

ORDINANCE NO. 31

AN ORDINANCE OF THE CITY OF POST OAK BEND, TEXAS, TO ESTABLISH UNIFORM RULES AND REGULATIONS GOVERNING THE CONSTRUCTION IN AND USE OF CITY RIGHTS-OF-WAY; PROVIDING FOR A PENALTY; PROVIDING A SEVERABILITY CLAUSE; PROVIDING FOR THE REPEAL OF ALL ORDINANCES IN CONFLICT; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the public easements and rights-of-way ("rights-of-way") of the City are valuable public resources that have required and will continue to require substantial investment by the City of Post Oak Bend ("City"); and

WHEREAS, the City desires to structure and implement a fair and orderly process for authorization to occupy and use the rights-of-way to protect the public interest consistent with applicable law; and

WHEREAS, the City desires to minimize inconvenience and disruption to the public, provide for the orderly and efficient use of the rights-of-way now and in the future and preserve adequate capacity of existing and future uses of the rights-of-way; and

WHEREAS, in accordance with applicable law, the City hereby exercises its right to control and manage its right-of-way in a nondiscriminatory way and implement certain police power regulations regarding the use of those rights-of-way; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF POST OAK BEND, TEXAS:

Section 1. The purpose of this ordinance is to:

- (A) Assist in the management of authorized public facilities ("facilities") placed in, on or over the rights-of-way of the City in order to minimize the congestion, inconvenience, deterioration, visual impact and other adverse effects, and the costs to the citizens resulting from the placement of such facilities within the rights-of-way;
- (B) Govern the use and occupancy of the 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 rights-of-way held in public trust by the City;
- (E) Preserve the physical integrity of the streets, roads, and highways of the City;
- (F) 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) Protect the safety, security, appearance, and condition of the rights-of-way.

Section 2. AUTHORITY; SCOPE.

This ordinance applies to all persons that place facilities in, on or over rights-of-way. Compensation for use of the rights-of-way shall be paid in accordance with all applicable law, including, but not limited to, cable providers, in accordance with the Federal Cable Act, 47 USC § 541, *et seq.*; for certificated telecommunication providers, Chapter 283 of the Texas Local Government Code; for distributors of natural gas or as otherwise applicable.

Section 3. DEFINITIONS.

In this ordinance the following words, terms and phrases shall have the following meanings:

- (A) **City** means The City of Post Oak Bend, Texas. As used throughout, the term City also includes the designated agent of the City;
- (B) **City Property** means all City buildings that are not dedicated for utility or street transportation purposes;
- (C) **Direction of the City** means all ordinances, laws, rules, resolutions, and regulations of the City that are not inconsistent with this ordinance and are now in force or may hereafter be passed and adopted;
- (D) **Director of Public Works or Director** means the City Director of Public Works or such Director's designee;
- (E) **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 rights-of-way;
- (F) **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 authorized by state law or City franchise to construct and maintain facilities in the rights-of-way;

(G) **Public Rights-of-Way** means the same as defined in Tex. Loc. Gov't 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 City Property".

Section 4. MUNICIPAL AUTHORIZATION REQUIRED.

(A) (1) Any person seeking to place facilities on, in or over the rights-of-way shall pay a \$600.00 construction permit application fee and shall file an application for such construction permit with the City and shall abide by the terms and provisions of this ordinance pertaining to use of the rights-of-way. If there are additional direct costs to the City in processing the applications, the City may recover those from the applicant prior to the issuance of the construction permit.

(2) With such application, applicants shall submit to the City written applications identifying the applicant and all of the applicant's affiliates that may have physical control of facilities within the rights-of-way, with a map of the proposed installations, general description of the services to be provided, a construction schedule, and a general description of the effect on rights-of-way as detailed below.

(B) Any person, except a Certificated Telecommunications Provider, prior to placing, reconstructing, or altering facilities in, on or over the rights-of-way, must obtain separate municipal authorization from the City, such as a license agreement or franchise, as may be applicable. For use of the rights-of-way, all users of the rights-of-way shall compensate the City on the value of the rights-of-way used, being typically either on a gross receipts basis or on a linear foot basis, to the fullest extent allowed by law.

