



CITY of NOVI CITY COUNCIL

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**Agenda Item 5
September 10, 2007**

SUBJECT: Consideration of Ordinance No. 07-157.04, an amendment to the Novi Code of Ordinances, Chapters 31 (Streets, Sidewalks and Other Public Places), to add requirements to address franchise utility construction in the City's rights-of-way. **Second Reading**

SUBMITTING DEPARTMENT: Engineering *PH*

CITY MANAGER APPROVAL: *[Signature]*

BACKGROUND INFORMATION:

Franchise telecommunications equipment is being installed in the City's rights-of-way that may damage and/or make it difficult to maintain buried public utilities. In addition, these structures may obstruct safe sight distances and pose aesthetic concerns.

To address the potential risks to public health, safety and welfare that utility structures pose, Engineering Division staff and the City Attorney - in collaboration with neighboring communities - have developed requirements to mitigate the impact that the installation of utility-related structures in the public right-of-way may have on the City and its residents. Specifically, the attached proposed ordinance amendment would revise utility plan submittal requirements, add standards for a utility company's use of the right-of-way, add standards for the removal of structures from the right-of-way, and add exemptions from the permitting process.

Since the amendment's first reading in August, the City Attorney met with representatives of AT&T. AT&T presented several objections to the proposed ordinance changes (AT&T letter dated August 30, 2007 is attached, including Kristin Kolb's responses to these objections in bold text). Some additional changes were made to the amendment language based on these objections, as described in Kristin Kolb's September 3, 2007 letter, which is also attached.

In addition, at the proposed text amendment's first reading, Council inquired about the composition and basis of the 25% administrative fee to be charged to utilities that damage City infrastructure or fail to restore the City's right-of-way. The attached memorandum from Rob Hayes, dated August 16, 2007, provides this information.

The proposed ordinance was sent to representatives of Detroit Edison, Consumers Energy, and Bright House Networks for review; however, only Bright House has responded (see attached letter). Most of their comments are addressed in the latest version of the ordinance.

RECOMMENDED ACTION: Consideration of Ordinance No. 07-157.04, an amendment to the Novi Code of Ordinances, Chapters 31 (Streets, Sidewalks and Other Public Places), to add requirements to address franchise utility construction in the City's rights-of-way. **Second Reading**

	1	2	Y	N
Mayor Landry				
Mayor Pro Tem Capello				
Council Member Gatt				
Council Member Margolis				

	1	2	Y	N
Council Member Mutch				
Council Member Nagy				
Council Member Paul				



MEMORANDUM

8-16-07
To: Mayor and City Council Members
Follow-up to Monday night question.
[Signature]

To: Clay Pearson, City Manager
Pam Antil, Assistant City Manager
From: Rob Hayes, City Engineer *RH*
Re: Administrative Fee for Incomplete Utility Construction in Right-of-Way
Date: August 16, 2007

At Monday's meeting, Council requested that staff provide the basis for the proposed 25% administrative fee that would apply when a franchise utility does not restore the right-of-way to pre-construction conditions. This fee would be 25% of the value of work required to complete restoration, and would be in addition to the amount that the franchise utility would reimburse the City for the actual cost of repair work.

The administrative fee would cover the costs that the City incurs, including design engineering, construction engineering and inspection, and legal services. Depending on the nature and magnitude of restoration work, staff support from Public Works, Water and Sewer, Forestry, and Finance may be required, and the cost of their time would also be recouped by the administrative fee. Based on our experience dealing with private utility companies working in the City's rights-of-way, the dollar value of restoration work is typically less than \$10,000, therefore unless there is major damage to the City's infrastructure; we anticipate that the fee would be less than \$2,500 in most cases.

The City's Stormwater Drainage Facility Maintenance Easement Agreement and Maintenance and Guarantee Bond both require a 25% administrative fee should the City need to self-perform corrective work on a site. Although I do not know how the City originally derived this percentage amount, a generally-accepted fee for design and construction engineering is 15%, and the cost of legal services and other staff administration costs can range up to 10% of construction value, which yields a total administrative fee of 25%. *h*

Some options Council may wish to consider include requiring the utility to pay:

- The proposed 25% administrative fee. This may be a conservative number, but it would help ensure that all of the City's costs are covered. ✓
- A lower administrative fee (perhaps 20%) that may run the risk of having un-recouped costs.
- The actual costs incurred by the City, up to a not-to-exceed amount of 25% of the value of the repair work. This would place the burden of proving actual costs on the City, which in and of itself would require the City to incur additional accounting costs for tracking and reporting these expenses. *One route to track and bill.*

Please let me know if you have any questions or comments in regards to recouping administrative costs from franchise utilities.

cc: Tom Schultz, City Attorney
Brian Coburn, Civil Engineer
Kathy Smith-Roy

September 3, 2007

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Mayor Landry and City Council
City of Novi
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Novi, Michigan 48375

KRISTIN BRICKER KOLB
Direct: 248-539-2837
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*Re: Draft Text Amendment to Chapter 31 Regarding Placement of
Structures in the Public Right-of-Way
Our File No. 55142.NOV*

Dear Mayor Landry and Council Members:

At your meeting on September 10, 2007, you will be asked to consider a second reading and adoption of the above-referenced text amendment. You will recall that the first reading was held at your August 13, 2007, Council meeting. Following that meeting, a meeting was held between City representatives and AT&T, which resulted in AT&T providing the City with its written objections to the proposed ordinance. Following receipt of that memorandum, and on the basis of other meetings our office has had with AT&T and other research we have done, we have made a few revisions to certain ordinance provisions.

The changes made since the first reading are summarized hereinbelow, and are identified in the text amendment in *bold, italicized* font. The more significant of those changes are:

- On Page 1-2 of the ordinance, a definition of "Practical difficulty."
- On Page 2 of the ordinance, a slight revision in the definition of "Utility."
- On Page 4 of the ordinance, under subsection 3(d), we added the phrase "if any," in reference to the requirement to indicate proposed parking locations on the plan.
- On Page 4 of the ordinance, a revision to the landscape detail, moving the substantive requirements for landscaping to a different section of the ordinance.
- On Page 4 of the ordinance, a revision to clarify that the road crossings should be at 90 degree angles to existing roadways.

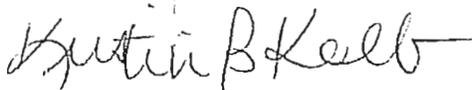
- On Page 5-6, adding a subparagraph (10) for landscaping standards, which includes some waiver language if landscaping was inappropriate in a particular circumstance; the language is taken from the zoning ordinance, which gives the Planning Commission (here it would be the City Engineer) similar authority in certain cases.
- On Page 6, subsection (b), we clarified that the requirement to obtain written consent from a private property owner was only required in the case that the utility did not already hold an easement for installation of an above-ground facility. We also modified what was (c) to read (b)(1), and clarified that zoning variances would only be required for placement of a facility on private property. This would cover the situation where a non-use variance was required to install the facility.
- On Page 7, changing some language to clarify that lines must be buried if existing poles are not present, and, if such poles are present and available, the lines must be buried only when such poles are removed and the other utilities on those poles are buried.
- At the end of subsection (i) on Page 8, we added the phrase “unless the City approves an alternate location” to address concerns regarding required underground location of utility lines.
- On Page 9, exempt individual connections for up to four users, so long as those connections do not disrupt a right of way or cross more than one property line.
- The biggest change is found in the addition of a new Section 31-11. The current ordinance does not contain an appeal process in the case that a permit is denied or if the applicant disagrees with any conditions imposed. AT&T objected to having to go through a “lengthy” appeal process. We added a variance process under which the City Engineer may allow exceptions where the application of the requirements of Section 31-4 results in a “practical difficulty” for the applicant. In other words, upon reviewing a permit, if the result is that a utility is unable to install a facility in the desired location, this provision would grant the City Engineer authority to waive the strict application of those requirements without having to file a formal appeal. The standards are those that Council is often asked to apply for different kinds of variance relief, and are found in Section 1-12 of the City Code. There is also a separate provision for appealing any decisions by the City Engineer to Council.

