

ORDINANCE TO RENAME CHAPTER 62, ARTICLE II OF THE CITY OF DURHAM CODE OF ORDINANCES, AND TO REPEAL EXISTING DIVISION 1, CONSISTING OF §§ 62-50 THROUGH 62-60, AND TO REPLACE IT WITH NEW DIVISION 1, §§62-50 THROUGH 62-56, AND TO RESERVE §§ 62-57 THROUGH 62-78 FOR FUTURE USE

THE CITY COUNCIL OF THE CITY OF DURHAM ORDAINS:

Sec. 1. Chapter 62, Article II of the City of Durham Code of Ordinances shall be renamed as follows: CONSTRUCTION AND EXCAVATION IN THE PUBLIC WAY, INSTALLATION OF FACILITIES AND UTILITIES.

Sec. 2. Chapter 62, Article II, Division 1 of the City of Durham Code of Ordinances shall be repealed in its entirety and replaced with the new Article II, Division 1, §§ 62-50 through 62-56 stated as follows:

**ARTICLE II. CONSTRUCTION AND EXCAVATION IN THE PUBLIC WAY,
INSTALLATION OF FACILITIES AND UTILITIES**

DIVISION 1. Work within Public Way; Utilities; Franchises, Licenses, and Permits

Sec. 62-50 Definitions

The following words and terms in this Division shall have the meaning given below unless the context indicates otherwise. These meanings shall apply whether a word is capitalized or not or is singular or plural.

Authorization means permission from the City to do work in the Public Way or to maintain Facilities in the Public Way and includes but is not limited to a franchise, a license, a permit, a letter, construction drawing approval. Multiple Authorizations may be required for certain activities.

Department means the Department of Public Works of the City of Durham.

Emergency means a condition that poses a clear and immediate danger to life or health, or a significant loss of property, or requires immediate repair to restore service to a group of users of such service.

Excavate means without limitation any cutting, digging, grading, tunneling, boring, or other alteration of the surface or subsurface material or earth in the Public Way.

Facilities means poles, pipes, culverts, conduits, ducts, cables, wires, fiber, amplifiers, pedestals, antennae, transmission or receiving equipment, other electronic equipment, electrical conductors, manholes, appliances, signs, poles, pavement structures, irrigation systems, landscaping, monument signs, monument mailboxes and any other similar equipment, for public or private use.

Person means an individual, association, firm, partnership, limited liability company, joint venture, corporation, government, utility, or other organized entity able to contract for the activities described in this ordinance, whether for profit or not for profit. The term does not include the City of Durham.

Public Way means the area that is used as, or offered, dedicated, or reserved for use as a public street, highway, alley, trail, sidewalk, curb, gutter, bike lane, bridge, round-about, tunnel, causeway, or shoulder, that is located in the City or in an area proposed for annexation to the City. The area also includes, without limitation, drainage areas and dedicated areas without surface improvements that are adjacent to improved areas, and areas where no roads or other improvements have been constructed but which are dedicated for one or more of the above uses. The Public Way encompasses the surface of the ground, and the area above and below the ground.

User means a Person that proposes to place Facilities in the Public Way, places such Facilities, or owns or maintains such Facilities. The term includes but is not limited to Licensees and Franchisees.

Sec. 62-51 General conditions for use of the Public Way

The provisions of this Division 1 (Sec. 62-51 through 62-56) apply to work performed in the Public Way and to Facilities that have been placed in the Public Way. Noncompliance with a requirement in this Division is a violation of the law and is subject to all remedies available under the law to the City.

The right to perform work in the Public Way and the ability to maintain Facilities in the Public Way are allowed subject to the conditions below, as supplemented by those set forth in other sections of this ordinance, standards adopted by the Department, and requirements contained in Authorizations.

(a) The City does not warrant its legal interest in the Public Way. Persons doing work in the Public Way and Users may need to obtain approvals from Persons with property interests in the Public Way.

(b) An Authorization does not grant exclusive rights to provide a service or to a particular location unless such rights are explicitly guaranteed in an Authorization.

(c) The City retains all rights it may have to use all portions of the Public Way for any purpose not prohibited by law.

