

TOWN OF COTTAGE GROVE
Resolution 2016-03

**APPROVAL OF RIGHT-OF-WAY PERMIT TO VILLAGE OF COTTAGE GROVE WATER UTILITY
FOR INSTALLATION OF WATER MAIN IN GASTON ROAD RIGHT-OF-WAY
(Terms and Conditions of ROW Permit Issued June 7, 2016)**

WHEREAS, pursuant to an application filed by the Village of Cottage Grove ("Village") with the Town of Cottage Grove ("Town") and at its meeting on December 21, 2015, the Town Board of the Town of Cottage Grove reviewed and approved issuance of a Right-of-Way Permit ("ROW Permit") for the Village of Cottage Grove Water Utility's installation of a water main extension in the public right-of-way of Gaston Road, which installation will be with an open cut trench and which construction will occur between June 2016 and August 2016 (the "Project"); and

WHEREAS, the Village provided comments to the Town and requested certain modifications to the Project and ROW Permit; and

WHEREAS, following further consideration and comment, the Town agreed to certain modifications to the Project made by the Village and reissued the ROW Permit, subject to certain terms and conditions that were deemed by the Town Board to be necessary for the public health, safety and welfare of Town residents and others using Gaston Road, all as set forth in the ROW Permit approved and issued by the Town on February 1, 2016, a copy of which is attached hereto as Exhibit A and incorporated by reference; and

WHEREAS, subsequent thereto, the Village submitted certain allegations and requests to the Public Service Commission of Wisconsin ("PSC") which were addressed by the PSC as an "informal complaint" when the PSC issued its determination, a copy of which is attached hereto as Exhibit B, and incorporated by reference; and

WHEREAS, in its determination, the PSC affirmed the Town's position that: (1) there is no evidence that the Town of Cottage Grove acted in a discriminatory manner when issuing the Village of Cottage Grove a right-of-way access permit under Wis. Admin. Code PSC 130.04; and, (2) the Village has not been denied access to the Gaston Road right-of-way; and

WHEREAS, the PSC further encouraged the parties to work together toward amicable resolution of any remaining issues rather than facing the delay and expense of seeking administrative relief through a formal complaint to the PSC; and

WHEREAS, the Town acknowledges the wisdom in the PSC's advice and wishes to proceed accordingly.

NOW, THEREFORE, the Town Board does hereby resolve as follows:

1. The Terms and Conditions attached to the ROW Permit issued February 1, 2016 are hereby revoked and deemed null and void.
2. The Terms and Conditions attached hereto as Exhibit C and issued on June 7, 2016 replace the Terms and Conditions of the February 1, 2016 ROW Permit.
3. This ROW Permit issued June 7, 2016 shall expire December 31, 2016.
4. The Village's payment of the application fee shall be made prior to commencement of construction.
5. Time is of the essence as to performance of the terms and conditions set forth in the ROW Permit issued June 7, 2016.
6. Any subsequent requests for permits associated with the Project shall require submission of a new application under Town ordinances in effect at the time of application.
7. The Town Clerk shall deliver a copy of this Town Board Resolution 2016-02 to the Village Clerk on June 8, 2016.

Approved by the Town Board of the Town of Cottage Grove at a duly noticed meeting held on June 7, 2016.

TOWN OF COTTAGE GROVE


Kris Hampton, Town Chairperson

Attested by:

Kim Banigan, Town Clerk

Incorporated by Reference:

Exhibit A. Terms and Conditions of February 1, 2016 ROW Permit

Exhibit B. PSC Determination

Exhibit C. Terms and Conditions of June 7, 2016 ROW Permit

EXHIBIT A

TOWN OF COTTAGE GROVE

4058 County Road N
COTTAGE GROVE, WISCONSIN 53527

February 12, 2016

Village of Cottage Grove
Attn: Deb Winter, Clerk
221 E. Cottage Grove Road
Cottage Grove, WI 53527

Dear Deb,

Enclosed please find a fully executed right-of-way permit for installation of a water main in the Gaston Road right-of-way by the Village of Cottage Grove Water Utility. Payment of the enclosed invoice in the amount of \$75.00 for the application fee is a condition of the permit. Please remit no later than February 26, 2016.

Sincerely,

TOWN OF COTTAGE GROVE



Kim Banigan
Clerk

Enclosure

Office Hours: 8:00 A.M. to 12:30 P.M., Monday thru Friday
Phone: 608-839-5021 • Fax: 608-839-4432
www.tn.cottagegrove.wi.gov

Town of Cottage Grove

4058 CTH N
Cottage Grove, WI 53527

Invoice

Date	Invoice #
12/22/2015	201530

Bill To
Village of Cottage Grove 221 E. Cottage Grove Road Cottage Grove, WI 53527

>

Description	Quantity	Rate	Billed Amount
Road Right-of-Way Permit - Gaston Road Watermain Extension	1	75.00	75.00
Please pay from this invoice.		Total This Invoice	\$75.00

Town of Cottage Grove
PERMITTING AUTHORITY

PERMIT NO.

