

ORDINANCE NO. 2016-03, SERIES 2016

**AN ORDINANCE CREATING CHAPTER 9-1-14
OF THE FREDONIA MUNICIPAL CODE
RELATING TO THE OCCUPANCY OF PUBLIC RIGHT-OF-WAY BY UTILITIES**

The Village Board of the Village of Fredonia does hereby ordain as follows:

WHEREAS, pursuant to § 182.017(1r), Wis. Stats., a public utility may, subject to certain provisions of the Wisconsin Statutes and to reasonable regulations made by any municipality through which the public utilities' transmission lines or systems may pass, construct and maintain such lines or systems with all necessary appurtenances in, across or beneath any public highway or bridge; and

WHEREAS, pursuant to § 196.58(1r), Wis. Stats., the Village Board may determine by ordinance the terms and conditions upon which a public utility may be permitted to occupy the streets, highways or other public places within the Village of Fredonia; and

WHEREAS, the Village Board has considered, and desires to hereby establish, the terms and conditions for occupancy of the public rights-of-way within the Village,

NOW, THEREFORE, BE IT RESOLVED by the Village Board of the Village of Fredonia that, effective upon the date of adoption of this ordinance, the following terms and conditions shall regulate and govern the occupancy of the public rights-of-way:

CHAPTER 9-1-14

OCCUPANCY OF PUBLIC RIGHTS-OF-WAY BY UTILITIES

(1) **General Provisions.**

(a) **Purpose and Findings.** In the exercise of governmental functions, the Village has priority over all other uses of the public rights-of-way. The Village desires to anticipate and minimize the number of obstructions, degradation, and excavations taking place to regulate the placement of facilities in the rights-of-way to ensure that the rights-of-way remain available for public services and are safe for public use, and to ensure that facilities are timely maintained, supported, protected or relocated to accommodate reconstruction or repairs. The taxpayers of the Village bear the financial burden for the upkeep, maintenance and reconstruction of the rights-of-way and a primary cause for the early and excessive deterioration of its rights-of-way is the frequent excavation by persons who locate facilities therein.

The Village finds increased use of the public rights-of-way results in increased costs to the taxpayers of the Village and that these costs are likely to continue into the foreseeable future.

The Village finds that the above-ground use of public rights-of-way creates special and unique public health, safety, and general welfare concerns for the Village, including, but not necessarily limited to, traffic safety, sight-line and vision triangle issues, break-away design consistent with other public utility pole or structure requirements, public snow plowing and snow storage, property access and public parking, obstruction to municipal Police, Fire, and Rescue Services, and related issues.

The Village finds that delays by occupants of the rights-of-ways in maintaining, supporting, protecting or relocating facilities, if they impact public construction projects, have the potential to significantly increase public works project costs borne by the taxpayers. Moreover, the Village finds that some right-of-way occupants have a history of delays and non-responsiveness.

The Village finds that right-of-way, by definition, is limited in area, use, and availability, and, as a result, requires regulation and limitation of use and occupancy, subject to all applicable state, federal, and constitutional laws and regulations and the provision of all necessary utility services to the public.

The Village finds that occupancy and excavation of its rights-of-way causes costs to be borne by the Village and its taxpayers, including but not limited to:

1. Administrative costs associated with public right-of-way projects, such as registration, permitting, inspection and supervision, supplies and materials.
2. Management costs associated with ongoing management activities necessitated by public right-of-way users.
3. Repair or restoration costs to the roadway associated with the actual excavation into the public right-of-way.
4. Degradation costs defined as depreciation caused to the roadway in terms of decreased useful life due to excavations in the public right-of-way.

In response to the foregoing facts and findings, the Village hereby adopts this ordinance relating to access to, administration of, and permits to excavate, obstruct and/or occupy the public rights-of-way. This ordinance imposes reasonable regulations on the placement and maintenance of equipment currently within its rights-of-way or to be placed therein in the future. It is intended to complement the regulatory roles of state and federal agencies.

The purpose of this ordinance is to provide the Village a framework within which to regulate and manage the public rights-of-way and to provide for recovery of

the costs incurred in doing so. This ordinance provides for the health, safety and welfare of the residents of the Village as they use the right-of-way of the Village, as well as to ensure the structural integrity of the public rights-of-way.