(d) An Authorization does not convey any legal right, title, or interest in the Public Way.

(e) The City and its officials, officers, and employees are not liable for any direct, indirect, or consequential damages that result when Facilities in the Public Way are damaged during the construction, installation, inspection, maintenance, or repair of public improvements that have received City funding or that are installed pursuant to a contract with the City.

(f) Users and Persons who cause work to be done in the Public Way shall pay for all damage that results, directly or indirectly, from work performed for their benefit in the Public Way, and for the installation, repair, maintenance, and operation of their Facilities in the Public Way.

(g) Nonenforcement of one or more provisions of an Authorization does not waive the City's right to enforce the provisions of an Authorization.

(h) An Authorization creates no third party rights against the City and is intended only for the benefit of the Person receiving the Authorization.

(i) An Authorization does not limit the City's exercise of its regulatory, police, governmental, legislative, or contracting authority. A subsequent ordinance may regulate Users more strictly than is provided in prior Authorizations received by such Users. If an Authorization conflicts with the terms of another Authorization or with the City Code, the stricter of the applicable provisions shall control. The stricter provision shall not control, however, if a later-issued Authorization or ordinance explicitly and specifically states that particular terms are to override prior, less strict terms in an Authorization.

Sec. 62-52. Work in Public Way requiring prior notice; authorizations; standards; fees

(a) *Work requiring prior notice to Department.* Persons and Users shall give prior notice to the Department of the following activities, and obtain necessary authorizations before initiating the work:

- (1) Excavation or restoration within the Public Way, including but not limited to construction of new portions of the Public Way;
- (2) Cutting, moving, or alteration of any pipe, conduit, pole, meter, fire hydrant, Facility, or other equipment or structure owned by the City, or attachment to such objects;
- (3) Installation or repair of Facilities within the Public Way including but not limited to placing Facilities on other Facilities already located in the Public Way;
- (4) Construction of private streets (including but not limited to paving and gutters), sidewalks, or alleys;
- (5) Installation or repair of Facilities for the conveyance of water, sewer, or stormwater; and
- (6) Installation or repair of Facilities for electrical, gas, video, internet, telephone, cable, telecommunications, television, or other information or data transfer service to customers within

the City.

(b) *Authorizations – franchises, licenses, permits, construction drawings, and other approvals.* The Department may require, in its discretion, one or more Authorizations for the work described in (a) above, and may require submission of all information it deems necessary for receipt of such Authorization(s). The Department shall determine, in its discretion whether a franchise, a license, a permit, construction drawings, or other type of authorization shall be required, or multiple authorizations, for work described in (a) above and for Users with Facilities in the Public Way.

(c) *Unlawful to do work without Authorizations; emergency.* Except in the event of an emergency, it shall be unlawful to do work in the Public Way or maintain Facilities in the Public Way without Authorizations that may be necessary. In the event of an emergency, a Person may do such work as is necessary to address the emergency. Application shall immediately be made for necessary authorizations from the City, notwithstanding that work may have started or have been completed and all necessary fees shall be paid.

(d) *Standards.* The Department shall develop standards and requirements for Authorizations, including but not limited to franchises, licenses, permits, and other approvals, and may attach conditions to such authorizations. The Department may also develop standards and requirements for doing work in the Public Way when an authorization is not required.

(d) *List of contractors.* The Department may require that Franchisees and Persons who contract to have work performed in the Public Way maintain an updated list of the contractors working on their projects, and acknowledge responsibility for the actions of the contractors on the Public Way.

(e) *Fees; accounts.* The Department shall charge such fees as are authorized by the City Council for Authorizations; applications for Authorizations; review of information and plans; inspections and reinspections; maintenance of Facilities in the Public Way; and for any other city review, oversight, or administration of proposed, ongoing, or completed activities described in (a) above. The Department may allow Persons to establish and fund escrow accounts or other accounts with the City to which fees may be charged.

(f) *Reinspection fees.* The Department shall charge fees as are authorized by the City Council for additional reviews and inspections required for work not completed to City standards and/or work that damaged existing infrastructure.

