

ORDINANCE NO. 2011-1137

**AN ORDINANCE TO AMEND CHAPTER 66
OF THE CODE OF ORDINANCES
FOR THE CITY OF ORANGE BEACH
TO ADD A NEW ARTICLE IV ENTITLED
RIGHTS-OF-WAY CONSTRUCTION AND ADMINISTRATION**

BE IT ORDAINED by the City Council for the City of Orange Beach, Alabama that Chapter 66 of the City Code is hereby amended to add a new Article IV entitled “Rights of Way Construction and Administration” as follows:

TABLE OF CONTENTS

	<u>Page</u>
1. Findings and Purpose.....	3
2. Easements Not Impaired.....	3
3. Not in Lieu of Franchise.....	3
4. Area of Jurisdiction.....	4
5. Definitions.....	4
6. Administration.....	6
7. Registration Requirement.....	7
8. Franchise Requirement.....	8
9. Rights-of-Way Permit Required.....	8
10. Valid Dates.....	8
11. Hours of Construction.....	8
12. Emergencies.....	8
13. Exemptions.....	8
14. Annual Permit.....	8
15. Work Done Without a Permit.....	8
16. Abandonment of Construction.....	9
17. Permit Applications.....	9
18. Issuance of Permit; Conditions.....	10
19. Permit Fees.....	11
20. Joint Applications.....	11
21. Denial of Permit.....	11
22. Enforcement.....	12

23.	Appeal Procedure.....	13
24.	Compliance with Construction Standards.....	13
25.	Location of Facilities.....	13
26.	Erection of Poles Prohibited; Above-Ground and Underground Facilities.....	13
27.	Lease Disruptive Technology.....	14
28.	Rights-of-Way Restoration.....	14
29.	Inspection.....	14
30.	Other Obligations.....	15
31.	Advertising, Signs, or Extraneous Markings.....	15
32.	Clearing Poles and Cables.....	15
33.	Removal and Relocation of Facilities.....	16
34.	Temporary Movement of Facilities.....	16
35.	Joint Trench Coordination; Planned Infrastructure.....	16
36.	Company Identification.....	17
37.	City Does Not Accept Liability.....	17
38.	Applicant or Permittee Indemnifies City.....	17
39.	Construction Bond.....	17
40.	Liability Insurance.....	18
41.	Workers' Compensation Insurance.....	18
42.	Non-exclusive Remedy.....	18
43.	Severability.....	18
44.	Reservation of Regulatory and Police Powers.....	19

1. **Findings and Purpose.**

- (a) The City of Orange Beach (“Orange Beach” or “the City”) is a class 8 Alabama municipal corporation organized pursuant to Alabama Code Section 11-40-1 (1975). Orange Beach is vested with a portion of the state’s sovereign power to protect the public health, safety and welfare. Alabama Code Section 11-45-1 (1975).
- (b) A fundamental role of municipal government is the building and ongoing maintenance of streets and sidewalks, commonly referred to as “Rights-of-Way.” Orange Beach holds the Rights-of-Way within its geographical boundaries as an asset in trust for its citizens. Municipal government has the primary role in protecting the Rights-of-Way within its jurisdiction, planning for its most efficient use, and insuring that community needs are met.
- (c) In addition to the police powers set out above, Section 220 of Alabama’s 1901 Constitution and Alabama Code Section 11-49-1 (1975) prohibit the use of the public Rights-of-Way without the consent of the City in which those Rights-of-Way are located. When such consent is granted by the City Council, it may be embodied in an ordinance, a franchise or use agreement.
- (d) Once consent is granted, construction activities are managed through the issuance of construction permits. The purpose of the permit fees set forth in this ordinance is to enable the City to recover its costs of administration and enforcement and not for the purpose of raising revenue.
- (e) Since the deregulation of the telephone industry, and the concomitant development of advanced communications services such as broadband, there has been a proliferation of entities having the need to occupy Rights-of-Way. It is therefore necessary and proper for the city to modernize its regulations to control the placement, construction and maintenance of Facilities owned by existing and potential Rights-of-Way users.
- (f) This Ordinance imposes reasonable regulations on the placement and maintenance of Facilities currently within its Rights-of-Way or to be placed therein at some future time. The purposes of this ordinance are to:
- insure that all persons using or occupying the Rights-of-Way have obtained the proper consent whether by franchise, use agreement or ordinance;
 - regulate construction activities in order to protect the public health, safety and welfare;
 - insure that all contractors working in the Rights-of-Way are properly licensed;
 - identify the types of facilities that have been installed in the Right-of-Way and their general location; and
 - better manage and control activities in the Rights-of-Way so that they remain in a state of good repair and free of unnecessary encumbrances.

2. **Easements Not Impaired.** Nothing in this Ordinance is intended to impair the legal obligation of any contract, franchise, use agreement, easement or other legal authorization previously granted by the City.

3. **Not in Lieu of Franchise.** Compliance with the permitting requirements of this Ordinance shall not excuse any person from complying with all other requirements of law, including holding a valid franchise, license, or use agreement from the City.

4. **Area of Jurisdiction.** This Ordinance shall apply to all Rights-of-Way within the corporate limits of the City as such corporate limits now exist or may exist in the future.
5. **Definitions.** Unless the context otherwise requires, the following definitions apply in this Ordinance. Defined terms remain defined terms whether or not capitalized.

“Applicant” means any Person requesting permission to Obstruct or Construct in a Rights-of-Way.

