

ORDINANCE NO. 16-58

AN ORDINANCE ADDING NEW CHAPTER 12.14 TO THE OLATHE MUNICIPAL CODE PERTAINING TO RIGHT-OF-WAY MANAGEMENT.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF OLATHE, KANSAS:

SECTION ONE: Chapter 12.14 is hereby added to the Olathe Municipal Code and shall read as follows:

**“CHAPTER 12.14
RIGHT-OF-WAY MANAGEMENT**

- 12.14.010 Definitions**
- 12.14.020 Right-of-Way Management.**
- 12.14.030 Use of the Right-of-Way.**
- 12.14.040 Facility Relocation or Vacation in the Right-of-Way.**
- 12.14.050 Damage to the Right-of-Way.**
- 12.14.060 Right-of-Way Use; Permits.**
- 12.14.070 Right-of-Way Use; Construction requirements.**
- 12.14.080 Right-of-Way Use; Denial of Permit.**
- 12.14.090 Right-of-Way Use; Abandoned Facilities.**
- 12.14.100 Right-of-Way Use; Revocation of Permit; Appeals.**

12.14.010. Definitions.

For the purposes of this Chapter, the following terms, phrases, words and their derivations shall have the meaning given in this section:

“Emergency” means a condition that:

- (A) Poses a clear and immediate danger to life or health, or of a significant loss of property; or
- (B) Requires immediate repair or replacement in order to restore service to a user.

“Facility” means lines, pipes, irrigation systems, wires, cables, conduit facilities, ducts, poles, towers, vaults, pedestals, boxes, appliances, antennas, transmitters, gates, meters, appurtenances, wireless communications facilities, or other equipment.

“MUTCD” means the Federal Highway Administration's Manual on Uniform Traffic Control Devices.

“Person” means any natural or corporate person, business association or business entity including, but not limited to, a partnership, a sole proprietorship, a political subdivision, a public or private agency of any kind, a utility, a successor or assign of any of the foregoing, or any other legal entity.

“Public Improvement” means any project undertaken by the City for the construction, reconstruction, maintenance, or repair of any public infrastructure, and including without limitation, streets, alleys, bridges, bikeways, parkways, sidewalks, sewer lines, water lines, drainage facilities, traffic control devices, street lights, public facilities, underground fiber conduit and any content therein, public buildings, Public Lands, and any appurtenances related thereto.

“Public Lands” means any real property of the City that is not Right-of-way.

“Right-of-way” and “ROW” means the area on, below or above streets, alleys, bridges and parkways in which the City has a dedicated or acquired right-of-way interest in the real property.

“Right-of-way user” and “ROW user” means a person, or its successors and assigns, that uses the right-of-way for purposes of work, excavation, provision of services, or to install, construct, maintain, and repair facilities thereon, including, but not limited to, landowners and service providers. A ROW user shall not include ordinary vehicular or pedestrian traffic.

“Service” means a commodity provided to a person by means of a delivery system that is comprised of facilities located or to be located in the right-of-way, including, but not limited to, gas, telephone, cable television, internet services, open video systems, wireless services, alarm systems, steam, electric, water, telegraph, data transmission, petroleum pipelines, or sanitary sewerage.

“Service Provider” means any person owning, possessing or having an interest in facilities in the right-of-way that are used for the provisions of a service for or without a fee; however, this definition shall also include persons owning, possessing or having an interest in facilities in the right-of-way that are used by, may be used by or are intended for use by another person, in whole or in part, to provide a service for or without a fee, regardless of whether the actual facility owner provides any service as defined herein.

“Street” means the pavement and sub-grade of a City residential, collector or arterial roadway.”

“Technical Specifications” means the Technical Specifications, Design Criteria, Design Aids, and Design Details promulgated by the City Engineer.

