

Hennepin County Ordinance 22 Updates

Overview

Due to the changes to Minnesota Statutes, sections 237.162 and 237.163, the Hennepin County Transportation Operations Department will be submitting revisions to Ordinance 22: County Road Right-Of-Way Use to the County Board. This will begin the public hearing process which is expected to take place in Q2 2018. The revisions involve minor edits to language, updates to construction standards to meet current practices, and substantial additions related to small-cell wireless facilities.

Summary of Changes by Section

Section 3.0: Definitions (pages 3-8 contain substantial changes)

- Several new definitions were added in order to reflect new statutory language.
- Updates to existing definitions were to add clarity to the definitions, and to reflect new statutory language.
- One definition was removed as a result of policy change.

Section 5.0; Section 10.0; Section 15.0; Section 17 (page 8, 13, 15, and 16 respectively contain minor changes)

- Minor updates to language to include small wireless facilities.

Section 6.0 Mapping Data; Section 7.0 Reporting Obligations (page 9 contains minor changes, page 11 contains moderate changes)

- Mapping major projects in Hennepin County's new mapping application, Utility Infrastructure Integration (UI2), is a condition of obtaining permits from the county.

Section 9.0 Permit Application (page 12 contains minor changes)

- Separate right-of-way permits are now required for each municipality, and for each mile of work for work that extends greater than one mile.

Section 20.0 Authority Over County-Owned Infrastructure and County Managed Public Rights-of-Way, Placement, Location, and Relocation of Facilities (pages 18-19 contain substantial changes)

- Hennepin County has priority of use of county-owned infrastructure and county managed public right-of-way
- Issues that arise from private infrastructure in the county managed public right of way or on county owned facilities must be resolved at the cost of the owner.
- Unauthorized attachments and facilities are prohibited.

Section 27.0 Small Wireless Facilities (pages 21 through 25 contain substantial additions)

- Language has been added to reflect MN statute sections 237.162 and sections 237.163.

Appendix A Fees (page 26 contains substantial updates)

- Permit and penalty fees are updated.
- New fees added for small wireless facilities.
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Appendix B – Requirements for a Right Of Way Permit (page 28 contains minor updates)

- Language related to the Americans with Disabilities Act has been updated.

All Changes by Section

Section 3.0 Definitions (pages 3-8)

"Applicant" means any person requesting permission to access, excavate/grade, place a utility service, place a wireless support structure or small wireless facility, landscape, or obstruct a right-of-way, who has completed a right-of-way permit application and has paid the appropriate right-of-way permit fees.

"APS" means audible pedestrian system.

"Collocate or collocation" means to install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure that is owned privately or by a local government unit.

"Congested right-of-way" means a crowded condition in the subsurface of the public right-of-way that occurs when the maximum lateral spacing between existing underground facilities does not allow for construction of new underground facilities without using hand digging to expose the existing lateral facilities in conformance with Minnesota Statutes, Section 216D.04 subdivision 3, over a continuous length in excess of 500 feet

"County Management Costs" are the actual costs incurred by the county for public rights-of-way management; including, but not limited to, costs associated with registering applicants seeking permission to work within or obstruct a right-of-way; issuing, processing and verifying right-of-way or small wireless facility permit applications; inspecting job sites; maintaining, supporting, protecting or moving user equipment during public right-of-way work; determining the adequacy of right-of-way restoration; restoring work inadequately performed after providing notice and opportunity to correct the work; mapping of "as built" locations of facilities located in rights-of-way; and revoking right-of-way or small wireless facility permits and performing all other functions required by this Ordinance, including other costs the county may incur in managing the provisions of this Ordinance. Management costs do not include: payment by a telecommunications right-of-way user for the use of the public right-of-way; unreasonable fees of a third-party contractor used by a local government unit as part of managing its public rights-of-way, including but not limited to any third-party contractor fee tied to or based upon customer counts, access lines, revenue generated by the telecommunications right-of-way user, or revenue generated for a local government unit; or the fees and cost of litigation relating to the interpretation of this section or section 237.163 or any ordinance enacted under those sections, or the local unit of government's fees and costs related to appeals taken pursuant to section 237.163, subdivision 5.

~~"Extension Fee" is a fee charged to extend the expiration date of a right-of-way permit.~~

"Local Government Unit" means a county, home rule charter or statutory city, town, or the Metropolitan Council.

"Micro wireless facility" means a small wireless facility that is no larger than 24 inches long, 15 inches high, and whose exterior antenna, if any, is no longer than 11 inches.

