

Same Infrastructure, Fewer Tools:

Managing The Ever-Increasing Demands For Private Use Of Public Right Of Way



Managing a city's right of way (ROW) and preserving its primary uses of vehicular and pedestrian traffic has become increasingly complex in the past decade. More and more users seek to utilize this limited city infrastructure to house the equipment and facilities they need to conduct business. Continued evolution of state and federal statutes (particularly Chapter 67 RSMo) and regulations add complexity to this task because modern legislation typically attempts to

streamline ROW use for business while limiting municipal control over this critical infrastructure. The purpose of this article is to describe the boundaries of municipal authority over the ROW at present, highlight specific issues that may arise, and offer strategies to handle increasing use of a city's ROW within those boundaries. Further, the approaches recommended herein are intended to set the stage for effective ROW management.

Per Missouri statute, the ROW is made up of the areas below or above public roads, streets, alleyways and the like, in that a city has an ownership interest.¹ The statutory definition does not apply to many types of municipal property, such as stormwater or sewer systems and any non-road property owned by a city such as parks. For areas within the ROW definition, though, a city must consent to use by public utilities “to construct, maintain and operate all equipment, facilities ... for the transmission or distribution of any service or commodity ...”² The statutory definition of “public utilities” is phrased broadly, so that any entities that “provide a public utility type of service for members of the general public” qualify for this privilege.³

In addition to the obligation of cities to grant access to the ROW, cities are also under obligations to treat similarly situated users of the ROW “in a reasonable, competitively neutral and nondiscriminatory and uniform manner, reflecting the distinct engineering, construction, operation, maintenance and public work and safety requirements applicable to the various users ...”⁴ Different ROW users are typically considered to have “equal rights” to each other, yet all should recognize that the rights of the public to use the ROW are paramount.⁵

New Demands On ROW

Due in part to the broad definition of “public utility” and the significant statutory rights afforded to such entities, more and more entities are seeking entry into cities’ ROW. Further accelerating consumption of the ROW by these new users is the city’s ability, or lack thereof, to charge fees for uses of the ROW. Generally speaking, Section 67.1846 RSMo currently reserves the ability for certain cities to charge a linear foot fee (that is, a rental fee amount based on footage in the ROW) on public utility ROW users. This statute also requires a credit to the linear foot fee for gross receipts taxes or business license taxes paid by that same entity. To be eligible to charge such fees, a political subdivision must have had in place, prior to May 1, 2001, an ordinance “reflecting a policy of imposing any linear foot fees on any public utility right-of-way user ...”⁶ As will be addressed below, it is even more crucial for such political subdivisions to have rules requiring identification of the specific entities owning facilities in the ROW, as those entities are eligible for credits against applicable linear foot fees. Cities also need accurate records of facility ownership to avoid issuing credits to fiber providers who are not paying gross receipts or business license taxes, including to entities that may be within the same corporate chain but are nonetheless ineligible for the credits. *If your city has not done an analysis on whether the authority recognized in Section 67.1846 RSMo applies to it, we recommend you consult your*



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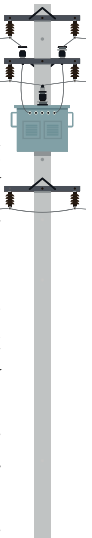
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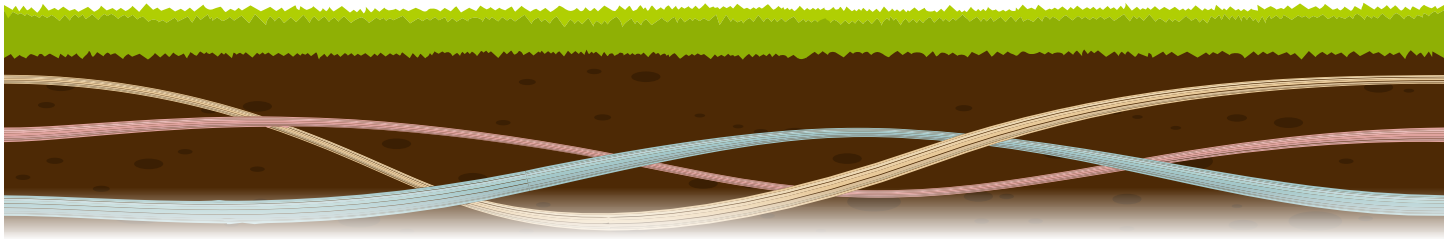
city attorney to review past city records on this issue, as there may be statutory authority for revenues your city has not previously utilized.

