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| **PRIVATE USE OF CITY OWNED LAND** |
|  | **Encroachment Agreement** | **Lease** | **Easement** | **Permits** | **Use Agreement** |
| **What is it?** | An encroachment agreement is an agreement between the City and an adjoining property owner to place something permanently in the City’s right-of-ways or other public grounds. These agreements are not available to place anything in parks, greenways and the Southwest Bike Path. Encroachment agreements are generally open ended, but are statutorily subject to termination by the City at any time with 10 days notice. | A lease is a formal agreement to use City property. The terms and conditions of leases vary significantly. A lease will generally exclude other public use of the land. | An easement is a legal ownership in the City’s land that gives the easement holder the right to use the City’s land for specified purposes. | A permit grants permission to use City property for a specific use for a specific period of time. Permits are created by City ordinance, or through the statutory powers of the Board of Parks Commissioners. | A use agreement is a specific agreement allowing another party to use City property in a certain way. It is not an encroachment agreement, lease, or easement, although it may have similar characteristics.  |
| **Limitations** | Except for neighborhood signs, bike racks, little free libraries and decorative pavement paintings, encroachment agreements may only be entered into with the adjoining property owner. Hence, third parties, including tenants of a property, may not place something in a street with an encroachment agreement. They must work with the property owner. An encroachment must be removed on 10 days notice from the City, for any reason, and can be removed by the City at the holder’s expense. | There are limitations on what type of City property may be leased. For example, we cannot lease surface right-of-way (as that must remain open to the public)[[1]](#footnote-1), shore land (for more than two years), and lands that may have deed restrictions prohibiting private use (like many of our parks). In addition, leases over 10 years are land divisions that require a certified survey map. | An easement may impose conditions upon the City’s use of its own property. Easements may not be possible over City owned lands that are deed restricted.  | Permits are limited in duration and use based upon the nature of the permit. However, the right-of-way occupancy permit under MGO 10.05 may last indefinitely, or at least until the City tells the utility to relocate. | Use agreements are not a substitute for the other types of uses and are subject to ordinance limitations and deed restrictions. |
| **Examples** | Underground utility vaults, monitoring wells, canopies, planters, and other decorative features (retaining walls, fences, lighting) are the most common encroachments.  | Cell phone water tower leases, community gardens, parking lot leases and ground or aerial leases are some of the more common leases of City property. |  Utility facilities across City land other than right-of-ways; access or driveway easements across City land. | Street vending permit (MGO 9.13); Right-of-way occupancy permit (MGO 10.05); street use permit (MGO 10.056); street occupancy permit (MGO 29.10); parks event permit. | Madison Mallards use of Warner Park; Brittingham Boats use of Brittingham boat pavilion; BID use of the Peace Park Visitor Center; MGE electric vehicle charging station agreements in parking lots. |
| **Process** | (1) Private party should discuss his/her/its project with the Office of Real Estate Services prior to submitting his/her/its application for an encroachment agreement. (2) Application is made to the Office of Real Estate Services and reviewed by staff.(3) If approved, an encroachment agreement is drafted by the Office of Real Estate Services, reviewed by the City Attorney, and signed by the owner and appropriate City staff.(4) Upon signature, payment of any fees and completion of an insurance certificate, the agreement is recorded. | Controlling City agency gives clearance for proposed use. Ultimately, the lease is authorized via Common Council resolution (and companion ordinance if involving subterranean or airspace rights in the public right-of-way). The Office of Real Estate Services will draft the lease, which may be reviewed by the City Attorney. | Controlling City agency gives clearance for proposed use. A resolution authorizing the execution of the easement is necessary and may be prepared by either the controlling City agency or other designated agency depending on the nature of the easement. The Office of Real Estate Services will draft and record the easement, which may be reviewed by the City Attorney. | Permits are granted pursuant to the relevant ordinance or adopted Board of Park Commissioners policy. | Use agreements are created by the controlling City agency and must be authorized by the Common Council. They are often drafted by the City Attorney.  |
| **Department Responsible** | Economic Development Division of the Planning and Community and Economic Development Department; Office of Real Estate Services  | Economic Development Division drafts leases, enforces leases and maintains the leases. All leases are reviewed by the Risk Manager and City Attorney and are usually signed by the City Clerk, City Attorney, Risk Manager, Finance Director and the Mayor. | Controlling City agency gives clearance for proposed use. Ultimately, easement is authorized by Common Council resolution. Easement is usually signed by City Clerk and Mayor. | Permits are administratively granted pursuant to the relevant ordinance or adopted Board of Park Commissioners policy. They do not include Common Council review, although Alder input may be part of the staff review process. | Controlling City agency gives clearance for the proposed use. Ultimately, the agreement is authorized by Common Council resolution and usually signed by the City Clerk, City Attorney, Risk Manager, Finance Director and the Mayor. |
| **Fees** | (1) Non-refundable application fee of $750 (2) Minimum annual fee of $500, The annual fee is determined by the multiplying the square footage of the encroachment area times the assessed square footage value of the land and a percentage thereof. (3) Permittee is required to have and maintain insurance | (1) Rent is determined by mutual agreement as defined in the lease. (2) Lessee is required to have and maintain insurance. | The City may charge the fair market value for an easement, or other amount as agreed to by the parties. | Permit fees are set by ordinance or the adopted fee schedule of the Board of Parks Commissioners. | Use Agreements may include the payment of a fee to the City, based upon the agreement of the parties. |
| **Relevant Authority (ordinance, policy, state law)** | Wis. Stat Sec. 66.0425 (Privileges in Streets)MGO Sec. 10.31 (Privileges in Streets)MGO 8.15 (Regulation of Private Use of Greenways, Park Lands and the Southwest Bike Path) | Wis. Stat. Sec. 66.0915 MGO 8.15 (Regulation of Private Use of Greenways, Park Lands and the Southwest Bike Path)MGO 16.23(3)(f)2. |  Wis. Stat. Sec. 62.11(5) (Home rule authority) | Wis. Stat. Sec. 27.08(2)(a) (Board of Parks Commissioners Authority)MGO Ch. 10MGO Sec. 29.10 | Wis. Stat. Sec. 62.11(5) (Home rule authority) |

