

ORDINANCE NO. 2019-07

AN ORDINANCE ENACTING RULES AND REGULATIONS CONCERNING STREET RIGHT OF WAY MANAGEMENT WITHIN THE CITY OF THE HIGHLANDS, KANSAS.

WHEREAS, the city of The Highlands, Kansas (the “City”) is a municipal corporation organized and existing under the laws of the State of Kansas, and authorized by the Kansas Constitution and state statute to determine its local affairs and to regulate the activities and installations of private entities on, in, above, and under the City’s public right-of-way (sometimes referred to herein as a “ROW”); and

WHEREAS, the Governing Body of the City finds that the public health, safety, welfare, and convenience of the City and its residents requires that it regulate the installation, construction, maintenance, and operation of lines, conduits, wires, fiber optic cables, pipes, pipelines, poles, towers, vaults, appliances, wireless communication facilities, or related facilities on, in, above, and under the public right-of-way within the City as well as the construction of driveway entrances to public streets.

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF THE HIGHLANDS, KANSAS:

Section 1. Purpose and Policy.

- A. To recognize the City’s role as the primary steward of the right-of-way and the City’s duty to its citizens to recover the costs of managing the right-of-way and incursions into it;
- B. To regulate conditions of occupancy and construction for those ROW-users occupying space within the City’s right-of-way given the anticipated increased use of the right-of-way by various ROW-users;
- C. To recognize the necessity for sound management practices consistent with the increased use of the City’s right-of-way and the fact that the right-of-way is a limited resource;
- D. To treat each ROW-user equitably and in a competitively neutral manner with considerations that may be unique to the technologies and situation of each particular ROW-user;
- E. To minimize disruption, visual impact, or inconvenience to the public, and to preserve the public, health, safety, and welfare; and
- F. To comply with state and federal law.

Section 2. Definitions.

For purposes of this Ordinance, the following words and phrases shall have the meaning given herein:

- A. **“Abandoned facilities”** means those facilities owned, constructed, or installed by the ROW-user that are not in use and are unlikely to be utilized in the future.
- B. **“Affiliate”** means any person controlling, controlled by, or under the common control of a “service provider.”
- C. **“Applicant”** means any person requesting permission to occupy, lease, or operate facilities using the right-of-way, or to excavate any area within the right-of-way.
- D. **“Associated equipment”** means any and all on-site equipment, including, without limitation, back-up generators and power supply units, cabinets, coaxial and fiber optic cables, connections, shelters, radio transceivers, regular power supply units, and wiring, to which a wireless antenna is attached in order to facilitate mobile broadband service and personal wireless service delivered on mobile broadband devices.
- E. **“Base station”** means a structure or equipment at a fixed location that enables FCC-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined herein or any equipment associated with a tower. The term includes, without limitation:
 - i. Equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul;
 - ii. Radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems (“DAS”) and small-cell networks); and
 - iii. Any structure other than a tower that, at the time the relevant permit application is filed with the City under this Ordinance, supports or houses equipment described in paragraphs (i)-(ii) above that has been reviewed and approved by the City.
- F. **“City”** means the city of The Highlands, Kansas, a municipal corporation, and any authorized representative thereof.

- G. **“Collocation”** means the mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.
- H. **“Construct”** means to install, erect, build, affix, or otherwise place any fixed structure or object in, on, under, through, or above the right-of-way.
- I. **“Eligible support structure”** means any tower or base station that exists at the time the application is filed with the City.
- J. **“Emergency”** means a condition that (1) poses a clear and immediate danger to life or health or of a significant loss of property; or (2) requires immediate repair or replacement in order to restore service to a user.
- K. **“Excavate”** means and includes any cutting, digging, excavating, tunneling, boring, grading, or other alteration of the surface or subsurface material or earth in the right-of-way.
- L. **“FCC”** means the Federal Communications Commission or its successor agency.
- M. **“Facility”** or **“facilities”** means lines, pipes, irrigation systems, wires, cables, conduit facilities, manholes, ducts, poles, towers, vaults, pedestals, boxes, appliances, antennae, transmitters, gates, meters, splice pits, wells, drains, sewer lines, appurtenances, wireless communication facilities or other equipment, or other structures.
- N. **“Facility based service provider”** means a service provider owning or possessing facilities in the right-of-way, whether they provide service within the City or outside the City.
- O. **“Franchise Contract Ordinance”** means a City Ordinance enacted to authorize a Service Provider to use equipment and materials installed in, on or above a City Right-of-Way in order to provide a Service to residents of the City for the purpose of generating revenue.
- P. **“Governing Body”** means the City Council of the city of The Highlands, Kansas or its designee.
- Q. **“KCC”** means the Kansas Corporation Commission or its successor agency.
- R. **“Kansas One Call”** or **“One Call”** means the statewide notification system established pursuant to the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 *et seq.*
- S. **“MUTCD”** means the latest edition of the Federal Highway Administration’s Manual on Uniform Traffic Control Devices.

