



## MEMORANDUM

TO: Bryan Cosgrove, City Manager  
Amanda Guile-Hinman, City Attorney

FROM: Wilsonville City Council

DATE: March 17, 2025

RE: Interpretation of WC 3.340 and WC 4.300-4.320

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### **I. INTRODUCTION**

City staff has requested the City Council interpret certain provisions of the Wilsonville Code (WC) regarding the presence and expansion of utilities, and, particularly, new utility poles, in the City right-of-way. In particular, City staff seeks City Council interpretation of the relationship between WC 3.340 and WC 4.300 through 4.320 concerning high-voltage electrical transmission poles. This memorandum serves as the City Council's official interpretation of WC Sections 3.340 and 4.300 through 4.320, and any related Wilsonville Code provisions referenced herein.

### **II. WC 3.340 – UTILITY CONSTRUCTION, INSTALLATION, AND RELOCATION**

The City Council interprets WC 3.340(3) to prohibit a utility provider from installing new utility poles in the City right-of-way, public easement, and public utility easement areas

(collectively referred to herein as “City right-of-way”)<sup>1</sup>. This interpretation is supported by the text, context, and legislative history of WC 3.340.

The City Council adopted WC 3.300 through 3.410 via Ordinance No. 615 in 2006. This ordinance created a uniform right-of-way management policy imposed on all providers with utilities in the City right-of-way. As a result, instead of approving individual franchise agreements with each service provider operating in the City right-of-way, Ordinance No. 615 provides a process for service providers to install, relocate, and maintain their utilities in the City right-of-way through acquiring a right-of-way permit from the City. *See* WC 3.320(1). The permit is required to meet the terms of WC Chapter 3. *See* WC 3.320(1)(a). If the public interest warrants, the City Engineer or designee may negotiate additional terms and conditions to the permit, but if such terms and conditions conflict with WC 3.300 through 3.410, the City Council must approve the negotiated permit. *See* WC 3.320(1)(b).

While WC 3.320 describes the right-of-way permit that a service provider must obtain, WC 3.340 describes the terms under which a service provider may construct, install, and/or relocate its facilities and equipment in the City right-of-way. WC 3.340(3) requires service providers to underground all new facilities and equipment with one limited exception. WC 3.340(3), states the following:

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<sup>1</sup> “Right-of-Way” is defined in WC 3.310 as “the space in, upon, above, along, across, over or under the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lanes, and places used or intended to be used by the general public for travel as the same now or may hereafter exist, that the City has the right to allow User to use.”

“Public Easement” is defined in WC 3.310 as “the space identified within the easement document this is in, upon, above, along, across, over or under the publicly owned and maintained storm, sanitary, or water facility.”

“Public Utility Easement” is defined in WC 3.310 as “the space in, upon, above, along, across, over or under the easement as identified within the easement document. By way of general description, public utility easements are typically created along the border(s) of a tax lot or frontage along public right-of-way and are intended for the use of utility companies and other authorized users to operate, place, relocate and maintain facilities in accordance with City requirements and standards.”

*“Under Grounding Required.* All new equipment or facilities<sup>[2]</sup> shall be constructed pursuant to W.C. 4.300 - 4. 320. User is prohibited from installing any new aerial cables, wire, or conduit except in locations where existing aerial cables, wire, or conduit have not yet been brought underground, permission for attachment or over-wrapping is obtained, and the City has no planned and funded construction project to bring aerial utilities underground.”

The only exception to the requirement to underground utilities is that new aerial cables, wire, or conduit may be installed where existing aerial cables, wire, or conduit are already present, and thus, attached to existing utility poles. Nothing in WC 3.340(3) allows installation of new utility poles. It is notable that “poles” are referenced in the definition of “equipment and facilities” in WC 3.310, but not in the narrow exception stated in WC 3.340(3). Therefore, the City Council does not interpret the exception in WC 3.340(3) to include poles. The express language in WC 3.340(3) supports the City Council’s interpretation because the provision only references an exception allowing installation of new aerial cables, wire, or conduit where equipment is already present. WC 3.340(3) does not state an exception to allow for new utility poles to be installed.

Not only does the express language in WC 3.340(3) support the City Council’s interpretation, the context of WC 3.340(3) does so as well. The second sentence of WC 3.340(3)

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<sup>2</sup> The term “equipment or facilities” is broadly defined in WC 3.310 and explicitly includes “poles:”

Equipment or Facilities means any tangible component, whether referred to singly or collectively, installed, maintained, or operated by User within the right-of-way, public easement, or public utility easement. By way of example, the terms means any pole, wire, sensor, loop, light, stabilization or "guy" wire, anchor, pipe, conduit, line, main, duct, cable, wire, switch, transformer, value, antennae or other equipment, including any equipment box or vault, located wholly or in part under, on, or above the surface of the ground within any right-of-way or easement. "Facility" includes any item placed in the right-of-way for the purpose of providing electric power, natural gas, telephone, telecommunications, radio, cable television, internet access, sewer, water, storm sewer or other utility or similar service.

Therefore, it is clear that the undergrounding requirement in WC 3.340(3) applies to utility poles, wires, and cables (and other similar equipment and facilities).

only permits new aerial cables, wire, or conduit if three conditions are met: (1) there are existing aerial cables, wire, or conduit that have not yet been brought underground; (2) there is permission for attachment or over-wrapping; and (3) the City has no planned and funded construction project to underground the utilities. The first and second conditions demonstrate that installing new poles is not included in the exception. For there to be existing aerial cables, wires, or conduit (the first exception), they necessarily have to be attached to existing poles. The second exception requires the service provider to obtain permission for attachment to the existing pole(s) where the existing aerial cables, wire, or conduit are present. Both these conditions indicate that new aerial cables, wire, or conduit are only allowed to be attached to existing utility poles.

Finally, the legislative history of WC 3.340(3) supports the City Council's interpretation. The staff report accompanying Ordinance No. 615 noted some of its key features, including the prohibition against above-ground utilities:

“(3) Aerial facilities are prohibited (under-grounding of all new equipment is required) except where there are no current underground facilities and city has no planned and funded project to bring aerial facilities underground.”

Based on the text, context, and legislative history regarding WC 3.340(3), the City Council interprets WC 3.340(3) to prohibit a utility provider from installing new utility poles in the City right-of-way. Subject to the terms of a right-of-way permit, a utility service provider may install only new aerial cables, wire, or conduit on existing utility poles if existing aerial cables, wire, or conduit have not yet been brought underground, permission for attachment or over-wrapping is obtained, and the City has no planned and funded construction project to bring aerial utilities underground. *See* WC 3.340(3).

### **III. WC 4.300-4.320 – UNDERGROUND UTILITIES**

WC 4.300 through 4.320, referenced in WC 3.340(3), only apply to circumstances where

existing above-ground utilities are present on land that is subject to a land use development approval. The City Council interprets WC 4.300 through 4.320 to be inapplicable to utility service providers unless a developer or subdivider is seeking land use development approval from the City. This interpretation is supported by the text, context, and legislative history of WC 4.300 through 4.320.

WC 4.300(.01) states the City Council's policy to "require underground installation of utilities in all new developments." (emphasis added). This provision makes clear that the undergrounding requirements in WC 4.300 through 4.320 apply to new developments, nothing more. Then, WC 4.300(.02) states:

"The approval of any development of land within the City will be upon the express condition that all new utility lines, including but not limited to those required for power, communication, street lighting, gas, cable television services and related facilities, shall be placed underground." (emphasis added).

In other words, WC 4.300(.02) states that a condition of approval for new developments will be to underground all new utility lines. Both WC 4.300(.01) and (.02) state that the undergrounding provisions found in this section apply to new development. Nothing in these provisions indicate that WC 4.300 through 4.320 apply to utility installations in City right-of-way where no new development is occurring.

WC 4.310 then states that Section 4.300 does not apply to, among other equipment and facilities, "utility transmission lines operating at 50,000 volts or more." WC 4.310, like WC 3.340(3), does not mention utility poles. Stated simply, WC 4.310 only exempts a new development from being required to underground high-voltage transmission lines, nothing more.

The City Council's interpretation of WC 4.300 through 4.320 is supported by the context of the provisions. WC 4.320(.01) requires the developer or subdivider to arrange with the serving

utilities to provide underground services. If WC 4.300 through 4.320 applied to circumstances beyond new land use development applications, the language in WC 4.300 and 4.320 would be broader than only referencing new development and the developer's responsibility to coordinate undergrounding.

The legislative history of WC 4.300 through 4.320 also supports the City Council's interpretation that these code provisions only apply to approvals of new development. The City Council first adopted undergrounding requirements for new development in 1973 via Ordinance No. 39. The title of Ordinance No. 39 is "An Ordinance Relating to Underground Utilities and Requiring Their Installation in All New Subdivisions." The title indicates that the regulations will apply to new subdivisions. Section 1(A) of the Ordinance states the City Council's intent of requiring "the underground installation of utilities in all new subdivisions." WC 4.300(.01) is now broader to include all new development, but has never expanded to include circumstances beyond development of land.

The reason that WC 3.340(3) references WC 4.300 through 4.320 is to include the circumstances when a service provider applies for a right-of-way permit pursuant to WC 3.300 *et seq.* to install utilities for a new development. That way, the City can impose the requirements of the development approval on both the service provider and the developer. *See* WC 4.320(.02) ("The location of the buried facilities shall conform to standards supplied to the subdivider by the City.").

Finally, assuming, for argument's sake only, that the reference to WC 4.300 through 4.320 in WC 3.340(3) was meant to apply those provisions to utilities in the City right-of-way regardless of a development approval, nothing in WC 4.300 through 4.320 states an intent to allow a utility to install new above-ground utility poles. At most, the reference in WC 3.340(3) to WC 4.300

through WC 4.320 is to reiterate the general undergrounding requirement while exempting utilities from having to underground certain existing equipment and facilities, such as existing utility transmission lines operating at 50,000 volts or above.

#### **IV. CONCLUSION**

The City Council interprets WC 3.340(3) to prohibit a utility provider from installing new utility poles in the City right-of-way, public easement, and public utility easement areas, and further interprets WC 4.300 to 4.320 to only apply to circumstances where existing above-ground utilities are present on land that is subject to a land use development approval.

#### **Attachments:**

WC 3.300 through 3.340

WC 4.300 through 4.320

Ordinance No. 615

Staff Report to Ordinance No. 615

Ordinance No. 39

## RIGHT-OF-WAY AND PUBLIC EASEMENT MANAGEMENT

## 3.300. - Intent and Scope.

- (1) Pursuant to the statutes of the State of Oregon and the powers granted in the Charter of the City, the City Council declares its intent to acquire, own, operate, maintain, and manage rights-of-way and to acquire, maintain, and manage public easements.
- (2) The purpose of this chapter is to provide for the non-discriminatory and competitively neutral management of the public rights-of-way and public easements in the interest of public safety and convenience and the protection of public infrastructure.
- (3) When any of the words or requirements under this chapter are ambiguous and subject to interpretation, they shall be interpreted and applied so as to avoid a violation of federal or state law.
- (4) If any section, sentence, clause or provision in this chapter is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state law, the remainder of this chapter shall not be affected.

