

EMERGENCY

City of Cincinnati

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An Ordinance No. 42

- 2014

MODIFYING the provisions of Chapter 722, "Management and Control of the Use of the City Right-of-Way," of the Cincinnati Municipal Code by enacting Sections 722-1-D, "Delay Costs," 722-1-F4, "Field Identify," 722-5, "Utility Coordination and General Construction Obligations," 722-7, "Administrative Orders," and 722-8, "Notice of Violation, Remedial Action and Civil Fine"; and **AMENDING** Sections 722-1-D, "Department of Transportation and Engineering," 722-1-D2, "Director," 722-1-F3, "Full," 722-1-R3, "Rules and Regulations for Making Openings in a Right-of-Way," 722-1-S3, "System," 722-2, "Right-of-Way Administration," 722-3, "Construction Permit," 722-4, "Construction, Relocation and Restoration," 722-5, "Enforcement of Permit Obligation," and 722-6, "General Provisions" for the purpose of clarifying the terms and requirements for use of the City's right of way; and **MODIFYING** the provisions of Title XV, "Code Compliance and Hearings," of the Cincinnati Municipal Code by amending Section 1501-9, "Class D Civil Offenses," for the purpose of including the offenses listed in Chapter 722.

WHEREAS, Council enacted Ordinance No. 349-2012 on September 26, 2012, creating Chapter 722 of the Cincinnati Municipal Code, "Management and Control of the Use of the City Right-of-Way," which codified certain aspects of the City of Cincinnati's control over the management, regulation, and administration of its public right-of-way and clarified the obligations of persons and utility providers with regard to facilities and structures located within the public right-of-way; and

WHEREAS, the Department of Transportation and Engineering has recommended clarifying amendments to Chapter 722 of the Cincinnati Municipal Code to further promote the efficient management, regulation, and administration of the public right-of-way; now, therefore,

BE IT ORDAINED by the Council of the City of Cincinnati, State of Ohio:

Section 1. That a new Section 722-1-D, "Delay Costs," is hereby enacted as follows:

Sec. 722-1-D. Delay Costs.

"Delay Costs" means additional costs incurred by the City as a direct result of a provider's violation of the utility relocation requirements set forth in this chapter including, but not limited to, the cost of resulting contractor change orders, delay claims, penalties, and the cost of additional city staff time incurred as a result of provider's violation.

Section 2. That existing Section 722-1-D of the Cincinnati Municipal Code, “Department of Transportation and Engineering,” is hereby amended and renumbered as Section 722-1-D2 as follows:

Sec. 722-1-D~~2~~. Department of Transportation and Engineering

“~~Department of Transportation and Engineering~~” means the Department of Transportation and Engineering of the city.

Section 3. That the existing Section 722-1-D of the Cincinnati Municipal Code is hereby repealed.

Section 4. That Section 722-1-D2 of the Cincinnati Municipal Code, “Director,” is hereby amended and renumbered as Section 722-1-D3 as follows:

Sec. 722-1-D~~3~~. Director.

“Director” means the Director of the Department of Transportation and Engineering; or ~~his or her~~ the director’s designee.

Section 5. That the existing Section 722-1-D2 of the Cincinnati Municipal Code is hereby repealed.

Section 6. That Section 722-1-F3 of the Cincinnati Municipal Code, “Full,” is hereby amended and renumbered as Section 722-1-F4 as follows:

Sec. 722-1-F~~3~~. Full.

“Full” means unable to accommodate any additional facilities as determined by the Director in accordance with the principles of public health, safety and welfare, following a reasonable analysis taking into consideration: all applicable law; commonly accepted industry standards; and routine engineering practices.

Section 7. That the existing Section 722-1-F3 of the Cincinnati Municipal Code is hereby repealed.

Section 8. That a new Section 722-1-F3 is hereby enacted as follows:

Sec. 722-1-F3. Field Identify.

“Field Identify” means to locate and mark underground utility facilities at the excavation site.

Section 9. That Section 722-1-R3 of the Cincinnati Municipal Code, “Rules and Regulations for Making Openings in a Right-of-Way,” is hereby amended as follows:

Sec. 722-1-R3. Rules and Regulations for Making Openings in a Right of Way.

“Rules and Regulations for Making Openings in a Right of Way” means the rules and regulations governing the making and restoration of openings in streets, alleys, sidewalks, public ways or places of the city drafted under the authority of this Code and ~~currently on file in the department of transportation and engineering~~, including without limitation the city's Right-of-Way Permits and Street Restoration Book Manual, as amended from time to time.

Section 10. That the existing Section 722-1-R3 of the Cincinnati Municipal Code is hereby repealed.

Section 11. That Section 722-1-S3 of the Cincinnati Municipal Code, “System,” is hereby amended as follows:

Sec. 722-1-S3. System.

“System” means any system of conduit, cables, ducts, pipes, wires, lines, towers, ~~poles, pole foundations~~, antennae wave guides, optic fiber, microwave, laser beams and any associated converters, equipment or facilities or utilities designed and constructed for the purpose of producing, receiving, amplifying, delivering or distributing services within the city. A system shall specifically include, but not necessarily be limited to: electric distribution and/or transmission systems, natural or artificial gas distribution and/or transmission systems, water distribution systems, storm sewer systems, sanitary sewer systems, cable television systems, telecommunications systems (whether voice, video, data, or other), fiber optic systems, and wireless communications systems, ~~and transit electrification~~ systems.