12.14.020. Right-Of-Way Management.

(A) Purpose. The purpose of this Chapter is:

(1) To recognize the City’s primary role as chief steward of the ROW and its duty to its citizens to recover the costs of managing the ROW and incursions into it;

(2) To clarify and regulate conditions of occupancy and construction for those ROW users occupying space within the City’s ROW given the anticipated increased use of the ROW by various ROW users throughout the country;

(3) To recognize the necessity for sound management practices in light of the increased use of the ROW and the fact that the ROW is a limited resource;

(4) To treat each ROW user equitably and in a competitively neutral and nondiscriminatory manner with considerations that may be unique to the technologies and situation of each particular ROW user;

(5) To minimize disruption, visual impact or inconvenience to the public, and to preserve the public health, safety and welfare; and

(6) To comply with applicable state and federal laws.

(B) Policy. It is the policy of the City to authorize any ROW user to utilize the ROW in a competitively neutral, non-discriminatory manner that maximizes the efficient use of the ROW while conserving the ROW and minimizing the burden on the ROW, both physically and aesthetically.

(1) Any use of the ROW by a ROW user shall be subject to the terms and conditions of this Chapter, in addition to other applicable federal, state or local requirements.

(2) The right granted to the ROW user to use the ROW is limited to the use that the ROW user has obtained from the City in accordance with this Chapter. These rights are for the exclusive use of the ROW user except where otherwise provided herein, or when authorized by the City.

(3) This Chapter regulates occupancy, use and excavations in the ROW by providing, among other things, for the issuance of permits which grant the authority to utilize and occupy the ROW within the City.

(4) All ROW users shall be subject to all rules, regulations, policies, resolutions, ordinances, and technical specifications now or hereafter adopted or promulgated by the City in the reasonable exercise of its police power and are subject to all applicable laws, orders, rules and regulations adopted by governmental entities now or hereafter having jurisdiction over the ROW relating to permits and fees, sidewalk and pavement cuts, utility location, construction coordination, surface restoration, and other requirements on the use of the ROW. This Chapter shall be construed in a manner consistent with all applicable federal, state, and local laws. The ROW user shall meet or exceed the most stringent technical standards set by regulatory bodies, including the City, now or hereafter having jurisdiction. The ROW user's rights are subject to the police powers of the City to adopt and enforce ordinances necessary to the health, safety, and welfare of the public. Failure of the ROW user to comply with any applicable law or regulation may result in a forfeiture of any permit or other authorization granted in accordance with this Chapter.

(5) The City Engineer is the principal City official for administration of ROW permits for work and excavations made in the ROW. The City Engineer may delegate any or all of the duties hereunder.

(C) Failure to enforce. The City's failure to enforce or remedy any noncompliance of the terms and conditions of this Chapter or of any permit granted hereunder shall not constitute a waiver of the City's rights nor a waiver of any person's obligation as herein provided.

(D) Penalties. Any person or entity violating any provision of this chapter is guilty of a public offense, and upon conviction thereof shall be fined in a sum of not less than two hundred dollars (\$200.00) nor more than five hundred dollars (\$500.00). Every day that this chapter is violated shall constitute a separate offense. The violation of any provision of this Chapter is hereby deemed to be grounds for revocation of the permit to operate with the City. The City shall have the authority to maintain civil suits or actions in any court of competent jurisdiction for the purpose of enforcing the provisions of this Chapter. In addition to any other remedies, the City Attorney may institute injunction, mandamus or other appropriate action or proceeding to prevent violation of this Chapter.

(E) Reservation of Rights. In addition to any rights specifically reserved to the City by this Chapter, the City reserves unto itself every right and power which is required to be reserved by a provision of any ordinance under any permit or other authorization granted under this Chapter. The City shall have the right to waive any provision of this Chapter or any permit or other authorization granted thereunder, except those required by federal or state law, if the City determines as follows:

- (1) That it is in the public interest to do so; and
- (2) That the enforcement of such provision will impose an undue hardship on the person.

To be effective, such waiver shall be evidenced by a statement in writing signed by a duly authorized representative of the City. Further, the City hereby reserves to itself the right to intervene in any suit, action or proceeding involving the provisions herein.

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

“12.14.030. Use of the Right-of-Way.