"Moratorium" means the period of time following a road surfacing project where excavations in the paved surface are prohibited, except for emergency repairs.

"Registrant" means any person (1) who has or seeks to have its facilities or equipment located in any county managed public right-of-way; or (2) who in any way occupies or uses, or seeks to occupy or use, the right-of-way or place its facilities or equipment in the right of way.

"Small wireless facility" means: (1) a wireless facility that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all its exposed elements could fit within an enclosure of no more than six cubic feet; and (ii) all other wireless equipment associated with the small wireless facility, excluding electric meters, concealment elements, telecommunications demarcation boxes, battery backup power systems, grounding equipment, power transfer switches, cutoff switches, cable, conduit, vertical cable runs for the connection of power and other services, and any equipment

concealed from public view within or behind an existing structure or concealment, is in aggregate no more than 28 cubic feet in volume; or (2) a micro wireless facility.

"Telecommunications Right-of-Way User" means a person owning or controlling a facility in the right-of-way, or seeking to own or control a facility in the right-of-way, that is used or is intended to be used for providing wireless service, transporting telecommunications or other voice or data information. For purposes of this Ordinance, a cable communications system defined and regulated under Minnesota Statutes Chapter 238, and telecommunications activities related to providing natural gas or electric energy services whether provided by a public utility as defined in Minnesota Statutes Section 216B.02, a municipality, a municipal gas or power agency organized under Minnesota Statutes Chapters 453 and 453A, or a cooperative electric association organized under Minnesota Statutes Chapter 308A, are not telecommunications right-of-way users, except to the extent these entities are offering wireless service.

"Utility pole" means a pole that is used in whole or in part to facilitate telecommunications or electric service.

"Wireless facility" (a) means equipment at a fixed location that enables the provision of wireless services between user equipment and a wireless service network, including: (1) equipment associated with wireless service; (2) a radio transceiver, antenna, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration; and (3) a small wireless facility. "Wireless facility" does not include (1) wireless support structures; (2) wireline backhaul facilities; or (3) coaxial or fiber-optic cables (i) between utility poles or wireless support structures, or (ii) that are to otherwise immediately adjacent to or directly associated with a specific antenna.

"Wireless service" means any service using licensed or unlicensed wireless spectrum, including the use of Wi-Fi, whether at a fixed location or by means of a mobile device, that is provided using wireless facilities. Wireless service does not include services regulated under Title VI of the Communications Act of 1934, as amended, including a cable service under United States Code, title 47, section 522, clause (6).

"Wireless support structure" means a new or existing structure in a public right-of-way designed to support or capable of supporting small wireless facilities, as reasonably determined by a local government unit.

"Wireline backhaul facility" means a facility used to transport communications data by wire from a wireless facility to a communications network.

Section 5.0 Registration (page 8)

(a) Registration. Each person who occupies or uses, or seeks to occupy or use, or seeks to place any equipment or facilities, small wireless facilities, or wireless support structures in or on the right-of-way, including persons with installation and maintenance responsibilities by lease, sublease or assignment, must register with the county. The county requires registration using the county's e-permitting system to perform permitted work in the county managed public right-of-way. In order for the registration to remain active, the Certificate of Insurance for the registered user must be updated annually by submitting a Certificate of Insurance to the department's permits office.

Section 6.0 Mapping Data (page 9)

Therefore, in managing the use of its public rights-of-way, the county may establish, develop, and implement a right-of-way mapping system as follows. The purpose of a mapping system is to:

1. Allow flexibility in its use by the county as an effective management tool;
2. Enhance public safety and user facility safety;
3. Provide for long-term cost savings;
4. Improve public right-of-way design quality;
5. Limit disruptions to traffic which inconvenience the traveling public; and
6. Allow for better information collection and cooperative usage among local government units, telecommunications companies, and other users of the public right-of-way.

Section 7.0 Reporting Obligations (page 10)

In addition, the registrant shall map electronically upcoming major projects onto the county's established mapping application. Information on the mapping application can be obtained by contacting the department's permits office. Mapping major projects is a condition of obtaining permits from the county. As of 2017, the county's established mapping application is Utility Infrastructure Integration, UI2.

Section 9.0 Permit Application (page 12)

Application and Fee. An application for a right-of-way permit shall be made using the county's current e-permitting system and shall be accompanied by fees for: (1) Permit application (APPENDIX A); (2) Prior work in the rights-of-way; and (3) Any undisputed loss, damage, or expense suffered by the county because of prior work in the rights-of-way or any emergency action taken by the county in regard to facilities comprehended in the permit application (4) other fees as allowed by Statute.

