

COUNCIL CHAMBER

City of Berea, Ohio

ORDINANCE No. 2019-55

By Jim Maxwell Sponsored By Mayor Cyril M. Kleem
AN ORDINANCE

AMENDING CHAPTER 301, STREET EXCAVATIONS, OF PART THREE – STREETS, UTILITIES AND PUBLIC SERVICES CODE, OF THE CODIFIED ORDINANCES OF THE CITY OF BEREA, AND DECLARING AN EMERGENCY.

WHEREAS, Chapter 301, Street Excavations, of the Codified Ordinances of the City of Berea establishes a process by which street excavations may be made in the public right-of-way; and

WHEREAS, current Chapter 301 was last reviewed and amended in 1968; and

WHEREAS, the Codified Ordinances of the City of Berea fails to address modern methods of access to and control of the public right-of-way access; and

WHEREAS, it is necessary to update Chapter 301 in order to better address requests to perform street excavations in the public right-of-way.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Berea, State of Ohio:

SECTION 1. That Chapter 301, Street Excavations, of Part Three – Streets, Utilities and Public Services Code, of the Codified Ordinances of the City of Berea, which has heretofore read as follows in Exhibit "A", which is attached hereto and incorporated herein, be and the same is hereby amended in its entirety to read as follows in Exhibit "B", which is attached hereto and incorporated by reference.

SECTION 2. That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and of any of its committees that resulted in such formal actions were in meetings open to the public in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

SECTION 3. That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, property, health, safety and welfare, or providing for the usual daily operation of a municipal department, and for the further reason that it is immediately necessary to address the modern methods of access into the right-of-way in this Chapter to allow for proper enforcement by the Building Department and Engineers. Therefore, provided this Ordinance receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, from and after the earliest period allowed by law.

PASSED: June 3, 2019

ATTEST: Allyson Es
Clerk of Council

APPROVED AS TO FORM:

Paul J.
Director of Law

[Signature]
President of Council

APPROVED: June 5, 2019

Cyril M. Kleem
Mayor

CHAPTER 301
Street Excavations

- 301.01 Permit required.
- 301.02 Permit application; fee.
- 301.03 Fee exceptions for franchise or City contract work.
- 301.04 Cash deposit for restoration.
- 301.05 Failure to restore street surface; payment of added cost or deposit refund.
- 301.06 Safety precautions.
- 301.07 Curb installation and alteration.
- 301.08 Regulation of existing curb cuts.
- 301.99 Penalty.

CROSS REFERENCES

- Assessments - see CHTR. XII
- Power to establish and care for streets - see Ohio R.C. 715.19, 717.01, 723.01
- Openings by the City - see Ohio R.C. 723.02
- Surface treatment - see Ohio R.C. 723.23, 723.31
- Excavation liability - see Ohio R.C. 723.49 et seq.
- Compulsory service connections - see Ohio R.C. 729.06, 743.23, 743.37
- Digging, excavating and piling earth on streets - see Ohio R.C. 5589.10
- Street obstructions - see TRAF. 711.01
- Barricades and warning lights - see GEN. OFF. 921.03

301.01 PERMIT REQUIRED.

No person shall make any opening or excavation in any street, highway or other public place within the City without first obtaining a permit to do so, as hereinafter provided.
(Ord.2-347. Passed 1917.)

301.02 PERMIT APPLICATION; FEE.

Application for such permit shall be made in writing to the Building Department of the City, stating the name and address of the applicant, the location of the proposed opening or excavation and the purpose therefor. Each application shall be accompanied by a fee of fifty dollars (\$50.00) for each permit.

301.03 FEE EXCEPTIONS FOR FRANCHISE OR CITY CONTRACT WORK.

No fee shall be required from an applicant desiring to make an opening or excavation provided for by any franchise granted by Council or by any contract entered into with the City.
(Ord. 2-347. Passed 1917.)

301.04 CASH DEPOSIT FOR RESTORATION.

Application for a street excavation permit shall be submitted by the Building Inspector to the Director of Public Service for approval. The Director will estimate the cost of restoration of the proposed opening or excavation to its former condition and shall require the applicant to

post a cash deposit in an amount equal to the estimated restoration cost. The Building Inspector shall issue a permit upon posting of the restoration cost by the applicant.

301.05 FAILURE TO RESTORE STREET SURFACE; PAYMENT OF ADDED COST OR DEPOSIT REFUND.

If any permittee fails to restore the surface to its former condition, to the satisfaction of the Director of Public Service, when notified by the Director to do so and within the time specified by him, such restoration shall be done by the City at the expense of the permittee, and the actual cost thereof shall be deducted from the cash deposit required by Section 301.04. If the actual cost is more than the deposit the balance due shall forthwith be paid to the City by the permittee upon presentation of a bill therefor. When the surface is restored to its former condition, the deposit or such amount thereof as remains unexpended shall be returned to the permittee.

(Ord. 2-347. Passed 1917.)

