CHAPTER 6 - PUBLIC IMPROVEMENTS

6.1 Enacting Ordinance. Unless otherwise indicated in section of this chapter, Chapter 6 of Dayton Code is enacted by Dayton City Ordinance #483, adopted and effective 08/01/94; and modified by Ordinances #486, adopted 10/03/94 and effective 11/03/94; #511, adopted 01/4/99 and effective 02/04/99; and #522, adopted 09/12/00 and effective 10/12/00.

6.2 Definitions.

(1) **"Developer"** means any individual or entity constructing, demolishing or repairing a public capital improvement within the City.

(2) **"Development"** means conducting a building or mining operation, making a physical change in the use or appearance of a structure or land, dividing land into two or more parcels, creating or terminating a right of access.

(3) **"Improvement Fee"** means a fee for costs associated with public capital improvements to be constructed after the date a systems development fee is adopted.

(4) **"Land Area"** means the area of a parcel of land as measured by projection of the parcel boundaries upon a horizontal plane with the exception of a portion of the parcel within a recorded right-of-way or easement subject to a servitude for a public street or scenic or preservation purpose.

(5) **"Owner"** means the owner or owners of record title or the purchaser or purchasers under a recorded sales agreement, and other persons having an interest of record in the described real property.

(6) **"Parcel of Land"** means a lot, parcel, block or other tract of land that is occupied or may be occupied by a structure or structures or other use, and that includes the yards and other open spaces required under the zoning, subdivision, or other development ordinances.

(7) **"Public Capital Improvement"** means improvement upon the property of the City or within an easement granted to the City which serves to further the operation of the city government and the interests and welfare of the public; for example, a facility or asset used for water supply, treatment and distribution; waste water collection, transmission, treatment and disposal; drainage and flood control; transportation; or parks and recreation.

(8) **"Qualified Public Improvement"** means a capital improvement that is (1) required as a condition of residential development approval; (2) identified in the City's improvement plan; and (3) not located on or contiguous to a parcel of land that is the subject of the residential development approval.

(9) **"Reimbursement Fee"** means a fee for costs associated with public capital improvements constructed or under construction on the date the systems development fee is adopted.

(10) **"Sewer Lateral Connection"** means the pipe and other equipment by means of which property owner conducts sewage from the premises served to the existing city sewer main within the city right of way.

(11) **"Sidewalk"** means that part of a street right-of-way between the curb line or the lateral line of the paved portion of the roadway and the adjacent property line, that is intended for the use of pedestrians.

(12) **"Single Living Unit"** means a residential structure or a portion of a residential structure generally intended for one family or fewer individuals (e.g. a single family home, half of a duplex, one apartment within a larger structure).

(13) **"Superintendent"** means the Superintendent of Public Works for the City of Dayton.

(14) **"Systems Development Charge"** means a reimbursement fee, an improvement fee or a combination thereof assessed or collected at the time of increased usage of a public capital improvement, at the time of issuance of a development permit or building permit, or at the time of connection to the public capital improvement. "Systems development charge" includes that portion of a sewer or water system connection charge that is greater than the amount necessary to reimburse the city for its average cost of inspecting and installing connections with water and sewer facilities. "Systems development charge" does not include fees assessed or collected as part of a local improvement district or a charge in lieu of a local improvement district assessment, or the cost of complying with requirement or conditions imposed by a land use decision.

(15) **"Water Service Connection"** means the pipe, valves and other equipment by means of which the City conducts water from the city water system to and through the meter, but not including piping from the meter to the premises served. Each water meter shall be placed within two feet of the city right of way.

6.3 Systems Development Charges.

6.3.1 Purpose. The purpose of the systems development charge is to impose a portion of the cost of public capital improvements for water, waste water drainage, streets, flood control, and parks upon those developments that create the need for or increase the demands on public improvements.

6.3.2 Scope. The systems development charge imposed by this section of Dayton Code is separate from and in addition to any applicable tax, assessment, charge, or fee otherwise provided by law or imposed as a condition of development.

6.3.3 Systems Development Charge Established . Unless otherwise exempted by the provisions of Dayton Code or other local or state law, a systems development charge is imposed upon all parcels of land within the city, and upon all lands outside the boundary of the city that connect to or otherwise use the sewer facilities, storm sewers, or water facilities of the city. The amount of the system development charge shall be set by resolution of City Council.

6.3.4 Calculation . The calculation of a reimbursement fee shall consider the cost of the then-existing facilities, prior contributions by the then-existing users, the value of unused capacity, rate-making principals employed to finance publicly owned public capital improvements, and other relevant factors identified by council to promote the objective that future systems users shall contribute no more than an equitable share of the cost of the then-existing facilities. The calculation of an improvement fee shall consider the

cost of projected public capital improvements needs to increase the capacity of the systems to which fee is related.

6.3.5 Authorized Expenditures .

(1) Reimbursement fees shall be applied only to public capital improvements associated with the systems for which the fees are assessed, including expenditures relating to repayment of indebtedness.

(2) Improvement fees shall be spent only on capacity increasing public capital improvements, including expenditures relating to repayment of future debt for the improvements. An increase in system capacity occurs if a capital improvement increases the level of performance or service provided by existing facilities or provides new facilities. The portion of the improvements funded by improvement fees must be related to demands created by development. A public capital improvement being funded wholly or in part from revenues derived from the improvement fee shall be included in the City's improvement plan.

