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CITY OF CAMBRIDGE

Office of the City Solicitor
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July 29, 2019

Louis A. DePasquale
City Manager
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RE: Response to Awaiting Report No. 18-141 Re: Report on safe way to bring power to the curb and across sidewalks to power electric vehicles

INTRODUCTION

We have prepared this memorandum in response to Awaiting Report No. 18-141, Council Order O-2 of December 17, 2018 (hereinafter, "Council Order"). The Council Order requests the City Manager "to determine if there is a safe and effective way for people to bring power to the curb and cross City sidewalks, to include running power cords under the sidewalk, to charge electric vehicles [(hereinafter "EVs")] and, if so, how the City might best go about appropriately permitting and monitoring such activity[.]"

As will be discussed below, power lines may be run under public sidewalks to connect to EVs parked in City streets as long as a license has been obtained from the Superintendent of Streets ("Superintendent") pursuant to Chapter 12.12 of the Cambridge City Code (hereinafter, "City Code" or "Code") and a grant of location is issued by the Pole and Conduit Commission pursuant to Section 15.16.140 of the Code.¹ Further, it is my opinion that running power lines, by themselves, on public sidewalks for extended periods of time to connect to EVs would likely violate the Americans with Disabilities Act ("ADA") and Architectural Access Board ("AAB") regulations and also create hazards for pedestrians and others, and therefore should not be permitted by the City. Also, although the City would have the authority to grant licenses to individuals who wish to hang power lines above sidewalks so that they can connect to EVs parked in City streets, it is not advisable for the City to allow such a practice as it would also create hazards for pedestrians and others.

¹ For avoidance of confusion, a power line used to charge an EV is not merely an ordinary extension cord but a specific type of power cord rated for EVs that is compliant with Section 625.17 of the National Electrical Code, NFPA 70.

DISCUSSION

A. In Order for an Individual to Place a Power Line Under a Public Sidewalk to Connect to an EV Parked in a City Street the Superintendent of Streets Must Grant a License Pursuant to Chapter 12.12 of the City Code.

In order to run a power line under a public sidewalk, an individual would need to obtain permission from the City. Such permission can be granted through a license. See Baseball Pub. Co. v. Bruton, 302 Mass. 54, 55 (1938) (stating license excuses acts done by one on land in possession of another that without license would be trespass).²

Chapter 12.12 of the City Code codifies a procedure for the granting of licenses to individuals who seek to excavate or obstruct City streets and sidewalks. Specifically, the first sentence of Section 12.12.010(A) states: “No person shall break or dig up the ground or stones in any street or on any sidewalk . . . or otherwise occupy [or] obstruct. . . the same, without first obtaining a written license from the Superintendent of Streets for that purpose.”

“Occupy” is not defined in Chapter 12.12. Black’s Law Dictionary, however, defines “occupy” as: “[t]o take up the extent, space, room, or time of.” Black’s Law Dictionary (10th ed. 2014), available at Westlaw; see Eastern Point, LLC v. Zoning Bd. of App. of Gloucester, 74 Mass. App. Ct. 481, 486 (2009) (noting courts may rely on dictionary definitions to give usual and accepted meanings to undefined words in statutes where said meanings are consistent with statutory purpose). Thus, the placement of a power line under a public sidewalk would constitute an occupation of it based on the above definition. Additionally, to place a power line under a sidewalk, a person would need to “break or dig up the ground or stones” in it (*i.e.*, excavate). Accordingly, placing a power line under a sidewalk would trigger the license requirements of Section 12.12.010(A), and therefore, a license from the Superintendent of Street would need to be obtained in order for an individual to perform such work.

The second sentence of Section 12.12.010(A) provides: “No gas pipe, water pipe, sewer, conduit, street railway track, pole nor any other structure, except wires, shall be placed beneath, upon or above any public street or way, except upon a location and at a grade approved by the City Engineer, or authorized by the City Council.” The placement of a power line under a public sidewalk would require the installation of a conduit for the line to run through. Thus, in addition to needing a license from the Superintendent of Streets, an individual seeking to run a power line under a public sidewalk would also need to obtain approval from the City Engineer or authorization from the City Council for the installation of a necessary conduit.

² Alternatively, an easement could be granted by the City to allow for such access to a sidewalk. However, the granting of an easement would be subject to the requirements of G.L. c. 30B and the property disposition procedures of Chapter 2.110 of the City Code, which are more cumbersome than granting a license. See City Code, Sec. 2.110.010; Inspector General, The Chapter 30B Manual: Procuring Supplies, Services and Real Property, p. 82 (Nov. 2016).

B. A Grant of Location from the Pole and Conduit Commission Would Need to be Issued in Order for an Individual to Place a Power Line Under a Public Sidewalk.

Chapter 15.16 of the City Code governs the placement of structures in public ways. Specifically, Section 15.16.140 provides, in part:

No person shall conduct, erect, lay or maintain in any public way, any pole, duct, conduit, manhole or other structure to support or contain wires or lines . . . for the purpose of light, heat and power except by order of the Pole and Conduit Commission previously obtained, in which the exact location of each shall be duly set forth.

As noted above, if a power line is run under a public sidewalk, it would need to be run through a conduit. Thus, in addition to needing a license from the Superintendent pursuant to Chapter 12.12 of the Code, an individual would also need to receive a grant of location from the Pole and Conduit Commission in order to place a conduit under a public sidewalk so that a power line can run through it and connect to an EV parked in a street.

