

ORDINANCE

AN ORDINANCE OF THE BOARD OF TRUSTEES OF SANITARY AND IMPROVEMENT DISTRICT NO. 5 CASS COUNTY, NEBRASKA TO REGULATE THE USE OF THE RIGHTS-OF-WAY IN THE DISTRICT; AND TO REQUIRE PERMITS TO OCCUPY THE RIGHTS-OF-WAY WITHIN THE DISTRICT.

BE IT ORDAINED BY THE BOARD OF TRUSTEES OF SANITARY AND IMPROVEMENT DISTRICT NO. 5 CASS COUNTY, NEBRASKA AS FOLLOWS.

PERMITS TO OCCUPY THE RIGHT-OF-WAY

1. DEFINITIONS.

A. “Applicant” shall mean any person or business entity submitting an application for a permit to occupy a right-of-way under the jurisdiction of the Board of Trustees Board of (Board) of Sanitary and Improvement District No. 5 Cass County, Nebraska (District) pursuant to this Ordinance.

B. “Facilities” shall mean pipes, conduits, wires, cables, towers, switches, amplifiers, transformers, fiber optic lines, antennae, poles, ducts, conductors, lines, mains, vaults, appliances, attachments, equipment, structures, manholes, fixtures, appurtenances, and such other objects, devices, or facilities that are designed, constructed, installed, used or operated in, upon, across, above or below the right-of-way.

C. “Franchise agreement” shall mean a franchise agreement, consent agreement, or similar agreement pursuant to which the Board has granted a person a license to place facilities in rights-of-way under the Board’s jurisdiction.

D. “Right-of-way” shall mean any platted public:

- (1) street;
- (2) alley;
- (3) sidewalk;
- (4) other right-of-way governed by the Board; or
- (5) other public ground within, or under the jurisdiction of, the Board.

E. “Technically feasible” means that by virtue of engineering or, if applicable, spectrum usage, the proposed placement, design, or site location of a facility can be implemented without a reduction in the functionality.

F. "Emergency repair" means only repairs required to protect the public safety from immediate and imminent threat of harm.

G. "Routine maintenance" means work in the right-of-way which does not involve a requirement for the use of "One-Call" nor which involves street closures or restrictions on the traveling public's use of the right-of-way by the placement of, or the need for the placement of, barricades, cones or other traffic control devices which shall remain after the maintenance workers have left the location of the work.

2. PURPOSE, SCOPE AND EXCEPTIONS.

A. *Purpose.* This Ordinance provides principles and procedures for the placement, construction, operation, maintenance, modification, repair, and removal of facilities as defined above in the rights-of-way. These principles and procedures are intended to protect the integrity of the District's rights-of-way and infrastructure, and to promote the safe and orderly use of the rights-of-way among all users thereof. To achieve these purposes, it is necessary to require permits for all right-of-way uses, except as prohibited by law, and to establish uniform and nondiscriminatory rules which govern such permits.

B. *Scope.* This Ordinance shall apply to all facilities located in the District's rights-of-way, subject to the limitations in this subsection "B", the exceptions provided in subsection "C" below, and preemption by applicable state or federal law. Any person in good-standing under a current, unexpired franchise agreement may continue to use the District's rights-of-way pursuant to the terms of such franchise agreement, unless otherwise prohibited by law, until the franchise agreement expires or is terminated. This Ordinance shall not apply to the following right-of-way uses which are governed elsewhere as noted:

- (1) Use of a right-of-way by an adjoining property owner for parking;
- (2) Use of the right-of-way by an adjoining property owner for the **temporary placement of above ground improvements which do not require use of the One-Call system;**
- (3) Closure and use of a right-of-way for an event, provided such closure and use shall have been approved by the Board; and
- (4) Routine maintenance as defined above.

C. *Exceptions.* The Board shall not require an application, permit, or other approval or charge fees or rates under this Ordinance for either routine maintenance of facilities where such maintenance is conducted by or on behalf of an applicant issued a permit for such facilities hereunder, or replacement of facilities with substantially similar facilities where such replacement is conducted by or on behalf of an applicant issued a permit for such facilities hereunder.

