

ORDINANCE NO. 2023-01

**AN ORDINANCE TO REPEAL AND RE-CREATE SECTION 8.03 OF THE TOWN OF DELAFIELD TOWN CODE CONCERNING STREET EXCAVATIONS AND ABOVE-GROUND INSTALLATIONS IN THE PUBLIC RIGHT-OF-WAY**

WHEREAS, on or about July 10, 2019 the State of Wisconsin adopted 2019 Wisconsin Act 14, which created Wisconsin Statutes Section 66.0414 concerning small wireless facilities, and made other changes to State laws concerning telecommunications facilities; and

WHEREAS, as a result of this legislation, the Town of Delafield Town staff have recommended that the Town Code be updated to address these issues in a manner permitted by current State laws; and

WHEREAS, the Town of Delafield Town staff also recommended to update the Town Code related to excavations that are proposed in or under any street, alley, public grounds or sidewalk; and

WHEREAS, wireless facilities in public right-of-way must be treated the same as other utility installations, and therefore the Town Code is proposed to be updated not only for wireless facilities, but for all above-ground installations in the public right-of-way; and

WHEREAS, the Town of Delafield Town staff has also recommended that the Insurance requirements to be provided by a contractor and/or subcontractor who is working in the street right of way be updated to provide sufficient insurance coverage for the Town; and

WHEREAS, the Town staff has also recommended that the insurance requirements for policies submitted by the contractor and/or subcontractor shall be included in the ordinance; and

WHEREAS, the Town Board hereby intends to adopt the recommendations of Town staff in this regard; and

WHEREAS, the Town Board of the Town of Delafield deems it necessary to place reasonable restrictions on the public rights-of-way.

NOW THEREFORE, the Town Board of the Town of Delafield, Waukesha County, Wisconsin, does hereby ordain as follows:

SECTION 1: Chapter 8 of the Town of Delafield Town Code entitled, "Public Works," Section 8.03 entitled, "Excavation in Public Right of Way" is hereby repealed and re-created as follows:

**8.03 EXCAVATION IN PUBLIC RIGHT-OF-WAY.**

(1) PERMITS REQUIRED. No person, company, or utility (hereinafter "applicant") shall make or cause to be made any excavation in or under any street, alley, public grounds or sidewalk in the Town without first obtaining a written obstruction or excavation permit from the Town Highway Superintendent. Such permit shall be issued only upon a written application signed by the applicant. The application shall describe the place where the excavation is proposed to be made

with such certainty that it may be readily located, and shall specify the purpose for which the excavation is to be made and when it is proposed to begin. Applicants shall pay a non-refundable application fee in an amount which shall be set forth from time to time by resolution of the Town Board.

## (2) FINANCIAL REQUIREMENTS.

(a) **Cash Bond.** Applicant shall provide a cash bond binding the applicant to the Town in an amount as determined by the Town Highway Superintendent and Town Administrator, that does not exceed \$10,000, that runs to the Town and any third party who may be injured, and that secures the performance of the conditions specified, as enumerated in Wisconsin Statutes Section 66.0425(2). The condition voiding the bond being that the applicant will perform and fully complete in a manner approved by the Town Highway Superintendent, all work for which any highway and street opening permit is issued, and within the time prescribed by the Town Highway Superintendent. In addition, such bond shall provide that the applicant will backfill, maintain, and restore the surface of any Town highway, street, alley, sidewalk or right-of-way.