(g) *Civil Penalties.* Any person who violates this article may be subject to all civil and equitable remedies stated in North Carolina General Statute 160A-175. Notwithstanding the foregoing, the violation of a stop work order issued pursuant to Section 62-52g shall constitute a misdemeanor punishable under N.C. General Statute 14-4.

The Department shall charge civil penalties as are authorized by the City Council for:

- i. Violation of Section 62-52(a) and/or 62-52(b)
- ii. Additional violations of Section 62-52(a) and/or 62-52(b) by the same User within 1 year of the first violation

Civil penalties authorized by this section may be assessed against the User on whose behalf work is being performed and against the contractor or subcontractor who is performing such work. Billings not paid within 30 days will be assessed a late fee of 1% of the unpaid balance per month.

(h) *Stop Work Order.* The city may issue a stop work order to any person or entity performing work in the Public Way where there is a violation of this section. A stop work order shall be in writing, state the work to be stopped, state the reasons therefore, and state the conditions under which the work may be resumed.

Sec. 62-53 General requirements for work in the Public Way

(a) *Permits; required information.* Persons doing work in the Public Way and Users, including but not limited to Users with a franchise or license with the City, shall obtain required permits and shall pay applicable application, review, permit, and inspection fees. Permits may be denied if the Person or User owes money to the City for prior fees, restoration costs, or other costs sustained by the City in connection with work or Facilities in the Public Way. Applicants for permits shall furnish drawings, maps, and any other information that may be required by the Department in the form the Department requests and shall seek approval of construction plans, if required.

(b) *Compliance with requirements; revocation of Authorizations.* Persons and Users shall comply with this ordinance, with the additional standards adopted by the Department, and with the requirements of Authorizations. The Department may revoke an Authorization for noncompliance with its terms and conditions or implementing standards and requirements or when an activity endangers the public health or safety.

(c) *Bonds; performance guarantees.* The City may require a Person conducting activities in the Public Way or a User to provide a performance bond or other performance guarantee for the work in (a) above or for keeping Facilities in the Public Way. The amount, form, and content of the guarantee shall be determined in the discretion of the City. The City may increase or decrease the amount of the bond or performance guarantee required. The City shall determine, in its discretion, the time period for which a performance guarantee shall be kept in force. The City may consider, among other things, the time period for a project and assessment of the performance of the project, the length of a license or franchise, and/or the projected time during which Facilities will exist in the Public Way. The performance guarantee shall, among other things, ensure compensation for i) damages resulting from the proposed work or a User's maintenance of Facilities in the Public Way; ii) direct and indirect costs to the City of remedying damage to the Public Way or Facilities within the Public Way; iii) direct and indirect costs to the City of remedying noncompliance with City ordinances or Authorizations; and iv) fines or penalties owed to the City. The rights reserved to the City under a bond or performance

guarantee do not limit the claims or rights the City may bring against a Person, except where a bond or guarantee has fully satisfied a City claim. Every bond shall require the surety to provide notice of cancellation or nonrenewal by registered or certified mail, which notice must be received by the Department at least 30 days prior to any cancellation or nonrenewal.

(d) *Insurance.* The City may require Persons that do work in the Public Way and Users to provide insurance by a company authorized to do business in North Carolina, including but not limited to: i) workers' compensation coverage for all employees; ii) employers' liability insurance; iii) commercial general liability; and iv) business auto policy. The City may require that the City of Durham be named as an additional insured on such insurance policies. The amount of insurance shall be as determined by the City.

(e) *No interference with City utilities.* Persons doing work in the Public Way shall not interfere with existing City utilities, such as infrastructure for water and sewer, the natural and constructed stormwater system, and traffic signals and associated lines, or the repair or replacement of such systems. Persons doing work in the Public Way shall give the Department at least 10 working days to locate and mark any existing City utility lines prior to initiating work. Damage to City utilities or other infrastructure shall be paid for by the Person or User contracting for the work that resulted in such damage. If Facilities are installed in violation of this provision, the City may require their removal, at the owner's expense.