Highway Coston Road

PERMIT TO CONSTRUCT, MAINTAIN OR REPAIR
FACILITY WITHIN HIGHWAY RIGHT-OF-WAY

TOWN OF COTTAGE GROVE

DANE COUNTY

Sec: 1/4 of 1/4, Sec. 4 6 5

T-07-NR-11-E

*See sheet G2 of plans for overhead

Name of Owner: Village of Cottage Grove Name of Agent: Mike Maloney, PE

Address: 221 E. Cottage Grove Road Address: 2901 International Lane,

Cottage Grove WI 53527 Suite 300 Madison, WI 53704

Agent's Office Phone: (608) 242-7779

Owner's Phone: (608) 839-4704

Type of Installation: Watermain Extension

Plans Prepared By: MSA Professional Services

Enclosures:

1- Project Plans

2- Memo - Petition to Install

Coston Road Watermain Extension

Facility Location is to cross right-of way parallel to right-of-way
 overhead X underground

Proposed Method of Installation

 tunnel

 suspend on poles

 cased

 jack & bore

 suspend on towers

 trench

X open cut

 plow

 drill

Estimated Starting Date June 1, 2016

Estimated Restoration Date August 1, 2016

The Applicant understands and agrees that the permitted work shall comply with all permit provisions and conditions listed on the reverse side hereof, and any special provisions listed below, or attached hereto, and all and all plans, details or notes attached hereto and made a part thereof.

BY [Signature]
(Signature of Authorized Representative)

Title Village Engineer
Date 11/30/15

PERMIT APPROVAL BY PERMITTING AUTHORITY

The foregoing application is hereby approved and permit issued by the Permitting Authority subject to full compliance by the Applicant with all provisions and conditions stated herein and on the reverse side hereof and all attachments hereto.

☐ Federal aid has been, or is being, used on this highway; current State of Wisconsin policy for accommodation of utilities on highway rights of way applies.

Other Special Provisions: Attached Conditions - Row Permit Exhibit A
V9 approved 2/1/2016.

BY: [Signature]
(Signature of Authorized Representative)

Title CHAIRMAN
Date: 2/1/16

AMOUNT DUE: \$50.00 (Pre-Paid) or \$75.00 invoiced upon approval.

TOWN OF COTTAGE GROVE
TERMS AND CONDITIONS INCORPORATED IN RIGHT-OF-WAY PERMIT TO
VILLAGE OF COTTAGE GROVE WATER UTILITY
FOR INSTALLATION OF WATER MAIN IN GASTON ROAD RIGHT-OF-WAY
[As Approved February 1, 2016]

1. The Permit to Construct a Facility within the Gaston Road Right-of-Way (the "ROW Permit") shall be issued to the Village of Cottage Grove Water Utility ("Village" or "Applicant") subject to all standard requirements as well as the following special terms and conditions:
 - a. The Village shall submit the required review fee.
 - b. The representations set forth in the Application (including the Petition to Install and Maintain Water Utilities prepared by the Village Engineer on November 30, 2015) are hereby incorporated as terms and conditions of the ROW Permit, except as expressly amended in writing herein or by change order presented and approved by the parties hereto, in writing. Email consenting to the change order shall be a sufficient writing for these purposes.
 - c. Authorized Representatives for the purposes of binding the Town as to this Project are the Town Engineer, Warren Myers and Town & Country Engineering, Inc. (warren@tcengineers.net), and the Town Chairperson, Kris Hampton (khampton@towncg.net). All notices to the Town regarding this Project shall be sent to or cc'd to the Town Clerk, Kim Banigan, via email to clerk@towncg.net.
 - d. Authorized Representatives for the purposes of binding the Village as to this Project are the Village Engineer (mmaloney@msa-ps.com), the Chairperson of the Village Water Utility Commission (*Chris Dyer*) and the Village Administrator (mgiese@village.cottage-grove.wi.us). All notices to the Village regarding this Project shall be sent to or cc'd to the Utility's Project Engineer, Travis McDermott, via email to tmcdermott@msa-ps.com.
 - e. A performance bond shall be issued naming the Town of Cottage Grove in an amount for the value of the road as reasonably determined by the Town Engineer following consideration of the Village Engineer's opinion as to probable cost. The performance bond shall be provided to the Town Clerk prior to commencement of construction.
 - f. The portion of Gaston Road where construction will occur shall be televised at the Village's expense and copies of the televised areas shall be provided to the Town prior to commencement of construction.
 - g. The Town Superintendent of Public Works ("Superintendent") (publicworks@towncg.net) and Town Engineer will be notified of the preconstruction meetings and be given an opportunity to attend. Notice shall also be provided to the Town Clerk. The Town Chairperson may also attend the preconstruction meetings.
 - h. The Town shall provide the Village with names and addresses of affected residents on Gaston Road, based on the tax roll. The Village shall provide at least two weeks' notice of the project to the listed Town residents, and shall work with Town residents in good faith to provide adequate access to and from the homes on Gaston Road and/or those dependent on Gaston Road to access their homes. The Town Superintendent shall be notified of the project schedule in a reasonable time and manner, with a copy of any such notice to the Town Clerk. The project schedule shall be managed by the Village in a manner that assures that the time and manner of disruption of traffic is minimized to the full extent reasonably possible. With that end in mind, once work commences, it shall progress to completion in as short a time frame as possible.
 - i. Specifications for the Project as to trench backfill and pavement restoration shall be provided to the Town Engineer and Superintendent for review and acceptance.
 - j. The water main burial shall be adjusted to allow future roadway improvements to occur without the added cost of relocating the water utility mains. This may require the