(b) Definitions. The following definitions apply in this ordinance. References hereinafter to “sections” are, unless otherwise specified, references to sections in this ordinance. Defined terms remain defined terms whether or not capitalized.

“Applicant” means any person requesting permission to excavate, obstruct and/or occupy a right-of-way.

“Bridge” means any bridge or culvert or series of culvert.

“Degradation” means the decrease in the useful life of the paved portion of the right-of-way, excluding the sidewalk right-of-way, caused by an excavation of the right-of-way, resulting in the need to reconstruct such right-of-way earlier than would be required if the excavation did not occur.

“Department” means the Department of Public Works of the Village.

“Emergency” means a condition that (1) poses a clear and immediate danger to life or health or of a significant loss of property; or (2) requires immediate repair or replacement in order to restore service to a customer.

“Director of Public Works” means the Village Director of Public Works or his/her designee.

“Excavate” means to dig into or in any way remove or physically disturb or penetrate any part of a right-of-way.

“Facilities” means all equipment owned, operated, leased or subleased in connection with the operation of a public service or utility service, and shall include, but is not limited to, poles, wires, pipes, cables, underground conduits, ducts, manholes, vaults, fiber optic cables, lines and other structures and appurtenances.

“In”, when used in conjunction with “right-of-way”, means over, above, within, on or under a right-of-way.

“Local representative” means a local person or persons, or designee of such person or persons, authorized by a registrant to accept service and to make decisions for that registrant regarding all matters within the scope of this ordinance.

“Municipal Code” means the Municipal Code of the Village of Fredonia, as amended.

“Obstruct” means to place any object in a right-of-way so as to hinder free and open passage over that or any part of the right-of-way.

“Permittee” means any person to whom a permit to occupy, excavate or obstruct a right-of-way has been granted under this ordinance or under Chapter 6, Municipal Code.

“Person” means corporation, company, association, firm, partnership, limited liability company, limited liability partnership and individuals and their lessors, transferees and receivers.

“Prequalified Contractor” means a contractor approved by the Department on an annual basis to work in the right-of-way.

“Public Utility” has the meaning provided in § 196.01(5), Wis. Stats.

“Registrant” means any person who has registered with the Village to have its facilities located in any right-of-way.

“Repair” means to perform construction work necessary to make the right-of-way useable for travel or its intended use according to Department specifications, or to restore equipment to an operable condition.

“Restore” means the process by which the excavated right-of-way and surrounding area, including pavement and foundation, is reconstructed to Department specifications.

“Right-of-Way” means the surface and space above and below an improved or unimproved public roadway, highway, street, bicycle lane and public sidewalk in which the Village has an interest, including other dedicated rights-of-way for travel purposes.

“Section” without reference to the Municipal Code shall mean a subsection within this chapter Chapter 9-1-14.

“Village” means the Village of Fredonia, Wisconsin, a municipal corporation.

(c) Administration. The Director of Public Works or his/her designee is responsible for administration of the rights-of-way and the permits and ordinances related thereto.

(2) Registration for Right-of-Way Occupancy.

- (a) Each person who has, or seeks to have, facilities located in any right-of-way shall register with the Department and pay the fee set forth in Section (4). Registration will consist of providing application information and paying a registration fee. This section shall not apply to those persons who have facilities in the right-of-way pursuant to a franchise or other agreement.
- (b) No person may construct, install, maintain, repair, remove, relocate or perform any other work on, or use any equipment or any part thereof in any right-of-way unless that person qualifies as a registrant, is registered with the Department, or is a prequalified contractor.
- (c) Nothing herein shall be construed to repeal or amend the provisions of a Village ordinance requiring persons to plant or maintain the parkway in the area of the right-of-way between their property and the street curb or pavement, construct sidewalks or driveways or other similar activities. Persons performing such activities shall not be required to obtain any permits under this ordinance.
- (3) Registration Information. The information provided to the Department at the time of registration, in order to qualify as a registrant, shall include, but not be limited to, the following:
- (a) Each registrant's name, Diggers Hotline registration certificate number, address and email address, if applicable, and telephone and facsimile numbers.
- (b) The name, address and e-mail address, if applicable, and telephone and facsimile numbers of a local representative. The local representative or designee shall be available at all times. Current information regarding how to contact the local representative in an emergency shall be provided at the time of registration.
- (c) A certificate of insurance on a form prescribed by the Department.
- (d) If the registrant is a corporation, an LLC or LLP, a copy of any certificate required to be filed under Wisconsin Statutes as recorded and certified by the Secretary of State.
- (e) A copy of the registrant's certificate of authority from the Wisconsin Public Service Commission or other applicable state or federal agency, where the person is lawfully required to have such certificate from said commission or other state or federal agency.
- (f) Execution of an indemnification agreement in a form prescribed by the Department.
- (g) The registrant shall keep all of the information listed above current at all times by providing to the Department information as to changes within fifteen (15)