(C) Any person with a current, unexpired consent, franchise, agreement, license or other authorization from the City ("Grant") to use the rights-of-way that is in effect at the time this ordinance takes effect shall continue to operate under and comply with that Grant (except to the extent the police power regulations in such Grant are inconsistent with this ordinance, in which event, this ordinance will control) until the Grant expires or until it is terminated by mutual agreement of the City and the person, or is terminated as otherwise provided for in law.

(D) Prerequisites to Issuance of Construction Permit - Each Person Must Register With the City. In order for the City to know which person owns or has physical control over facilities in the rights-of-way within the City, each person who owns or has physical control over facilities shall register with the City and provide the following information at a minimum: (i) the person's name, address, and telephone number(s) and (ii) a twenty-four (24) hour telephone number(s) to a contact person(s) with decision-making authority for the person. Each person shall update and keep current the required registration with the City at all times.

Section 5. ADMINISTRATION AND ENFORCEMENT.

(A) The City shall administer and enforce compliance with this ordinance.

(B) A person shall report information related to the use of the rights-of-way that the City requires in the form and manner reasonably prescribed by the Director.

(C) The Director shall report to the City Council upon the determination that a person has failed to comply with this ordinance.

Section 6. CONSTRUCTION OBLIGATIONS.

(A) A person is subject to reasonable police power regulation of the City to manage its rights-of-way in connection with the excavation, construction, installation, expansion, reconstruction, relocation, alteration, removal, maintenance or repair of facilities in the 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 relating to the excavation, construction, installation, expansion, reconstruction, relocation, alteration, removal, maintenance or repair of facilities performed by the person in the rights-of-way.

(2) A person shall be required to place facilities within the rights-of-way in accordance with applicable City requirements.

(3) The undergrounding of facilities is encouraged. In any event, facilities shall be installed underground where existing utilities are already underground.

(4) Conduits and ducts shall be installed parallel with the curb line and cross the rights-of-way perpendicular to the rights-of-way centerline unless otherwise directed by the City.

(5) Ducts and conduits shall be installed by trenchless excavation or directional boring when placing these facilities under paved rights-of-way or a driveway crossing to avoid motor vehicle interruptions, unless otherwise directed by the City.

(B) A person shall perform excavations and other construction in the 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 right-of-way. All excavations and other construction in the rights-of-way shall be conducted so as to minimize interference with the use of public and private property. Any plant or facility placed within the rights-

of-way which is suspended in any manner above ground shall either be placed on existing poles or equipment or be suspended at a height not less than twenty-two feet (22') above ground level, unless otherwise approved by the Director, but in no event less than fifteen feet (15'), except to the extent state law controls. A person shall follow all reasonable construction directions given by the City in order to minimize any such interference.

(C) PERMITS FOR CONSTRUCTION

(1) Except as otherwise provided in subsection (3) below, a person must obtain a permit 72 hours prior to any excavation, construction, installation, expansion, reconstruction, relocation, alteration, removal, maintenance or repair of the person's facilities.

(2) Bonding and insurance will be provided by the person as required by this ordinance.

(3) A construction permit is not required for routine maintenance that does not require excavation of the rights-of-way or which does not block traffic lanes or sidewalks during peak traffic periods between 7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 6:30 p.m. on weekdays, or for more than two hours during any non-peak traffic period. The failure of the person to request and obtain a permit from the City prior to performing any of the above listed activities in, on or over any right-of-way, except in an emergency as provided below, will subject the person to a stop-work order from the City and enforcement action pursuant to the City's ordinances.

(4) A person shall furnish the City with construction plans and maps using a standard format adopted by City, showing the location and proposed routing of new construction or reconstruction at least 21 business days before beginning construction or reconstruction that involves an alteration to the surface or subsurface of the rights-of-way, unless otherwise approved by the City. 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.

