects due to location on safety for the driving public, pedestrians, and owners and users of adjacent property including, but not limited to, whether the proposed equipment or structure, as constructed, arranged, and operated, will:

1. Have a substantial or undue adverse or detrimental effect upon or danger to adjacent property, the character of the area, or the public health, safety, morals, comfort, and general welfare, and the potential diminution and impairment of property values within the community or neighborhood and;
2. Unreasonably interfere with the use and development of neighboring property according to the applicable zoning district regulations;
3. Cause undue traffic congestion or draw significant amounts of traffic through residential streets;
4. Result in the destruction, loss, or damage of any points of visual interest, including views of waterways, open spaces, historic buildings, or historic landscapes or city-scapes, architecturally significant structures, or other scenic views or natural, scenic, or historic feature of significant importance;
5. Have an unreasonable risk to persons and property from erosion, flooding, fire, noise, glare, falling debris or ice, fire, explosion, effects from chemical, environmental impacts, vehicle crash impacts, or similar hazards;
6. Comply with all applicable federal and state statutes, regulations, and administrative code provisions and requirements.

Said report shall indicate the risk of the safety hazard and the proposed design element to address said safety hazard, including measures to be taken to provide ingress and egress so designed as to minimize traffic congestion on the public streets and to reasonably protect persons and property from erosion, flooding, fire, noise, glare, falling debris or ice, chemical effects, environmental impacts, vehicle crash impacts, and similar hazards.

The commissioner of public works may require the applicant's report be provided by a structural engineer or other expert approved by the commissioner of public works, if the commissioner of public works deems it to be necessary to have such an expert opinion in light of the circumstances of the application, for the protection of public health and safety, in which case the applicant shall provide such an opinion at the applicant's cost.

- (e) The plan must show how the installation and maintenance of said above grade right-of-way use will not impact snow or grass removal from the terrace, sidewalk, or street, or conflict with the operation or maintenance of vehicular travel and existing utilities above or below ground.
- (f) An alternative analysis shall be provided to show what options other than locating above grade in the right-of-way exists and the approximate costs of such alternatives.

(2) Application process.

(a) The commissioner of public works shall review said permit application and determine if all application materials have been submitted within 10 days of receipt of the initial application.

1. If the application materials are not complete, the commissioner of public works shall provide written notice to the person on the application that said application is incomplete.
2. The applicant shall have up to 30 days from the date of initial application to provide a complete application or the application shall be deemed insufficient and denied.

The city shall have 60 days to review and act on the permit for Existing Uses under subsection (2)(b) from the date that the commissioner of public works determines the application is complete and all fees paid. The city shall have 90 days to review and act on the permit for New Uses under subsection (2)(c) from the date that the commissioner of public works determines the application is complete and all fees paid.

(b) Existing Uses. The commissioner of public works shall determine whether to approve, deny, or conditionally grant above grade right-of-way permits for any new installation, use, encroachment, obstruction, or excavation proposed to be added to either a previously approved above grade use or one that was legally placed prior to [INSERT ORDINANCE EFFECTIVE DATE], unless the commissioner of public works concludes the new installation, use, encroachment, obstruction, or excavation may obstruct or incommode the public use in which case the application shall be subject to the procedures of subsection (2)(c).

(c) New Uses. All above grade right-of-way permit applications other than those described pursuant to subsection (2)(b), shall be considered as follows.

1. A review of a permit application shall be conducted as soon as reasonably possible after the commissioner of public works has deemed application materials complete.
2. Notice shall be given by the commissioner of public works to all properties within 200 feet of the proposed installation.
3. The permit application review shall be conducted, at minimum, by the director of city development and the commissioner of public works, or their designees. Such permit application review shall give consideration to the application, information received from the applicant, staff and expert reports, or other information as the director of city development and the commissioner of public works, or their designees, determines appropriate. Consideration shall be given to public safety, alternative options, any established aesthetic considerations, and the public good when considering an above grade right-of-way permit. The director of city development and the commissioner of public

works, or their designees, may grant the permit, grant the permit with conditions, or deny the permit.

- (d) Right-of-Way Restoration. The work to be done under the permit, and the repair and restoration of the right-of-way as required herein, must be completed within the dates specified in the permit to the satisfaction of the commissioner of public works. In addition to repairing its own work, the permittee must restore the general area of the work, and the surrounding areas, including the paving and its foundations, to the same condition that existed before the commencement of the work and must inspect the area of the work and use reasonable care to maintain the same condition for 36 months thereafter.