- The final change is to Part X of the ordinance, the Severability clause. We added language indicating that if a portion of the ordinance were to be struck down by a court or an *administrative agency of the State of Michigan* (i.e. the Michigan Public Service Commission), the remainder of the ordinance would still be valid and enforceable. This addition is in response to a belief that AT&T would file a challenge to the ordinance with the MPSC.

We understand AT&T's objections to be aimed at the ordinance as increasing the cost of its activities and therefore also of competition. The ordinance, however, is a broadly applicable regulation to protect City rights-of-way. It applies to any utility and user—not just AT&T—and it is an attempt to address what this City and other communities are seeing as daily occurrences in their rights-of-way. The City has not only the right but the obligation to ensure proper management of these public spaces, which house in addition to cable and phone lines roads and sidewalks and gas lines and electric lines and water and sewer lines (so far). These are not limitless spaces, and this City has first hand knowledge (e.g., the Novi/I-96 water main hit) of just how expensive mistakes in these crowded areas can be.

We will be present at your meeting on September 10th to discuss the matter in greater detail with you and answer any questions. We suspect AT&T representatives will be there as well, vigorously objecting to the ordinance. If you have any questions in advance of the meeting, please contact our office.

Very truly yours,



Kristin Bricker Kolb

KBK:jw

Enc.

cc: Clay J. Pearson, City Manager
Pamela W. Antil, Assistant City Manager
Sheryl Walsh, Community Relations Director
Rob Hayes, City Engineer
Brian Coburn, City Engineer
Thomas R. Schultz, Esq.

“STRIKE-OUT” VERSION

STATE OF MICHIGAN

COUNTY OF OAKLAND

CITY OF NOVI

ORDINANCE NO. 07-157.04

AN ORDINANCE TO AMEND CHAPTER 31, "STREETS, SIDEWALKS, AND OTHER PUBLIC PLACES," ARTICLE I, "IN GENERAL," TO ADD A DEFINITION SECTION, AMEND THE PLAN SUBMITTAL REQUIREMENTS, ADD STANDARDS FOR INSTALLATIONS IN THE RIGHT-OF-WAY, ADD STANDARDS FOR USE OF THE RIGHT OF WAY, CREATE STANDARDS FOR REMOVAL OF INSTALLATIONS IN THE RIGHT-OF-WAY, AND TO ADD EXEMPTIONS FROM THE PERMITTING REQUIREMENTS.

THE CITY OF NOVI ORDAINS:

Part I.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 – 2 to read as follows:

Section 31-2. Definitions.

As used in this chapter, the following words and terms shall have the following meanings:

AASHTO shall mean the American Association of State Highway and Transportation Officials.

Crash Zone shall mean the area five (5) feet from the back of a curb or 12 feet from the edge of the pavement of a traveled lane, whichever is greater.

Facility or Facilities shall mean the Utility's equipment or personal property, such as wires, cables, pipes or conduits, equipment cabinets, structures or other equipment used for the transmission of electrical current impulses, sounds, voices or communications, water, sewage, gas or other fuel.

Practical difficulty, for purposes of this Chapter only, shall be established upon satisfactory evidence, as determined by the City Engineer, of the following::

- (A) *A literal application of the substantive requirement would result in exceptional, practical difficulty to the applicant;*

- (B) *The alternative proposed by the applicant will be adequate for the intended use and shall not substantially deviate from the performance that would be obtained by strict enforcement of the standards; and*
- (C) *The granting of the variance will not be detrimental to the public health, safety or welfare, nor injurious to adjoining or neighboring property, nor contrary to the overall purpose and goals of the chapter or article containing the regulation in question.*

Public Right-of-Way shall mean the area on, below, or above a public roadway, highway, street, alley, easement, or waterway. Public right-of-way does not include a federal, state, or private right-of-way.

Sight Triangle shall mean a triangular-shaped portion of land established at roadway, highway, or street intersections in which there are restrictions on structures erected, placed or planted which would limit or obstruct the sight distance of motorists entering or leaving the intersection

Utility shall mean any public *or private* utility company, person, corporation or other entity, including, but not limited to telecommunication, water, sewer, *electric*, gas and other fuel *providers*.

Zone of Influence shall mean the area within a 45 degree angle from a pipe invert.

PART II.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by re-numbering Section 31 - 2 as 31-3 and amending it to read as follows:

Section 31 – 3. Application; review; bond.

- (a) [Unchanged.]
- (b) *Plan submittal requirements.*
 - (1) Plans submitted in conjunction with a request for a permit shall contain the following information:
 - a. A location map, with a minimum scale of 1” = 50’ and north arrow, showing the location of the proposed facility in relation to the surrounding area.
 - b. Proprietor information, parcel identification number and/or addresses of all affected and adjacent parcels, and street names.

- c. Location of the proposed facility, including proposed invert elevations of all structures, piping or appurtenances.
 - d. Any property lines within 50 feet of the proposed facility.
 - e. For the area 25 feet on either side of the proposed facility (including, but not limited to all proposed structures, transmission lines, and underground routing), the following items must be provided:
 - (i) Two-foot contours or strip topography of elevations.
 - (ii) Location of all structures, manholes, fire hydrants, trees or any other permanent physical objects. All structures must be labeled.
 - (iii) Location of any and all water courses.
 - f. Length, size and type of each section of proposed pipe between structures.
 - g. A minimum of two benchmarks consistent with the datum utilized by local standards.
 - h. A note whether the proposed facility will be located within 500 feet of a waterbody or watercourse.
 - i. A traffic control plan shall be provided for any road closure proposed under Section 31-9.
- (2) For proposed facilities to be installed within road rights-of-way or adjacent to private or public roadways, the following additional items must be shown:
- a. All existing facilities within the road right-of-way or within 25 feet on either side of the proposed facility.
 - b. Pavement type and limits.
 - c. Existing and proposed right-of-way lines.
- (3) For proposed above-ground installation of facilities, the following additional items must be shown:
- a. Separate detail of each above-ground facility indicating all their dimensions.

- b. If proposed within the sight triangle of the right-of-way, strip topography of elevations within 50 feet of the proposed facility to verify no sight obstructions.
 - c. Dimensions of the facility from existing pavement, property lines, right-of-way lines and other facilities.
 - d. Indicate proposed parking location, *if any*, dimensions and method (i.e. gravel, grass pavers, etc.) to limit disruption for maintenance vehicles. Parking on non-motorized pathways is prohibited.
 - e. Show compliance with AASHTO standards for above-ground facility placement.
- (4) A landscaping plan *as provided for in Section 31-4(a)(10)*.
~~indicating plant material of sufficient height and density to screen any above-ground proposed facility shall be required. Said landscaping shall be suitable for the location and conditions, and shall be maintained and replaced as necessary by the Utility.~~

(b)(c) [Unchanged.]

(e)(d) [Unchanged.]

(e) Owners of property zoned for single-family residential use undertaking minor disruption of the public right-of-way are exempt from the requirements of this Section. For purposes of this Chapter, “minor disruption” shall be interpreted to mean excavation of less than two feet.

Part III.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 – 4 to read as follows:

Section 31-4. Standards for the Installation of Facilities in the Road Rights-of-Way or in Private Easements.