301.06 SAFETY PRECAUTIONS.

Each permittee shall take all precautions necessary to avoid injury to persons or property by reason of the making of such opening or excavation, and shall save the City harmless from any and all loss, injury or expense resulting from or in any manner occasioned by the opening or excavation.

(Ord. 2-347. Passed 1917.)

301.07 CURB INSTALLATION AND ALTERATION.

(a) Any alteration, change, repair, removal, replacement, cutting, lowering or installation of curbs shall be done by contractors, authorized by the City or employees of the City, under the control and direction of the Director of Public Service and shall be done pursuant to a permit issued by the Building Department. Such permit shall be issued upon the approval of an application therefor by the person entitled to possession, or the owner, of the property abutting such curb location as provided in subparagraph (b) or subparagraph (c) below. A fee as provided in Chapter 1311 of the Building Code shall be paid upon the filing of an application under this section in the Building Department, to defray the cost of administering this section.

(b) The length and location of each curb-cut and lowered curb shall be subject to the approval of the Director of Public Safety who shall consider the existing traffic pattern and volume, the adequacy of existing access, if any, to the premises, and the movement of pedestrian traffic.

(c) The elevation of newly installed, relocated, or reinstalled curbs shall be subject to the approval of the Director of Public Service.

(d) The cost of any work done pursuant to this section and Section 301.08 below, shall be borne by the City, but may at the discretion of the Council of this City be assessed as provided by charter and general law.

301.08 REGULATION OF EXISTING CURB-CUTS.

Where an existing curb-cut adversely affects the existing traffic pattern or volume or the movement of pedestrian traffic, the Director of Public Safety may direct the Director of Public

Service to close the curb cut, and if premises are thereby deprived of access to the street, to replace the curb-cut with a new curb-cut at such location as is designated by the Director of Public Safety, provided that in no case shall the elimination of an existing curb-cut pursuant to this paragraph have the effect of unreasonably restricting access to premises abutting a public street.

(Ord. 68-80. Passed 9-3-68.)

301.99 PENALTY.

Any person violating any provision of this chapter is guilty of a minor misdemeanor for each offense.

CHAPTER 301
Right-of-Way; Curb Installation and Cuts

- 301.01 Definitions
- 301.02 Purpose
- 301.03 Types of Permits and Permit Fees
- 301.04 Permit Required to Occupy or Use the Right-of-Way; Exception
- 301.05 Application for Permit to Occupy or Use the Right-of-Way; Approval
- 301.06 Annual Registration Required
- 301.07 Insurance, Bond and Indemnification
- 301.08 General Right-of-Way Use and Construction Regulations
- 301.09 Location, Relocation and Removal of Facilities
- 301.10 Notice of Work, Routine Maintenance and Emergency Work
- 301.11 Recovery of City Costs of Managing the Right-of-Way
- 301.12 Miscellaneous Provisions
- 301.13 Curb Installation; Alteration; Existing Curb Cuts
- 301.99 Penalties and Other Remedies

301.01 DEFINITIONS

As used in the Codified Ordinances:

- A. **Above-ground facilities** means that portion of a service provider's facilities above the surface of the right-of-way outside of the public street, including wires, cables and other such equipment running between poles, including the underground supports and foundations for such facilities.
- B. **Applicant** means any person, individual, corporation, partnership, association, organization or similar entity or agent thereof, applying for a right-of-way permit hereunder.
- C. **Construct, constructing, construction** means installing, repairing, replacing or removing any facility, regardless of the methods employed, including excavation.
- D. **Director of Public Service** means the Director of Public Service or his or her designee.
- E. **Emergency** means an unforeseen occurrence or condition calling for immediate action.
- F. **Excavate, excavating or excavation** means cutting, sawing, breaking, drilling into, boring under, or otherwise altering any public street or sidewalk pavement, and/or digging, drilling into or boring under any unpaved portion of the right-of-way, including any other work or activity which disturbs the existing surface or subsurface structure, composition, or soil compaction.
- G. **Excess capacity** means the volume or capacity in any existing or future facility or pole in the right-of-way that is or will be available for use for additional facilities.
- H. **Facilities or facility** means the plant, equipment and property, including but not limited to, cables, fibers, wires, lines, pipes, conduits, ducts, pedestals, antennae, electronics, poles,

pipes, mains, plant, equipment and other appurtenances located under, on or above the surface of the ground in the right-of-way of the City and used or to be used to operate a system to transmit, receive, distribute, provide or offer a service, publicly or privately.