## 3.310. - Definitions.

The following definitions shall apply generally to the provisions of this chapter:

*City* means the City of Wilsonville, an Oregon municipal corporation, and all of the territory within its corporate boundaries, as may change from time to time.

*City's Authorized Representative* means the staff or person(s) as designated by the City Engineer to represent the City and/or oversee User's work.

*City Facilities* means City or publicly-owned structures or equipment located within the Right-of-Way or public easement used for governmental purposes.

*Equipment* or *Facilities* means any tangible component, whether referred to singly or collectively, installed, maintained, or operated by User within the right-of-way, public easement, or public utility easement. By way of example, the terms means any pole, wire, sensor, loop, light, stabilization or "guy" wire, anchor, pipe, conduit, line, main, duct, cable, wire, switch, transformer, valve, antennae or other equipment, including any equipment box or vault, located wholly or in part under, on, or above the surface of the ground within any right-of-way or easement. "Facility" includes any item placed in the right-of-way for the purpose of providing electric power, natural gas, telephone, telecommunications, radio, cable television, internet access, sewer, water, storm sewer or other utility or similar service.



*Franchise* means an agreement between the City and User which grants a privilege to use public Right-of-Way, public easement or public utility easements within the City for a dedicated purpose and for specific compensation.

*Non-City Facilities* means light poles, utility poles, pipes, cable, wire, conduit, vaults, ducts, fiber or similar equipment that is not owned or operated by the City and that is lawfully placed in the Right-of-Way, public easement or public utility easement.

*Person* means any individual, sole proprietorship, partnership, corporation, association or other organization authorized to do business in the State of Oregon, and includes any natural person.

*Right-of-Way* means the space in, upon, above, along, across, over or under the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lanes, and places used or intended to be used by the general public for travel as the same now or may hereafter exist, that the City has the right to allow User to use. Right-of-Way shall not include the airspace above the right-of-Way used for cellular mobile radio service or broadcast television service.

*Public Easement* means the space identified within the easement document this is in, upon, above, along, across, over or under the publicly owned and maintained storm, sanitary, or water facility.

*Public Utility Easement* means the space in, upon, above, along, across, over or under the easement as identified within the easement document. By way of general description, public utility easements are typically created along the border(s) of a tax lot or frontage along public right-of-way and are intended for the use of utility companies and other authorized users to operate, place, relocate and maintain facilities in accordance with City requirements and standards.

*User* means a Person that performs Work within the Rights-of-Way, public easement or public utility easements, whether or not a permit is applied for or granted.

*Work* means excavation or fill, or the construction, demolition, installation, replacement, or relocation of Equipment, within the Right-of-Way, public easement or public utility easement.

### 3.320. - Permits.

- (1) *Permit Required.* No Person or User shall occupy or encroach on Right-of-Way, Public Easement or Public Utility Easements, nor store materials in, or perform Work, or place, relocate or maintain facilities located within Right-of-Way or easements without first obtaining a permit from the City. Application for such permit shall include at a minimum proposed construction plans and traffic control plans and shall be accompanied by an application fee. Permits are not required for routine maintenance or repair of above ground Equipment, the installation of new replacement cables or wires on existing aerial facilities, when the installation, maintenance or repair will not

impact vehicular, pedestrian, or bicycle traffic by closing or blocking or partially obstructing a lane of travel and for the installation of individual customer service connections, repairs or maintenance that does not require cutting or breaking of the roadway, curb or sidewalk.

Emergency responses related to existing facilities, in order to prevent service interruptions or the imminent threat of harm to persons and property, may be undertaken without first obtaining a permit; however, the City Engineer shall be notified immediately, or as soon as reasonably possible after cessation of the emergency regarding work performed, or being performed, in the Rights-of-Way.

This permit is labeled a "Right-of-way and Public Easement Use Permit." The City Engineer or City's authorized representative is authorized to establish application forms, reasonable right-of-way management procedures, terms, and conditions for such permits, approve or deny permit applications, and perform such other acts as provided by this ordinance .

- (a) *Determination by City.* The City's authorized representative shall, within 30 days of receipt of a complete permit application, issue a written determination granting, granting with conditions, or denying the permit in whole or in part. If the permit is denied, the written determination shall include the reasons for denial. The permit shall be evaluated based upon the demonstrated ability of the permit applicant to meet the terms of this chapter, the continuing capacity of the public right-of way or public easement to accommodate the permit applicant's proposed facilities and the applicable federal, state and local laws, rules and polices. If denied, the applicant may appeal to the City Council.
- (b) *Additional Terms and Conditions.* If the public interest warrants, The City Engineer or authorized representative and User may negotiate non-discriminatory additional terms and conditions regarding the management of the right-of-way to clarify, enhance, expand, waive or vary the provision of this chapter. The additional terms and conditions may conflict with the terms of Section 3.300 to 3.410 with the review and approval of City Council. Such additional terms and conditions shall be in writing and signed by both the City and applicant.
- (2) *Permit Non-Exclusive.* The permit is not exclusive. The City expressly reserves the right to grant permits or rights to other Persons, as well as the City's right to use the Right-of-Way or public easement for similar or different purposes, as allowed hereunder. The permit is subject to all recorded deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record that may affect the Right-of-Way or public easement. Nothing in the permit shall be deemed to grant, convey, create, or vest in User a real property interest in land, including any fee, leasehold interest, or easement.
- (3) *Reservation of City Rights.* Nothing in the permit shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Right-of-Way, Public Easement or public utility easement, laying down, repairing or removing water mains or constructing or

establishing any other public work, utility or improvement, including repairs, replacement or removal of City Facilities. If any of User's Equipment interferes with the construction or repair of any Right-of-Way, public easement, public work, City utility, City improvement, or City Facility, and the City and User are unable to find a reasonable alternative, User's Equipment shall be removed or relocated as provided in 3.340 below, in a manner acceptable to the City, and subject to industry standard engineering and safety codes.

- (4) *Permit Fee.* The application for a permit shall be accompanied by a permit fee which shall be set and adjusted by the City Manager in an amount designed to reasonably defray administrative expenses.

### 3.340. - Construction, Installation and Relocation.

- (1) *Construction and Installation.* Subject to the terms of the permit, User may enter upon the Right-of-Way, Public Easement or public utility easement to perform all Work that is necessary to install, operate, maintain, remove, reinstall, relocate, and replace Equipment in or on User's Facilities or in or on City Facilities. All work shall be in conformance with the Public Works Standards and other federal, state, or local laws and ordinances. The City may determine the methods used to place Equipment to the extent such methods are reasonable and feasible. Any disturbance to existing City or private facilities shall be immediately repaired and brought to equal or better condition.
- (2) *No Interference.* User, in the performance and exercise of its rights and obligations under the permit, shall not interfere in any manner with the existence and operation of any Rights-of-Way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, traffic control signals, light poles, utility poles, pipes, cable, wire, sensor, loop, light, stabilization or "guy" wire, anchor, conduit, line, main, switch, transformer, antennae, vaults, ducts, fiber, cable television, and other telecommunications, utility, communication system or municipal property, without the express written approval of the owner or owners of the affected personal property or properties. Upon notification by the City, User may be required to review plans of others to determine if interference may occur.
- (3) *Under Grounding Required.* All new equipment or facilities shall be constructed pursuant to W. C. 4.300—4. 320. User is prohibited from installing any new aerial cables, wire, or conduit except in locations where existing aerial cables, wire, or conduit have not yet been brought underground, permission for attachment or over-wrapping is obtained, and the City has no planned and funded construction project to bring aerial utilities underground. When new construction occurs, existing overhead equipment or facilities on the project site or immediately adjacent to the project site, shall be brought under ground, wherever reasonably possible, in a location acceptable to the City. The cost of bringing such equipment or facilities underground (but not the cost of any upgraded equipment or facility) shall be the responsibility of the developer responsible for the project site.

(4) *Hours of Work.* Except for emergencies, hours of work are as follows:

Monday through Friday:	7:00 a.m. to 8:00 p.m. Pacific Standard Time
Monday through Friday:	7:00 a.m. to 9:00 p.m. Pacific Daylight Time
Saturday:	9:00 a.m. to 6:00 p.m. Pacific Standard Time
Saturday:	9:00 a.m. to 7:00 p.m. Pacific Daylight Time
Sunday:	No work Allowed unless authorized by the City Engineer

- (5) *Obtaining Required Permits.* If the excavation, installation, operation, maintenance, removal, reinstallation, relocation or replacement of the Equipment in the Right-of-Way or easement requires any additional permits, User shall obtain the permits and pay any standard and customary permit fees as provided by law.
- (6) *Plans.* Upon request, and in a generally recognized format acceptable to the City, each User shall provide the City with an accurate map(s) certifying the approximate horizontal and vertical location, size and type of material of all of User's under ground facilities within the public Rights-Of-Way, Public Easement or Public Utility Easement or easements or a portion thereof. A User shall not be required to "pothole" or conduct "vertical locates" to satisfy a mapping request unless reasonably required for the design of a City public improvement project. For 100 percent City-financed projects, City shall be responsible for any elevation surveys and contacting Digsafelyoregon.com (one call) for any pre-engineering locates.
- (7) *Duty to provide information.* Within 60 business days of a written request from the City, each User shall:
- (a) Furnish the City with information sufficient to demonstrate that User has complied with all requirements of this ordinance provided that the City outline the specific area(s) and matter for which City is reviewing the Users compliance.
  - (b) Make available for inspection by the City at reasonable time and intervals all maps, diagrams, plans and other documents, maintained by the User that describe or locate facilities within the public Right-of-Way or easement.

(8)

*Relocation.* City shall have the right to require User to change the location of its Equipment or to remove its Equipment from the Right-of-Way and Public Easement, and to relocate its equipment within a Public Utility Easement. Costs for relocation or removal necessitated for anything other than publicly-funded projects shall be borne by the Person requesting/ necessitating relocation or removal. User shall pay the cost for relocation of User's Equipment for publicly-funded projects to the extent the City is not reimbursed . When a project is funded with both private and public funds, User shall pay the percentage of the costs that is equal to the percentage of City funds that were spent on the relocation. Prior to relocation, the City shall make a reasonable effort to find an alternative location within a public Right-of-Way for relocated facilities. If User shall fail to relocate or remove any Equipment as requested by the City by the date established by the City, the City may cause the Equipment to be removed at User's sole expense. Upon receipt of a detailed invoice for payment from the City, User shall reimburse the City for the costs the City incurred within 60 days. This subsection operates concurrently with Oregon Administrative Rules.