- (a) All installation of Facilities under this Chapter shall comply with the following standards.
 - (1) Generally, proposed facilities must run in straight lines and parallel to road rights-of-way and/or existing facilities.
 - (2) Road crossings should be at a 90 degree angle to *an adjacent* ~~the~~ road.

- (3) The facilities shall not be located within the Zone of Influence of an existing or proposed sanitary sewer or water main, unless otherwise approved by the City Engineer or his or her designee. All underground facilities *proposed to be located perpendicular to an existing utility line shall* ~~must~~ maintain a minimum vertical clearance of 18 inches from any part of *the existing utility line* .
- (4) If the facilities are proposed to be located in a public right-of-way, any above-ground facilities shall be placed at the extension of existing property lines that are perpendicular to the road right-of-way.
- (5) Facilities proposed to be located above-ground shall be installed outside of the sight triangle in accordance with the AASHTO guidelines.
- (6) Facilities proposed to be located above-ground are prohibited within any Crash Zone, and must be a minimum of three (3) feet off of any pedestrian pathways or sidewalks.
- (7) Unless provided otherwise herein, facilities proposed to be located underground must be installed at least four (4) feet below the center line of the road.
- (8) Facilities shall be of a neutral color such that they are in harmony with and blend in to the immediate surrounding area. Under no circumstances will primary colors be permitted.
- (9) Right-of-way approval from the Road Commission for Oakland County is required prior to the issuance of a construction permit for rights-of-way that are under the jurisdiction of the Road Commission.
- (10) *Landscaping shall be provided in accordance with the following requirements:*
 - (A) *Plant material shall be of sufficient height and density to screen any proposed above-ground Facility. Landscaping shall be maintained and replaced as necessary by the Utility.*
 - (B) *The landscaping shall not interfere with any other proposed or existing use of the right-of-way.*
 - (C) *Any existing landscaping in the right-of-way, whether installed by the City, a Utility, or a private property owner, which is disturbed as a result of the installation, maintenance or repair of a Facility, shall be replaced by the Utility causing such disturbance to the exact condition it existed prior to the disturbance.*

(D) The City Engineer may reduce or waive the landscaping requirements when it determines that practical difficulties exist due to the parcel size or configuration, or where the design of the site would be enhanced by an alternative design solution while still meeting the intent of this section.

- (b) If the facility is proposed to be located on private property, and unless the Utility has previously obtained an easement on the property for installation of above-ground Facilities, the Utility must obtain the written consent of the property owner(s), which written consent or easement shall be submitted with the application for a permit. The placement of Facilities on private property shall not interfere with any prior existing Utility easements.
- (1) Any zoning variances that may be required for placement of Facilities on private property shall be obtained prior to issuance of a permit under this Chapter.

Part IV.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 - 5 to read as follows:

Section 31 – 5. Use of the public right-of-way.

- (a) Utility, its contractors, subcontractors, and its facilities shall not unduly burden or interfere with the present or future use of the public right-of-way. A Utility's facilities shall be installed and maintained so as to not endanger or injure persons or property on or about the public right-of-way. If the City reasonably determines that any portion of the facilities constitutes an undue burden or interference, following an approved installation, Utility, at its sole expense, shall modify the facilities or take such other actions as the City may determine is in the public interest to remove or alleviate the burden, and the Utility shall do so within a reasonable time period.
- (b) Utility, its contractors and subcontractors shall immediately restore, at the Utility's sole cost and expense, in a manner approved by the City, any portion of the public right-of-way that is in any way disturbed, damaged, or injured by the construction, installation, operation, maintenance or removal of the facilities to a reasonably equivalent (or, at Utility's option, better) condition to that which existed prior to the disturbance. In the event that the Utility, its contractors or subcontractors fail to make such repair within a reasonable time, following notice and an opportunity to cure, the City may, but is not obligated to, make the repair and the Utility shall pay the costs incurred by the City plus an administrative fee in the amount of 25% for such repair. All pedestrian pathways and sidewalks disturbed as a result of installation, operation, maintenance or removal of Facilities must be restored to current ADA requirements.
- (c) The construction and installation of the facilities shall be performed in accordance

with the plans approved by the City. The open cut of any public right-of-way shall be coordinated with the City Engineer or his or her designee. The Utility shall install and maintain the facilities in a reasonably safe condition. ~~If the existing poles in the public right-of-way are overburdened or unavailable for the Utilities use, or the facilities of all users of the poles are required to go underground then the Utility shall, at its expense, place such portion of its Facilities underground,~~ ***All utility lines are to be installed underground unless an existing pole is available for such use. If the owner of the pole relocates its Facilities underground, all lines attached must also be moved underground at the owner's expense,*** unless the City approves an alternate location. The Utility may perform maintenance on the facilities without prior approval of the City, provided that the Utility shall obtain any and all permits required by the City in the event that any maintenance will disturb or block vehicular traffic or are otherwise required by the City.

(d) The Utility shall coordinate its construction and all other work in the public right-of-way with the City's program for street construction and rebuilding (collectively "Street Construction") and its program for street repaving and resurfacing (except seal coating and patching) (collectively, "Street Resurfacing"). The goals of such coordination shall be to encourage the Utility to conduct all work in the public right-of-way in conjunction with or immediately prior to any Street Construction or Street Resurfacing planned by the City.

(e) If the City vacates or consents to the vacation of a public right-of-way within its jurisdiction, and such vacation necessitates the removal and relocation of the Utility's facilities in the vacated public right-of-way, the Utility shall remove its facilities at its sole cost and expense when ordered to do so by the City or a court of competent jurisdiction. The Utility shall relocate its facilities to such alternate location as the City and the Utility mutually agree upon, applying reasonable engineering standards.

(f) If the City requests the Utility to relocate, protect, support, disconnect, or remove its facilities because of street or utility work, or other public projects, the Utility shall relocate, protect, support, disconnect, or remove its facilities, at its sole cost and expense, including where necessary to such alternate location as the City and the Utility mutually agree, applying reasonable engineering standards. The work shall be completed within a reasonable time period.

(g) The City shall have the right to sever, disrupt, dig-up or otherwise destroy facilities of the Utility if such action is necessary due to a public emergency or ~~the failure of the Utility to meet the requirements of~~ ***in the event the facilities are installed in violation of the requirements of this Chapter this Section.*** If reasonable to do so under the circumstances, the City shall attempt to provide advance notice to the Utility. Public emergency shall be any condition which poses an immediate threat to life, health, or property caused by any natural or man-made disaster, including, but not limited to, storms, floods, fire, accidents, explosions, water main breaks, hazardous material spills, etc. The Utility shall be responsible for repair at its sole cost and expense of any of its facilities damaged pursuant to any such action taken by the City.

(h) If eligible to join, and if it is not already a member, the Utility shall subscribe to and be a member of "MISS DIG," the association of utilities formed pursuant to Act 53 of the Public Acts of 1974, as amended, MCL § 460.701 et seq., and shall conduct its business in conformance with the statutory provisions and regulations promulgated thereunder.

(i) If the Utility has its facilities on poles of Consumers Energy, Detroit Edison or another electric or telecommunications provider and Consumers Energy, Detroit Edison or such other electric or telecommunications provider relocates its system underground, then the Utility shall relocate its facilities underground in the same location at the Utility's sole cost and expense, unless the City approves an alternate location.

(j) All personnel of the Utility and its contractors or subcontractors who have as part of their normal duties contact with the general public shall wear on their clothing a clearly visible identification card bearing the Utility's name, their name and photograph. The Utility shall account for all identification cards at all times. Every service vehicle of the Utility and its contractors or subcontractors shall be clearly identified as such to the public, such as by a magnetic sign with Utility's name and telephone number.