(b) **Indemnity Bond or Certificate of Insurance.**

1. **Bond.** Except as provided in sub. 2. below, the applicant shall provide an indemnity bond binding the applicant, as principal, and a corporate surety licensed to do business in this State, as surety, to the Town in the penal sum of \$10,000, the condition voiding the bond being that the applicant shall indemnify and save harmless the Town, its officers, agent and employees and shall defend the same from and against any and all liability claims, loss, damages, interest, actions, suits, judgments, costs, expenses, attorney's fees and the like, to whomsoever owned and by whomsoever brought or obtained, which may in any manner result from or arise in the course of or out of the performance of any work for which any obstruction or excavation permit is issued to the applicant during the term of the bond or of any work incidental thereto; the bond shall provide that the penal sum of \$10,000 does not and shall in no manner be construed to limit the legal liability of the applicant (who is principal thereon) to indemnify or otherwise reimburse the Town for any loss, damage or expense it may incur through the defaults, acts or omissions of the applicant in the performance of any work for which an obstruction or excavation permit is issued to the applicant.

2. **Insurance.**

a. In lieu of the indemnity bond, the applicant may deposit with the Town Board proof of insurance showing to the Town Administrator's satisfaction that the applicant is maintaining in force policy of insurance containing the coverages indicated herein. Such coverage shall be provided for all work in the street right of way and shall be provided by the applicant and any subcontractors involved in the project.

### **(1). Commercial General Liability (Occurrence Form)**

Applicant's policy shall include the following:

- a. General Aggregate (other than Prod/Comp Ops Liability) \$2,000,000
- b. Products/Completed Operations Aggregate: \$1,000,000
- c. Personal & Advertising Injury Liability \$1,000,000
- d. Each Occurrence \$1,000,000
- e. Town of Delafield as an Additional Insured on a primary non-contributory basis, using for CG2010 07/04 or equivalent.
- f. Waiver of subrogation in favor of Town of Delafield

**(2). Workers' Compensation and Employer's Liability**

Applicants Policy shall include the following:

- a. Workers' Compensation: State Statutory Limits
- b. Employer's Liability
  - 1. Bodily Injury by Accident \$100,000 each accident
  - 2. Bodily Injury by Disease \$500,000 policy limit
  - 3. Bodily Injury by Disease \$100,000 each employee
  - 4. Waiver of Subrogation in favor of Town of Delafield

**(3). Auto Liability**

Applicants Policy shall include the following:

- a. Combined Single limit \$1,000,000

**(4). Umbrella Liability**

Applicants Policy shall include the following:

- a. Each Occurrence and Aggregate \$5,000,000

b. The above coverages must be placed with an insurance company with an A.M. Best rating of A-: VII or better.

The expiration date of the insurance policy and must provide that the insurance policy cannot be changed or canceled except upon 10 days' notice to the Town. If such insurance policy expires or is canceled within one year of the date of issuance of any obstruction or excavation permit, similar insurance must be provided without any gap in coverage.

- 3. Form. The bonds shall be in the form designated or approved by the Town Board, and the Town Board shall also approve the sureties and any certificate of insurance. Bonds may be furnished to cover each individual permit applicant, or an applicant may furnish bonds covering work under all permits granted within a stated period, and may periodically renew the same. The obligation of such bonds shall remain in full force and effect after date of expiration as to any work for which a permit was granted prior to expiration.

