



Board of Aldermen Request for Action

MEETING DATE: 10/4/2022

DEPARTMENT: Public Works

AGENDA ITEM: Bill No. 2963-22 - Chapter 510 Revisions – 2nd Reading

REQUESTED BOARD ACTION:

A motion to approve Bill No. 2963-22, Chapter 510 revisions 2nd reading by title only.

SUMMARY:

Over the past couple summers, several new fiber companies have received agreements with the City of Smithville to install new communication lines and fiber for internet services. Staff has been very accommodating with contractors and sub-contractors installing this new infrastructure. There have been several instances where both public infrastructure and private services have been damaged by all the installations. To date, for the most part, the contractors have been responsive in making repairs and paying for damages. Staff reviewed Chapter 510 of the city code and found a few areas that weren't clear nor necessarily being followed. The proposed revisions clarify the process and responsibilities of the many services using the City Right of Way.

Summarizing:

- The Ordinance clarifies what area the Franchisee can use, Right of Way, and other easements
- The Ordinance specifically requires contractors and subcontractors to obtain business licenses with the City. Current practice has been only the General contractor held the license
- The ordinance holds all contractors and sub-contractors to the provisions of the agreements the City has with the Franchise holder. The contractor is responsible for the same requirements that the Franchisee has agreed to.
- The ordinance requires all contractors and sub-contractors to carry their own insurance and bond, and indemnify the City for any damages.
- The contractor or sub-contractor must have a responsible person in charge on site that can clearly communicate with staff.

Ultimately, the Franchisee is the owner of the new infrastructure and responsible to the City through the Right of Way agreement but some of these companies are so large that access and communication with them is difficult and very time consuming. And many times it becomes a finger pointing game. This Ordinance will place responsibility

on the person/ company actually doing the work in the Right of Way for any issues that occur.

PREVIOUS ACTION:

N/A

POLICY ISSUE:

Right of Way management

FINANCIAL CONSIDERATIONS:

There is no financial impact

ATTACHMENTS:

- ☒ Ordinance
- ☐ Resolution
- ☐ Staff Report
- ☐ Other:

- ☐ Contract
- ☐ Plans
- ☐ Minutes

BILL NO. 2963-22

ORDINANCE NO. 316X-22

**REPEALING ORDINANCE SECTION 510.015 DEFINITIONS AND ENACTING
NEW ORDINANCE SECTION 510.015 DEFINITIONS
AND
ORDINANCE ENACTING SECTION 510.021 COMPLIANCE WITH CHAPTER 610
AND
REPEALING ORDINANCE SECTION 510.025 FRANCHISE OR RIGHTS-OF-WAY
AGREEMENT REQUIRED AND ENACTING A NEW ORDINANCE SECTION
510.025 FRANCHISE OR RIGHTS-OF-WAY AGREEMENT REQUIRED
AND
ENACTING SECTION 510.041 COMMUNICATION
AND
ENACTING SECTION 510.042 INDEMNIFICATION AND LIABILITY**

WHEREAS city staff has identified issues relating to how a Right-of Way is defined in Section 510.015 regarding which Easements may be used after obtaining a Right-of-Way Agreement or Permit from the city pursuant to Chapter 510. Section 510.015 DEFINITIONS currently defines Rights-of-Way or ROW as follows:

RIGHTS-OF-WAY or ROW

The area on, below or above a public roadway, highway, street or alleyway in which the City has an ownership interest, and including such adjacent area of such public ways within such ownership interest as made available by the City for rights-of-way use herein, but not including:

- 1. Easements obtained by utilities or private easements in platted subdivisions or tracts;*
- 2. Railroad rights-of-way and ground utilized or acquired for railroad facilities; or*
- 3. Poles, pipes, cables, conduits, wires, optical cables, or other means of transmission, collection or exchange of communications, information, substances, data, or electronic or electrical current or impulses utilized by a utility owned or operated by a governmental entity pursuant to Chapter 91, R.S.Mo., or pursuant to a charter form of government.*

WHEREAS city wishes to make clear that a ROW does not include certain Easements. The City Attorney as drafted a suggested change to this definition to read as follows:

RIGHTS-OF-WAY or ROW

The area on, below or above a public roadway, highway, street or alleyway in which the City has an ownership interest, and including such adjacent area of such public ways within such ownership interest as made available by the City for rights-of-way use herein, but not including:

- 1. Easements obtained by utilities or private easements in platted subdivisions or tracts;*

2. Railroad rights-of-way and ground utilized or acquired for railroad facilities; or
3. Poles, pipes, cables, conduits, wires, optical cables, or other means of transmission, collection or exchange of communications, information, substances, data, or electronic or electrical current or impulses utilized by a utility owned or operated by a governmental entity pursuant to Chapter 91, R.S.Mo., or pursuant to a charter form of government.
4. Easements held by the City for sewer, pedestrian access, stormwater, waterline, or drainage. Access to any such easement shall require a separate agreement with the city.

WHEREAS city staff has requested clarification of whether a franchisee or permit holders under chapter 510 Rights-Of-Way Management, must also comply with the requirements of chapter 610 Business Regulations.

WHEREAS while believing that there is nothing in chapter 510 Rights-Of-Way Management that exempts compliance with chapter 610 Business Regulations, the city Attorney has drafted and recommended that to remove all potential confusion (reasonable or otherwise) that the city pass a new Ordinance in the following form.

Section 510.021 Compliance with Chapter 610. Unless otherwise required by law, nothing in Chapter 510 shall exempt any franchisee or permit holder under Chapter 510 Rights-Of-Way Management with complying with all applicable provisions of Chapter 610 Business Regulations or any other applicable ordinance. Unless otherwise required by law, compliance with Chapter 610 Business Regulations shall be in addition to any other requirement of Chapter 510 Rights-Of-Way Management.

WHEREAS city staff has identified issues relating to franchise or permit holder(s) subcontracting with person(s) or entities who do not have a franchise agreement with or a permit to work in the city's ROW. While the city believes that §510.025(D) already makes it clear that such subcontracting or assignment is improper, the city wants to make that even more clear.

WHEREAS §510.025(D) of the city Ordinances currently reads as follows:

*D. **Transferability.** Except as provided in this Chapter or as otherwise required by law, no franchise, agreement, or permit may be transferred without the written application to, and consent of the City based on the requirements and policies of this Chapter. The City shall not unreasonably withhold its consent to transfer as provided herein, but any costs incurred shall be paid by the applicant.*

WHEREAS the city attorney has drafted and recommended that to address this issue the city pass a new Ordinance Section 510.025 and specifically new subsection 510.025(D) in the following form.

*D. **Transferability.** Except as provided in this Chapter or as otherwise required by law, no franchise agreement, or permit may be transferred or subcontracted to any Person without the written application to and consent of the City based on the requirements and policies of this Chapter. Any such transfer or subcontract, even if consented to by the city, will not relieve the franchisee or permit holder from all the responsibilities (including insurance and bond) of the franchisee or permit holder. The city shall not unreasonably withhold its consent to the transfer or subcontract as provided herein, upon the compliance with this chapter, or as otherwise required by law, but any costs incurred by the city shall be paid by the applicant.*

WHEREAS City staff has identified issues relating to the difficulty the city has on occasion with communicating with contractors/franchisee/permit holders working in the city right of way.

WHEREAS the city Attorney has drafted and recommended that to address this issue the city pass a new Ordinance in the following form.

Section 510.041 Communication. *Every franchisee or permit holder performing any work in the ROW shall always have someone present at the site of the work who is capable of reasonably and thoroughly communicating with the city and who is authorized to do so on behalf of the franchisee or permit holder.*

WHEREAS city staff has identified issues relating to a franchisee or permit holder allegedly causing damage to the city's property, or the property of third Person(s) because of work performed pursuant to the franchise or permit. The city wishes to make clear that the franchisee or permit holder must indemnify and save the city harmless from all liability and costs, including attorney's fees claimed by any person claiming injury because of the work. Further that the franchisee or permit holder shall be responsible for all reasonable damages incurred by the city or any third persons because of the work. While the city believes that chapter 510 already requires all franchisee or permit holders be responsible for all reasonable damages, the city wants to make that even more clear.

WHEREAS the city Attorney has drafted and recommended that to address this issue the city pass a new Ordinance in the following form.