- (9) *Repairs and Restoration.* Repairs to existing City Facilities that have been damaged during User's installation, operation, maintenance, removal, reinstallation, replacement or relocation of Equipment in the Right-of-Way or easement and/or restoration of landscaping shall be in conformance with the Public Works Standards. If User does not repair the Right-of-Way or easement to at least the condition that existed prior to construction within the time frame given in the permit or as otherwise agreed to by the City, then the City may, upon 15 days (or less if public safety requires) prior written notice to User, repair the Right-of-Way or easement at User's sole expense. Upon the receipt of a detailed invoice from the City, User shall reimburse the City for the costs the City incurred within 60 days.
- (10) *Use by City.* The City, at its cost, may install pipes or conduit in any trench or excavation created by User, to the extent that such space therein or thereon is reasonably available. The City may also require User to excavate trenches larger than needed by User, with the excess capacity to be utilized by the City and with the City responsible for the incremental cost provided that such requirement does not impose unreasonable delay on the User's construction activities.
- (11) *Safety.* User shall perform all Work in a manner that ensures safety of workers and the public. Safety requirements and traffic maintenance shall be in conformance with the Public Works Standards.
- (12) *Moving of Structures and Equipment.* Whenever it becomes necessary to allow for the passage of buildings, machinery or other objects, User shall temporarily rearrange, remove, lower or raise its wires, cables or other Facilities as necessary, at no cost to the City. However, any person or persons, other than the City, desiring to move any such buildings, machinery or other objects, shall pay the entire actual cost incurred by User for changing, altering, moving, removing or replacing its wires, cables, or other Facilities so as to permit such passage, and shall deposit in advance with User a sum equal to such cost as estimated by User. The person or persons that requested the move shall pay all direct damages caused directly by the changing, altering,

moving, removing or replacing of such wires, cables or other Facilities, except for damages and claims that are the direct result of User's negligent acts. Except in an emergency, User shall be given not less than 30 days written notice by the party desiring to move such building or other objects. Such notice shall detail the route of movement of such buildings or other objects over and along the streets, alleys, avenues, thoroughfares and public highways of the City. Upon receiving required notice, User shall complete such moves as soon as practicable, and without undue delay. Furthermore, the passage of buildings, machinery or other objects shall be with as much haste as possible and shall not be necessarily delayed or cause User unnecessary expense or waste of time.

### 3.350. - Maintenance.

User shall install and maintain all Equipment in a manner that prevents injury to the Right-of-Way, Public Easement or Public Utility Easement, the City's property or the property belonging to another person. User shall, at its own expense, repair, and maintain Equipment from time to time as may be necessary to accomplish this purpose.

### 3.360. - Vacation.

If the City vacates any Right-of-Way, or portion thereof, that User uses, User shall remove its Equipment from the Right-of-Way at its own expense unless the City reserves a public utility easement, which the City shall make a reasonable effort to do. User shall be notified of proposed vacation at least 90 days before User shall be required to relocate or remove its Equipment. If User fails to remove its Equipment within 30 days, or as otherwise necessary to complete removal, after a Right-of-Way is vacated, the City may remove the Equipment at User's sole expense. Upon receipt of a detailed invoice from the City, User shall reimburse the City for the costs the City incurred within 60 days.

### 3.370. - Financial, Liability and Insurance Provisions.

#### (1) *Insurance.*

- (a) When the City, at its sole discretion, determines that the User's Work or manner of performance warrants, User shall maintain public liability and property damage insurance that protects User and the City, as well as the City's officers, agents, and employees, from the claims referred to in Paragraph C of this Section. The insurance shall provide coverage at all times of not less than \$500,000.00 for bodily injury including death and personal injury for one claimant, \$1,000,000.00 for bodily injury including death and personal injury for each occurrence, and \$1,000,000.00 for each occurrence involving property damages, plus costs of defense; or a single limit policy of not less than \$1,000,000.00 covering all claims per occurrence, plus costs of defense. Motor vehicle liability insurance in the amount of

## UNDERGROUND UTILITIES

### Section 4.300. - General.

- (.01) The City Council deems it reasonable and necessary in order to accomplish the orderly and desirable development of land within the corporate limits of the City, to require the underground installation of utilities in all new developments.
- (.02) After the effective date of this Code, the approval of any development of land within the City will be upon the express condition that all new utility lines, including but not limited to those required for power, communication, street lighting, gas, cable television services and related facilities, shall be placed underground.
- (.03) The construction of underground utilities shall be subject to the City's Public Works Standards and shall meet applicable requirements for erosion control and other environmental protection.

### Section 4.310 - Exceptions.

Section 4.300 of this Code shall not apply to surface-mounted transformers, surface-mounted connection boxes, wireless communication facilities, and meter cabinets and other appurtenances which are reasonably necessary to be placed above ground, or to temporary utility service facilities during construction, or to high capacity electric and communication feeder lines, or to utility transmission lines operating at 50,000 volts or more.

### Section 4.320. - Requirements.

- (.01) The developer or subdivider shall be responsible for and make all necessary arrangements with the serving utility to provide the underground services (including cost of rearranging any existing overhead facilities). All such underground facilities as described shall be constructed in compliance with the rules and regulations of the Public Utility Commission of the State of Oregon relating to the installation and safety of underground lines, plant, system, equipment and apparatus.
- (.02) The location of the buried facilities shall conform to standards supplied to the subdivider by the City. The City also reserves the right to approve location of all surface-mounted transformers.
- (.03) Interior easements (back lot lines) will only be used for storm or sanitary sewers, and front easements will be used for other utilities unless different locations are approved by the City Engineer. Easements satisfactory to the serving utilities shall be provided by the developer and shall be set forth on the plat.

**ORDINANCE NO. 615**

**AN ORDINANCE OF THE CITY OF WILSONVILLE ADMINISTERING RIGHTS-OF-WAY AND PUBLIC EASEMENTS, AMENDING CHAPTER 3 OF THE WILSONVILLE CODE BY ADDING SECTIONS 3.300 TO 3.410 THERETO.**

WHEREAS, the City of Wilsonville owns or holds in trust certain rights-of-way and easements within the City; and

WHEREAS, persons, utility companies and other entities often desire to construct or install, relocate, operate or maintain certain facilities within City rights-of-way and easements; and

WHEREAS, the City requires that to occupy or encroach on a right-of-way or easement, the person or entity receive permission from the City in the form of a franchise, license or permit; and

WHEREAS, because the form and terms of permission has varied over time, and given the differential regulatory policy reflected in the various franchises, licenses and permits, there has not been a common and consistent application of the standards for placing, relocating and maintaining facilities in the right-of way or easement; and

WHEREAS, a uniform right-of-way and public easement policy would 1) assure that all utilities operating, placing, relocating and maintaining facilities and/or services within the City comply with the ordinances, rules and regulations of the City, 2) assure that the City can continue to fairly and responsibly protect the public health, safety and welfare of its citizens, 3) permit and manage reasonable access to the public rights-of-way and easements of the City, on a competitively neutral and non-discriminatory basis, and conserve the limited physical capacity of those public rights-of-way and easements and 4) enable the City to discharge its public trust consistent with the rapidly evolving federal and state regulatory policies, industry competition and technological development; and

WHEREAS, the council desires to achieve these purposes by enactment of this Ordinance;



NOW, THEREFORE, THE CITY OF WILSONVILLE ORDAINS AS FOLLOWS:

**Section 1.** Chapter 3 of the Wilsonville Code is amended by adding the following sections:

**Right-of-Way and Public Easement Management**

**3.300 Intent and Scope**

- (1) Pursuant to the statutes of the State of Oregon and the powers granted in the Charter of the City, the City Council declares its intent to acquire, own, operate, maintain, and manage rights-of-way and to acquire, maintain, and manage public easements.
- (2) The purpose of this chapter is to provide for the non-discriminatory and competitively neutral management of the public rights-of-way and public easements in the interest of public safety and convenience and the protection of public infrastructure.
- (3) When any of the words or requirements under this chapter are ambiguous and subject to interpretation, they shall be interpreted and applied so as to avoid a violation of federal or state law.
- (4) If any section, sentence, clause or provision in this chapter is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state law, the remainder of this chapter shall not be affected.

**3.310 Definitions.**

The following definitions shall apply generally to the provisions of this chapter:

- (1) **City.** "City" means the City of Wilsonville, an Oregon municipal corporation, and all of the territory within its corporate boundaries, as may change from time to time.
- (2) **City's Authorized Representative.** "City's authorized representative" means the staff or person(s) as designated by the City Engineer to represent the City and/or oversee User's work.
- (3) **City Facilities.** "City Facilities" means City or publicly-owned structures or equipment located within the Right-of-Way or public easement used for governmental purposes.
- (4) **Equipment or Facilities.** "Equipment" or "facilities" means any tangible component, whether referred to singly or collectively, installed, maintained, or

operated by User within the right-of-way, public easement, or public utility easement. By way of example, the terms means any pole, wire, sensor, loop, light, stabilization or "guy" wire, anchor, pipe, conduit, line, main, duct, cable, wire, switch, transformer, value, antennae or other equipment, including any equipment box or vault, located wholly or in part under, on, or above the surface of the ground within any right-of-way or easement. "Facility" includes any item placed in the right of way for the purpose of providing electric power, natural gas, telephone, telecommunications, radio, cable television, internet access, sewer, water, storm sewer or other utility or similar service.

- (5) **Franchise.** "Franchise" means an agreement between the City and User which grants a privilege to use public Right-of-Way, public easement or public utility easements within the City for a dedicated purpose and for specific compensation.
- (6) **Non-City Facilities.** "Non-City Facilities" means light poles, utility poles, pipes, cable, wire, conduit, vaults, ducts, fiber or similar equipment that is not owned or operated by the City and that is lawfully placed in the Right-of-Way, public easement or public utility easement.
- (7) **Person.** "Person" means any individual, sole proprietorship, partnership, corporation, association or other organization authorized to do business in the State of Oregon, and includes any natural person.
- (8) **Right-of-Way.** "Right-of-Way" means the space in, upon, above, along, across, over or under the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lanes, and places used or intended to be used by the general public for travel as the same now or may hereafter exist, that the City has the right to allow User to use. Right-of-Way shall not include the airspace above the right-of-Way used for cellular mobile radio service or broadcast television service.
- (9) **Public Easement.** "Public easement" means the space identified within the easement document this is in, upon, above, along, across, over or under the publicly owned and maintained storm, sanitary, or water facility.
- (10) **Public Utility Easement.** "Public utility easement" means the space in, upon, above, along, across, over or under the easement as identified within the easement document. By way of general description, public utility easements are typically created along the border(s) of a tax lot or frontage along public right-of-way and are intended for the use of utility companies and other authorized users to operate, place, relocate and maintain facilities in accordance with city requirements and standards.
- (11) **User.** "User" means a Person that performs Work within the Rights-of-Way, public easement or public utility easements, whether or not a permit is applied for or granted.

- (11) **Work.** "Work" means excavation or fill, or the construction, demolition, installation, replacement, or relocation of Equipment, within the Right-of-Way, public easement or public utility easement.