“Application” means the process by which an Applicant submits a request for permission to Obstruct or Construct in the Rights-of-Way.

“Applicable Law” means any or all federal, state or municipal statutes, ordinances, rules, regulations, standards, and other law, that are now existing or hereafter adopted or amended from time to time, which apply to a Grantee, its Facilities, operations, services, or system.

“Block” means that part of the public Right-of-Way that includes the area from the property line to the parallel property line in width and extending from the centerline of an intersecting street to the centerline of the next intersecting street in length or five hundred (500) feet, whichever is less.

“City Cost” means the direct and indirect costs borne by the City for the administration of this Ordinance.

“Construct” means to excavate, repair, rehabilitate, maintain, and install sanitary sewers, water mains, fire hydrants, valves, meters, manholes, service lines and connections, gas mains, telephone and electrical conduit and their miscellaneous service lines and connections, video and telecommunications Facilities cables, wires, lines, wave guides, antennas, and other equipment or Facilities, pedestals, and service cabinets, poles, guy wires, storm drains, manholes, inlets, catch basins, irrigation systems, driveways, sidewalks, pavement extensions, curbs, walks, steps, building canopies, balconies, overhead walkways, and temporary detour pedestrian walkways on, above, or under any part of the Rights-of-Way provided however, that Construct shall not mean installation, repair, rehabilitation or maintenance of Facilities that do not involve excavation of any portion of the Rights-of-Way.

“Construction Bond” means a bond posted to ensure proper and complete Construction and/or Restoration of a Permitted Facility pursuant to a Permit as determined by the Public Works Director.

“Construction Standards for Miscellaneous Construction, Utility Excavation, and Rights-of-Way and Pavement Restoration (Construction Standards)” means the compilation of provisions and requirements that provide the technical specifications and details for the Construction of Facilities in the Rights-of-Way.

“Emergency” means a condition that poses a clear and immediate danger to life or health, or of a significant loss of property or Utility service. Emergency also includes requests for service which the applicant deems urgent and can be classified as a Small Project.

“Excavation” means any work in the surface or subsurface of the Rights-of-Way including but not limited to opening the Rights-of-Way, installing, servicing, repairing or modifying any Facilities in or under the

surface or subsurface, and restoring the surface and subsurface of the Rights-of-Way.

“Extended Application” means an Application made to Construct or Obstruct more of the Rights-of-Way than allowed in, or to extend, a Permit that had already been issued.

“Facilities” means any tangible thing located in any Rights-of-Way; but shall not include boulevard plantings or gardens planted or maintained in the Rights-of-Way between a Person's property and the street edge of pavement.

“Franchise,” or “Use Agreement” means the grant of authority from City to occupy any portion of the Rights-of-Way for any purpose therein described.

“In” when used in conjunction with Rights-of-Way, means over, above, in, within, on or under a Rights-of-Way.

“Landscape or Landscaping” means trees, shrubs and irrigation systems in the Rights-of-Way.

“Major Project” means construction of water, sewer, gas, telephone, fiber optic, electric power conduit, cable and duct, TV cable, jacking, boring, pushing and tunneling, retrofitting existing facilities, storm drain and any other miscellaneous major facility construction projects that involve more than one continuous block or five hundred (500) linear feet of Right-of-Way.

“Minor Project” means construction of miscellaneous utility service lines, manhole installation not associated with Major Project construction, main line point repairs and installation, miscellaneous utility service line repair, storm drain and inlet repairs, vaults, irrigation systems and other miscellaneous construction and repair projects that involve less than one block or five hundred (500) linear feet of Right-of-Way.

“Notice of Violation” means a written warning issued by the Public Works Director for a violation or possible violation of this Ordinance.

“Obstruct” means to place any tangible object in a Rights-of-Way so as to hinder free and open passage over, under, or through that or any part of the Rights-of-Way.

“Permit, Construction Permit or Rights-of-Way Permit” means the Permit which must be obtained from the City before a Person may Construct in, or Obstruct in that part of the Right-of-Way described in such permit, and to hinder free and open passage thereon to the extent and for the duration specified in the permit. The term also includes permits issued by the Alabama Department of Transportation (ALDOT) authorizing construction or maintenance of facilities located on state roadways within the corporate limits of the City.

“Permit Fee” means money charged by the City to cover the costs as provided in this Ordinance.

“Permittee” means any Person to whom a Permit to Construct or Obstruct a Rights-of-Way has been granted by the City and/or ALDOT.

“Public Works Director” means the Director of the City of Orange Beach Public Works Department.

"Restoration" means the process by which a Constructed or Obstructed Rights-of-Way is restored as specified in this Ordinance.

"Rights-of-Way" means the surface of and the space above and below any public street, public road, public highway, public freeway, public lane, public way, public alley, public sidewalk, public boulevard, public parkway, public drive or any public utility easement or public Rights-of-Way within the corporate limits.

"Service or Utility Service" means services provided by Utilities.

"Sidewalk" means the paved pedestrian walkway between the edge of the road and the street Rights-of-Way line.

"Small Project" means the installation of equipment cabinets, junction boxes, terminal boxes, splice boxes, regulator stations, meters and valves in paved areas, utility poles, guy poles and appurtenances not associated with a Major or Minor Project. Small Project also includes the installation, repair and routine maintenance of miscellaneous utility service drop lines, overhead wires and cables, traffic signal poles, light poles, traffic signs, meters, valves and other miscellaneous construction, repair, routine maintenance and inspection, that requires minimal excavation or Right-of-Way disruption.

