

**CONSTRUCTION IN THE PUBLIC RIGHTS-OF-WAY
ORDINANCE NO. 01-001**

AN ORDINANCE TO ESTABLISH RULES AND REGULATIONS GOVERNING THE CONSTRUCTION AND USE OF CITY PUBLIC RIGHTS-OF-WAY, AND MAY BE KNOWN AS THE "CONSTRUCTION IN THE PUBLIC RIGHTS-OF-WAY ORDINANCE."

WHEREAS, the City of New Berlin (the "City") seeks to facilitate an orderly use of the Public Rights-of-Way in a non-discriminatory and competitively neutral basis; and,

WHEREAS, in accordance with applicable federal laws, including, but not limited to, 47 U.S.C. § 253 (c) and state laws, including, but not limited to, Tex. Util. Code § 14.008 and § 54.205; Tex. Transp. Code § 311.002 and § 311.003; and Tex. Loc. Gov't Code § 282.002; the City seeks to exercise its historical rights to control and manage its Public Rights-of-Way in a competitively neutral and nondiscriminatory basis; and implement certain police power regulations in the use of those Public Rights-of-Way, in accordance with Local Gov. Code § 283.056

NOW, THEREFORE BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF NEW BERLIN, TEXAS

SECTION 1. FINDINGS AND PURPOSE

The purpose of this Ordinance is to:

- (A) Assist in the management of Facilities placed in, on or over the Public Right-of-Way in order to minimize the congestion, inconvenience, visual impact and other adverse effects, and the costs to the citizens resulting from the placement of facilities within the Public Rights-of-Way;
- (B) Govern the use and occupancy of the Public Rights-of-Way;
- (C) Assist the City in its efforts to protect the public health, safety and welfare;
- (D) Conserve the limited physical capacity of the Public Rights-of-Way held in public trust by the City;
- (E) To preserve the physical integrity of the streets and highways;
- (F) To control the orderly flow of vehicles and pedestrians;
- (G) Keep track of the different entities using the rights-of-way to prevent interference between them;

- (H) Assist on scheduling common trenching and street cuts; and
- (I) Protect the safety, security, appearance, and condition of the Public Rights-of-Way.

This Ordinance may be referred to as the "Construction in the Public Rights-of-Way Ordinance."

SECTION 2 - AUTHORITY; SCOPE.

This Ordinance applies to all Persons that place Facilities in, on or over Public Rights-of-Way.

SECTION 3 - DEFINITIONS.

In this Chapter:

- (A) **City** means The City of New Berlin, Texas. As used throughout, the term City also includes the designated agent of the City.
- (B) **Mayor** means the Mayor of the City or the Mayor's designee.
- (C) **Direction of the City** means all ordinances, laws, rules, resolutions, and regulations of the City that are not inconsistent with this Ordinance and that are now in force or may hereafter be passed and adopted.
- (D) **Facilities** means any and all of the wires, cables, fibers, duct spaces, manholes, poles, conduits, underground and overhead passageways and other equipment, structures, plant and appurtenances and all associated physical equipment placed in, on or under the Public Rights-of-Way.
- (E) **Person** means a natural Person (an individual), corporation, company, association, partnership, firm, limited liability company, joint venture, joint stock company or association, and other such entity.
- (F) **Public Rights-of-Way** means the same as in the Texas Local Government Code, § 283.002(6), the area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which the municipality has an interest. The term does not include the airwaves above a Public Right-of-Way with regard to wireless telecommunications.

SECTION 4 - MUNICIPAL AUTHORIZATION REQUIRED.

- (A) Any Person seeking to place Facilities on, in or over the Public Rights-of-Way, shall first file an application for a construction/building permit with the City and shall abide by the terms and provisions of this Ordinance pertaining to use of the Public Rights-of-Way.
- (B) Any Person, prior to placing, reconstructing, or altering Facilities in, on or over the Public Rights-of-Way, must obtain separate municipal authorization from the City.

- (C) Any Person with a current, unexpired consent, franchise agreement or other authorization from the City ("Grant") to use the Public Rights-of-Way that is in effect at the time this Ordinance takes effect shall continue to operate under and comply with that Grant until the Grant expires or until it is terminated by mutual agreement of the City and the Person, or terminated as otherwise provided for in law.

SECTION 5 - ADMINISTRATION AND ENFORCEMENT.

- (A) The Mayor shall administer and enforce compliance with this Ordinance.
- (B) A Person shall report information related to the use of the Public Rights-of-Way that the Mayor requires in the form and manner reasonably prescribed by the Mayor.
- (C) The Mayor shall report to the City Council upon the determination that a Person has failed to comply with this Chapter.

