

ORDINANCE

NO. OR06-2006-46

AN ORDINANCE AMENDING TITLE XV: LAND USAGE BY THE ADDITION OF CHAPTER 157, MANAGEMENT OF THE-RIGHT-OF-WAY, TO THE CLEBURNE CODE OF ORDINANCES, PROVIDING DEFINITIONS, REGULATING THE INSTALLATION, REPAIR AND MAINTENANCE OF UTILITY AND TELECOMMUNICATIONS FACILITIES WITHIN THE RIGHT-OF-WAY IN THE CITY OF CLEBURNE, TEXAS; REQUIRING REGISTRATION AND A CONSTRUCTION PERMIT; PROVIDING FOR REVOCATION AND APPEAL PROCEDURES; PROVIDING FOR THE FILING OF PLANS BY RIGHT-OF-WAY USERS; PROVIDING FOR THE PROTECTION OF THE SAFETY AND CONVENIENCE OF THE PUBLIC; PROVIDING FOR RESTORATION; PROVIDING A PENALTY FOR EACH OFFENSE; PROVIDING A CUMULATIVE CLAUSE; PROVIDING A SEVERABILITY CLAUSE; PROVIDING FOR PUBLICATION; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City of Cleburne, Texas is a home rule city acting under its charter adopted by the electorate pursuant to Article XI, Section 5 of the Texas Constitution and Chapter 9 of the Local Government Code; and

WHEREAS, pursuant to its home rule charter, the City of Cleburne has the control and jurisdiction of the public streets and other right-of-way of the City, with the right to regulate or prohibit the location of pipes, cables, lines, wires, or other facilities in the right-of-way; and

WHEREAS, without proper regulation, the placement of such facilities within the right-of-way will conflict with the primary uses of the right-of-way and will reduce the efficient use of limited space for facilities; and

WHEREAS, in accordance with applicable federal law, 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, and article 1175(2), V.T.C.S., the City seeks to exercise its historical rights to control and manage its rights-of-way; and amend its existing police power regulations for the use of those rights-of-way, all in accordance with Local Government Code §283.056; and

WHEREAS, the City Council of the City of Cleburne deems it necessary to adopt this ordinance amending the regulations governing the placement and maintenance of utility facilities within the right-of-way to promote public safety and convenience and to assure the efficient and orderly use of the right-of-way by the many gas, electric, cable, telecommunications, water, wastewater, and other utility providers so that the best interests of the public are served;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CLEBURNE, TEXAS:

SECTION ONE. That Title XV of the Code of Ordinances of the City of Cleburne, Texas, is hereby amended by the addition of the following Chapter:

**CHAPTER 157
MANAGEMENT OF THE-RIGHT-OF-WAY**

SEC. 157.20. PURPOSE.

The purpose of this article is to:

- (a) protect the health, safety, and welfare of the public during the installation, operation, and maintenance of facilities by public service providers;
- (b) govern and monitor the orderly use of the public right-of-way;
- (c) provide for the registration of public service providers with facilities in the public right-of-way;
- (d) provide insurance requirements for construction in the public right-of-way;
- (e) provide permit requirements and procedures for construction in the public right-of-way;
- (f) provide for maintenance and repair of the public right-of-way and of facilities located in the public right-of-way;
- (g) provide for emergency activities in the public right-of-way;
- (h) provide for coordination with public improvements;
- (i) regulate the installation of utility structures;
- (j) provide an effective date;
- (k) provide for enforcement; and
- (l) provide a penalty for violation of any provisions of this ordinance.

SEC. 157.21. DEFINITIONS.

CITY – The City of Cleburne and the City’s officers and employees.

CONFORM – To remove, alter, change, relocate, or adapt the underground or overhead facilities of a public service provider in the public right-of-way in advance of proposed public improvements financed by the City.

CONSTRUCTION – Any of the following activities performed by any person within a public right-of-way:

- (a) Installation, excavation, laying, placement, repair, upgrade, maintenance, or relocation of facilities or other improvements, whether temporary or permanent;
- (b) Modification or alteration to any surface, subsurface, or aerial space within the public right-of-way;
- (c) Performance, restoration, or repair of pavement cuts or excavations; or
- (d) Other similar construction work.

DIRECTOR – The City of Cleburne’s Public Works Director or any designated representative.

EMERGENCY SITUATION – Circumstances requiring immediate construction or operations by a public service provider to:

- (a) prevent imminent damage or injury to the health or safety of any person or to the public right-of-way;
- (b) restore service; or
- (c) prevent the immediate loss of service.

EXCAVATION – The removal of dirt, fill, or other material in the public right-of-way including, but not limited to, the methods of open trenching, boring, tunneling, or jacking.

FACILITIES – Includes, but is not limited to, the plant, equipment, buildings, structures, poles, wires, cables, lines, conduit, mains, pipes, vaults, and appurtenances of a public service provider or the City located within the public right-of-way and includes property owned, operated, leased, licensed, used, controlled, or supplied for, by, or in connection with the business of the public service provider or the City.

PAVEMENT CUT – A cut made into the paved surface, including a sidewalk, of the public right-of-way.

PERMITTEE – The person applying for or receiving a permit to perform construction within the City’s right-of-way under the terms and conditions of this ordinance. The term includes any

officer, director, partner, manager, superintendent, or other authorized person exercising control over or on behalf of the public service provider.

PERSON – A natural person, a corporation, a public service provider or its representative, a permittee, a governmental entity or agency (excluding the City or the City’s contractor), a limited liability company, a joint venture, a business trust, an estate, a trust, a partnership, an association, or any other legal entity.

PUBLIC RIGHT-OF-WAY – the area of land within the City on, below, or above a public roadway, highway, street, public sidewalk, alley, or public utility easement. The term does not include airwaves above the public right-of-way that fall under the exclusive jurisdiction of the United States government.