"State Roadway" means the three State highways in the City of Orange Beach: State Road 182 (Perdido Beach Boulevard), State Road 180 (Canal Road), and State Road 161 (Orange Beach Boulevard).

"Trenchless Technology" means the use of directional boring, horizontal drilling and micro-tunneling and other techniques in the Construction of underground portions of Facilities which result in the least amount of disruption and damage to Rights-of-Way as possible.

"Underground Facilities" means all lines, cables, conduits, posts, tanks and any other Facilities owned or operated by Persons other than the City which are located wholly or partially underneath Rights-of-Way.

"Utilities" means any water, sewer, gas, drainage, sprinkler or culvert pipe and any electric power, telecommunication, signal, communication, or cable television conduit, fiber, wire, cable, or operator thereof.

6. **Administration.** The Public Works Director shall be the principal City official responsible for the administration of the Rights-of-Way, Rights-of-Way Permits and this Ordinance.
- (a) The Public Works Director may adopt and may amend from time to time, Construction Standards and other rules reasonably required to carry out the purposes of this Ordinance. Any requirement not specifically covered by this Ordinance or the Construction Standards shall be determined by the Public Works Director subject to the appeals provision in subsection (b) below. The Public Works Director may delegate any or all of the duties hereunder.
 - (b) Should any person be aggrieved by the decision of the Public Works Director, such person may appeal by filing written notice with the Public Works Director within fifteen (15) days from the date of such decision. The Public Works director shall send a copy of the appeal and all relevant documentation, within fifteen (15) days, to the City Clerk's office to be considered by the City Council at a public hearing.

7. **Registration Requirement.**

- (a) Each utility who occupies, uses or has facilities in the Rights-of-Way at the time of passage of the ordinance codified in this chapter, including by lease, sublease or assignment to operate facilities located in the rights-of-way, unless specifically exempted by state or federal law or this code, shall file a registration statement with the Department of Public Works within 90 days of the effective date of the ordinance codified in this chapter.
- (b) The registration information provided to the city shall be on a form approved by the department and include, but not be limited to:
 - 1. The name, legal status (i. e. partnership, corporation, etc.), street address, e-mail address, and telephone and facsimile numbers of the utility filing the registration statement (the "registrant"). If the registrant is not the owner of the facility in the Right-of-Way, the registration shall include the name, street address, e-mail address if applicable, and telephone and facsimile numbers of the owner.
 - 2. The name, street address, e-mail address if applicable and telephone and facsimile numbers of one or more facilities representative(s). Current information regarding how to contact the facilities representative(s) in an emergency shall be provided at the time of filing a registration and shall be updated as necessary to assure accurate contact information is available to the city at all times.
 - 3. A copy, if requested, of the utility's certificate of authority (or other acceptable evidence of authority to operate) from the state public service commission and/or the FCC and any other similar approvals, permits, or agreements.
 - 4. Proof of a prior, valid authorization from the City authorizing use of the rights of way within the City such as a franchise or use agreement. If Owner believes that City authorization was not required prior to the installation of any of its facilities in the rights of way, then the owner must provide a short statement of reasons, including any legal citations, that such prior authorization was not required
 - 5. General description of the facilities, equipment and service area.
 - 6. A map, in digital format if available, of the location of the facilities.
- (c) *Incomplete registration.* If a registration is incomplete, the director shall notify the registrant and shall provide a reasonable period of time in which to complete the registration. If a registration is complete, the director shall so notify the utility in writing.
- (d) Registration confers no property or other rights and is not transferable without the written consent of the director.
- (e) Beginning one year after the effective date of this chapter, any facilities or part of a facility found in a Right-of-Way for which registration is required but has not been obtained may be deemed to be a nuisance and an unauthorized use of the Rights-of-Way. The city may exercise any remedies or rights it has at law or in equity, including, but not limited to abating the nuisance; taking possession of the facilities, evicting the utility

from the Right-of-Way; prosecuting the violator; and/or any other remedy provided by city ordinance or otherwise allowed in law or in equity.

8. **Franchise Requirement.** No person may construct, operate or continue to operate any utilities system within the City without having been issued a franchise or use agreement by the City Council, or who can otherwise demonstrate to the satisfaction of the City that such Person has a valid, prior authorization to occupy the Rights-of-Way under applicable law.
9. **Right-of-Way Permit Required.** Except as otherwise provided in this Chapter, no person may construct in or obstruct any portion of the rights of way without first having obtained a City Rights-of-Way permit or a permit issued by ALDOT.
10. **Valid Dates.** A Permit is valid only for the dates and the area(s) of Rights-of-Way specified in the Permit. No Person may Construct in or Obstruct the Rights-of-Way beyond the date or dates specified in the Permit unless such Person:
 - (a) Makes an Extended Application for the Rights-of-Way Permit before the expiration of the initial Permit; and
 - (b) A new Permit or Permit extension is granted.However, if no work is initiated within sixty (60) days of obtaining a Permit, the Permit is void.
11. **Hours of Construction.** The hours of construction shall be restricted to 7:00 A.M. to 3:30 P.M., Monday through Friday. The Public Works Director may authorize construction during other time periods and, if allowed, such approval shall be endorsed on the Rights-of-Way Permit.
12. **Emergencies.** When the work must commence immediately because of an Emergency the Permittee shall comply with the provisions of Section 15 below, entitled "Work Without a Permit".
13. **Exemptions.** No Rights-of-Way Permit shall be required for the following activities:
 - (a) Installation of and repair of Facilities by or for the City of Orange Beach; and
 - (b) Residential and commercial driveway construction when associated with an active building permit and included in the building permit scope of work for the site construction.
 - (c) Landscaping.
14. **Annual Permit.** Applicants may be allowed, if determined by the Public Works Director, to obtain in advance, an annual, quarterly, or semi-annual permit for Minor Projects outside roadway limits and some Small Projects that involve minimal Excavation. Permit fees shall be calculated as an estimate of similar work conducted over the past twelve (12) months.
15. **Work Done Without a Permit.**
 - (a) *Emergency situations.* Each permittee shall notify the Public Works director (by telephone or in person) of any event regarding its facilities which it considers to be an emergency by the next business day. The applicant may proceed to take whatever actions are necessary in order to respond to the emergency. Within two (2)

