

EMERGENCY

City of Cincinnati

AWG

SR/RLT

An Ordinance No. _____ - 2012

ENACTING Chapter 722, "Management and Control of the Use of the City Right-of-Way," of the Cincinnati Municipal Code to clarify 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 for the purpose of including the offenses listed in Chapter 722, by amending Section 1501-9, "Class D Civil Offenses."

WHEREAS, the City of Cincinnati's management, regulation, and administration of its public right of way with regard to matters of local concern is a valid exercise of the power of local self-government granted by Section 3 and Section 7 of Article XVIII of the Ohio Constitution; and

WHEREAS, the Council has determined that its control over the City right-of-way under its home rule charter authority requires additional clarification of the respective rights and obligations of the City and persons seeking to maintain facilities and structures within the public right of way; and

WHEREAS, Council intends for the proposed ordinance to supplement the right-of-way procedures set forth in Chapter 718, Chapter 721, and Chapter 723 of the Cincinnati Municipal Code, as well as Ohio Revised Code Section 153.64; and

WHEREAS, Council finds that the City's streets must be managed in order to provide for the public welfare through safe, timely, and efficient transportation of persons and goods and thereby promote the long-term sustainable growth of the City; and

WHEREAS, Council desires to promote the management the right of way in a manner that fosters long-term, multi-modal public transportation options in addition to private automobiles (such as, for example, pedestrian, bicycle, bus, and streetcar modes of travel); and

WHEREAS, modern public transportation improvement projects support the sustainable transportation planning and expansion of the region's public transit network over time and thereby provide reliable and affordable transportation options for persons throughout Greater Cincinnati; and

WHEREAS, the City incurs substantial costs associated with the management and administration of the public right of way; and

WHEREAS, other large cities in Ohio have implemented similar policies to improve their management and control of the public right of way, including Dayton, Cleveland, and Toledo; now, therefore,

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

Section 1. That Chapter 722, "Management and Control of the Use of the City Right-of-Way," of the Cincinnati Municipal Code is enacted to read as follows:

Sec. 722-1. - Definitions.

For the purposes of this Chapter 722, the following words and phrases shall have the meanings ascribed to them below, regardless of whether or not the words and phrases are capitalized.

Sec. 722-1-B. - Best effort(s).

"Best effort(s)" means the best reasonable efforts under the circumstances, taking into consideration, among other appropriate matters, all applicable laws, regulations, safety, engineering and operational codes, available technology, human resources, and cost.

Sec. 722-1-C. - Cable Franchise.

"Cable Franchise" has the same meaning as "franchise" in the Cable Communications Policy Act of 1984, 98 Stat. 2779, 47 U.S.C.A. 522.

Sec. 722-1-C2. - Cable Operator.

"Cable Operator" has the same meaning as in the Cable Communications Policy Act of 1984, 98 Stat. 2779, 47 U.S.C.A. 522.

Sec. 722-1-C3. - Cable Service.

"Cable Service" has the same meaning as in the Cable Communications Policy Act of 1984, 98 Stat. 2779, 47 U.S.C.A. 522.

Sec. 722-1-C4. - City.

"City" means the City of Cincinnati, Ohio.

Sec. 722-1-C5. - City Council.

"City Council" means the governing body of the City.

Sec. 722-1-C6. - City Manager.

"City Manager" means the administrative head of the municipal government known as the City of Cincinnati, Ohio.

Sec. 722-1-C7. – Cincinnati Municipal Code.

"Cincinnati Municipal Code" or "Code" means the City of Cincinnati Municipal Code, related city legislation, and related city regulations.

Sec. 722-1-C8. - Construct.

"Construct" means digging, boring, tunneling, trenching, excavating, obstructing, installing wires, installing conduit, installing pipes, installing transmission lines, installing poles, installing signs or installing Facilities, other than landscaping, ornamental plantings in, on, above, within, over, below, under or through any part of the right of way. Construct shall also include the act of opening and/or cutting into the surface of any paved or improved surface that is any part of the right of way.

Sec. 722-1-C9. - Construction.

"Construction" means the act or process of digging, boring, tunneling, trenching, excavating, obstructing, installing wires, installing conduit, installing pipes, installing transmission lines, installing poles, installing signs or installing Facilities, other than landscaping, ornamental plantings in, on, above, within, over, below, under or through any part of the right of way. Construction shall also include the act of opening and/or cutting into the surface of any paved or improved surface that is part of the right of way.