A separate right-of-way permit is required for work within each county road right-of-way for each municipality where work will take place. For work that extends greater than one mile, a separate right-of-way permit is required for each mile of work. Small Wireless Transmitters are exempt from this requirement under MN Statute 237.163, Subd. 3(a)(4)(b)(1). Please see Section 27(a) of this Ordinance.

Section 10.0 Issuance of Permit (page 13)

(b) Conditions. The engineer may impose reasonable conditions upon the issuance of the permit and the performance of the permit holder thereunder to protect the public health, safety and welfare, to ensure the structural integrity of the rights-of-way, to ensure completion of the rights-of-way restoration within a specified period, to protect the property and safety of other users of the rights-of-way, to minimize the disruption and inconvenience to the public or when necessary to protect the right-of-way and its current and future use. The county may require, in its discretion, that a right-of-way applicant install additional, related fiber-optic infrastructure, at county's reasonable expense, for use by the county and its partners. The engineer and the applicant shall collaboratively develop infrastructure specifications, additional cost estimates and documentation necessary to transfer right, title and interest to the county. In addition, the 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.

(c) Small wireless facility conditions. See section 27 of this ordinance.

Section 15.0 Denial of Permit (Page 15)

Small Wireless Facilities Permit Denial or Revocation. See Section 18 and Section 27 of this ordinance.

Section 17.0 Inspection (page 16)

(b) Authority of Engineer. At the time of inspection, the engineer may order the immediate cessation of any work which poses a serious threat to the life, health, safety or well-being of the public. The engineer may issue an order to the permit holder for any work which 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 nonconformity within a stated deadline will be cause for revocation of the permit. The engineer will send written notice to Small Wireless Transmitter users of no later than the third business day after a suspension identifying the alleged violation. If the violation is not corrected at the user's sole expense within the stated deadline, the engineer may revoke the permit and coordinate the county's correction of the nonconformity.

Section 20.0 Authority Over County-Owned Infrastructure and County Managed Public Rights-of-Way, Placement, Location, and Relocation of Facilities (page 18)

(a) Priority of Use. The county has priority of use of county-owned infrastructure, and county managed public right-of-way.

1. To the extent consistent with applicable federal, state, and local law, the county engineer may determine that certain classes of county-owned infrastructure or specific units of county-owned infrastructure are necessary for the county's exclusive use due to legal, mechanical, structural, safety, environmental, service, or other requirements and are unavailable for use by any other person.

(f) Private infrastructure. The county engineer shall notify the owner of infrastructure occupying the county managed public right-of-way or county owned infrastructure anytime private infrastructure or its technology interferes with, or causes degradation to, the county's existing or future infrastructure or technology. The owner of the private infrastructure shall coordinate with the county to resolve the identified issue(s) within one month of notification. A resolution that addresses the issue(s) shall be implemented within one month. The owner of the private infrastructure is responsible for all costs associated with the resolution. All private infrastructure and its associated technology must meet all federal, state, and local requirements, and must adhere to all State and Federal roadside safety requirements.

(h) Unauthorized attachments and facilities prohibited.

1. No person shall knowingly affix, install, place, attach, maintain, or fail to remove an unauthorized attachment or other facility to county-owned infrastructure or in the county managed public right-of-way or other property of the county on demand by the county or any authorized representative thereof.
2. No person shall use an attachment or other facility on county-owned infrastructure of county managed public right-of-way or other property of the county to provide a service not authorized by a permit, license, or other authority.
3. Each unauthorized attachment or use is a separate offense. Each day a violation of this Ordinance continues is a separate offense.

Section 27.0 Small Wireless Facilities

(a) **Small Wireless Facility Permits.** A telecommunications right of way user seeking to place a new wireless support structure or collocate a small wireless facility in any county managed public right-of-way must obtain a permit or permits under this pursuant to this Ordinance and all other applicable laws. An applicant may file a consolidated small wireless facility permit application addressing the proposed collocation of no more than 15 small wireless facilities provided that all small wireless facilities in the application:

- (1) are located within a two-mile radius;
- (2) consist of substantially similar equipment; and
- (3) are placed on similar types of wireless support structures.

Exemptions. No small wireless facility permit is required to conduct the following activities in the right-of-way:

- (1) routine maintenance of a small wireless facility;
- (2) replacement of a small wireless 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.