Section 510.042 Indemnification and Liability. *Every franchisee or permit holder or other Person performing any work in the ROW shall indemnify and save the City harmless from all liability and costs, including attorney's fees claimed by any Person because of the work. Every franchisee or permit holder or other Person shall be responsible for all reasonable damages incurred by the city or any third persons because of the work.*

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF SMITHVILLE, MISSOURI AS FOLLOWS:

Effective Immediately the City of Smithville repeals the existing Section 510.015 DEFINITIONS, and the City of Smithville enacts the new Ordinance Section 510.015 DEFINITIONS which shall read as follows.

Section 510.015 Definitions.

The following definitions shall apply to this Chapter, except that where the definitions set forth in Section 67.1830, R.S.Mo., as may be amended, are required by law to apply to specific uses of the rights-of-way, such definitions shall apply to such circumstances.

ABANDONED FACILITIES

Those facilities owned by a ROW user that are not in use or cannot be utilized by the owner in the future.

ADMINISTRATIVE FEE

That fee charged by the City to administer all aspects of rights-of-way management to recover its cost of this management.

APPLICANT

Any person required to apply for a rights-of-way permit.

CITY

The City of Smithville, Missouri, a municipal corporation and any duly authorized representative.

CITY ADMINISTRATOR

The City Administrator, Smithville, Missouri, or his or her authorized designee.

CITY SPECIFICATIONS

The City of Smithville design and constructions standards adopted pursuant to Section **520.020**, on file with the City Clerk as of the date of this Chapter, and incorporated herein, and as may be amended from time to time by the authority of the City Administrator establishing such specifications and procedures consistent with the requirements and purposes of this Chapter.

CONSTRUCT

Includes construct, install, erect, build, affix or otherwise place any fixed structure or object, in, on, under, through or above the rights-of-way.

EMBEDDED

To surround tightly or incorporate.

EMERGENCY

Any incident that requires immediate intrusion and work within the rights-of-way to restore service to a user.

EXCAVATE

Any removal of the surface or subsurface earth or boring or tunneling activity within the public rights-of-way.

FACILITY

All/any lines, pipes, irrigation systems, wires, cables, conduit facilities, poles, towers, vaults, pedestals, boxes, or other equipment owned or controlled by an entity other than the City.

FACILITY-BASED SERVICE PROVIDER

A service provider owning or possessing facilities in the rights-of-way.

FCC

The Federal Communications Commission.

GOVERNING BODY

The Mayor and the Board of Aldermen of the City of Smithville, Missouri.

GOVERNMENTAL ENTITY

Any subdivision of the governments within the United States of America.

PAVEMENT

The improved surface of the public way with concrete, asphalt, aggregate or other treated materials.

PERSON

An individual, person or body natural or corporate.

PSC

The Missouri Public Service Commission.

PUBLIC EASEMENT

Any easement for utilities, access, or other use dedicated to the City or in the name of the City irrespective of whether the easement is held in trust by the City for private and public users and regardless of whether private utilities or others in addition to or other than the City are actually using the easements.

PUBLIC IMPROVEMENT

Any public project undertaken by the City for the public good.

PUBLIC LANDS

Any real property owned by the City not used as rights-of-way or considered to be rights-of-way.

REPAIR

The temporary work necessary to make the rights-of-way usable for the public.

RESELLER SERVICE PROVIDER

A person providing service within the City that does not have its own facilities in the rights-of-way, but instead uses the rights-of-way by interconnecting with or using the network elements of another ROW user utilizing the rights-of-way, and/or by leasing excess capacity from a facility-based service provider.

RESTORATION

Returning the rights-of-way surface to its original condition, or better.

RIGHTS-OF-WAY or ROW

The area on, below or above a public roadway, highway, street or alleyway in which the City has an ownership interest, and including such adjacent area of such public ways within such ownership interest as made available by the City for rights-of-way use herein, but not including:

- 1.** Easements obtained by utilities or private easements in platted subdivisions or tracts.

2. Railroad rights-of-way and ground utilized or acquired for railroad facilities; or
3. Poles, pipes, cables, conduits, wires, optical cables, or other means of transmission, collection or exchange of communications, information, substances, data, or electronic or electrical current or impulses utilized by a utility owned or operated by a governmental entity pursuant to Chapter 91, R.S.Mo., or pursuant to a charter form of government.
4. Easements held by the City for sewer, pedestrian access, stormwater, waterline, or drainage. Access to any such easement shall require a separate agreement with the city.

