

AN ORDINANCE TO REGULATE ACCESS TO AND ONGOING USE OF PUBLIC RIGHTS-OF-WAY BY TELECOMMUNICATIONS PROVIDERS**THE VILLAGE OF SHEPHERD HEREBY ORDAINS:**

Section 1. **Purpose.** The purpose of this Ordinance is to regulate the access to and ongoing use of Public Rights-of-Way by Telecommunications Providers to ensure and protect the public health, safety, and welfare and to exercise reasonable control of the Public Rights-of-Way pursuant to the Village Charter, the Michigan Telecommunications Act (Act No. 216 of the Public Acts of 1995, as amended, being MCLA 484.2101 et seq.), other state statutes (including, without limitation, MCLA 247.183), and Article VII, Section 29 of the 1963 Michigan Constitution by (1) minimizing disruption of the Public Rights-of-Way by regulating the access to and ongoing use of Public Rights-of-Way by Telecommunications Providers and the construction, and installation, of facilities in the Public Rights-of-Way to provide Telecommunications Services, (2) ensuring that the Village and the public are protected from liability for use of the Public Rights-of-Way by Telecommunications Providers, (3) providing for the payment of nondiscriminatory permit fees which do not exceed the fixed and variable costs of granting permits and maintaining the rights-of-way used by Telecommunications Providers, and (4) assisting Telecommunications Providers in understanding the Village's requirements for use of the Public Rights-of-Way and providing a fair and non-discriminatory policy for permitting the use of the Public Rights-of-Way by such providers.

Section 2. **Reservation of Rights.** Then issuance of a Permit or Permits under this Ordinance and the access to and use of the Public Rights-of-Way by a Telecommunications Provider shall not constitute a waiver of or otherwise adversely affect the following reserved rights:

- (1) **Right to Require Franchise.** Article VII, Section 29 of the 1963 Michigan Constitution and the Village Charter require that all public utilities obtain a franchise to conduct a local business within the Village. The applicability of this requirement to Telecommunications Providers may be challenged under Section 102 (dd) of the Michigan Telecommunications Act which purports to define telecommunications services as not constituting public utility services. Due to this and other legal and regulatory issues, and to avoid the expense and delay of litigation that may be unnecessary, the Village hereby determines that Telecommunications Providers shall not be required at this time to obtain franchises for the transaction of local business within the Village. Telecommunications Providers shall be required to obtain and maintain a Permit for access to and ongoing use of the Public Rights-of-Way and to otherwise comply with the terms of this Ordinance. Such a permit shall not constitute a franchise. The Village reserves the right to require Telecommunications Providers to obtain a franchise in the future to transact local business within the Village.
- (2) **Rights Regarding Takings Claim.** Certain cable or Telecommunications Providers have initiated or supported legal proceedings in which they contend that federal law grants them the right to physically occupy the rights-of-way and other property of a municipality for the purpose of providing telecommunications service without compensating the municipality for the use or value of the property so occupied or the cost of acquiring and maintaining such property. Municipalities dispute that claim. The Village believes that if such a claim were sustained it would, among other things, constitute an unlawful taking by the United States in violation of the Fifth Amendment to the United States Constitution. The legal issues involved in such disputes have not been finally decided. The Village desires to act on applications for Permits granting access to its Public Rights-of-Way at this time rather than wait for determination of these issues, provided this can be done without waiver or loss of any rights of the Village or a Permittee. Therefore, notwithstanding any other provision hereof, a Permittee is not precluded by this Ordinance from seeking relief from the fee provisions of

Section 6 from any court or agency of competent jurisdiction. If a Permittee seeks such relief, the Village reserves the right to assert a takings claim and to take all action it deems necessary in support thereof. Neither this Ordinance nor the issuance or acceptance of a Permit hereunder constitutes or will be claimed to constitute a waiver or relinquishment of any rights or defenses of either the Village or the Permittee in connection with these disputed issues, and the acceptance of a Permit constitutes an acknowledgement and agreement thereto by the Permittee.

- (3) **Option to Obtain Consent Agreement.** The Village finds that legislative, legal and regulatory issues in connection with use of the Public Rights-of-Way by Telecommunications Providers and the resulting potential for litigation and delay are likely to have an adverse affect on the development of a healthy, competitive telecommunications infrastructure in the community. This would be detrimental to the Village and its residents as well as to Telecommunications Providers. The issue effect, among other things, both the cost to Telecommunications Providers and the compensation to the Village for the maintenance and use of its Public Rights-of-Way. In order to promote certainty, encourage competition and avoid litigation, the Village will, at the request and sole option of an applicant or Permittee, consider entering into a consent agreement for use of the Public Rights-of-Way for the provision of Telecommunications Services on terms and conditions mutually acceptable to the village and the telecommunications Provider. It is the Village's intent that such an agreement would satisfy the requirement for a Permit under this Ordinance, and would include, among other things, the Permit fee; an extended term of up to fifteen (15) years; authorization to conduct a local business in the Village pursuant to Article VII, Section 29 of the 1963 Michigan Constitution; and a covenant to abide by the terms of the agreement as a compromise of disputed issues and uncertain outcomes, notwithstanding the resolution of these legislative, regulatory and legal requirements in the future. A Permittee may request a consent agreement at any time.

Section 3. **Terms Defined.**

The meaning of the terms used in this Ordinance shall be as follows:

- (1) "Affiliate" and "Affiliated" means any entity Controlling, Controlled by or under common Control with a Permittee.
- (2) "Village" means the Village of Shepherd.
- (3) "Village Council" means the Village Council of the Village of Shepherd or its designee. This subsection does not authorize delegation of any decision or function that is required by law to be made by the Village Council. In any case in which a hearing is held pursuant to this Ordinance, the Village Council may conduct the hearing or, in its sole discretion, may by resolution appoint a committee or subcommittee of the commission or a hearing officer to conduct the hearing officer to conduct the hearing and submit a proposal for decision to it, pursuant to procedures established by resolution.
- (4) "Village President" means the Village President or his or her designee.
- (5) "Control," "Controlling," and "Controlled" means effective control, by whatever means exercised, such as those described in Report and Order and Further Notice of Proposed Rule Making in MM Docket 92-264, 8 FCC Rcd 6828 (1993) at paragraphs 22-28 (adopting broadcast transfer of control standards as then in effect).