(5) These construction plans shall show all features within the rights-of-way that would affect the placement of the proposed facilities such as, but not limited to, existing underground and aerial wires or conduits, ducts, poles, wires, pipes, sewerage, water lines, and cables as well as their ownership; fire hydrants; driveways; curbs, inlets and drains; and trees and large shrubs. Drawings shall be drawn to an appropriate scale of no larger than one (1) inch equals fifty (50) feet using a standard format. Drawings shall show horizontal dimensions from the curb line and elevations.

(6) To the extent known, plans for ongoing repair, maintenance, and improvements which involve cutting into paved City roads or streets shall be submitted to the City on an annual basis, no later than April 1 of each year, and updated based upon any changes. This does not require any proprietary information, such as equipment or customer specific information. Such information may be designated confidential, and to the extent allowed by law, will be kept confidential by the City.

(8) Once a permit is issued, the City shall be notified at least 24 hours in advance that construction in the rights-of-way is ready to proceed by a person or its representative. Information signs (at least 3 ft. x 3 ft. in size) stating the identity of the person doing the work, their telephone number, and the person's identity and telephone number shall be placed at the location where construction is to occur 48 hours prior to the beginning of work in the rights-of-way and shall continue to be posted at the location during the entire time the work is occurring and/or until permanent repairs are completed.

(9) Erosion control measures and advance warning signs, markers, cones, and barricades must be in place before work begins. A person may be required to show proof of engineered plans relating to storm water and erosion when applicable. A person shall be responsible for storm water management erosion control that complies with city, state and federal guidelines, as applicable.

(10) Directional boring is permitted only Monday through Friday 7:00 a.m. to 6:00 p.m. No work in the rights-of-way shall be performed except for emergencies, on Sundays or on holidays.

(11) Without affecting the legal relationship between a person and the person's contractors, a person is responsible for the workmanship and any damages by a contractor or subcontractor.

(D) Within fourteen (14) days of completion of excavation, construction, installation, expansion, reconstruction, relocation, alteration, removal, maintenance or repair of facilities or other work in the rights-of-way, a person shall temporarily restore and repair the rights-of-way in accordance with standard City specifications, and any other applicable codes and ordinances. Within thirty (30) calendar days after completion of work in the rights-of-way, the person shall permanently restore, replace, relay and/or repair the surface, base, curbs, drainage systems, irrigation systems, landscape treatment or other facilities and infrastructure located on, in or under any right-of-way that has been excavated, altered or damaged by reason of the excavation, construction, installation, expansion, reconstruction, relocation, alteration, removal, maintenance or repair of the person's facilities in accordance with existing standards of the City in effect at the time of the work. Upon a showing of good cause, the City may at its sole discretion extend the time for restoration and repair of the rights-of-way under this subsection. Unless the person provides a recent dated photograph or a video tape of the right-of-way before the construction, the condition of the right-of-way before construction should be presumed in good condition, subject only to reasonable wear and tear, as determined by the Director.

(F) Upon failure of a person to perform any such repair or replacement work the City may repair such portion of the right-of-

way that has been disturbed by the person, the person's contractors or agents. Upon receipt of an invoice from the City, the person shall reimburse the City for the costs so incurred within thirty (30) calendar days from the date of the City invoice.

(E) Should the City reasonably determine, within one year from the date of the completion of the repair work, that the surface, base, curbs, drainage systems, irrigation systems, landscape treatment or other facilities and infrastructure located on, in or under any right-of-way requires additional restoration, replacement or repair work to meet existing standards of the City, a person shall perform such additional restoration, replacement or repair work to the satisfaction of the City, subject to all City remedies as provided herein.

(F) Notwithstanding the foregoing in subsection (G), if the City determines that the failure of a person to properly repair or restore the right-of-way constitutes a safety hazard to the public, the City may undertake emergency repairs and restoration efforts, after emergency notice has been provided, to the extent reasonable under the circumstances, and the person failed to respond within a reasonable time specified by the City. Upon receipt of an invoice from the City, 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.

(G) If the City 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 City'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.