(A) No person may excavate, construct, or use a Facility within the ROW of the City except as provided in this chapter. The ROW user's use of the ROW is in all matters subordinate to the City's use or occupation of the ROW. The City may reserve sufficient space within the ROW for future public improvements. Without limitation of its rights, the City expressly reserves the right to exercise its governmental powers now and hereafter vested in or granted to the City.

(B) The ROW user shall coordinate the placement of Facilities in a manner that does not interfere with any existing, planned, or future public improvement and does not compromise the public health, safety or welfare, as reasonably determined by the City. The Facilities shall be placed with adequate clearance from such public improvements so as not to impact or be impacted by such public improvements and as required by the City's Technical Specifications, available in the office of the City Engineer and on the City's Website. Such standards shall be competitively neutral and not unreasonable or discriminatory.

(C) The ROW user must give due consideration to any request made by the City concerning placement of Facilities in private easements in order to limit or eliminate future street improvement relocation expenses.

(D) All Facilities shall be located and laid so as not to disrupt or interfere with any pipes, drains, sewers, irrigation systems, or other structures or public improvements already installed. In addition, the ROW user shall, in doing work in connection with its Facilities, avoid, so far as may be practicable, disrupting or interfering with the lawful use of ROW or other public lands of the City.

(E) All Facilities of the ROW user shall be placed so that they do not interfere with the use of ROW and public lands. The City, through its City Engineer, shall have the right to consult and review the location, design and nature of the Facility prior to its being installed.

(F) Whenever reasonably possible, all newly constructed Facilities shall be located underground. The ROW user shall comply with all requirements of the City relating to underground Facilities. This requirement may be discretionally waived by the City Engineer for safety concerns, or some other good cause under the condition that does not cause discrimination among ROW users. If this requirement is waived, the Facilities shall be located as directed by the City Engineer, including, but not limited to, requirements regarding location and height. Above ground Facilities shall comply with the Technical Specifications and all applicable zoning regulations, and be located in a manner that does not compromise the public health, safety or welfare.

(G) The ROW user shall not interfere with the Facilities of other ROW users without their permission. When the City requires or negotiates to have a service provider cease using its existing poles and to relocate its Facilities underground, all other service providers using the same poles shall also relocate their Facilities underground at the same time, except transmission equipment, as defined in 47 CFR 1.40001. Provided, any such relocations shall be subject to the appeal process contained in Section 12.14.150.

(H) A ROW user shall not construct or reconstruct any of its Facilities located upon, over, under or within the City ROW without first having submitted in writing a description of its planned improvement to the City Engineer and having received a permit for such improvement. Any drawings, plans and/or specifications submitted shall be certified by a Kansas registered professional engineer stating that such drawings, plans or specifications, or both, comply with all applicable technical codes, rules and regulations, unless such plans are based directly on nationally recognized codes, or City specifications which are appropriately cited, and attested to on the plans by the signature of an authorized official of the organization applying for the permit.

(I) The ROW user shall cooperate promptly and fully with the City and take all reasonable measures necessary to provide accurate and complete on-site information regarding the nature and horizontal and vertical location of its Facilities located within the ROW, both underground and overhead, when requested by the City or its authorized agent for a public improvement. Such location and identification shall be at the expense of the ROW user without any expense to the City, its employees, agents, or authorized contractors.

(J) The Service Provider shall keep and maintain accurate records and as-built drawings depicting accurate location of all its Facilities constructed, reconstructed or relocated in ROW. Within ten (10) days of a request by the City, the service provider will provide to the City information concerning the location and conditions of such Facilities as may be reasonably requested. Such information shall be either on Kansas state plane coordinates, or include prominent ground features sufficient to allow the city to align the Facilities. When available to the Service Provider, such information will be submitted electronically in an AutoCad® format to the extent compatible with the City's Geographical Information Systems (GIS) and Johnson County Automated Integrated Mapping Systems (AIMS) provided, however, that nothing herein shall be construed to require the Service Provider to acquire or modify any electronic mapping system. Underground Facilities shall be differentiated from overhead Facilities. Such mapping and identification shall be at the sole expense of the service provider.