- (6) "Local Exchange Service" means the provision of an access line and usage within a local calling area for the transmission of high quality two-way interactive switched voice of data communication.
- (7) "Permit" means non-exclusive permit issued pursuant to this Ordinance for access to and ongoing use of Public Rights-of-Way by Telecommunications Providers for wires, poles, pipes, conduits, or other facilities designed or used to provide Telecommunications Services. The term "Permit" does not include any other permits, licenses, or approvals required by the Village or other governmental entities.
- (8) "Permittee" means a Telecommunications Provider which has been issued a Permit pursuant to this Ordinance.
- (9) "Person" means an individual, corporation, partnership, association, governmental entity, or any other legal entity.
- (10) "Public Rights-of-Way" means the public rights-of-way, easements, highways, streets, and alleys within the Village.
- (11) "Telecommunications Act" means Act. No. 216 of the Public Acts of 1995, as amended from time to time.
- (12) "Telecommunications Provider" means a Person who provides one or more Telecommunications Services for compensation.
- (13) "Telecommunications Services" means regulated and unregulated services offered to customers for the transmission of two-way interactive communication and associated usage. "Telecommunications Services" does not include one-way transmission to subscribers of video programming or other programming services and subscriber interaction for the selection of video programming or other programming services.
- (14) "Telecommunications System" means facilities designed or used to provide Telecommunications Services.
- (15) "Video Programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

Section 4. **Permits.**

- (1) *Permit Required.* No person shall use the Public Rights-of-Way to provide Telecommunications Services without a Permit issued pursuant to this Ordinance. For purposes of this Ordinance, use of Public Rights-of-Way includes the installation, construction, maintenance, or repair, of a Telecommunications System within the Public Rights-of-Way. Failure to comply with the Permit requirement of this Section shall constitute a violation of this Ordinance. A person who violates this requirement shall comply with all requirements of this Ordinance applicable to a Permittee and shall pay the annual fee plus late payment charges as provided by Section 6 for the time period in which the violator did not have a Permit plus the actual costs incurred by the Village in enforcing this Ordinance against the Person. Receipt of a Permit under this Ordinance does not supersede a Permittee's obligation to obtain any and all other necessary permits or authorizations, under any applicable Village ordinance, resolution, regulation, or policy.
- (2) *Consent Agreement.* If a telecommunications Provider negotiates a consent agreement with the Village under the provisions of Section 2(3), and the Village determines that the consent

agreement substantially satisfies the obligations of a Telecommunications Provider under this Ordinance, giving due regard to any special circumstances involving the Telecommunications Provider, the consent agreement will be deemed to satisfy the requirement of a Permit under this Ordinance and under the Telecommunications Provider, the consent agreement will be deemed to satisfy the requirement of a Permit under this Ordinance and under the Telecommunications Acts. When a consent agreement is no longer in effect, the Telecommunications Provider shall be required to comply with all terms and conditions of this Ordinance as it may be amended from time to time.

Section 5. **Permit Application Procedures.**

- (1) **Application.** A Telecommunications Provider shall apply for a Permit pursuant to this Ordinance. The application shall be made on an application form provided by the Village. Three (3) copies of the application shall be filed with the Village Clerk, and two (2) additional copies each shall simultaneously be filed with the Department of Public Works Superintendent and Village Attorney.
- (2) **Required Information.** In addition to other information required by the Village or this Ordinance, the application shall include, without limitation, the following information:
 - (a) The name and address of the applicant or any Person exercising Control over the applicant, and if the applicant or any Person or Persons exercising Control is not a natural Person, each of its officers, directors, stockholders beneficially holding more than fifteen percent (15%) of the outstanding voting shares, or its managers, general partners, limited partners and/or members holding an equity interest of more than fifteen percent (15%). If no person controls fifteen percent or more of the outstanding shares, the name and address of ten largest shareholders, partners, limited partners, and/or members as the case may be shall be provided.
 - (b) Copies of the most recent financial statements of the applicant.
 - (c) A general description of the applicants existing and proposed telecommunications system telecommunications services in the Village and the type of existing and proposed wires and other facilities proposed to be placed in the public rights-of-way; and a statement whether such systems and or facilities are owned by the applicant and that such use complies with the terms of any agreement existing between the owner thereof and the applicant. Alternatively, with respect to any facilities not owned by the applicant, the applicant may furnish a copy of any written agreement between the owners of such facilities and the applicant setting forth the nature of the applicant's interest therein and the right of the applicant to use the facilities.
 - (d) A map setting forth the location of the facilities in the Public Rights-of-Way. The map shall completely and accurately identify the location and dimensions of above ground and underground facilities in sufficient detail to the satisfaction of the Village President or his or her designee. Prior to the issuance of a right-of way construction permit, specific location of the facilities in the public rights-of way must be identified.
 - (e) Proof of applicable federal and state authority, if any be needed, to operate a Telecommunications System in the Village.
- (3) **Application Fee.** The application will be accompanied by a non-refundable application fee in an amount established by ordinance or resolution of the Village Council. The nonrefundable application fee shall be designed to reimburse the Village for the costs of

reviewing an application for a Permit and issuance of a Permit in accordance with the procedures of this Ordinance.