SECTION 6 - CONSTRUCTION OBLIGATIONS.

A Person is subject to reasonable police power regulation of the City to manage its Public Rights-of-Way in connection with the construction, expansion, reconstruction, maintenance or repair of Facilities in the Public Rights-of-Way, pursuant to the City's rights as a custodian of public property, based upon the City's historic rights under state and federal laws. Such regulations include, but are not limited to, the following:

- (1) At the City's request, a Person shall furnish the City accurate and complete information and a construction/building permit application relating to the construction, reconstruction, removal, maintenance, operation and repair of Facilities performed by the Person in the Public Rights-of-Way.
- (2) A Person may be required to place certain Facilities within the Public Rights-of-Way underground according to applicable City requirements absent a compelling demonstration by the Person that, in any specific instance, this requirement is not reasonable or feasible nor is it equally applicable to other similar users of the Public Rights-of-Way.
- (3) A Person shall perform operations, excavations and other construction in the Public Rights-of-Way in accordance with all applicable City requirements, including the obligation to use trenchless technology whenever commercially economical and practical and consistent with obligations on other similar users of the Public Right-of-Way. The City shall waive the requirement of trenchless technology if it determines that the field conditions warrant the waiver, based upon information provided to the City by the Person. All excavations and other construction in the Public Rights-of-Way shall be conducted so as to minimize interference with the use of public and private

property. A Person shall follow all reasonable construction directions given by the City in order to minimize any such interference.

- (4) A Person must obtain a construction/building permit and any other permit, as reasonably required by applicable City Ordinances, prior to any excavation, construction, installation, expansion, repair, removal, relocation or maintenance of the Person's Facilities. Once a permit is issued, Person shall give to the City a minimum of forty-eight (48) hours notice (which could be at the time of the issuance of the permit) prior to undertaking any of the above listed activities on its Network in, on or under the Public Rights-of-Way. The failure of the Person to request and obtain a construction/building permit from the City prior to performing any of the above listed activities in, on or over any Public Right-of-Way, except in an emergency as provided for in Subsection (11) below, will subject the Person to a stop-work order from the City and enforcement action pursuant to the City's Ordinances. If the Person fails to act upon any permit within 90 calendar days of issuance, the construction/building permit shall become invalid, and the Person will be required to obtain another construction/building permit.
- (5) When a Person completes construction, expansion, reconstruction, removal, excavation or other work, the Person shall promptly restore the rights-of-way in accordance with applicable City requirements. A Person shall replace and properly relay and repair the surface, base irrigation system and landscape treatment of any Public Rights-of-Way that may be excavated or damaged by reason of the erection, construction, maintenance, or repair of the Person's Facilities within thirty (30) calendar days after completion of the work in accordance with existing standards of the City in effect at the time of the work.
- (6) Upon failure of a Person to perform any such repair or replacement work, and five (5) days after written notice has been given by the City to the Person, the City may repair such portion of the Public Rights-of-Way as may have been disturbed by the Person, its contractors or agents. Upon receipt of a invoice from the City, the Person will reimburse the City for the costs so incurred within thirty (30) calendar days from the date of the City invoice.
- (7) Should the City reasonably determine, within two (2) years from the date of the completion of the repair work, that the surface, base, irrigation system or landscape treatment requires additional restoration work to meet existing standards of the City, a Person shall perform such additional restoration work to the satisfaction of the City, subject to all City remedies as provided herein.
- (8) Notwithstanding the foregoing, if the City determines that the failure of a Person to properly repair or restore the Public Rights-of-Way constitutes a safety hazard to the public, the City may undertake emergency repairs and

restoration efforts. A Person shall promptly reimburse the City for all costs incurred by the City within thirty (30) calendar days from the date of the City invoice.