- T. **“Pavement”** means the weatherproofing and load distributing surface coverings of the portions of the right-of-way intended for vehicular or pedestrian use, including Portland cement concrete pavement, asphalt concrete pavement, asphalt treated road surfaces, any aggregate base material, and brick.
- U. **“Person”** means any natural or corporate person, business association, or business entity including, but not limited to, a partnership, a sole proprietorship, a political subdivision, a public or private agency of any kind, a utility, a successor or assign of any of the foregoing, or any other legal entity.
- V. **“Permittee”** means any person to whom a right-of-way permit is issued to perform excavation or work regulated by this Ordinance in a right-of-way.
- W. **“Public improvement”** means any project undertaken by the City for the construction, reconstruction, maintenance, or repair of any public infrastructure, and including, without limitation, streets, alleys, bridges, bikeways, sidestrips, sidewalks, sewers, drainage facilities, traffic control devices, street lights, public facilities, public buildings, or public lands.
- X. **“Public lands”** means any real property of the City that is not right-of-way.
- Y. **“Repair”** means the construction work necessary to restore the right-of-way to its previous configuration and use.
- Z. **“Reseller service provider”** means a service provider providing service within the City limits that does not have its own facilities in the right-of-way, but instead uses the right-of-way by interconnecting with or using the network elements of another service provider utilizing the right-of-way, or by leasing excess capacity from a facility-based service provider.
- AA. **“Restoration”** means the process by which an excavated right-of-way and surrounding area, including pavement and foundation, is returned to the same condition, or better, that existed before the commence of the work.
- BB. **“Right-of-way”** means only the area of real property in which the City has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below, or above the present and future streets, alleys, avenues, roads, highways, parkways, highways, bikeways, sidewalks, or boulevards dedicated or acquired as a right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other nonwire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

- CC. **“Right-of-way permit”** or **“permit”** means the authorization to excavate, disrupt, or obstruct for the construction, installation, repair, or maintenance of any type of facility or for the performance of work within the right-of-way.
- DD. **“Routine service operation”** means a work activity that does not require excavation with mechanical equipment and that makes no material change to the facilities, is performed on existing facilities to ensure the safe and continued corporation of the system, and does not disrupt traffic.
- EE. **“ROW-user”** means a person, its successors and assigns, that uses the right-of-way for purposes of work, excavation, provision of services, or to install, construct, maintain, repair facilities thereon, including, but not limited to, landowners and service providers. A ROW-user shall not include ordinary vehicular or pedestrian traffic, the City, any governmental entity that has entered into an agreement with the City regarding the use and occupancy of the City’s right-of-way, or a reseller service provider that does not own or control its own facilities in the right-of-way.
- FF. **“Service”** means a commodity provided to a person by means of a distribution, transmission, or collection system that is comprised of facilities located or to be located in the right-of-way, including, but not limited to: gas, telephone, cable television, internet services, open video systems, alarm systems, steam, electric, water, telegraph, data transmission, petroleum pipelines, or sewer systems.
- GG. **“Service provider”** means any person that is a provider of a service for or without a fee that has the requisite certifications and authorizations from applicable governmental entities, including the KCC and the FCC, to provide such service. Service provider includes both facility-based service providers and reseller service providers.
- HH. **“Street”** means curb and gutter, pavement and sub-grade of a City residential, collector, arterial, or limited access roadway.
- II. **“Tower”** means any structure built for the sole or primary purpose of supporting any FCC-licensed or -authorized antenna, including any structure that is constructed for wireless communications service. This term does not include a base station.
- JJ. **“Transmission equipment”** means equipment that facilitates transmission of any FCC-licensed or authorized wireless communication service.
- KK. **“Wireless communications facility”** or **“WCF”** means any antenna, associated equipment, base station, small cell system, tower, and transmission equipment located within City limits.