(K) The Service Provider shall not sell, transfer, lease, assign, sublet or dispose of its Facilities, or any portion thereof, that is located in City ROW, or any right, title or interest in the same, or the transfer of any rights granted by the City to any person either by forced or involuntary sale, or by ordinary sale, consolidation or otherwise, without notice to the City. This provision shall not apply to the sale or lease of Facilities to reseller service providers. No notice to the City shall be required for a transfer in trust, mortgage, or other similar instrument, in whole or in part, to secure an indebtedness, or for a pro forma transfer to a corporation, partnership, or other entity controlling, controlled by or under common control with the Service Provider.

(L) Encroachments in the ROW for private purposes which create a safety hazard, as determined by the City Engineer are prohibited. The City may prohibit the use or occupancy of a specific portion of the ROW by a ROW user due to public health, safety or welfare considerations.

12.14.040. Facility Relocation or Vacation in the Right-of-Way.

(A) The ROW user shall promptly remove, relocate or adjust any Facilities located in the ROW as directed by the City for a public improvement or when reasonably required by the City by reason of public health, safety or welfare. Such removal, relocation, or adjustment shall be performed by the ROW user at the ROW user's sole expense without expense to the City, its employees, agents, or authorized contractors and shall be specifically subject to rules, regulations and schedules of the City, including to any franchise agreement between the ROW user and the City. The ROW user shall proceed with relocations at due diligence upon notice by the City to begin relocation.

(B) Any damages suffered by the City, its agents or its contractors to the extent caused by ROW user's failure to timely relocate or adjust its Facilities, or failure to properly relocate or adjust such Facilities including proper restoration of surfaces, shall be borne by the ROW user.

(C) It is the intent of this section for both the City and the ROW user to cooperate with one another so that the need for Facility relocation is minimized and, when required and feasible, relocations may be completed prior to receipt of bids by the City for a public improvement.

(D) If the City vacates a ROW which contains the Facilities of a ROW user, and if the vacation does not require the relocation of the ROW user's Facilities, the City shall reserve, to and for itself and all ROW users having Facilities in the vacated ROW, an easement for the right to install, maintain and operate any Facilities in the vacated ROW and to enter upon such vacated ROW at any time for the purpose of reconstructing, inspecting, maintaining or repairing the same.

12.14.050. Damage to the Right-of-Way.

(A) In the event the ROW user severely disturbs or damages the root structure of any tree in the ROW to the detriment of the health and safety of the tree, the ROW user will be required to remove and replace the tree at the ROW user's cost. In review of the ROW user's plan, the City Engineer, discretionarily, may require the ROW user to directionally bore around any tree in the ROW.

(B) Upon the appropriate request of any person having satisfied City procedure and ordinances, the ROW user shall remove, raise, or lower its Facilities temporarily to permit the moving of houses or other structures. The expense of such temporary removal, raising or lowering shall be paid by the person requesting the same, and the ROW user may require such payment in advance. The ROW user must be given not less than fifteen (15) days written notice from the person detailing the time and location of the moving operations, and not less than 24-hours advance notice from the person advising of the actual operation.

(C) The City Engineer may cause to be removed any encroachment in the ROW that creates a hazard to public health, safety, or welfare, and the cost of such removal and restoration of the ROW shall be borne by the ROW user.

12.14.060. Right-of-Way Use; Permits.

(A) Any person who desires to use any portion of the City ROW shall obtain a permit from the City prior to any use, construction or entry upon the City ROW. No use of the ROW shall be authorized in any capacity or manner without first obtaining the necessary permit from the City. Any person who has obtained a permit for use of the city ROW shall report any changes in the information submitted to the city in writing within thirty (30) days of any change to such information.

(B) Prior to providing any service to the City and its residents, a service provider shall first obtain the necessary franchise agreement from the City. If state law permits the City to enter into a franchise agreement with an applicant, a franchise agreement will be required of such applicant.

