



Date: April 26, 2018

To: Thomas J. Bonfield, City Manager
Through: W. Bowman Ferguson, Deputy City Manager
From: Marvin G. Williams, Director of Public Works
Subject: Establishing Civil Penalties for Unauthorized Work Within the Public Right of Way

Executive Summary

Public Works Department staff is proposing the assessment of civil penalties for unauthorized work within the public right of way.

Recommendation

The Public Works Department recommends that the City Council adopt an ordinance to amend Section 62-50 and Section 62-52 of the Durham City Code of Ordinances to establish civil penalties for unauthorized work in the right of.

Background

Public Works Department staff have proactively worked to improve processes to protect the infrastructure and meet the demands of the evolving and increasing uses of public rights of way (also called “the public way”) such as utilities, small wireless facilities, public art, specialty landscaping and signage, and other uses. Staff takes seriously the effectiveness of Department processes and accountability for the authorized and permitted use of the right of way. In evaluating the Department’s processes regarding the public way, staff considered the potential effectiveness of specifying civil penalties in the City Code to help prevent unauthorized work within the public way. Based on its evaluation, it is believed that civil penalties may assist in incentivizing use of the right of way in compliance with the City’s requirements. These requirements are in place to secure public safety, and to protect the right of way and other permitted users of the right of way.

The City Code, as currently written, authorizes staff to subject offenders to civil penalties, although the penalties are not specified:

(From 62-52)

(g) Civil penalties. Any person who violates this article may be subject to all civil and equitable remedies stated in G.S. 160A-175. Notwithstanding the foregoing, the violation of a stop work order issued pursuant to this subsection shall constitute a misdemeanor punishable under G.S. 14-4.

The department shall charge civil penalties as are authorized by the city council for:

(1) Violation of subsection (a) and/or (b).

(2) Additional violations of subsection (a) and/or (b) by the same user within one-year of the first violation.

Civil penalties authorized by this section may be assessed against the user on whose behalf work is being performed and against the contractor or subcontractor who is performing such

work. Billings not paid within 30 days will be assessed a late fee of one percent of the unpaid balance per month.

(h) Stop work order. The city may issue a stop work order to any person or entity performing work in the public way where there is a violation of this section. A stop work order shall be in writing, state the work to be stopped, state the reasons therefore, and state the conditions under which the work may be resumed.

Issues and Analysis

Proposed Civil Penalties

For the civil penalties for working without the appropriate authorization, typically a permit, there are three categories: (1) A \$250 civil penalty for violations associated with single family homes, (2) a civil penalty of \$1,000 for other violations which, (3) escalates to \$2,000 for repeat offenses. Each of these penalties have additional amounts assessed for late payment. Also, as an additional non-monetary penalty, a Stop Work Order of seven days for initial offenses and thirty days for subsequent offenses.

Methodology

The fee structure for work within the right of way prior to its amendment on February 5, 2018 included a provision to add triple the fee amount onto a permit fee if the applicant applied for a permit after commencing unauthorized work.

Staff found the “triple fee” amount an effective deterrent as it would often prevent future subsequent offenses by those working within the right of way without authorization. Due to its effectiveness, the “triple fee” approach was staff’s methodology in developing the penalties included in the attached ordinance.

For non-single family residential violations, the previous fee schedule included fees of \$50 for less than 200 feet of privately utility work within the right of way, \$120 for 200-1,000 feet of work, or \$460 for 1,000-5,000 feet of work. Staff assumed most permits would likely be for work between 50 and 500 feet of work, which would correlate to \$50-\$460 in fees.

Applying the “triple fee” methodology, the associated penalties for work without a permit would be \$150-\$1,380. A tiered penalty structure was considered, but such a structure would introduce further necessary fact-finding and offer an opportunity for confusion. The fee included in the ordinance for any length of unauthorized work within the right of way was set at \$1,000 for the first offense. This amount is doubled for subsequent offenses.

Exemption for Emergency Work

To enable emergency work to be performed prior to the issuance of a permit, the ordinance includes an exemption from the penalty. This element of the ordinance allows residents with service interruptions to be brought back online expeditiously.

Penalty Intending to Discourage Abuse of Exemption Provision

Since the penalty ordinance offers an exemption for emergency work, the ordinance includes a penalty for abusing this exemption scaling the civil penalty to double the normal penalty amount. To date, staff is unaware of any false emergency claims.

Appeals Process.

The ordinance includes an appeals process where those being issued a penalty can appeal to the Director of Public Works and cite circumstances evidencing that a penalty was inappropriately issued.

A Note Regarding Current City Code

City Code as currently codified does subject offenders to civil penalties, stop work orders, and potentially misdemeanors; however, the civil penalties and stop work orders are not expressly defined, nor is an appeal process established. These Code amendments expressly specify the penalties and the appeal process.

Alternatives

1. (Recommended) The City Council can adopt an ordinance to amend Section 62-50 and Section 62-52 of the Durham City Code of Ordinances.
2. The City Council can direct the administration to revise the ordinance as stated above.
3. The City Council can decide not to approve the proposed penalty ordinance.

Financial Impact

The City does not receive the penalty proceeds. The financial impact to the City for establishing, amending, or eliminating any fee is not applicable.

Equal Business Opportunity Summary

The Equal Business Opportunity Summary is not applicable for this update.

Attachments

1. Penalty Fee Ordinance