3. PERMITS.

A. *Permit Required.* Unless otherwise specifically provided by law, it shall be unlawful for any person to lay, construct, operate, maintain, offer for lease, or make available for any use whatsoever, any facilities across, along, over, above, or under any public right-of-way for any private or commercial purpose unless such person been issued a permit to occupy such right-of-way under this Ordinance.

Permits shall be required for the construction of improvements below ground by an adjoining property owner, including the installation of lawn irrigation systems or similar improvements.

B. *Permit Applications.* Applications for permits under this Ordinance shall be made in writing to the Board by presenting the same to the Board's attorney. Each such application shall include the following:

(1) A set of completed construction plans for all facilities to be located in the right-of-way under the permit, bundled into a single file, formatted to 11" by 17", which includes:

(a) the name, location, address (if available), and GPS coordinates for the facilities;

(b) labeled and dimensioned site plan and elevation plans of the facilities with, as applicable, key symbols, ROW lines, property lines, street information, topographical information, existing and proposed utilities, adjacent property uses, and easements;

(c) structural plans of the facilities signed and stamped by a professional engineer licensed in Nebraska;

(d) dimensions of the facilities, and a description of type, color, and finish of all visible construction materials;

(e) accurate visual depictions or representations of all above-ground components of the facilities; and

(f) additional detail requested by the Board to clarify the proposed work required for the facilities.

(2) An attestation that the proposed facilities satisfy each of the aesthetic and design standards set forth in this Ordinance, except for such standards, if any, for which applicant is concurrently submitting a request for relief under subsection 7 hereof.

(3) Evidence that, prior to commencement of any work in the right-of-way pursuant to the application, the applicant will procure the performance or construction bond required under this Ordinance.

(4) Evidence of the applicant's insurance required under this Ordinance.

(5) All applicable building and permit fees.

(6) The deposit, if any, requested by the Board pursuant to subsection 6 hereof for independent technical and legal review.

(7) Such other submission requirements set forth in the Board's published application form.

C. *Review; Issuance; Denial.* The Board shall review the application and, within 45 days after receipt, shall notify the applicant in writing whether the application is complete. If an application is incomplete, the Board will specifically identify the missing information in writing and the applicant may resubmit the completed application within 30 days without additional charge. If the applicant makes any material changes in a resubmission, other than the material changes required by the Board, the applicant shall be required to make a new application and submit a new application fee. The Board will notify the applicant in writing whether its application has been approved or denied. If the application is denied, the Board shall document the basis for denial, including any specific provisions of this Ordinance or other applicable law on which the denial was based. The applicant may cure the deficiencies identified by the Board and resubmit the application within 30 days without paying an additional application fee.

D. *Term and Renewal.* The term of each permit to occupy the right-of-way issued under this Ordinance shall be set forth in the permit. The applicant may apply to renew a permit issued hereunder for an equivalent duration and the Board shall renew the permit for such period provided the applicant demonstrates compliance with the criteria set forth in in this Section. Applications for permit renewal may be submitted no earlier than 180 days prior to the expiration of the then current permit and no later than 90 days prior to the expiration of the then current permit.

E. *Permit Conditions.* All permits to occupy the right-of-way issued under this Ordinance are issued subject to the following conditions, and each applicant agrees, by accepting such permit, to be bound by the same:

(1) All facilities shall be constructed, operated, maintained, repaired, removed, modified, and restored in strict compliance with all current applicable technical, safety, and safety-related codes adopted by the Board, the State of Nebraska, or the federal government. The applicant shall, at its sole cost and expense, inspect, keep, and maintain its facilities in the right-of-way in safe condition, in good order and repair, and as otherwise according to best industry practices.