- I. **Lane obstruction** means the blocking or diverting of vehicular traffic from a public street or where one lane of traffic is closed for the purpose of constructing, excavating, maintaining or operating any facility, including but not limited to:
 - 1. The lifting or removing of manhole or handhole covers, and/or
 - 2. The opening or accessing of at-grade or pole-mounted cabinets, pedestals, transformers, power supplies, amplifiers, splice enclosures, traps or other facilities.
- J. **Occupancy, occupy or use** means, with respect to the right-of-way, to place a tangible thing in the right-of-way for any purpose, including, but not limited to, gardens, constructing, repairing, positioning, maintaining or operating lines, poles, pipes, conduits, ducts, equipment or other structures, appurtenances or facilities necessary to operate, or relating to, a system for the delivery of services over the right-of-way.
- K. **Permittee** means any applicant issued a right-of-way permit pursuant to this Chapter to use or occupy all or a portion of the rights-of-way in accordance with the provisions of this Chapter and said right-of-way permit and service providers and contractors.
- L. **Person** means an individual, corporation, partnership, association, organization or similar entity or their agents and assigns.
- M. **Public property** means any real property owned by the City or easements held or used by the City.
- N. **Public street** means the paved and unpaved portion of any street, road, boulevard, drives, highway, freeway, parkway, lane, court, alley, or other right-of-way in which the City has an interest in law or equity and which has been acquired, established, dedicated or devoted to street purposes.
- O. **Public right-of-way fee or permit fee** means a fee levied to recover the costs incurred by the City and associated with the occupancy or use of a right-of-way, as provided in Chapter 4939 of the Ohio Revised Code.
- P. **Residential purposes** means residential use of right-of-way for such uses as mailboxes, trees, decorative purposes or any curb cuts and driveways, and as may be further defined by the Director of Public Service.
- Q. **Right-of-way** means the surface of and the space above and below the paved or unpaved portions of any public street, public road, public highway, public freeway, public lane, public path, public way, public alley, public court, public sidewalk, public boulevard, public parkway, public drive, and any other land dedicated or otherwise designed for the same or hereafter held by the City which shall, within its proper use and meaning, in the sole opinion of the Director of Public Service, entitle a permittee, in accordance with the terms herein and of any right-of-way permit, for the purpose of installing or operating any poles, wires, cables, transformers, conductors, ducts, lines, mains, conduits, vaults, manholes, amplifiers,

appliances, attachments or other property or facilities as may be ordinarily necessary and pertinent to the provision of natural gas, electric, cable television, communications or other utility services as set forth in any service permit or any right-of-way permit. Right-of-way shall not include private easements or public property, except to the extent the use or occupation of public property is specifically granted in a right-of-way permit or by regulation.

- R. **Routine maintenance** means repair, upkeep, replacement or restoration of existing facilities located in the right-of-way for the purpose of preventing deterioration or performance deficiencies, maintaining appearance, or securing the original level of performance, that is not an emergency and does not include excavation of the right-of-way.
- S. **Service** means the offering of water, sanitary sewer, storm sewer, electric, gas, telephone, telecommunications, cable television, video, information or other utility-like service directly to the public, or to such classes of users as to be effectively available to the public, or a class of private users, regardless of the facilities used.
- T. **Service provider** means any person who directly or indirectly owns, controls, operates or manages facilities within the City's right-of-way, used or to be used for the purpose of operating a system.
- U. **System** means a network of facilities for the transmission and/or distribution of a particular service.
- V. **Trenchless technology** means techniques for utility line installation, replacement, rehabilitation, renovation, repair, inspection, location and leak detections, with minimum excavation from the ground surface, including the use of directional boring, horizontal drilling and micro-tunneling and other techniques in the construction of underground portions of facilities that result in the least amount of disruption and damage to the right-of-way as possible.
- W. **Underground facilities** means that portion of a System located under the surface of the ground, excluding the underground foundations or supports for Overhead Facilities.

301.02 PURPOSE

The purpose and intent of this Chapter is to:

- A. Manage reasonable access to the City's right-of-way by utility and other service providers and ensure their compliance with the Ordinances, rules and regulations of the City.
- B. Conserve the limited physical capacity of the right-of-way held in trust by the City for the benefit of the public.
- C. Assure that the City fairly and responsibly protects the public health, safety and welfare.
- D. Enable the City to discharge its public trust consistent with rapidly evolving federal and State regulatory policies, industry competition and technological development.

301.03 TYPES OF PERMITS AND PERMIT FEES

- A. **General Right-of-Way Permit** – Includes, but is not limited to permits for services by utilities, cable television, communications or commercial entities, with the exclusion of small cell facilities (Chapter 1333). The permit fee for a General Right-of-Way Permit is \$1,000.
- B. **Limited Right-of-Way Permit** – Typically includes permits for non-residential services for small, single projects or connections involving one parcel or small group of contiguous parcels. The permit fee for a Limited Right-of-Way Permit is \$250.
- C. **Residential Right-of-Way Permit** – Includes a permit for services provided to a single, residential property for the sole benefit of the owner of the residential property. The permit fee for a Residential Right-of-Way Permit is \$50.
- D. **Curb Installation or Cut Permit** – The fee for a curb installation or curb cut is included in the permit fee established in (A) through (C) above.
- E. Unless otherwise required in the Codified Ordinances, a right-of-way permit shall not be required for the following:
 - 1. Newspaper stands
 - 2. Down spout lines
 - 3. Temporary signs
 - 4. Window air conditioners;
 - 5. Sidewalk cafes;
 - 6. Outdoor dining areas;
 - 7. Awnings
 - 8. Sidewalks

While (1) through (8) are exempt from the requirements for a right-of-way permit, other permits and/or fees may be required.