Part V.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 - 6 to read as follows:

Section 31-6. Removal of Facilities.

(a) *Underground Facilities.* As soon as practicable after the Utility has discontinued the use of its facilities, the Utility, or its successors and assigns shall remove all of its facilities from the public right-of-way. The Utility shall not remove any underground portions of the facilities which requires trenching or other opening of the public right-of-way except with the prior written approval of the City Engineer or his or her designee. All removals shall be at Utility's sole cost and expense.

(b) *Above Ground.* As soon as practicable after the Utility has discontinued the use of its facilities, the Utility, or its successor or assigns at its sole cost and expense, shall, unless waived in writing by the City Engineer or his or her designee, remove from the public right-of-way all above-ground elements of its facilities, including but not limited to poles, pedestal mounted terminal boxes, equipment cabinets, and lines attached to or suspended from poles.

(c) *Schedule.* The schedule and timing of removal shall be subject to approval by City Engineer or his or her designee. Unless extended by the City Engineer or his or her designee, removal shall be completed not later than twelve (12) months following termination of use of the facility. Portions of the facilities in the public right-of-way which are not removed within such time period shall be deemed abandoned and, at the

option of the City, upon prior written notice to the Utility, title to those portions of the abandoned facilities shall vest in the City.

Part VI.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 - 7 to read as follows:

Section 31 – 7. As-built plans.

- (a) Each Utility or other entity installing facilities in, on, or under, land within the City shall maintain plans showing the exact location of such facilities after such installation is completed.
- (b) Two (2) copies of such “as built” plans shall be submitted to the City Engineer within thirty (30) days of the completion of the installation.
- (c) The performance guarantee required under Section 31-3(c) shall not be released by the City until the requirements of this Section are complied with.

Part VII.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 - 8 to read as follows:

Section 31 – 8. Exemptions.

The following types of installations shall be exempt from the permitting requirements of this Chapter:

- (a) Connection from a main or branch utility line, including, but not limited to wires, cables, pipes, conduits or other equipment used for the transmission of electrical current impulses, sounds, voices or communications, water sewage, gas or other fuel, to an individual user or subscriber provided such connection does not service more than *four* users, does not cross a public street, and does not cross the frontage of more than one property. *For purposes of this section, “frontage” shall mean any parcel boundary adjacent to a public right-of-way.*
- (b) Any wires, cables, pipes, conduits or other equipment which are installed at the direction of, by, and/or for the benefit of the City.

Part VIII.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended to re-number Section 31-3 as 31-9 and Section 31-4 as 31-10 as follows:

Section 31 – 9. Closing of streets, highways, and alleys.

[Unchanged.]

Section 31 – 10. Violations.

[Unchanged.]

Part IX.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 - 11 to read as follows:

Section 31 – 11. Variances and appeals.

(a) If, in the opinion of the City Engineer, application of the provisions of Section 31-4 results in a practical difficulty for the applicant, the City Engineer may grant a variance from the strict application of that Section, so long as the spirit and intent of this Chapter are met.

(b) Any person whose permit application is denied or approved with conditions the applicant wishes to challenge, or whose variance request under (a) is denied, may appeal to the City Council by filing a written appeal with the City not more than ten days after the decision. The application for appeal shall fully and particularly set forth the nature and grounds upon which the appeal is based. The City Council, shall, within 30 days after the filing of such notice of appeal, hold a hearing on the appeal. Upon hearing the appeal, the City Council shall either approve, conditionally approve or deny the permit for issuance, and in doing so, may in its sole discretion, on the applicant's request or its own motion, waive or modify article requirements that were the basis for permit denial.

Part X.

Severability. Should any section, subdivision, clause, or phrase of this Ordinance be declared by the Courts *or an administrative agency of the State of Michigan* to be invalid, the same shall not affect the validity of the Ordinance as a whole or any part thereof, other than the parts so invalidated.

Part XI.

Savings. This amendment does not affect or impair any act done, offense committed, or right accruing, accrued, or acquired or liability, penalty, forfeiture, or punishment, pending or incurred prior to the amendment.

Part XII.

Repealer. All other Ordinances or parts of Ordinances in conflict herewith are hereby repealed only to the extent necessary to give this Ordinance full force and effect.

Part XIII.

Effective Date: Publication. The provisions of this Ordinance shall become effective fifteen (15) days after its adoption and shall be published within 15 days of its adoption by publication of a brief notice in a newspaper circulated in the City, stating the date of enactment and the effective date of the ordinance, a brief statement as to the subject matter of this Ordinance and such other facts as the Clerk shall deem pertinent, and that a copy of the Ordinance is available for public use and inspection at the office of the City Clerk.

MADE, PASSED AND ADOPTED BY THE NOVI CITY COUNCIL THIS 10th DAY OF SEPTEMBER, 2007.

DAVID LANDRY – MAYOR

MARYANNE CORNELIUS – CITY CLERK

Date of Public Hearing _____
Date of Adoption _____
Date of Publication of
Notice of Adoption _____

CERTIFICATE OF ADOPTION

I hereby certify that the foregoing is true and complete copy of the Ordinance passed at the regular meeting of the Novi City Council held on the 10th day of September, 2007.

MARYANNE CORNELIUS – CITY CLERK

973637_1

“CLEAN” VERSION

STATE OF MICHIGAN
COUNTY OF OAKLAND
CITY OF NOVI
ORDINANCE NO. 07-157.04

AN ORDINANCE TO AMEND CHAPTER 31, “STREETS, SIDEWALKS,
AND OTHER PUBLIC PLACES,” ARTICLE I, “IN GENERAL,”
TO ADD A DEFINITION SECTION, AMEND THE PLAN SUBMITTAL
REQUIREMENTS, ADD STANDARDS FOR INSTALLATIONS IN
THE RIGHT-OF-WAY, ADD STANDARDS FOR USE OF THE
RIGHT OF WAY, CREATE STANDARDS FOR REMOVAL OF
INSTALLATIONS IN THE RIGHT-OF-WAY, AND TO ADD
EXEMPTIONS FROM THE PERMITTING REQUIREMENTS.

THE CITY OF NOVI ORDAINS:

Part I.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 – 2 to read as follows:

Section 31-2. Definitions.

As used in this chapter, the following words and terms shall have the following meanings:

AASHTO shall mean the American Association of State Highway and Transportation Officials.

Crash Zone shall mean the area five (5) feet from the back of a curb or 12 feet from the edge of the pavement of a traveled lane, whichever is greater.

Facility or Facilities shall mean the Utility’s equipment or personal property, such as wires, cables, pipes or conduits, equipment cabinets, structures or other equipment used for the transmission of electrical current impulses, sounds, voices or communications, water, sewage, gas or other fuel.

Practical difficulty, for purposes of this Chapter only, shall be established upon satisfactory evidence, as determined by the City Engineer, of the following:

- (A) A literal application of the substantive requirement would result in exceptional, practical difficulty to the applicant;

- (B) The alternative proposed by the applicant will be adequate for the intended use and shall not substantially deviate from the performance that would be obtained by strict enforcement of the standards; and
- (C) The granting of the variance will not be detrimental to the public health, safety or welfare, nor injurious to adjoining or neighboring property, nor contrary to the overall purpose and goals of the chapter or article containing the regulation in question.

Public Right-of-Way shall mean the area on, below, or above a public roadway, highway, street, alley, easement, or waterway. Public right-of-way does not include a federal, state, or private right-of-way.

Sight Triangle shall mean a triangular-shaped portion of land established at roadway, highway, or street intersections in which there are restrictions on structures erected, placed or planted which would limit or obstruct the sight distance of motorists entering or leaving the intersection

Utility shall mean any public or private utility company, person, corporation or other entity, including, but not limited to telecommunication, water, sewer, electric, gas and other fuel providers.