Section 12. That the existing Section 722-1-S3 of the Cincinnati Municipal Code is hereby repealed.

Section 13. That Section 722-2 of the Cincinnati Municipal Code, “Right of Way Administration” is hereby amended as follows:

Sec. 722-2. Right of Way Administration.

- (a) *Administration.* The ~~city manager~~director shall be the principle city official responsible for the administration of Chapter 722, except as otherwise provided herein. The ~~City Manager~~ director may delegate any or all of the duties hereunder to the ~~Director~~ city engineer or other designee.
- (b) *Right-of-Way Occupancy.* Each person who occupies, uses or seeks to occupy or use the right-of-way to operate a system located in the right-of-way, or who has, or seeks to have, a system located in any right-of-way, shall be subject to the requirements of Chapter 722, including persons operating under a permit, license or franchise issued by the city prior to the effective date of this Chapter, except that nothing in this chapter shall control as against the express terms of a valid franchise granted to a public utility to occupy the right-of-way.

A permit, license, franchise, or other permission for a provider to use or occupy the right of way is a nonexclusive, limited right to occupy the right-of-way in the city, for the limited purposes and for the limited period stated in the permit, license, or franchise, and in accordance with the requirements of this chapter. Permits to occupy the right-of-way may not be subdivided or subleased; provided, however, that two or more providers may co-locate facilities in the same area of the right-of-way so long as each such provider complies with the provisions of this chapter. A permit does not excuse a provider from obtaining appropriate access or pole attachment agreements before collocating its facilities on facilities of others, including the city's facilities.

Section 14. That the existing Section 722-2 of the Cincinnati Municipal Code is hereby repealed.

Section 15. That Section 722-3 of the Cincinnati Municipal Code, "Construction Permit" is hereby amended as follows:

Sec. 722-3. Construction Permit.

- (a) *Permit Required for Construction in Right of Way.* The director is charged with regulating the right of way for the construction, maintenance, and repair of streets, sidewalks, sidewalk spaces, alleys, public ways and places, and no person, whether an abutting owner or not, shall do or permit to be done by his agents or employees without having first obtained from the ~~D~~director ~~or his or her designee~~ a permit under Chapter 718, Chapter 721, Chapter 722, or Chapter 723 to do any of the following acts:
 - (i) Make any excavation or dig into any street, sidewalk, sidewalk space, alley, or other portion of the right of way;
 - (ii) Remove, break or make holes in any pavement of the roadway or sidewalk or in any sidewalk space or any curb;

- (iii) Construct, build, erect, or place any thing or structure in, upon, over, or under a street, sidewalk, sidewalk space, alley, or public way or place;
 - (iv) Make an improvement to the surface of any street, sidewalk, sidewalk space, alley, or public way or place by grading or paving, or construct or repair a sidewalk or curb, or make any other improvement thereto; or
 - (v) Occupy or obstruct the right-of-way for purposes of accessing or maintaining facilities ~~in the right of way~~.
- (b) ~~Repealed. *Applicability*. Nothing in this chapter shall control as against the express terms and conditions of a franchise granted to a public utility to occupy the right of way.~~
- (c) *Other Approvals, Permits, and Agreements*. Providers shall obtain any and all regulatory approvals, permits, authorizations, or licenses necessary for the offering or provision of such services from the appropriate federal, state and local authorities and upon the city's reasonable request, shall provide copies of such documents to the city. Further, permission to occupy the right-of-way shall not entitle a provider to use, alter, convert to, or interfere with, the facilities, easements, poles, conduits, lines, pipelines, wires, fiber, cable or any other real or personal property of any kind whatsoever under the management or control of the city.
- (d) *Conditions for Providers Occupying the Right of Way*. In order to provide for the safe and effective management of the right of way by the city and in addition to the requirements imposed by the Cincinnati municipal code, providers shall:
- (i) Prioritize efficient, and least obtrusive use of right of way, consistent with safety, and to minimize traffic and other disruptions including street cuts; and
 - (ii) When possible, participate in joint planning, construction and advance notification of right of way work, as may be required by the city. Utility providers ~~will be required to~~ must enter planned work into the department of transportation and engineer's CAGIS-based construction coordination system within 30 days of a written request by the director. Noncompliance with construction coordination requirements shall be grounds for denial of a construction permit; and
 - (iii) Upon written notice, and at the direction of the director, promptly remove or rearrange facilities as necessary for public safety; and
 - (iv) Perform all work, construction, maintenance or removal of facilities within the right of way, including tree trimming, in accordance with good engineering, construction and arboricultural practice including any appropriate state building codes, safety codes and law and use best efforts to repair and replace any street, curb or other portion of the right of way,

or facilities located therein, to a condition to be determined by the director to be adequate under current standards and not less than materially equivalent to its condition prior to such work and to do so in a manner which minimizes any inconvenience to the public, the city and other providers, all in accordance with all applicable provisions of this chapter and the Cincinnati municipal code; and