301.04 PERMIT REQUIRED TO OCCUPY OR USE THE RIGHT-OF-WAY; EXCEPTION

- A. Except as otherwise provided herein, no person shall occupy or use the right-of-way without first obtaining a right-of-way permit from the City.
- B. A person with existing facilities lawfully occupying the right-of-way on July 2, 2002 or has a valid franchise agreement or other agreement with the City to provide cable or video services in the City or has a video service authorization from the State, shall have conclusively presumed to have received consent for those facilities to occupy or use the right-of-way.
- C. Any occupancy or use of the right-of-way that is beyond scope of a franchise agreement or beyond the lawful use or occupancy, as existed on July 2, 2002, shall require a permit for such additional occupancy or use.

**301.05 APPLICATION FOR PERMIT TO OCCUPY OR USE THE RIGHT-OF-WAY;
APPROVAL**

A. Application

1. The application for a right-of-way permit shall be on a form provided by the City.
2. The applicant is required to provide all of the information requested on the application form.
3. Upon written request of an applicant, the Director of Public Service may modify any requirements if in his or her reasonable discretion such modification serves the purposes of this Chapter and the City's need to manage its public rights-of-way.

B. APPROVAL; DENIAL; REVOCATION, SUSPENSION; APPEAL

1. Approval or Denial of Application

- a. The Director of Public Service shall grant or deny, in writing, an application for a permit to occupy or use the right-of-way within sixty (60) days of the date on which the person filed the application with the City.
- b. The Director of Public Service may withhold or delay its approval to an application to occupy or use the right-of-way based on a failure to provide requested information or the applicant's failure to possess the financial, technical and managerial resources necessary to protect the public health, safety and welfare, or for other reasons based on the health, safety and welfare of the City and in accordance with Ohio law.
- c. If the Director of Public Service denies an application to occupy or use the right-of-way, the Director of Public Service shall provide the reasons in writing for denying the application.
- d. A permit to occupy or use the right-of-way shall set forth the any specific terms or conditions that may apply to the approval to occupy or use the right-of-way.

2. Suspension or Revocation of a Permit

- a. City may revoke or suspend a permit granted pursuant to this Chapter, for any one of the following reasons:
 - 1) Construction, reconstruction, operation or excavation at an unauthorized location.
 - 2) Construction, reconstruction or operation in violation of City's safety and/or construction requirements.
 - 3) Material misrepresentation by or on behalf of a service provider or contractor in any application or registration required by this Chapter.

- 4) Failure to relocate or remove facilities, or failure to restore the right-of-way, as required by this Chapter.
- 5) Insolvency or bankruptcy of the service provider or contractor.
- 6) Violation of material provisions of this Chapter.

- b. In the event that the Director of Public Service believes that grounds exist for revocation or suspension of a permit to occupy or use the right-of-way, he or she shall give the permittee, service provider or contractor written notice of the apparent violation or noncompliance, providing a short and concise statement of the nature and general facts of the violation or noncompliance, and providing the permittee, service provider or contractor a reasonable period of time, not exceeding thirty (30) days, to furnish evidence that corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance; or that rebuts the alleged violation or noncompliance; or that a lesser penalty or sanction would better serve the public interest.

3. Appeal

- a. An applicant or permittee may appeal any decision of the Director of Public Service regarding a denial, revocation or suspension of consent to occupy or use the right-of-way, initial or annual registration, or construction permit, or denial for a request for modification or waiver of any requirements of this Chapter.
- b. Within ten (10) calendar days of a written decision of the Director of Public Service or within sixty (60) days of the filing of the application if no action was taken, an applicant or permittee may file a written appeal to the Right-of-Way Appeals Board seeking relief from an adverse decision of the Director of Public Service.
- c. The Right-of-Way Appeals Board shall consist of the Mayor or his designee, the Director of Planning and Zoning, and the Director of Finance, and shall hear appeals pursuant to procedures established by the Board.
 - 1) The Board shall consider all relevant factors including, but not limited to:
 - a) The purpose of the Director of Public Service's decision or requirement of this Chapter from which relief is requested; whether the Director of Public Service's decision or the requirement of this Chapter is necessary or appropriate to protect the interests of the City.
 - b) The health, safety and general welfare of the City's residents, the general public, and properties in the City.

- c) The purposes and intent of this Chapter; and the extent of the hardship, economic or otherwise, the applicant or permittee will bear if the requested relief is not granted.
- 2) The Board of Right-of-Way Appeals shall issue a written decision within thirty (30) days of the filing of the appeal, unless such a period is waived by the application, setting forth the Board's reasons for granting or denying the petition for relief. The decision of the Board is the final decision of the City on the appeal.