If any of the above activities will obstruct the right-of-way, the user must obtain a right-of-way use permit.

(b) **Permission from Owner.** If the applicant seeks to collocate a small wireless facility on an existing wireless support structure that is not owned by the county, the applicant must, at the time of application, provide the county with proof that it has obtained the necessary authority from the owner of the wireless support structure to collocate the small wireless facility on the structure.

(c) **Approval of small wireless facility permits.**

Deadline for action. The engineer and all other county officials and departments have 90 days after the receipt of a small wireless facility permit application to issue or deny the permit. In rendering a decision on a consolidated permit application, the county may approve some small wireless facilities and deny others, but may not use the denial of one or more attachments as a basis to deny all small wireless facilities in the application.

If the county receives applications from applications within a seven-day period from one or more applicants seeking approval for 30 or more small wireless facilities, the local government unit may extend the 90-day deadline by an additional 30 days. The county will send written notifications to any applicant whose application will be subject to the extension.

Conditions for approval. The engineer will condition approval of a small wireless facility permit on compliance with; (1) generally applicable and reasonable health, safety, and welfare regulations consistent with the county's right-of-way management; (2) reasonable accommodations for decorative wireless support structures or signs; and (3) any reasonable restocking, replacement, or relocation requirements when a new wireless support structure is placed in a public right-of-way.

Tolling the deadline. The deadline for action on a small wireless facility permit may be tolled if:

1. The application fails to submit all required documentation and information the county requires. The engineer will issue a written notice of incompleteness to the applicant within 30 days of receipt of the application clearly and specifically delineating all missing documents and information. Upon submission of additional documents or information the county will have 10 days to notify the application of any still-missing information that was outlined in the original written notice. Any missing information that was not clearly and specifically delineated in the initial written notice of incompleteness does not toll the 90-day clock.
2. The county and applicant mutually agree in writing to toll the review period.

(d) **Permit denial or revocation.** The engineer may deny any application for a right-of-way or small wireless facility permit if the telecommunications right-of-way user does not comply with a provision of this Ordinance to the extent consistent with law or that approval if the permit would be contrary to generally applicable and reasonable health, safety, and welfare regulations. The county must notify the applicant in writing within three business days of its decision to deny the permit. Upon denial, the applicant may cure the deficiencies identified by the county and resubmit its application. If the applicant resubmits the application within 30 days of receiving written notice of the denial, an additional filing or processing fee must not be required. The county must approve or deny the revised application within 30 days after the revised application is submitted.

Generally applicable health, safety, and welfare regulations for the purposes of this section specifically includes, but is not limited to, the following:

1. The engineer may require the applicant to submit a structural engineering analysis by a Minnesota registered professional engineer certifying that the pole or other structure that is proposed to support the attachment can reasonably support the proposed attachment considering the conditions of the street, the anticipated hazards from traffic to be encountered at the location and considering the wind, snow, ice, and other conditions reasonably anticipated at the proposed location
2. If the engineer determines based upon reasonable engineering judgment that a user's attachment impairs the safety, purpose, or structural integrity of county-owned infrastructure, the engineer may require the user, at the user's sole expense and risk, to change, move, remove, or rearrange the attachments.
3. The engineer may inspect, at any time, the construction or installation of a user's attachments on county-owned infrastructure. If the engineer determines that a user's installation or construction may violate applicable regulation, including, but not limited to, this Ordinance, the National Electric Code, the National Electric Safety

Code, the county's standards for the county-owned infrastructure involved, or the conditions of the user's application or permit, the engineer may suspend the user's construction or installation activities.

4. The engineer may deny an application if the engineer:
 - a. Determines based upon reasonable engineering judgment that the proposed attachment is of excessive size or weight or otherwise would, subject county owned infrastructure to unacceptable levels of stress.
 - b. Reasonably determines in the engineer's reasonable engineering judgment that the proposed attachment would likely jeopardize the reliability or integrity of the electrical system or of individual units of county-owned infrastructure, or would likely violate generally applicable electrical or engineering principles.
 - c. The proposed attachment would present an unreasonable safety hazard as specifically and reasonably identified by the engineer.
 - d. In the case approval would impair the county's ability to operate or maintain county-owned infrastructure in a reasonable manner considering reasonable goals or standards for operating the infrastructure involved.
 - e. There is insufficient capacity or placement of the attachment would violate the National Electric Safety Code or the county's standard design criteria, and the county infrastructure cannot reasonably be modified or enlarged at the cost of the applicant.