- (v) Construct, install, operate and maintain its facilities and system in a manner consistent with all applicable laws, ordinances, construction standards and governmental requirements including, but not limited to, the national electric safety code, national electric code and applicable FCC or other federal, state and/or local regulations; and
- (vi) Comply with CMC Section 743-19, "Protection of Public Trees," which prohibits providers from performing work within 15 feet of a public tree without first obtaining a permit for such work from the urban forestry division of the Cincinnati parks' department~~Be on notice that removal of trees within the right of way of the city requires prior written approval by the parks department. Any such tree that is removed without the parks written permission shall be replaced, at the sole expense of the responsible person, with a healthy tree of like kind; and~~
- (vii) Warrant that all worker facilities, conditions and procedures that are used during construction, installation, operation and maintenance of the provider's facilities within the right of way shall comply with all applicable standards of the federal occupational safety and health administration; and
- (viii) Use its best efforts to cooperate with the city in any emergencies involving the right of way; and
- (ix) Weather permitting, remove all graffiti within 30 calendar days of notice. Provider shall remove any and all graffiti on any of the provider's facilities located within the city right-of-way. Should the provider fail to do so, the city may take ~~whatever action is necessary~~ to remove the graffiti and bill the provider for the cost thereof; and
- (x) Providers shall field identify their facilities in the right of way ~~whenever providers are notified by the city that the city has determined that such identification is necessary in order for the city to begin planning for the construction, paving, maintenance, repairing, relocating or in any way altering any street or area in the right of way as defined in this chapter. The city shall notify the providers at least 60 days prior to the commencement of said activities; in field identifying facilities: in~~ accordance with the requirements set forth in the Ohio revised code and the Cincinnati municipal code, including, but not limited to, CMC Section 722-5(a); and

- (A) ~~Providers shall field identify all facilities that are within the affected right of way using customary industry standards and distinct identification; and~~
 - (B) ~~Facilities will be so marked as to identify the provider responsible for said facilities consistent with the rules and regulations for making openings in a right of way; and~~
 - (C) ~~Should any such marking interfere with the facilities function, create a safety problem or violate any safety code, alternative methods of marking the facilities may be approved by the director.~~
 - (D) ~~All marking should be clearly readable from the ground and be consistent with the rules and regulations for making openings in a right of way.~~
 - (E) ~~Provide the city with a copy of all recorded and verified utilities within the project limits.~~
- (xi) Permittee shall have a valid authorization ~~Track Access Permit~~ from SORTA where required under the code for work occurring within the right of way along a streetcar route.

Section 16. That the existing Section 722-3 of the Cincinnati Municipal Code is hereby repealed.

Section 17. That Section 722-4 of the Cincinnati Municipal Code, "Construction, Relocation and Restoration" is hereby amended, with Section 722-4(d) and Section 722-4(e) amended and renumbered as Section 722-5(b) and Section 722-5(c), respectively, per Section 21 of this ordinance as follows:

Sec. 722-4. Construction, Location and Relocation and Restoration of Provider Facilities.

- (a) *Location of Facilities.*
 - (i) The placement of new facilities and replacement of old facilities, either above ground or underground, shall be completed in conformity with applicable laws, including, but not limited to, the Cincinnati municipal code, the city street restoration book, and applicable city regulations.

- (ii) The city director shall have the right to dictate the location, including both horizontal and vertical placement, of a new or relocated facility that is placed within the right-of-way.
 - (iii) The city director shall have the power to prohibit or limit the placement of new or additional facilities within the right-of-way if the right of way is full. In making such decisions, the city director shall strive to the extent possible to accommodate all existing and potential users of the right-of-way, but shall be guided primarily by considerations of the public health, safety and welfare, the condition of the right of way, the time of year with respect to essential utilities, the protection of existing facilities in the right of way, future city, ~~and~~ county, and state plans for public improvements, development projects which have been determined to be in the public interest, and nondiscriminatory and competitively neutral treatment among providers.
 - (iv) Any new or relocated facility that is located in a designated underground district shall be located underground.
- (b) *Least Disruptive Technology*. All construction or maintenance of facilities shall be accomplished in the manner resulting in the least amount of damage and disruption of the right of way. Specifically, every permittee when performing underground construction, ~~if technically and/or technologically feasible, if required by the director~~ shall utilize trenchless technology, including, but not limited to, horizontal drilling, directional boring, and microtunneling, ~~except where expressly prohibited by the department of transportation and engineering.~~ When the above methods are used the permittee ~~will be required to pothole~~ shall perform potholing to locate existing utilities prior to starting the work. In addition, the director or the director's designee may require all cable, wire or fiber optic cable installed in the subsurface right of way pursuant to this chapter ~~may be required~~ to be installed in conduit, and if so required, no cable, wire or fiber optic cable may be installed pursuant to this chapter using "direct bury" techniques.
- (c) *Relocation of Facilities*.
- (i) ~~Within fifteen (15) days following written notice from the city a~~ A provider shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any facilities in the right-of-way whenever the city director shall have determined that such removal, relocation, change or alteration is reasonably necessary for any one of the following reasons:
 - (A) the need to construct, repair, maintain, improve or use the right of way or public property;
 - (B) the construction, reconstruction, repair, maintenance or installation of any public improvement in or on the right of way; or