business days after the occurrence of the emergency, the applicant shall apply for the necessary permits, pay the fees associated therewith and fulfill the rest of the requirements necessary to bring itself into compliance with this article for the actions it took in response to the emergency.

- (b) In the event that the Public Works Director becomes aware of an emergency regarding an applicant's facilities, the department shall attempt to contact the local representative of each applicant affected, if known, or potentially affected, by the emergency, who must comply with subsection (a) of this section. In any event, the department may take whatever action deemed necessary in order to respond to the emergency.
- (c) *Non-emergency situations.* Except in the case of an emergency, any person who obstructs or excavates a Right-of-Way without a permit must:
 - (1) Subsequently obtain a permit,
 - (2) Pay three (3) times the normal fee for said permit,
 - (3) Pay three times all the other fees required by the Code,
 - (4) Deposit with the department any amount necessary to correct any damage to the Right-of-Way,
 - (5) Provide security to the City as provided in Section 17, and
 - (6) Comply with all of the requirements of this Article. In addition thereto, any such person shall also be subject to the issuance of a notice of violation and/or a municipal offense ticket.

16. **Abandonment of Construction.** In the event Permittee abandons construction, once commenced, of the Facilities, for more than thirty (30) consecutive days prior to such time Facilities are available for the intended use, the City may reasonably request Permittee to dismantle such Facilities located within Rights-of-Way after reasonable notice and opportunity to be heard by City Council. If Permittee fails to so dismantle based on a decision of the City Council, the City may dismantle at Permittee's expense and Permittee shall reimburse the City within thirty (30) days of receipt of an invoice therefor. In the event a Permittee has been requested to relocate its Facilities located in the Rights-of-Way due to the abandonment or discontinued use of a structure supporting its Facilities, the City may reasonably request Permittee to relocate such Facilities to a new support structure. If Permittee fails to so relocate, the City may relocate at Permittee's expense and Permittee shall reimburse the City within thirty (30) days of receipt of an invoice therefor.

17. **Permit Applications.** Application for a Permit is made to the Public Works Director.

- A. All Permit Applications shall include the requirements of this Ordinance, specifically including, but not limited to the following:
 - (1) Each Applicant's name, Alabama One-Call registration certificate number, address, and e-mail address, if applicable, and telephone and facsimile numbers.

(2) The name, address, and e-mail address, if applicable, and telephone and facsimile numbers of a local representative. The local representative or designee shall be available at all times.

(4) Insurance

a. Verifying that an insurance policy has been insured to the Applicant by an insurance company licensed to do business in the State of Alabama or a form of self-insurance acceptable to the City.

b. Verifying that the Applicant is insured as required by this Ordinance or a Franchise, License, or Use Agreement.

c. The City may require a copy of the actual insurance policies.

(5) If the person is a corporation, a copy of the certificate of incorporation as recorded and certified by the Secretary of State.

(6) A copy of the person's Use Agreement, Franchise, License, or other legal authorization or order granting a certificate of authority from the State of Alabama Public Service Commission or other applicable state or federal agency. If applicant does not have such authorization, Applicant must provide a detailed explanation as to the basis of the claimed exemption including applicable laws and/or authorization upon which it is relying.

B. In the event Applicant furnished similar information to the City as may be required for a Franchise, License, or Use Agreement, such information may not be duplicated but may be supplemented based on review by the Public Works Director.

C. The Applicant shall keep all of the information listed above current at all times by providing to the City information as to changes within fifteen (15) days following the date on which the Applicant has knowledge of any change.

D. Tree and Landscaping requirements of this Ordinance shall be administered and enforced by the Public Works Director.

18. **Issuance of Permit; Conditions.**

A. If the Public Works Director determines that the Applicant has satisfied the requirements of this Ordinance, the Public Works Director shall issue a Permit or issue notification and reason for denial.

B. The Public Works Director may impose reasonable conditions upon the issuance of the Permit and the performance of the Applicant thereunder in order to protect the public health, safety and welfare, to insure the structural integrity of the Rights-of-Way, to protect the property and safety of other users of the Rights-of-Way, and to minimize the disruption and inconvenience to the traveling public, including notification to property owners.

C. The Public Works Director may require a cash deposit or a bond in such amount as the Director determines is sufficient to cover all expenses connected with the work, including inspection of the same; provided,

however, that the Director may discontinue such arrangement at any time. The city shall not be liable for any interest on such deposit made.