Zone of Influence shall mean the area within a 45 degree angle from a pipe invert.

PART II.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by re-numbering Section 31 - 2 as 31-3 and amending it to read as follows:

Section 31 – 3. Application; review; bond.

- (a) [Unchanged.]
- (b) *Plan submittal requirements.*
 - (1) Plans submitted in conjunction with a request for a permit shall contain the following information:
 - a. A location map, with a minimum scale of 1" = 50' and north arrow, showing the location of the proposed facility in relation to the surrounding area.
 - b. Proprietor information, parcel identification number and/or addresses of all affected and adjacent parcels, and street names.

- c. Location of the proposed facility, including proposed invert elevations of all structures, piping or appurtenances.
 - d. Any property lines within 50 feet of the proposed facility.
 - e. For the area 25 feet on either side of the proposed facility (including, but not limited to all proposed structures, transmission lines, and underground routing), the following items must be provided:
 - (i) Two-foot contours or strip topography of elevations.
 - (ii) Location of all structures, manholes, fire hydrants, trees or any other permanent physical objects. All structures must be labeled.
 - (iii) Location of any and all water courses.
 - f. Length, size and type of each section of proposed pipe between structures.
 - g. A minimum of two benchmarks consistent with the datum utilized by local standards.
 - h. A note whether the proposed facility will be located within 500 feet of a waterbody or watercourse.
 - i. A traffic control plan shall be provided for any road closure proposed under Section 31-9.
- (2) For proposed facilities to be installed within road rights-of-way or adjacent to private or public roadways, the following additional items must be shown:
- a. All existing facilities within the road right-of-way or within 25 feet on either side of the proposed facility.
 - b. Pavement type and limits.
 - c. Existing and proposed right-of-way lines.
- (3) For proposed above-ground installation of facilities, the following additional items must be shown:
- a. Separate detail of each above-ground facility indicating all their dimensions.

- b. If proposed within the sight triangle of the right-of-way, strip topography of elevations within 50 feet of the proposed facility to verify no sight obstructions.
- c. Dimensions of the facility from existing pavement, property lines, right-of-way lines and other facilities.
- d. Indicate proposed parking location, if any, dimensions and method (i.e. gravel, grass pavers, etc.) to limit disruption for maintenance vehicles. Parking on non-motorized pathways is prohibited.
- e. Show compliance with AASHTO standards for above-ground facility placement.

(4) A landscaping plan as provided for in Section 31-4(a)(10).

~~(b)~~(c) [Unchanged.]

~~(e)~~(d) [Unchanged.]

(e) Owners of property zoned for single-family residential use undertaking minor disruption of the public right-of-way are exempt from the requirements of this Section. For purposes of this Chapter, “minor disruption” shall be interpreted to mean excavation of less than two feet.

Part III.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 – 4 to read as follows:

Section 31-4. Standards for the Installation of Facilities in the Road Rights-of-Way or in Private Easements.

- (a) All installation of Facilities under this Chapter shall comply with the following standards.
 - (1) Generally, proposed facilities must run in straight lines and parallel to road rights-of-way and/or existing facilities.
 - (2) Road crossings should be at a 90 degree angle to an adjacent road.
 - (3) The facilities shall not be located within the Zone of Influence of an existing or proposed sanitary sewer or water main, unless otherwise approved by the City Engineer or his or her designee. All underground facilities proposed to be located perpendicular to an existing utility line

shall maintain a minimum vertical clearance of 18 inches from any part of the existing utility line .

- (4) If the facilities are proposed to be located in a public right-of-way, any above-ground facilities shall be placed at the extension of existing property lines that are perpendicular to the road right-of-way.
- (5) Facilities proposed to be located above-ground shall be installed outside of the sight triangle in accordance with the AASHTO guidelines.
- (6) Facilities proposed to be located above-ground are prohibited within any Crash Zone, and must be a minimum of three (3) feet off of any pedestrian pathways or sidewalks.
- (7) Unless provided otherwise herein, facilities proposed to be located underground must be installed at least four (4) feet below the center line of the road.
- (8) Facilities shall be of a neutral color such that they are in harmony with and blend in to the immediate surrounding area. Under no circumstances will primary colors be permitted.
- (9) Right-of-way approval from the Road Commission for Oakland County is required prior to the issuance of a construction permit for rights-of-way that are under the jurisdiction of the Road Commission.
- (10) Landscaping shall be provided in accordance with the following requirements:
 - (A) Plant material shall be of sufficient height and density to screen any proposed above-ground Facility. Landscaping shall be maintained and replaced as necessary by the Utility.
 - (B) The landscaping shall not interfere with any other proposed or existing use of the right-of-way.
 - (C) Any existing landscaping in the right-of-way, whether installed by the City, a Utility, or a private property owner, which is disturbed as a result of the installation, maintenance or repair of a Facility, shall be replaced by the Utility causing such disturbance to the exact condition it existed prior to the disturbance.
 - (D) The City Engineer may reduce or waive the landscaping requirements when it determines that practical difficulties exist due to the parcel size or configuration, or where the design of the site

would be enhanced by an alternative design solution while still meeting the intent of this section.

- (b) If the facility is proposed to be located on private property, and unless the Utility has previously obtained an easement on the property for installation of above-ground Facilities, the Utility must obtain the written consent of the property owner(s), which written consent or easement shall be submitted with the application for a permit. The placement of Facilities on private property shall not interfere with any prior existing Utility easements.
 - (1) Any zoning variances that may be required for placement of Facilities on private property shall be obtained prior to issuance of a permit under this Chapter.

Part IV.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 - 5 to read as follows:

Section 31 – 5. Use of the public right-of-way.

- (a) Utility, its contractors, subcontractors, and its facilities shall not unduly burden or interfere with the present or future use of the public right-of-way. A Utility's facilities shall be installed and maintained so as to not endanger or injure persons or property on or about the public right-of-way. If the City reasonably determines that any portion of the facilities constitutes an undue burden or interference, following an approved installation, Utility, at its sole expense, shall modify the facilities or take such other actions as the City may determine is in the public interest to remove or alleviate the burden, and the Utility shall do so within a reasonable time period.
- (b) Utility, its contractors and subcontractors shall immediately restore, at the Utility's sole cost and expense, in a manner approved by the City, any portion of the public right-of-way that is in any way disturbed, damaged, or injured by the construction, installation, operation, maintenance or removal of the facilities to a reasonably equivalent (or, at Utility's option, better) condition to that which existed prior to the disturbance. In the event that the Utility, its contractors or subcontractors fail to make such repair within a reasonable time, following notice and an opportunity to cure, the City may, but is not obligated to, make the repair and the Utility shall pay the costs incurred by the City plus an administrative fee in the amount of 25% for such repair. All pedestrian pathways and sidewalks disturbed as a result of installation, operation, maintenance or removal of Facilities must be restored to current ADA requirements.
- (c) The construction and installation of the facilities shall be performed in accordance with the plans approved by the City. The open cut of any public right-of-way shall be coordinated with the City Engineer or his or her designee. The Utility shall install and maintain the facilities in a reasonably safe condition. All utility lines are to be installed

underground unless an existing pole is available for such use. If the owner of the pole relocates its Facilities underground, all lines attached must also be moved underground at the owner's expense, unless the City approves an alternate location. The Utility may perform maintenance on the facilities without prior approval of the City, provided that the Utility shall obtain any and all permits required by the City in the event that any maintenance will disturb or block vehicular traffic or are otherwise required by the City.