Many of the newer ROW users seek to provide services outside of the regulatory authority of the Public Service Commission (PSC), such as dark fiber, broadband connectivity, or fiber backhaul to support 5G networks. While a permit for excavation or for attaching to poles within the ROW may still be required, in many cases a simple permitting structure does not offer the city as much information as it needs to effectively manage and coordinate uses of the ROW. One goal in effective ROW management should be to understand how these separate entities fit together and use the ROW to conduct different businesses, and this is also critical to treating similarly situated users in a uniform manner. Strategies to accomplish this goal, and others, are discussed below.

Strategies For Handling These New Demands

To achieve municipal goals while remaining consistent with the broad statutory authority granted to public utilities, a city can and should enact certain municipal regulations to have clear, enforceable authority over permitting processes, excavations, relocation, restoration, interference and other activities of utilities that affect important governmental interests. For instance, a city generally has the ability to require relocation of a public utility’s facilities in the ROW, at the user’s expense, for projects with a public purpose.⁷ Establishing rules for payment and timing of relocation for public projects can improve how quickly ROW users will move their





facilities, the level of cooperation to arrange movement of facilities between separate but intertwined uses (such as electric poles also containing communications lines), and the overall speed at which the city can get its projects done. Because cities have authority to set certain requirements that address issues such as excavations, relocation, restoration and interference, as “reasonable rules and regulations of governmental bodies having jurisdiction of such public places[.]”⁸ establishing rules to effectuate a city’s goals on these issues, along with the recommended strategies listed below for a “belt-and-suspenders” approach, is a critical part of successful ROW management.

1. Require ROW Use Applications

For any entity seeking to utilize the ROW, cities should require the filing of an application to use the ROW, and then enter into and maintain a ROW use agreement for the entire duration of the planned use. As an initial matter, the city needs to know which companies own each facility placed in the ROW so it may quickly and easily contact such entities in cases of emergencies or interference with municipal facilities. Having this information is also particularly necessary to protect cities in instances of bankruptcies, mergers and acquisitions, all of which could result in changes in ownership over physical property within the ROW without knowing who those new parties are or without those parties knowing their obligations to the city. Further still, having reliable chain of ownership and contact information for these

facilities puts the city in a position to efficiently address bonding, insurance, restoration and restoration guarantee obligations owed by a ROW user. This helps to minimize city costs in enforcement of ROW user obligations and greatly increases the likelihood of recovery of costs a city incurs for any restoration work needed to ensure the ROW remains in a reasonably safe condition. Alternatively, if hazardous conditions created in the ROW by others are not restored, a city risks being held liable since such conditions can constitute an exception to the city’s sovereign immunity.⁹

Requiring applications can help ensure that all ROW users keep key information on file with the city, including:

1. The services a user is proposing to provide;
2. What regulatory regime the user would operate under;
3. Any potential exemptions under federal, state or local law that apply to such user; and
4. A user’s existing or proposed systems in the ROW.

All of this information requires that the ROW user itself demonstrate the facts, any applicable legal exemptions, or other pertinent information relating to the user’s proposed operation. This approach allows cities to treat each individual entity the same as all others and requires the ROW user to identify if there are any lawful exemptions that apply to a city’s ROW usage rules. The approach also saves cities from having to become experts in each emerging trend for

ROW usage and each individual use by creating a system where users proposing similar uses will be identified and placed on the same track as other similarly situated users. This expedites the process to get the correct authorizations in place to move forward on proposed projects. Additionally, an application requires the ROW user to affirmatively state what rights it believes it has and gives cities an opportunity to examine that information before acting in a manner that may discriminate against a new or existing user. Thus, the application process alone provides a city with much more useful information about these proposed ROW users than it would receive with only a typical excavation permit and allows cities to quickly identify requirements that should apply to a particular type of ROW use. Furthermore, Chapter 67 RSMo allows for cities to deny applications

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for a ROW permit or to revoke existing permits, but only in specific circumstances.¹⁰ Unless a city has accurate, detailed information about its ROW users, its ability to exercise this statutory authority will be substantially diminished.