PUBLIC RIGHT-OF-WAY PERMITTING AND CONSTRUCTION MANUAL – The Manual, as adopted and amended from time to time, published by the City of Cleburne that contains engineering, technical, and other special criteria and standards established by the Director for permitting and construction within the public right-of-way.

PUBLIC SERVICE PROVIDER – Any energy delivery or transport company, telecommunications company, cable company, gas company, water utility, storm water utility, wastewater utility, or other utility. The City of Cleburne, or any person working under contract with the City, is not included in this definition.

SPOILS OR EXCAVATED MATERIAL – Construction waste, construction supplies, or excavated dirt, fill, or other similar material that is stored or placed upon the surface of a public right-of-way.

UTILITY STRUCTURE – Any above or below ground manhole, hand hole, vault, cabinet, or any other appurtenance other than a pole or device attached to a pole which is owned or used by a public service provider. The phrase does not include fire hydrants, devices or structures used to control or direct pedestrian or vehicular traffic on an adjacent roadway.

SEC. 157.22. AUTHORITY; ENFORCEMENT; OFFENSES.

(a) Authority.

- (1) The Director is authorized to administer and enforce the provisions of this ordinance, and to promulgate regulations including, but not limited to, engineering, technical, and other special criteria and standards.
- (2) The Director is authorized to enter a construction site for which a permit is granted under this ordinance for purposes of inspection to determine compliance with the permit and this ordinance.

- (3) The Director is authorized to request from the public service provider plans of record that show all of its facilities existing in the public right-of-way that may impact existing or proposed City facilities, including infrastructure, or another service provider's existing or proposed facilities. The public service provider shall provide to the Director plans of record within 90 days of the request, or in accordance with an alternate schedule as agreed to by both parties, to the extent such records are available. Public release of such records shall be in accordance with the Public Information Act, V.T.C.A., Government Code, Chapter 552.
- (4) If the release of the location of any utility, including water and sewer, or of plans of record submitted under this section would jeopardize public safety, the information shall be considered confidential. In addition, if plans of record submitted under this section include information expressly designated by the public service provider as a trade secret or other confidential information protected from disclosure by state law, the Director may not disclose that information to the public without the consent of the public service provider, unless otherwise compelled by an opinion of the attorney general pursuant to the Texas Public Information Act, as amended, or by a court having jurisdiction of the matter pursuant to applicable law. This section may not be construed to authorize a public service provider to designate all matters in its plans of record as confidential or as trade secrets.

(b) *Enforcement and offenses.*

- (1) A person commits an offense if the person:
- (i) performs, authorizes, directs, or supervises construction without a valid permit issued under this ordinance;
 - (ii) fails to comply with restrictions or requirements of a permit issued under this ordinance;
 - (iii) fails to comply with a lawful order or regulation of the Director issued pursuant to this ordinance; or
 - (iv) violates any other provision of this ordinance.
- (2) A person commits an offense if, in connection with the performance of construction in the public right-of-way, the person:
- (i) damages the public right-of-way beyond what is incidental or necessary to the performance of the construction;
 - (ii) damages public or private facilities within the public right-of-way;

- (iii) fails to clear debris associated with the construction in a timely manner from a public right-of-way after construction is completed;
 - (iv) fails to immediately clear debris which results from construction and which creates a safety hazard in a public right-of-way; or
 - (v) fails to stabilize any disturbed area from erosion within 14 days after construction is completed, unless an alternative time frame is approved by the Director.
- (3) It is a defense to prosecution for a violation of this ordinance that the person or public service provider has a franchise, license, interlocal or other agreement with the City which provides the provisions of this ordinance shall not apply to the public service provider.
- (4) A culpable mental state is not required to prove an offense under this ordinance. A person who violates any provision of this ordinance is guilty of a separate offense for each day or portion of a day during which the violation is committed, continued, authorized or directed. An offense under Sections 157.22(b) 2. (iii) or (iv) is punishable by a fine of not less than \$500 or more than \$2,000. Any other offense under this ordinance is punishable by a fine of \$500.
- (5) This ordinance may be enforced by a civil court action in accordance with state or federal law, in addition to any other remedies, civil or criminal, the City has for a violation of this ordinance.
- (6) Prior to initiation of civil enforcement litigation, the permittee, or any other person who has violated a provision of this ordinance, shall be given the opportunity to correct the violation within a timeframe specified by the Director. This subsection does not prohibit the Director or the City from taking enforcement action as to past or present violations of this ordinance, notwithstanding their correction.
- (7) If a permittee is a contractor of the public service provider and has been convicted of an offense under this ordinance, no additional permits will be granted to the contractor until the offense has been corrected and any direct or indirect costs incurred by the City have been reimbursed. No additional permits shall be granted to the contractor for a period of one year from the date of the conviction.
- (8) If a public service provider utilizes its own employees to perform permitted work, and the provider's employee is convicted of an offense under this ordinance, no additional permits shall be issued to the service provider until the offense has been corrected and any costs incurred by the City have been reimbursed. This provision shall not prohibit a public service provider from performing work in an emergency situation.

- (9) In the event the person or public service provider believes it should not be held responsible for costs assessed pursuant to Subsection (7) or (8) above, the person or provider may file a request for a refund within 60 days of payment of the costs. The request shall be submitted to the Director and shall include documentation and evidence to support the request for a refund. The Director shall conduct a hearing at which the applicant may present evidence. The Director shall render a decision as to whether the refund should be granted, based upon the preponderance of evidence presented. The public service provider shall have the right to appeal the decision of the Public Works Director to District Court within 60 days of the decision of the Public Works Director.

SEC. 157.23. REGISTRATION REQUIREMENTS.