- (4) *Administrative Completeness.* An application shall not be deemed to be filed for purposes of the 90-day permit application review period in Section 251 (3) of the Telecommunications Act unless and until the application is determined by the department of Public Works Superintendent or Village Clerk to be administratively complete. A determination whether the application is administratively complete shall be made by the Village Clerk within fifteen (15) business days after the application is received by the Village. If the Village Clerk determines that the application is not administratively complete, the Village Clerk shall so advise the applicant in writing and shall identify the items which must be furnished by the applicant for an administratively complete application.
- (5) *Additional Information.* The Village President may request an applicant to submit such additional information which the Village President deems reasonably necessary or relevant to review the application. The applicant shall comply with all such requests in compliance with reasonable deadlines for such additional information established by the Village President. If the applicant fails to provide the requested additional information by the deadline established by the Village President, the 90-day period for acting on the application under Subsection (7) below shall be extended by the number of days after the deadline that the information was provided to the Village President.
- (6) *Misleading Statements.* A person who makes a statement which was untrue when made or omits a material fact for the purpose of inducing the Village to issue a permit hereunder, which permit would not have been issued but for the misstatement of fact or omission of fact, shall be in violation of this ordinance and shall be subject to all remedies for violation of this ordinance including, without limitation, denial of the requested action, permit revocation, civil fines and costs.
- (7) *Permit Approval or Denial.* Within seventy-five (75) days after the Village President determines that the application is administratively complete (subject to any adjustments for delays in providing additional information as provided in subsection (5)), the Village Council shall hold a public hearing on application. Notice of the public hearing shall be published in a newspaper in general circulation not less than ten (10) days before the public hearing. Notice of the public hearing shall also be mailed to the applicant not less than ten (10) days before the public hearing. Any report or recommendation on the on the application obtained or prepared by the Village President shall be mailed to the applicant not less than ten (10) days before the public hearing. The applicant and any other interested parties may appear in person, by agent, or by letter at such hearing to submit comments on the application. Following the public hearing, the Village Council shall approve, approve with conditions, or deny the application within ninety (90) days after the Village President determines that the application is administratively complete pursuant to subsection (4), subject to any adjustments for delays in providing additional information as provided in subsection (5). The Village Council shall not unreasonably deny an application for a Permit. The failure of the Village to substantially comply in good faith with the procedural requirements of this Section 5 for the review of Permit applications shall not invalidate the decision or proceedings of the Village.
- (8) *Conditions.* The Village Council may impose conditions on a Permit to protect the public health, safety and welfare. Without limitation, these conditions may include the posting of a bond by the Telecommunications Provider in an amount which shall not exceed the reasonable cost to ensure that the Public Rights-of-Way are returned to their original

condition during and after the Telecommunications Provider's access and use. The Village Council may require a Telecommunications Provider to maintain a letter of credit, cash bond, or other financial guarantee with a local financial guarantee with a local financial institution, in an amount proportionate to the size of such Telecommunications Provider's System (including approved expansions, if any), but not in excess of the reasonable cost to ensure that the Public Rights-of-Way are returned to their original condition, which can be drawn upon by the Village due to the Telecommunication's Provider's failure to cure to the reasonable satisfaction of the Village President or his or her designee, any violation of this Ordinance, or breach or default under a Permit, after thirty (30) days notice.

- (9) *Modification.* The Village Council may, in its discretion, grant a modification of a specific requirement of Sections 7, 8, 9, or 11 of this Ordinance if the applicant requests such modification in its application for a Permit and if the applicant demonstrates that:
- (a) there are exceptional or extraordinary circumstances which warrant a modification,
 - (b) the modification will not be detrimental to the public health, safety, and welfare, and
 - (c) the modification will not impair the intent and purposes of this Ordinance and its several sections. The application shall describe the applicant's request for a modification and the reasons for the request with specificity. A modification granted by the Village Council pursuant to this Section shall expire upon the expiration of the Permit or earlier if so determined by the Village Council. A modification shall modify only those requirements determined by the Village Council. A modification shall modify only those requirements expressly set forth in approval of the Village Council and shall not modify any other provisions of this Ordinance. If a request for a modification is denied by the Village Council, the Telecommunications Provider shall comply with all requirements of this Ordinance without exception.
- (10) *Waiver.* The Village Council shall grant a waiver of any requirement of this Ordinance, except Sections 8 (1), 8 (3), 8 (6), 8 (7) and 8 (8), if an applicant or Permittee requests a waiver and the Village Council finds that (a) unless waived the requirement will prohibit or have the effect of prohibiting the ability of the applicant or Permittee to provide any Telecommunications Service within the meaning of Section 253 (a) of the Federal Telecommunications Act, 47 USC Section 253 (a), (b) the requirement is not within the cope of any state or local authority referenced in Section 253 (c), and (c) the requirement is not necessary to protect the public safety and welfare or safeguard the rights of consumers. Any request for a waiver must be included in an application for a Permit. A request for a waiver shall include a detailed statement of the facts and circumstances forming the basis for the request. If the request is made in connection with an application for a Permit, the provisions of Sections 5(4) through 5(7) shall apply to the request. Sections 5(1), 5(3), and 5(6) shall apply to a waiver request that is not made in connection with a Permit application, and the request may be denied for violation of or failure to comply with any of those provisions. Section 5(7) shall also apply to such a request, with the exception of the 75 and 90 day time periods set forth in that Section, but the Village Council may by resolution establish different or additional procedures for conducting the public hearing and acting on the request.

Section 6. Annual Permit Fees.