(C) Applications for a ROW permit shall be submitted to the City Engineer by either the ROW user or by the person who will do the work in the ROW. Before an application may be submitted, the applicant must attend a pre-application meeting, unless waived by the City Engineer. Such pre-application meeting shall include a discussion of technical studies, plans and other information deemed relevant to the specific application request;

(D) ROW permit applications shall contain and be considered complete only upon receipt of the following:

- (1) Identity and legal status of applicant, including related affiliates;

(2) Name, address, telephone number, fax number (if applicable) and email address of officer, agent or employee responsible for filing the ROW permit;

(3) Name, address, telephone number, fax number (if applicable) and email address of the local representative of the service provider who shall be available at all times to act on behalf of the service provider in the event of an emergency;

(4) Information sufficient to determine whether the service provider is subject to franchising by Kansas law;

(5) Description of the service provider's intended use of the ROW;

(6) Proof of any necessary permit, license, certification, grant, registration, franchise agreement or any other authorization required by any appropriate governmental entity, including, but not limited to, the City, the FCC or the KCC;

(7) Maps showing the proposed location of Facilities of the service provider within the City;

(8) A traffic control plan;

(9) If the ROW user is connecting to an electric power source, proof that the ROW user has obtained the proper electrical permit;

(10) Submission of a completed permit application form, including all required attachments as required by technical specifications;

(11) Payment of all money due to the City for permit fees and costs, for prior excavation costs, for any loss, damage or expense suffered by the City because of the applicant's prior excavations of the ROW, or for any emergency actions taken by the City;

(12) In the case of applications for new telecommunications Facilities, applicants shall provide notice by certified mail to all property owners within 100 feet of the proposed location of such facility, as required by the City Engineer or designee;

(13) In the case where an applicant is requesting use of City streetlight poles, a structural analysis and field inspection of such poles; and

(14) Such other information as may be reasonably required by the City to complete the application.

(E) All applications shall be processed within the timeframes required by state and federal law.

(F) If an applicant has submitted an application for a permit for the installation, construction, maintenance or repair of multiple Facilities, that applicant may not submit another application for a permit for the installation, construction, maintenance or repair of multiple Facilities until the first application has been approved or denied. This provision may be waived by the City Engineer.

(G) The ROW permit fee shall be established by a resolution of the Governing Body. The permit fee shall be subject to all state and federal fee limitations. The ROW permit fee may include a permit fee, inspection fee, and excavation fee, in one consolidated price. Fees paid for a ROW permit, which is subsequently revoked by the City Engineer, are not refundable. Except as provided for in an emergency situation, a ROW user who is found to have worked or is working in the ROW without having first obtained a permit, may be convicted of a public offense for violation of this section and is subject to the penalties described in O.M.C. 12.14.020(D). The City Engineer is further authorized to take any necessary administrative enforcement action, including but not limited to, stopping work in the ROW. The City may also charge and collect any necessary repair and restoration costs.

(H) If the City Engineer determines that the applicant has satisfied the requirements of this Chapter of the Olathe Municipal Code the City Engineer shall issue a ROW permit. The City Engineer may impose reasonable conditions upon the issuance of a ROW permit and the performance of the permittee in order to protect the public health, safety and welfare, to ensure the structural integrity of the ROW, to protect the property and safety of other users of the ROW, and to minimize the disruption and inconvenience to the traveling public.

(I) Issued permits are not transferable. If work is being done for the ROW user by another person or a subcontractor, the person doing the work and the ROW user shall be liable and responsible for all damages, obligations, and warranties herein described.

(J) Applicants may apply jointly for permits to excavate the ROW at the same time and place. Applicants who apply jointly for a ROW excavation permit may share in the payment of the permit fee.

(K) A ROW permit shall only be valid for the area of the ROW specified within the permit. No permittee may cause any work to be done outside the area specified in the permit, except as provided herein. Any permittee who determines that an area greater than that which is specified in the permit must be excavated must do the following prior to the commencement of work in that greater area:

- (1) Make application for a permit extension and pay any additional fees required thereby; and
- (2) Receive a new ROW permit or permit extension.