301.06 ANNUAL REGISTRATION REQUIRED

- A. Permittees or a person deemed to have received consent pursuant to 301.04(B) shall register with the City each calendar year between January 1 and January 31 on a form provided by the City.
- B. The purpose of Annual Registration is to assist the City in monitoring use of the right-of-way; to maintain an accurate and current database of information concerning service providers that occupy or use the right-of-way; and to assist the City in managing the right-of-way in a manner that best serves the public health, safety and general welfare.
- C. All permittees or their lessees or assigns shall provide the City with notice of any changes to their ownership, lessees or assignees, and shall provide contact information within thirty (30) days of said change.

301.07 INSURANCE, BOND, DEPOSITS AND INDEMNIFICATION

- A. Insurance requirements for a General Right-of-Way Permit or a Limited Right-of-Way Permit
 - 1. Each initial application for a permit to occupy or use the right-of-way or at the time of the annual registration, shall provide evidence of the following insurance policies, naming the City, its elected and appointed officers, agents, representatives and employees as additional insureds, in the following amounts:
 - a. Comprehensive general liability insurance with limits not less than three million dollars (\$3,000,000) for bodily injury or death to each person; and
 - b. Three million dollars (\$3,000,000) for property damage resulting from any one accident and three million dollars (\$3,000,000) for all other types of liability.
 - c. Automobile liability for owned, non-owned and hired vehicles with a limit of three million dollars (\$3,000,000) for each person and three million dollars (\$3,000,000) for each accident.
 - d. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard insurance with limits of not less than three million dollars (\$3,000,000).

2. The liability insurance policies required by this Section shall be maintained by the permittee throughout the period of time during which the permittee is occupying or using the right-of-way, or is engaged in the removal of its facilities. Each such insurance policy shall contain the following endorsement:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until sixty (60) days after receipt by the City, by registered mail, of a written notice addressed to the City's Director of Law of such intent to cancel or not to renew."

Within sixty (60) days after receipt by the City of said notice, and in no event later than thirty (30) days prior to said cancellation, the permittee, service provider or contractor shall obtain and furnish to the City replacement insurance policies meeting the requirements of this Section.

B. Cash Deposit, Bond and Indemnification Requirements for all Permit Types

1. In order to ensure the full and complete compliance with, and performance under this Chapter, including any costs, expenses, damages or loss the City because of any failure attributable to a permittee, the Director of Public Service will estimate the cost of restoration of the proposed opening or excavation to its former condition and shall require the applicant to post a cash deposit or bond in an amount equal to the estimated restoration cost.
2. Before claims are made against the cash deposit or bond, the City shall give written notice to the permittee:
 - a. Describing the act, default or failure to be remedied, or the damages, cost or expenses which the City has incurred by reason of the permittee's act or default; or
 - b. Providing a reasonable opportunity for the permittee to remedy the existing or ongoing default or failure, if applicable; or
 - c. Providing a reasonable opportunity for the permittee to pay any monies due the City before the City makes a claim against the cash deposit or bond or letter of credit or other instrument; or
 - d. That the permittee will be given an opportunity to review the act, default or failure described in the notice with the Director of Public Service.
3. Any draw upon the cash deposit or bond to recover the City's costs related to a permittee's use of the right-of-way shall be considered Public Way Fees as that term is defined in Chapter 4939 of the Ohio Revised Code and shall be assessed by the Director of Public Service in accordance with Chapter 4939 and other applicable law. The cash deposit, bond, letter of credit or other instrument is in addition to the permit fee provided for in 301.03.

301.08 GENERAL RIGHT-OF-WAY USE AND CONSTRUCTION REGULATIONS

- A. A permit or consent that is initially presumed to be granted to occupy or use the right-of-way is subject to any conditions or limitations set forth in the permit; and, shall not confer any exclusive right, privilege, license or franchise to occupy or use the right-of-way of the City to operate a system for delivery of services or any other purposes; and, shall not convey any right, title or interest in the right-of-way.
- B. Facilities shall be constructed, reconstructed and excavated in accordance with all applicable federal, State and local codes, rules, regulations and technical codes including, but not limited to, the National Electrical Safety Code.
- C. Each permittee shall maintain its system or facilities in good and safe condition and in a manner that complies with all applicable federal, State and local requirements.
- D. No permittee may locate or maintain its facilities so as to unreasonably interfere, as determined by the Director of Public Service, with the use of the right-of-way by the City, the general public or other persons authorized to use, occupy or be present in or upon the right-of-way. All such facilities shall be moved by the service provider, temporarily or permanently, as determined by and at the direction of the Director of Public Service.
- E. To the extent reasonably possible, all facilities shall be constructed or reconstructed in the manner resulting in the least amount of damage and disruption of the right-of-way.
- F. No permittee shall take any action or permit any action to be done which may impair or damage any City property, right-of-way, other ways or other public or private property located in, or on properties adjacent thereto.
- G. The permittee shall maintain a copy of the permit and approved plans at the work site, which shall be made available for inspection by the Director of Public Service whenever work is occurring.
- H. Safety
 - 1. During the excavation and prior to completing construction, the permittee shall provide suitable barriers, warning devices and/or lights, all of which shall be in accordance with the Director of Public Service's direction.
 - a. If the Director of Public Service determines any safety measure is insufficient and a flagman is required, the service provider or permittee shall provide the Director of Public Service with evidence that a flagman will be on duty to direct traffic at times when the Director of Public Service deems necessary or appropriate.
 - b. Additional requirements for lane obstructions and street closings are addressed in 301.10.
 - 2. Each permittee shall take all precautions necessary to avoid injury to persons or property by reason of the work conducted in the right-of-way, and shall hold the City

harmless from any loss, injury or expense resulting from or in any manner due to the work conducted in the right-of-way.