### **3.320 Permits.**

- (1) **Permit Required.** No Person or User shall occupy or encroach on Right-of-Way, Public Easement or Public Utility Easements, nor store materials in, or perform Work, or place, relocate or maintain facilities located within Right-of-Way or easements without first obtaining a permit from the City. Application for such permit shall include at a minimum proposed construction plans and traffic control plans and shall be accompanied by an application fee. Permits are not required for routine maintenance or repair of above ground Equipment, the installation of new replacement cables or wires on existing aerial facilities, when the installation, maintenance or repair will not impact vehicular, pedestrian, or bicycle traffic by closing or blocking or partially obstructing a lane of travel and for the installation of individual customer service connections, repairs or maintenance that does not require cutting or breaking of the roadway, curb or sidewalk.

Emergency responses related to existing facilities, in order to prevent service interruptions or the imminent threat of harm to persons and property, may be undertaken without first obtaining a permit; however, the City Engineer shall be notified immediately, or as soon as reasonably possible after cessation of the emergency regarding work performed, or being performed, in the Rights-of-Way.

This permit is labeled a "Right of Way and Public Easement Use Permit." The City Engineer or City's authorized representative is authorized to establish application forms, reasonable right-of-way management procedures, terms, and conditions for such permits, approve or deny permit applications, and perform such other acts as provided by this ordinance .

(a) **Determination by City.** The City's authorized representative shall, within 30 days of receipt of a complete permit application, issue a written determination granting, granting with conditions, or denying the permit in whole or in part. If the permit is denied, the written determination shall include the reasons for denial. The permit shall be evaluated based upon the demonstrated ability of the permit applicant to meet the terms of this chapter, the continuing capacity of the public right-of way or public easement to accommodate the permit applicant's proposed facilities and the applicable federal, state and local laws, rules and polices. If denied, the applicant may appeal to the City Council.

(b) **Additional Terms and Conditions.** If the public interest warrants, The City Engineer or authorized representative and User may negotiate non-discriminatory additional terms and conditions regarding the management of the right-of-way to clarify, enhance, expand, waive or vary the provision of this chapter. The

additional terms and conditions may conflict with the terms of Section 3.300 to 3.410 with the review and approval of City Council. Such additional terms and conditions shall be in writing and signed by both the City and applicant.

- (2) **Permit Non-Exclusive.** The permit is not exclusive. The City expressly reserves the right to grant permits or rights to other Persons, as well as the City's right to use the Right-of-Way or public easement for similar or different purposes, as allowed hereunder. The permit is subject to all recorded deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record that may affect the Right-of-Way or public easement. Nothing in the permit shall be deemed to grant, convey, create, or vest in User a real property interest in land, including any fee, leasehold interest, or easement.
- (3) **Reservation of City Rights.** Nothing in the permit shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Right-of-Way, Public Easement or public utility easement, laying down, repairing or removing water mains or constructing or establishing any other public work, utility or improvement, including repairs, replacement or removal of City Facilities. If any of User's Equipment interferes with the construction or repair of any Right-of-Way, public easement, public work, City utility, City improvement, or City Facility, and the City and User are unable to find a reasonable alternative, User's Equipment shall be removed or relocated as provided in 3.340 below, in a manner acceptable to the City, and subject to industry standard engineering and safety codes.
- (4) **Permit Fee.** The application for a permit shall be accompanied by a permit fee which shall be set and adjusted by the City Manager in an amount designed to reasonably defray administrative expenses.

### **3.340 Construction, Installation and Relocation**

- (1) **Construction and Installation.** Subject to the terms of the permit, User may enter upon the Right-of-Way, Public Easement or public utility easement to perform all Work that is necessary to install, operate, maintain, remove, reinstall, relocate, and replace Equipment in or on User's Facilities or in or on City Facilities. All work shall be in conformance with the Public Works Standards and other federal, state, or local laws and ordinances. The City may determine the methods used to place Equipment to the extent such methods are reasonable and feasible. Any disturbance to existing City or private facilities shall be immediately repaired and brought to equal or better condition.
- (2) **No Interference.** User, in the performance and exercise of its rights and obligations under the permit, shall not interfere in any manner with the existence and operation of any Rights-of-Way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliners, traffic control signals, light poles, utility poles, pipes, cable, wire,

sensor, loop, light, stabilization or "guy" wire, anchor, conduit, line, main, switch, transformer, antennae, vaults, ducts, fiber, cable television, and other telecommunications, utility, communication system or municipal property, without the express written approval of the owner or owners of the affected personal property or properties. Upon notification by the City, User may be required to review plans of others to determine if interference may occur.

- (3) **Under Grounding Required.** All new equipment or facilities shall be constructed pursuant to W. C. 4.300 – 4. 320. User is prohibited from installing any new aerial cables, wire, or conduit except in locations where existing aerial cables, wire, or conduit have not yet been brought underground, permission for attachment or over-wrapping is obtained, and the City has no planned and funded construction project to bring aerial utilities underground.

When new construction occurs, existing overhead equipment or facilities on the project site or immediately adjacent to the project site, shall be brought under ground, wherever reasonably possible, in a location acceptable to the City. The cost of bringing such equipment or facilities underground (but not the cost of any upgraded equipment or facility) shall be the responsibility of the developer responsible for the project site.

- (4) **Hours of Work.** Except for emergencies, hours of work are as follows:

Monday through Friday:	7:00 a.m. to 8:00 p.m. Pacific Standard Time
Monday through Friday:	7:00 a.m. to 9:00 p.m. Pacific Daylight Time
Saturday:	9:00 a.m. to 6:00 p.m. Pacific Standard Time
Saturday:	9:00 a.m. to 7:00 p.m. Pacific Daylight Time
Sunday:	No work Allowed unless authorized by the City Engineer

- (5) **Obtaining Required Permits.** If the excavation, installation, operation, maintenance, removal, reinstallation, relocation or replacement of the Equipment in the Right-of-Way or easement requires any additional permits, User shall obtain the permits and pay any standard and customary permit fees as provided by law.
- (6) **Plans.** Upon request, and in a generally recognized format acceptable to the City, each User shall provide the City with an accurate map(s) certifying the approximate horizontal and vertical location, size and type of material of all of User's under ground facilities within the public Rights-Of-Way, Public Easement or Public Utility Easement or easements or a portion thereof. A User shall not be required to "pothole" or conduct "vertical locates" to satisfy a mapping request unless reasonably required for the design of a City public improvement project. For 100% City-financed projects, City shall be responsible for any elevation surveys and contacting Digsafelyoregon.com (one call) for any pre-engineering locates.

- (7) **Duty to provide information.** Within sixty (60) business days of a written request from the City, each User shall:
- (a) Furnish the City with information sufficient to demonstrate that User has complied with all requirements of this ordinance provided that the city outline the specific area(s) and matter for which City is reviewing the Users compliance .
  - (b) Make available for inspection by the City at reasonable time and intervals all maps, diagrams, plans and other documents, maintained by the User that describe or locate facilities within the public Right-of-Way or easement.
- (8) **Relocation.** City shall have the right to require User to change the location of its Equipment or to remove its Equipment from the Right-of-Way and Public Easement, and to relocate its equipment within a Public Utility Easement. Costs for relocation or removal necessitated for anything other than publicly--funded projects shall be borne by the Person requesting/ necessitating relocation or removal. User shall pay the cost for relocation of User's Equipment for publicly-funded projects to the extent the City is not reimbursed . When a project is funded with both private and public funds, User shall pay the percentage of the costs that is equal to the percentage of City funds that were spent on the relocation. Prior to relocation, the City shall make a reasonable effort to find an alternative location within a public Right-of-Way for relocated facilities. If User shall fail to relocate or remove any Equipment as requested by the City by the date established by the City, the City may cause the Equipment to be removed at User's sole expense. Upon receipt of a detailed invoice for payment from the City, User shall reimburse the City for the costs the City incurred within sixty (60) days. This subsection operates concurrently with Oregon Administrative Rules.
- (9) **Repairs and Restoration.** Repairs to existing City Facilities that have been damaged during User's installation, operation, maintenance, removal, reinstallation, replacement or relocation of Equipment in the Right-of-Way or easement and/or restoration of landscaping shall be in conformance with the Public Works Standards. If User does not repair the Right-of-Way or easement to at least the condition that existed prior to construction within the time frame given in the permit or as otherwise agreed to by the City, then the City may, upon fifteen (15) days (or less if public safety requires) prior written notice to User, repair the Right-of-Way or easement at User's sole expense. Upon the receipt of a detailed invoice from the City, User shall reimburse the City for the costs the City incurred within sixty (60) days.
- (10) **Use by City.** The City, at its cost, may install pipes or conduit in any trench or excavation created by User, to the extent that such space therein or thereon is reasonably available. The City may also require User to excavate trenches larger than needed by User, with the excess capacity to be utilized by the City and with

the City responsible for the incremental cost provided that such requirement does not impose unreasonable delay on the User's construction activities.

- (11) **Safety.** User shall perform all Work in a manner that ensures safety of workers and the public. Safety requirements and traffic maintenance shall be in conformance with the Public Works Standards.
- (12) **Moving of Structures and Equipment.** Whenever it becomes necessary to allow for the passage of buildings, machinery or other objects, User shall temporarily rearrange, remove, lower or raise its wires, cables or other Facilities as necessary, at no cost to the City. However, any person or persons, other than the City, desiring to move any such buildings, machinery or other objects, shall pay the entire actual cost incurred by User for changing, altering, moving, removing or replacing its wires, cables, or other Facilities so as to permit such passage, and shall deposit in advance with User a sum equal to such cost as estimated by User. The person or persons that requested the move shall pay all direct damages caused directly by the changing, altering, moving, removing or replacing of such wires, cables or other Facilities, except for damages and claims that are the direct result of User's negligent acts. Except in an emergency, User shall be given not less than thirty (30) days written notice by the party desiring to move such building or other objects. Such notice shall detail the route of movement of such buildings or other objects over and along the streets, alleys, avenues, thoroughfares and public highways of the City. Upon receiving required notice, User shall complete such moves as soon as practicable, and without undue delay. Furthermore, the passage of buildings, machinery or other objects shall be with as much haste as possible and shall not be necessarily delayed or cause User unnecessary expense or waste of time.

**3.350 Maintenance.** User shall install and maintain all Equipment in a manner that prevents injury to the Right-of-Way, Public Easement or Public Utility Easement, the City's property or the property belonging to another person. User shall, at its own expense, repair, and maintain Equipment from time to time as may be necessary to accomplish this purpose.

**3.360 Vacation.** If the City vacates any Right-of-Way, or portion thereof, that User uses, User shall remove its Equipment from the Right-of-Way at its own expense unless the City reserves a public utility easement, which the City shall make a reasonable effort to do. User shall be notified of proposed vacation at least 90 days before User shall be required to relocate or remove its Equipment. If User fails to remove its Equipment within thirty (30) days, or as otherwise necessary to complete removal, after a Right-of-Way is vacated, the City may remove the Equipment at User's sole expense. Upon receipt of a detailed invoice from the City, User shall reimburse the City for the costs the City incurred within sixty (60) days.