- D. An engineer's estimate for the cost of work may be required by the Director. Such estimate must be signed and sealed by a professional engineer registered in the State of Alabama.

19. **Permit Fees.**

- A. Permit Fees shall be established by the City Council upon recommendation of the Public Works Director. Said fees shall be in an amount sufficient to recover the following costs:

- (1) The City Costs, including administration, inspection, and enforcement.
- (2) The cost for Obstructing the Rights-of-Way may include at least the following: lost parking meter revenue, costs associated with traffic management, and lost tax revenues.

- B. No Permit shall be issued without payment of such fees.

- C. All permit fees are non-refundable.

20. **Joint Applications.** Applicants are encouraged to make joint Application for Permits to Construct or Obstruct the Rights-of-Way at the same place and time. Applicants who apply for Permits for the same or similar Obstruction or Construction for the same Rights-of-Way location may share in the payment of the Permit Fee. Applicants must agree among themselves as to the portion each will pay and indicate the same on their applications.

21. **Denial of Permit.**

- A. Except in the case of an Emergency, no Rights-of-Way Permit will be granted:

- (1) To any Person who has failed to comply with the requirements of this Ordinance.
- (2) If, in the discretion of the Public Works Director, the issuance of a Permit for the particular date and/or time would cause a conflict or interfere with an exhibition, celebration, festival, or any other event. The Public Works Director, in exercising this discretion, shall be guided by the safety and convenience of ordinary travel of the public over the Rights-of-Way, and by considerations relating to the public health, safety and welfare.

- B. The Public Works Director may deny a Permit in order to protect the public health, safety and welfare, to prevent interference with the safety and convenience of ordinary travel over the Rights-of-Way, or when necessary to protect the Rights-of-Way and its users. The Public Works Director may consider one or more of the following factors:

- (1) The extent to which Rights-of-Way space where the Permit is sought is available.
- (2) The competing demands for the particular space in the Rights-of-Way.

- (3) The availability of other locations in the Rights-of-Way or in other Rights-of-Way for the Facilities of the particular company.
 - (4) The applicability of Ordinances or other regulations of the Rights-of-Way that affect location of Facilities in the Rights-of-Way.
 - (5) The degree of compliance of the Applicant with the terms and conditions of its franchise, this Ordinance, and other applicable ordinances and regulations; the degree of disruption to surrounding neighborhoods and businesses that will result from the use of that part of the Rights-of-Way.
 - (6) The condition and age of the Rights-of-Way, and whether and when it is scheduled for total or partial Construction; and the balancing of the costs of disruption to the public and damage to the Rights-of-Way, against the benefits to that part of the public served by the expansion into additional parts of the Rights-of-Way.
- C. A Permittee may appeal a decision of the Public Works Director, as described in Section 23 of this Ordinance.

22. **Enforcement.**

- A. Permittees hold Permits issued pursuant to this Ordinance as a Privilege and not as a right.
- B. If the Public Works Director determines that the Permittee has violated a material term or condition of any statute, ordinance, rule, regulation or any condition of the Permit, the Public Works Director shall issue a Stop Work Order to the Permittee to remedy such violation. The Stop Work Order shall provide requirements for correction of violation, any applicable penalties for continued violation, the process and procedures for enforcement that may be applicable as required under the general ordinances of the City. A material violation by Permittee shall include, but shall not be limited to, the following:
 - (1) The violation of any material provision of the Permit.
 - (2) An evasion or attempt to evade any material provision of the Rights-of-Way Permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the City or its citizens.
 - (3) Any material misrepresentation of fact in the Application for a Permit.
 - (4) The failure to maintain the required bonds and/or insurance.
 - (5) The failure to complete the work in a timely manner.
 - (6) The failure to correct a condition indicated on an order issued pursuant to this Ordinance.
- C. Within forty-eight (48) hours of receiving a Stop Work Order, Permittee shall contact the Public Works Director with a plan, acceptable to the Public Works Director, for its correction. Permittee's failure to so contact the Public Works Director, or the Permittee's failure to submit an acceptable plan, or Permittee's failure to reasonably implement the approved plan, shall be cause for the Public Works Director to recover

costs, expenses or damages from the Construction Bond or to deny further Rights-of-Way Construction or to revoke a Permit.

23. **Appeal Procedure.**

A Rights-of-Way user that: (1) has been denied a permit; (2) has had a permit revoked; or (3) believes that the fees imposed are invalid, has the right to have the denial, revocation, or fee imposition reviewed, upon written request, by the City Council. The City Council shall act on a timely written request at its next regularly scheduled meeting. A decision by the City Council affirming the denial, revocation, or fee imposition will be in writing and supported by written finding establishing the reasonableness of the decision.

24. **Compliance With Construction Standards.** All Construction or maintenance of Facilities shall be in accordance with the construction standards promulgated by the Public Works Director, any requirements of a Franchise, License, Use Agreement, or other lawful authority, and this Ordinance.

25. **Location of Facilities.**

A. A Permittee shall not place Facilities above or below ground where the same will interfere with any gas, electricity, telephone fixtures, sanitary and storm sewers, water hydrants, traffic control system and loops, or other Facilities or other utility use, and all such poles, conduits or other fixtures, in or upon any street shall be so placed as to comply with all requirements of the City and applicable law.

B. A Permittee shall notify all businesses and residents that may be affected by the proposed work prior to commencement of such work, except for work that is not reasonably anticipated to result in disruption or the loss of use of the property.