I. Compliance with permit

1. All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the facilities.
2. The Director of Public Service shall have access to the work and such further information as may be required to ensure compliance with such requirements.
3. Field changes may be approved by the Director of Public Service if such changes are determined to be necessary due to site conditions or other changed circumstances.
4. Noncomplying work shall, upon an order of the Director of Public Service immediately cease and be immediately removed and/or corrected by the permittee.

J. Duties upon completion of the work

1. Duty to provide drawings

Within forty-five (45) days after completion, the permittee shall provide the City with two (2) complete sets of plans, drawn to scale and certified to the City as accurately depicting the location of all facilities constructed pursuant to the Permit. If required by the City, the plans shall be submitted in a digital format compatible with the City's computer software.

2. Site restoration; Duties upon completion of work; On-going duties

- a. Upon completion of any construction work, the permittee shall promptly repair any and all rights-of-way, property improvements, fixtures, structures and facilities which were damaged during the course of construction, and restore them as nearly as practicable to their prior condition.
- b. All trees, landscaping and grounds removed, damaged or disturbed as a result of the construction, installation, maintenance, repair or replacement of facilities must be replaced or restored as nearly as may be practicable, to the condition existing prior to performance of work, except to the extent that tree trimming is necessary to prevent the interference of tree branches with above-ground facilities. However, the permittee is not required to restore unauthorized gardens, structures or other materials that were previously in the right-of-way.
- c. All restoration work within the right-of-way shall be done in accordance with landscape plans approved by the Director of Public Service.
- d. When a permittee does any construction, reconstruction, excavation, routine maintenance, emergency work or any other work in or affecting any right-of-way or City property, it shall, after the work is completed and at its own expense, promptly remove any obstructions from and restore such ways or

property, within ten (10) to sixty (60) days, at the Director of Public Service's discretion, to as good a condition as existed before the work was undertaken, unless otherwise directed by the City.

- e. If weather or other conditions prevent the complete restoration required by this Section, the permittee shall temporarily restore the affected ways or property as reasonably directed by the Director of Public Service, at the permittee's sole expense. The permittee shall promptly undertake and complete the required permanent restoration when weather or other conditions no longer prevent permanent restoration.

If the permittee does not timely complete the required temporary or permanent restoration as directed by the Director of Public Service, the City may complete the restoration at the other party's expense and may draw upon the permit fee, cash deposit, bond, letter of credit or other instrument to reimburse the City for its costs incurred in performing the restoration.

- f. Maintenance of Landscaping or other Aesthetic Requirements

Any permittee with a permit that includes a landscaping, screening and/or other aesthetic requirement in connection with the placement of any structure or item above the ground in the right-of-way, shall maintain the landscaping, screening and/or other aesthetic requirement, on a continuing basis, in the manner specified in the permit or other manner as approved in writing by the Director of Public Service.

301.09 LOCATION, RELOCATION AND REMOVAL OF FACILITIES

All facilities shall be constructed, reconstructed, installed and located in accordance with the following terms and conditions:

A. Underground facilities

1. Whenever the existing electric, cable, telecommunications and other similar facilities are located underground in a right-of-way, a service provider with permission to occupy the same right-of-way with the electric, cable, telecommunications or other similar facilities, shall also locate its facilities underground.
2. Facilities shall be installed within an existing compatible underground duct or conduit whenever excess capacity exists within such facility, and where such installation is appropriate and practical under relevant safety and operational standards.
3. Unless otherwise authorized by the Director of Public Service for good cause, the construction or reconstruction of underground facilities shall utilize trenchless technology, including, but not limited to, horizontal drilling, directional boring, and micro-tunneling, if technically and/or technologically feasible.

B. Above-ground facilities

1. No above-ground facilities shall be located in the right-of-way, including any portion of underground facilities, without the express written permission of, and pursuant to a plan approved by, the Director of Public Service.
2. An applicant may submit a plan for the location of above-ground facilities, only if the applicant establishes that it is not technologically practicable to install the facilities underground. The Director of Public Service's approval may include appropriate landscaping, screening and/or other aesthetic requirements. The Director of Public Service may also suggest an alternate location(s) if the proposed location would, in the Director of Public Service's reasonable judgment, cause realistic health, safety or aesthetic concerns.
3. Above-ground facilities shall not be located where those facilities would pose an unreasonable hazard to the public's use of the right-of-way. An unreasonable hazard shall include a visual or physical obstruction.
4. A permittee with a permit to install above-ground facilities shall install its facilities on pole attachments to existing utility poles if there is excess capacity on an existing pole.