(f) *Compliance with regulations, safety standards, and industry codes.* Persons and Users performing work in the Public Way shall ensure worker, traffic, and pedestrian safety and shall ensure that all work is performed in accordance with industry standards. Compliance with all federal, state, and local regulations, and all federal, state, local and industry codes and standards is required. These include but are not limited to compliance with the Occupational Safety and Health Act; compliance with the National Electrical Code and National Electrical Safety Code; compliance with fiber optic installation standards and telecommunication industry standards; compliance with plumbing and pipe installation codes and standards; and compliance with standards and codes for traffic safety and lane closures. Persons and Users shall provide all equipment and personnel necessary to meet applicable regulations, codes, and standards and shall furnish additional equipment or personnel if requested by the City. Information requested by the City regarding compliance with these standards shall be provided within the time frame requested by the City.

(g) *Licensed professionals.* Work in the Public Way shall be performed and supervised by licensed professionals where required under state law.

(h) *Notice of beginning and end of project.* Persons doing work in the Public Way shall notify the Department upon beginning and ending a project in the Public Way.

(i) *Inspections; fees.* The Department may conduct inspections of work performed in the Public Way. Persons performing such work and Users shall comply with all directives of the City to facilitate such inspections. The Department may charge fees as set by the City Council for such inspections, which may be varied to account for the nature of the project, the number of

inspections required, or other factors. The Department may direct a Person or User to do additional work as a result of an inspection and such Person or User shall comply with such directive.

Sec. 62-54 Restoration of surrounding areas

(a) *Obligation to restore disturbed areas.* A Person or User that conducts excavation or other activities that disturb the Public Way or planting within the Public Way or Facilities within the Public Way shall restore the Public Way to a condition equivalent to that it was in prior to the disturbance. The restoration shall include but is not limited to installation of pavement, resurfacing nearby areas, grading other surface areas, restoring below ground areas, planting and landscaping, replacing curb ramps to current standard, and repairing improvements and Facilities. Restoration shall meet the standards set by the Department. The Department may also require restoration of areas that have not been disturbed if it is necessary to restore the disturbed areas to a similar functional condition as existed prior to the Person's or User's work.

(b) *Temporary restoration.* Where permanent restoration is impractical because of weather or other circumstances, the Department may require temporary restoration to be followed by permanent restoration.

(c) *Timetable set by City.* The Department shall determine the time period during which restoration must be accomplished.

(d) *Repair of inadequate restoration work.* Where restoration work proves to be inadequate over time, as determined in the Department's discretion, the Department may require additional restoration. Such additional restoration may be required for a period of three years from the date of completion of the initial restoration work. The Person or User responsible for the work necessitating the original restoration shall be responsible for the costs of the additional restoration. The Department's inspection and/or approval of original restoration work does not waive the Department's right to require additional restoration.

(e) *Reimbursement to City of costs of restoration.* If a User or other Person responsible for damage to the Public Way does not complete required restoration during the period required by the Department, the City may complete the restoration. The costs shall be promptly reimbursed by the User or the Person directing the original work that required restoration of the Public Way.

Sec 62-55. Additional requirements for location, relocation, maintenance and removal of Facilities in the Public Way.

In addition to complying with 62-51 through 62-54 above, Users that locate, relocate, repair, maintain, or remove Facilities in the Public Way shall also comply with the following requirements:

(a) *Locations determined in discretion of Department.* The Department shall have the discretion to approve, deny, alter, and condition all proposed locations of Facilities in the Public Way, and to determine whether placement, if allowed, shall be above ground or below ground.

(b) *Underground locations for wire and fiber.* Wires, fiber, and similar conduit shall generally be located underground. A User that wishes to place such Facilities above ground shall demonstrate to the City's satisfaction why above ground placement is necessary.

(c) *Existing ducts.* Facilities shall be located in existing ducts if such ducts are available and practicable to use, as determined in the discretion of the City, taking into account relevant considerations. A User shall take reasonable steps to procure the right to use existing ducts.

(d) *Documentation of sufficient space.* A User shall demonstrate to the Department's satisfaction that sufficient space exists in the Public Way for its proposed Facilities without interfering with existing or future public projects, and that placement of the Facilities will not unduly disrupt use of the Public Way or negatively impact the condition of the Public Way.