- (1) *Establishment of Annual Fees; Payment.* In addition to the non-refundable application fee set forth in Section 5 (3) and any other fees for other permits

or authorizations required by the Village, a Permittee shall pay an annual fee in an amount established by an ordinance or resolution of the Village Council. The annual fee may be modified from time to time by ordinance or resolution of the Village Council. The annual fee may be modified from time to time by ordinance or resolution of the Village Council. The amount of the annual fee shall not exceed the fixed and variable costs to the Village in maintaining the Public Rights-of-Way used by a Telecommunications Provider unless otherwise permitted by law. The annual fee shall be payable quarterly as follows:1

- 1st quarter (Jan. 1- March 31) - April 30
- 2nd quarter (April 1- June 30) - July 31
- 3rd quarter (July 1- Sept. 30) - October 31
- 4th quarter (Oct. 1- Dec. 31) – January 31

When a Permit is issued during a calendar year, the annual fee shall be prorated for the balance of the calendar year. In the event that a quarterly payment is not paid when due, the Permittee shall pay a late payment charge of the greater of \$100 or interest at the rate of one percent (1%) over the prime rate then charged by FirstBank and computed monthly. A Person who violates this Ordinance by failing to obtain a Permit shall pay the annual fee plus late payment charges, as required by this Section, for the time period in which the violator did not have a Permit plus the actual costs of the Village in enforcing this Ordinance against the Person.

- (2) *Records.* All records (including those of Affiliates) reasonably necessary to verify the accuracy of annual fees paid by the Permittee under Section 6(1) shall be made available by a Permittee at a location within the Village or within twenty (20) miles of the Village’s boundaries. The Village, by itself or in combination with other municipalities, reserves the right to audit any Permittee (or any Affiliate of a Permittee) to verify the accuracy of annual fees paid or to be paid to the Village. Any additional amount due the Village shall be paid within thirty (30) days of submission of an invoice. If the additional amount due exceeds two percent (2%) of the total annual fee which the audit determines should have been paid for a calendar year, the Permittee shall pay the Village’s costs in connection with the audit within thirty (30) days of submission of an invoice.
- (3) *Other payments.* The non-refundable application fees and the annual fees established pursuant to this Ordinance shall be in addition to any tax, charge, fee or payment due, or to become due, to the Village by a Permittee under any Village Ordinance or the laws of the State of Michigan.
- (4) *Misleading Statements.* A person who makes a statement which was untrue when made or omits a material fact for the purpose of inducing the Village to issue a permit hereunder, which permit would not have been issued but for the misstatement of fact or omission of fact, shall be in violation of this ordinance and shall be subject to all remedies for violation of this ordinance including, without limitation, denial of the requested action, permit revocation, civil fines and costs.

Section 7. Duration of Permit; Renewal. A Permit shall remain in effect until June 30 following the tenth year anniversary from the date of the issuance of the Permit (unless the Permit expires pursuant to Section 8 (11) or the Permit is earlier revoked pursuant to

Section 13). Applications for renewal of Permits shall be filed in the same manner as original applications in Section 6 and shall be filed with the Village not less than one hundred twenty (120) days before the expiration of the Permit. The Village expressly reserves all rights to approve, approve with conditions, or deny applications for Permit renewals pursuant to this Ordinance and to impose additional conditions on renewed Permits.

Section 8. Permit Terms and Requirements.

- (1) *Non-Exclusive, Additional Permits.* A Permit shall be non-exclusive. The Village expressly reserves the right to approve, at any time, additional Permits for access to and ongoing use of the Public Rights-of-Way by Telecommunications Providers and to enter into agreements and grant franchises for such access and use. The issuance of additional Permits, entry into agreements, or grant of franchises shall not be deemed to amend, modify, revoke, or terminate the terms and conditions of any Permits previously issued to Telecommunication Providers.
- (2) *Expansion Requests.* A Permit approved by the Village Council shall authorize access to and ongoing use of the Public Rights-of-Way described in the Permit, subject to compliance with the conditions of the Permit, the requirements of this Ordinance, and any other applicable requirements of a Village ordinance or applicable state and federal law. The Permittee shall not use any Public Rights-of-Way not expressly authorized by the Permit. Any use of the Public Rights-of-Way (including any installation, construction, maintenance, or repair of a Telecommunication System within the Public Rights-of-Way) to provide Telecommunications Services shall be performed only as authorized by the Permit. A Permittee may, however, expand or modify its Telecommunications System to Public Rights-of-Ways not described in its Permit by obtaining approval of an amended Permit from the Village. Such approval may be granted in writing by the Village President in response to a written request from the Permittee for expansion or modification to specific portions of named Public Rights-of-Way. The Village Council may establish by resolution a nonrefundable application fee for such a request. The Village President may grant, grant with conditions, or deny such request. The Village President shall not unreasonably deny any request. A denial of any request may be appealed to the Village Council which shall make the final decision. Any expansion or modification into additional Public Rights-of-Way shall be subject to all terms and conditions of the original Permit and this Ordinance including, without limitation, the application of the annual fee to the expanded or modified Public Rights-of-Way used by the Permittee.
- (3) *Construction Permit.* A Permittee shall not commence construction, excavation, street opening, tree trimming, or maintenance of, upon, over, across or under the Public Rights-of-Way in the Village without first obtaining all necessary construction, excavation, street opening, tree trimming, or maintenance within the Public Rights-of-Way.
- (4) *Lease or Use of Facilities; Overlapping.* A Permittee shall not lease, sublease, license or otherwise allow the use of wires, conduit, poles or facilities in the Public Rights-of-Way by a Person without securing from the person has secured all necessary governmental approvals required to occupy space in public rights-of-way. A Permittee shall not allow the property of a third party or non-Telecommunications System wires or any other facilities to be overlashed, affixed or attached to any portion of a Permittee's Telecommunications System located in the public right-of-

way; or allow other actions with a similar result without securing from the person a representation that all governmental approvals have been secured in order to occupy space in the public right-of-way.