C. Relocation or Removal of Facilities

1. Within ninety (90) days following written notice from the City, a permittee shall, at its expense, temporarily or permanently remove, relocate, change or alter the position of any of its facilities in the right-of-way whenever the City determines that such removal, relocation, change or alteration is reasonably necessary for:
 - a. The construction, reconstruction, maintenance or installation of any City or other public improvement in or upon the right-of-way; or
 - b. The operations of the City or other governmental entity in or upon the right-of-way.

Notwithstanding the above, a permittee shall not be required to bear the expense of removal, relocation, change or alteration of position of any facilities if such requirement is prohibited by law.

2. Removal of Unauthorized Facilities

- a. Within thirty (30) days following written notice from the City, any service provider, permittee or other person that owns, controls or maintains any unauthorized system, facility or related appurtenances in the City's right-of-way shall, at its own expense, remove those facilities or appurtenances from the right-of-way.
- b. After thirty (30) days have expired, the City may remove the facilities or appurtenances from the right-of-way at the other party's expense. A system

or facility is unauthorized and subject to removal in the following circumstances:

- 1) Upon revocation of the permit to occupy or use the right-of-way; or
- 2) If the system or facility was constructed, reconstructed, operated or maintained without the City's consent, except as otherwise provided by this Chapter;
- 3) Upon abandonment of a facility in the right-of-way of the City, with the exception of underground facilities abandoned in a manner authorized and approved by the Director of Public Service;
- 4) If the system or facility was constructed or reconstructed, or any excavation of a right-of-way was performed, without a permit, except as otherwise provided by this Chapter;
- 5) If the system or facility was constructed, reconstructed, operated or maintained, or any excavation of a right-of-way was performed, at a location not permitted pursuant to the City's consent for the provider to occupy or use the right-of-way; or
- 6) If the permittee fails to comply with, or cure a violation of, a material requirement of this Chapter.

Notwithstanding the above, no permittee shall be required to remove unauthorized facilities or appurtenances from the rights-of-way if such requirement is prohibited by law.

3. Emergency relocation or removal

Subject to applicable state and federal law, the City retains the right and privilege to cut or move any facilities, or stop work on any construction, reconstruction, or excavation, located in the right-of-way, as the Director of Public Service may determine to be necessary, appropriate or useful in response to any need to protect the public health, safety or welfare.

301.10 NOTICE OF WORK, ROUTINE MAINTENANCE AND EMERGENCY WORK

A. Notice of Work Required. A service provider or contractor shall provide the City with notice of work in the right-of-way, including routine maintenance, work to be performed pursuant to a newly issued permit or for emergency work, and may include notice to adjacent homeowners and businesses, as may be required by the Director of Public Service, as follows:

1. Notice of Excavation in the Right-of-Way

- a. A service provider or contractor shall provide the Director of Public Service with notice no later than forty-eight (48) hours after commencing any excavation, including installation of a pole, in the right-of-way.

- b. A service provider or contractor shall notify the Ohio Utility Protection Service ("OUPS") in advance of any excavation of the right-of-way in accordance with Ohio law and OUPS regulations.
- 2. Notice of Lane Obstruction or Closing of a Public Street
 - a. For routine maintenance or work to be performed pursuant to a newly issued permit that requires a lane obstruction such that two vehicles may not pass in opposite directions, or requires closing a public street, the permittee shall provide the Director of Public Service and the Police Department to the extent reasonably practical, with twenty-four (24) hours advance notice prior to commencing such work, and shall maintain traffic in compliance with the ODOT Manual of Uniform Traffic Control Devices or other applicable ODOT regulations.
 - b. All police related expenses incurred by the City as a result of the lane obstruction shall be paid by the permittee.

3. Notice of Extension of Above-Ground Facilities

For the relocation or replacement of more than one thousand (1000) lineal feet of a permittee's existing above-ground facilities in the right-of-way, the permittee shall provide the Director of Public Service with twenty-four (24) hours advance notice.

4. Emergency Work; Commencement and Notice

In the event of the need for any unexpected repair or emergency work, a permittee may commence such emergency response work as required under the circumstances, provided that if the emergency work requires excavation of a right-of-way, lane obstruction or closing a public street, the permittee shall notify the Director of Public Service and the Police Department immediately after commencing such emergency work, but in no event later than twenty-four (24) hours of commencing such work, if advance notice is not practicable.

310.11 RECOVERY OF CITY COSTS OF MANAGING THE RIGHT-OF-WAY

- A. The purpose of this Section is to provide for the recovery of all direct and indirect costs and expenses actually incurred by the City and associated with a permittee's occupancy or use of the right-of-way and related to the enforcement and administration of this Chapter in accordance with applicable law.
- B. Recovery of Costs. Any City costs related to a permittee's occupancy or use of the right-of-way and recovered pursuant to this Chapter shall be considered Public Way Fees as that term is defined in this Chapter and Chapter 4939 of the Ohio Revised Code.
 - 1. Public Way Fees shall be assessed by the Director of Public Service in a manner that is in accordance with Chapter 4939 of the Ohio Revised Code and any other applicable law.