calculation of future road profiles now, which can be completed at minimal cost using the Village Engineer's drawings and a CADD program, and the costs for developing needed calculations shall be paid by the Village. The exact depth and required cover shall be as determined and agreed to by the Village Engineer and Town Engineer. The Village shall provide the Town with as-built maps locating the water main and appurtenances all within thirty (30) days of completion of the Project.

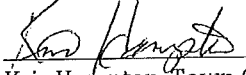
- k. The Village shall take all reasonable precautions and do everything reasonably possible to avoid differential frost heave between the south half where the trench will be and the water main laid, and the north half of Gaston Road.
- l. The Village shall provide the Town with a standard one (1) year project warranty¹ which shall include coverage for damages because of frost heave or other consequences related to the Village's decision to construct only half of the road for this Project. The Village shall be responsible for prompt repair of the damage to standards and specifications acceptable to the Town Engineer. This provision shall survive completion of the Project and shall remain binding on the Village.
- m. The water main shall be constructed on the south portion of Gaston Road and the south portion of Gaston Road shall be fully reconstructed by the Village. The Village shall complete the Project at its sole cost and in accordance with plans reviewed and accepted by the Town Engineer. Any damage to the north side of Gaston Road during construction shall be repaired at the Village's cost and to standards acceptable to the Town Engineer. The Village will comply with Wis. State Admin. PSC 130 and other requirements imposed by law.
- n. All areas disturbed by the Project will be restored to as good conditions. All work and restoration shall be consistent with the Town's MS-4 Permit Requirements and such other drainage and stormwater requirements imposed by law. Costs of restoration shall be paid by the Village.
- o. Flushing of hydrants shall be completed by the Village in a manner that does not adversely impact the property adjacent to the hydrants. Any damages and associated costs for repair and restoration caused by flushing of hydrants shall be the Village's responsibility. This provision shall survive completion of the Project and shall remain binding on the Village.
- p. The Village shall pay all costs incurred by the Town for management function and other reasonable costs as enumerated in Wis. State Admin. PSC 130. The Village acknowledges that services resulting in management function costs may be provided by the Town Superintendent of Public Works, the Town Clerk, the Town Treasurer, the Town Engineer and the Town Attorney, as deemed prudent and necessary by the Town. All such fees shall be reimbursable at the same rate actually paid by the Town for the services, and reimbursement by the Village shall occur within 45 days of the date of the invoice for same. Interest on unpaid amounts shall accrue at the rate of ½ % per month or part thereof. Late fees shall accrue per invoice in an amount that is equal to the costs incurred by the Town for multiple requests for payment, including staff time for invoicing and follow-up inquiries.
- q. The Town and Village shall enter an agreement regarding connection of public water to Town residents that is consistent with the terms of the agreement presented to the Town Board on December 21, 2015, and the agreement shall be fully executed prior to commencement of construction.
- r. The Village shall re-stripe the road following completion of the project, at Village's sole cost.

¹ The Town Engineer and Village Engineer shall determine the provisions contained therein.

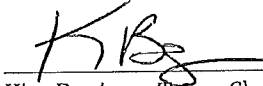
- s. All work shall be completed in accordance with the law, and industry construction standards, including necessary and prudent erosion and stormwater management controls.
2. By mutual agreement, the Village Utility Commission has authorized the Village Engineer to, and the Village Engineer shall, include two bid alternatives:
 - a. For milling and paving the north side of Gaston Road at the same time the south side is paved and the Village shall provide such bid information to the Town prior to the Village's award of bids. The Town may request that the alternate bid be awarded; however, if the alternate is awarded at the Town's request, the Town shall be responsible for the associated costs.
 - b. For a 2 year project warranty from the contractor. The Town may request that the alternate bid be awarded; however, if the alternate is awarded at the Town's request, the Town shall be responsible for the associated costs.
3. Commencement of construction shall be deemed acceptance of the above conditions by the Village.
4. Time is of the essence as to performance of the terms and conditions set forth of this ROW Permit.
5. The Application, Petition, Agreement and Plans identified below shall be binding as represented, except that the preliminary plans included with the Petition shall be amended to provide for construction of the water main on the south side of Gaston Road:
 - a. Application. Application signed by Village Engineer and dated November 30, 2015
 - b. Petition. Petition to Install and Maintain Water Utilities prepared by the Village Engineer on November 30, 2015, and Preliminary Plans prepared by MSA and submitted therewith
 - c. Agreement. Proposed Agreement Regarding Connections and Related Documents provided by Village Engineer to Town Clerk via email dated December 17, 2015
 - d. Plans (for South Side Construction). Updated construction plans prepared by the Village Engineer and accepted by the Town Engineer to relocate the water main to the south side of Gaston Road
6. This ROW Permit was approved by the Town Board on February 1, 2016, and is the final and complete permit for the Project. It supersedes all previous agreements by the parties as to this subject matter, whether oral or in writing, and replaces the permit first issued on December 21, 2015, which shall be considered void when this permit is issued.