- LL. **“Wireless communication service”** means, without limitation, all FCC-licensed back-haul and other fixed wireless services, broadcast, private, and public safety services, and unlicensed wireless services.

Terms defined under this section have the meaning provided herein, whether capitalized or otherwise.

Section 3. Americans with Disabilities Act. Restoration of public infrastructure, including, without limitation, sidewalks, handicap ramps, and pavement, shall form to the requirements of the Americans with Disabilities Act (“ADA”), as set forth in the “ADAAG Manual, Americans with Disabilities Act Accessibility Guidelines,” developed by the U.S. Architectural and Transportation Barriers Compliance Board, latest edition. The permittee is responsible for work beyond the permittee’s work zone that may be necessary to meet ADA requirements in the permittee’s work zone.

Section 4. Compliance with the MUTCD. All ROW-users must comply with the MUTCD, which is incorporated herein by reference as if fully set forth herein.

Section 5. Permit Requirement. No person shall construct, maintain, or permit in or on any portion of the right-of-way, any fixed structure, material, or object without having obtained a right-of-way permit from the City. Except as otherwise provided, no ROW-user may excavate any right-of-way or conduct any repair, construction, or reconstruction of facilities located within the right-of-way without first having obtained a right-of-way permit from the City. This requirement shall not apply to:

- A. Contractors and City employees working on the construction or reconstruction of public improvements on behalf of the City;
- B. ROW-users performing routine service operations as defined herein; and
- C. Maintenance performed on street light fixtures or lamps which does not materially alter, add to, or take away from the structure and operations of existing facilities.

Section 6. Work Without a Permit. Except in the case of emergency work, any ROW-user found to be working in the right-of-way without a permit will be ordered to stop work until a permit is issued and properly made available for inspection at the worksite.

Section 7. Permits; Emergency Situations. An emergency situation shall not exempt ROW-users from obtaining a right-of-way permit for applicable work activities. If, due to an emergency, it is necessary for a ROW-user to immediately perform work in the right-of-way and it is impractical for the ROW-user to first get the appropriate permit, the work may be performed and the required permit will be obtained as soon as possible.

Section 8. Permit Application. An application for a right-of-way permit shall be submitted to the Governing Body by the ROW-user. All right-of-way permit applications must contain and will only be considered complete upon receipt of the following:

- A. A complete permit application form, including all required attachments and drawings showing the location and area of the proposed project and the location of all existing and proposed facilities at such location; and
- B. Payment of all money due to the City for permit fees and costs, including any such fees and costs due and unpaid from the applicant; and
- C. At the discretion of the governing body, the completion of a Franchise Contract Ordinance, passed by the City Council and signed by the Service Provider may be required. If the governing body requires a Franchise Contract Ordinance, then use of any completed facilities as a means to provide Services to residents of the City without first having that Contract Ordinance agreed to and signed by all parties shall void all prior permits and agreements between the City and the Service Provider.

Section 9. Issuance of Permit.

- A. If the Governing Body determines that the applicant has satisfied the requirements of this Ordinance, the Governing Body will issue a right-of-way permit. The Governing Body's decision shall be based upon, but not limited to, the following:
 - 1. Submission of a complete application;
 - 2. Submission of the appropriate permit fee and bond;
 - 3. Designated project commencement and termination dates;
 - 4. Sufficient scheduling and coordination information;
 - 5. Location and route of all facilities in the right-of-way;
 - 6. Description of work to be done in right-of-way;
 - 7. Compliance with all applicable codes, rules, and regulations;

8. Coordination plan with existing facilities for their removal or relation to affected facilities;
 9. Proof of liability insurance; and
 10. Other information as required by the City to protect the public health, safety, and welfare.
- B. The Governing Body may adopt and publish rules and regulations establishing reasonable conditions on the issuance of a right-of-way permit and the performance of the permittee to protect the public health, safety, and welfare, to ensure structural integrity of the right-of-way, to protect the property and safety of other ROW-users, and to minimize disruption and inconvenience to the traveling public. Any conditions shall be in writing upon or attached to the permit.
- C. Issued permits are non-transferable.