(d) The Utility shall coordinate its construction and all other work in the public right-of-way with the City's program for street construction and rebuilding (collectively "Street Construction") and its program for street repaving and resurfacing (except seal coating and patching) (collectively, "Street Resurfacing"). The goals of such coordination shall be to encourage the Utility to conduct all work in the public right-of-way in conjunction with or immediately prior to any Street Construction or Street Resurfacing planned by the City.

(e) If the City vacates or consents to the vacation of a public right-of-way within its jurisdiction, and such vacation necessitates the removal and relocation of the Utility's facilities in the vacated public right-of-way, the Utility shall remove its facilities at its sole cost and expense when ordered to do so by the City or a court of competent jurisdiction. The Utility shall relocate its facilities to such alternate location as the City and the Utility mutually agree upon, applying reasonable engineering standards.

(f) If the City requests the Utility to relocate, protect, support, disconnect, or remove its facilities because of street or utility work, or other public projects, the Utility shall relocate, protect, support, disconnect, or remove its facilities, at its sole cost and expense, including where necessary to such alternate location as the City and the Utility mutually agree, applying reasonable engineering standards. The work shall be completed within a reasonable time period.

(g) The City shall have the right to sever, disrupt, dig-up or otherwise destroy facilities of the Utility if such action is necessary due to a public emergency or in the event the facilities are installed in violation of this Chapter. If reasonable to do so under the circumstances, the City shall attempt to provide advance notice to the Utility. Public emergency shall be any condition which poses an immediate threat to life, health, or property caused by any natural or man-made disaster, including, but not limited to, storms, floods, fire, accidents, explosions, water main breaks, hazardous material spills, etc. The Utility shall be responsible for repair at its sole cost and expense of any of its facilities damaged pursuant to any such action taken by the City.

(h) If eligible to join, and if it is not already a member, the Utility shall subscribe to and be a member of "MISS DIG," the association of utilities formed pursuant to Act 53 of the Public Acts of 1974, as amended, MCL § 460.701 et seq., and shall conduct its business in conformance with the statutory provisions and regulations promulgated thereunder.

(i) If the Utility has its facilities on poles of Consumers Energy, Detroit Edison or

another electric or telecommunications provider and Consumers Energy, Detroit Edison or such other electric or telecommunications provider relocates its system underground, then the Utility shall relocate its facilities underground in the same location at the Utility's sole cost and expense, unless the City approves an alternate location.

(j) All personnel of the Utility and its contractors or subcontractors who have as part of their normal duties contact with the general public shall wear on their clothing a clearly visible identification card bearing the Utility's name, their name and photograph. The Utility shall account for all identification cards at all times. Every service vehicle of the Utility and its contractors or subcontractors shall be clearly identified as such to the public, such as by a magnetic sign with Utility's name and telephone number.

Part V.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 - 6 to read as follows:

Section 31-6. Removal of Facilities.

(a) *Underground Facilities.* As soon as practicable after the Utility has discontinued the use of its facilities, the Utility, or its successors and assigns shall remove all of its facilities from the public right-of-way. The Utility shall not remove any underground portions of the facilities which requires trenching or other opening of the public right-of-way except with the prior written approval of the City Engineer or his or her designee. All removals shall be at Utility's sole cost and expense.

(b) *Above Ground.* As soon as practicable after the Utility has discontinued the use of its facilities, the Utility, or its successor or assigns at its sole cost and expense, shall, unless waived in writing by the City Engineer or his or her designee, remove from the public right-of-way all above-ground elements of its facilities, including but not limited to poles, pedestal mounted terminal boxes, equipment cabinets, and lines attached to or suspended from poles.

(c) *Schedule.* The schedule and timing of removal shall be subject to approval by City Engineer or his or her designee. Unless extended by the City Engineer or his or her designee, removal shall be completed not later than twelve (12) months following termination of use of the facility. Portions of the facilities in the public right-of-way which are not removed within such time period shall be deemed abandoned and, at the option of the City, upon prior written notice to the Utility, title to those portions of the abandoned facilities shall vest in the City.

Part VI.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 - 7 to read as follows:

Section 31 – 7. As-built plans.

- (a) Each Utility or other entity installing facilities in, on, or under, land within the City shall maintain plans showing the exact location of such facilities after such installation is completed.
- (b) Two (2) copies of such “as built” plans shall be submitted to the City Engineer within thirty (30) days of the completion of the installation.
- (c) The performance guarantee required under Section 31-3(c) shall not be released by the City until the requirements of this Section are complied with.

Part VII.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 - 8 to read as follows:

Section 31 – 8. Exemptions.

The following types of installations shall be exempt from the permitting requirements of this Chapter:

- (a) Connection from a main or branch utility line, including, but not limited to wires, cables, pipes, conduits or other equipment used for the transmission of electrical current impulses, sounds, voices or communications, water sewage, gas or other fuel, to an individual user or subscriber provided such connection does not service more than four users, does not cross a public street, and does not cross the frontage of more than one property. For purposes of this section, “frontage” shall mean any parcel boundary adjacent to a public right-of-way.
- (b) Any wires, cables, pipes, conduits or other equipment which are installed at the direction of, by, and/or for the benefit of the City.

Part VIII.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended to re-number Section 31-3 as 31-9 and Section 31-4 as 31-10 as follows:

Section 31 – 9. Closing of streets, highways, and alleys.

[Unchanged.]

Section 31 – 10. Violations.

[Unchanged.]

Part IX.

That Chapter 31, Streets, Sidewalks and Other Public Places, Article I, is hereby amended by adding a new Section 31 - 11 to read as follows:

Section 31 – 11. Variances and appeals.

(a) If, in the opinion of the City Engineer, application of the provisions of Section 31-4 results in a practical difficulty for the applicant, the City Engineer may grant a variance from the strict application of that Section, so long as the spirit and intent of this Chapter are met.

(b) Any person whose permit application is denied or approved with conditions the applicant wishes to challenge, or whose variance request under (a) is denied, may appeal to the City Council by filing a written appeal with the City not more than ten days after the decision. The application for appeal shall fully and particularly set forth the nature and grounds upon which the appeal is based. The City Council, shall, within 30 days after the filing of such notice of appeal, hold a hearing on the appeal. Upon hearing the appeal, the City Council shall either approve, conditionally approve or deny the permit for issuance, and in doing so, may in its sole discretion, on the applicant's request or its own motion, waive or modify article requirements that were the basis for permit denial.

Part X.

Severability. Should any section, subdivision, clause, or phrase of this Ordinance be declared by the Courts or an administrative agency of the State of Michigan to be invalid, the same shall not affect the validity of the Ordinance as a whole or any part thereof, other than the parts so invalidated.

Part XI.

Savings. This amendment does not affect or impair any act done, offense committed, or right accruing, accrued, or acquired or liability, penalty, forfeiture, or punishment, pending or incurred prior to the amendment.

Part XII.

Repealer. All other Ordinances or parts of Ordinances in conflict herewith are hereby repealed only to the extent necessary to give this Ordinance full force and effect.

Part XIII.

Effective Date: Publication. The provisions of this Ordinance shall become effective fifteen (15) days after its adoption and shall be published within 15 days of its adoption by publication of a brief notice in a newspaper circulated in the City, stating the date of enactment and the effective date of the ordinance, a brief statement as to the subject matter of this Ordinance and such other facts as the Clerk shall deem pertinent, and that a copy of the Ordinance is available for public use and inspection at the office of the City Clerk.

MADE, PASSED AND ADOPTED BY THE NOVI CITY COUNCIL THIS 10th DAY OF SEPTEMBER, 2007.

DAVID LANDRY – MAYOR

MARYANNE CORNELIUS – CITY CLERK

Date of Public Hearing _____
Date of Adoption _____
Date of Publication of
Notice of Adoption _____

CERTIFICATE OF ADOPTION

I hereby certify that the foregoing is true and complete copy of the Ordinance passed at the regular meeting of the Novi City Council held on the 10th day of September, 2007.