The above special terms and conditions have been approved by the Town and are incorporated as part of the ROW permit:

Date Approved: February 1, 2016
TOWN OF COTTAGE GROVE


Kris Hampton, Town Chairperson
Authorized Representative

Attested by:


Kim Banigan, Town Clerk

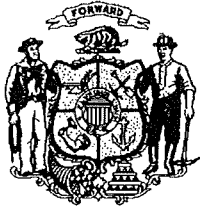


EXHIBIT B

Public Service Commission of Wisconsin

Ellen Nowak, Chairperson
Phil Montgomery, Commissioner
Mike Huebsch, Commissioner

610 North Whitney Wa
P.O. Box 785
Madison, WI 53707-785

May 12, 2016

Mr. Leighton W. Boushea, Attorney
Boushea, Segall & Kliminski
2945 Triverton Pike Drive, Suite 101
Madison, WI 53711

Ms. Susan K. Allen
Stafford Rosenbaum, LLP
1200 North Mayfair Road, Suite 430
Milwaukee, WI 53226-3282

Re: Informal Complaint
Gaston Road Water Main Construction Project
Cottage Grove, Wisconsin

Dear Mr. Boushea and Ms. Allen:

Public Service Commission (Commission) staff has reviewed the Application to Public Service Commission filed by the village of Cottage Grove with the Commission on (or about) March 15, 2016 and other documentation related to this informal complaint. In the Application, the village asserts that the town of Cottage Grove has acted in a discriminatory manner against the village in the issuance of a right-of-way access permit under Wis. Admin. Code § PSC 130.04, for the proposed construction of water main by the village in Gaston Road. The village maintains that the town has in fact denied the requested right-of-way access by the inclusion of certain permit conditions.

Commission staff determines that there is no evidence of discrimination by the town. Commission staff also determines, as explained in detail below, that the town's permit conditions at issue are reasonable, in part, and unreasonable, in part.

The Commission is responsible for the regulation of public utilities, including those that are municipally owned. In addition to ensuring utility compliance with statutes, administrative codes, and record-keeping requirements, the Commission's staff diligently investigates and mediates thousands of consumer complaints annually. During the complaint process, Commission staff reviews all pertinent information to make certain that the utility's handling of the complaint is in compliance with the applicable rules.

Although the town has scrutinized the village's right-of-access application to a greater level than what appears to be normal for the township, the length of the water main in Gaston Road, the degree of disruption of the road surfaces during construction of the water main, and the

number of residents who live along the road and will be effected by the construction justifies the higher level of scrutiny.

The following issues have been raised by the township during the review of the right-of-way application.

1. Location of the water main on the north side of Gaston Road.
2. Depth of water main burial relative to existing vertical curves on Gaston Road.
3. Gaston Road pavement restoration.
4. Construction warranty period.
5. Potential erosion of ditches during routine maintenance flushing.
6. Payment of town management costs.

With the exception of Item 6., the village and town appeared to have reached reasonable accommodations on the permit conditions imposed by the town. However, it appears that being unable to reach a final agreement on the management costs, the village is withdrawing its consent to the permit conditions previously agreed to.

Background

On November 15, 2015, the village of Cottage Grove Utility Commission petitioned the town of Cottage Grove requesting approval for a right-of-way use permit to install and maintain a 16-inch water main extension along the town's Gaston Road to loop an existing dead-end line located on Commerce Parkway in the village with another existing dead-end main located near Glacial Drumlin Public School, also in the village.¹ At a December 7, 2015, Town Board meeting, a number of concerns were raised including placement of the water main, the number of fire hydrants, the ability to allow service to town residences, and overall construction. Further discussion was tabled until December 21, 2015.

The Town Board approved the permit, with conditions, at its December 21, 2015 meeting.² Subsequently, the village requested modifications to the permit. The town cancelled the original permit and reissued another permit with conditions on January 4, 2016. More discussions followed and on February 1, 2016, the town reissued a revised permit, which, the village rejects as containing discriminatory provisions.

On, March 15, 2016, the village petitioned the Public Service Commission of Wisconsin (PSC) to promptly issue an order authorizing the village to proceed with the project within the boundaries of the town. The applicable statute is Wis. Stat. § 196.58(7)(a). However, the statute is available only if the town had rejected the village's application for a permit. Because that is

¹ See Wis. Stat. § 196.58(7)(a); town of Cottage Grove, Wis., Code of Ordinances § 8.03 (2015).

² At this meeting, there was no discussion of Wis. Stat. § 196.58(7)(a) providing that a petition shall be deemed approved when a municipality fails to act on the petition within a 15-day period. However, it appears that the parties had previously agreed to waive the 15-day limitation.

not the case here, Commission staff is treating this as an informal complaint under Wis. Admin. Code § PSC 2.08.