2. Utilize ROW Use Agreements

A ROW use agreement requirement can further clarify the regulatory relationship by using a contract to document the terms of a city's ROW ordinance in one place while also addressing administrative details specific to each user.¹¹ Such an agreement requirement was recently upheld by the Missouri Supreme Court in *City of Aurora v. Spectra Communications Group LLC*.¹² These agreements help both parties establish how the ROW code functions, the process for applying for permits, and the obligations of the proposed user for its use of city ROW. Initially, a large company deploying facilities within a city's ROW will often have outside contractors and subcontractors, or employees without proper authority, applying for excavation permits. By requiring the company to sign a ROW use agreement, the contract itself will likely be reviewed by corporate officers that will better understand and appropriately plan for the obligations it places upon the company. There is also the benefit that such an agreement can create a separate avenue for enforcement of a ROW code's requirements, one that may be faster and easier than the traditional municipal ordinance violation procedures.

There are legitimate claims under Missouri law that may exempt certain users from being required to have a ROW use agreement, particularly when cities implement a new agreement requirement and seek to enforce such requirement on existing users, but those cases would need to be scrutinized individually depending on the use and user in question. One example of this preemption is included in newer Missouri legislation (Sections 67.5110-.5125 RSMo) the "Uniform Small Wireless Facility Deployment Act"



(USWFDA) regulating ROW use agreement applicability for small wireless facilities that is discussed in more detail below. This Act generally prohibits cities from requiring a ROW use agreement for companies installing and using such facilities.¹³ However, generally speaking, new entrants to your city's ROW can and should be required to enter into a form ROW use agreement for such use.

3. Permit Conditions

After receiving an application from a ROW user and entering into an agreement for such use, it is still important to have up-to-date permit documents to mitigate the potential hazards that can arise from installing physical facilities within the ROW and to provide a sufficient level of oversight. One type of permit condition will serve as a useful example: including a minimum depth for installation of underground utility lines in the ROW. This requirement enhances safety generally and can also help minimize a city's exposure to liability for damage claims from doing normal maintenance work such as replacing a deteriorated concrete slab. If, as maintenance crews performing that type of work sometimes discover, a utility line is placed just beneath the pavement, it is practically inevitable that the line will be damaged by the removal of the slab. One layer of defense available to cities in such cases is this exclusion from the definition of excavation in Missouri's Underground Facility Safety and Damage Prevention Act: "...the use of mechanized tools and equipment to break and remove pavement and masonry down only to the depth of such pavement or masonry on roads dedicated to the public use for vehicular traffic."¹⁴ Using that exclusion as a defense, however, may lead to a factual debate over how and when the damage occurred. If a city has a minimum depth requirement clearly stated in its regulations and permits, and has kept that requirement in place over time, one picture including a tape measure showing that the line was placed at too shallow of a depth can help avoid arguments over liability.

As this example illustrates, good permitting documentation provides an opportunity to simplify and even enhance protections for cities. Generally, permittees should be required to accept all ROW obligations outlined within the city's code and ROW use agreement as a condition of receiving the permit. Doing so puts the excavator on formal notice of all requirements under the municipal code and limits possible arguments that a permit document might somehow supersede the regular rules. Further limitations or protections can be to require the use of boring technology instead of trenching, or placement of multiple lines in shared conduit. Missouri law does, however, provide limits on the costs a city can place on the ROW user for these requirements.¹⁵ Also, bonding and

insurance requirements (unless an entity is expressly exempt, such as with self-insurance¹⁶) should be in place prior to any issuance of permits. Once a city has received an application for an excavation permit, there is a 31-day "shot clock" to act on an excavation application or it is "deemed approved," so cities need to track when permit applications are received and resolve all issues associated with the proposed work promptly.¹⁷ Thus, cities should have specific terms integrated into permit documents dictating how the excavation work is to be performed while also ensuring those terms and the process for issuance comply with Missouri law.