C. Running Power Lines, by Themselves, on Public Sidewalks for Extended Periods of Time Would Likely Violate the ADA and AAB Regulations, and also Create Hazards for Pedestrians and Others.

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.³ Federal regulations promulgated pursuant to Title II impose additional obligations on public entities regarding the provision of services, programs or activities. Of relevance to this analysis is a regulation concerning “facilities.”

“Facility” is defined as “all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.” 28 C.F.R. § 35.104. Based on this definition, a public sidewalk is considered a “facility” for Title II purposes.

Additionally, 28 C.F.R. § 35.133 provides, in part:

(a) A public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. . . . (b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

Appendix B of the Title II regulations provides guidance on said regulations and notes the following regarding the requirements of 28 C.F.R. § 35.133: “Failure of the public entity to

³ The City is a “public entity” for the purposes of Title II of the ADA. 42 U.S.C. § 12131(1).

ensure that accessible routes are properly maintained and **free of obstructions**, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part.” 28 C.F.R. Pt. 35, app. B (emphasis added). Additionally, 28 C.F.R. § 35.133 has been interpreted to mean that “[w]hile temporary obstructions do not violate the ADA, obstructions that persist beyond a reasonable period of time do violate the statute.” Cohen v. City of Culver City, 754 F.3d 690, 699 (9th Cir. 2014).

Regarding applicable state law, G.L. c. 22, § 13A establishes the AAB and authorizes the AAB to promulgate regulations concerning access requirements for public buildings and other structures with respect to people with disabilities. G.L. c. 22, § 13A. Of note, 521 CMR 20.1 provides:

An accessible route shall provide a **continuous unobstructed path** connecting accessible spaces and elements inside and outside a facility. Accessible routes may include but are not limited to walks, halls, corridors, aisles, skywalks, and tunnels. Accessible routes may not include stairs, steps, or escalators, even if the stairs and steps are required to be accessible under 521 CMR.

(emphasis added). Public sidewalks are subject to the requirements of 521 CMR 20.1 concerning accessible routes. See 521 CMR 5.1 (defining, *inter alia*, “accessible route,” “accessible space,” “element,” “facility,” “sidewalk” and “walk”).

In light of the above, it is my opinion that running a power line, by itself, on a public sidewalk for an extended period of time for the purpose of connecting to an EV parked in a City street would likely violate the ADA and AAB regulations. More specifically, it would be difficult for individuals with certain disabilities (e.g., those who require the use of a wheelchair or walker) to cross power lines that run across City sidewalks. Thus, running a power line on a public sidewalk would likely violate the ADA and AAG regulations as it would constitute an obstruction of said sidewalk. Additionally, regardless of whether a person has a disability, the running of a power line on a sidewalk would likely constitute a tripping hazard for pedestrians and others using said sidewalk. Accordingly, it is not advisable for the City to allow the running of power lines, by themselves, on public sidewalks in order to connect to EVs.

D. The Hanging of Power Lines Above City Sidewalks so that Power Lines Connect to EVs Parked in City Streets Would Likely Create Hazards for Pedestrians and Others.

It is conceivable that individuals may wish to extend power lines from the second story (or higher) of buildings to EVs parked in City streets so that such power lines hang above sidewalks. A person who wishes to extend a power line in this manner may need prior permission from the City. Specifically, a power line could hang above a sidewalk in such a way that it impedes or obstructs the flow of traffic on the sidewalk because the line is hung too low. The extension of a power line in this manner would therefore require a written license from the Superintendent as Section 12.12.010(A) of the City Code prohibits the occupation or obstruction of a City sidewalk without such a license.

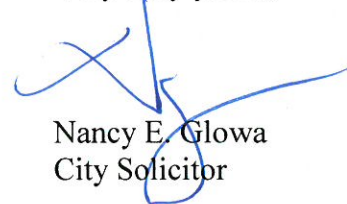
The granting of such a license however may raise policy concerns. Specifically, if a power line hangs too low above a sidewalk, it could create a hazard for pedestrians and others using the sidewalk, as pedestrians, for example, may need to step off a sidewalk (and potentially onto private property or into a City street in order to get around the hanging power line). Aside from this general hazard, a power line that hangs too low above a sidewalk would likely impede or obstruct individuals with disabilities from using the sidewalk and thus would likely constitute a violation of the ADA and AAB for the reasons stated in the previous section.

In this regard, even though the City would have the authority to grant licenses to allow individuals to hang power lines above sidewalks in order to connect EVs parked in City streets, it is not advisable for the City to grant such license in light of hazards that would likely result.

CONCLUSION

For the reasons set forth above, it is my opinion that power lines may be run under public sidewalks to connect to EVs parked in City Streets as long as a license is obtained from the Superintendent pursuant to Chapter 12.12 of the City Code and a grant of location is provided by the Pole and Conduit Commission pursuant to Section 15.16.140 of the Code. Additionally, I believe that running power lines, by themselves, on public sidewalks for extended periods of time to connect to EVs would likely violate the ADA and AAB regulations and also create hazards for pedestrians and others, and it would therefore be inadvisable to allow such activities. Also, although the City would have the authority to allow individuals to hang power lines over sidewalks to connect to EVs parked in City streets, it is not advisable for the City to allow such a practice as it would likely create hazards for pedestrians and others.

Very truly yours,



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