Section 10. Denial of Permit.

- A. The Governing Body may deny a permit or prohibit the use or occupancy of a specific portion of the right-of-way to protect the public health, safety, and welfare, to prevent interference with the safety and convenience of ordinary travel over the right-of-way, or when necessary, to protect the right-of-way and ROW-users. The Governing Body may consider all relevant factors in making said decision, including, but not limited to:
1. The availability of right-of-way space where the permit is sought;
 2. The competing demands for the space requested in the right-of-way;
 3. The availability of other portions of the right-of-way or in other right-of-way for the applicant's facilities;
 4. The applicability of ordinances or regulations, including City zoning and land use regulations, that may affect the location of or other standards for facilities within the right-of-way;
 5. The degree of compliance by the applicant with the terms and conditions of its franchise, this Ordinance, or other applicable ordinances and regulations;
 6. The degree of disruption to surrounding residences and communities that will result from the use of the requested portion of the right-of-way;

7. The balance of the costs of disruption to the public and damage to the right-of-way with the benefits to that part of the public served by the construction and work completed in the right-of-way;
 8. Whether issuing the right-of-way permit for the requested dates and times would cause a conflict or interfere with events held within the City. In exercising this discretion, the Governing Body will take into consideration the safety and convenience of any anticipated travel by the public over the right-of-way; and
 9. The adverse impact of the facilities or the facilities' proposed location on any reasonable public interest necessitated by the public health, safety, and welfare.
- B. Notwithstanding the foregoing, the Governing Body may exercise its reasonable judgment in issuing right-of-way permits in any case where the permit is necessary to:
1. Prevent substantial economic hardship to a user of the ROW-user's service; or
 2. Allow the ROW-user to materially improve the service it provides.
- C. The Governing Body will not issue a right-of-way permit for encroachments in the right-of-way for private purposes that create a public safety hazard or would be found a nuisance under the City's ordinances.

Section 11. Revocation of Permit.

- A. Permittees hold right-of-way permits issued under this Ordinance as a privilege, not as a right. The City reserves its right, as provided herein, to revoke any right-of-way permit, without refund of any fees or costs associated therewith, in the event of a substantial breach of the terms and conditions of any law, ordinance, or regulation, or the terms and conditions of the right-of-way permit. A substantial breach includes, but is not limited to, the following:
1. The violation of any material provision of the right-of-way permit;
 2. An attempted or actual circumvention of any material provision of the right-of-way permit, or the attempted or actual perpetration of any fraud or deceit upon the City or its citizens;
 3. Any material misrepresentation of any fact in the permit application;
 4. The failure to maintain the required bond or insurance;

5. The failure to complete the work in a timely manner;
 6. The failure to correct a condition indicated on an order issued pursuant to this Ordinance;
 7. Traffic control violations; or
 8. Failure to repair the permittee's facilities damaged in the right-of-way.
- B. If the Governing Body determines that the permittee has committed a substantial breach of any law or condition set forth in the right-of-way permit, the Governing Body will make written demand upon the permittee to remedy such violation. The demand will state that the continued violation may be cause for revocation of the permit or legal action, if applicable. Further, in the event of a substantial breach, the Governing Body, may impose additional or revised conditions on the right-of-way permit, to address or to cure such breach. Within five calendar days of receiving notification of the breach, permittee shall contact the Governing Body with a plan, acceptable to the Governing Body, for correction of the breach. Permittee's failure to contact the Governing Body, failure to submit an acceptable plan, or failure to reasonably implement the approved plan is cause for immediate revocation of the right-of-way permit.
- C. If a right-of-way permit is revoked, the permittee will reimburse the City for the City's reasonable costs, including administration costs, restoration costs, and the costs of collection and reasonable attorneys' fees incurred in connection with such revocation.
- D. Nothing in this section limits the right of the Governing Body to revoke a permit issued hereunder, with or without notice to the permittee, in the event the Governing Body finds that acts or omissions of the permittee pose a substantial and immediate danger to the public.

Section 12. Permitted Work.