Disclaimer: This document is not a formal opinion of the City Attorney. It is meant to summarize the ways that City lands may be used for private purposes. This document does not include all potential uses of City property (i.e., news boxes, bicycle-sharing facilities, terrace planting, edible landscapes, etc.), nor should it be considered a representation of the ability to use City property for a private purpose. Requests to use City property for private purposes should take into account the nature of the request, the circumstances surrounding the proposed use and the lands in question, any legal restrictions that may exist upon the City, and existing City and State laws.

This statement has been modified per 8/7/17 e-mail from Kevin Ramakrishna:

*I have some good news for you. It appears that the City does have the right to lease public right of way at ground level as long as the City initially acquired the property for a valid public purpose but finds it not needed for public use.*

*The applicable law flows from the Wisconsin Constitution. Article XI, §3(a), Wis. Const., permits a City to acquire real property and convey any real property not needed for public use.*

*The Wisconsin Supreme Court has found the same, stating, “Municipalities have the same right, unless restricted by statute, to convey property as they have to acquire property, and such matters are within the reasonable discretion of the proper municipal authorities.” Kranjec v. City of West Allis, 267 Wis. 430, 434 (1954) (regarding a lease of city park land for use as a parking lot); see also Smith v. City of Wisconsin Rapids, 273 Wis. 58 (1956).*

*In a relevant case, the Milwaukee Sewerage Commission leased ground to a private business for use as a parking lot, and plaintiff brought suit alleging that, among other things, the lease was illegally entered. S.D. Realty Co. v. Sewerage Commission of City of Milwaukee, 15 Wis. 2d 15 (1961). In that case, the Wisconsin Supreme Court found that such a lease, “falls within the rule that a Wisconsin municipality may lease municipal lands no longer required for public use.” Id. at 28. It further notes that the Wisconsin rule is inconsistent with the rule of the majority of states, but that “we are satisfied that the rule in Wisconsin is otherwise.” Id. at 27.*

*The subject was also discussed in an Attorney General Opinion which, upon review of the case law, states:*

*In Wisconsin, therefore, unless restrained by statutes, cities and villages possess substantial authority to sell or lease real property to which they have fee title and which is not affected by a public trust. 58 Op. Atty. Gen. 178.*

*While it appears that all relevant case law is about 60 years old, there is no indication that the law has changed.*

*My previous interpretations of the law in this area were based on Wis. Stats. §§66.0915(3)(a) and (4)(a). Based upon the foregoing, those statutes place restraints on leases of certain city property, but do not limit all leases. In fact, the Attorney General Opinion, cited herein, found that it is “quite probable, then, that our court would uphold the authority of a city or village to lease air space over a municipally owned parking lot - even without specific statutory authorization – upon a determination that such a lease is in the public interest and that the proposed use will not materially alter or interfere with existing public uses.” 58 Op. Atty. Gen. 178, at 182.*

1. See last page for modification to this statement [↑](#footnote-ref-1)