- (a) *Registration.* A public service provider with existing facilities within the public right-of-way must register with the City within 60 days of the effective date of this Ordinance. Any public service provider who does not have existing facilities within the public right-of-way and who wishes to install new facilities must first register with the City. Registration shall be in accordance with the following requirements:
- (1) Prior to registration, a public service provider must be either a Certificated Telecommunications Provider under Chapter 283 of the Texas Local Government Code, have a Certificate of Convenience and Necessity under Chapter 13 of the Texas Water Code, have a franchise, interlocal or license agreement with the City or be authorized by State statute to operate facilities within the public right-of-way. Registration shall otherwise be denied.
 - (2) The registration must be on a form furnished by the Director and made in the name of the public service provider that owns the facilities. The form must be filled out completely and accurately. Any omissions or inaccuracies on the form may be cause for denial of the registration at the City's discretion.
 - (3) If information provided as part of the registration changes, the public service provider must inform the Director in writing not more than 30 days after the date the change occurs.
 - (4) The public service provider shall include the following with the registration:
 - (i) the name of the public service provider using the public right-of-way, including any business name, assumed name, or trade name the public service provider operates under, or has operated under within the past 5 years.

- (ii) if the public service provider is a Certificated Telecommunications Provider, a copy of the certification issued by the Texas Public Utilities Commission to provide local exchange telephone service.
 - (iii) a copy of any franchise, agreement or license issued by the City of Cleburne or statute authorizing the public service provider to use the public right-of-way.
 - (iv) the name and mailing address of the officer or agent designated as the person authorized to receive service of process on behalf of the public service provider.
- (5) The public service provider must provide proof of insurance and appropriate bonds. The requirements for insurance and bonds are provided in Subsections (b) and (c) below.

(b) *Insurance requirements.*

- (1) A public service provider shall obtain and maintain insurance throughout the time it has facilities in public rights-of-way. The City reserves the right to review the insurance requirements, and to reasonably adjust insurance coverage and limits when the City Attorney determines that changes in statutory law, court decisions, or the claims history of the industry or the public service provider require adjustment of the coverage. Insurance policies shall meet the following minimum requirements:

Workers' Compensation and Employer's Liability Insurance

Workers' Compensation	Statutory Limit
Employer's Liability	\$100,000 Each Accident
	\$100,000 Disease – Each Employee
	\$500,000 Disease – Policy Limit
(Employers Liability not required if policy limit is greater than \$10,000,000)	

Liability Insurance

Commercial General Liability \$1,000,000 Per Occurrence
 (No standard coverages are to be excluded by endorsement) The policy shall provide blanket contractual liability insurance for all written contracts and shall include coverage for products and completed operations liability, independent contractor's liability; coverage for property damage from perils of explosion, collapse or damage to underground utilities, commonly known as XCU coverage.

Automobile Liability Insurance

Commercial Auto Liability Policy \$500,000 Combined Single Limit
 (including coverage for owned, hired, and non-owned autos)

Umbrella Liability

(Following Form and Drop Down Provisions Included) \$5,000,000 Each Occurrence

- (2) In addition to the above requirements, the insurance required under this section shall:
- (i) be written with the City of Cleburne as an additional insured, except on worker's compensation and employer's liability insurance, using an endorsement Form GC 20 26 or broader;
 - (ii) provide for 30 days notice of cancellation to the City, for nonpayment of premium, material change, or any other cause;
 - (iii) be written through companies duly authorized to transact that class of insurance in the State of Texas. Insurance is to be placed with insurers with a Best Rating of no less than A-:VII;
 - (iv) waive subrogation rights for loss or damage so that insurers have no right to recovery or subrogation against the City of Cleburne, it being the intention that the required insurance policies shall protect the City, its officers, and employees and be primary coverage for all losses covered by the policies; and
 - (v) provide that notice of claims shall be provided to the Director by certified mail.
- (3) The policy clause "Other Insurance" shall not apply to the City if the City is an additional insured under the policy.
- (4) For purposes of this section, the City will accept a self-insurance program of the public service provider if the approved in advance by the City and:
- (i) provides the equivalent coverage as required herein if the public service provider demonstrates by written information that it has adequate financial resources to be a self-insured entity as reasonably determined by the City; or
 - (ii) in the case of a cable service provider who holds a state-issued certificate of authority and is self-insured under the provisions of state law, such self-insurance program provides the same defense and claims processing as required by this section.
- (5) A certificate of insurance providing proof of coverage shall be provided to the Director with the registration form.

(6) If a public service provider is subject to statutory limitations for damages resulting from liability less than the minimum coverages provided in subsection (1) hereof, the public service provider shall not be required to provide proof of insurance coverages in excess of the statutory requirements.

(c) *Bonding requirements.*

- (1) Each year, not later than February 1, a public service provider shall, without cost to the City, provide a maintenance bond for the construction work anticipated to be performed in the public rights-of-way in the upcoming year. The maintenance bond shall guarantee the work for two years from the date of its completion and shall be in the amount of 100 per cent of the cost of the construction work, including the cost of the restoration of the public right-of-way, to be performed in the upcoming year. Each bond shall be executed by a surety company authorized to do business in the State of Texas and acceptable to the City. At the option of the service provider, maintenance bonds may be provided for each project.
- (2) A public service provider that has assets in excess of \$20,000,000 dollars may annually submit a written request for a waiver from the bonding requirements. The request for a waiver shall be filed not later than the November 1 before the calendar year for which the waiver is sought.
 - (i) The request shall set forth in detail the basis for the request including but not limited to:
 - a. The public service provider's performance history in the City;
 - b. Documentation, in a form acceptable to the City, that demonstrates that the public service provider has assets in excess of \$20,000,000; and
 - c. Documentation, in a form acceptable to the City, that demonstrates that the public service provider has assets or reserves sufficient to cover the amount of the bonds.
 - (ii) Within 30 business days of receipt of a written request for a waiver, the Director, with good cause, may grant a waiver to the bonding requirements. In making this decision, the Director shall take into account, among other things:
 - a. the public service provider's record of performance in the City's rights-of-way;
 - b. the public service provider's record of compliance with this ordinance;