- A. The permittee must identify and locate any underground facilities in conformance with the Kansas One Call system, and notice must be provided directly to the City and all applicable ROW-users and applicable utility entities.
- B. All facilities and other appurtenances laid, constructed, and maintained by the permittee shall be laid, constructed, and maintained in accordance with acceptable engineering standards and practices and in accordance with all applicable codes adopted or approved by the City, with applicable state law, and the rules and regulations of the KCC and any other local, state, or federal agency having jurisdiction.

- C. The permittee is liable for any damage to underground facilities due to its excavation work prior to obtaining the location of such facilities, or for any damage to underground facilities that have been properly identified prior to excavation. The permittee will not make or attempt to make repairs, relocation, or replacement of damaged or disturbed underground facilities without the approval of the owner of the facilities.
- D. Any contractor, agent, affiliate, employee, or subcontractor used for facilities work in the right-of-way must be properly licensed under all applicable federal, state, and local law. Each contractor, agent, affiliate, employee, or subcontractor shall be accountable for the obligations herein to the same extent as the permittee. The permittee is ultimately responsible to ensure the contractor, agent, affiliate, employee, or subcontractor fully complies with the provisions of this Ordinance and likewise will be responsible for all acts or omissions of the contractor, agent, affiliate, employee, or subcontractor. Furthermore, upon written notice by the City, the permittee shall be responsible for promptly correcting acts or omissions by any contractor, agent, affiliate, employee or subcontractor.

Section 13. Notification Requirements.

- A. Prior to the commencement of excavation, the permittee shall identify and locate buried facilities to be spray painted according to the Uniform Color Code required by Kansas One Call.
- B. If vehicle or pedestrian traffic is affected, permittee will be responsible for notifying applicable emergency services, including law enforcement, of the schedule and location of such excavation prior to the commencement of such excavation.

Section 14. Right-of-Way and Street Closure.

- A. Whenever a ROW-user excavates or disrupts any part of the right-of-way, the ROW-user has a duty to maintain an adequate passage for vehicles and pedestrians across or around the excavation until it is backfilled as specified, unless the City has authorized street closure in the ROW-user's permit.
- B. A ROW-user who excavates or disrupts the right-of-way and leaves any material, debris, or equipment in the right-of-way must ensure that the site is enclosed and properly secured with substantial and sufficient barricades, drums, plates, warning lights, and orange fencing material as required by local, state, and federal laws and regulations or by the conditions contained in the right-of-way permit.
- C. If an excavation is left open overnight, the right-of-way must be protected and secured. The permittee assumes the sole responsibility to maintain proper

barricades, plates, safety fencing, and lights as required from the time of opening the excavation until the excavation is surfaced and opened for travel.

- D. The City may close any street or any part of a street when it deems it necessary to accommodate the work in the right-of-way, for the protection of public health or safety, or because of other special conditions.
- E. A permittee will notify the City no less than three business days in advance of any excavation in or disruption of the right-of-way which requires street closure or which reduces traffic flow to less than two lanes of moving traffic.
- F. A permittee that requires a full street closure must request the same in the permittee's right-of-way application. Permittee will be responsible for traffic control in the area affected by the full street closure.
- G. The ROW-user must participate in any joint planning, construction, and advance notification of right-of-way work, including coordination and consolidation of street-cut work as directed by the Governing Body. In addition, the ROW-user must cooperate with other ROW-users and the City for the most efficient, aesthetic, and least obstructive use of the right-of-way, consistent with safety, and to minimize traffic and other disruptions, including street cuts.

Section 15. Abandoned and Unusable Facilities.

- A. A ROW-user owning abandoned facilities in the right-of-way must:
 - 1. Remove its facilities and replace or restore any damage or disturbance caused by the removal at its own expense, if required by the Governing Body;
 - 2. Provide information satisfactory to the City that the ROW-user's obligations for its facilities in the right-of-way has been lawfully assumed by another authorized ROW-user; or
 - 3. At the ROW-user's own expense, remove the facilities.
- B. A ROW-user who fails to comply with this section and whose facilities remain unused for two years will be deemed abandoned, unless the City receives confirmation that the ROW-user intends to use the facilities. Abandoned facilities are deemed a nuisance. The City may exercise all remedies or rights it has at law or in equity, including, but not limited to:
 - 1. Imposing a fee for noncompliance;

2. Calling on or otherwise demanding payment from the ROW-user's performance bond or other bonds required of the ROW-user by the City;
 3. Abating the nuisance;
 4. Taking possession and ownership of the facility and restoring it to usable function; or
 5. Requiring the removal of the facility by the ROW-user.
- C. The City may charge the ROW-user for any costs that the City incurs in taking any of the actions described in this section.