working days following the date on which the registrant has knowledge of any change.

- (4) Registration Fee. The Department shall charge an annual Registration Fee in an amount of \$50 to recover the costs incurred by the Village for processing and updating registration information.

- (5) Reporting Obligations. It is in the best interests of all affected parties to attempt to coordinate construction in the public right-of-way whenever it is reasonably possible. Therefore, periodic reporting by the registrant of known construction plans will be useful to achieve this objective.

(a) Every registrant shall, at the time of registration and no later than January 1 of each year, file a construction and major maintenance plan with the Department. The Department shall make available at the time of registration, if known and approved, the Department's construction and major maintenance plan. The registrant's plan and the Department's plan shall be submitted on a form prescribed by the Department and shall contain the information determined by the Department to be necessary to facilitate the coordination and reduction in the frequency of excavations of rights-of-way. The plan shall include, but shall not be limited to, the following information:

1. The locations and the estimated beginning and ending dates of all projects planned to be commenced during the next calendar year; and
2. The tentative locations and estimated beginning and ending dates for all projects contemplated for the two years following the next calendar year.

(b) By February 1 of each year, the Department will have available for inspection in its office a composite list of all projects of which the Department has been informed in the annual plans. All registrants are responsible for keeping themselves informed of the current status of this list.

(c) Thereafter, by February 15, each registrant may change any project in its list and must notify the Department of all such changes in said list. The Department will make all such changes available for inspection in its office. Notwithstanding the foregoing, a registrant may at any time join in a project of another registrant listed by the other registrant or undertake any maintenance project not listed in registrant's plan.

- (6) Permit to Install, Excavate, or Otherwise Occupy Right-of-Way Required.

(a) Permit Required. Except as otherwise provided in this ordinance or the Municipal Code, no person shall install facilities, excavate, or otherwise occupy

any right-of-way without first having obtained a permit for same from the Department. A copy of any permit issued under this ordinance shall be made available at all times by the Permittee at the indicated work site and shall be available for inspection by the Department upon request.

(b) Permit Application. Application for a permit shall be made to the Department. Permit applications shall contain, and will be considered complete only upon compliance with the requirements of the following provisions:

1. Registration and qualification as a registrant with the Department if required by this ordinance.
2. Submission of a completed permit application form, including all required attachments, and scaled drawings showing the location and area of the proposed project and the location of all existing and proposed facilities that are part of applicant's proposed project.
3. Payment of all money due to the Village for all of the following:
 - a. applicable permit fees and costs as set forth below;
 - b. subject to Section (6)(b)4, unpaid fees or costs due for prior excavations;
 - c. subject to Section (6)(b)4., any loss, damage, or expense suffered by the Village because of applicant's prior excavations of the rights-of-way or any emergency actions taken by the Village.
4. The Department shall not deny an applicant an excavation permit because of a dispute between the Village and the applicant related to Section (6)(b)3.a. or c. if:
 - a. the dispute has been adjudicated in favor of the applicant; or
 - b. the dispute is the subject of any appeal filed by the applicant and no decision in the matter has as yet been rendered.

(7) Installation/Excavation/Occupancy Permit Fee. The Permit Fee shall be established by the Department in an amount sufficient to recover the costs incurred by the Village. This fee shall recover administrative and inspection costs, excavation costs, as well as degradation costs, as defined below. Payment of said fees shall be collected prior to issuance of the permit. However, the Director of Public Works may establish a fee collection process from governmental agencies and private utilities in order to expedite the permitting system and recognize that certain excavations are deemed emergencies.