- (9) A Person shall furnish the City with construction plans and maps showing the location and proposed routing of new construction or reconstruction as least fifteen (15) days before beginning construction or reconstruction that involves an alteration to the surface or subsurface of the Public Rights-of-Way. A Person may not begin construction until the location of new Facilities and proposed routing of the new construction or reconstruction and all required plans and drawings have been approved in writing by the City, which approval will not be unreasonably withheld, taking due consideration of the surrounding area and alternative locations for the Facilities and routing.
- (10) If the Mayor declares an emergency with regard to the health and safety of the citizens and requests by written notice the removal or abatement of Facilities, a Person shall remove or abate the Person's Facilities by the deadline provided in the Mayor's request. The Person and the City shall cooperate to the extent possible to assure continuity of service. If the Person, after notice, fails or refuses to act, the City may remove or abate the facility, at the sole cost and expense of the Person, without paying compensation to the Person and without the City incurring liability for damages.
- (11) Except in the case of customer service interruptions and imminent harm to property or Person ("Emergency Conditions"), a Person may not excavate the pavement of a street or public rights-of-way without first complying with City requirements. The Mayor or designee shall be notified immediately regarding work performed under such Emergency Conditions, and the Person shall comply with the requirements of City standards for the restoration of the Public Rights-of-Way.
- (12) Within sixty (60) days of completion of each new permitted section of a Person's Facilities, the Person shall supply the City with a complete set of "as built" drawings for the segment in a format used in the ordinary course of the Person's business and as reasonably prescribed by the City, and as allowed by law.
- (13) **Joint Construction**
 - (a) It is the City's desire to minimize the amount of time it's public right-of-ways are under construction. Construction in the public right-of-way causes traffic congestion, inconvenience to vehicle and pedestrian citizen travelers, and eventual weakness of the infrastructure. The City will therefore require all applicants for a construction/building permit for placement of Facilities in the public rights-of-way to endeavor to coordinate and enter into joint

construction agreements of their Facilities in the public rights-of-way. Once the City receives a Persons application for a construction/building permit, the City will provide the applicant with the names, addresses and phone numbers of contact persons of other applicants for construction in the public rights-of-way. It will be the responsibility of all the applicants to coordinate with other Person's in the excavation of the public rights-of-way for the installation, reconstruction, removal, relocation, maintenance, operation, or repair of their Facilities. The applicants are required to use their best efforts to coordinate with each other and provide the City with a joint construction time line. If the City has current applications for a construction/building permit pending with the City and an applicant refuses to cooperate with any other applicants for joint construction, that applicant's request for a construction/building permit shall be denied for the requisite time period.

- (b) Once a construction in the right-of-way permit has been granted and the construction project completed, the City shall impose a four (4) month moratorium on construction in the public rights-of-way in any location that has previously been disturbed or excavated. No construction/building permit shall be issued until the Mayor is fully satisfied that the applicant has contacted and attempted to coordinate a joint construction agreement with other pending applicants. An applicant's failure to cooperate in the joint construction of facilities may result in the denial of their construction/building permit application for the requisite time period.

SECTION 7 - CONDITIONS OF PUBLIC RIGHTS-OF-WAY OCCUPANCY.

- (A) In the exercise of governmental functions, the City has first priority over all other uses of the Public Rights-of-Way. The City reserves the right to lay sewer, gas, water, electric and other pipe lines or cables and conduits, and to do underground and overhead work, and attachments, restructuring or changes in aerial Facilities in, across, along, over or under a public street, alley or Public Rights-of-Way occupied by a Person, and to change the curb, sidewalks or the grade of streets.
- (B) The City shall assign the location in or over the Public Rights-of-Way among competing users of the Public Rights-of-Way with due consideration to the public health and safety considerations of each user type, and to the extent the City can demonstrate that there is limited space available for additional users, may limit new users, as allowed under state or federal law.
- (C) If the City authorizes abutting landowners to occupy space under the surface of any public street, alley, or Public Rights-of-Way, the grant to an abutting landowner shall be subject to the rights of the previously authorized user of the Public Rights-of-Way. If the City closes or abandons a Public Right-of-Way that contains a portion of a Person's Facilities, the City shall close or abandon such Public Right-of-Way subject to the rights of the Person.

- (D) If the City gives written notice, a Person shall, as its own expense, temporarily or permanently, remove, relocate, change or alter the position of Person's Facilities that are in the Public Rights-of-Way within 120 days, except in circumstances that require additional time as reasonably determined by the City based upon information provided by the Person. For projects expected to take longer than 120 days to remove, change or relocate, the City will confer with Person before determining the alternations to be required and the timing thereof. The City shall give notice whenever the City has determined that removal, relocation, change or alternation is reasonably necessary for the construction, operation, repair, maintenance or installation of a City or other governmental public improvement in the Public Rights-of-Way. This section shall not be construed to prevent a Person's recovery of the cost of relocation or removal from third parties who initiate the request for relocation or removal, nor shall it be required if improvements are solely for beautification purposes without prior joint deliberation and agreement with Person.

If the Person fails to relocate Facilities in the time allowed by the City in this Section, the Person may be subject to liability to the City for such delay and as set forth in the City Code of Ordinances, now or hereafter enacted.