Section 16. Relocation. Whenever requested by the City, in order to accomplish construction and maintenance activities related to the public health, safety, and welfare, a service provider must promptly remove its facilities from the right-of-way or relocate or adjust its facilities within the right-of-way at no cost to the City. Such relocation or adjustment will be completed as soon as reasonably possible within the time set forth in any request by the City for such relocation or adjustment. Any damages suffered by the City or its contractors as a result of the service provider's failure to timely relocate or adjust its facilities shall be born by the service provider.

Section 17. Existing Facilities. ROW-users are required to provide detailed maps of their facilities located in the right-of-way to the City upon request.

Section 18. Wireless Communication Facilities.

- A. **Applicability.** Other requirements of applicants or ROW-users within this Ordinance shall apply to WCFs under this Section, unless such requirements conflict with the provisions of this Section.
- B. **Permit Review.** The timeframe for review of a permit application shall begin to run when the permit application is submitted, but shall be tolled if the City finds the application incomplete and requests that the applicant submit additional information to complete the permit application. Such requests shall be made within 30 days of submission of the permit application. After submission of additional information, the City will notify the applicant within 10 days of this submission if the additional information failed to complete the permit application.
- C. **Approval.** The City shall have 90 days to review collocation applications and 150 days to review and decide on all other siting and permit applications.
- D. **Denial.** Any denial by the Governing Body of a permit under this Section will, in accordance with federal and state law, be made in writing and be supported by

substantial evidence contained in the written record issued contemporaneously with said decision.

- E. **As-Built Plans.** The applicant shall submit to the Governing Body an as-built set of plans and photographs depicting the entire WCF, including all transmission equipment and associated equipment, within 90 days after the completion of construction.
- F. **Compliance with Approved Plans.** The applicant shall build any WCF and associated equipment within the specifications and details outlined in the applicant's permit application that was approved by the Governing Body.
- G. **Removal of Abandoned Equipment.** A WCF or a component of that WCF that ceases to be in use for more than 90 days shall be removed by the applicant, wireless communications service provider, or property owner within 90 days of the cessation of use of that WCF. A new permit shall not be issued to an owner or operator of a WCF or a wireless communications service provider until the abandoned WCF or its component is removed.
- H. **Interpretation.** Any words, terms, or phrases that are not defined in this Ordinance, Section, or other applicable law of the City, shall have the meanings as set forth in Chapter 6 of Title 47 of the United States Code, Part 1 of Title 47 of the Code of Federal Regulations, and, if not defined therein, their common and ordinary meaning.

Section 19. Federal, State, and City Jurisdiction.

- A. This Ordinance shall be construed in a manner consistent with all applicable federal, state, and local laws. Notwithstanding any other provision of this Ordinance to the contrary, the construction, operation, and maintenance of the ROW-user's facilities shall be in accordance with all laws and regulations of the United States, the State of Kansas, and any political subdivision thereof, or any administrative agency thereof, having jurisdiction.
- B. The ROW-user shall meet or exceed the most stringent technical standards set by regulatory bodies, including the City, now or hereafter having jurisdiction.
- C. The ROW-user's rights are subject to the police powers of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public. The ROW-user shall comply with all applicable laws and ordinances enacted pursuant to that power.
- D. Failure of the ROW-user to comply with any applicable rule, regulation, ordinance, or otherwise, may result in a forfeiture of any permit, registration, or authorization granted in accordance with this Ordinance.

Section 20. City's Failure to Enforce. The City's failure to enforce or remedy any noncompliance of the terms, conditions, and provisions of this Ordinance or of any permit granted under this Ordinance shall not constitute a waiver of the City's rights nor a waiver of any person's obligations as provided in this Ordinance.

Section 21. Reservation of Rights.

- A. In addition to any rights specifically reserved to the City by this Ordinance, the City reserves unto itself every right and power which is required to be reserved by a provision of any ordinance under any registration, permit, or other authorization granted under this Ordinance.
- B. The City shall have the right to waive any provision of this Ordinance or any registration, permit, or other authorization granted thereunder, except those required by federal or state law, if the City determines that: (1) it is in the public interest to do so, and (2) the enforcement of such provision will impose an undue hardship on the applicant or ROW-user. To be effective, such waiver shall be evidenced by a statement in writing signed by a duly authorized representative of the City.