C. All construction and maintenance of Facilities by Permittee or its subcontractors shall be performed in accordance with industry standards and the requirements of this Ordinance. Permittee shall have no vested right in any Facilities location, and such Facilities shall be removed by Permittee at its own cost and expense (except as otherwise may be provided herein or, in regard to cost, where reimbursement is available under state or federal law), whenever the same restricts or obstructs or interferes with the operation or location or any future operation or location of said Rights-of-Way and places in accordance with this Ordinance or a Use Agreement.

26. **Erection of Poles Prohibited; Above-Ground and Underground Facilities.**

A. Notwithstanding anything to the contrary in this Ordinance, a Permittee shall not erect, for any reason, any pole on or along any Rights-of-Way without the approval of the City. Nothing herein shall be construed to limit or eliminate any right, requirement or obligation a Permittee may have to enter into a pole attachment agreement and/or agreement for conduit use with the City or a private utility for the use of another's pole or conduit.

B. Notwithstanding anything contained in this Ordinance, to the contrary, and except due to technological reasons or due to the size or shape of Facilities that would result in unreasonable expense and therefore exempted as determined by the Public Works Director, or as otherwise described in a Franchise, License, or Use Agreement:

- (1) In those areas within the City where primarily all Facilities are currently placed underground, all Facilities shall remain or be placed underground.
 - (2) In areas where utility facilities are primarily above ground at the time of a Permittee's installation, the City may allow Permittee, at Permittee's sole cost and expense, to install its Facilities above ground, provided that at such time as the City adopts an underground plan and primarily all utility facilities or other Facilities are placed underground, Permittee shall likewise place its Facilities underground without cost to the City. If as part of a plan to underground above-ground Facilities public funding is available, all Permittees shall be treated similarly unless such funding is made available from a source other than the City and is designated for a specific use.
 - (3) In no event shall Permittee be authorized to place above ground any Facilities that have previously been underground without prior approval from the City.
27. **Least Disruptive Technology.** Applicants are encouraged to perform Construction and maintenance of Facilities in a manner resulting in the least amount of damage and disruption of the Rights-of-Way. Applicants may be required to use Trenchless Technology for construction projects, within the Rights-of-Way, where circumstances warrant protection of structures, trees, pavement and other Facilities.
28. **Rights-of-Way Restoration.**
- A. The work authorized under the Permit, and the Restoration of the Rights-of-Way as required herein, must be completed within the dates specified in the Permit. In addition to its own work, the Permittee must restore the general area of the work, including sod in all disturbed areas and reconstruction of all improvements, including the paving and its foundation, per the Construction Standards described in this Ordinance.
 - B. By restoring the Rights-of-Way, the Permittee guarantees its work for twenty-four (24) months following its completion, said work may be required to be guaranteed by a Construction Bond. During this twenty-four (24) month period, the Permittee shall, upon notification from the Public Works Director, correct all Restoration work to the extent necessary using the method required by the Public Works Director. Said work shall be completed within the time specified by the Public Works Director.
29. **Inspection.** Except for routine work, when the work under any Permit hereunder is completed, the Permittee shall notify the Public Works Director.
- A. Permittee shall make the work site available to the Public Works Director or his authorized representative and to all others as authorized by law for inspection at all reasonable times during the execution and upon completion of the work.
 - B. At the time of inspection, the Public Works Director or his authorized representative may order the immediate cessation of any work which poses a serious threat to the life, health, safety or well-being of the public.
 - C. The Public Works Director or his authorized representative may issue a Stop Work Order to the Permittee for any work which does not conform to

this Ordinance. The Stop Work Order shall provide requirements for correction of violation, any applicable penalties for continued violation, the process and procedures and right of Permittee that may be applicable as required.

D. The Public Works Director may require the Permittee to provide an as-built survey showing the work signed and sealed by a professional land surveyor or engineer, registered in the State of Alabama.

30. **Other Obligations.** Obtaining a Rights-of-Way Permit does not relieve Permittee of its duty to obtain all other necessary Permits, Franchises, Licenses, or Use Agreements, and authority and to pay all applicable fees.

A. A Permittee shall comply with all requirements of local, State and federal laws, including a Franchise, License, or Use Agreement or other lawful authorization duly adopted by the City Council, as well as the Alabama One-Call excavation notice system.

B. A Permittee shall perform all work in conformance with all applicable codes and established rules and regulations, and is responsible for all work done in the Rights-of-Way pursuant to its Permit, regardless of who performs the work.

C. Except in the case of an Emergency, and with the approval of the Public Works Director, no Rights-of-Way Obstruction or excavation may be performed when seasonally prohibited or when conditions are unreasonable for such work.

D. A Permittee shall not so Obstruct a Rights-of-Way that the natural free and clear passage of water through the gutters or other waterways shall be interfered with.

E. Private vehicles not owned by or under contract to Permittee may not be parked within or adjacent to a permit area.

31. **Advertising, Signs, or Extraneous Markings.** Unless otherwise authorized by a Franchise, License, or Use Agreement or applicable law, Permittee shall not place or cause to be placed any sort of signs, advertisements, or other extraneous markings, whether relating to the Permittee or any other Person or entity on Rights-of-Way, except such necessary minimal markings as approved by the City as are reasonably necessary to identify the System for service, repair, maintenance, or emergency purposes, or as may be otherwise required to be affixed by applicable law or regulation.