**(3) SPECIFICATIONS FOR HIGHWAY AND STREET OPENINGS.**

- (a) No openings in Town highways, Town maintained highways, streets, alleys, other public ways or public lands will be permitted when the ground is frozen, except, when necessary, in the opinion of the Town Highway Superintendent. In making such an opening all materials excavated from existing or proposed pavements or driveways or within 5' of the edges thereof, shall be removed from the site and disposed of by the applicant in a manner approved by the Town Highway Superintendent. Maintenance of any excavation shall be performed on a regular and as-needed basis until such time a permanent repair can be performed. If maintenance work is not performed timely, no additional permits will be issued to the applicant and the Town may use the cash bond to perform repairs.
- (b) All excavations made in accordance with permission given pursuant hereto shall be enclosed with sufficient barriers, and lamps shall be maintained upon the same at night. All other necessary precautions shall be taken to guard the public against accidents from the beginning to the completion of the work. Underground facilities may be laid only on condition that the applicant is bonded as hereinbefore mentioned from all damages that may result from his neglect of necessary precaution against all accidents to persons or property of others.
- (c) All disturbed areas associated with an excavation of any Town highway, street, alley, other public way or public lands, must be restored to precisely the same condition and relation to the remainder as they were before. All rubbish, boulders and other undesirable materials not used in backfilling must be removed immediately and the excavated areas shall be left in perfect repair. The applicant shall be responsible for to repair any settling or damage of the excavation for one year after approval of the repair.
- (d) When any excavation is made in an existing or proposed pavement or driveway, or within 5' of the edge thereof, all excavated material must be removed and the excavation backfilled with slurry to 4-inches below the surface of the pavement in a manner approved by the Town Highway Superintendent. The Town Highway Superintendent may waive the requirement, in writing, for slurry backfill for repairs only done to the surface of the driveway. The top 4-inches shall be asphalt pavement conforming to specifications in this Chapter. Concrete pavement shall be replaced in kind. Concrete shall meet the following specifications:

Minimum cement content - sacks per cubic yard 6.0  
Compressive strength after 28 days cured 3,500 psi  
Maximum amount of water per sack of cement 6.0 gallons  
Size of coarse aggregate required No. 1 plus No. 2  
Slump 1 Inch - 3 Inches  
Air Content 4.5% - 7.5%  
Admixtures (including flyash) shall NOT be allowed.

Any tunnels shall be backfilled in a manner approved by the Town Highway Superintendent and Town Engineer.

- (e) No work shall be performed and no excavation shall be made within the limits of any Town maintained highway, street, alley, other public way or public lands without prior notification in writing to the Town Highway Superintendent at least 48 hours before commencement of the work.
- (f) Traffic shall not be shut off from travel over the highways without express authority from the Town Highway Superintendent.
- (g) All pipelines shall be installed and laid so as not to interfere with the use of the highways by the public nor the use of the adjoining land by the owner thereof, and no trees or bushes shall be cut, trimmed or the branches thereof cut or broken in the construction or maintenance of any line without the consent of the owner of the trees or bushes.
- (h) If any utility services installed by the applicant shall interfere with the maintenance or construction, within the right of ways of any streets or public way, the utility services shall be realigned at no expense to the Town.

#### (4) ABOVE-GROUND INSTALLATIONS

- (a) *Above-ground installations 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, except as provided in subsection (b) and (c).
- (b) *Exceptions.* The prohibition of subsection (a) shall not apply to the following.
  1. Official signage, official traffic control devices, and utilities owned or leased by the Town.
  2. A use permitted by conditional use permit or right of way agreement granted under the applicable laws.
  3. Building materials for the period specifically authorized by the Town Board which shall not obstruct more than 1/3 of the traveled portion of the street, and which do not interfere with flow in the gutters.
  4. Mailboxes for the collection of mail from the United States Postal Service are exempted from sub (a) if they comply with the Town's standard for mailbox dimensions and installation guidelines.
  5. A legally placed above grade use in existence prior to April 11, 2023.
  6. Special privileges permitted pursuant to State law.
- (c) *Permit required.* If an encroachment, obstruction, or excavation results in the above grade use of the right-of-way then an above grade right-of-way permit from the Town is required prior to the encroachment, obstruction, or excavation being established.
  1. Application requirements.