- (5) *“As Built” Maps.* Without expense to the Village, a Permittee shall provide the Village with “as built” maps, records and plans showing its Telecommunications System or portions thereof within the Village including those of Affiliates used by the Permittee, and maps and descriptive information of facilities of other Persons used by the Permittee. The Village President may waive part or all of this requirement if satisfactory records of the location of the Telecommunications System were previously provided to the Village. The “as built” maps, records and plans shall be provided within thirty (30) days of the completion of the Telecommunications System and any extensions, additions, or modifications to the Telecommunications System and any extensions, additions, or modifications to the Telecommunications System. In addition to the foregoing, a Permittee, without expense to the Village, shall, upon forty-eight (48) hours notice, give the Village access to all “as-built” maps, records, plans and specifications showing its Telecommunications System or portions thereof within the Village. Upon request by the Village, a Permittee shall inform the Village as soon as possible (but no more than one business day after the request) of any changes from previously supplied maps, records, or plans and shall mark up maps provided by the Village so as to show the location of its Telecommunications System.
- (6) *No Inducement.* By acceptance of a Permit, a Permittee acknowledges that it has not been induced to obtain the Permit by any understanding or promise or other statement, whether verbal or written, by or on behalf of the Village or by any third Person concerning any term or condition of a Permit not expressed in this Ordinance.
- (7) *Acceptance of Terms and Conditions.* Permittee acknowledges by the acceptance of a Permit that it has carefully read its terms and conditions and does not accept all such terms and conditions.
- (8) *No Priority.* A permit does not establish any priority of use of the Public Rights-of-Way by a Permittee over any present or future Permittees or parties having agreements with the Village or franchises for such use. In the event of any dispute as to the priority of use of the Public Rights-of-Way by a Permittee over any present or future Permittees or parties having agreements with the Village or franchises for such use. In the event of any dispute as to the priority of use of the Public Rights-of-Way, the first priority shall be to the public generally, the second priority to the Village, the third priority to the State of Michigan and its political subdivisions in the performance of their various functions, and thereafter as between Permittees, other Permit holders, parties having agreements with the Village, and franchisees, as determined by the Village in the exercise of its powers, including the police power and other powers reserved to and conferred on it by the State of Michigan.
- (9) *Future Use by the Village.* A Permittee acknowledges, by accepting a Permit, that it obtains no rights to or further use of the Public Rights-of-Way other than those expressly granted herein. Each Permittee acknowledges and accepts as its own risk that the Village may make use in the future of the Public Rights-of-Way which a Permittee is using or in which a Permittee’s Telecommunications System is located in a manner inconsistent with the Permittee’s use of such Public Rights-of-Way and that in such event the Permittee will not be entitled to compensation from the Village.

- (10) *Expiration of Permit.* Unless the Village grants an extension, a Permit shall expire one (1) year from the date of issuance unless prior thereto the Permittee either (a) commences construction, installation, or operation of its Telecommunications System within the Public Rights-of-Way authorized by the Permit and diligently pursues completion of construction or installation, or (b) commences use of the Public Rights-of-Way to provide Telecommunications Services as authorized by the Permit.

Section 9. Use of Public Rights-of-Way By Permittee.

- (1) *No Burden on Public Rights-of-Way.* A Permittee and its contractors and subcontractors and a Permittee's Telecommunications System shall not unduly burden or interfere with the present or future use of any of the Public Rights-of-Way within the Village. A Permittee shall erect and maintain its Telecommunications System so as to cause minimum interference with the use of Public Rights-of-Way and with the rights and reasonable convenience of property owners. Permittee's cables and wires shall be suspended or buried so as to not endanger or injure Persons or property in the Public Rights-of-Way. If the Village in its reasonable judgements determines that any portion of the Telecommunications System located in the public right-of-way constitutes an undue burden or interference, the Permittee at its sole cost and expense shall modify that portion of the Telecommunications Systems or take such other actions as the Village may determine are in the public interest to remove or alleviate the burden, and the Permittee shall do so within the time period established by the Village.
- (2) *Restoration of Property.* A Permittee and its contractors and subcontractors shall immediately restore, at the Permittee's sole cost and expense and in a manner approved by the Village, any portion of the Public Rights-of-Way that is in any way disturbed, damaged, or injured by the construction, operation, maintenance or removal of the Telecommunications System to as good or better condition than that which existed prior to the disturbance. In the event that the Permittee, its contractors or subcontractors fail to do so within the time specified by the Village, the Village shall be entitled to complete the work and the Permittee shall reimburse the Village for the costs of doing so or Village may draw upon the letter of credit or bond posted by the Permittee, at Village's sole option.
- (3) *Easements.* Upon Village's request, a Telecommunications Provider shall submit evidence of any easement or authorization to use private property for construction or operation of its Telecommunications System. Any easements over or under private property necessary for the construction or operation of a Telecommunications System shall be arranged for and obtained by the Permittee. Any use or intrusion on private property without an easement or other instrument evidencing permission of the property owner shall constitute a trespass by the Permittee and a violation of this Ordinance. Any easement over or under property owned by the Village other than the Public Rights-of-Way shall be separately negotiated with the Village.
- (4) *Tree Trimming.* Subject to all applicable Village ordinances, if any, Permittee may trim trees upon and overhanging the Public Rights-of-Way so as to prevent the branches of such trees coming intocontact with its Telecommunications System. The Permittee shall minimize the trimming of trees to trimming only those trees that are essential to maintain the integrity of its Telecommunications System. No trimming shall be done in the Public Rights-of-Way without previously informing the Village Permittee will use reasonable efforts to notify all affected property owners in advance of trimming trees on or adjacent to their properties.

- (5) *Pavement Cut Coordination/Additional Fees.* A Permittee shall coordinate all construction work in the Public Rights-of-Way with Village's program for street construction, rebuilding, resurfacing and repair (collectively, "Street Resurfacing"). A Permittee shall meet with the official of the Village primarily responsible for the Public Rights-of-Way at least twice per year to this end.

The goals of such coordination shall be to require a Permittee to conduct all work in the Public Rights-of-Way in conjunction with or immediately prior to any Street Resurfacing planned by the Village, and to prevent the Public Rights-of-Way from being disturbed by a Permittee for a period of years after such Street Resurfacing.