MARYANNE CORNELIUS – CITY CLERK

973637_3

AT&T's Principal Objections and
Concerns to Proposed City of Novi
Ordinance with
City Attorney Kolb Responses



Lori Doughty
Director
External Affairs

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313.223.5975 Phone
313.496.9332 Fax

August 30, 2007

*Hand-delivered 11:20 a.m.
Rec'd 8-30-07
CJR*

Mr. David Landry - Mayor
Mr. Clay J. Pearson - City Manager
The City of Novi, Michigan
45175 West 10 Mile Road
Novi, Michigan 48375

Dear Mr. Landry,
Dear Mr. Pearson,

As requested at our August 24, 2007 meeting, enclosed please find AT&T's objections to the proposed amendment to the Novi Code of Ordinances Chapters 31, introduced by the City of Novi on August 13, 2007. AT&T is requesting another face-to-face meeting during the week of September 4, 2007, as we previously discussed. Please let us know when you are available to meet. We are looking forward to further discussions.

Sincerely,

Lori Doughty

AT&Ts Principal Objections and Concerns to Proposed City of Novi Ordinance

1. The proposed ordinance would violate AT&T's statutory and constitutionally protected rights to use extensive portions of public rights-of-way.

A. These parts of the ordinance which present this problem include the prohibitions against placing facilities:

- (1) In the "Sight Triangle" (31-4)(a)(5), an area of unspecified and potentially unlimited dimensions in all directions from every street intersection;
- (2) In the "Crash Zone" (31-4)(a)(6), an area within up to 12 feet from of the traveled portion of the right-of-way; and
- (3) Within 3 feet of any pedestrian pathway or sidewalk. (31-4)(a)(6).

At many places, there are already numerous trees, shrubs, signs, fences, walls and other items within the so-called "Sight Triangle", and the placement of an additional utility cabinet there would not change the sight lines available to passing motorists or pedestrians.

Response: The sight triangle limitations are between 2.5' and 12' above the ground. Under current City ordinances, fences, signs and walls are not permitted in the rights-of-way. Shrubs are generally under 3 feet and do not generally cause a safety issue.

B. These prohibitions are worsened by the mandate to place cabinets in the public right-of-way only at the extensions of property lines (31-4)(a)(4). The practical effect of these restrictions in combination is to deny access, in many places, to large stretches of the non-traveled portion of the public right-of-way where utility cabinets and poles have traditionally been placed without any problems of pedestrian or vehicular safety. The effect of this proposed ordinance, if already in effect, would have been to prohibit the placement of some utility cabinets which have been safely in place for long periods of time and other cabinets for which permits have been issued this year by Novi.

Response: This is geared at subdivisions with narrower lots, to help avoid a large box in the middle of the frontage. Parcels with wider frontages have more flexibility and the variance process included that allows for relaxation of standards by the City Engineer will be helpful in those situations. Currently, the City requires fire hydrants and telephone poles to be located at the extension of property lines.

C. The restrictions on placement in the Sight Triangle and “Crash Zone” have singled out utility facilities in a discriminatory manner. If there is a legitimate and enforceable public purpose for such a restriction, then it must be applied in a non-discriminatory manner to all objects in these areas, including fire hydrants, signs, trees, landscaping, walls and fences.

Response: See response to (A) above. Additionally, both the METRO Act and the Uniform Video Service Local Franchise Act *specifically and intentionally* reserve broad authority to municipalities to regulate the public rights-of-way, particularly in the areas of public health, safety and welfare. The Legislature has recognized—even if AT&T is not focused on it—that these limited public spaces house much more than just AT&T’s phone and cable lines. Roads, sidewalks, gas lines, electric lines, water lines, sewer lines and other improvements must all co-exist in these areas. Management of these areas is the City’s right and responsibility.

The text amendment now contains an expedited administrative variance process where the requirements listed above would result in a “practical difficulty” (i.e. result in no available location to place a Facility) to the applicant and an explicit appeal process to the City Council.

2. The ordinance would prevent AT&T from designing and engineering its network and the placement of its facilities and equipment in the most efficient and cost effective manner. By preventing AT&T from placing new VRAD cabinets in close proximity to existing cross-connect boxes, the proposed ordinance could potentially double or triple the number of cabinets AT&T would have to place in order to serve many neighborhoods.

Response: This is difficult to comment on because it relies on undisclosed fact known only to AT&T. However, again, the expedited variance process should provide some relief. While we certainly understand AT&T’s desire to provide access in the “most efficient and cost effective manner,” we also have an obligation to manage the ROW and all the improvements that are in it so that everyone using it gets “reasonable access.” The cost to the City of fixing problems when speed and efficiency trump the protection of this public area can be substantial.

3. The ordinance would discriminate against AT&T, as compared to the incumbent cable provider and other entities that have placed facilities and equipment in the rights-of-way (including the City itself), in imposing an entirely new and more restrictive, onerous and burdensome set of requirements which were not imposed upon the incumbent cable provider or others when they installed, constructed and maintained their networks in the City. Such discrimination is in violation of not only the METRO Act, MCL 484.3101 et seq., but also the recently enacted Michigan Uniform Video Services Local Franchise Act, 2006 PA 480 (e.g. Sections 3(8), 5(4), 8(1), 8(2)(a), 8(9)), as well as the terms of the franchise agreement between the City and AT&T. Moreover, this discrimination bestows a competitive and technological advantage on the

incumbent cable company, and effectively operates to preserve the incumbent cable monopoly over video services in the City.

Response: The ordinance applies to anyone using the right-of-way, including all utility companies, as well as the cable and telecom providers. The incumbent cable provider in the City installs its facilities underground. However, if the incumbents were to install any new facilities above-ground, they will be bound by these provisions as well. And again, both the METRO Act and the Uniform Video Service Local Franchise Act reserve broad authority to municipalities to regulate the public rights-of-way, in furtherance of the public health, safety, and welfare.

4. Section 31-4(b) of the proposed ordinance potentially confiscates a valuable property right of AT&T and other utilities if it is intended to deny the right to use private utility easements to place facilities unless additional consent is obtained from property owners to place the utility cabinets, possibly at a significant price.

Response: Language has been added to clarify that if the utility has an existing easement for an above-ground facility, additional permission of the private property owner is not required; otherwise the utility would have to get the permission of the private easement holder and the property owner to use the private easement. This is no more onerous on a utility to show than it is on any other user of land in the City. Neither AT&T nor any utility has an inherent right to install their facilities on property outside of the right-of-way, and consent of the property owner must be obtained and would be asked for in the normal course of any development or improvement.

5. These above-cited provisions of the proposed ordinance and other provisions are inconsistent with the METRO Act, MCL 484.3101, et seq., particularly Section 4(1), and its prohibition on imposing restrictions, requirements and limits beyond those strictly necessary to protect public health, safety and welfare.

Response: The authority referred to by AT&T is not described in those statutes as “narrow.” The Michigan Constitution, the METRO Act, and the Uniform Video Service Local Franchise Act all reserve what we believe is broad authority to municipalities to regulate the public rights-of-way, in furtherance of the public health, safety, and welfare.

6. Sections 31-5(c), (f), and (i) of the proposed ordinance are inconsistent with the recent Michigan Supreme Court decision in the City of Taylor v Detroit Edison, 475 Mich 106 (2006). The ordinance would impose all the costs on a utility for the relocation of facilities at the request of the municipality for aesthetic or other nonessential reasons contrary to this decision which invalidated a Taylor ordinance to the same effect.