### **3.370 Financial, Liability and Insurance Provisions.**

#### **(1) Insurance.**

(a) When the City, at its sole discretion, determines that the User's Work or manner of performance warrants, User shall maintain public liability and property damage insurance that protects User and the City, as well as the City's officers, agents, and employees, from the claims referred to in Paragraph C of this Section. The insurance shall provide coverage at all times of not less than \$500,000 for bodily injury including death and personal injury for one claimant, \$1,000,000 for bodily injury including death and personal injury for each occurrence, and \$1,000,000 for each occurrence involving property damages, plus costs of defense; or a single limit policy of not less than \$1,000,000 covering all claims per occurrence, plus costs of defense. Motor vehicle liability insurance in the amount of \$1,000,000 for each occurrence shall be maintained. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. The coverage must apply as to claims between insureds on the policy. The Certificate of Insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days' prior written notice first being given to the City. If the insurance is canceled or materially altered, User shall provide a replacement policy with the terms as outlined in this Section. User shall maintain continuous uninterrupted coverage, in the terms and amounts required. User may self insure any or all of the above coverage.

(b) User shall maintain on file with the City a Certificate of Insurance or self-insurance certifying the coverage required above.

(2) **Financial Assurance.** When the City, at its sole discretion, determines that User's Work or manner of performance warrants, the City may request and the User shall provide a financial security. The form of the financial security (bond, cashiers check, letter of credit, etc.) shall be reasonably determined by the City Engineer or authorized representative. The value of the financial security shall be in an amount determined by the City Engineer or designee but shall not exceed 150% of the engineer's estimated value of the Work the User is obligated to perform. The estimated value of the Work shall be verified by the City's authorized representative. The financial assurance instrument shall be reasonably reviewed and approved as to form by the City Attorney.

#### **(3) Indemnification**

(a) User shall indemnify, defend, and hold the City, its officers, agents, and employees harmless from any claims for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorney fees or expenses, arising



from any casualty or accident to person or property by reason of any act done under the permit, by or for User, its agents or employees, or by reason of any neglect or omission of User to keep its Equipment in a safe condition, but not if arising out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees. The City shall provide User with prompt notice of any such claim, which User shall defend. No settlement or compromise of any such claim will be done by the City or the User without the prior written approval of the other party. User and its agents, contractors and others shall consult and cooperate with the City while conducting its defense.

(b) User shall also indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from User's failure to remove or relocate any of its Equipment in the Rights-of-Way or easements in a timely manner, unless User's failure arises directly from the City's negligence or willful misconduct or that of another User.

**3.380 Vegetation.** User shall prune or cause to be pruned any vegetation to the extent allowed by law, including but not limited to tree limbs and roots that protrude into the Right-of-Way or easement and inhibit the operation of the User's Equipment. Except for an emergency, before pruning any vegetation, User shall obtain any required permits from the City. The City shall provide notification to users of any pruning or permitting requirements. All pruning shall be done using proper arboricultural practices. User shall be responsible for the costs of pruning and of replacing or treating any vegetation that is not pruned in accordance with proper arboricultural practices and that is damaged or dies as a result. If User fails to replace or treat damaged or dead vegetation within thirty (30) days after receiving written notice from the City, the City may replace or treat the vegetation at User's sole expense. Upon receipt of a detailed invoice from the City, User shall pay the City for the costs the City incurred within sixty (60) days.

**3.390 Discontinued Use.** Whenever User discontinues use of any Equipment and does not intend to use the Equipment within six (6) consecutive months, User shall remove the Equipment from the Right-of-Way or easement unless the City agrees, in writing, that the Equipment may remain in the Right-of-Way or easement and the User conveys title or ownership of the Equipment to the City. The City shall not unreasonably withhold such agreement. If User fails to remove Equipment that is no longer going to be used, and the City has not agreed to allow User to abandon such Equipment in place, the City may remove the Equipment at User's sole expense. Upon receipt of a demand for payment from the City, User shall pay the City for the estimated costs or a detailed invoice of the costs the City incurred within sixty (60) days.

**3.400 Assignment.** Except as provided below, the permit shall not be assigned or transferred without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned, or delayed. User may assign a franchise or permit to a parent, subsidiary, affiliate, or to any entity that acquires all or substantially all the

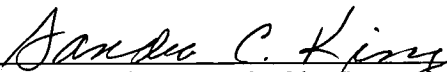
equity or assets of User by sale, merger or otherwise without the consent of the City, but upon written notice to the City.

**3.410 Franchise Required.** Unless exempted by state or federal law, User shall enter into a non-exclusive Franchise agreement with the City for cable services and other services as specifically set forth in city code. To the extent allowed by law, the requirements of this chapter may be varied or waived by the provisions of a franchise agreement, provided that no such franchise or similar lawful authorization shall contain material terms or conditions which are substantially more favorable or less burdensome than the material terms and conditions in other Users' existing franchises.


**Section 2.** To the extent that this ordinance is not in conflict with, and can be implemented with, User's existing Franchise agreements, this ordinance shall apply to all such Franchise agreements for use of the public Rights-of-Way or public easements.

**Section 3.** Severability. In the event any provisions of this Ordinance shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

SUBMITTED to the Wilsonville City Council and read for the first time at a regular meeting thereof on the 4<sup>th</sup> day of December 2006, at the hour of 7:00 p.m. at the Wilsonville City Hall, 29799 SW Wilsonville Road, Wilsonville, Oregon, and scheduled for second reading on the 18th day of December 2006, commencing at the hour of 7:00 p.m. at the Wilsonville City Hall.

  
Sandra C. King, MMC, City Recorder

ENACTED by the City Council on the 18th day of December 2006, by the following  
votes: YEAS: -4- NAYS: -0-

  
Sandra C. King, MMC, City Recorder

DATED and signed by the Mayor this 20<sup>th</sup> day of December, 2006.

  
CHARLOTTE LEHAN, MAYOR

**SUMMARY OF VOTES:**

Mayor Lehan	Yes
Councilor Kirk	Yes
Councilor Holt	Excused
Councilor Knapp	Yes
Councilor Ripple	Yes

## **Memorandum**

To: Mayor and City Council

From: Paul A. Lee, Assistant City Attorney

Re: Right-of-way Ordinance and Privilege Tax Ordinance Nos. 615 and 616

Date: November 29, 2006

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### **I. Introduction**

Following an unsuccessful negotiation with Verizon Northwest Inc. to renew a telecommunications franchise, staff approached council with the proposal that the city consider adopting a Right-of-Way management ordinance and Privilege tax ordinance. These ordinances would operate to ensure that telecommunications service providers, gas, electric, cable companies and other utilities placing equipment in city rights-of-way would comply with basic requirements regarding construction of those facilities and compensate the city for the utility's use of the right of way, whether or not a utility franchise exists. While franchises (individual agreements for use of the right of way) have been the traditional method by which the city grants permission to occupy or encroach on the public right-of-way, the regulatory trend has been for local governments to adopt ordinances that provide a common set of requirements concerning, among other things, the permitting, construction and relocation of utility facilities in the public streets and easements. Council directed staff to propose a general regulatory framework. The two ordinances scheduled for public hearing are recommended by staff in order to 1) assure that the city can continue to fairly and responsibly protect the public health, safety and welfare of its citizens by regulating, on a competitively neutral basis, access to those public rights-of-way and 2) assuring that utilities installing and maintaining equipment in the right-of-way fairly compensate the city for the privilege of doing so.

A brief discussion of the regulatory context of right-of-way management shall serve as a backdrop for consideration of these ordinances.

### **II. Right-of-way management**

#### **A. Authority.**

Through statute, charter and common law authority, cities have the authority to regulate and manage the public right-of-way to ensure that transportation interests of the general public are not compromised by the extraordinary, non-transportation related use of public streets and easements by utilities. This regulatory authority also

includes the right and obligation to obtain compensation for private use of a public asset (the streets and easements) by utilities. This authority to regulate right of way use and obtain compensation for that use is typically exercised via franchises and general ordinances.

## B. Franchise Basics

A franchise is a government-granted special privilege that generally does not belong to citizens as a common right. Utilities utilize the public right of way differently than the average citizen in that they place equipment in, on or over the right of way for extended periods of time. Cities have primary responsibility for managing use of the public right-of-way within city boundaries and the process of conditionally permitting utility use through grant of a franchise is the most common way to exercise that authority. The public has an interest in ensuring that transportation facilities are not disrupted. Franchises commonly provide for the manner in which utilities place facilities in public streets so as to reduce this disruption. Cities also seek, on the public's behalf, franchise fees as rental payments for the special use of the public right of way and compensation for the inconvenience and expense caused by utility equipment on public streets and disruption of traffic, and to prevent the general taxpayers from subsidizing such extraordinary use.

A franchise is a contract adopted by ordinance and is as binding as the terms of any other contract. Depending on the provisions of the franchise, the law of contracts, and the terms of legislation, franchise provisions can operate independently of changes to local, state and federal law.

Franchise terms cannot be perpetual, and statute limits terms to 20 years. The term of the franchise usually reflects a balance of concerns that changing law or technology should be accommodated over time and the desire of the franchisee to amortize the expenditures of facility construction.

Franchises are usually nonexclusive, unless an exclusive franchise is authorized by law. Telecommunications and cable franchises may not be exclusive.

Franchise fees are a form of rental payment for use of the right-of-way. They are regarded both as a cost of doing business on public rights of way (utilities would otherwise have to acquire easements over myriad private properties) and as a reimbursement for the costs of right-of-way and franchise management. The fees work much like a gross receipts tax and are typically calculated based on a percentage of the revenues derived from sales of the utility company to customers in the city.

The "cost of doing business" aspect to franchise fees and privilege taxes have implications for rate making and the appearance of customer bills. The Oregon Public Utility Commission has adopted rules that define what percentage of city-imposed fees or taxes are allowed as operating expenses and reflected in the rates, and what percentage may be itemized on billing statements. The amounts beyond

which the utility may pass on charges to users of the utility are 3.5 % for electric and water utilities, 3 % for gas utilities, and 4% for telecommunications utilities.

Federal and state law provides certain limitations on the amount that a local government may collect for use of the right-of-way. ORS 221.515 provides for a privilege tax of up to 7% of local exchange revenues earned by telecommunications carriers operating in the city. ORS 221.450 provides for imposition of a privilege tax of 5% of gross revenues for specified utilities operating without a franchise. The federal Cable Act limits cable franchise fees to 5% of gross revenues per year. There are no legal limits on the franchise fees competitive local exchange carriers (e.g. Time Warner, Integra Telecom), and pass-through providers may pay (using right-of way but not serving customers in the city). Federal law does require that these competitors be treated in a reasonably comparable (non-discriminatory) fashion, though specifics of what this actually entails are being litigated in many forums all over the country, and legislation at the federal and state levels is likely.

Franchise agreements are negotiated with each utility. The problem with franchises is that they all must be negotiated and agreed upon, and, because the agreements are a product of "slice in time" regulatory *milieu*, franchise agreements may reflect varying provisions, even between comparable utilities.

The modern trend is for cities to enact regulation outside of their franchise regulatory guidelines.