(e) *Posting of notice.* The city may require a User to post written notice of proposed work or activities along the Public Way impacted and/or to distribute notices to individual properties located along the Public Way.

(f) *Documentation to City upon completion.* Users shall give the Department all information it requests regarding the installation of Facilities upon completion. Such information may include, but is not limited to as-built or other maps, which shall be furnished in the form required by the Department, and changes to planned locations that were necessary to avoid pre-existing infrastructure.

(g) *Maps and information on file with Users.* During the time period a User has Facilities in the Public Way, the User shall maintain one or more maps showing the placement of its Facilities in the Public Way. A User shall also maintain other information regarding the function and capacity of its Facilities. Upon the City's request, the User shall furnish these maps and information to the City within the time period specified at no cost and in such form and detail as the City requires.

(h) *NC One Call.* Users with underground Facilities shall maintain a membership in the NC Underground Locating System during the time period Facilities are located in the Public Way and respond to and locate underground Facilities as required by the Underground Damage Prevention Act, NCGS 87-101 *et seq.*, and other applicable regulations and requirements.

(i) *Relocation of Facilities.* A User shall at its own cost relocate its Facilities within a time determined in the discretion of the City if the City determines in its discretion that the Facilities i) interfere with the use of the Public Way, or the provision of services to City residents; or ii) interfere with the repair or maintenance of any City-maintained utility; or iii) will impede the construction of a project funded in part with public funds, or a project to be dedicated to the public upon completion, or iv) that the Public Way can be better or more

efficiently utilized by the relocation of the Facilities.

(j) *Maintenance of Facilities.* Users shall monitor, maintain, and repair their Facilities in the Public Way so that they function in a safe manner and do not create a risk to persons or property. Users shall notify the Department of maintenance and repair work that may impact the Public Way or use of the Public Way. Users shall give the City all information requested regarding the condition of Facilities. Users shall repair Facilities upon City request.

(k) *Removal of Facilities in the Public Way.* Facilities placed in the Public Way without an Authorization, if one is required by the City, and Facilities for which a license or franchise has expired shall be removed upon order of the City. In addition, all abandoned Facilities or Facilities that no longer function as part of a User's system shall be removed by their Owner. If Facilities that are required to be removed are not removed, the City may remove them, with the cost of removal to be borne by the owner.

(l) *Third party use.* Users shall permit other Licensees and Franchisees, including holders of franchises awarded pursuant to N.C. Gen. Stat. section 66-350 et. seq., to utilize available space in or on the User's Facilities upon reasonable terms and charges negotiated by and agreed to by the respective Users, Franchisees, and Licensees. Charges calculated in accordance with section 224 of the Communications Act of 1934, as amended, 47 USC 224 shall constitute reasonable charges for pole attachments..

Sec. 62-56 Exemptions from Requirements

The Department may exempt its contractors or the North Carolina Department of Transportation (NCDOT) from particular requirements in Sec. 62-51 through 55 when substantial compliance has been assured through the City's contracting system, or, in the case of NC DOT, where the need for state infrastructure on city roads, or a joint undertaking by the City and NC DOT, or the use of state controlled areas of the Public Way makes the application of such requirements unreasonable.

Sec. 62-56 Franchises and Licenses

(a) *Services in the Public Way subject to a Franchise.* In order to place or maintain Facilities in the Public Way, all Persons that operate utilities that the City may franchise under the authority of NCGS 160A-319 or City Charter Sections 67 through 73 shall apply for a franchise to be approved by the City Council in accordance with City Charter. Services for which a franchise shall be required include telephone; electrical power; water; wastewater collection, treatment, or disposal; gas production, transmission or distribution; transportation; solid waste collection and disposal; off-street parking systems; and stormwater management and drainage services. All franchises shall provide the City with a performance bond or other performance guarantee. All franchises shall obtain a permit from Public Works prior to performing work in the Public Way.

(b) *Licenses.* A User shall apply for a License prior to placement or maintenance of Facilities in the Public Way in situations in which the City does not issue franchises. The Director of Public Works or designee shall determine, in his/her discretion, the necessity of a license and the type of license, taking into consideration the length of time the Facilities will be in the Public Way, the potential impact on the Public Way, and the City's prior practice. Facilities for which a license shall be required include monument signs, monument mailboxes, fiber optic cable, irrigation systems, specialty street signs, canopies, specialty pavement structures, and other features.