Response: The greatly overstates the ruling in the Taylor case. The Supreme Court did not make a substantive ruling on the City’s ordinance at issue in that

case; rather, it determined that the MPSC has jurisdiction over the issue of burying electrical lines because it had adopted a regulation on the specific issue; the Court therefore referred the matter to that agency, which we do not believe has ruled on the question yet. So while Taylor involved an ordinance that (may) directly conflict(s) with MPSC regulations regarding the underground location of electrical lines, the MPSC has not issued regulations regarding the relocation of telephone or cable lines, nor do they have regulations regarding control of ROWs.

7. Section 31-4(c) of the proposed ordinance appears to extend, for the first time, zoning requirements to the placement of utility cabinets, cross boxes, pedestals. Those zoning requirements have never been applied before to utility facilities except central offices.

Response: The updated version clarifies that variances may be needed where facilities are located outside of the ROW on private property (e.g. allow accessory structures within the front yard setback, etc.).

8. While purporting to exempt work on service drops which have never previously been subject to a permitting process, the proposed ordinance exemption in section 31-8(a) narrowly applies only to installation of facilities serving a single user. In an effort to reduce the number of pedestals appearing on private residential property, many of the pedestals that AT&T installs serve 2 or more households. The ordinance would require AT&T to obtain permits to place those pedestals or incent AT&T to place multiple additional pedestals to come within the ordinance exemption.

Response: This provision has been revised to provide they may serve up to four households without getting a permit, so long as the lines do not cross a public street nor the entire frontage of a parcel adjacent to a street. This is to ensure that restoration issues are monitored by the City.

9. These sections of the ordinance discussed above would impose additional and more stringent requirements than those of the Oakland County Road Commission regarding the use of public right-of-way under County jurisdiction. AT&T already has to undergo an extensive review and permitting process by the Road Commission. The City's ordinance would impose an additional layer of permitting beyond that which is already done and that which is necessary.

Response: This permitting requirement is not new.

10. The ordinance would substantially drive up the costs for AT&T and its customers to upgrade its network and provide state of the art telecommunications and video service to the residents. The requirements which would impose unnecessary and substantial, additional costs include:

- A. Those mandating installation of landscaping around every utility cabinet to an unprecedented extent and requiring maintenance and replacement of the landscaping in perpetuity by the utility, not the municipal entity with responsibility for maintaining the right-of-way (31- 3(b)(4));

Response: This is up to Council as to whether to maintain this requirement.

- B. A mandate for creating parking areas with gravel, grass payers, blacktop or some other surface in the vicinity of the utility cabinets (31- 3(b)(3));

Response: This item has been revised to state that if parking is to be provided, these are the requirements.

- C. The time, labor and expense of meeting significant, additional permit submission requirements (31-3); and

Response: Again, a permit already required. Furthermore, currently, the City is dealing with re-submittals on a regular basis, due to the applications being incomplete. With clearer permit requirements, this should reduce or eliminate the need for re-submittals.

- D. The substantial cost of having to place additional VRAD cabinets to serve certain neighborhoods because the distance between existing cross connect boxes and new VRAD cabinets would be greater than optimal network engineering requires.

Response: Since the location of boxes is “proprietary,” it is difficult to respond to this item. It is not clear why the ordinance as drafted would require more VRAD boxes.

11. The proposed ordinance presents the potential of worsening the aesthetics of the City by mandating gravel, grass payers or some other surface for parking next to the utility cabinet sites. This section also prohibits parking of vehicles on all “non-motorized pathways” which would include dirt paths and all unpaved surfaces which might be used by pedestrians (31-1(3)(d)).

Response: As to first comment, the ordinance has been amended to read “if provided.” As to second, it is our understanding that in many areas, sidewalks and safety paths are not constructed to withstand weight of heavy utility vehicles. Allowing parking on would not only be a safety hazard to pedestrians and users of pathways, but could speed up deterioration at cost to City and/or residents who paid for. Additionally, parking on sidewalks and safety paths, etc., is already prohibited under §33-490(a).

12. The substantial permitting and other requirements will significantly slow the deployment of the technology and equipment necessary to upgrade AT&T’s telecommunications network. The availability of higher speed internet access, higher quality voice and data communications and video services will be substantially slowed if not denied altogether to some neighborhoods by the proposed ordinance requirements. The ordinance could also have a severe adverse impact on economic development in the City if businesses who are considering locating in

Novi discover that their access to advanced telecommunications and data services would be delayed or denied completely by the ordinance.

Response: The City's rights-of-way are not infinite spaces. They contain other improvements and other service providers. The ordinance is neutral as to all in that respect, and responds to the changing rules for what we are required to allow in them. Under the recent legislative changes we no longer "bargain for" franchise terms of ROW use that we and the franchisee can mutually agree on—the uses are simply permitted. But they are permitted under statutes that acknowledge that there are many competitors for the use of our ROWs, and that reserve to the City the right to regulate how and when improvements are placed.

The regulations here boil down to:

- **Added definitions that a "neutral" from a regulatory standpoint (not mentioned by AT&T)**
- **Plan submittal requirements that are not onerous (not mentioned by AT&T)**
- **Installation standards that are applicable to any utility and when viewed as a whole are not prohibitive, especially with the administrative variance procedure added.**
- **ROW use standards: basically, coordinate with others using the ROW, build pursuant to the plans you submit, and restore/clean up after the project is complete. Also, if you abandon the facilities, remove them from the ROW.**

With due respect, the provisions of the ordinance are intended to be a measured effort to ensure that the City's rights-of-way are fairly shared and not abused, and are not intended to impose a burden on one user not shared by other users.

Comments from Bright House Networks



Hon. David Landry
Mayor
City of Novi
45175 W. Ten Mile Rd.
Novi, MI 48375

September 5, 2007

September 5, 2007

RE: Proposed ROW Ordinance – City of Novi

Dear Mayor Landry;

Thank you for the opportunity to comment on the proposed changes to Novi's ROW ordinance. With the time frame to respond being short, please understand that we may have some additional comments going forward. For the most part however, the proposed changes do not present any significant operational concerns.

There are a couple of items that, during our review, raised some questions; they are listed below.

1. Section 31-3 (b) Bright House suggests that any proposed facility in excess of 32 cubic feet (i.e. 4x4x2), be subject to landscape requirements.
2. Section 31-5 (b) - Novi provides itself the right to assess a 25% "administrative fee" if it is forced to make a repair that a utility failed to make after notice and opportunity to cure. In many cases this fee would have no direct or reasonable relationship to the administrative costs incurred. As such, the fee is really punitive in nature and should be replaced by a flat fee.
3. Section 31-5 (d) – A user must "coordinate" all "construction and other ROW work with the City's "Street Construction" plans. This could delay projects if an operator is required to wait a significant amount of time to "coordinate" its plans with that of the City's. Perhaps a waiver process could be included in the clause if the work is not burdensome and the proposed timetable would unreasonably delay a time sensitive project.
4. Section 31-5 (g) - It's one thing to be held harmless if an emergency requires the City to "damage" our property in a "public emergency", but this section goes on to

say"...or the failure of the Utility to meet the requirements of this Section." This portion of the provision should be deleted so that the section is strictly limited to just public emergencies

5. Section 31-7 – There are proprietary concerns in turning over as-built maps but we can certainly make them available for inspection. If this is not sufficient, a provision requiring the confidential treatment of such information needs to be incorporated into the ROW ordinance

As a procedural matter, in submitting these comments to the City, Bright House Networks does not waive any legal rights it may have and reserves its rights under applicable state and federal law.

Once again we thank you for the opportunity to comment and ask that we have the opportunity for further discussion should the situation merit.

Very truly yours,

Robert A. McCann
President