32. **Clearing Poles and Cables.** Permittee shall comply with all applicable City and State laws, rules, and ordinances with respect to the removal, trimming and cutting of trees and keeping its Facilities clear of trees in and along Rights-of-Way. Except in emergency situations, in installing, maintaining, and removing its Facilities, Permittee shall neither remove, cut, trim nor damage any trees within the Rights-of-Way, alleys and public places of the City except with the prior consent of the City, or, where on private property, without the property owner's consent.

Within five (5) days notice from the City, a Permittee shall promptly, if it can safely to do so, remove all or any portion of a tree which has fallen upon the aerial Facilities of the Permittee. Failing therein, the City may remove such fallen tree, or portion thereof, at the Permittee's expense and obtain reimbursement for all costs associated therewith within thirty (30) days of invoicing. In such event the

City shall not be liable to Permittees whose Facilities are affected thereby and shall be indemnified and held harmless in accordance with this Ordinance.

33. **Removal and Relocation of Facilities.** A Permittee may, or as may be determined by the Public Works Director, be required, at its expense, to promptly protect, support, temporarily disconnect, relocate in, or remove from, Rights-of-Way, lands or places, any Facilities of Permittee whenever required by the City upon reasonable notice applicable to the conditions warranting such disconnection and as then determined by Public Works Director by reason of traffic conditions, public safety, Rights-of-Way construction or any other reasonable public purpose.
34. **Temporary Movement of Facilities.** Permittee, on the request of the Public Works Director, or any Person holding a lawful permit issued by the City, or any permit issued by an appropriate state agency, shall temporarily move its Facilities to permit the moving of large objects, vehicles, buildings or other structures. Except where requested by the City or other governmental entity in connection with a public project, the expense of such temporary moves shall be paid to Permittee by the Person requesting the same and Permittee shall have the authority to require such payment in advance. In no event shall the City pay such expense. Nothing herein shall be construed to abrogate the provisions for moving Facilities contained in any pole attachment agreement the Permittee has with another Person.
35. **Joint Trench Coordination; Planned Infrastructure.**
 - A. Whenever it is possible and reasonably practicable to joint trench or share bores or cuts or joint share conduit, Permittee shall work with the City and other Permittees and licensees, so as to reduce, as far as possible, the number of street cuts within the City.
 - B. If required of other users of the Rights-of-Way, when Permittee installs any new trench and/or conduit as part of its Facilities, the Permittee may, at the request of the City or its designee install, at the expense of the City, sufficient additional space and/or conduit or other related Facilities to meet the City's planned public improvement and infrastructure needs. Permittee may make such trench space and/or conduit available to the City on the basis of not more than the pro rata cost of that portion of the space in a trench and/or conduit determined by the total labor and material cost of all Facilities and Facilities at that location. The City shall have the option to lay its own conduit or place other public improvements that do not cause significant cost, delay or redesign, including without limitation, wiring for traffic signals, street lights, etc., in Permittee's open trenches during the initial construction and during any future rebuilds or repairs. Permittee shall provide written notice of the proposed construction to the City and the City will then have twenty (20) business days after receipt to indicate in writing to the Permittee, unless Permittee requires a shorter time for City reply, as to its construction needs and request for additional Facilities.
 - C. Permittee agrees to comply with all applicable City requirements applicable to City trenching requirements, including but not limited to how long a trench shall remain open and unfilled as well as any requirements related to signs or other markings that shall be utilized by Permittee to ensure safety to others. For purposes of this Section, "open" shall mean and include any degree of refilling and/or restoration of the trench short of the final restoration of the pavement or the ground to its original grade.

36. **Company Identification.** Permittee shall ensure that all of its vehicles and employees are clearly identified to the general public as being associated with Permittee while engaged in outside construction maintenance or service. Said employee identification requirement may be satisfied by the carrying of and presentment, upon request, of a company identification card.
37. **City Does Not Accept Liability.** By reason of the grant of a Rights-of-Way Permit, the City does not assume any liability:
- A. For injuries to Persons, damage to property, or loss of Service claims by parties other than the Applicant or the City.
 - B. For claims or penalties of any sort resulting from the installation, presence, maintenance, or operation of Facilities by Applicants or activities of Applicants.
38. **Applicant or Permittee Indemnifies City.** Including as required by a Franchise, License, or Use Agreement or other lawful authorization by accepting a Permit, a Permittee is required, to indemnify, and hold the City whole and harmless from all costs, liabilities, and claims for damages of any kind arising out of the Construction, presence, installation, maintenance, repair or operation of its Facilities, or out of any activity undertaken in or near a Rights-of-Way, whether any act or omission complained of is authorized, allowed, or prohibited by a Rights-of-Way Permit. It further agrees that it will not bring, nor cause to be brought, any action, suit or other proceeding claiming damages, or seeking any other relief against the City for any claim nor for any award arising out of the presence, installation, maintenance or operation of its Facilities, or any activity undertaken in or near a Rights-of-Way, whether the act or omission complained of is authorized, allowed or prohibited by a Permit. The foregoing does not indemnify the City for its own negligence. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the Applicant or to the City; and the Applicant, in defending any action on behalf of the City, shall be entitled to assert in any action every defense or immunity that the City could assert in its own behalf.
39. **Construction Bond.**
- A. The applicant shall be required to provide a Construction Bond, except as any such Construction Bond as may be required by a Franchise, License, or Use Agreement, to guarantee the proper construction and completion of Rights-of-Way work and restoration. Such Bond shall be made available to the Public Works Director before any Permit is issued and such Construction Bond must include a procedure for the City to follow to recover costs, expenses or damages in order to insure enforcement of the terms and conditions of this Ordinance or a Franchise, License, or Use Agreement or other lawful authorization applicable to Rights-of-Way use. A construction bond will not be required for small projects if no paved area or Rights-of-Way is disturbed by the project. The Public Works Director may waive the requirement for the Construction Bond for Permittees who evidence financial ability to pay the cost of the repairs to the City's Rights-of-Way resulting from their permitted activity.
 - B. City departments performing installation of facilities, routine maintenance and repair, and other agencies working in the Rights-of-Way that are not involved in the installation, repair and maintenance of utilities, are exempt from the requirements of paragraph A in accordance with this Section.