- a. An above grade right-of-way permit application shall be filed with the Town Highway Superintendent.
  - b. The applicant shall pay the 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 Town Board, and may be amended from time to time. In addition, a professional fee charge back agreement shall be signed to ensure compliance with Town ordinance that professional fees incurred by the Town to review said applications are not paid by the taxpayers, but by the applicant seeking special review and benefit.
  - 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 hazards to the public from said equipment, structure, and impacts due to location on safety for the driving public, pedestrians, and owners and users of adjacent property for such things as, but not limited to; fall zone, fire, explosion, chemical, environmental impacts, and vehicle crash impacts. Said report shall indicate the risk of the safety hazard and the proposed design element to address said safety hazard. The Town Highway Superintendent may require the applicant's report to be provided by a structural engineer or other expert approved by the Town Highway Superintendent, if the Town Highway Superintendent 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 removal or lawn care 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 application shall be submitted for review by the Town Highway Superintendent, and shall include all information required by applicable laws. The application shall be subject to a completeness determination within the time required by applicable laws.
  - b. Existing uses. Town staff shall determine whether to approve, deny, or conditionally grant above grade right-of-way permits for any new encroachment, obstruction, or excavation added to either a previously approved above grade use

or one that was legally placed prior to April 11, 2023, unless the Town Highway Superintendent concludes the new encroachment, obstruction, or excavation may obstruct or incommode the public use in which case the application shall be subject to the procedures of subsection c.

- c. **New uses.** All above grade right-of-way permit applications other than those described pursuant to subsection b., shall be considered as follows.
  - i. The Town Board shall hold a public hearing as reasonably soon as possible after application materials have been deemed complete by the Town and proper notification period for a class 1 notice and notice to all properties within 200 feet of the proposed installation.
  - ii. The Town Board shall give consideration to the application, the testimony received at the public hearing, staff and expert reports, or other information as the Town Board determines appropriate, as follows.
    - A. The Town Board shall consider public safety, alternative options, and the public good when considering an above grade right-of-way permit.
    - B. All users of the Town right-of-way shall comply with the following aesthetic standards:
      - 1. In areas where facilities are currently nonexistent or underground, undergrounding is required.
      - 2. No new above ground structures, including co-locations on existing structures, shall be placed within 500 feet of historic structures or historic districts designated by the National Register of Historic Places in Wisconsin or listed on the State Register of Historic Places. The 500-foot separation is waived for installations that are completely concealed from view, or are not visible from locations where the historic structure can be observed.
      - 3. Attachments to existing structures shall be designed to be flush with the existing structure as much as can reasonably be done, shall be a color that matches the existing structure and shall be the smallest size possible to reasonably accommodate the intended purpose. If the structure to which the attachment is made changes color due to repainting, resurfacing or other means, the attachment shall be modified to match the new color.
    - C. The Town Board may grant the permit, grant the permit with conditions, or deny the permit. If the application is denied, the applicant must be provided a written documentation explaining the basis for the denial.
- 3. **Non-Preemption.** Any party objecting to the requirements of this Subsection (c) (Permit Required) or conditions imposed shall have an opportunity to demonstrate that the requirement constitutes an effective prohibition in violation of State or Federal law, in an appeal made pursuant to Section (d), below.

(d) *Appeals.* Any person who wishes to dispute actions taken by the Town pursuant to this Ordinance may contact the Town Clerk and request to appear before the Town Board at an upcoming regular Town Board meeting and may, at that time, present the matter to the Town Board for resolution. Appeal from the decision of the Town Board shall be by writ of certiorari to the Waukesha County Circuit Court.

## SECTION 2: SEVERABILITY.

The several sections of this ordinance are declared to be severable. If any section or portion thereof shall be declared by a court of competent jurisdiction to be invalid, unlawful or unenforceable, such decision shall apply only to the specific section or portion thereof directly specified in the decision and shall not affect the validity of any other provisions, sections or portions thereof of the ordinance. The remainder of the ordinance shall remain in full force and effect. Any other ordinances whose terms are in conflict with the provisions of this ordinance are hereby repealed as to those terms that conflict.



SECTION 3: EFFECTIVE DATE.

This ordinance shall take effect immediately upon passage and posting or publication as provided by law.

Dated this 17 day of April, 2023.

TOWN OF DELAFIELD

  
Ron Troy, Town Chair

ATTEST:

  
Dan Green, Town Administrator – Clerk/Treasurer

Published and/or posted this 17 day of April, 2023.