Relevant Authority

Wisconsin Admin. Code § PSC 130.03(1) provides that a municipal regulation³ that requires a utility to install, at the utility's expense, facilities that are not consistent with the utility's practice for design or construction is unreasonable unless there is an adequate health, safety, or public welfare justification for the requirement. This provision is inapplicable under Wis. Admin. Code § PSC 130.03(2) if the municipality or a third party agrees to reimburse the utility for the difference in cost between the standard design or construction and any special design or construction requirement sought by the municipality if consistent with safe and reliable utility construction practices.

Wisconsin Admin. Code § PSC 130.04 states that unless there is an adequate health, safety, or public welfare justification, it is unreasonable for a municipality to deny a utility access to a municipal right-of-way or to discriminate between utilities seeking access to municipal rights-of-way.

Wisconsin Admin. Code § PSC 130.05(1) provides that a municipal regulation is unreasonable if it requires a utility to pay more than the actual cost of functions undertaken by the municipality to manage utility access to and use of municipal rights-of-way. However, Wis. Stat. § 196.58(1r)(a) states that a municipal regulation that determines the quality and character of a utility's occupation of the municipality's streets, highways or other public places “shall be in force” and is “on its face reasonable.” According to the statute, the municipality's regulation is presumptively reasonable. An administrative rule can interpret a statute, but not contradict it. Therefore, pursuant to the governing statute and administrative rule, a municipality's regulation is presumptively reasonable and a utility challenging the regulation must make a prima facie case that the regulation is unreasonable.⁴

³ A municipal regulation includes any ordinance or resolution adopted by the governing body of a municipality relating to utility use of municipal rights-of-way or any contract entered into by a municipality and a utility relating to utility use of municipal rights-of-way. Wis. Admin. Code § PSC 130.01(3).

⁴ *Complaint by Wisconsin Pub. Serv. Corp. Against the City of Manitowoc, Pursuant to Wis. Stat. S 196.58, As to the Reasonableness of the City's Practice Requiring Relocation of Util. Facilities at Util. Expense*, 9300-GI-102 (Wis. P.S.C., April 18, 2008).

Permit Conditions

The village takes issue with the following provisions of the Terms and Conditions Incorporated in Right-Of-Way Permit, dated February 1, 2016:

Paragraph 1.f. The portion of the Gaston Road where construction will occur shall be televised at the Village's expense and copies of the televised areas shall be provided to the Town prior to commencement of construction.

Staff determines that this requirement is presumptively reasonable as no evidence has been presented that it is unreasonable.

Paragraph 1.j. The water main burial shall be adjusted to allow future roadway improvements to occur without the added cost of relocating the water utility mains. This may require the calculation of future road profiles now, which can be completed at minimal cost using the Village Engineer's drawings and a CADD program, and the costs for developing needed calculations shall be paid by the Village. The exact depth and required cover shall be as determined and agreed to by the Village Engineer and Town Engineer. The Village shall provide the Town with as-built maps locating the water main and appurtenances all within thirty (30) days of completion of the Project.

Staff determines that this requirement is reasonable, in part, and unreasonable, in part. This provision requires that the village install, at its expense, facilities that are not consistent with the village's practice for design or construction. The town asserts that there is an adequate health, safety, or public welfare justification for the requirement. The town states that Gaston Road includes sharp hills that do not meet current safety standards with respect to stopping site distance requirements. The town anticipates that the road may need to be lowered to comply with safety standards and requests that the village install its water main at a sufficient depth to allow for future road lowering. However, the town is requiring that the village, at village expense, calculate a future safe road profile to enable the village to determine the depth of its water mains. At least one person testified at the December 21, 2015 Town Board meeting that Gaston Road was "already in bad shape due to truck traffic from the quarry".

The town has not agreed to reimburse the village for the difference in cost between the standard design or construction and any special design or construction to meet probable future depth requirements. Wis. Admin. Code § PSC 130.03(2). The village's planned construction of the trench is roughly 6 to 8 feet wide and on average 8.5 feet in depth. (PSC REF#: 280750) The town would have the trench dug "several feet" deeper than the average 8.5 feet.⁵

⁵ The record does not contain any cost analysis comparing the cost difference between the village's standard design and the town's special design requirement.

Wisconsin Stat. § 196.58(7)(b) requires that the village restore the land “to the same condition as it existed prior to the installation.” Gaston Road does not meet safety standards and deeper placement of the water mains will do nothing to improve the road’s safety. However, whether or not deeper placement of the water mains is necessary for health, safety, or public welfare and, thus, a reasonable exercise of the town’s police power is beyond the scope of this informal complaint. Because Wis. Admin. Code ch. 130 does not define ‘health, safety or public welfare’, conceivably, every decision a municipality makes in one way or another affects the health, safety and welfare of the public. Thus, unless there existed no link between the special design for the water mains and a health, safety, or public welfare justification, the town’s requirement must on its face be deemed reasonable. Wis. Stat. § 196.58(1r)(a).