RIGHTS-OF-WAY PERMIT

The authorization to make excavations or perform work for the construction, installation, repair or maintenance of any type of facility within the rights-of-way.

RIGHTS-OF-WAY USER or ROW USER

Such persons and entities maintaining, constructing or installing facilities in the public rights-of-way of the City unless otherwise expressly exempted by law. The term shall not include the City; provided that the City shall nevertheless comply with all such requirements applicable to ROW users to the extent such compliance is otherwise required by State or Federal law.

SERVICE

That function provided to property adjoining the public rights-of-way from a service provider.

WORK

1. Construction, alteration, maintenance, installation, storage, or location of facilities installed below, on or above ground in the public rights-of-way, other than excavation, that also:
 - a. Causes or threatens to cause any obstruction or interference to any vehicular or pedestrian traffic or traffic lane in the rights-of-way.
 - b. Involves temporary or permanent storage of materials or equipment on rights-of-way.
 - c. Causes or reasonably may cause damage to any public improvement within the rights-of-way; or
 - d. Causes removal, replacement or alteration to any safety feature or requirement within the rights-of-way, including but not limited to removal of manhole covers, altering lighting, traffic signage or signals, placement or removal of traffic barricades, etc.
2. Work shall not include routine or other maintenance on poles, boxes, or other facilities that does not result in one (1) or more of the circumstances described in Subsection (1)(a) through (d) herein.

AND

Effective Immediately the City of Smithville enacts Ordinance Section 510.021 which shall read as follows.

Section 510.021 Compliance with Chapter 610. *Unless otherwise required by law, nothing in Chapter 510 shall exempt any franchisee or permit holder under Chapter 510 Rights-Of-Way Management with complying with all applicable provisions of Chapter 610 Business Regulations or any other applicable ordinance. Unless otherwise required by law, compliance with Chapter 610 Business Regulations shall be in addition to any other requirement of Chapter 510 Rights-Of-Way Management.*

AND

Effective Immediately the City of Smithville repeals the existing Section 510.025, and the City of Smithville enacts the new Ordinance Section 510.025 which shall read as follows.

Section 510.025 Franchise Or Rights-Of-Way Agreement Required.

A. Agreement Or Franchise Required. *Except when otherwise authorized by applicable law, no Row user may construct, maintain, own, control, or use facilities in the rights-of-way without a franchise or ROW agreement with the City as provided herein. All such franchises and agreements shall be approved by ordinance of the Governing Body on a non-discriminatory basis, provided that the applicant is in compliance with all applicable requirements. Such franchises and agreements shall be deemed to incorporate the terms of this Chapter and other applicable laws of the City, except as may be expressly stated in such agreements and franchises. Reseller service providers shall not be required to obtain a franchise or agreement but shall be required to register with the City prior to providing service on forms provided by the City.*

1. Franchise. *A franchise shall be required from the City in conformance with all applicable franchise procedures for any Row user seeking to use the rights-of-way for purposes of providing or distribution of electricity, gas, water, steam, lighting, or sewer public utility service in the City, except where otherwise provided by law. Such franchise may be granted only after satisfaction of all applicable procedural or substantive requirements established by City ordinances or other law.*

2. ROW Agreement. *A ROW agreement with the City shall be required for all Row users not set forth in Subsection (A)(1), irrespective of any State licensing, franchise or certificate that may also be held by the Row user, except as otherwise required herein or by law. Such agreements shall conform to all applicable law but shall not be subject to procedures applicable to franchises, and the City may, if appropriate, approve form agreements that may be executed by the Mayor after approval by the Board of Aldermen.*

3. Incidental Uses. *Incidental uses of the public rights-of-way may be permitted without a franchise or ROW agreement pursuant to a rights-of-way permit issued by the City Administrator. The City Administrator may establish such application, requirements and conditions applicable to such uses consistent with the purposes of this Chapter or as otherwise established by law.*

B. Franchises And Agreements Non-Exclusive. *The authority granted by the City in any agreement or franchise shall be for non-exclusive use of the rights-of-way. The*

City specifically reserves the right to grant, at any time, such additional agreements or other rights to use the rights-of-way for any purpose and to any other person, including itself, as it deems appropriate, subject to all applicable law. The granting of an agreement or franchise shall not be deemed to create any property interest of any kind in favor of the ROW user.