- (C) the public health, safety, and welfare requires it;~~;~~ ~~or~~
 - ~~(D) for the efficient operations of the city or other governmental entity in or on the right of way.~~
- (ii) No provider shall, without reasonable compensation, be required by the city to:
 - (A) relocate, change, support, hold, or alter the position of any facility for the benefit of a third party unless that party is performing services in the right of way on behalf of the city or installing facilities that will be owned by the city;
 - (B) relocate, change, support, hold, or alter the position of any facility for the benefit of a municipal utility providing the same service as and competing for customers with any provider in the city right-of-way; ~~or~~
 - (C) relocate, change, support, hold, or alter the position of any facility for a municipal water or sewer utility performing maintenance and upkeep of existing facilities in the public right-of-way; or
 - (D) relocate, change, support, hold, or alter the position of any facility for a non-transportation related aesthetic improvement.
 - (iii) If a provider disputes a director determination of provider responsibility for relocation costs under Section 722-4(c), provider shall nonetheless coordinate and perform the relocation work in accordance with Section 722-5(a) pending resolution of the cost dispute in the appropriate legal forum. The Director may adjust the time limit provided in Section 722-4(c) as reasonably necessary to accommodate the work if he or she determines the provider is proceeding with the work in a timely and good faith manner.
 - (iv) Notwithstanding the foregoing, a provider who has facilities in the right of way subject to a vacation or narrowing that is not required for the purposes of the city, shall have a permanent easement in such vacated portion or excess portion in conformity with O.R.C. § 723.04.1.
 - ~~(v) Any utility that is proposed or being relocated in an established underground district shall be installed underground.~~
 - ~~(vi) If, within 15 days from the city's written order or within the time determined by the director under Section 722-4(c)(iii), a provider does not proceed to remove or relocate facilities as required under Section 722-4(c) and complete the removal or relocation within a reasonable time, the director may, to the extent not inconsistent with applicable law, remove or relocate the same by employing the necessary labor, tools, and equipment; however, the city shall have no liability for any damage caused by such~~

~~action and the provider shall be liable to the city for all reasonable costs incurred by the city in such action.~~

- (d) ~~*Construction Schedule.* All work shall be performed within a reasonable amount of time and shall be diligently perused by the permittee. Unless otherwise provided for in this chapter, or unless the director waives any of the requirements of this section due to unique or unusual circumstances, a permittee shall be required to submit a written construction schedule to the city five working days before commencing any work in or about the right of way, and shall further notify the city not less than one working day in advance of any excavation in the right of way. This section shall apply to all situations with the exception of circumstances under Section 722-5(c) (emergency situations). When the installation or relocation of a facility is required in coordination with a city construction contract, the utility company shall commit to a schedule in writing prior to the city awarding the contract. If the utility work is delayed and the delay causes a delay to the city's contractor and there is a settlement for delay costs between the city and the contractor then the city has the right to recover those costs from the utility that caused the delay.~~
- (e) ~~*Other Obligations*~~
- (i) ~~Obtaining a construction permit does not relieve permittee of its duty to obtain all other necessary permits, licenses, and authority and to pay all fees required by any other city, county, state or federal laws.~~
- (ii) ~~Permittee shall comply with all requirements of all laws, including the Ohio utility protection service.~~
- (iii) ~~Permittee shall perform all work in conformance with all applicable laws and standards, and is responsible for all work done in the right of way pursuant to its permit, regardless of who performs the work.~~
- (iv) ~~No right of way obstruction or excavation may be performed when seasonally prohibited or when conditions are unreasonable for such work, except in the case of an emergency as outlined in Section 722-5(c).~~
- (v) ~~Permittee shall not obstruct a right of way so that the natural free and clear passage of water through the gutters or other waterways shall be interfered with.~~
- (vi) ~~Private vehicles other than necessary construction vehicles may not be parked within or adjacent to a permit area. The loading or unloading of trucks adjacent to a permit area is prohibited unless specifically authorized by the permit.~~
- (f) ~~Section 722-4(a), Section 722-4(b) and Section 722-4 (d) through (e) shall be effective on March 1, 2012.~~

Section 18. That the existing Section 722-4 of the Cincinnati Municipal Code is hereby repealed.

Section 19. That Section 722-5, "Enforcement of Permit Obligation," is hereby amended and renumbered as Section 722-6 as follows:

Sec. 722-56. Enforcement of Permit Obligation.

- (a) *Mandatory Denial of Permit.* Except in the case of an emergency, no construction permit or minor maintenance permit will be granted:
 - (i) To any person who has not yet made an application; or
 - (ii) If, in the discretion of the 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 director, in exercising this discretion, shall be guided by the safety and convenience of ordinary travel of the public over the right of way, and by considerations relating to the public health, safety and welfare.
- (b) *Permissive Denial of Permit.* The director may deny a permit in order to protect the public health, safety and welfare, to prevent interference with the safety and convenience of public travel over the right of way, or when necessary to protect the right of way and its users.
 - (i) The director, in his or her discretion, may consider one or more of the following factors:
 - (A) The extent to which right-of-way space where the permit is sought is available; and/or
 - (B) The competing demands for the particular space in the right of way; and/or
 - (C) The availability of other locations in the right of way or in other rights of way for the proposed facilities; and/or
 - (D) The applicability of this chapter or other regulations of the right-of-way that affect location of facilities in the right of way; and/or
 - (E) The degree of compliance of the provider with the terms and conditions of its permits, this chapter, and other applicable ordinances and regulations; and/or

- (F) The degree of disruption to surrounding communities and businesses that will result from the use of that part of the right of way; and/or
- (G) The condition and age of the right of way, and whether and when it is scheduled for total or partial re-construction; and/or
- (H) The balancing of the costs of disruption to the public and damage to the right-of-way, against the benefits to that part of the public served by the expansion into additional parts of the right-of-way; and/or
- (I) Whether such applicant or its agent has failed within the past three years to comply, or is presently not in full compliance with, the requirements of this chapter; or, if applicable, any other law.