1. *Monument Signs and Mailboxes License.* A Monument Sign and Mailbox License may be granted by the City Council to construct and maintain a monument sign and/or monument mailbox within the Public Way.

2. *Telecommunications License.* A Telecommunication License may be granted to construct and maintain equipment that transmits/communicates between points specified by the User and provides services that are regulated under the Federal Telecommunications Act of 1996 and are not subject to a franchise agreement. This equipment shall be referred to as Telecommunications System. The City Council may grant a Telecommunications License for Users proposing to construct and maintain more than 5 miles of Telecommunications System within the Public Way. The Public Works Department may grant a Telecommunications License for Users proposing to construct and maintain 5 or less miles of Telecommunications System within the Public Way. A performance bond or other performance guarantee for the work shall be provided by the applicant to the Public Works Department prior to receiving the license.

3. *Licenses for other Facilities.* The Public Works Department may grant a license to construct and maintain other Facilities not included in 1 and 2 above.

(c) *Compliance with all other requirements.* The requirements of Sections 62-51 through 55 above apply to franchisees and licensees and all franchisees and licensees shall apply for necessary Authorizations from the Department in addition to the franchise or license they hold.

(d) *Contents of Franchises and Licenses.* Licenses and franchises shall, at a minimum, contain the following provisions:

1. The identity and legal status of the User;
2. The name and contact information for the officer, agent, or employee of User responsible for communications with the City, which shall be continuously updated as the information changes;
3. A general description of existing and proposed Facilities and the portions of the Public Way to be utilized for such Facilities, with additional specifics as may be required by the Department;
4. A description of the services, if any, to be offered within the City, and the parts of the City or properties within the City where such services will be available, which description shall be updated as services change;

5. A description of the services or Facilities to be offered to the City itself, or to other public or governmental institutions within the City, if any such services are to be offered;
6. Acknowledgment that the license or franchise does not limit the City's police power and that the City may enact additional ordinances, standards, and requirements that will apply to User;
7. Acknowledgment that the User will be required to obtain additional permits and approvals from the City beyond the license or franchise;
8. Acknowledgment that the User is responsible for all damage caused by its contractors;
9. Commitment to pay for all damages that arise in connection with the User's acts or omissions in the Public Way or the User's Facilities;
10. Commitment to defend and indemnify the City for all claims and liabilities that arise in connection with the User's acts or omissions in the Public Way or the User's Facilities;
11. A description of bonds or performance guarantees and insurance that are required, if any;
12. The time period of the franchise or license;
13. In the case of a franchise, acknowledgment that transfer or assignment requires approval of the City Council under Section 70 of the City Charter.

(e) *Assignment.* If a license allows assignment, notice of the assignment shall be given to the Department not less than 30 days prior to the assignment, with ownership and contact information updated to reflect the proposed assignment.

(f) *Information available to City.* All licenses and franchisees shall provide the City i) all books, data, records, maps, plans, GIS data files, billings, and payments or submissions to the state relating to the User's Facilities and their function, location, income, history, maintenance, and repair, and ii) filings with the NC Utilities Commission. The documents shall be provided within a reasonable period of time, not to exceed 30 days. The City may examine all such information at no cost. If information is copied for the City, the costs of copying, if any, shall be limited to the charges of a commercial copying facility selected by the City.

(g) *Declaration of forfeiture.* The City may declare a forfeiture of a license or franchise and all of the User's rights arising thereunder in the event the User does not comply with material provisions of its license or franchise, or is in substantial violation of this ordinance or other standards adopted by the City. The City shall give a franchisee or licensee at least 30 days' written notice of its intent to declare a forfeiture, which notice shall include a description of the noncompliance. The User shall have 30 days from receipt of the City's notice to cure the noncompliance or to make substantial progress toward such cure, as determined in the reasonable discretion of the City.

Sec. 3. §§62-57 through 62-78 shall be reserved for future use.

Sec. 4. This ordinance shall take effect upon passage by the Durham City Council.