(a) Waiving of Fees. Fees shall not be waived unless the work involved is a direct result of the Director of Public Work's demand that facilities owned by a

utility be removed or relocated or unless waived by the Village Board upon review of the Director of Public Work's decision.

(b) **Fee Schedule.** The minimum fee for each excavation permit for a single address shall be as set forth in section 11.16 of the Municipal Code. The fee for a permit issued after commencing work, except in cases of emergency as determined by the Director of Public Works, shall be double the fees set forth herein. This permit fee shall be in addition to any forfeiture provided elsewhere in the Municipal Code.

For those permit applications which provide for a substantial undertaking of excavation within the public right-of-way attended by disruption of the general public and traffic, the Director of Public Works is authorized to assess the actual cost of the Village employee's time engaged in the review and inspection of the anticipated work, multiplied by a factor determined by the respective department to represent the Village's cost for statutory expense, benefits, insurance, sick leave, holidays, vacation and similar benefits, overhead and supervision, said factor not to exceed 2.0, plus the cost of mileage reimbursed to Village employees which is attributed to the work, plus all consultant fees associated with the work at the invoiced amount plus ten percent (10%) for administration.

(c) **Village Exemption.** The Village and its contractors shall not pay degradation fees for excavations due to general government functions.

(d) **Permit fees paid for a permit that the Department has revoked are not refundable.**

(8) **Right-of-Way Repair/Restoration.**

(a) The Permittee shall be required to repair the public right-of-way to Department specifications, subject to inspection and acceptance by the Department. In addition to repairing its own work, the Permittee must repair the general area of the work, and the surrounding areas, including the paving and its foundations, to the specifications of the Department. The Department shall inspect the area of the work and accept the work when it determines that proper repair has been made, per specifications of the Department.

(b) **Guarantees.** The Permittee guarantees its work and shall maintain it for thirty-six (36) months following its completion. During this period it shall, upon notification from the Department, correct all work to the extent necessary, using the method required by the Department. Said work shall be completed within ten (10) calendar days of the receipt of the notice from the Department, not including days during which work cannot be done due to circumstances constituting force majeure.

(c) Failure to Repair/Restore. If the Permittee fails to repair/restore the right-of-way in the manner and to the condition required by the Department, or fails to satisfactorily and timely complete all work required by the Department, the Department at its option may do such work. In that event the Permittee shall pay to the Village, within thirty (30) days of billing, the cost of repairing/restoring the right-of-way.

(9) Inspection.

(a) Notice of Completion. When the work under any permit hereunder is begun and completed the Permittee shall notify the Department.

(b) Site Inspection. Permittee shall make the work site available to the Department and to all others as authorized by law for inspection at all reasonable times during the execution of and upon completion of the work.

(c) Authority of Department. At the time of inspection the Village may order the immediate cessation of any work which poses a threat to the life, health, safety or well-being of the public. The Village may issue an order to the registrant or Permittee for any work that does not conform to applicable Village standards, conditions or codes. The order shall state that failure to correct the violation will be cause for revocation of the permit. Within ten (10) days after issuance of the order, the registrant or Permittee shall present proof to the Department that the violation has been corrected. If such proof is not presented within the required time, the Department may revoke the permit pursuant to Section (12).

(10) Ongoing Management Fees. The cost of trimming trees around facilities is an ongoing expense to the Village. Such costs will be determined and a fee to offset costs may be assessed against permit holders in the future.

(11) Compliance with Other Laws. Obtaining a permit to excavate, install and/or occupy the right-of-way does not relieve Permittee of its duty to obtain all other necessary permits, licenses, and authority and to pay all fees required by any other Village, county, state, or federal rules, laws or regulations. A permittee shall comply with all requirements of local, state and federal laws. A permittee shall perform all work in conformance with all applicable codes and established rules and regulations, and is responsible for all work done in the right-of-way pursuant to its permit, regardless of who performs the work.

(12) Revocations, Suspensions, Refusals to Issue or Extend Permits.