(c) *Work Done Without a Permit in Emergency Situations.*

- (i) Each provider shall, as soon as is practicable, immediately notify the director of any event regarding its facilities which it considers to be an emergency. The provider may proceed to take whatever actions are necessary in order to respond to the emergency. Within one business working day, unless otherwise extended by the director, after the occurrence or discovery of the emergency (whichever is later), the provider 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 chapter for any and all actions taken in response to the emergency. In the event that the city becomes aware of an emergency regarding a provider's facilities, the city shall use best efforts to contact the provider or the system representative of each provider affected, or potentially affected, by the emergency. In any event, the city may take whatever action it deems necessary in order to respond to the emergency, the cost of which shall be borne by the provider whose facilities caused the emergency. Nothing in this section shall alter any emergency permitting requirements applicable to work occurring along a streetcar public way.
- (ii) Except in the case of an emergency, any provider who constructs in, on, above, within, over, below or through a right-of-way without a valid permit must subsequently obtain a permit, pay double the normal fee for said permit, pay ~~double~~ triple all the other fees required by the Cincinnati municipal code, deposit with the city the fees necessary to correct any damage to the right-of-way and comply with all of the requirements of this chapter, including payment of any additional fines or penalties applicable under the code.

(d) *Revocation of Permits.*

- (i) Permittees hold permits issued pursuant to this code as a privilege and not as a right. The city reserves its right, as provided herein, to revoke any permit, without refunding any fees, in the event of a substantial breach of the terms and conditions of any law, or any provision or condition of the permit. A substantial breach by permittee shall include, but shall not be limited to, the following:
 - (A) The violation of any provision or condition of the permit; or
 - (B) An evasion or attempt to evade any provision or condition of the permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the city or its citizens; or
 - (C) Any material misrepresentation of fact in the application for a permit; or
 - (D) The failure to maintain the required construction or removal bonds and/or insurance; or
 - (E) The failure to complete the construction in a timely manner.
- (ii) If the director determines that the permittee has committed a substantial breach of a term or condition of any law or any condition of the permit, the director and engineering shall serve a written demand upon the permittee to remedy such violation. The demand shall state that continued violations may be cause for revocation of the permit. Upon a substantial breach, as stated above, the director may place additional or revised conditions on the permit.
- (iii) By the close of the next business working day following receipt of notification of the breach, permittee shall contact the director with a plan, acceptable to the director, for its correction. Permittee's failure to so contact the 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 immediate revocation of the permit.
- (iv) If a permittee commits a second substantial default as outlined above, permittee's permit ~~will~~ may be automatically ~~be~~ revoked and the permittee ~~will~~ may not be allowed further permits for up to and including one full year, except for emergency repairs.
- (v) If a permit is revoked, the permittee shall also reimburse the city for the city's reasonable costs, including restoration costs and the costs of collection and reasonable attorneys' fees incurred in connection with such revocation.

Section 20. That the existing Section 722-5 of the Cincinnati Municipal Code is hereby repealed.

Section 21. That a new Section 722-5, “Utility Coordination and General Construction Obligations,” is enacted as follows:

Sec. 722-5. Utility Coordination and General Construction Obligations.

The following utility coordination and general construction obligations serve to promote the safe, efficient, and fair management of provider access to limited space within the public right-of-way. A provider shall comply with the following requirements as a condition for receiving permits to work in the public right-of-way.

- (a) *Utility Coordination for Public Improvement Projects.* For public improvement projects in the public right-of-way, providers shall comply with specific coordination and relocation procedures set forth below in addition to other requirements of the Cincinnati Municipal Code. A provider that fails to comply with CMC Section 722-5(a) may be subject to civil penalties and reimbursement claims for delay costs as set forth in CMC Section 722-7.
 - (i) *Step 1 – Identification and field marking.* Providers shall field identify and provide written records of their facilities in the right-of-way within 30 days of being notified by the director that such identification is necessary for the city to begin planning for the construction, paving, maintenance, repair, relocation, or other alteration of any street or area in the public right-of-way. Providers shall comply with the following requirements for field identification of facilities:
 - (A) Each provider shall field identify all its facilities within the project area in a manner that is clearly legible from the ground, consistent with industry best practices, and in compliance with city and state rules and regulations;
 - (B) If standard field identification methods would potentially create a safety problem or violate any safety code, then permittee shall request approval from the director for alternative methods of marking facilities; and
 - (C) Providers shall supply the department plans and records of all recorded and verified utilities within the project limits.
 - (ii) *Step 2 – Verification and relocation.* The city shall include facility identification information provided in Step 1, above, in the preliminary construction drawings, which will be transmitted to providers together with preliminary roadway alignment drawings. Upon receiving preliminary construction drawings from the city, provider shall respond to the department as follows:

- (A) Provider shall review the preliminary construction drawings and reply within 30 days to confirm the locations of the facilities shown on the drawings or correct the drawings to accurately show the location of provider's facilities;
 - (B) Provider shall identify any conflicts with provider facilities and the proposed improvement work, identify the scope of relocation work necessary to remedy the conflict(s), and identify any other work proposed by the provider within the project limits;
 - (C) Provide the city with a description of the proposed work as identified in 722-5(a)(ii)(B) and an estimated time frame needed for the completion of provider's project-related work; and
 - (D) The city will use the scope and estimated time as provided in 722-5(a)(ii)(C) to develop a project schedule. Provider shall be given a reasonable time prior to construction to permanently or temporarily move its facilities or, alternatively, if project conditions allow, the city and provider may agree to coordinate relocation with construction contractor to whom the contract for a public improvement is awarded. If the time frame requested by provider is not reasonable and conflicts with the city's project schedule, then provider shall take reasonable steps to revise its time frame to fit within the project schedule. Once agreed to by the provider and the city the project schedule will be incorporated into the project bid documents as stated in 722-5(a)(iii).
- (iii) *Step 3 – Final Drawings and Schedule.* The department will utilize the information obtained from providers in Steps 1 and 2, above, to create final construction plans and a schedule for utility work for the public improvement project. The final plans and schedule will be transmitted to each affected provider for final review and verification. If provider does not respond to the city within 14 days of receipt of final plans and schedule, provider shall be deemed to have concurred and verified the contents of the construction plans and schedules. The city shall rely upon provider-verified plans and schedules for contractor procurement (e.g., in a 4A note to contractor) and construction purposes.
- (iv) *Step 4 – Utility Coordination with Contractor during Construction.* Prior to the start of construction of the public improvement, the city shall notify providers of known utilities within the limits of the construction area of the name of the contractor and the schedule for the proposed work. Each affected provider shall coordinate with the city's contractor when requested to locate utilities and perform needed relocation work. In the event of a conflict with an unidentified or mislocated utility during construction, the affected provider shall be promptly notified of the conflict. Upon notification, the provider shall take steps to resolve the utility conflict and to complete the removal or relocation within a

reasonable time specified by the director or director's designee. If provider fails to act diligently to remove or relocate the obstructing facilities, the director may employ the necessary labor, tools, and equipment to remedy provider noncompliance, including removal or relocation of such facilities. The city shall have no liability for any damage caused by such action and provider shall be liable to the city for all reasonable costs incurred by the city in such action.

- (v) *Failure to Comply with CMC Section 722-5.* If provider does not comply with the requirements of CMC Section 722-5, then the director may issue a notice of civil offense and civil fine and issue administrative orders as provided in CMC Section 722-7 to bring about compliance. As provided in CMC Section 722-7, a provider may be required to reimburse the city for delay costs and/or costs of remedial work incurred by the city.
- (b) *Construction Schedule for Utility Work, Generally.* All work by a provider within the public right-of-way shall be performed within a reasonable amount of time and shall be diligently pursued by the permittee, irrespective of the public or non-public character of the work. With the exceptions of public improvement project work subject to Section 722-5(a) and emergency work subject to CMC Section 722-6(c), permittee shall submit a written construction schedule to the city not less than five working days prior to commencing work in the right of way and shall notify the city not less than one working day prior to excavation in the right of way.
- (c) *General Permittee Obligations.*
 - (i) Obtaining a construction permit does not relieve permittee of its duty to obtain all other necessary permits, licenses, and authority and to pay all fees required by any other city, county, state or federal laws.
 - (ii) Permittee shall comply with Ohio Utility Protection Service requirements.
 - (iii) Permittee shall perform all work in conformance with all applicable laws and standards, and is responsible for all work done in the right-of-way pursuant to its permit, regardless of who performs the work.
 - (iv) No right-of-way obstruction or excavation may be performed when seasonally prohibited or when conditions are unreasonable for such work, except in the case of an emergency as outlined in Section 722-6(c).
 - (v) Permittee shall not obstruct a right-of-way so that the natural free and clear passage of water through the gutters or other waterways shall be interfered with.
 - (vi) Private vehicles other than necessary construction vehicles may not be parked within or adjacent to a permit area. The loading or unloading of

trucks adjacent to a permit area is prohibited unless specifically authorized by the permit.

Section 22. That Section 722-6 of the Cincinnati Municipal Code, "General Provisions," is hereby amended and renumbered as Section 722-9 as follows:

Sec. 722-69. General Provisions

- (a) *Non-Exclusive Remedy.* The remedies provided in this chapter are not exclusive or in lieu of other rights and remedies that the city may have under the Cincinnati municipal code, or at law, or in equity. The city is hereby authorized at any time to seek legal and equitable relief for actual or threatened injury to the public right of way, including damages to the right of way, whether caused by a violation of any of the provisions of this chapter or other provisions of this code.
- (b) *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, right or any portions of this section are illegal or unenforceable, then any such permit or right granted or deemed to exist hereunder shall be considered as a revocable permit with a mutual right in either party to terminate without cause upon giving 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 to issue such revocable permit and the power to revoke it.
- (c) *Reservation of Regulatory and Police Powers.* The city, by the granting of a permit pursuant to this chapter, 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 laws of the United States, state of Ohio and under the charter of the city of Cincinnati to regulate the use of the right of way. The permittee by its acceptance of a permit for work in the right of way, is deemed to acknowledge that all lawful powers and rights, regulatory power, or police power, or otherwise as now are or the same as 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 provider 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.