- c. a showing of financial responsibility by the public service provider to complete the proposed project, and;
 - d. any other factors deemed relevant to management of the City's rights-of-way.
- (3) A bond may not be required from a cable service provider for any work consisting of aerial construction except that a bond as provided for herein may be required of a provider that cannot demonstrate a record of at least four years' performance of work in any municipal public right-of-way free of currently unsatisfied claims by a municipality for damage to the right-of-way.
- (d) The requirements for insurance may be satisfied by public service providers with a current franchise or license or other agreement if their current franchise or license adequately provides for insurance coverage which will afford equivalent protection for the City. The requirements for bonds may be satisfied by public service providers with a current franchise, interlocal or license agreement if the agreement adequately provides for bonds.
 - (e) After registration has been completed, a separate construction permit for each work location must be obtained from the City's Engineering Department. Nothing in this section relieves a public service provider from obtaining a construction permit under this ordinance to perform work in the public right-of-way, except as otherwise provided in this ordinance.

SEC. 157.24. CONSTRUCTION PERMIT REQUIREMENTS.

- (a) A person commits an offense if the person performs any construction within a public right-of-way without first obtaining a construction permit from the Engineering Department prior to the start of construction. A person who undertakes any work outside of the public right-of-way that will cut, break, or otherwise damage the public right-of-way shall also obtain a construction permit. Any crossing of public right-of-way either by open cut or boring shall apply for a construction permit.
- (b) It is a defense to prosecution for a violation of subsection (a) that the person performs construction within the right-of-way without a permit because of an emergency situation.
- (c) A person who undertakes work on behalf of a developer or public service provider to construct utilities to serve a new subdivision, where such work is in a proposed right-of-way, shall obtain a permit prior to the start of construction. All work performed within the right-of-way proposed to be dedicated to the City shall be performed in accordance with the requirements of this ordinance.
- (d) Prior to obtaining a permit, the public service provider must be registered with the City.

- (e) A construction permit is not required if the activity in the public right-of-way consists exclusively of:
- (1) routine maintenance or repair of facilities that does not involve any of the following: the cutting or breaking of pavement or a sidewalk; the closure of a traffic lane for longer than 24 hours; boring; or excavation greater than 500 cubic feet; or
 - (2) a connection of real property to a utility service on the same side of the public right-of-way, if the connection does not require a pavement cut in the right-of-way; or
 - (3) the replacement of a single damaged pole and associated work within a ten foot radius of the damaged pole;
 - (4) installation of aerial lines on existing poles, or installation of aerial lines on not more than 10 new poles; or
 - (5) the installation of fire hydrants.
- (f) The following procedures and requirements govern the application for and issuance of a permit to perform construction within the public right-of-way:
- (1) Permit application.
 - (i) A permit application must be made in writing on a form obtained from the Engineering Department. The application must be signed and submitted by the permittee on behalf of the owner of the facility for which the permit is requested. The application for permit must be filled out completely and accurately. Any omissions or inaccuracies on the form may be cause for denial of the permit at the City's discretion.
 - (ii) A permit application must be submitted to the Director in accordance with the timeframes specified in the Public Right-of-Way Permitting and Construction Manual.
 - (iii) The Director shall state on the permit any reasonable additional restrictions or requirements determined necessary. These additional restrictions or requirements shall be considered a part of the permitted activity.
 - (iv) The permittee shall, as an express condition of the permit, comply in all respects with the requirements prescribed for the permitted activity in the Public Right-of-Way Permitting and Construction Manual and with all other City ordinances and state or federal laws or regulations affecting the permitted activity.

- (2) Construction Plan. The permit application on any project must include submittal of construction plans to the Engineering Department. The plans must conform to the standards set forth in the Public Right-of-Way Permitting and Construction Manual. When required by the Texas Engineering Practice Act, as amended, the plans must be sealed by a professional engineer licensed to practice in the State of Texas.
- (3) Storm Water Pollution Prevention Plan. The permittee shall submit with the permit application two sets of a Storm Water Pollution Prevention Plan to the Engineering Department in cases where stream crossings are open cut.
- (4) Traffic Control Plan. Any work that may impact traffic flow or result in lane closures in any street shall comply with the requirements of the most current edition of The Texas Manual on Uniform Traffic Control Devices.
- (5) Trench Safety Plan. Trench safety systems shall meet U.S. Occupational Safety and Health Administration standards and requirements.
- (6) Project Documentation: Except in an emergency situation, the city recommends that the permittee provides the Director a video tape in VHS format or photographs of the project site before commencement of the work. The video or photographs shall show fences, driveways, landscaping, roadways, sidewalks, mailboxes, and other improvements along the length of the project.
- (g) Construction in the public right-of-way may commence prior to obtaining a permit if the public service provider determines a valid need to perform work due to an emergency situation. The public service provider shall give immediate verbal notice, including the reasons for the emergency situation, to the Director. The public service provider shall provide a written description of the work required by the emergency situation and submit an application for a permit not later than the second business day following commencement of the emergency situation,
- (h) If no construction has commenced under a permit within 90 calendar days after issuance of the permit, the permit becomes null and void, and a new permit is required before construction may be performed in the public right-of-way. The Director may grant an extension to a permit only before the permit expires.

SEC. 157.25. PERMIT DENIAL, REVOCATION AND APPEAL.