However, requiring that the village calculate the town’s future road profiles at village expense is on its face unreasonable. There is no adequate health, safety, or public welfare justification for the requirement. Moreover, Wis. Stat. § 66.0811 restricts the use of public utility revenues to payments to meet operation, maintenance, depreciation, interest, and debt service fund requirements, local and school tax equivalents, additions and improvements, and other necessary disbursements or indebtedness. The village is not authorized to use utility monies to pay for design changes to a town road.⁶

Paragraph 1.l. The Village shall provide the Town with a standard one (1) year project warranty which shall include coverage for damages because of frost heave or other consequences related to the Village's decision to construct only half of the road for this Project. The Village shall be responsible for prompt repair of the damage to standards and specifications acceptable to the Town Engineer. This provision shall survive completion of the Project and shall remain binding on the Village.

A municipality making an installation under Wis. Stat. § 196.58(7) shall restore the land on or in which such installation has been made to the same condition as it existed prior to the installation.

Paragraph 1.m. The water main shall be constructed on the south portion of Gaston Road and the south portion of Gaston Road shall be fully reconstructed by the Village. The Village shall complete the Project at its sole cost and in accordance with plans reviewed and accepted by the Town Engineer. Any damage to the north side of Gaston Road during construction shall be repaired at the Village's cost and to standards acceptable to the Town Engineer. The Village will comply with Wis. State Admin. PSC 130 and other requirements imposed by law.

A municipality making an installation under Wis. Stat. § 196.58(7) shall restore the land on or in which such installation has been made to the same condition as it existed prior to the installation.

⁶ See also Wis. Stat. § 82.03(1)(a).

Paragraph 1.p. The Village shall pay all costs incurred by the Town for management function and other reasonable costs as enumerated in Wis. State Admin. PSC 130. The Village acknowledges that services resulting in management function costs may be provided by the Town Superintendent of Public Works, the Town Clerk, the Town Treasurer, the Town Engineer and the Town Attorney, as deemed prudent and necessary by the Town. All such fees shall be reimbursable at the same rate actually paid by the Town for the services, and reimbursement by the Village shall occur within 45 days of the date of the invoice for same. Interest on unpaid amounts shall accrue at the rate of 1/2 % per month or part thereof. Late fees shall accrue in an amount that is equal to the Town for multiple requests for payment, including staff time for invoicing and follow-up inquiries.

Commission staff determines that this requirement is reasonable, in part, and unreasonable, in part. Wisconsin Admin. Code § PSC 130.05(1) enumerates those costs that a municipal regulation may reasonably require as part of the actual cost of functions undertaken by the municipality to manage utility access to and use of municipal rights-of-way. Specifically, Wis. Admin. Code § PSC 130.05(1) states: “[t]hese management functions include all of the following:” and goes on to list those management functions in subsecs. (1)(a) through (h). The word “include” or “includes” is a term of enumeration encompassing only those provisions specifically listed. Other costs, whether or not the town deems them prudent and necessary, are not included.

Wisconsin Admin. Code § PSC 130.05(3) provides for recovery of costs incurred under subsecs (1)(a), (b), (c) and (g) through the pre-excavation permit fee. That is, these costs are socialized among all permit applicants. On the other hand, § PSC 130.05(4) provides for the recovery of costs incurred under subsecs. (1)(d), (e), and (f) directly from the cost causing utility. These include maintaining, supporting, protecting, or moving utility equipment during work in municipal rights-of-way; undertaking restoration work inadequately performed by a utility after providing notice and the opportunity to correct the work; and revoking utility permits.

One cannot reasonably infer that the town clerk, treasurer or attorney perform any of the direct-billed functions under subsecs. (1)(d), (e), or (f) to manage utility access to and use of municipal rights-of-way. Arguably, the town engineer or superintendent of public works may perform some management functions. But, allowable and recoverable costs would be limited to those costs specifically listed under subsecs. (1)(d), (e), (f) and (h).

This determination does not reach the merits or reasonableness of the amount or cap of any allowable costs under Wis. Admin. Code § PSC 130.05 as that would be premature.

Paragraph 1.q. The Town and Village shall enter an agreement regarding connection of public water to Town residents that is consistent with the terms of the agreement presented to the Town Board on December 21, 2015, and the agreement shall be fully executed prior to commencement of construction.

The provision of water service to customers outside of the municipality or the utility's service territory is governed by Wis. Stat. § 66.0813.

Paragraph 1.r. The Village shall re-stripe the road following completion of the project, at Village's sole cost.

A municipality making an installation under Wis. Stat. § 196.58(7) shall restore the land on or in which such installation has been made to the same condition as it existed prior to the installation.

Paragraph 1.s. All work shall be completed in accordance with the law, and industry construction standards, including necessary and prudent erosion and stormwater management controls.

A municipality making an installation under Wis. Stat. § 196.58(7) shall restore the land on or in which such installation has been made to the same condition as it existed prior to the installation.

Allegation of Discrimination

The village asserts that the town is discriminating against it because the conditions the town seeks to impose exceed its authority, and that the cumulative effect of the conditions is to effectively deny the Permit. The town responds that given the scope of the project and the public safety and welfare concerns involved, the permit conditions are reasonable.⁷ Further, that the town has not denied the village access to its right-of-way.