(2) The applicant shall, at its sole cost and expense, promptly restore the right-of-way to its original condition after it completes work related to the facilities. The Board may require an applicant to repair all damage to a right-of-way directly caused by the activities of the applicant in the right-of-way and return the right-of-way to equal or better condition to that before the damage occurred. If the applicant fails to make the repairs that are reasonably required by the Board within 14 days after written notice, the Board may undertake such repairs and charge the applicant the cost of such repairs. The Board shall grant an extension of up to 10 days to complete such repairs if the applicant requests such extension within the original 14-day period. In the event of immediate threat to life or safety or to prevent serious injury, the Board may immediately undertake to restore the site and then notify of and charge the applicant for all restoration costs.

(3) The applicant assumes the risk of any loss, damage to, or loss of use of facilities which are damaged, destroyed, or taken out of service for any reason, except to the extent such loss or damage is due to or caused by the negligent or willful misconduct of the Board.

(4) The applicant shall undertake only the activities enumerated in its permit to occupy the right-of-way and such permit shall not create a property right or grant authority to the applicant to infringe upon the rights of others who may own or have other interests in a right-of-way, utility easement, or other privately owned property. Except as otherwise provided herein or in applicable state or federal laws, any additions or changes to the facilities or activities enumerated in applicant's existing permit shall require a new permit.

(5) Neither the applicant nor its facilities shall interfere with any traffic-control devices and other public works equipment; water, wastewater, stormwater, gas, electrical, or other public utility infrastructure; or the facilities of any other occupant of the right-of-way permitted hereunder.

(6) The Board shall have the right at any time when in its judgement it becomes necessary or advisable to require a change of location of the facilities as a matter of safety, or on account of a change of grade, resurfacing, repair, or reconstruction of any right-of-way. If the owner of such facilities has not moved or relocated the facilities within 30 days after the Board requests the same in writing, the Board may undertake such movement or relocation and charge the owner the costs of the same.

(7) The Board retains the right and privilege to cut or move any facilities, as the Board may determine, in its sole discretion, to be necessary, appropriate, or useful in response to any public emergency. If circumstances permit, the Board shall notify the applicant and provide an opportunity for applicant to move its own facilities prior to cutting or removing the facilities. In all cases, the Board shall

notify the applicant after cutting or removing the facilities as promptly as reasonably possible.

(8) The applicant shall immediately notify the Board in the event of an emergency regarding the applicant's facilities that may affect public health or safety, and such notice shall include, at a minimum, the nature of the emergency and the applicant's planned response to the emergency.

(9) The applicant shall comply with the Nebraska One Call Notification Act before commencing any excavation or similar work in the right-of-way.

(10) The applicant acknowledges that applications and all supporting written material applicant submits to the Board are public records subject to the Nebraska Public Records Law. While an applicant may designate any such public records as "proprietary" or "confidential", the Board shall treat them as such only to the extent expressly permitted by the Nebraska Public Records Law and, other than the cost of the Board's routine response to public records requests, the Board shall be under no obligation to incur any costs to protect the same from disclosure.

(11) Prior to commencement, and at all times during, any work performed by or on behalf of applicant in the right-of-way, the applicant shall maintain a performance or construction bond, in form acceptable to the Board, equal to at least 100% of the estimated cost of the facilities and related work covered by the application.

(12) During the term of any permit to occupy the right-of-way issued hereunder, the applicant shall maintain comprehensive general liability, automobile, workers compensation, employer's liability, and umbrella insurance in form and amount consistent with the Board's published requirements for the same. All such insurance policies shall include the Board and its agents as additional insureds and shall not be modified or cancelled without 30 days prior written notice being given to the Board.

(13) The applicant shall defend, indemnify, and hold harmless the District, the Board, the District's agents, officers, attorney's and officials from any and all damages, liabilities, injuries, losses, attorneys' fees, costs, and expenses, whether for personal injury, death, or property damage, arising out of or in in any way related to the activities or performance of the applicant or its agents, except to the extent caused by the negligence or willful misconduct of the Board. In the event the Board becomes aware of any actions or claims, the Board shall promptly notify the applicant and reasonably cooperate in the defense. It is expressly agreed that the Board shall have the right to approve, which approval shall not be unreasonably withheld, the legal counsel providing the Board's defense, and the applicant shall reimburse the Board for any costs, expenses, and attorneys' fees directly and

necessarily incurred by the Board in the course of the defense.