- (a) The Director may refuse to issue a permit if:
 - (1) the public service provider does not have a valid registration on file with the City;

- (2) the proposed construction will substantially interfere with vehicles or pedestrians and no procedures, or procedures inconsistent with this ordinance, have been identified to minimize the interference;
- (3) the proposed construction will interfere with existing or proposed facilities of the City, or existing facilities already in the public right-of-way pursuant to a valid franchise;
- (4) the proposed construction, incidental traffic control, or other permitted activity, or the manner in which it is to be performed, will violate a City ordinance or regulation or a state or federal statute or regulation; or
- (5) the permittee:
 - (i) fails to furnish all the information required by this ordinance;
 - (ii) knowingly or intentionally furnishes false or incorrect information to the Director;
 - (iii) fails, except for good cause shown, to file the application on the approved form within the time limits prescribed by the Public Right-of-Way Permitting and Construction Manual;
 - (iv) has violated a provision of this ordinance twice within the two year period immediately preceding the date of application and has failed to correct the violations;
 - (v) is an independent contractor of a public service provider who has been convicted of a violation of this ordinance in the year preceding the application;
 - (vi) is not in compliance with applicable requirements of an existing permit issued under this ordinance; or
 - (vii) has failed to reimburse the City for any costs owed pursuant to this ordinance.
- (b) The Director may suspend construction or revoke an issued permit on the same grounds for which a permit may be denied under Subsection (a) or if the permittee:
 - (1) commences or performs construction in violation of an applicable requirement of this ordinance or the permit;
 - (2) creates or is likely to create a public health or safety hazard by performance of the construction in question;

- (3) fails to comply with an order or regulation of the Director that is applicable to the construction;
 - (4) fails to comply with the restrictions or requirements of other City ordinances or state or federal laws or regulations applicable to the construction;
 - (5) commences or performs work without having prior knowledge and understanding of the applicable repair standards as specified in the Public Right-of-Way Permitting and Construction Manual;
 - (6) fails to comply with the requirements of the latest edition of the Texas Manual on Uniform Traffic Control Devices; or
 - (7) fails to properly implement a stormwater pollution prevention plan.
- (c) The Director shall provide immediate verbal notice of a suspension or revocation to the permittee and forward written notice of a suspension or revocation within two business days of the verbal notice. Construction that is suspended may not resume until the Director determines that the permittee has corrected the violation, noncompliance, or hazard that caused the suspension. The Director may reinstate a permit that has been revoked if the Director determines that:
- (1) the permittee has corrected the violation, noncompliance, or hazard that caused the revocation; and
 - (2) the health or safety of the public is not jeopardized by reinstating the permit.
- (d) If the Director denies or revokes a construction permit, the City shall give notice by personal service or by certified mail, return receipt requested, to the applicant or permittee. The applicant or permittee may appeal the decision to deny or revoke by filing written notice with the City Manager, within five days after receipt of notice. The City Manager shall mail or cause to be personally delivered, written notice of the time and place of the hearing to the person appealing. The notice shall be mailed to the address specified in the notice of appeal form. The City Manager shall conduct a hearing and shall make a decision on the basis of a preponderance of the evidence presented at the hearing. The City Manager shall notify the applicant or permittee by personal service or by mail.
- (e) The applicant or permittee may appeal the decision of the City Manager to deny or revoke a permit by filing written notice with the City Secretary for consideration of the City Council, within five days after receipt of notice of the City Manager's decision. The City Secretary shall mail notice of the time and place of the hearing to the appellant at the address shown on the appeal form. The City Council shall conduct a hearing and shall

make a decision on the basis of a preponderance of the evidence presented at the hearing. The decision of the City Council shall be final.

SEC. 157.26 VARIANCE.

Any variance from the requirements of this ordinance must be approved in advance by the Director. The Director may grant a variance only if the applicant demonstrates an extreme hardship and the public health, safety, welfare, and convenience are not adversely affected by granting the variance. The Director may not grant a variance from the indemnity requirements.

SEC. 157.27 CONSTRUCTION REQUIREMENTS.

- (a) A permittee shall cause all work performed within the public right-of-way to be performed in a good and workmanlike manner and in faithful and strict compliance with the permit, this ordinance, other City ordinances, and regulations promulgated by the Director relating to construction within the public right-of-way.
- (b) The installation, replacement, repair, or maintenance of any City facility by the permittee shall be subject to inspection and approval by the City. The permittee agrees to cooperate fully with the City in conducting the inspection. Such inspections shall be conducted concurrent with the installation, replacement, repair, or maintenance affecting the City's facilities and a final inspection shall be made within a reasonable time after completion of the project. The permittee shall promptly perform remedial action required by the City pursuant to such an inspection.
- (c) The permittee shall maintain the construction area in a manner that avoids health hazards, and hazards to vehicular and pedestrian traffic until the public right-of-way is permanently restored. Specific construction requirements are contained in the Public Right-of-Way Permitting and Construction Manual, as amended.
- (d) A permittee performing construction in the public right-of-way shall, upon completion of the work, restore the public right-of-way to a condition that is equal to or better than the condition of the public right-of-way prior to construction in a manner prescribed by the Public Right-of-Way Permitting and Construction Manual, as amended.
- (e) The permittee has the exclusive responsibility to coordinate with other public service providers to protect all existing facilities in the public right-of-way in which the construction occurs. Acceptance of the plans and issuance of a permit does not constitute liability on the City's part for any damage to existing facilities.