(L) A ROW permit shall be valid only for the dates specified in the permit. No permittee may commence work before the permit start date or, except as provided herein, may continue working after the end date. If a permittee does not complete the work by the permit end date, the permittee must apply for and receive a new ROW permit or a permit extension for additional time. This supplementary application must be submitted to the City prior to the permit end date.

(M) Obtaining a ROW permit under this Chapter shall not relieve the permittee of its duty to obtain any necessary permit, license, certification, grant, franchise agreement or any other authorization required by any appropriate Governmental Entity, including, but not limited to, the City, the FCC or the KCC, and to pay any fees required by any other City, County, State, or Federal rules, laws, or regulations. A permittee shall perform all work in full accord with any and all applicable engineering codes adopted or approved by the parties and in accordance with applicable statutes of the State of Kansas, and the rules and regulations of the KCC or any other local, state or federal agency having jurisdiction over the parties. A permittee shall perform all work in conformance with all applicable codes and established rules and regulations and shall be responsible for all work done in the ROW pursuant to its permit, regardless of who does the work.

(N) Except in cases of an emergency or with approval of the City Engineer, no ROW work may be done when conditions are unreasonable for such work. A permittee shall not disrupt a ROW such that the natural free and clear passage of water through the gutters or other waterways is interfered with. Private vehicles may not be parked within or next to the permit area.

12.14.070. Right-of-Way Use; Construction requirements.

(A) The permittee shall not make any cut, excavation or grading of the ROW other than excavations necessary for emergency repairs without first securing a ROW permit.

(B) The permittee shall not at any one time open or encumber more of the ROW than shall be reasonably necessary to enable the permittee to complete the project in the most expeditious manner. The permittee shall not permit such an excavation to remain open longer than is necessary to complete the repair or installation.

(C) The permittee shall, in the performance of any work required for the installation, repair, maintenance, relocation or removal of any of its Facilities, limit all excavations to those excavations that are necessary for efficient operation.

(D) The permittee shall notify the City no less than two (2) working days in advance of any construction, reconstruction, repair, location or relocation of Facilities which would require any street closure or which reduces traffic flow to less than two (2) lanes of moving traffic for more than four (4) hours. Except in the event of an emergency as reasonably determined by the permittee, no such closure shall take place without notice and prior authorization from the City.

(E) Non-emergency traffic control devices on arterial and collector streets shall not be placed prior to 8:30 AM or after 4:00 PM, in order to minimize disruption of traffic flow.

(F) All work performed in the ROW or which in any way impacts vehicular or pedestrian traffic shall be properly signed, barricaded, and otherwise protected at the permittee's expense. Such signage shall be in conformance with the latest edition of the MUTCD unless otherwise agreed to by the City.

(G) The permittee shall identify and locate any underground Facilities in conformance with the Kansas Underground Utility Damage Prevention Act, and notice shall be provided directly to the applicable underground utility service provider or to the Traffic Operations Division of the Public Works Department with respect to any municipal traffic signal and street light systems, as appropriate.

(H) The permittee shall be liable for any damages to underground Facilities due to excavation work prior to obtaining location of such Facilities, or for any damage to underground Facilities that have been properly identified prior to excavation. The permittee shall not make or attempt to make repairs, relocation or replacement of damaged or disturbed underground Facilities without the approval of the owner of the Facilities.

(I) Whenever there is an excavation, the permittee shall be responsible for providing adequate traffic control to the surrounding area as determined by City Engineer. The permittee shall perform work on the ROW at such times that will allow the least interference with the normal flow of traffic and the peace and quiet of the neighborhood. In the event the excavation is not completed in a reasonable period of time, the permittee may be liable for actual damages to the City for delay caused by the permittee pursuant to this Chapter.

(J) Any excavation, back filling, repair and restoration, and all other work performed in the ROW shall be done in conformance with the Technical Specifications.