The permittee shall perform repairs and restorations according to the standards and with the materials specified by the commissioner of public works. The commissioner of public works shall have the authority to prescribe the manner and extent of the restoration, and may do so in written procedures of general application or on a case-by-case basis. The commissioner of public works in exercising this authority shall be guided by the following standards and considerations:

1. The number, size, depth and duration of the excavations, disruptions, or damage to the right-of-way.
2. The traffic volume carried by the right-of-way.
3. The character of the neighborhood surrounding the right-of-way; the pre-excavation condition of the right-of-way.
4. The remaining life-expectancy of the right-of-way affected by the excavation.
5. Whether the relative cost of the method of restoration to the permittee is in reasonable balance with the prevention of an accelerated depreciation of the right-of-way that would otherwise result from the excavation, disturbance or damage to the right-of-way.
6. The likelihood that the particular method of restoration would be effective in slowing the depreciation of the right-of-way that would otherwise take place.

Methods of restoration may include, but are not limited to, patching, replacement of the right-of-way base, restoration of landscaping, and milling and overlay of the entire area of the right-of-way affected by the work. During this 36-month period, it shall, upon notification from the commissioner of public works, correct all restoration work to the extent necessary using the method required by the commissioner of public works. Said work shall be completed within five calendar days of the receipt of the notice from the commissioner of public works. If the permittee fails to restore the right-of-way in the manner and to the condition required by the commissioner of public works, or fails to satisfactorily and timely complete all repairs required by the commissioner of public works, the commissioner of public works, at his or her

option, may do such work. In that event, the permittee shall pay to the city, within 30 days of billing, the cost of restoring the right-of-way.

- (e) **Bond.** Prior to commencing the work, any permittee performing work within the right-of-way shall post a financial guarantee in an amount approved by the commissioner of public works and in a form approved by the city attorney, provided that the limitations of Wis. Stats. sec. 66.0425(2) shall apply as applicable. If, 36 months after completion of the restoration of the right-of-way, the commissioner of public works determines that the right-of-way has been properly restored, the surety on the performance bond shall be released.
- (f) **Indemnification Agreement.** Before any person, entity, or utility commences work pursuant to this section, such person, entity or utility shall execute an agreement with the city to hold the city harmless, indemnify, and defend the city from and against any and all injury and damage of any kind caused or occurring as a result of such work. The agreement shall be in a form approved by the city attorney, and shall have continuing effect during the course of such work and for all time that the obstruction or facilities or installation remain within the right-of-way, and thereafter until such obstruction is removed and the site is fully restored to the satisfaction of the commissioner of public works.
- (g) **Reservation of Rights.** The city retains all rights in city rights-of-way. The grant of a right-of-way permit per this section does not constitute a waiver of any city rights and remedies regarding ongoing compliance obligations toward such installations. All persons, entities and utilities installing obstructions or encroachments or conducting excavation in city rights-of-way shall remove or relocate the obstruction, encroachment, or excavation upon ten-day notice, except as otherwise provided by law.
- (h) **Compensation.** The city may require payment of compensation, in an amount determined by the common council, for the grant of any permit pursuant to this section, provided that compensation for more than applicable fees and cost recovery shall not be required of utilities that have the right to use the right-of-way by Wis. Stat. sec.182.017(1r). The compensation required shall be fair and reasonable, competitively neutral and nondiscriminatory and designed to recover direct and actual costs in connection with the installation, such as the cost for staff to review the siting application, costs associated with the use of the right-of-way, costs associated with maintaining the right-of-way itself or structures within the right-of-way to which the facilities are attached, and these standards apply both to initial fees and any recurring fees.
- (i) **Waiver of Deadlines.** Timeline deadlines in this process may be waived by written mutual agreement of the applicant and the city.
- (j) **Appeals.** Any applicant may appeal the staff determination regarding a right-of-way permit application within ten days of the date of receipt of such determination. The appeal shall be to the city plan commission. Any such appeal shall be presented to the director of city development, who shall arrange for the city plan commission to

consider the matter at its next regularly scheduled meeting, subject to open meetings notice requirements.

- (k) Compliance with Laws. Approval of a permit pursuant to this section does not waive the requirement to comply with all other applicable laws and ordinances. All applicable federal, state, and local codes, statutes, regulations, administrative rules, ordinances and other laws must be followed.

Part 2: This ordinance shall take effect upon passage by a majority vote of the members-elect of the City Common Council and publication or posting as required by law.

Passed by the Common Council:

Approved:

Mayor

Attest:

City Clerk