- (f) The permittee has the exclusive responsibility to locate the extent of the public right-of-way. Acceptance of the plans and issuance of a permit does not constitute liability on the City's part for any facilities placed on private property.
- (g) If facilities are placed on private property, the public service provider shall contact property owners and acquire easements or remove the facilities from private property.
- (h) When making a pavement cut or excavation, or placing soils or excavated material in or along a public right-of-way, the permittee shall place barricades, warning signs, and warning lights at the location sufficient to warn the public of the hazard of the open cut, excavation, spoils, or excavated material. These traffic control devices shall be placed in accordance with the Texas Manual on Uniform Traffic Control Devices requirements.
- (i) If a street or alley must be totally closed for any duration, the permittee shall provide for reasonable alternative access to the adjacent properties at all times. If a sidewalk is to be closed or blocked for longer than one day, the permittee shall provide a reasonable alternative for pedestrian access.
- (j) Sidewalks designated as school routes shall be open at all times on days that school is in session, or a reasonable alternative shall be provided before work commences. To be considered a reasonable alternative, a sidewalk shall provide 36 inches minimum surface width.
- (k) Except in an emergency situation, if a person's work in the right-of-way will alter trees or shrubbery located within any public right-of-way, the person shall first notify the adjacent property owners.
- (l) A person commits an offense if the person cuts, defaces or in any way injures a tree or shrub located within a public median without prior approval from the Director or his designated representative. It is a defense to prosecution that the person is topping trees to accommodate overhead utility service.
- (m) Temporary restoration of the public right-of-way may not remain for more than 10 business days after the completion of a repair or installation of an underground structure or facility, unless a time extension has been granted by the Director. The City may, at the expense of the permittee or other responsible person, remove any temporary restoration remaining in the public right-of-way beyond the 10 day time limit and make permanent repairs. Any exception to the 10 day time limit, other than a relocation of a facility in advance of a City construction project in the public right-of-way, must be approved by the Director prior to expiration of the time limit.
- (n) Except in an emergency, the permittee shall notify the Director in writing 48 hours prior to any work requiring a permit proposed for a weekend.

- (o) The contractor will maintain at all times on the job site a responsible person proficient in speaking the English language, authorized to receive and relay instructions from the City.
- (p) A permittee shall:
- (1) maintain a copy of the excavation permit and accepted engineering plans at the construction site available for inspection by the Director at all times when construction or installation work is occurring;
 - (2) complete all construction work authorized by the permit in the time specified in the permit, unless the permittee has obtained an extension from the Director; and
 - (3) provide the Director access to the work and to such further information he or she may reasonably require to ensure compliance with the permit.
- (q) All concrete driveways and streets shall be bored rather than open cut. If the concrete street is planned to be reconstructed within two years, or for other good cause, the Director may grant an exception upon request.
- (r) No pavement cuts in newly constructed, reconstructed, or resurfaced (greater than one inch) asphalt streets shall be made for 60 months after the substantial completion of the street work. The Director may grant an exception based on the public service provider's written demonstration, if he finds that the following criteria have been met:
- (1) Boring or jacking without disturbing the pavement is not practical due to physical characteristics of the street or alley or other utility conflicts; and
 - (2) Alternative utility alignments that do not involve excavating the street or alley are found to be impracticable; and
 - (3) The proposed excavation cannot reasonably be delayed until the five-year 60 months deferment period has lapsed; or
 - (4) Emergency service restoration is required and no other timely alternatives are available; or
 - (5) New technology that sufficiently minimizes damage to the pavement structure is available; or
 - (6) A utility line required to be located is under the street.
- (s) The Director may require the use of trenchless technology or boring based on the following criteria:

- a. It is in the best interest of the City; and
 - b. It is technically, commercially, and economically feasible; and
 - c. It is not in violation of federal or state regulations or industry safety standards.
- (t) The permittee and any person responsible for construction shall protect the public right-of-way surface, and all existing facilities and improvements both above and below ground from excavated materials, equipment operations, and other construction activities.
- (u) The permittee shall ensure that no excavated material or contamination of any type is allowed to enter or remain in a water or wastewater main or access structure, drainage facility, or natural drainage feature.

SEC. 157.28. IMPROPERLY CONSTRUCTED FACILITIES.

- (a) A person shall:
- (1) properly construct, install, repair, relocate, and/or upgrade its existing facilities within the public right-of-way; and
 - (2) repair or restore any damage to other facilities, the public right-of-way, or private property that occurs as a result of improper construction, installation, repair, relocation, or upgrade of the public service provider's facilities.
- (b) Facilities will be considered to be improperly constructed, installed, repaired, relocated, or upgraded if:
- (1) the construction, installation, repair, relocation, or upgrade endangers public health or safety; or
 - (2) the facilities encroach upon private property or extend outside the right-of-way location designated in the permit without authorization; or
 - (3) the construction, design, or configuration of the facilities does not comply with applicable local, state, or federal laws or regulations; or
 - (4) the construction, installation, repair, relocation, or upgrade is conducted in a manner that damages private or public property or another public service provider's facilities; or
 - (5) the facilities are not capable of being located or maintained using standard practices; or

- (6) the facilities are placed in an area that interferes with another public service provider's existing facilities.

SEC. 157.29. RESTORATION AND MAINTENANCE PERIOD.

- (a) All construction performed under any permit granted to a person by the City under this ordinance must be maintained to the satisfaction of the Director for two years after substantial completion of construction or repair.
- (b) Work performed within the public right-of-way and outside the limits of the pavement, that includes, but is not limited to, the surface, underground infrastructure, irrigation system, landscaping, signage, and/or sidewalks is subject to the two-year maintenance period. Should the City reasonably determine, within two years from the date of the completion of work, that additional restoration work is required, the permittee shall perform such additional restoration work to the satisfaction of the City within 30 days after the Director gives written notice to the permittee to correct the damage, defect, or other problem. If the restoration work is not completed within 30 days, the work may be performed by the City, and costs for said work charged to the permittee.
- (c) The permittee shall notify the Director at least 24 hours before commencing any repair operations. If a construction or excavation site is subsequently disturbed by another party, including another permittee or the City, any continuing obligation to maintain the overlapping area shall cease. If the site is disturbed by another permittee, then that permittee shall be subject to the maintenance period for the overlapping area.
- (d) The Director shall notify the permittee in writing if the backfill on a permitted pavement cut or excavation settles at any time during the two year maintenance period, causing subsidence in the pavement of one-half inch or more, vertically measured in any three foot horizontal direction. Upon notification, the permittee shall commence repair work within 10 days and notify the Director 24 hours in advance of commencement of the repair work. If the repair work is not commenced within 30 days or an appropriate extension as approved by the City Manager, the repair work may be performed by the City.
- (e) The decision of the Director as to the necessity of correcting any damage, defect or other problem is binding on all parties.
- (f) All damage caused directly or indirectly to the public right-of-way surface or subsurface outside the construction area will be regarded as part of the construction and must be included in the total area repaired.