40. **Liability Insurance.**

- A. Unless otherwise described in a Franchise, License or Use Agreement or other lawful authorization, a Permittee shall maintain the insurance as required by this Section, and furnish evidence of the same to the Public Works Director with its application for a permit. At a minimum, the Permittee shall be required to provide liability insurance with a company licensed to do business in the State of Alabama with a rating by Best of not less than "A", insuring Permittee and the City with regard to all damages mentioned in this Section, in the minimum amounts of:
1. One million dollars (\$1,000,000.00) for bodily injury or death to any one (1) Person.
 2. Five million dollars (\$5,000,000.00) for bodily injury or death resulting from any one accident.
 3. Five million dollars (\$5,000,000.00) for all other types of liability.
- B. The amounts shown in paragraph A shall be increased by amendment to this Ordinance.

41. **Workers' Compensation Insurance.** A Permittee will obtain and maintain workers' compensation insurance for all Permittee's employees, and in case any work is sublet, Permittee will require any subcontractor similarly to provide workers' compensation insurance for all subcontractor's employees, in compliance with state laws, and to fully protect the City from any and all claims arising out of work-related occurrences. Permittee shall indemnify the City in accordance with Section 38 for any damage resulting to it from failure of either Permittee or any subcontractor to obtain and maintain such insurance. Permittee will provide the City with a certificate of insurance indicating workers' compensation insurance prior to operations under a Franchise, License or Use Agreement or other lawful authorization and the commencement of any construction, system upgrade, reconstruction, or maintenance of the Facilities. The certificate of insurance should confirm that the required endorsements are in effect.

42. **Non-exclusive Remedy.** The remedies provided in this Ordinance are not exclusive or in lieu of other rights and remedies that the City may have at law or in equity. The City is hereby authorized to seek legal and equitable relief for actual or threatened injury to the Rights-of-Way, including damages to the Rights-of-Way, whether caused by a violation of any of the provisions of this Ordinance or other provisions of this Ordinance.

43. **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 thereof. If a regulatory body or a court of competent jurisdiction should determine by a final, non-appealable order that any Permit or right or any portions of this chapter is illegal or unenforceable, then any such Permit or right granted or deemed to exist hereunder shall be considered as a Permit with a mutual right in either party to terminate without cause upon giving sixty (60) days written notice to the other. The requirements and conditions of such a revocable Permit shall be the same requirements and conditions as set forth in the Permit or right respectively, except for conditions relating to the term of the Permit and the right of termination. If a Permit or right shall be considered a revocable Permit as provided herein, the Permittee must acknowledge the

authority of the City Council to issue such revocable Permit and the power to revoke it.

44. **Reservation of Regulatory and Police Powers.** The City by the granting of a Rights-of-Way Permit, does not surrender or to any extent lose, waive, impair, or lessen the lawful powers and rights, which it has now or may be hereafter vested in the City under the Constitution and statutes of the State of Alabama to regulate the use of the Rights-of-Way by the Permittee or to charge reasonable compensation for such use; and the Permittee by its acceptance of a Rights-of-Way Permit must agree that all lawful powers and rights, regulatory power, or police power, or otherwise as are or the same may be from time to time vested in or reserved to the City, shall be in full force and effect and subject to the exercise thereof by the City at any time. A Permittee or Applicant is deemed to acknowledge that its rights are subject to the regulatory and police powers of the City to adopt and enforce general ordinances necessary to the safety and welfare of the public and is deemed to agree to comply with all applicable general laws and ordinances enacted by the City pursuant to such powers.

Any conflict between the provisions of a Rights-of-Way Permit and any other present or future lawful exercise of the City's regulatory or police powers shall be resolved in favor of the latter.

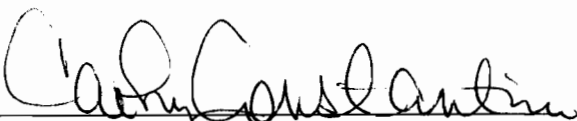
This ordinance shall become effective the 1st day of January, 2012.

ADOPTED this the 20th day of December, 2011.



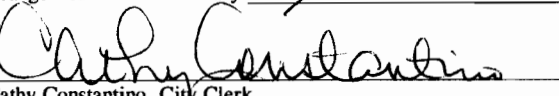
Tony Kennon, Mayor

ATTEST:



Cathy Constantino, City Clerk

The City Clerk of the City of Orange Beach, Alabama hereby certifies that the foregoing Ordinance 2011-1137 was posted on _____ in the following three (3) public places:
Orange Beach City Hall _____
Orange Beach Post Office _____
Orange Beach Public Library _____



Cathy Constantino, City Clerk

J

J

J