In addition to any other fees or payments required by this Ordinance, a Permittee shall pay to the Village the sum set from time to time by Village Council resolution or ordinance for each foot cut into or excavation of any Public Rights-of-Way, or portion thereof, which was subject to Street Resurfacing within eighteen (18) months prior to such cut or excavation. This fee is in addition to all other fees required by this Ordinance.

- (6) *Marking.* A Permittee shall mark any installations of its Telecommunications System which occur after the effective date of this Ordinance as follows:
- (a) Aerial portions of its Telecommunications System shall be marked with a marker on its lines on alternate poles which shall state the Permittee's name and provide a toll-free number to call for assistance.
 - (b) Direct buried underground portions of its Telecommunications System shall have (i) a conducting wire placed in the ground at least several inches above the Permittee's cable (if such cable is non-conductive), (ii) at least several inches above that a continuous colored tape with the Permittee's name and a toll-free phone number and a statement to the effect that there is buried cable beneath, and (iii) stakes or other appropriate above-ground markers with the Permittee's name and a toll-free number indicating that there is buried telephone cable below.
 - (c) Portions of its Telecommunications System located in conduit, including facilities of others used by a Permittee, shall be marked at each manhole with Permittee's name and toll-free telephone number to call for assistance.
- (7) *Compliance with Laws.* A Permittee shall comply with all laws, statues, ordinances, rules, regulations regarding the installation, construction, ownership and use of its Telecommunications System, whether federal, state or local, now in force or which hereafter may be promulgated (including, without limitation, any ordinance, requiring the installation of a reasonable amount of additional conduit when a Permittee installs underground conduit for its Telecommunications System). Before any installation is commenced, the Permittee shall secure all necessary permits, licenses and approvals from all appropriate departments, agencies, boards or commission of the Village or other governmental entity as may be required by law, including, without limitation, all utility line permits and highway permits. A Permittee shall comply in all respects with applicable codes and industry standards, including but not limited to the National Electrical Safety Code (latest edition) and the National Electric Code (latest edition). A Permittee shall comply with all zoning and land use ordinances and historic preservation ordinances as may exist or may hereafter be amended.

- (8) *Street Vacation.* If the Village vacates or consents to the vacation of Public Rights-of-Way within its jurisdiction, and such vacation necessitates the removal and relocation of a Permittee's facilities in the vacated right-of-way, the Permittee shall, as a condition of the Permit, consent to the vacation and move its facilities at its sole cost and expense when ordered to do so by the Village or a court of competent jurisdiction. The Permittee shall relocate its facilities to such alternate route as the Village, acting reasonably and in good faith, shall designate.
- (9) *Relocation.* A Permittee may request to relocate its facilities above, below or within a Public Way. The Village President may grant, grant with conditions, or deny such request. If the Village requests a Permittee to relocate, protect, support, disconnect, place underground or remove its facilities because of street or utility work, or other public projects, the Permittee shall relocate, protect, support, disconnect, place underground or remove its facilities, at its sole cost and expense, to such alternate route as the Village, acting reasonably and in good faith, shall designate. The work shall be completed within the time period designated by the Village.
- (10) *Public Emergency.* The Village shall have the right to sever, disrupt, dig-up or otherwise destroy facilities of a Permittee, without any prior notice, if such action is deemed necessary by the Village President, Police Chief, or Fire Chief or their designees because of a public emergency. Public emergency shall be any condition which, in the opinion of any of the officials named, poses an immediate threat to life, health, or property caused by any natural or man-made disaster, including, but not limited to, storms, floods, fire, accidents, explosions, major water breaks, hazardous material spills, etc. The Permittee shall be responsible for repair at its sole cost and expense of any of its facilities damaged pursuant to any such action taken by the Village.
- (11) *Miss Dig.* If eligible to join, a Permittee shall subscribe to and be a member of "MISS DIG," the association of utilities formed pursuant to Act 53 of the Public Acts of 1974, as amended, MCL Section 460.701 et seq., and shall conduct its business in conformance with the statutory provisions and regulations promulgated thereunder.
- (12) *Use of Existing Facilities, Under grounding.* A Permittee shall utilize existing poles, conduits, and other facilities wherever practicable, and shall not construct or install any new, different, or additional poles or other facilities unless expressly authorized by the Permit. Where utility wiring is located underground, either at the time of initial construction or subsequent thereto, a Permittee's Telecommunications System shall also be located underground unless otherwise expressly authorized by the Permit. All under grounding shall be at the sole cost and expense of the Permittee.
- (13) *Underground Relocation.* If a Permittee has its facilities on poles of a municipal electric utility, or any other public utility company and such utility relocates its facilities underground, the Permittee shall relocate its facilities underground in the same location at Permittee's sole cost and expense.
- (14) *Pole/Conduit/Trench License Agreement; Notification.* If a Permittee forfeits or otherwise loses its rights under a pole/conduit/trench license agreement with any entity, then Permittee shall notify the Village Clerk in writing within thirty (30) days.
- (15) *Identification.* All personnel of a Permittee and its contractors or subcontractors who have as part of their normal duties contact with the general public shall wear on their clothing a clearly visible identification card bearing their name and photograph. A Permittee shall account for all identification cards at all times. Every service vehicle of a Permittee and its

contractors or subcontractors shall be clearly identified as such to the public with the Permittee's name.

- (16) *9-1-1 Emergency Service.* As a condition of a Permit, a Permittee providing Local Exchange Service shall arrange to have 911 services provided within the Village in accordance with the provisions of the applicable 9-1-1 service plan and the rules and orders of the Michigan Public Service Commission.

Section 10. No Village Liability; Indemnification.