(a) The Department may refuse to issue a permit or may revoke, suspend or refuse to extend an existing permit if it finds any of the following grounds:

1. The applicant or Permittee is required to be registered and has not done so.

2. Issuance of a permit or installation of facilities for the requested date or location would interfere with an exhibition, celebration, festival or other event.
3. Misrepresentation of any fact by the applicant or Permittee.
4. Failure of the applicant or Permittee to maintain required bonds and/or insurance.
5. Failure of the applicant or Permittee to complete work in a timely manner.
6. The proposed activity is contrary to the public health, safety or welfare.
7. The proposed activity requires above-ground structures causing safety issues including, but not limited to, sight-line safety, vision triangles, break-away structures, public plowing and snow storage, obstruction to municipal Police, Fire, and Rescue services, and related issues with the use of the right-of-way.
8. The extent to which right-of-way space where the permit is sought is available.
9. The competing demands for the particular space in the right-of-way.
10. The availability of other locations in the right-of-way or in other rights-of-way for the facilities of the Permittee or applicant.
11. The applicability of Village ordinances, or other regulations of the right-of-way, including, but not limited to, Sections 86.16 (prohibiting interference with use of highway by the public) and 182.17 (prohibiting poles in front of residence or occupied business), Wis. Stats., that affect the location, type, height, size and/or use of facilities in the right-of-way.

(b) Discretionary Issuance. The Department may issue a permit where issuance is necessary (a) to prevent substantial economic hardship to a customer of the Permittee or applicant, or (b) to allow such customer to materially improve its utility service, or (c) to allow the Permittee or applicant to comply with state or federal law or Village ordinances or an order of a court or administrative agency.

(c) Appeals. Any person aggrieved by a decision of the Department revoking, suspending, refusing to issue or refusing to extend a permit may file a request for review with the Village Board. A request for review shall be filed within ten (10)

days of the decision being appealed. Following a hearing, the Village Board may affirm, reverse or modify the decision of the Department.

(13) Work Done Without a Permit.

(a) Emergency Situations. Each registrant shall immediately notify the Village by verbal notice on an emergency phone number provided by the Village of any event regarding its facilities that it considers to be an emergency. The registrant may proceed to take whatever actions are necessary to respond to the emergency. Within two business days after the occurrence of the emergency, the registrant shall apply for the necessary permits, pay the fees associated therewith and otherwise fully comply with the requirements of this ordinance. If the Village becomes aware of any emergency regarding a registrant's facilities, the Department may attempt to contact the local representative of each registrant affected, or potentially affected, by the emergency. The Village may take such action it deems necessary to protect public safety as a result of the emergency, the cost of which shall be borne by the registrant whose facilities occasioned the emergency.

(b) Non-Emergency Situations. Except in an emergency, any person who, without first having obtained the necessary permit, excavates, installs facilities within or otherwise attempts to occupy a right-of-way shall be subject to a stop-work order or other appropriate legal remedy, and must subsequently obtain a permit, and shall, in addition to any penalties prescribed by the Municipal Code, pay double the normal fee for said permit, pay double all the other fees required by this ordinance or other provisions of the Municipal Codes, deposit with the Department the fees necessary to correct any damage to the right-of-way, and comply with all of the requirements of this ordinance.

(14) Location of Facilities.

(a) Underground. Unless in conflict with state or federal law, except when existing above-ground facilities are used, the installation of new facilities and replacement of old facilities shall be done underground or contained within buildings or other structures in conformity with applicable codes.

(b) Limitation of Space. The Department may prohibit or limit the placement of new or additional facilities within the right-of-way if there is insufficient space to accommodate all of the requests of persons to occupy and use the right-of-way. In making such determination, the Department shall strive to the extent possible to accommodate all existing and potential users of the right-of-way, but may prohibit or limit the placement of new or additional facilities when required to protect public health, safety or welfare.

(c) Attachment to Bridges. Whenever an applicant or Permittee under this section requests permission to attach pipes, conduits, cables or wires to any

Village bridge structure, the applicant shall pay a fee of \$1,000 upon the granting of such permission to defray administrative expense in the analysis and inspection of such installation. The owner of such pipes, conduits, cables or wires shall be entitled to no compensation for removal or relocation of the same in the case of repair, removal, or replacement of said bridge structure by the Village.