Section 22. Fees. The following fees shall be assessed against a permittee:

- A. **Permit Fee.** A permit fee of \$50.00, plus such additional amount as may be required to reimburse the City for a licensed engineer's review;
- B. **Repair and Restoration.** All costs and expenses associated with repair and restoration of the right-of-way due to damage caused by the permittee, its affiliates, assigns, contractors, and subcontractors in the right-of-way;
- C. **Performance Bond.** In addition to the foregoing fees, each applicant for a permit in connection with a project with an estimated cost of \$100,000.00 or more shall provide a performance bond, in a form acceptable to the City, from a surety licensed to conduct surety business in the State of Kansas, insuring appropriate and timely performance in the construction and maintenance of facilities located in the right-of-way.

Section 23. Waiver of Permit Fees. All fees are non-refundable, but shall be subject to all state and federal fee limitations. The right-of-way fee shall be waived:

- A. When the ROW-user is required to remove, relocate, or adjust its facilities located in the right-of-way at the direction of the City to facilitate a public improvement;

- B. When required by the City for reasons of the public health, safety, or welfare; or
- C. When such fees are prohibited from being imposed by the conditions set forth in a controlling franchise agreement.

Section 24. Indemnification.

- A. A ROW-user operating under the provisions of this Ordinance shall fully indemnify, release, defend, and hold harmless the City and its agents when acting in their capacity as municipal officials, employees, and agents, from and against any and all claims, demands, suits, proceedings, and actions, liability, and judgment by other persons for damages, losses, costs, and expenses, including attorneys' fees, to the extent caused by negligent acts or omissions of the ROW-user in the performance of the permitted work.
- B. The City or ROW-user agrees to timely notify the other in writing of any known claim, demand, suit, proceeding, or action against the City or ROW-user related to or arising out of the ROW-user's activities in the right-of-way.
- C. Nothing herein shall be deemed to prevent the City or any agent from participating in the defense of any litigation by their own counsel at their own expense. Such participation shall not, under any circumstances, relieve the ROW-user from its duty to defend against liability or its duty to pay any judgment entered against the City or its agents.
- D. If a ROW-user and the City are found jointly liable by a court of competent jurisdiction, liability will be apportioned comparatively in accordance with state law without, however, waiving any governmental immunity available to the City under state law and without waiving any defenses of the parties under state or federal law.
- E. This section is solely for the benefit of the City and ROW-user and does not create or grant any rights, contractual or otherwise, to any other person.

Section 25. Penalties.

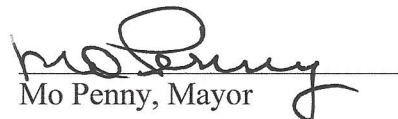
- A. The violation of any provision of this Ordinance is declared to be a public offense. Any person convicted of such a violation shall be punished by a fine of not less than \$250 and not more than \$1,000. Each act of violation and each day upon which any such violation shall occur shall constitute a separate offense.
- B. The violation of any provision of this Ordinance is deemed to be grounds for revocation of a right-of-way permit and registration to operate within the City.

Section 26. Severability. If any section, subsection, sentence, clause, phrase, or portion of this Ordinance is for any reason held invalid or unconstitutional by any court or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions.

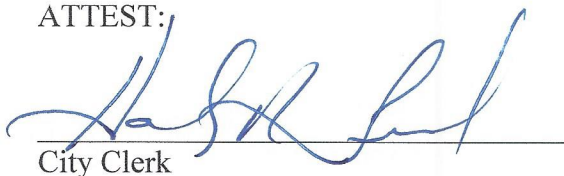
Section 27. Effective Date. This Ordinance shall take effect and be effective after its passage by the Governing Body of the City, and publication of a summary of this Ordinance one time in the official City newspaper.

THIS ORDINANCE IS ADOPTED AND APPROVED BY THE GOVERNING BODY OF THE HIGHLANDS this 24TH day of JANUARY, 2019.




Mo Penny, Mayor

ATTEST:


City Clerk

Approved as to form:


City Attorney