- (1) The Village, and its officers, agents, elected or appointed officials, employees, departments, boards, and councils, shall not be liable to a Permittee's Telecommunications System or the provision of Telecommunications Services, or for any damages arising out of a Permittee's use of the Public Rights-of-Way.
- (2) *Indemnification.* As a condition of a Permit, a Permittee shall defend, indemnify, protect, and hold harmless the Village, its officers, agents, employees, elected and appointed officials, departments, boards, and councils from any and all claims, losses, liabilities, causes of action, demands, judgments, decrees, proceedings, and expenses of any nature (including, without limitation, attorneys' fees) arising out of or resulting from the acts or omissions of the Permittee, its officers, agents, employees, contractors, successors, or assigns, but only to the extent of the fault of the Permittee, its officers, agents, employees, contractors, successors, or assigns.

Section 11 Insurance.

- (1) A Permittee shall obtain and maintain in full force and effect for the duration of a Permit the following insurance covering all insurable risks associated with its ownership or use of its Telecommunications system:
- (a) A comprehensive general liability insurance policy, including Completed Operations Liability, Independent Contractors Liability, Contractual Liability coverage and coverage for property damage from perils of explosion, collapse or damage to underground utilities, commonly known as XCU coverage, in an amount not less than Five Million Dollars (\$5,000,000).
- (b) An Automobile Liability Insurance Policy covering any vehicles used in connection with its activities under its Permit in an amount not less than One Million Dollars (\$1,000,000.00).
- (c) Workers' Compensation and Employer's Liability Insurance with statutory limits.
- (2) The Village shall be named as an additional insured in all applicable policies. All insurance policies shall provide that they shall not be canceled or modified unless thirty (30) days prior written notice is given to the Village. A Permittee shall provide the Village with a certificate of insurance evidencing such coverage as a condition of issuance of the Permit and shall maintain on file with the Village a current certificate. All insurance shall be issued by insurance carriers licensed to do business by the state of Michigan or by surplus line carriers shall be rated A+ or better by A.M. Best Company or another rating agency approved by the Village.
- (3) If the insurance policies required by this Section are written with deductibles in excess of Fifty Thousand Dollars (\$50,000), the deductibles shall be approved in advance by the Village. A Permittee agrees to indemnify and save harmless the Village from and against the

payment of any deductible and from the payment of any premium on any insurance policy required to be furnished by this Ordinance.

- (4) The Permittee shall require that its contractors and subcontractors working in Public Rights-of-Way carry in full force and effect workers' compensation and employer liability, comprehensive general liability and automobile liability insurance coverages of the types which Permittee is required to obtain under Section 11 (1) with appropriate limits of coverage.
- (5) The Permittee's insurance coverage shall be primary insurance with respect to the Village, its officers, agents, employees, elected and appointed officials, departments, boards, and councils. Any insurance or self-insurance maintained by any of them shall be in excess of the Permittee's insurance and shall not contribute to it.

Section 12. No Assignment or Transfer of Control Without Village Consent. A Permittee shall not assign or transfer a Permit or any of its rights under a Permit, in whole or in part, voluntarily, involuntarily or by operation of law, including by merger or consolidation or by other means, without the prior written consent of the Village, which shall not be unreasonably withheld. The Permittee shall reimburse the Village for reasonable, actual costs, including attorney fees, incurred in the review of a request by the Permittee for consent to an assignment or transfer of the Permit. Notwithstanding anything in this Section to the contrary, the Permittee may grant a security interest in its rights under a Permit in favor of a third party without first obtaining the consent of the Village. If a Permit or any rights thereunder is assigned or transferred in whole or in part with the approval of the Village, the terms and conditions of the Permit and of this Ordinance shall be binding upon the successors and assigns of the Permittee. Notwithstanding the provisions of this section, if the transfer of a permit is to an affiliate owned or controlled by the Permittee, then no such approval shall be required, but the Permittee shall provide written notice prior to any of such transfer to the Village; provided however, no such transfer will relieve the Permittee of its obligation of compliance with this ordinance and permit.

Section 13. Revocation. In addition to all other rights and powers reserved or pertaining to the Village, the Village reserves an additional separate and distinct remedy the right to revoke a Permit and all rights and privileges of a Permittee in any of the following events or for any of the following reasons:

- (1) A Permittee fails after thirty (30) days prior written notice to comply with any of the provisions of the Permit or this Ordinance (except Section 5 (6)): or
- (2) A Permittee becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt; or
- (3) All or part of a Permittee's facilities are sold under an instrument to secure a debt and are not redeemed by the Permittee within ninety (90) days from such sale; or
- (4) A Permittee violates Section 5(6) of this Ordinance or otherwise attempts to or does practice any fraud or deceit in its conduct or relations with the Village; or
- (5) The Village condemns all of the property of a Permittee within the Village by the lawful exercise of eminent domain; or
- (6) A Permittee abandons its Telecommunications System or fails to seek renewal of its Permit; or

- (7) A Permittee fails to pay any fines due for violations of this Ordinance; or
- (8) A Permittee fails to pay any civil fines imposed by a court of competent jurisdiction, such as pursuant to an ordinance providing for civil infractions.

No revocation, except for reason of condemnation, shall be effective unless the Village Council shall have adopted a resolution setting forth the reason for the revocation and the effective date, which resolution shall not be adopted without thirty (30) days prior notice to the Permittee and a hearing at which the Permittee receives rudimentary due process.

Section 14. Removal.