Revocation. The engineer may revoke a right-of-way or small wireless facility permit granted to a telecommunications right of way user without refund pursuant to Section 18 of this ordinance in the event of a substantial breach of the terms and conditions of statute, ordinance, rule, or regulation or any material condition of the permit.

Denial Procedural Requirements. The engineer will notify a telecommunications right-of-way user in writing within three business days of the decision to deny a permit and will document the basis for denial.

(e) Term. The term of a small wireless facility permit will be equal to the length of time that the small wireless facility is in use, unless earlier revoked under this section.

(f) Requirements for New Wireless Support Structures. New wireless support structures that comply with the following requirements may be placed in the right-of-way after the issuance of a small wireless facility permit:

1. A new wireless support structure must not exceed 50 feet above ground level, subject to local zoning regulation, and must be separated from other wireless support structures by a minimum of 600 feet.
2. A new wireless support structure that replaces an existing wireless support structures that is higher than 50 feet above ground level may be placed at the height of the existing wireless support structure, subject to local zoning regulation.
3. The diameter of a new wireless support structure that replaces an existing wireless support structure must not exceed the diameter of the existing wireless support structure by more than fifty percent.
4. Wireless facilities constructed in the right-of-way after May 31, 2017 must not extend more than 10 feet above an existing wireless support structure in place as of May 31, 2017.

(g) Requirements for Small Wireless Facilities. A small wireless facility that complies with the following requirements may be collocated on a wireless support structure within the right of way after the issuance of a small wireless facility permit:

1. The small wireless facility must have limited exposed cabling and mounting hardware. It must also match the wireless support structure it is attached to in color and, as close as practicable, in material and design.
2. The small wireless facility must not interfere with public safety wireless telecommunications.
3. Small wireless facilities in the right-of-way must be removed and relocated at the county's request and at no cost to the county when the engineer determines that removal and relocation is necessary to prevent interference with the following which is including but not limited to: present or future county use of the right-of-way for a public project; the public health, safety, or welfare; or the safety and convenience of travel over the right-of-way.
4. A small wireless facility attached to an existing wireless support structure must not block light emanating from the wireless support structure and must not otherwise interfere with the original use of the wireless support structure.
5. Ground-mounted equipment associated with small wireless facility is prohibited unless the applicant can show that ground-mounted equipment is necessary for operation of the small wireless facility. If ground-mounted equipment is necessary it must meet the following standards:
 - a. Ground-mounted equipment must not disrupt traffic or pedestrian circulation and must not interfere with vehicle or pedestrian intersection sight lines;
 - b. Ground-mounted equipment must not create a safety hazard;
 - c. The ground-mounted equipment minimizes impacts on adjacent property;
 - d. If placed above grade, ground-mounted equipment must be limited to three feet in height and 28 cubic feet in cumulative size;
 - e. If placed above grade, be separated from a sidewalk by a minimum of three feet;
 - f. If placed above grade, screening compatible with the surrounding area must be provided around the ground-mounted equipment must be provided if deemed necessary by the engineer.

APPENDIX A – Fees and Right Of Way Permit Application Link

FEES, PERMIT FEES:

Activity	Fee
Permit Fee	<u>\$330.00 per application (2017 rate). Fees are periodically adjusted by the Hennepin County Board.</u>
Penalty or Fee for Violation	Delay Penalty - minimum <u>\$100.00</u> per occurrence per day maximum <u>\$1000.00</u> per occurrence per day Fee for Violation - actual county cost to correct
<u>Small wireless facility rent</u>	<u>\$150 per year per facility collocated on a county-owned structure</u>
<u>Small wireless facility maintenance</u>	<u>\$25 per year for maintenance associated with collocation</u>
<u>Small wireless facility right of way permit fee per collocation</u>	<u>\$TBD per collocation (2017 rate).</u>

Activity	Fee
Monthly fee for electricity used to operate a small wireless facility	The county will not supply electricity for the operation of small wireless facilities. Electricity must be purchased directly from a utility.

APPENDIX B – Requirements for a Right-Of-Way Permit

Americans with Disabilities Act – Pedestrian facilities on public rights-of-way are required to be accessible to persons with disabilities through the following federal statutes:

- Section 504 of the Rehabilitation Act of 1973 (Section 504) (29 U.S.C. 5794) and
- Title II of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. 59 12131-12164)

~~Any work in the county managed public rights-of-way that impacts any pedestrian facilities requires that the restoration of the pedestrian facilities impacted be restored to conform to current Americans with Disabilities Act requirements and standards.~~