(K) The permittee shall notify the office of the City Engineer upon completion of the authorized work to schedule an inspection at the start of back filling. Upon completion of all ROW restoration activities, the permittee will schedule a closeout inspection.

(L) In addition to the required scheduled inspections, the City Engineer may choose to inspect the ongoing permitted work in the ROW at any time to ensure that all requirements of the approved permit are being met by the permittee.

(M) At the time of any inspection, the City Engineer may order the immediate cessation of any work which poses a serious threat to the life, health, safety, or welfare of the public. The City Engineer may issue a citation to the permittee for any work which does not conform to the applicable standards, conditions, code or terms of the permit. The citation shall state that failure to correct the violation will be cause for revocation of the permit.

12.14.080. Right-of-Way Use; Denial of Permit.

(A) The City Engineer may deny a permit or prohibit the use or occupancy of a specific portion of the ROW to protect the public health, safety or welfare, to prevent interference with the safety and convenience of ordinary travel over the ROW, or when necessary to protect the ROW and its users. The City Engineer, discretionarily, may consider all relevant factors including but not limited to:

- (1) The extent to which the ROW space where the permit is sought is available;
- (2) The competing demands for the particular space in the ROW;
- (3) The availability of other portions of the same ROW or in other ROW areas for the Facilities of the applicant;
- (4) The applicability of any ordinance or other regulations, including City zoning regulations, that affect location of or other standards for Facilities in the ROW;
- (5) The degree of compliance of the applicant with the terms and conditions of its franchise, this Chapter, and other applicable ordinances and regulations;
- (6) The degree of disruption to surrounding communities and businesses that will result from the use of that part of the ROW;
- (7) The balancing of costs of disruption to the public and damage to the ROW, against the benefits to that part of the public served by the construction in the ROW;
- (8) Whether the issuance of a ROW permit for the particular dates or time requested would cause a conflict or interferes with an exhibition, celebration, festival, or any other event. In exercising this discretion, the City Engineer shall be guided by the safety and convenience of anticipated travel of the public over the ROW;
- (10) Whether the Application complies with the Technical Specifications; and
- (11) The adverse impact of the Facilities or the Facilities' proposed location on any reasonable public interest necessitated by public health, safety or welfare.

(B) Notwithstanding the above provisions, the City Engineer may discretionarily issue a ROW permit in any case where the permit is necessary to:

- (1) Prevent substantial economic hardship to a user of the applicant's service; or
- (2) Allow such user to materially improve the service provided by the applicant.

(C) Any denial of a wireless communications antenna, tower or related Facilities shall, in accordance with federal and state law, be made in writing and supported by substantial evidence contained in a written record issued contemporaneously with such decision.

12.14.090. Right-of-Way Use; Abandoned Facilities.

(A) A ROW user owning abandoned Facilities in the ROW must either:

(1) Remove its Facilities and replace or restore any damage or disturbance caused by the removal at its own expense. The City Engineer may allow underground Facilities or portions thereof remain in place if the City Engineer determines that it is in the best interest of public health, safety or welfare to do so. At such time, the City may take ownership and responsibility of such vacated Facilities left in place;

(2) Provide information satisfactory to the City that the ROW user's obligations for its Facilities in the ROW have been lawfully assumed by another authorized ROW user; or

(3) Submit to the City a proposal and instruments for transferring ownership of its Facilities to the City. If the ROW user proceeds under this section, the City may, at its option purchase the equipment, require the ROW user, at its own expense, to remove it, or require the ROW user to post a bond in an amount sufficient to reimburse the City for reasonable anticipated costs to be incurred to remove the Facilities.

(B) Facilities of a ROW user, who fails to comply with this section when such Facilities remain unused for two (2) years, shall be deemed to be abandoned after the City has followed the notice procedures in Chapter 6.06, unless the City receives confirmation that the ROW user intends to use the Facilities.