(H) Except in the case of customer service interruptions and imminent harm to property or persons ("Emergency Conditions"), a person may not excavate the pavement of a street or right-of-way without first complying with City requirements. The City shall be notified as promptly as possible regarding work performed under such Emergency Conditions, and the Person shall comply with the requirements of City standards and of this ordinance for the restoration, replacement or repair of the rights-of-way.

(I) The City shall require reasonable bonding requirements of a person, as are required of other entities that place facilities in the rights-of-way. Such bonding amounts will be reasonably determined by the City depending on several factors as to public safety and risk of harm to persons and property. Such factors include: (1) the nature of the construction project (overhead, trenchless, open trench), (2) type of facility (gas, electric, water, telecommunications, cable, fiber), (3) past construction history of person in the City as to any damage claims, repairs and timeliness of construction. The City may in a non-discriminatory manner waive or reduce the amount of the bond in the event the person provides written documentation as to reserves available to compensate the City for damages, and has a two year history of no claims, or damages to City property by the City, or of prompt payment on such claims.

(J) A person issued a permit pursuant to this ordinance shall, at all times, employ the standard of care attendant to the risks involved to prevent actions, failures and accidents which may cause damage, injury or nuisance to persons, the public, the facilities of other persons, or to any City structures or structures owned by other persons located in the rights-of-way. A person issued a permit pursuant to this ordinance shall observe all federal and state statutes and regulations and all applicable City ordinances and codes. A person issued a permit pursuant to this ordinance shall keep and maintain its facilities in a safe and suitable condition, and in good order and repair.

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

(A) In the exercise of governmental functions, the City has first priority over all other users of the rights-of-way. The City reserves the right to lay sewer, gas, and water facilities, and any other pipe lines or cables and conduits, and to do underground and overhead work, and have attachments and require, restructuring or changes in the City's aerial facilities in, across, along, over or under a public street, alley or right-of-way that may be occupied by a person, and to change the curb, route or grade of sidewalks and streets, to the fullest extent allowed by law.

(B) The City shall assign the location in or over the rights-of-way among competing users of the 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. As a priority, each user of the rights-of-way will be allowed one alignment on one side of the street for placement of its facilities, provided there is adequate space available. In the event an additional alignment(s) or both sides of the street has been requested by a user, the City will grant such request, provided there is adequate space available and the requestor has demonstrated the financial or technical impracticability of the use of the requestor's single alignment or use of only one side of the street.

(C) If the City authorizes abutting landowners to occupy space under the surface of any public street, alley, or right-of-way, the Grant to an abutting landowner shall be subject to the rights of the previously authorized users of the right-of-way.

(D) If the City gives written notice, a person shall, at its own expense, temporarily or permanently, remove, relocate, change or alter the position of a person's facilities that are in the 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, relocate, change or alter, the Director will confer with the person before determining the alterations to be required and the timing thereof. The Director shall give notice whenever the City has determined that removal, relocation, change or alteration is reasonably necessary for the construction, operation, repair, maintenance or installation of a City governmental public improvement in the right-of-way. This section shall not be construed to prevent a person's recovery of the cost of relocation

or removal from private 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 the person. On a non-discriminatory basis, the Director and a person may agree in writing to different time frames than those provided above if circumstances reasonably warrant such a change.

(E) A person may trim trees or other vegetation in or over the rights-of-way as needed 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) days. A person shall not be responsible for tree trimming or removal, except as to the trimming required to construct, maintain or restore utility service.

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. A person shall furnish the City with proof of insurance at the time of the request for construction permits. The City reserves the right to review the insurance requirements and to reasonably adjust insurance coverage and limits when the City determines that changes in statutory law, court decisions, or the claims history of the industry or the person require adjustment of the coverage.

(B) A person shall furnish to the City, at no cost to the City, copies of certificates of insurance evidencing the coverage required by this section. 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) The insurance certificate required under subsection (B) shall:

- (1) name the City of and its officers, employees, board members and elected representatives as additional insured 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 City by certified mail.

(D) A person shall file and maintain proof of insurance with the City. An insurance certificate obtained in compliance with this section is subject to City Attorney approval. 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 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) A person shall pay premiums and assessments for the insurance required under this section. 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.