Based on the materials provided by you, the village engineer, and discussions with the village and town engineers, Commission staff has concluded that the town of Cottage Grove has not acted in a discriminatory manner, nor denied the permit application.

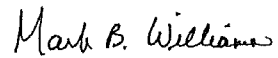
Commission staff encourages the village and township to continue to negotiate reasonable conditions to the requested right-of-way access. If an agreement cannot be reached, then the village may consider filing a formal complaint pursuant to Wis. Stat. § 196.58(7)(a) and Wis. Admin. Code § PSC 130. The formal complaint process would likely take six to nine months to complete. All of the Commission's expenses incurred in reviewing the formal

⁷ Town of Cottage Grove's Response to Application of Village (March 25, 2016).

Mr. Leighton Boushea and Ms. Susan Allen
Application for Right-of-Way Access by the Village of Cottage Grove
Page 8

complaint would be billed at Commission discretion to one or both of the involved municipalities.

Sincerely,

A handwritten signature in cursive script that reads "Mark B. Williams".

Mark B. Williams, P.E.
Public Service Engineer – Senior
Division of Water, Telecommunications and Consumer Affairs

MBW:DA:DL:01409651

EXHIBIT C

**TOWN OF COTTAGE GROVE
TERMS AND CONDITIONS INCORPORATED IN RIGHT-OF-WAY PERMIT TO
VILLAGE OF COTTAGE GROVE WATER UTILITY
FOR INSTALLATION OF WATER MAIN IN GASTON ROAD RIGHT-OF-WAY
[As Approved June 7, 2016]**

1. The Permit to Construct a Facility within the Gaston Road Right-of-Way (the "ROW Permit") shall be issued to the Village of Cottage Grove Water Utility ("Village" or "Applicant") subject to all standard requirements as well as the following special terms and conditions:
 - a. The Village shall submit the required review fee prior to commencement of construction.
 - b. The representations set forth in the Application (including the Petition to Install and Maintain Water Utilities prepared by the Village Engineer on November 30, 2015) are hereby incorporated as terms and conditions of the ROW Permit, except as expressly amended in writing herein or by change order presented and approved by the parties hereto, in writing. Email consenting to the change order shall be a sufficient writing for these purposes.
 - c. Authorized Representatives for the purposes of binding the Town as to this Project are the Town Engineer, Warren Myers and Town & Country Engineering, Inc. (warren@tcengineers.net), and the Town Chairperson, Kris Hampton (khampton@towncng.net). All notices to the Town regarding this Project shall be sent to or cc'd to the Town Clerk, Kim Banigan, via email to clerk@towncng.net.
 - d. Authorized Representatives for the purposes of binding the Village as to this Project are the Village Engineer (mmaloney@msa-ps.com), the Chairperson of the Village Water Utility Commission (*Chris Dyer*) and the Village Administrator (mgiese@village.cottage-grove.wi.us). All notices to the Village regarding this Project shall be sent to or cc'd to the Utility's Project Engineer, Travis McDermott, via email to tmcdermott@msa-ps.com.
 - e. A performance bond shall be issued naming the Town of Cottage Grove in an amount for the value of the road as reasonably determined by the Town Engineer following consideration of the Village Engineer's opinion as to probable cost. The performance bond shall be provided to the Town Clerk prior to commencement of construction.
 - f. The portion of Gaston Road where construction will occur shall be televised at the Village's expense and copies of the televised areas shall be provided to the Town prior to commencement of construction.
 - g. The Town Superintendent of Public Works ("Superintendent") (publicworks@towncng.net) and Town Engineer will be notified of the preconstruction meetings and be given an opportunity to attend. Notice shall also be provided to the Town Clerk. The Town Chairperson may also attend the preconstruction meetings.
 - h. The Town shall provide the Village with names and addresses of affected residents on Gaston Road, based on the tax roll. The Village shall provide at least two weeks' notice of the project to the listed Town residents, and shall work with Town residents in good faith to provide adequate access to and from the homes on Gaston Road and/or those dependent on Gaston Road to access their homes. The Town Superintendent shall be notified of the project schedule in a reasonable time and manner, with a copy of any such notice to the Town Clerk. The project schedule shall be managed by the Village in a manner that assures that the time and manner of disruption of traffic is minimized to the full extent reasonably possible. With that end in mind, once work commences, it shall progress to completion in as short a time frame as possible.
 - i. Specifications for the Project as to trench backfill and pavement restoration shall be provided to the Town Engineer and Superintendent for review and acceptance.