2. City costs related to a permittee's occupancy or use of the right-of-way which may be recovered include, but are not limited to, administrative costs associated with applications for consent to occupy or use the right-of-way, initial and annual registration, issuance and enforcement of construction permits, and invoicing for inspections.
 3. City costs related to a permittee's use of the right-of-way and recovered pursuant to this Chapter from the performance bond, letter of credit or cash deposit shall be considered Public Way Fees and shall be assessed by the Director of Public Service in accordance with Chapter 4939 and any other applicable law.
- C. **Regulatory Fees and Compensation Not a Tax.** The regulatory fees and costs provided for in this Chapter are separate from, and in addition to, any and all federal, State, local and City taxes as may be levied, imposed or due from a Service Provider, Contractor, its customers or subscribers, or on account of the lease, sale, delivery or transmission of Services.
 - D. **Special Fund.** Any Public Way Fees levied by, and remitted to, the City pursuant to this Chapter shall be deposited in a special fund maintained by the City for that purpose in accordance with the requirements of Ohio R.C. 4939.05(D).

310.12 MISCELLANEOUS PROVISIONS

A. Modification or Waiver of Requirements

It is within the Director of Public Service's reasonable discretion to modify or waive a requirement or requirements of this Chapter where such requirements, in the Director of Public Service's judgment, are not necessary or appropriate to protect the City's interests in managing its rights-of-way and the purposes and intent of this Chapter.

B. Preemption by State and Federal Law

Except as may be preempted by applicable State or Federal laws, rates, regulations, and orders, this Chapter shall apply and be controlling over each Service Provider with Facilities in the rights-of-way, and Contractors performing work related to those Facilities.

- C. **Application to City-Owned or Operated Facilities.** Contractors working on City owned or operated Facilities shall comply with all requirements of this Chapter.
- D. **Application to Existing Code Provisions.** In the event of a direct conflict between any provision of this Chapter and any other section of the City's Codified Ordinances, the provisions of this Chapter shall apply.
- E. **Severability.** If any section, subsection, sentence, clause, phrase, or other portion of this Chapter, or its application to any person, is, for any reason, declared invalid, in whole or in part by any court or agency of competent jurisdiction, that decision shall not affect the validity of the remaining portions hereof.

301.13 CURB INSTALLATION; ALTERATION; EXISTING CURB CUTS

- A. Any alteration, change, repair, removal, replacement, cutting, lowering or installation of curbs shall be done by contractors, authorized by the City or employees of the City, under the control and direction of the Director of Public Service.
- B. The Director of Public Service shall establish a reasonable fee, not to exceed the right-of-way permit fee established in Section 301.03, to defray the cost of administering this section.
- C. The length and location of each curb-cut and lowered curb shall be subject to the approval of the Director of Public Service or his designee who shall consider the existing traffic pattern and volume, the adequacy of existing access, if any, to the premises, and the movement of pedestrian traffic.
- D. The elevation of newly installed, relocated, or reinstalled curbs shall be subject to the approval of the Director of Public Service or his designee.
- E. Costs incurred by the City may be assessed in accordance with Section VII of the Charter of the City of Berea and the general laws of the State of Ohio.
- G. Regulation of existing curb cuts

Where an existing curb-cut adversely affects the existing traffic pattern or volume or movement of pedestrian traffic, the Director of Public Service may direct the permittee to close the curb cut, and if premises or abutting property are thereby deprived of access to the street, to replace the curb-cut with a new curb-cut at such location as is designated by the Director of Public Service, provided that in no case shall the elimination of an existing curb-cut pursuant to this paragraph have the effect of unreasonably restricting access to premises abutting a public street.

310.99 PENALTIES AND OTHER REMEDIES

- A. Whoever violates any provision of the Chapter is guilty of a misdemeanor offense for each offense, subject to the imposition of a fine of not more than five hundred dollars (\$500.00) for each offense. Each violation of a Section or part of a Section of this Chapter shall constitute a separate and distinct violation independent of any other Section or part of a Section or any order issued pursuant to this Chapter.
- B. Application of Penalty to Officers or Agents. Where the defendant is other than a natural person, subsection (a) above shall also apply to any agent, superintendent, officer, member or partner who, alone or with others, has charge, care or control of the defendant's activities, not limited to construction projects.
- C. Equitable Remedies. The imposition of any penalty shall not preclude the Director of Law from instituting an appropriate action or proceeding in a court of proper jurisdiction to prevent an unlawful repair or maintenance; or to restrain, correct or abate a violation; or to prevent the occupancy or use of the right-of-way or to require compliance with the provisions of this Chapter or other applicable laws, ordinances, rules or regulations or the orders or determination of the City, including but not limited to civil violations and forfeiture as provided.