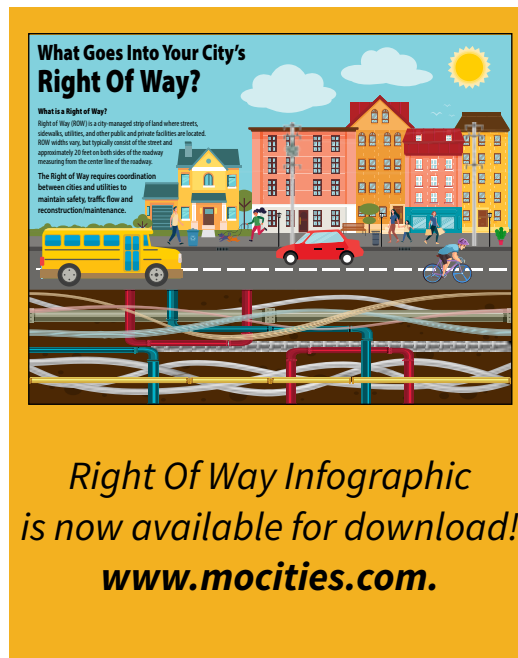
The Newest Demands—Small Wireless Facilities

In 2018, the Missouri Legislature passed the USWFDA in response to the stated plans of various communications providers to quickly build out the next generation of technology for wireless communications, otherwise known as "5G" networks. Since then, companies have moved

quickly to deploy these networks in certain areas and can be expected to expand into others over time. This work generally involves placement of numerous smaller antennae installations on existing or new utility poles in lieu of larger antennae on standalone towers. To appropriately handle this new demand on ROW, it is critical that cities enact regulations requiring applicants to demonstrate that the proposed plans meet engineering standards and have been graded structurally sound for such installations. The USWFDA expressly preserves a city's ability to reject small wireless facilities applications in instances that would cause safety issues in the ROW.¹⁸ This step would occur when individual permits for sites are submitted, as the structural analysis relates specifically to the pole proposed to

be installed or used. Additionally, cities may require installers of these facilities "to comply with reasonable, objective and cost-effective concealment or safety requirements ..."¹⁹

More specifically, cities may prohibit these installations that often involve much more than just small antennae attached to poles, from obstructing the usual uses of the ROW or interfering with or impairing the operation of existing utility facilities or municipal pole attachments. As with other types of work in the ROW, permits may be required for work that will involve excavation, obstruct traffic or materially impede the use of a sidewalk.²⁰ The reasons a city may deny permission for installation of small wireless facilities include material interference with sight lines or clear zones, or noncompliance with applicable safety codes.²¹ Other safety-oriented municipal goals, such as procuring as-builts or other mapping of facilities installed within a city to prevent future



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entities from boring into existing or new lines can also occur at the permitting process as a way to close out the ticket and ensure the work was done up to a city's standards.²² It is also important to note that an entity conducting excavation in the ROW has a statutory obligation to restore the excavation area for four years.²³ Finally, the 31-day "shot clock" discussed above also applies to excavations for installation of these new facilities, so cities must track receipt of the applications and act promptly.²⁴

There are additional, special rules put into effect by the USWFDA that give small wireless facility installers more abilities to install such facilities within the ROW. A city must allow such attachment of small wireless facilities to a city's utility poles, except for poles used by a municipal electric utility,²⁵ and cannot require a ROW use agreement for such attachments.²⁶ Cities may only deny attachment of small wireless facilities to municipal poles in specific instances.²⁷ A city is also limited in annual attachment rates for small wireless facilities to municipal poles at \$150/year per attachment.²⁸ Cities are also limited in insurance or bonding over these small wireless installations,²⁹ but careful attention should be paid to all of the activities a ROW user is performing, given that this exemption may be more limited to the specific activities in comparison to the work being done by a ROW user claiming these exemptions.

Conclusion

This area of the law is subject to fairly frequent changes. Currently proposed legislation in Jefferson City includes a bill, HB 386, that would decrease the maximum allowable percentage of video service provider's gross receipts from 5% to 2.5% by August 28, 2027, fees, as well as create a "Task Force on the Future of Right-of-Way Management and Taxation." The direction this task force might take is yet to be determined, but if the trends over the past couple of decades are any indication, it could serve as a vehicle for efforts to further limit municipal authority over its ROW. As always, the Missouri Municipal League, with the support of the Missouri Municipal Attorney's Association, will be watching for further developments and seeking to advance municipal interests when possible.

If your city is encountering any of these new demands for use of the public ROW, we encourage you to consult with your city attorney to review its current ROW regulations and consider options for enhancements in line with the approaches recommended herein. 🍃

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Endnotes: Due to print space restrictions, endnotes are available by request. Contact MML at (573) 635-9134 or info@mocities.com to request this article with full endnotes.