Notwithstanding anything in this Subsection (D), the Mayor and a Person may agree in writing to different time frames than those provided above if circumstances reasonably warrant such a change.

- (E) During the term of its Municipal Consent, a Person may trim trees in or over the rights-of-way for the safe and reliable operation, use and maintenance of its Facilities. All tree trimming shall be performed in accordance with standards promulgated by the City. Should the Person, its contractor or agent, fail to remove such trimmings within twenty-four (24) hours, the City may remove the trimmings or have them removed, and upon receipt of a bill from the City, the Person shall promptly reimburse the City for all costs incurred within thirty (30) working days.
- (F) Persons shall temporarily remove, raise or lower its aerial Facilities to permit the moving of houses or other bulky structures, if the City gives written notice of no less than 48 hours. The expense of these temporary rearrangements shall be paid by the party or parties requesting and benefiting from the temporary rearrangements. Person may require prepayment or prior posting of a bond from the party requesting temporary move.

SECTION 8 - INSURANCE REQUIREMENTS.

- (A) A Person shall obtain and maintain insurance in the amounts reasonably prescribed by the City with an insurance company licensed to do business in the State of Texas acceptable to the City throughout the term of a Municipal Consent conveyed under this Chapter. A Person shall furnish the City with proof of insurance at the time of the application for the construction/building permits. The City reserves the right to review the insurance requirements and to reasonably adjust insurance coverage and limits when the City Manger determines that changes in statutory law, court decisions, or the claims history of the industry

or the Person require adjustment of the coverage. For purposes of this section, the City may accept certificates of self-insurance issued by the State of Texas or letters written by the Person in those instances where the State does not issue such letters, which provide the same coverage as required herein. However, for the City to accept such letters the Person must demonstrate by written information that it has adequate financial resources to be a self-insured entity as reasonably determined by the City, based on financial information requested by and furnished to the City. The City's current insurance requirements are described in Exhibit "A" attached hereto.

- (B) Person shall furnish, at no cost to the City, copies of certificates of insurance evidencing the coverage required by this Section to the City. The City may request the deletion, revision or modification of particular policy terms, conditions, limitations or exclusions, unless the policy provisions are established by a law or regulation binding the City, the Person, or the underwriter. If the City requests a deletion, revision or modification, a Person shall exercise reasonable efforts to pay for and to accomplish the change.
- (C) An insurance certificate shall contain the following required provisions:
 - (1) name the City and its officers, employees, board members and elected representatives as additional insureds for all applicable coverage;
 - (2) provide for 30 days notice to the City for cancellation, non-renewal, or material change; and
 - (3) provide that notice of claims shall be provided to the Mayor by certified mail.
- (D) Person shall file and maintain proof of insurance with the Mayor. An insurance certificate obtained in compliance with this section is subject to review by the City attorney and approval by the Mayor. The City may require the certificate to be changed to reflect changing liability limits. A Person shall immediately advise the City Attorney of actual or potential litigation that may develop which may affect an existing carrier's obligation to defend and indemnify.
- (E) An insurer has no right of recovery against the City. The required insurance policies shall protect the Person and the City. The insurance shall be primary coverage for losses covered by the policies.
- (F) The policy clause "Other Insurance" shall not apply to the City if the City is an insured under the policy.
- (G) The Person shall pay premiums and assessments. A company which issues an insurance policy has no recourse against the City for payment of a premium or assessment. Insurance policies obtained by a Person must provide that the issuing company waives all right of recovery by way of subrogation against the City in connection with damage covered by the policy.

- (H) An applicant, prior to any construction, repair, adjustment, relocation, or replacement of Facilities must furnish a bond or security pursuant to this ordinance. The Applicant shall file an annual surety bond which will be valid each year construction will occur through one (1) full year after the completion of the construction from a surety company authorized to do business in the State of Texas in the amount of the estimated amount of the cost to restore the right-of-way for the work anticipated to be done in that year, in the event the applicant leaves a job site in the right-of-way unfinished, incomplete or unsafe.