- j. The water main burial shall be adjusted to allow future roadway improvements to occur without the added cost of relocating the water utility mains. This may require the calculation of future road profiles now, which can be completed at minimal cost using the Village Engineer's drawings and a CADD program, and any such minimal cost for developing needed calculations shall be reimbursable by the Town. The exact depth and required cover shall be as determined and agreed to by the Village Engineer and Town Engineer. The Village shall provide the Town with as-built maps locating the water main and appurtenances all within thirty (30) days of completion of the Project.
- k. The Village shall take all reasonable precautions and do everything reasonably possible to avoid differential frost heave between the south half where the trench will be and the water main laid, and the north half of Gaston Road.
- l. The Village shall provide the Town with a standard one (1) year project warranty¹ which shall commence no sooner than the last to occur of substantial completion of the Project and acceptance of the repavement by the Town Engineer. The warranty shall include coverage for damages because of frost heave or other consequences related to the Village's decision to construct only half of the road for this Project. The Village shall be responsible for prompt repair of the damage to standards and specifications acceptable to the Town Engineer. This provision shall survive completion of the Project and shall remain binding on the Village.
- m. The water main shall be constructed on the south portion of Gaston Road and the south portion of Gaston Road shall be fully reconstructed by the Village. The Village shall complete the Project at its sole cost and in accordance with plans reviewed and accepted by the Town Engineer. Any damage to the north side of Gaston Road during construction shall be repaired at the Village's cost and to standards acceptable to the Town Engineer. The Village will comply with Wis. State Admin. PSC 130 and other requirements imposed by law.
- n. All areas disturbed by the Project will be restored to as good conditions. All work and restoration shall be consistent with the Town's MS-4 Permit Requirements and such other drainage and stormwater requirements imposed by law. Costs of restoration shall be paid by the Village.
- o. Flushing of hydrants shall be completed by the Village in a manner that does not adversely impact the property adjacent to the hydrants. Any damages and associated costs for repair and restoration caused by flushing of hydrants shall be the Village's responsibility. This provision shall survive completion of the Project and shall remain binding on the Village.
- p. The Village shall pay all costs incurred by the Town for management functions and other reasonable costs as enumerated in Wis. State Admin. PSC 130. All such fees shall be reimbursable at the same rate actually paid by the Town for the services, and reimbursement by the Village shall occur within 45 days of the date of the invoice for same. Interest on unpaid amounts shall accrue at the rate of ½ % per month or part thereof. Late fees shall accrue per invoice in an amount that is equal to the costs incurred by the Town for multiple requests for payment, including staff time for invoicing and follow-up inquiries.
- q. Town residents who are adjacent to the Village water main installation may contact the Village Utility Commission for direction on entering an agreement regarding connection to public water that is consistent with the the law and the terms of the agreement presented by the Village to the Town Board on December 21, 2015. Upon presentation of a fully executed agreement, the Town shall consider amendment of this ROW Permit to include the additional work associated with the Town resident's connection to public water. Such agreements shall be presented prior to commencement of construction.

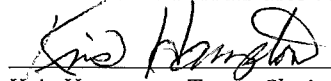
¹ The Town Engineer and Village Engineer shall determine the provisions contained therein.

- r. The Village shall re-stripe the road following completion of the project.
 - s. All work shall be completed in accordance with the law, and industry construction standards, including necessary and prudent erosion and stormwater management controls.
2. By mutual agreement, the Village Utility Commission has authorized the Village Engineer to, and the Village Engineer shall, include two bid alternatives:
 - a. For milling and paving the north side of Gaston Road at the same time the south side is paved and the Village shall provide such bid information to the Town prior to the Village's award of bids. The Town may request that the alternate bid be awarded; however, if the alternate is awarded at the Town's request, the Town shall be responsible for the associated costs.
 - b. For a 2 year project warranty from the contractor. The Town may request that the alternate bid be awarded; however, if the alternate is awarded at the Town's request, the Town shall be responsible for the associated costs.
3. Commencement of construction shall be deemed acceptance of the above conditions by the Village.
4. Time is of the essence as to performance of the terms and conditions set forth in this ROW Permit. This ROW Permit dated June 7, 2016 shall expire December 31, 2016. Any subsequent requests for permits associated with the Project shall require submission of a new application under Town ordinances in effect at the time the application is made.
5. The Application, Petition, Agreement and Plans identified below shall be binding as represented, except that the preliminary plans included with the Petition shall be amended to provide for construction of the water main on the south side of Gaston Road:
 - a. Application. Application signed by Village Engineer and dated November 30, 2015
 - b. Petition. Petition to Install and Maintain Water Utilities prepared by the Village Engineer on November 30, 2015, and Preliminary Plans prepared by MSA and submitted therewith
 - c. Agreement. Proposed Agreement Regarding Connections and Related Documents provided by Village Engineer to Town Clerk via email dated December 17, 2015
 - d. Plans (for South Side Construction). Updated construction plans prepared by the Village Engineer and accepted by the Town Engineer to relocate the water main to the south side of Gaston Road
6. This ROW Permit was approved by the Town Board on June 7, 2016, and is the final and complete permit for the Project. It supersedes all previous agreements by the parties as to this subject matter, whether oral or in writing, and replaces the permit issued on February 1, 2016, which shall be considered void when this permit is issued.

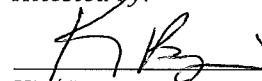
The above special terms and conditions have been approved by the Town and are incorporated as part of the ROW permit:

Date Approved: June 7, 2016

TOWN OF COTTAGE GROVE


Kris Hampton, Town Chairperson
Authorized Representative

Attested by:


Kim Banigan, Town Clerk