Sec. 722-1-C10. - Construction Permit.

"Construction Permit" means any permit required under Chapter 718, Chapter 721, Chapter 722, or Chapter 723, for construction or use in or on a right of way.

Sec. 722-1-C11. - County.

"County" means Hamilton County, Ohio (except for the purpose of the provision of sewer and water service within or through the city). County specifically excludes any and all contractors, agents or other persons acting on behalf of said county.

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

"Department of Transportation and Engineering" means the Department of Transportation and Engineering of the city.

Sec. 722-1-D2. - Director.

"Director" means the Director of the Department of Transportation and Engineering, or his or her designee.

Sec. 722-1-E. - Emergency.

"Emergency" means a condition that poses a clear and immediate danger to life or health, or of a significant loss of property.

Sec. 722-1-F. - Facility(ies).

"Facility(ies)" means any tangible thing located in any right of way within the city; but shall not include boulevard plantings, ornamental plantings or gardens planted or maintained in the right of way between a person's property and the street edge of pavement.

Sec. 722-1-F2. - FCC.

"FCC" means the Federal Communications Commission, or any successor thereto.

Sec. 722-1-F3. - 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.

Sec. 722-1-I. - In.

"In," when used in conjunction with right of way, means in, on, above, within, over, below, under or through a right of way.

Sec. 722-1-I2. - Inspector.

"Inspector" means any person authorized by the Director to carry out inspections related to the provisions of Chapter 722.

Sec. 722-1-L. - Law.

"Law" means any local, state and/or federal legislative, judicial or administrative order, certificate, decision, statute, constitution, ordinance, resolution, regulation, rule, tariff or other requirement in effect either at the time of execution of Chapter 722 or at any time during the location of, and/or while a provider's facilities are located in the public rights-of-way.

Sec. 722-1-O. - Ohio Manual of Uniform Traffic Control Devices.

"Ohio Manual of Uniform Traffic Control Devices" means the uniform system of traffic control devices promulgated by the Ohio Department of Transportation pursuant to O.R.C. § 4511.09.

Sec. 722-1-O2. - O.R.C.

"O.R.C." means the Revised Code of the State of Ohio.

Sec. 722-1-O3. - Ohio Utility Protection Service.

"Ohio Utility Protection Service" means the utility protection service as defined in O.R.C. § 153.64 and/or § 3781.26 or a statutory successor thereto.

Sec. 722-1-O4. - Open Video Service.

"Open Video Service" means any video programming services provided to any person through the use of the right of way, which person is certified by the FCC to operate an open video system pursuant to § 651 et seq. of the Telecommunications Act of 1996 (codified at 47 U.S.C. Title VI, Part V), regardless of the facilities used.

Sec. 722-1-P. - Permit.

"Permit" means a construction permit or revocable street privilege, required for activity within the right of way, as the context requires.

Sec. 722-1-P2. - Permit Fee.

"Permit Fee" means money paid to the city for a permit to construct in the right of way as authorized by the Cincinnati Municipal Code including, but not limited to, Chapters 718, 721, 722, and 723 of the Code.

Sec. 722-1-P3. - Permittee.

"Permittee" means any person to whom a construction permit, minor maintenance permit, or other permit for activity within the right of way that has been granted by the city and not revoked.

Sec. 722-1-P4. - Person.

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

Sec. 722-1-P5. - Potholing.

"Potholing" means the practice of excavating a small section or sections of the street to locate existing underground facilities.

Sec. 722-1-P6. - Provider.

"Provider" means a person who owns or operates a system in the right of way. The city, county, and cable television operators operating pursuant to a valid Cable Franchise, shall also be considered providers.

Sec. 722-1-P7. – Public Improvement

A "Public Improvement" means any construction, reconstruction, improvement, enlargement, alteration, or repair of a building, highway, drainage system, water system, road, street, sidewalk, sidewalk area, alley, sewer, ditch, sewage disposal plant, water works, and all other structures or works of any nature by a public authority. Public improvements include, without limitation, street improvements that enable the public use of the city's street network by both automobile and public non-automobile modes of transportation (e.g., transportation by pedestrian way, bicycle, public bus, or public streetcar).