- (d) *Method of Service.* Any notice or order of the director or city manager shall be deemed to be properly served if a copy thereof is:
- (i) Delivered personally; or
 - (ii) Successfully transmitted via facsimile transmission to the last known fax number of the person to be served; or
 - (iii) Left at the usual place of business of the person to whom it is to be served upon and with someone who is 18 years of age or older; or
 - (iv) Sent by certified, preposted U.S. mail to the last known address; or
 - (v) If the notice is attempted to be served by certified, preposted U.S. mail and then returned showing that the letter was not delivered, or the certified letter is not returned within 14 days after the date of mailing, then notice may be sent by regular, preposted, first-class U.S.; or
 - (vi) If the notice is attempted to be served by regular, first class U.S. mail, postage prepaid, and the letter is then returned showing that the letter was not delivered, or is not returned within 14 days after the date of mailing, then notice shall be posted in a conspicuous place in or about the structure, building, premises or property affected by such notice.
- (e) *Applies to All Providers.* This chapter shall apply to all providers and all permittees unless expressly exempted.
- (f) *Police Powers and Charter Authority.* All persons' 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. All persons shall comply with all applicable laws enacted by the city pursuant to its police powers. In particular, all persons shall comply with city zoning and other land use requirements pertaining to the placement and specifications of facilities. In addition, all persons' rights under this chapter shall be subject to the city's home rule charter authority over the use of the public right-of-way.
- (g) *Compliance.* No person shall be relieved of its obligation to comply with any of the provisions of this chapter by reason of any failure of the city to enforce prompt compliance.
- (h) *Choice of Law and Forum.* This chapter and the terms and conditions of any permit or enforcement action under this chapter shall be construed and enforced in accordance with the substantive laws of the City of Cincinnati, State of Ohio, and United States, in that order. As a condition of the grant of any permit all disputes shall be resolved in a court of competent jurisdiction in Hamilton County, Ohio.
- (i) *Force Majeure.* In the event any person's performance of any of the terms, conditions or obligations required by this chapter is prevented by a cause or event not within such person's control, such inability to perform shall be deemed

excused and no penalties or sanctions shall be imposed as a result thereof. For the purpose of this section, causes or events not within the control of a provider shall include, without limitation, acts of God, strikes, sabotage, riots or civil disturbances, failure or loss of, explosions, acts of public enemies, and natural disasters such as floods, earthquakes, landslides, and fires.

- (j) *No Warranty.* The city makes no representation or warranty regarding its right to authorize the construction of facilities on any particular right of way. The burden and responsibility for making such determination shall be upon the person installing facilities in the right of way.
- ~~(k) *Appeals.* All appeals provided for by this chapter and any notification to the city required by this chapter shall be in writing and sent via certified U.S. mail to the city manager or director as specified in this chapter.~~
- (k) *City Standards.* As part of city-required standards wherever the right of way is under construction, if deemed advisable and practicable by the director, the city may install all such facilities deemed necessary to accommodate future provider needs. Any such installed facilities shall be city property and may be conveyed to any person under such terms and conditions as are deemed advisable by the city manager.

Section 23. That the existing Section 722-6 of the Cincinnati Municipal Code is hereby repealed.

Section 24. That a new Section 722-7, "Administrative Orders," is hereby enacted as follows:

Sec. 722-7. Administrative Orders.

In addition to or in lieu of any other remedies provided by law, if a person violates any of the provisions of this chapter, or fails to take the corrective action set out in a notice provided for in CMC Section 722-5(a) by the date provided in the notice, the director, or the director's designee, may issue an administrative order or orders containing any of the following measures:

- (a) Notice of violation and remedial action related to the violation, including an order requiring provider to submit a remedial action plan to the city to bring about compliance with this chapter;
- (b) Issuance of a Notice of Civil Offense and Civil Fine against the permittee for committing a Class D civil offense;
- (c) An order that provider reimburse delay costs incurred by the city as a result of provider failure to comply with CMC Section 722-5. Upon incurring delay costs,

the director may order provider to reimburse the city for such costs if the following conditions are met:

- (i) The director or director's designee gave notice of the public improvement project to provider consistently with CMC Section 722-5(a)(i)-(iv);
 - (ii) For delay caused by conflicts with provider's facilities occurring after the start of construction, the city and/or contractor notified provider of potential liability for delay costs promptly after discovering the conflict;
 - (iii) For delay caused by provider's failure to meet the final schedule developed pursuant to 722-5(a), the city and/or contractor notified provider of potential liability for delay costs promptly after discovering that provider would not meet the required schedule;
 - (iv) Provider shall not be responsible for reimbursement of any portion of delay costs that were caused solely by matters outside of provider's control. Provider ignorance of the location of its own facilities (vertical and horizontal location) is no defense against responsibility for reimbursement of delay costs.
- (d) An order that provider reimburse the city for costs of relocation work performed by the director or director's agent pursuant to CMC Section 722-5(a)(iv). Upon incurring costs under CMC Section 722-5(a)(iv), the director may order provider to reimburse the city for such costs if the following conditions are met:
- (i) The director provided notice of the public improvement project to provider consistently with CMC Section 722-5(a)(i)-(iv);
 - (ii) The city and/or contractor notified provider of the facility conflict and gave provider a reasonable amount of time to commence the relocation work prior to city remedial action; and
 - (iii) Prior to initiating city relocation work, the director notified provider in writing that failure to commence and diligently pursue the required relocation work as required by the director would result in the city taking steps to relocate provider's facilities in order to remedy provider's noncompliance with CMC Section 722-5(a)(iv).