- (1) *Removal; Underground.* Upon revocation of a Permit, or upon expiration of a Permit if the Permit is not renewed, the Permittee may remove any underground Cable from the Public Rights-of-Way which has been installed in such a manner that it can be removed without trenching or other opening of the streets along the extension of Cable to be removed. Except as otherwise provided, the Permittee shall not remove any underground Cable or conduit which requires trenching or other opening of the Public Rights-of-Way along the extension of Cable to be removed. The Permittee shall remove, at its sole cost and expense, any underground Cable or conduit which is ordered to be removed by the Village based upon a determination, in the sole discretion of the Village, that removal is required in order to eliminate or prevent a hazardous condition or promote future utilization of the streets for public purposes. Any order by the Village to remove Cable or conduit shall be mailed to the Permittee not later than thirty (30) calendar days following the date of revocation or expiration of the Permit. A Permittee shall file written notice with the Village Clerk not later than thirty (30) calendar days following the date of expiration or termination of the Permit of its intention to remove Cable and a schedule for removal by location. The schedule and timing of removal shall be subject to approval and regulation by the Village. Removal shall be completed not later than twelve (12) months following the date of revocation or expiration of the Permit. Underground Cable and conduit in the Public Rights-of-Way which is not removed within such time period shall be deemed abandoned and, at the option of the Village, title shall be vested in the Village. For purposes of this subsection (1), "Cable" means any wire, coaxial cable, fiber optic cable, feed wire or pull wire.
- (2) *Removal; Above Ground.* Upon revocation of a Permit, or upon expiration of a Permit if the Permit is not renewed, a Permittee, at its sole cost and expense, shall, unless relieved of the obligation by the Village, remove from the Public Rights-of-Way all above ground elements of its Telecommunications System, including but not limited to poles, pedestal mounted terminal boxes, and lines attached to or suspended from poles.
- (3) *Permits; Restoration; Completion.* A Permittee shall apply for and obtain such encroachment permits, licenses, authorization or other approvals and pay such fees and deposit such security as required by applicable law or ordinances of the Village, shall conduct and complete the work of removal in compliance with all such applicable law or ordinances, and shall restore the Public Rights-of-Way to the same condition they were in before the work of removal commenced.

Section 15. Other Provisions Not Waived.

- (1) Nothing in this Ordinance shall be construed as a waiver of any ordinances, Charter provisions, codes, or regulations of the Village or Village's right to require Permittee or

Persons utilizing the Telecommunications System or Telecommunications Services to secure appropriate permits or authorization for such use.

- (2) The Village fully reserves its police powers to ensure and protect the public health, safety, and welfare and fully reserves its authority and power to amend this Ordinance at any time. The terms and conditions of any Permit shall be subject to compliance with any future amendments of this Ordinance. The Village fully reserves its right to exercise the reasonable control of the Public Rights-of-Way pursuant to Article VII, Section 29 of the 1963 Michigan Constitution.
- (3) Nothing in this Ordinance or any Permit shall limit any right the Village may have to acquire by eminent domain any property of a Telecommunications Provider.
- (4) Nothing in this Ordinance or any Permit shall limit the authority of the Village to impose a tax, fee, or other assessment of any kind on any Person. A Telecommunications Provider shall pay all fees necessary to obtain all federal, state, and local licenses, permits, and authorizations required for the construction, installation, maintenance, or operation of its Telecommunications System within the Public Rights-of-Way.

Section 16. **Severability.**

- (1) If any provision of this ordinance or any related ordinances is held by any Court of any Federal, State or County agency of competent jurisdiction to be invalid as conflicting with any Federal, State or County law, rule or regulation, said provision shall be considered a separate, distinct and independent part of this ordinance, and such holding shall not affect the validity and enforceability of any other of these. In the event that such law, rule or regulations subsequently repealed, rescinded, amended or otherwise changes, so that the provisions which had been held invalid or modified is no longer in conflict with the laws, rules and regulations then in effect, said provision shall thereupon return to full force and effect and shall binding on the parties, provided that the Village shall give the Permittee thirty (30) days written notice of such change before requiring compliance with said provision.
- (2) Any other provisions of this ordinance to the contrary notwithstanding, a Permittee shall at all times comply with all laws and regulations of the Federal, State, County and Village governments and all administrative agencies thereof, provided, however, that if any law or regulation shall prohibit a Permittee expressly from performing a service required thereunder, such that it would be in conflict with the terms of this ordinance or the provisions of the Village's code of ordinances, then as soon as such a conflict becomes known to the Permittee, the Permittee shall notify the Village in writing of what it believes the conflict to consist of and in particular what law or regulation it believes to be in conflict with this ordinance or the Village's code of ordinances and the Permittee shall be thereby excused from performance thereunder, provided that it acts in good faith reliance thereon, pending an authorization resolution of such conflict.
- (3) If the Village determines that a material provision of this ordinance or any related ordinances is affected by such action of a Court or of the Federal, State, or County government, the Village shall have the right to modify any of the provisions herein or in such related ordinances to such reasonable extent as may be necessary to carry out the full intent and purpose of this ordinance.

Section 17. **Authorized Village Officials.**

The Village President or his or her designee is hereby designated as the authorized Village official to issue municipal civil infraction citations (directing alleged violators to appear in court) or municipal civil infraction violation notices (directing alleged violators to appear at the municipal ordinance violations bureau) for violations under this Ordinance as provided by this Ordinance.

Section 18. Municipal Civil Infraction.

A person who violates any provision of this Ordinance is responsible for a municipal civil infraction, subject to payment of a civil fine of not less than Five Hundred Dollars (\$500.00) and not more than Five Thousand Dollars (\$5,000), plus costs and other sanctions, for each infraction. Each day that a violation continues shall be a separate infraction. Repeat offenses under this Ordinance shall be subject to increased fines as follows:

First repeat offense	Not less than One thousand Dollars (\$1,000)
Dollars	and not more than Ten Thousand Dollars (\$10,000)
Second and subsequent repeat offense	Not less than Two Thousand Dollars (\$2,000) and not more than Twenty thousand Dollars (\$20,000)

Section 19. Separability.

If any section, subsection, paragraph, sentence, clause, phrase or portion of this ordinance is, for any reason, held invalid or unconstitutional by any Court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

Section 20. Ordinances Repealed.

All ordinances and/or parts of ordinances inconsistent with this ordinance are hereby repealed.

Section 21. Effective Date.

This Ordinance shall become effective 30 days after its adoption and shall apply to any and all applications pending for a telecommunications permit.

This ordinance shall take effect thirty (30) days after its adoption:

Adopted: May 17, 1999
Published: June 2, 1999
Effective: June 17, 1999