- (g) Upon failure of the permittee to perform any such repair or restoration work described in Subsections (a) through (e) above, the City may repair such portion of the public right-of-way as may be required. The permittee or public service provider shall reimburse the City for the actual direct and indirect costs of the repair work.

SEC. 157.30. EMERGENCY REPAIRS IN THE PUBLIC RIGHT-OF-WAY.

- (a) If the Director determines during construction that a temporary emergency repair to a public right-of-way is necessary to correct a situation that is hazardous to the public, the Director shall immediately notify the permittee. If the permittee does not commence the emergency repair within a reasonable time, the Director may cause performance of such temporary emergency repair work as is necessary to correct the hazardous situation. The permittee, or public service provider, shall reimburse the City for the actual direct and indirect cost of the work necessary to correct the hazardous situation. The permittee shall maintain the temporary emergency repair until the permittee completes construction and permanent repairs.
- (b) If the Director determines that a problem with a public service provider's existing facility in a public right-of-way requires a temporary emergency repair to correct a situation that is hazardous to the public, the Director shall immediately notify the public service provider. If the public service provider does not commence the emergency repair within a reasonable time, the Director may cause performance of such temporary emergency repair work as is necessary to correct the hazardous situation. The public service provider shall reimburse the City for the actual direct and indirect cost of the work necessary to correct the hazardous situation. The public service provider shall maintain the temporary emergency repair until the public service provider completes construction and permanent repairs.

SEC. 157.31. PUBLIC IMPROVEMENT COORDINATION.

- (a) Whenever the Director deems it necessary to remove, alter, change, relocate, or adapt the underground or overhead facilities of a public service provider in the public right-of-way due to the City's reconstruction, widening, or straightening of streets; placement or replacement of water, wastewater, or storm water facilities; installation of traffic signals, traffic signs, and streetlights; or construction of any other City public improvement project, the public service provider that owns the facilities shall conform its facilities to the City's project.
- (b) The facilities must be conformed at the public service provider's expense within 120 days after the Director sends final plans and notice to relocate to the public service provider, unless (i) a different conformance schedule for the work is approved by the Director, or

- (ii) the service provider's franchise or other agreement with the City provides for different relocation requirements.
- (c) Facilities of a public service provider that are not conformed within the 120-day notice period or within the approved schedule or such additional time as may have been granted by the City, may be deemed abandoned. Prior to taking any action, the City will provide the service provider 10 days notice of intent to act. The City, and any person working under contract with the City, will not be liable for any damage to or destruction or removal of the facilities, or for any interruption or termination of service through the facilities, caused by the activity of the City, or its contractors, in carrying out the work described in Subsection (a).
- (d) A person performing construction within the public right-of-way for the purpose of conforming facilities at the request of the City in advance preparation for a public improvement project shall obtain a permit under this ordinance.
- (e) The permittee shall maintain the construction area in accordance with the requirements of the Public Right of Way Permitting and Construction Manual or until the work order authorizing the construction of the public improvement project is issued by the City, whichever comes first.

SEC. 157.32. UTILITY STRUCTURES; PERMIT.

- (a) A person commits an offense if the person places or installs a utility structure within the public right-of-way without a construction permit. In addition, a separate Utility Structure Permit shall be required for structures greater than 65 cubic feet in volume. The Utility Structure Permit shall be considered a part of the construction permit.
- (b) Above ground utility structures shall be permitted in accordance with Section (a) and shall meet the following requirements:
 - (1) Utility structures exceeding two feet in height shall not be placed within any intersection visibility triangle.
 - (2) Utility structures less than 65 cubic feet in volume, with no dimension greater than six feet, may be placed within the public right-of-way without screening.
 - (3) Utility structures greater than 65 cubic feet in volume, and less than 240 cubic feet in volume, and less than seven feet in height shall be placed within a public or private utility easement outside the street right-of-way
 - (4) Utility structures greater than 240 cubic feet in volume or more than seven feet in height shall be located in a private utility easement or other private property.

- (5) The placement of the pad shall allow for existing and proposed sidewalks.
 - (6) Utility structures shall comply with all requirements of other City ordinances and other state and federal laws and regulations. The public service provider shall be responsible for obtaining other permits, as required.
- (c) Below-ground utility structures shall be permitted in accordance with subsection (a).
- (d) In reviewing the Utility Structure Permit application, the City will consider the following:
- (1) size, location and impact of the proposed structure;
 - (2) the structure's coordination with existing and proposed public facilities; and
 - (3) availability of remaining right-of-way.

If the City determines that the proposed utility structure cannot be placed within the right-of-way without adversely affecting the integrity of an existing or future facility owned by the City, or the safety of the traveling public, the City shall have the right to deny the location of a new or replacement utility structure within the said right-of-way and may provide assistance in identifying alternative locations for the utility structure.