(14) Any facilities that are not operated for a continuous period of 90 days after completion of initial installation, excluding nonoperation due to a natural disaster or other unforeseeable circumstance or temporary equipment failure, shall be considered abandoned. If facilities are abandoned, the owner shall remove such facility, at such owner's cost, no later than 30 days after notice from the Board. If the owner fails to remove such facilities within 30 days, the Board may undertake the removal of the facilities and charge the owner the costs of such removal. If the facilities are located on a utility pole, the pole shall also be removed unless such pole is otherwise being used by another utility or is owned by a party other than the owner of the removed facilities.

(15) In addition to all other remedies available to the Board under this Ordinance or other applicable law, the Board may revoke an applicant's permit to occupy the right-of-way if the applicant fails to comply with any of the conditions set forth herein, and upon such revocation, may direct applicant, at applicant's cost, to remove applicant's facilities from the right-of-way and restore the right-of-way to its original condition. If the applicant fails to remove its facilities and restore the right-of-way within 30 days after the Board's written request, the Board may cause such work to be done and applicant shall reimburse the Board for the costs of such work upon Board's written demand for the same.

4. FEES.

A. Applicant shall pay an initial application fee of \$ _____ when seeking approval to occupy the rights-of-way. If an "applicant" begins work in the rights-of-way without a permit and without having filed an application fee:

(1) the Board may seek the assistance of law enforcement to remove obstructions to the right-of-way in the form of equipment and personnel and/or seek injunctive relief from the District Court of Cass County Nebraska; and/or

(2) when the application is actually filed the fee shall be two times the initial application fee due to the work involved in stopping the non-permitted work.

5. PURPOSE.

A. The purpose of the standards set forth in this Section is to establish guidelines for the design, placement, and installation of facilities in the right-of-way. All facilities placed in the District's rights-of-way pursuant to this Ordinance shall comply with these standards; provided, the Board may authorize the waiver of, partial relief from, or exemption from, any one or more of these standards pursuant to subsection 7.

(1) *Underground Facilities.* When facilities are proposed in area where other similar facilities are primarily located underground, all components thereof shall be placed underground to the extent technically feasible.

(2) *Existing Aesthetics.* To the extent technically feasible, all ground-mounted components of facilities shall reasonably match the existing, adjacent streetscape character. Applicants shall use the same aesthetics as existing infrastructure to promote a uniform appearance.

(3) *Consolidation.* To the extent technically feasible: (1) facilities shall be designed to consolidate all ground-mounted components within approved singular enclosures and (2) all cables, wires, and conduits shall be concealed from view.

(4) *Location.* The placement of proposed facilities with existing facilities shall be preferred over placement of facilities at new sites. If an applicant chooses not to place its facilities with available existing facilities, the applicant must document that location of its proposed facilities with available existing facilities is not technically feasible.

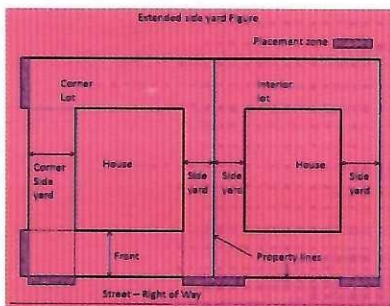
(5) *Camouflage.* Facilities shall be designed to camouflage and conceal all above-ground components of such facilities to the extent technically feasible.

(6) *Signs.* Ground-mounted facilities shall have a four inch by six inch metallic sign permanently mounted between four feet and six feet from ground level and clearly visible to the public which provides the identifying information and emergency contact number for the owner of such facilities. No other signs, advertising, or banners are permitted on facilities except to the extent the same are mandated by state or federal law.

(7) *Generators.* Generators are not permitted in the right-of-way.

(8) *Lighting.* Lighting is not permitted on facilities except to the extent mandated by state or federal law.