C. Lease Required For Public Lands. Unless otherwise provided, use or installation of any facilities in, on or over public lands of the City not constituting rights-of-way shall be permitted only if a lease agreement or other separate written approval has been negotiated and approved by the City with such reasonable terms and conditions as the City may require.

D. Transferability. Except as provided in this Chapter or as otherwise required by law, no franchise agreement, or permit may be transferred or subcontracted to any Person without the written application to and consent of the City based on the requirements and policies of this Chapter. Any such transfer or subcontract, even if consented to by the city, will not relieve the franchisee or permit holder from all the responsibilities (including insurance and bond) of the Franchisee or Permit holder. The City shall not unreasonably withhold its consent to the transfer or subcontract as provided herein, upon the compliance with this chapter, or as otherwise required by law, but any costs incurred by the city shall be paid by the applicant.

E. Application For Franchise Or Agreement Required.

1. Application. An application for franchise or ROW agreement shall be presented to the City Administrator in writing and shall include all such information as is required by this Section. The ROW user shall be responsible for accurately maintaining the information in the application during the term of any franchise or agreement and shall be responsible for all costs incurred by the City due to the failure to provide or maintain as accurate any application information required herein.

2. Application Fee. An application fee for review, documentation and approval of such agreement or franchise shall be established by the City Administrator to recover any actual costs anticipated and incurred by the City in reviewing, documenting, or negotiating such agreement or franchise, including reasonable legal fees, provided that no costs, if any, of litigation or interpretation of Section 67.1830 or 67.1832, R.S.Mo., shall be included if such inclusion is prohibited by law as to that applicant. If the actual costs are thereafter determined to be less than the application fee, such amount shall be returned to the applicant after written request therefrom; if the actual costs reasonably exceed the application fee, the applicant shall, after written notice from the City, pay such additional amount prior to issuance by the City of any final approval. Nothing herein shall be construed to prohibit the City from also charging reasonable compensation for use of the public rights-of-way where such a fee is not contrary to applicable law.

3. Application Form. A ROW user shall submit a completed application for franchise or ROW agreement on such form provided by the City, which shall include information necessary to determine compliance with this Chapter.

4. Approval Process. After submission by the ROW user of a duly executed and completed application and application fee, and executed franchise or ROW

agreement as may be provided by the City Administrator, or as modified by the City Administrator in review of the specific circumstances of the application, all in conformity with the requirements of this Chapter and all applicable law, the City Administrator shall submit such franchise or agreement to the Board of Aldermen for approval. Upon determining compliance with this Chapter, the Board of Aldermen shall authorize execution of the franchise or agreement (or a modified agreement otherwise acceptable to the City consistent with the purposes of this Chapter), and such executed franchise or agreement shall constitute consent to use the public rights-of-way; provided that nothing herein shall preclude the rejection or modification of any executed franchise or agreement submitted to the City to the extent such applicable law does not prohibit such rejection or modification, including where necessary to reasonably and in a uniform or non-discriminatory manner reflect the distinct engineering, construction, operation, maintenance, public work or safety requirements applicable to the applicant.

AND

Effective Immediately the City of Smithville enacts Ordinance Section 510.041 which shall read as follows.

Section 510.041 Communication. *Every franchisee or permit holder performing any work in the ROW shall always have someone present at the site of the work who is capable of reasonably and thoroughly communicating with the city and who is authorized to do so on behalf of the franchisee or permit holder.*

AND

Effective Immediately the City of Smithville enacts Ordinance Section 510.042 which shall read as follows.

Section 510.042 Indemnification and Liability. *Every franchisee or permit holder or other Person performing any work in the ROW shall indemnify and save the City harmless from all liability and costs, including attorney's fees claimed by any Person because of the work. Every franchisee or permit holder or other Person shall be responsible for all reasonable damages incurred by the city or any third persons because of the work.*

PASSED AND ADOPTED BY THE BOARD OF ALDERMEN OF THE CITY OF SMITHVILLE THIS 18th DAY OF OCTOBER 2022

DAMIEN BOLEY, MAYOR

ATTEST:

LINDA DRUMMOND, CITY CLERK

1st reading 10/04/2022

2nd reading 10/18/2022