(15) Relocation and Protection of Facilities. A registrant shall promptly and at its own expense maintain, support, protect or relocate its facilities in the right-of-way whenever the Village, or its agent, acting in its governmental capacity, requests such action to allow for public work in the right-of-way. The Village, or its agent, shall issue a due date for the work to the local representative of not less than seventy-two (72) hours, which due date shall be reasonable and based upon the actions to be undertaken by the registrant. If requested, the registrant shall restore the right-of-way following the completion of the work. If a registrant fails to perform the actions required herein by the due date, in addition to all other available legal remedies available to the Village, the registrant shall be subject to forfeitures as provided in §11.40.010, Municipal Code. Notwithstanding the foregoing, a person shall not be required to remove or relocate its facilities from a right-of-way which has been vacated in favor of a nongovernmental entity unless the reasonable costs thereof are first paid to the person therefore.

(16) Village Right to Self-Help. In the event that a registrant does not proceed to maintain, support, protect or relocate its facilities as ordered in (15), the Village may arrange to do the work and bill the registrant, said bill to be paid within thirty (30) days of the date mailing to the registrant.

(17) Abandoned Facilities.

(a) Discontinued Operations. A registrant who has determined to discontinue its operations in the Village must either:

1. Provide information satisfactory to the Department that the registrant's obligations for its facilities under this ordinance have been lawfully assumed by another registrant; or
2. Submit to the Department a proposal and instruments for dedication of its facilities to the Village. If a registrant proceeds under this clause, the Village may, at its option:
 - a. accept the dedication for all or a portion of the facilities; or
 - b. require the registrant, at its own expense, to remove the facilities in the right-of-way at ground or above-ground level; or
 - c. require the registrant to post a bond or provide payment sufficient to reimburse the Village for reasonably anticipated costs to be incurred in removing the facilities.

However, any registrant who has unusable and abandoned facilities in any right-of-way shall remove it from that right-of-way within two years, unless the Department waives this requirement in writing.

(b) Abandoned Facilities. Facilities of a registrant who fails to comply with Section (17)(a)1., and which, for two (2) years, remain unused shall be deemed to be abandoned. Abandoned facilities are deemed to be a public nuisance. In addition to any remedies or rights it has at law or in equity, the Village may, at its option (i) abate the nuisance, (ii) take possession of the facilities, or (iii) require removal of the facilities by the registrant, or the registrant's successor in interest.

(c) Public Utilities. This Section (17) shall not apply to a public utility, as defined in § 96.01(5), Wis. Stats., that is required to comply with § 196.81, Wis. Stats.

(18) Reservation of Regulatory and Police Powers. The Village, by the granting of a permit to excavate, install facilities within, obstruct and/or occupy the right-of-way, or by registering a person under this ordinance, does not surrender, in any manner or to any extent lose, waive, impair or lessen the lawful powers and rights which it now has or which may be hereafter granted to the Village under the Constitution and statutes of the state of Wisconsin to regulate the use of the right-of-way by the permittee; and the permittee, by its acceptance of a permit to excavate, obstruct and/or occupy the right-of-way or of registration under this ordinance, agrees that all lawful powers and rights, regulatory powers, or otherwise as are or the same may be from time to time vested in or reserved to the Village, shall be in full force and effect, and permittee is subject to the regulatory and police powers of the Village to adopt and enforce general ordinances and ordinances necessary to the health, safety and welfare of the public, and is deemed to agree to comply with all applicable general ordinances and ordinances enacted by the Village pursuant to such powers.

(19) Severability. If any section, subsection, sentence, clause, phrase, or portion of this ordinance is for any reason held invalid or unconstitutional by any court or administrative agency 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.

(20) Penalty. Except as otherwise provided herein, and in addition to all other legal remedies available to the Village, any person who violates this ordinance or fails to comply with the provisions hereof shall be subject to forfeitures as provided in §11.40.010, Municipal Code.

(21) Effective Date. This ordinance shall be effective upon publication

Approved by the Village Board of the Village of Fredonia this 7th day of April, 2016.

Donald Dohrwardt
Village President

ATTEST:

Sandra Tretow
Village Clerk