Section 25. That a new Section 722-8, "Notice of Violation, Remedial Action and Civil Fine," is hereby enacted as follows:

Sec. 722-8. Notice of Violation, Remedial Action and Civil Fine.

Upon issuance of an administrative order for a notice of violation or a civil fine provided in CMC Section 722-7, the director shall serve upon the provider a written notice in accordance with CMC Section 1501-13.

A person served with a written notice pursuant to this section may answer the charge in accordance with Section 1501-15, including an offer of proof of correction, if applicable, in accordance with Section 1501-19 within seven days of receipt of the notice by the person being charged.

For purposes of denying a civil violation of this chapter, or offering proof of correction, the procedures contained in Section 1501-13 to Section 1501-31 shall apply to the person being charged.

Section 26. That a Section 722-99, "Penalties," is hereby amended as follows:

Sec. 722-99. – Penalties.

A violation of any provision of Section 722-4 is a Class D Civil Offense. ~~Each day's violation shall be a separate offense.~~

Section 27. That the existing Section 722-99 of the Cincinnati Municipal Code is hereby repealed.

Section 28. That Section 1501-9 of Title XV of the Cincinnati Municipal Code, "Code Compliance and Hearings," is hereby amended as follows:

Sec. 1501-9. – Class D Civil Offenses.

A person who violates a standard of conduct set forth in a provision of the Cincinnati Municipal Code listed below is liable for the civil fine specified in §1501-99 for a Class D Civil Offense. If the provision is listed under paragraph (a) below, the otherwise applicable civil fine is reduced by 50% if the person charged shows in accordance with §1501-15 that the violation has been corrected. If a person has previously been found to have violated the same provision of the Cincinnati Municipal Code within one year that person may be charged as a second offender and on being found to have committed a second or subsequent offense is liable for the civil fine for the subsequent offense provided below, which fine is specified in §1501-99 and is not subject to reduction for correction of the violation.

- (a) Class D Civil Offenses With Civil Fines Subject to 50% Reduction for Correction of Violation:

			Civil Fine for Subsequent Offense
(1)	§720-13	Private Facilities	Class E
(2)	§720-45	Notice of Violations	Class E
(3)	§720-69	Notice to Correct Drainage	Class E
(4)	Chapter 855	Rooming Houses	Class D

(5)	Chapter 895	Outdoor Advertising Signs	Class D
(6)	Chapter 1101	Administration, Cincinnati Building Code	Class E
(7)	Chapter 1106	General and Specialty Contractors	Class E
(8)	Chapter 1117	Housing Code	Class E
(9)	Chapter 1119	Building Hazard Abatement Code	Class E
(10)	Title XIV	Zoning Code	Class E
(11)	§1201-21	Maintenance	Class D
(12)	§1201-33	Evacuation	Class D
(13)	§1201-35	Spills and Leaks	Class D
(14)	Chapter 1235	Detectors, Early Fire Warning Systems	Class D
(15)	§ 1123-11(a)	Vacant Foreclosed Property Registration - Failure to register a vacant, foreclosed property.	Class E

(b) Class D Civil Offenses With Civil Fines Not Subject to 50% Reduction for Correction of Violation:

			Civil Fine for Subsequent Offense
(1)	§718-25	Secret Street Uses	Class E
(2)	§721-59	Taking Material from Streets	Class E
(3)	§729-63	Dumping	Class E
(4)	§ 761-14	Eviction or Retaliation by Landlord	Class E
(5)	Chapter 891	Home Improvement	Class E
(6)	§1201-47	Failure to Comply with Orders	Class D
(7)	§1219-21	Causing Fire Through Negligence	Class D
(8)	Chapter 1251	Fire Starting Apparatus	Class D
(9)	§759-3	Use of a Motor Vehicle for Prostitution or Solicitation	Class D
(10)	§759-4	Use of a Motor Vehicle to Facilitate a Drug Related Crime	Class D
(11)	<u>Chapter 722</u> §722-4	<u>Management and Control of the Use of the City Right-of-Way Construction, Relocation and Restoration in the Public Right-of-Way</u>	<u>Class E</u> Class D
(12)	Chapter 730	Commercial Waste Franchises	Class E

Section 29. That the existing Section 1501-9 of the Cincinnati Municipal Code is hereby repealed.

Section 30. That this ordinance shall be an emergency measure necessary for the preservation of the public peace, health, safety and general welfare and shall, subject to the terms of Article II, Section 6 of the Charter, be effective immediately. The reason for the emergency is to provide utility providers and other persons with facilities occupying the public right-of-way with guidance regarding right-of-way construction obligations at the earliest possible time to further promote the efficient management, regulation, and administration of the public right-of-way by the Department of Transportation and Engineering.

Passed: March 19, 2014

John Cranley
Mayor

Attest: Miss A
Clerk

New language underscored. Deleted language indicated by strikethrough.

I HEREBY CERTIFY THAT ORDINANCE No. 42-2014
WAS PUBLISHED IN THE CITY BULLETIN
IN ACCORDANCE WITH THE CHARTER ON 4-1-2014
Melissa A. [Signature]
CLERK OF COUNCIL