### C. General Ordinance Regulation

A general right of way ordinance would provide the minimum regulations necessary for the general welfare by specifying the conditions for construction and maintenance of utility facilities within the right-of-way. Adopting regulations outside of the franchise agreements would apply to similarly situated providers and would eliminate the need for multiple contracts and negotiations. The intent of a general ordinance is non-discrimination and an effort to provide, to the extent practicable, a level playing field for the class of utilities utilizing the right-of-way for the bulk of their facilities. At the same time, the general ordinance approach enables the city to unilaterally enact desired regulations and retain the regulatory flexibility to meet changing conditions, including negotiation of franchises with willing utilities. It would also position the City appropriately in preparation of anticipated changes in federal and state laws.

The recent inability of the city to come to a negotiated franchise agreement with Verizon is an example of how the tension between service provision and regulation could be mitigated by a general ordinance. Following much negotiation, the city and the telephone company had divergent views about the term of the new telecommunications franchise, who bore the cost of relocating utility lines, and the requirement for franchising additional services. Provision of the upgrade to Verizon's services via extra high speed broadband fiber optic cable foundered on an inability to come to terms. With a general ordinance specifying certain minimum

standards for installation, under grounding, and relocation, (which Verizon and other affected utilities were able to comment on and shape), Verizon will be able to provide upgraded service to the citizens of Wilsonville under conditions that preserve the public welfare.

Major features of the right-of-way ordinance are as follows:

- 1) A right of way permit is required for any installation of facilities in the right-of-way. "Right-of-way" includes the traditional concept of dedicated street area, but also public easements and public utility easements (PUEs).
- 2) Application for the permit is to the City Engineer or designee. Construction plan documents and the provision of other information is required for application completeness and approval.
- 3) Aerial facilities are prohibited (under-grounding of all new equipment is required) except where there are no current underground facilities and city has no planned and funded project to bring aerial facilities underground.
- 4) Relocation is at the User's expense to the extent a project is publicly funded. Relocation necessitated by a private developer is at the developer's expense. Relocation that is necessitated by a joint public/private project requires that the User pay for a portion of the relocation costs equal to the percentage of city funding.
- 4) Public liability insurance, financial assurances, and indemnification are required as a condition of the permit.
- 5) Separate franchises are to be provided if legally required and, to the extent allowed by law, are discretionary with the User and the city negotiating terms at variance with the general ordinance.

In the process of drafting the right-of-way ordinance, the staff has endeavored to accommodate the concerns of the utilities. One of the primary areas of concern involved under grounding and relocation of facilities, and collaboration resulted in the language of features 3) and 4) above. Another concern involved equal treatment and non-discrimination. The ordinance provides for such "level playing field" requirements, which makes for good administrative practice and potentially improves the defensibility of the ordinance should it be challenged.

#### D. Privilege Tax Ordinance

"Privilege tax" is a term from state statute and refers to a fee that a municipality may charge to utilities for use of the municipality's right-of-way. The tax for the privilege of using public property is in-lieu of a franchise fee and would be imposed by council by ordinance. In cases where providers and the city cannot or do not wish to negotiate franchise agreements, the privilege tax ordinance would ensure public compensation for use of the right-of-way.

The privilege tax ordinance may provide for a tax in excess of franchisee fees, but depending on the franchise or applicable state or federal law limitations noted above, may not work a change in the amount of compensation for use of the right-of-way.

Most of the franchises in the city provide for an increase of the fee based upon a change in law, upon notice or agreement, so there will not be an increase in franchise fees under the Privilege Tax ordinance for franchised utilities. The council may act to raise franchise fees under the franchise agreement in a process separate and apart from the present legislation. The exception to this is for Telecommunications carriers – incumbent local exchange carriers – which staff is recommending be subject to a 7% of gross revenues, rather than the 5% that is provided in expired but extended month to month franchises. This has been discussed and reserved as a potential revenue increase for incumbent local exchange carriers (ILECs) without a franchise. Verizon and Century Tel are the only ILECs in Wilsonville utilities subject to the change and Verizon has not objected to the increase. The increase is ultimately a council decision. In this connection, the finance department reports that a 7% privilege tax for telecommunications carriers would net approximately \$38,500 additional revenue – an amount that is expected to decline in the future as more and more of this revenue is lost to wireless providers, who, because of the lack of right-of-way based facilities, are not regulated by the right-of-way ordinance.

As to privilege tax amounts, staff is recommending the following

The recommended tax amounts are as follows:

- 1) Telecommunications carriers – 7% gross revenues
- 2) All other providers/users – 5%
- 4) "Pass through" users (those not serving city residents) \$.075 per calendar quarter per foot of facility in the right-of-way.
- 5) Non right-of-way based utilities (e.g., wireless) with antennas/other facilities in right-of-way, a privilege tax as negotiated with the city.

Utilities newly serving Wilsonville would be subject to the privilege tax ordinances. Again, with the exception of the telecommunication carriers, the effect of the privilege tax ordinance is revenue neutral. This is because franchised utilities are subject to franchise fee provisions in respective agreements, and while these fees may be adjusted under the terms of the franchises, the privilege taxes provided in the ordinance do not automatically apply until existing franchises terminate.

Major features of the privilege tax ordinance include provision for the amount of the tax, the manner in which the tax is paid, accounted for and audited. Should the city independently increase franchise fees under franchise agreements, the ordinance provides for a credit towards the tax in the full amount of the franchise fee paid.

Input from utilities reprised the non-discrimination principle, which staff has attempted to incorporate. As requested, permit fees are limited by the ordinance to amounts reasonably calculated to defray administrative costs. Other procedural matters have been particularized so as to provide clarity. Several areas of concern have not been modified by staff. These include City use of utility trenches,

limitations on the city's ability to conduct audits, and reiteration of applicable laws (which in staff's view need not be specified).

#### Conclusion and Recommendation.

As noted, staff has received input from utilities and modified many aspects of the ordinances to hopefully achieve a workable and fair regulatory scheme. Staff recommends the adoption of the ordinances. New (and perhaps outstanding) issues may be raised in the context of the public hearing, in which case staff will address those the council finds meritorious with amendments for the second reading of the ordinances slated for December 18, 2006.



## **ORDINANCE NO. 615**

### **AN ORDINANCE OF THE CITY OF WILSONVILLE ADMINISTERING RIGHTS-OF-WAY AND PUBLIC EASEMENTS, AMENDING CHAPTER 3 OF THE WILSONVILLE CODE BY ADDING SECTIONS 3.300 TO 3.410 THERETO.**

WHEREAS, the City of Wilsonville owns or holds in trust certain rights-of-way and easements within the City; and

WHEREAS, persons, utility companies and other entities often desire to construct or install, relocate, operate or maintain certain facilities within City rights-of-way and easements; and

WHEREAS, the City requires that to occupy or encroach on a right-of-way or easement, the person or entity receive permission from the City in the form of a franchise, license or permit; and

WHEREAS, because the form and terms of permission has varied over time, and given the differential regulatory policy reflected in the various franchises, licenses and permits, there has not been a common and consistent application of the standards for placing, relocating and maintaining facilities in the right-of way or easement; and

WHEREAS, a uniform right-of-way and public easement policy would 1) assure that all utilities operating, placing, relocating and maintaining facilities and/or services within the City comply with the ordinances, rules and regulations of the City, 2) assure that the City can continue to fairly and responsibly protect the public health, safety and welfare of its citizens, 3) permit and manage reasonable access to the public rights-of-way and easements of the City, on a competitively neutral and non-discriminatory basis, and conserve the limited physical capacity of those public rights-of-way and easements and 4) enable the City to discharge its public trust consistent with the rapidly evolving federal and state regulatory policies, industry competition and technological development; and

WHEREAS, the council desires to achieve these purposes by enactment of this Ordinance;

NOW, THEREFORE, THE CITY OF WILSONVILLE ORDAINS AS FOLLOWS:

**Section 1.** Chapter 3 of the Wilsonville Code is amended by adding the following sections:

**Right-of-Way and Public Easement Management**

**3.300 Intent and Scope**

- (1) Pursuant to the statutes of the State of Oregon and the powers granted in the Charter of the City, the City Council declares its intent to acquire, own, operate, maintain, and manage rights-of-way and to acquire, maintain, and manage public easements.
- (2) The purpose of this chapter is to provide for the non-discriminatory and competitively neutral management of the public rights-of-way and public easements in the interest of public safety and convenience and the protection of public infrastructure.
- (3) When any of the words or requirements under this chapter are ambiguous and subject to interpretation, they shall be interpreted and applied so as to avoid a violation of federal or state law.
- (4) If any section, sentence, clause or provision in this chapter is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state law, the remainder of this chapter shall not be affected.

**3.310 Definitions.**

The following definitions shall apply generally to the provisions of this chapter:

- (1) **City.** "City" means the City of Wilsonville, an Oregon municipal corporation, and all of the territory within its corporate boundaries, as may change from time to time.
- (2) **City's Authorized Representative.** "City's authorized representative" means the staff or person(s) as designated by the City Engineer to represent the City and/or oversee User's work.
- (3) **City Facilities.** "City Facilities" means City or publicly-owned structures or equipment located within the Right-of-Way or public easement used for governmental purposes.
- (4) **Equipment or Facilities.** "Equipment" or "facilities" means any tangible component, whether referred to singly or collectively, installed, maintained, or

operated by User within the right-of-way, public easement, or public utility easement. By way of example, the terms means any pole, wire, sensor, loop, light, stabilization or "guy" wire, anchor, pipe, conduit, line, main, duct, cable, wire, switch, transformer, valve, antennae or other equipment, including any equipment box or vault, located wholly or in part under, on, or above the surface of the ground within any right-of-way or easement. "Facility" includes any item placed in the right of way for the purpose of providing electric power, natural gas, telephone, telecommunications, radio, cable television, internet access, sewer, water, storm sewer or other utility or similar service.

- (5) **Franchise.** "Franchise" means an agreement between the City and User which grants a privilege to use public Right-of-Way, public easement or public utility easements within the City for a dedicated purpose and for specific compensation.
- (6) **Non-City Facilities.** "Non-City Facilities" means light poles, utility poles, pipes, cable, wire, conduit, vaults, ducts, fiber or similar equipment that is not owned or operated by the City and that is lawfully placed in the Right-of-Way, public easement or public utility easement.
- (7) **Person.** "Person" means any individual, sole proprietorship, partnership, corporation, association or other organization authorized to do business in the State of Oregon, and includes any natural person.
- (8) **Right-of-Way.** "Right-of-Way" means the space in, upon, above, along, across, over or under the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lanes, and places used or intended to be used by the general public for travel as the same now or may hereafter exist, that the City has the right to allow User to use. Right-of-Way shall not include the airspace above the right-of-Way used for cellular mobile radio service or broadcast television service.
- (9) **Public Easement.** "Public easement" means the space identified within the easement document this is in, upon, above, along, across, over or under the publicly owned and maintained storm, sanitary, or water facility.
- (10) **Public Utility Easement.** "Public utility easement" means the space in, upon, above, along, across, over or under the easement as identified within the easement document. By way of general description, public utility easements are typically created along the border(s) of a tax lot or frontage along public right-of-way and are intended for the use of utility companies to operate, place, relocate and maintain facilities in accordance with city requirements and standards.
- (11) **User.** "User" means a Person that performs Work within the Rights-of-Way, public easement or public utility easements, whether or not a permit is applied for or granted.