Sec. 722-1-P8. - PUCO.

"PUCO" means the Public Utilities Commission of Ohio as defined in O.R.C. § 4901.02.

Sec. 722-1-R. - Restoration.

"Restoration" means the process and the resultant effects by which a right of way is returned to a condition as good as or better than its condition immediately prior to the construction. Restoration shall occur in accordance with the rules and regulations for making openings in a right of way as amended from time to time.

Sec. 722-1-R2. - Right(s) of Way.

"Right(s) of Way" means the surface and space in, above, within, over below, under or through any real property in which the city has an interest in law or equity, whether held in fee, or other estate or interest, or as a trustee for the public, including, but not limited to any public street, boulevard, road, highway, freeway, lane, alley, court, sidewalk, parkway, river, tunnel, viaduct, bridge, conduit, or any other place, area, or real property owned by or under the legal or equitable control of the city that, consistent with the purposes for which it was dedicated, may be used for the purposes of constructing, operating, repairing, or replacing a system. Right of way shall not include buildings, parks, or other public property or easements that have not been dedicated to compatible

uses, except to the extent the use or occupation of such property is specifically granted in a permit or by law.

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 street restoration book.

Sec. 722-1-S. - Service(s).

"Service(s)" means the offering of any service for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.

Sec. 722-1-S2 - SORTA.

"SORTA" means the Southern Ohio Regional Transit Authority or its corporate successor for the limited purposes of providing public transportation.

Sec. 722-1-S3. - System.

"System" means any system of conduit, cables, ducts, pipes, wires, lines, towers, 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, wireless communications systems, and transit electrification systems.

Sec. 722-1-S4. - System Representative.

"System Representative" means the specifically identified agent/employee of a provider who is authorized to direct field activities of that provider and serve as official notice agent for system related information. Any such system representative shall be required to be available at all times to receive notice of and immediately direct response to system related emergencies or situations.

Sec. 722-1-T. - Trenchless Technology.

"Trenchless Technology" means, but is not limited to, the use of directional boring, horizontal drilling, microtunneling 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.

Sec. 722-1-U. - Underground Facilities.

"Underground Facilities" means all lines, cables, conduits, pipes, posts, tanks, vaults and any other facilities which are located wholly or partially underneath rights-of-way.

Sec. 722-1-U2. - Utility.

"Utility" 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.

Sec. 722-1-W. - Working Day.

"Working Day" means any Monday, Tuesday, Wednesday, Thursday or Friday, but excluding legal holidays observed by the city.

Sec. 722-2. - Right-of-Way Administration.

- (a) *Administration.* The city manager shall be the principle city official responsible for the administration of Chapter 722, except as otherwise provided herein. The City Manager may delegate any or all of the duties hereunder to the Director 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.

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 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) *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 enter planned work into the department of transportation and engineer's CAGIS-based construction coordination system; 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) 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:
 - (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 Track Access Permit from SORTA where required under the code for work occurring within the right of way along a streetcar route.

Sec. 722-4. - Construction, Relocation and Restoration.

(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 shall have the right to dictate the location of a new or relocated facility that is placed within the right of way.
- (iii) The city 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 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 plans for public improvements, development projects which have been determined to be in the public interest and nondiscriminatory and competitively neutral treatment among providers.

(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, 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 installations are used the permittee will be required to pothole to locate existing utilities prior to starting the work. In addition, 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 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 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;
 - (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 non-transportation related aesthetic improvement.
- (iii) 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.

Sec. 722-5. - 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 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 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 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 automatically be revoked and the permittee will 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.

Sec. 722-6. - 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.* 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.
- (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, 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.
- (l) *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.

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 2. 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>§ 722-4</u>	<u>Construction, Relocation and Restoration in the Public Right-of-Way</u>	<u>Class D</u>

Section 3. That the existing Section 1501-9 of the Cincinnati Municipal Code is hereby repealed.

Section 4. 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 this emergency ordinance is to support the City's full authority over the right of way at the earliest possible date in order to provide for the safe, cost-efficient, and timely management of the right of way and related public improvements.

Passed: _____, 2012

Mayor

Attest: _____
Clerk

New language underscored.