Section 9. INDEMNITY.

(A) Except as to Certificated Telecommunications Providers, each person placing facilities in the 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 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 and 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 or authorized under this ordinance.

Upon commencement of any suit, proceeding at law or in equity against the City relating to or covering any matter covered by this indemnity, to indemnify and hold the City harmless, or to pay said final judgment and costs, as the case may be, the City shall give the Person reasonable notice of such suit or proceeding. The Person shall promptly provide a defense to any such suit or suits, including any appellate proceedings brought in connection therewith, and pay as aforesaid, any final judgment or judgments that

may be rendered against the City by reason of such damage suit. Upon failure of the Person to comply with the provisions of this Ordinance, after reasonable notice to the City, the City shall have the right to defend the same and in addition to being reimbursed for any such judgment that may be rendered against the City, together with all court costs incurred therein, the Person shall promptly reimburse the City for attorney's fees, including those employed by the City in such case or cases, as well as all expenses incurred by the City by reason of undertaking the defense of such suit or suits, whether such suit or suits are successfully defended, settled, compromised, or fully adjudicated against the City.

(B) This indemnity provision shall not apply to any liability resulting from the negligence of the City, its officers, employees, agents, contractors, or subcontractors.

(C) The provisions of this indemnity are solely for the benefit of the City and are not intended to create or grant any rights, contractual or otherwise, to any other person or entity;

(D) To the fullest extent permitted by law, a person shall pay all expenses incurred by the City in defending itself with regard to all damages and penalties provided in this ordinance. These expenses shall include all out-of-pocket expenses such as attorney's fees, and shall also include the reasonable value of any services rendered by any employees of the City. In the event the City is compelled to undertake the defense of any such suit by reason of a person's failure to perform as hereinabove provided, the City shall have full right and authority to make or enter into any settlement or compromise of such adjudication as the City Council shall deem in the best interest of the City, this without the prior approval or consent of the person with respect to the terms of such compromise or settlement.

Section 10. 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 of full force and effect and the City shall promptly promulgate new or revised provisions in compliance with the authority's decision or enactment.

Section 11. GOVERNING LAW; REPEAL.

This ordinance shall be construed in accordance with the law in effect on the date of passage of this ordinance to the extent that such law 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 police power based regulations to manage its rights-of-way, pursuant to Sections 6 and 7 or as otherwise provided by law. All ordinances of the City in conflict with the provisions of this ordinance are repealed.

Section 12. UNAUTHORIZED USE OF PUBLIC RIGHTS-OF-WAY; PENALTY.

The City may institute all appropriate legal action to prohibit any person from using the rights-of-way unless the person has complied with the terms of this ordinance. Any person violating any provision of this ordinance shall be deemed guilty of a misdemeanor and shall be subject to a fine not to exceed five hundred dollars (\$500.00) for each offense, and each and every day such violation shall continue shall be deemed to constitute a separate offense.

Section 13. CONSTRUCTION PERMIT ACCEPTANCE.

Each Construction Permit Application to use the rights-of-way shall contain, or have attached, the following:

"By this application for a construction permit to use the rights-of-way, I, as the lawful representative of _____ (not the contractor but a representative of the Facility Owner with authority to bind the Owner), hereby agree to use the City's Rights-of-Way under the terms and conditions approved by the City of Post Oak Bend Right-of-Way Management Ordinance (Ordinance No. _____).

Name
Title
Date"

Section 14. EFFECTIVE DATE.

This Ordinance shall become effective immediately upon passage and publication of the caption as required by law.

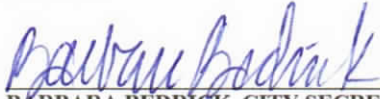
11th DULY PASSED by the City Council of the City of Post Oak Bend, Texas, in regular meeting in the City Hall, on this the day of JUNE, A.D. 2013.

APPROVED:

Raymond Bednik

RAYMOND BEDRICK, MAYOR

ATTEST:



BARBARA BEDRICK, CITY SECRETARY

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ATTEST:



BARBARA BEDRICK, CITY SECRETARY