- (11) **Work.** "Work" means excavation or fill, or the construction, demolition, installation, replacement, or relocation of Equipment, within the Right-of-Way, public easement or public utility easement.

### **3.320 Permits.**

- (1) **Permit Required.** No Person or User shall occupy or encroach on Right-of-Way, Public Easement or Public Utility Easements, nor store materials in, or perform Work, or place, relocate or maintain facilities located within Right-of-Way or easements without first obtaining a permit from the City. Application for such permit shall include at a minimum proposed construction plans and traffic control plans and shall be accompanied by an application fee. Permits are not required for routine maintenance or repair of above ground Equipment, the installation of new replacement cables or wires on existing aerial facilities, when the installation, maintenance or repair will not impact vehicular, pedestrian, or bicycle traffic by closing or blocking or partially obstructing a lane of travel and for the installation of individual customer service connections, repairs or maintenance that does not require cutting or breaking of the roadway, curb or sidewalk.

Emergency responses related to existing facilities, in order to prevent service interruptions or the imminent threat of harm to persons and property, may be undertaken without first obtaining a permit; however, the City Engineer shall be notified immediately, or as soon as reasonably possible after cessation of the emergency regarding work performed, or being performed, in the Rights-of-Way.

This permit is labeled a "Right of Way and Public Easement Use Permit." The City Engineer or City's authorized representative is authorized to establish application forms, reasonable right-of-way management procedures, terms, and conditions for such permits, approve or deny permit applications, and perform such other acts as provided by this ordinance .

(a) **Determination by City.** The City's authorized representative shall, within 30 days of receipt of a complete permit application, issue a written determination granting, granting with conditions, or denying the permit in whole or in part. If the permit is denied, the written determination shall include the reasons for denial. The permit shall be evaluated based upon the demonstrated ability of the permit applicant to meet the terms of this chapter, the continuing capacity of the public right-of way or public easement to accommodate the permit applicant's proposed facilities and the applicable federal, state and local laws, rules and polices. If denied, the applicant may appeal to the City Council.

(b) **Additional Terms and Conditions.** If the public interest warrants, The City Engineer or authorized representative and User may negotiate non-discriminatory additional terms and conditions regarding the management of the right-of-way to clarify, enhance, expand, waive or vary the provision of this chapter. The

additional terms and conditions may conflict with the terms of Section 3.300 to 3.410 with the review and approval of City Council. Such additional terms and conditions shall be in writing and signed by both the City and applicant.

- (2) **Permit Non-Exclusive.** The permit is not exclusive. The City expressly reserves the right to grant permits or rights to other Persons, as well as the City's right to use the Right-of-Way or public easement for similar or different purposes, as allowed hereunder. The permit is subject to all recorded deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record that may affect the Right-of-Way or public easement. Nothing in the permit shall be deemed to grant, convey, create, or vest in User a real property interest in land, including any fee, leasehold interest, or easement.
- (3) **Reservation of City Rights.** Nothing in the permit shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Right-of-Way, Public Easement or public utility easement, laying down, repairing or removing water mains or constructing or establishing any other public work, utility or improvement, including repairs, replacement or removal of City Facilities. If any of User's Equipment interferes with the construction or repair of any Right-of-Way, public easement, public work, City utility, City improvement, or City Facility, and the City and User are unable to find a reasonable alternative, User's Equipment shall be removed or relocated as provided in 3.340 below, in a manner acceptable to the City, and subject to industry standard engineering and safety codes.
- (4) **Permit Fee.** The application for a permit shall be accompanied by a permit fee which shall be set and adjusted by the City Manager in an amount designed to reasonably defray administrative expenses.

### **3.340 Construction, Installation and Relocation**

- (1) **Construction and Installation.** Subject to the terms of the permit, User may enter upon the Right-of-Way, Public Easement or public utility easement to perform all Work that is necessary to install, operate, maintain, remove, reinstall, relocate, and replace Equipment in or on User's Facilities or in or on City Facilities. All work shall be in conformance with the Public Works Standards and other federal, state, or local laws and ordinances. The City may determine the methods used to place Equipment to the extent such methods are reasonable and feasible. Any disturbance to existing City or private facilities shall be immediately repaired and brought to equal or better condition.
- (2) **No Interference.** User, in the performance and exercise of its rights and obligations under the permit, shall not interfere in any manner with the existence and operation of any Rights-of-Way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, traffic control signals, light poles, utility poles, pipes, cable, wire,

sensor, loop, light, stabilization or "guy" wire, anchor, conduit, line, main, switch, transformer, antennae, vaults, ducts, fiber, cable television, and other telecommunications, utility, communication system or municipal property, without the express written approval of the owner or owners of the affected personal property or properties. Upon notification by the City, User may be required to review plans of others to determine if interference may occur.

- (3) **Under Grounding Required.** All new equipment or facilities shall be constructed pursuant to W. C. 4.300 – 4.320. User is prohibited from installing any new aerial cables, wire, or conduit except in locations where existing aerial cables, wire, or conduit have not yet been brought underground, permission for attachment or over-wrapping is obtained, and the City has no planned and funded construction project to bring aerial utilities underground.

When new construction occurs, existing overhead equipment or facilities on the project site or immediately adjacent to the project site, shall be brought underground, wherever reasonably possible, in a location acceptable to the City. The cost of bringing such equipment or facilities underground (but not the cost of any upgraded equipment or facility) shall be the responsibility of the developer responsible for the project site.

- (4) **Hours of Work.** Except for emergencies, hours of work are as follows:

Monday through Friday:	7:00 a.m. to 8:00 p.m. Pacific Standard Time
Monday through Friday:	7:00 a.m. to 9:00 p.m. Pacific Daylight Time
Saturday:	9:00 a.m. to 6:00 p.m. Pacific Standard Time
Saturday:	9:00 a.m. to 7:00 p.m. Pacific Daylight Time
Sunday:	No work Allowed unless authorized by the City Engineer

- (5) **Obtaining Required Permits.** If the excavation, installation, operation, maintenance, removal, reinstallation, relocation or replacement of the Equipment in the Right-of-Way or easement requires any additional permits, User shall obtain the permits and pay any standard and customary permit fees as provided by law.

- (6) **Plans.** Upon request, and in a generally recognized format acceptable to the City, each User shall provide the City with an accurate map(s) certifying the approximate horizontal and vertical location, size and type of material of all of User's under ground facilities within the public Rights-Of-Way, Public Easement or Public Utility Easement or easements or a portion thereof. A User shall not be required to "pothole" or conduct "vertical locates" to satisfy a mapping request unless reasonably required for the design of a City public improvement project. For 100% City-financed projects, City shall be responsible for any elevation surveys and contacting Digsafelyoregon.com (one call) for any pre-engineering locates.

- (7) **Duty to provide information.** Within sixty (60) business days of a written request from the City, each User shall:
- (a) Furnish the City with information sufficient to demonstrate that User has complied with all requirements of this ordinance provided that the city outline the specific area(s) and matter for which City is reviewing the Users compliance .
  - (b) Make available for inspection by the City at reasonable time and intervals all maps, diagrams, plans and other documents, maintained by the User that describe or locate facilities within the public Right-of-Way or easement.
- (8) **Relocation.** City shall have the right to require User to change the location of its Equipment or to remove its Equipment from the Right-of-Way, Public Easement or Public Utility Easement. Costs for relocation or removal necessitated for anything other than publicly-funded projects shall be borne by the Person requesting/ necessitating relocation or removal. User shall pay the cost for relocation of User's Equipment for publicly-funded projects to the extent the City is not reimbursed . When a project is funded with both private and public funds, User shall pay the percentage of the costs that is equal to the percentage of City funds that were spent on the relocation. Prior to relocation, the City shall make a reasonable effort to find an alternative location within a public Right-of-Way for relocated facilities. If User shall fail to relocate or remove any Equipment as requested by the City by the date established by the City, the City may cause the Equipment to be removed at User's sole expense. Upon receipt of a detailed invoice for payment from the City, User shall reimburse the City for the costs the City incurred within sixty (60) days. This subsection operates concurrently with Oregon Administrative Rules.
- (9) **Repairs and Restoration.** Repairs to existing City Facilities that have been damaged during User's installation, operation, maintenance, removal, reinstallation, replacement or relocation of Equipment in the Right-of-Way or easement and/or restoration of landscaping shall be in conformance with the Public Works Standards. If User does not repair the Right-of-Way or easement to at least the condition that existed prior to construction within the time frame given in the permit or as otherwise agreed to by the City, then the City may, upon fifteen (15) days (or less if public safety requires) prior written notice to User, repair the Right-of-Way or easement at User's sole expense. Upon the receipt of a detailed invoice from the City, User shall reimburse the City for the costs the City incurred within sixty (60) days.
- (10) **Use by City.** The City, at its cost, may install pipes or conduit in any trench or excavation created by User, to the extent that such space therein or thereon is reasonably available. The City may also require User to excavate trenches larger than needed by User, with the excess capacity to be utilized by the City and with the City responsible for the incremental cost provided that such requirement does not impose unreasonable delay on the User's construction activities.

(11) **Safety.** User shall perform all Work in a manner that ensures safety of workers and the public. Safety requirements and traffic maintenance shall be in conformance with the Public Works Standards.

(12) **Moving of Structures and Equipment.** Whenever it becomes necessary to allow for the passage of buildings, machinery or other objects, User shall temporarily rearrange, remove, lower or raise its wires, cables or other Facilities as necessary, at no cost to the City. However, any person or persons, other than the City, desiring to move any such buildings, machinery or other objects, shall pay the entire actual cost incurred by User for changing, altering, moving, removing or replacing its wires, cables, or other Facilities so as to permit such passage, and shall deposit in advance with User a sum equal to such cost as estimated by User. The person or persons that requested the move shall pay all direct damages caused directly by the changing, altering, moving, removing or replacing of such wires, cables or other Facilities, except for damages and claims that are the direct result of User's negligent acts. Except in an emergency, User shall be given not less than thirty (30) days written notice by the party desiring to move such building or other objects. Such notice shall detail the route of movement of such buildings or other objects over and along the streets, alleys, avenues, thoroughfares and public highways of the City. Upon receiving required notice, User shall complete such moves as soon as practicable, and without undue delay. Furthermore, the passage of buildings, machinery or other objects shall be with as much haste as possible and shall not be necessarily delayed or cause User unnecessary expense or waste of time.

**3.350 Maintenance.** User shall install and maintain all Equipment in a manner that prevents injury to the Right-of-Way, Public Easement or Public Utility Easement, the City's property or the property belonging to another person. User shall, at its own expense, repair, and maintain Equipment from time to time as may be necessary to accomplish this purpose.