(C) Abandoned Facilities are deemed to be a nuisance hereunder. The City may exercise any remedies or rights it has at law or in equity, including, but not limited to:

(1) Abating the nuisance;

(2) Taking possession and ownership of the Facility and restoring it to a useable function;

(3) Requiring the removal of the Facility by the ROW user; or

(4) Exercising any other right enumerated in this Chapter, including, but not limited to, Section 12.14.020(D), or any other rights and or remedies set forth in the Olathe Municipal Code pertaining to nuisance abatement.

12.14.100. Right-of-Way Use; Revocation of Permit; Appeals.

(A) Permittees hold ROW permits issued pursuant to this Chapter as a privilege and not as a right. The City reserves its right, as provided herein, to revoke any ROW permit, without refund of the permit fee, in the event of a substantial breach of the terms and conditions of any law or the ROW permit. A substantial breach shall include, but not be limited to the following:

(1) The violation of any material provision of the ROW permit;

(2) An evasion or attempt to evade any material provision of the ROW permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the City or its citizens;

(3) Any material misrepresentation of any fact in the permit application;

(4) The failure to maintain the required insurance;

(5) The failure to complete the work in a timely manner;

(6) The failure to correct a condition indicated on an order issued pursuant to this Chapter;

(7) Repeated traffic control violations; or

(8) Failure to repair Facilities damaged in the ROW.

(B) If the City Engineer determines that the permittee has committed a substantial breach of any law or condition placed on the ROW permit, the City Engineer shall make a written demand upon the permittee to remedy such violation. The demand shall state that the continued violation may be cause for revocation of the permit, or legal action if applicable. Further, a substantial breach, as stated above, will allow the City Engineer, discretionarily, to place additional or revised conditions on the ROW permit, specifically related to the manner in which the breach is cured by the permittee. Within five (5) calendar days of receiving notification of the breach, permittee shall contact the City Engineer with a plan, acceptable to the City Engineer, for correction of the breach.

(C) Permittee's failure to contact the City Engineer, permittee's failure to submit an acceptable plan, or permittee's failure to reasonably implement the approved plan shall be cause for immediate revocation of the ROW permit.

(D) If a ROW permit is revoked, the permittee shall also reimburse the City for the City's reasonable costs, including administrative costs, restoration costs and the costs of collection and reasonable attorneys' fees incurred in connection with such revocation.

(E) Whenever a person is aggrieved by any decision or action taken by the City Engineer pursuant to this chapter, the person may file an appeal to the City Manager or designee within ten (10) calendar days of the date of notice of such decision or action. The persons shall be afforded a hearing on the matter before the City Manager or designee within thirty (30) days of filing the appeal. In cases of applicability or interpretation of the rules, the City Manager may revoke such decision or action taken by the City Engineer. The decision of the City Manager regarding such appeals is final. However, this appeal is not available to any person who is availing themselves of the appeal provisions set forth in K.S.A. 66-2019 (h)(6).

(F) In cases where compliance with such decision or action taken by the City Engineer would cause undue hardship, the City Manager may extend the time limit of such decision or action, or may grant exceptions to, or waive requirements of, or grant a variance from the specific provisions of rules. The City Manager shall give due consideration to the purposes of the rules in preserving public safety and convenience, integrity of public infrastructure, and the operational safety and function of the public ROW.

(G) Pending a decision of the City Manager, the order of the City Engineer shall be stayed, unless the City Engineer determines that such actions will pose a threat to public safety or the integrity of the public infrastructure.

(H) If a person still deems themselves aggrieved after the appeal to the City Manager, such person shall have thirty (30) days after the effective date of the City Manager’s final decision to appeal the City Manager’s decision to the governing body.”

SECTION TWO: This Ordinance shall take effect and be in force from and after its passage and publication or summary publication as provided by law.

PASSED by the Governing Body this 1st day of November, 2016.

SIGNED by the Mayor this 1st day of November, 2016.

Mayor

ATTEST:

City Clerk

(SEAL)

APPROVED AS TO FORM:

City Attorney

Publish one time and return one Proof of Publication to the City Clerk and one to the City Attorney.