- (e) A request for a waiver of the location and size requirements may be made to the Director with respect to a particular site for a proposed utility structure.
- (1) The request for a waiver must include a detailed justification for the waiver, including the lack of existing sites not within the public right-of-way; alternative sites sought and reviewed; proof that compliance with the requirement is impracticable; and the necessity of the utility structure and its size at the proposed site to provide service.
 - (2) Within 30 calendar days of receipt of a written request for a waiver, the Director may grant a waiver for good cause.
 - (3) In making this decision, the Director shall consider:
 - (i) the availability of other sites not located in the public right-of-way and person's efforts to secure those sites;
 - (ii) the size, location and impact of the proposed utility structure in the right-of-way at the proposed site;
 - (iii) person's need to provide services to a property or area to be served by the proposed site;

- (iv) person's need for the proposed size of the utility structure to provide services to a property or area to be served by the proposed site;
 - (v) the proximity of other utility structures and person's efforts to collocate at those sites; and
 - (vi) the public health, safety, welfare and convenience.
- (4) The Director shall provide written notice to the applicant of a decision regarding a waiver pursuant to this subsection.
- (5) The Director's decision regarding the waiver shall be final.
- (f) If a utility structure is proposed to be located on City property other than public right-of-way, the following requirements apply:
- (1) The service provider shall submit to the Director a plan showing the facilities proposed to be constructed on City property. The structure shall not be constructed without the City's approval.
 - (2) Nothing contained herein, however, shall ever be held or construed to confer upon any person the right to place a utility structure upon City property. The City reserves the right, at its sole discretion, to enter into an agreement to allow the placement of a utility structure on City property.
 - (3) The City shall not be liable for damages or losses of any kind whatsoever by reason of injury to property or person occasioned by the use of any City property. The City shall have no obligations in regard to the maintenance of any improvements within such City property. The public service provider shall defend the City at its cost and expense from all claims and demands arising from the placement or maintenance of the structures.
 - (4) The use of City property for the placement of a utility structure shall be discontinued and improvements removed within 90 days of notification by the City and the cost of the discontinuation and removal of improvements shall be borne by the owner of the improvement.
 - (5) The public service provider shall pay City a fee for use of the property based upon the fair market value as determined by the City. In addition to a use fee, the City may, to the extent permitted by law, require the public service provider to provide network connectivity and/or conduit to the City.

- (6) The public service provider shall cooperate with other providers in connection with allowing co-location of facilities within the utility structure.

SEC. 157.33. INDEMNITY.

- (a) Except as to Certificated Telecommunication Providers, or a public service provider whose current franchise contains an indemnity which provides that it is controlling over this provision, each person and public service provider installing, maintaining, removing or repairing facilities in the public right-of-way shall promptly defend, indemnify and hold the City harmless from and against all damages, costs, losses or expenses including any and all claims, lawsuit, judgments, costs, liens, losses expenses, fees (including reasonable attorney's fees and costs of defense) proceedings, actions demands, causes of action, liability, and suits of any kind and nature, including personal or bodily injury (including death), property damage, or other harm for which recovery of damages is sought, that is found by a court of competent jurisdiction to be caused solely by the negligent act, error, or omission of the public service provider or any agent, officer, director, representative, employee, affiliate, or subcontractor of the public service provider or their respective officers, agents, employees, directors, or representatives, or any other person while installing, repairing, maintaining, or removing facilities in a public right-of-way.
- (b) The indemnity provided by this section does not apply to any liability resulting from the negligence of the City or its officers, employees contractors, or subcontractors. If the public service provider and the City are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the City under state law and without waving any defenses of the parties under state law.
- (c) The provisions of this indemnity are solely for the benefit of the City and are not intended to create any rights, contractual or otherwise, to any person or entity.
- (d) A permittee who is a Certificated Telecommunication Provider as defined in Chapter 283, Texas Local Government Code, as amended, shall give the City the indemnity provided in Section 283.057, Texas Local Government Code, as amended.

SEC. 157.34 EFFECTIVE DATE.

- (a) The effective date of this ordinance is July 1, 2006.
- (b) Any permit issued prior to the effective date will remain subject to the terms and conditions of City procedures in effect at the time of issuance of the permit and is not

affected by this ordinance, except that, upon expiration or conclusion of the permit, a new or renewal permit must be obtained in accordance with this ordinance.”

SEC. 157.35. PENALTY.

(A) *General Penalty.* Any person who violates any provision of this chapter for which no other penalty is set forth shall be subject to the penalty set forth in § 10.99 of the Cleburne City Code.

(B) Any person or persons, firm or corporation which violates any of the provisions of §§ 157.22(b) 2. (iii) or (iv) is punishable by a fine of not less than \$500 nor more than \$2,000 for each offense, and each violation hereof shall be deemed a separate and distinct offense for each day it continues, and shall be punishable as such.

SECTION TWO. This ordinance shall be cumulative of all provisions of ordinances of the City of Cleburne, Texas, except where the provisions of this ordinance are in direct conflict with the provisions of such ordinances, in which event the conflicting provisions of such ordinances are hereby repealed.

SECTION THREE. It is hereby declared to be the intention of the City Council that the phrases, clauses, sentences, paragraphs and sections of this ordinance are severable, and if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this ordinance, since the same would have been enacted by the City Council without the incorporation in this ordinance of any such unconstitutional phrase, clause, sentence, paragraph or section.

SECTION FOUR. All rights and remedies of the City of Cleburne are expressly saved as to any and all violations that have accrued at the time of the effective date of this ordinance of the provisions of the Code of Ordinances of the City of Cleburne, as amended, or any other ordinances affecting excavation within the City's right-of-way, and, as to such accrued violations and all pending litigation, both civil and criminal, whether pending in court or not, under such ordinances, same shall not be affected by this ordinance but may be prosecuted until final disposition by the courts.

SECTION FIVE. The City Secretary of the City of Cleburne is hereby directed to publish in the official newspaper of the City of Cleburne, the caption, penalty clause, publication clause and effective date clause of this ordinance two (2) times as authorized by Section 52.103 of the Local Government Code.

SECTION SIX. This ordinance shall be in full force and effect on June 23, 2006, and from and after its passage and publication as required by law, and it is so ordained.

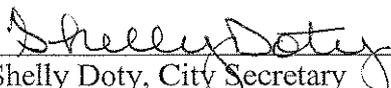
PASSED AND APPROVED this the 13th day of June, 2006, at a Regular Meeting of the City Council of the City of Cleburne, Texas.

CITY OF CLEBURNE

BY: 

Ted Reynolds, Mayor

ATTEST:



Shelly Doty, City Secretary