**3.360 Vacation.** If the City vacates any Right-of-Way, or portion thereof, that User uses, User shall remove its Equipment from the Right-of-Way at its own expense unless the City reserves a public utility easement, which the City shall make a reasonable effort to do. User shall be notified of proposed vacation at least 90 days before User shall be required to relocate or remove its Equipment. If User fails to remove its Equipment within thirty (30) days, or as otherwise necessary to complete removal, after a Right-of-Way is vacated, the City may remove the Equipment at User's sole expense. Upon receipt of a detailed invoice from the City, User shall reimburse the City for the costs the City incurred within sixty (60) days.

**3.370 Financial, Liability and Insurance Provisions.**

**(1) Insurance.**



(a) When the City, at its sole discretion, determines that the User's Work or manner of performance warrants, User shall maintain public liability and property damage insurance that protects User and the City, as well as the City's officers, agents, and employees, from the claims referred to in Paragraph C of this Section. The insurance shall provide coverage at all times of not less than \$500,000 for bodily injury including death and personal injury for one claimant, \$1,000,000 for bodily injury including death and personal injury for each occurrence, and \$1,000,000 for each occurrence involving property damages, plus costs of defense; or a single limit policy of not less than \$1,000,000 covering all claims per occurrence, plus costs of defense. Motor vehicle liability insurance in the amount of \$1,000,000 for each occurrence shall be maintained. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. The coverage must apply as to claims between insureds on the policy. The Certificate of Insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days' prior written notice first being given to the City. If the insurance is canceled or materially altered, User shall provide a replacement policy with the terms as outlined in this Section. User shall maintain continuous uninterrupted coverage, in the terms and amounts required. User may self insure any or all of the above coverage.

(b) User shall maintain on file with the City a Certificate of Insurance or self-insurance certifying the coverage required above.

- (2) **Financial Assurance.** When the City, at its sole discretion, determines that User's Work or manner of performance warrants, the City may request and the User shall provide a financial security. The form of the financial security (bond, cashiers check, letter of credit, etc.) shall be reasonably determined by the City Engineer or authorized representative. The value of the financial security shall be in an amount determined by the City Engineer or designee but shall not exceed 150% of the engineer's estimated value of the Work the User is obligated to perform. The estimated value of the Work shall be verified by the City's authorized representative. The financial assurance instrument shall be reasonably reviewed and approved as to form by the City Attorney.

(3) **Indemnification**

(a) User shall indemnify, defend, and hold the City, its officers, agents, and employees harmless from any claims for injury, damage, loss, liability, cost or expense, including court and appeal costs and attorney fees or expenses, arising from any casualty or accident to person or property by reason of any act done under the permit, by or for User, its agents or employees, or by reason of any neglect or omission of User to keep its Equipment in a safe condition, but not if arising out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees. The City shall provide User with prompt notice of

any such claim, which User shall defend. No settlement or compromise of any such claim will be done by the City or the User without the prior written approval of the other party. User and its agents, contractors and others shall consult and cooperate with the City while conducting its defense.

(b) User shall also indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from User's failure to remove or relocate any of its Equipment in the Rights-of-Way or easements in a timely manner, unless User's failure arises directly from the City's negligence or willful misconduct or that of another User.

**3.380 Vegetation.** User shall prune or cause to be pruned any vegetation to the extent allowed by law, including but not limited to tree limbs and roots that protrude into the Right-of-Way or easement and inhibit the operation of the User's Equipment. Except for an emergency, before pruning any vegetation, User shall obtain any required permits from the City. The City shall provide notification to users of any pruning or permitting requirements. All pruning shall be done using proper arboricultural practices. User shall be responsible for the costs of pruning and of replacing or treating any vegetation that is not pruned in accordance with proper arboricultural practices and that is damaged or dies as a result. If User fails to replace or treat damaged or dead vegetation within thirty (30) days after receiving written notice from the City, the City may replace or treat the vegetation at User's sole expense. Upon receipt of a detailed invoice from the City, User shall pay the City for the costs the City incurred within sixty (60) days.

**3.390 Discontinued Use.** Whenever User discontinues use of any Equipment and does not intend to use the Equipment within six (6) consecutive months, User shall remove the Equipment from the Right-of-Way or easement unless the City agrees, in writing, that the Equipment may remain in the Right-of-Way or easement and the User conveys title or ownership of the Equipment to the City. The City shall not unreasonably withhold such agreement. If User fails to remove Equipment that is no longer going to be used, and the City has not agreed to allow User to abandon such Equipment in place, the City may remove the Equipment at User's sole expense. Upon receipt of a demand for payment from the City, User shall pay the City for the costs the City incurred within sixty (60) days.

**3.400 Assignment.** Except as provided below, the permit shall not be assigned or transferred without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned, or delayed. User may assign a franchise or permit to a parent, subsidiary, affiliate, or to any entity that acquires all or substantially all the equity or assets of User by sale, merger or otherwise without the consent of the City, but upon written notice to the City.

**3.410 Franchise Required.** Unless exempted by state or federal law, User shall enter into a non-exclusive Franchise agreement with the City for cable services and other services as specifically set forth in city code. To the extent allowed by law, the

requirements of this chapter may be varied or waived by the provisions of a franchise agreement, provided that no such franchise or similar lawful authorization shall contain material terms or conditions which are substantially more favorable or less burdensome than the material terms and conditions in other Users' existing franchises.

**Section 2.** To the extent that this ordinance is not in conflict with, and can be implemented with, User's existing Franchise agreements, this ordinance shall apply to all such Franchise agreements for use of the public Rights-of-Way or public easements.

**Section 3.** Severability. In the event any provisions of this Ordinance shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

SUBMITTED to the Wilsonville City Council and read for the first time at a regular meeting thereof on the 4<sup>th</sup> day of December 2006, at the hour of 7:00 p.m. at the Wilsonville City Hall, 29799 SW Wilsonville Road, Wilsonville, Oregon, and scheduled for second reading on the 18th day of December 2006, commencing at the hour of 7:00 p.m. at the Wilsonville City Hall.

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Sandra C. King, MMC, City Recorder

ENACTED by the City Council on the \_\_\_\_ day of \_\_\_\_\_, 2006, by the following votes: YEAS: \_\_\_\_ NAYS: \_\_\_\_

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Sandra C. King, MMC, City Recorder

DATED and signed by the Mayor this \_\_\_\_ day of \_\_\_\_\_, 2006.

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CHARLOTTE LEHAN, MAYOR

**SUMMARY OF VOTES:**

Mayor Lehan	_____
Councilor Kirk	_____
Councilor Holt	_____
Councilor Knapp	_____
Councilor Ripple	_____

AFFIDAVIT OF POSTING ORDINANCE NO. 39

STATE OF OREGON                    )  
  )  
Counties of Clackamas            )  
and Washington                    ) ss.  
  )  
City of Wilsonville                )

I, the undersigned, City Recorder of the City of Wilsonville,  
Oregon, being first duly sworn on oath depose and say:

On Tuesday the 16th day of October, 1973, I caused to be  
posted copies of the attached Ordinance No. 39 in the following three  
(3) public and conspicuous places of the City, to-wit:

1. Wilsonville City Hall
2. Kopper Kitchen Restaurant
3. Wilsonville United States Post Office

The Notices remained posted for more than five (5) consecutive  
days prior to the time for final reading and passage of the  
Ordinance on the 22nd day of October, 1973.

Dated at Wilsonville, Oregon this 16th day of October, 1973.

Margie A. Hintz  
City Recorder

Subscribed and sworn to before me this 16th day of October, 1973.

Steven Peters  
Notary Public for Oregon  
My Commission expires: 9-6-77

ORDINANCE NO. 39

AN ORDINANCE RELATING TO UNDERGROUND UTILITIES AND REQUIRING THEIR  
INSTALLATION IN ALL NEW SUBDIVISIONS.

THE CITY OF WILSONVILLE ORDAINS AS FOLLOWS:

SECTION 1:

A. The City Council deems it reasonable and necessary in order to accomplish the orderly and desirable development of land within the corporate limits of the City of Wilsonville to require the underground installation of utilities in all new subdivisions.

B. After the effective date of this Ordinance, the approval of any plat or subdivision of land within the City will be upon the express condition that all new utility lines, including but not limited to those required for power, communication, street lighting, gas, cable television services and related facilities, shall be placed underground.

SECTION 2:

A. Section 1 of this Ordinance shall not apply to surface mounted transformers, surface mounted connection boxes, and meter cabinets and other appurtenances which are reasonable necessary to be placed above ground, or to temporary utility service facilities during construction, or to high capacity electric and communication feeder lines, or to utility transmission lines operating at 50,000 volts or above.

SECTION 3:

A. The subdivider shall be responsible for and shall make all necessary arrangement with the serving utility to provide the underground services described in Section 1 hereof (including cost of rearranging any existing overhead facilities). All such underground electric and communication facilities as described above shall be constructed in compliance with the rules and regulations of the Public Utility Commissioner of the State of Oregon relating to the installation and safety of underground lines, plant, system, equipment and apparatus.

B. The location of the buried facilities shall conform to standards supplied to the subdivider by the City. The City also reserves the right to approve location of all surface mounted transformers.

C. Interior easements (back lot lines) will only be used for storm or sanitary sewers, and front easements will be used for other utilities unless different locations are approved by the Planning Commission. Easements satisfactory to the serving utility shall be provided by the subdivider and shall be set forth on the plat.

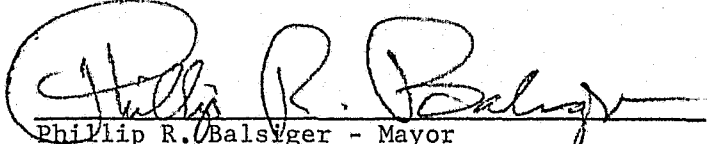
SECTION 4:

A. All Ordinances, or parts of Ordinances, in conflict herewith are hereby repealed

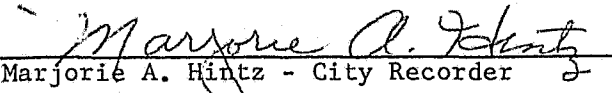
SECTION 5:

This Ordinance shall take effect immediately upon its final reading and passage by the City Council.

Passed on first reading at a regular meeting of the Wilsonville City Council on the 8th day of October, 1973; ordered posted in three (3) public and conspicuous places in the City of Wilsonville for a period of five (5) consecutive days as required by the Wilsonville City Charter, and to come up for final reading and action of the Wilsonville City Council at a regular meeting thereof on the 22nd day of October, 1973, at the hour of 7:30 o'clock p.m. at the Council's regular meeting place in the Wilsonville City Hall.

  
Phillip R. Balsiger - Mayor

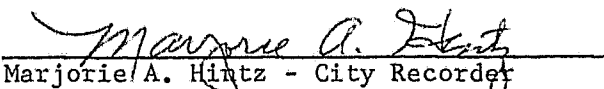
ATTEST:

  
Marjorie A. Hintz - City Recorder

Passed on final reading of the Wilsonville City Council at a meeting thereof on the day of 22<sup>nd</sup> of October, 1973, by the following vote: Yeas 5. Nays       .

  
Phillip R. Balsiger - Mayor

ATTEST:

  
Marjorie A. Hintz - City Recorder