(9) *Traffic Signals.* Facilities shall not be allowed on traffic signal systems.



(10) *Placement Guidelines.* All facilities proposed to be located at new sites:

(a) Shall be located in a manner or location that (a) does not obstruct, impede, or hinder the usual pedestrian or vehicular

travel; (b) does not adversely affect public safety or impair legal access and use of the public right-of-way; (c) conforms to applicable law (including the Americans with Disabilities Act of 1990) and public right-of-way design standards, specifications, and design requirements, and (d) does not in any way create a risk to public health, safety, or welfare;

(b) Shall be located in a manner that does not significantly create a new obstruction to primary and inherently valuable sightline(s) of an adjacent property;

(c) Shall be located in alignment with existing trees, utility poles, and streetlights and placed to avoid disturbance within the critical root zone of any tree;

(d) Shall be located in the right-of-way, but placed within the extended side yard setback zones of the adjacent property, (see Figure);

(e) Shall not be located along the frontage of properties in any area declared as an historic district prior to placement, unless otherwise approved by the Board;

(f) Shall be located with separation from any low-pressure natural gas line or intermediate or high-pressure natural gas line and with appropriate clearance as approved from all existing utilities;

(g) Shall not materially impact any existing bridges, culverts, or retaining walls; and

(h) Shall be located outside of all AASHTO clear zones and outside of clear sight triangles (at a minimum) as follows: (a) 5-foot leg pedestrian sight triangle at each residential driveway; (b) 10-foot leg pedestrian sight triangle at each driveway and alley; (c) 30-foot leg corner sight triangle; and (d) roadway sight triangles shall be based on AASHTO standards for each driveway, alley, and intersection.

6. **INDEPENDENT REVIEW.**

A. The Board may require independent technical and legal review. Although the Board intends for Board's attorney to initially review permit applications to the extent feasible, the Board may retain the services of an independent technical consultant of its choice to provide technical

evaluations of applications submitted pursuant to this Ordinance. The review may include, but is not limited to (a) the accuracy and completeness of the items submitted with the application; (b) the applicability of analysis and techniques and methodologies proposed by the applicant; (c) the validity of conclusions reached by the applicant; and (d) whether the proposed use of the right-of-way complies with this Ordinance. The applicant shall pay the cost for any independent technical consultant and attorneys' fees through a deposit with the District, estimated by the Board, within 10 business days of the Board's request. When the Board requests such payment, the application shall be deemed incomplete until the deposit is received. In the event that such costs and fees do not exceed the deposit amount, the Board shall refund any unused portion within 30 days after a permit to occupy the right-of-way is issued or, if no final permit is issued, within 30 days after the Board receives a written request from the applicant. If the costs and fees exceed the deposit amount, then the applicant shall pay the difference to the Board before a permit to occupy the right-of-way is issued. The technical consultant and attorney shall provide an itemized description of the services provided and related fees and costs. The fees shall be limited to a reasonable approximation of costs and the costs shall be reasonable.

7. RELIEF, WAIVER, OR EXEMPTION.

A. Any applicant desiring relief from, the waiver of, or exemption from, any aspect or requirement of this Ordinance, may submit a written request for such relief, waiver, or exemption to the Board at a meeting for consideration at the following meeting. Such relief may be temporary or permanent, partial or complete. However, the burden of proving the need for the requested relief, waiver, or exemption shall be solely on the applicant. No such relief, waiver, or exemption shall be approved unless the applicant demonstrates by clear and convincing evidence that, if granted, the relief, waiver, or exemption will have no significant effect on the health, safety, or welfare of the District, its residents, or other right-of-way users. The Board shall be entitled to an extension of any applicable processing timelines as needed to address such request. Designated Board Staff shall present the request for any such relief, waiver, or exemption, along with the application and other relevant material, to the Board which shall be the final arbiter regarding the request for relief, waiver, or exemption.

Passed and approved this 19th day of April 2022.



Kurt Meisinger, Chair

ATTEST:



Dan Brandt, Clerk