SECTION 9 - INDEMNIFICATION

- (A) Unless otherwise provided by Tex. Loc. Gov't. Code §283.057, any permit issued under this ordinance shall not be effective unless it contains the following:

Each person agrees to and shall indemnify, hold harmless and defend, the City, its officers, agents and employees, collectively referred to as "City", from and against any and all claims, losses, damages, causes of action, suits and liability of every kind, including all expenses of litigation, court costs, and attorney's fees for injury to or death of any person, or for damage to any property, arising out of or in connection with the construction, maintenance, operation, repair, replacement, adjustment or removal of any part or all of the Facilities permitted herein, where such injuries, death, or damages are caused by the concurrent negligence of the City and Person and/or by the joint or sole negligence of the Person. It is the expressed intention of the parties hereto, both Person and the City, that the indemnity provided for in this paragraph is an indemnity by Person to indemnify, protect and defend the City from the consequences of (i) the City's own negligence, where that negligence and Persons negligence are concurring causes of the injury, death or damage; and/or (ii) Persons joint and sole negligence. Furthermore, the indemnity provided for in this paragraph shall have no application to any claim, loss, damage, cause of action, suit and liability where the injury, death or damage results from the sole negligence of the City unmixed with the fault of any other person or entity.

- (B) Each Person placing Facilities in the Public Rights-of-Way shall agree to promptly defend, indemnify and hold the City harmless from and against all damages, costs, losses or expenses (i) for the repair, replacement, or restoration of City's or any other public utilities property, equipment, materials, structures and Facilities which are damaged, destroyed or found to be defective as a result of the Person's acts or omissions; (ii) from and against any and all claims, demands, suits, causes of action, and judgments for (a) damage to or loss of the property of any Person (including, but not limited to the Person, its agents, officers, employees and subcontractors, City's agents, officers and employees, and third parties); and/or (b) death, bodily injury, illness, disease, loss of services, or loss of income or wages to any Person (including, but not limited to the agents, officers and employees of the Person, Person's subcontractors, the City, and third parties), arising out of, incident to, concerning or resulting from the negligent or willful act or omissions of the Person, its agents, employees, and/or subcontractors, in the performance of activities pursuant to this Ordinance.

- (C) The provisions of this indemnity is solely for the benefit of the City and is not intended to create or grant any rights, contractual or otherwise, to any other Person or entity.

SECTION 10 - NO GRANT OF CITY EASEMENT

- (A) Nothing in this ordinance shall be construed as granting permission for the use of any public way within the CITY, without the express consent of the City Council.
- (B) Nothing in this ordinance shall be construed as an assumption by the CITY of any responsibility of an owner or operator of Facilities not owned by the CITY, and no CITY officer, employee or agent shall have authority to relieve an owner or operator of a Facilities from their responsibility under this ordinance or any other law.

SECTION 11 - SEVERABILITY.

The provisions of this ordinance are severable. However, in the event this Ordinance or any procedure provided in this Ordinance becomes unlawful, or is declared or determined by a judicial, administrative or legislative authority exercising its jurisdiction to be excessive, unenforceable, void, illegal or otherwise inapplicable, in whole or in part, the remaining and lawful provisions shall be full force and effect and the City shall promptly promulgate new or revised provisions in compliance with the authority's decision or enactment.

SECTION 12 - GOVERNING LAW.

This Ordinance shall be construed in accordance with City Ordinances in effect on the date of passage of this Ordinance to the extent that such Ordinances are not in conflict with or in violation of the Constitution and laws of the United States or the State of Texas, subject to the City's ongoing authority to adopt reasonable regulations to manage its Public Rights-of-Way, pursuant to Sections 6 and 7 or as otherwise provided by law.

SECTION 13 - UNAUTHORIZED USE OF PUBLIC RIGHTS-OF-WAY.

The City may institute all appropriate legal action to prohibit any Person from knowingly using the Public Rights-of-Way unless the Person has complied with the terms of this Ordinance.

PASSED AND APPROVED this 15th day of January, 2000.

Ferdinand Friederick
Mayor Ferdinand Friederick

ATTEST:

[Signature]
City Councilmember

APPROVED AS TO FORM:

[Signature]
City Attorney

Exhibit "A"

City of New Berlin Insurance Requirements

An applicant for a permit for construction/building in the public right-of-way shall maintain at all times during the life of the construction/building permit; during the term of municipal consent/franchise agreement.; and as long as the Person is providing local access under Tex Loc. Gov't Code 283, shall maintain at all times, liability insurance in the total amount of one million dollars (\$1,000,000.00). The coverage must be on an "occurrence" basis and must include coverage for personal injury, contractual liability, premises liability, medical damages, underground, explosion and collapse hazards, as it pertains to all Facilities owned by the Person in a public right-of-way in the City's jurisdiction. Such policy shall name the City of New Berlin, its officers, agents, and employees as an additional insured. Each policy must include a cancellation provision in which the insurance company is required to notify the City in writing, not fewer than thirty (30) days before canceling, failing to renew, or reducing policy limits. The applicant shall file the required original certificate of insurance prior to any issuance of a permit to commencement of work.