(3) Notwithstanding subsection (1) and (2) of this section, systems development charge revenues may be expended on the direct costs of complying with the provisions of this section of Dayton Code, including the costs of developing systems development charge calculations and providing an annual accounting of systems development charge expenditures.

6.3.6 Expenditure Restrictions. Systems development charges shall not be expended for costs associated with the construction of administrative office facilities that are more than an incidental part of other public capital improvements, or for costs of the operation or routine maintenance of public capital improvements.

6.3.7 Improvement Plan. The council shall adopt a plan that:

(1) Lists the public capital improvements that may be funded with improvement fee revenues;

(2) Lists the estimated cost and time of construction of each improvement; and

(3) Describes the process for modifying the plan.

6.3.8 Collection of Charge.

(1) The systems development charge is payable upon issuance of a building permit, a development permit, a permit to connect to the water system or a permit to connect to the sewer system.

(2) If development is commenced or connection is made to the water or sewer systems without an appropriate permit, the systems development charge is immediately payable upon the earliest date that a permit was required.

6.3.9 Delinquent Charges; Hearing.

(1) When a systems development charge has not been paid, the city recorder shall report to the council the amount of the uncollected charge, the description of the

real property to which the charge is attributable, the date upon which the charge was due, and the name of the owner.

(2) The city council shall, by motion, schedule a public hearing on the matter and direct that notice of the hearing be given to each owner with a copy of the city recorders report concerning the unpaid charge. Notice of the hearing shall be given either personally or by certified mail, return receipt requested, and by posting notice on the parcel at least 10 days before the date set for the hearing.

(3) At the hearing, the council may accept, reject, or modify the determination of the city recorder as set forth in the report. If the council finds that a systems development charge is unpaid and uncollected, it shall, by motion, direct the city recorder to docket the unpaid and uncollected systems development charge in the lien docket. Upon completion of the docketing, the city shall have a lien against the described land for the full amount of the unpaid charge, together with interest accruing at the rate of 10% per year and with the city's actual cost of serving notice or the hearing on the owners. The lien shall be enforceable in the manner provided in ORS Chapter 223.

6.3.10 Installment Payment.

(1) When a systems development charge of $25 or more is due and collectable, the owner of the parcel of land subject to the development charge may apply for payment in 20 semi-annual installments, to include interest on the unpaid balance, in accordance with ORS 223.208.

(2) The city recorder shall provide application forms for installment payments, which shall include a waiver of all rights to contest the validity of the lien, except for the correction of computational errors.

(3) An applicant for installment payments shall have the burden of demonstrating the applicant's authority to assent to the imposition of a lien on the parcel and that the interest of the applicant is adequate to secure payment of the lien.

(4) The city recorder shall docket the lien in the lien docket. From that time the city shall have alien upon the described parcel for the amount of the systems development charge, together with interest on the unpaid balance at the rate established by the council. The lien shall be enforceable in the manner provided in ORS Chapter 223.

6.3.11 Exemption.

(1) Structures and uses established and existing on or before August 1, 1994, are exempt from a systems development charge, except water and sewer charges, to the extent of the structure or use then existing and to the extent of the parcel of land as it is constituted on that date. Structures and uses affected by this subsection shall pay the water or sewer charges pursuant to the terms of this section of Dayton Code upon the receipt of a permit to connect to the water or sewer system.

(2) Additions to single-family dwellings that do not constitute the addition of a dwelling unit, as defined by the Building Code, are exempt from all portions of the systems development charge.

(3) An alteration, addition, replacement or change in use that does not increase the parcel's or structure's use of the public improvement facility.

(4) A project financed by city revenues is exempt from all portions of the systems development charge.

6.3.12 Credits.

(1) A systems development charge shall be imposed when a change of use of a parcel or structure occurs, but credit shall be given for the computed systems development charge to the extent that prior structures existed and services were established on or after June 1, 1994. The credit so computed shall not exceed the calculated systems development charge. No refund shall be made on account of such credit.

(2) A credit shall be given for the cost of a qualified public improvement associated with a residential development. If a qualified public improvement is located partially on and partially off the parcel that is the subject of the residential development approval, the credit shall be given only for the cost of the portion of the improvement not located on or wholly contiguous to the property. The credit provided for by this subsection shall be only for the improvement fee charged for the type of improvement being constructed and shall not exceed the improvement fee even if the cost of the capital improvement exceed the applicable improvement fee.

6.3.13 Segregation and Use of Revenue.

(1) All funds derived from a particular type of systems development charge are to be segregated by accounting practices from all other funds of the city. That portion of the systems development charge calculated and collected on account of a specific facility system shall be used for no purpose other than those set forth in section 6.2 of Dayton Code.

(2) The city recorder shall provide the city council with an annual accounting, based on the city's fiscal year, for systems development charges showing the total amount of systems development charge revenues collected for each type of facility and the projects funded from each account.

6.3.14 Appeal Procedure.

(1) A person aggrieved by a decision required or permitted to be made by the city recorder under this ordinance or a person challenging the propriety of an expenditure of systems development charge revenues may appeal the decision or the expenditure to the city council by filing a written request with the city recorder describing with particularity the decision or the expenditure from which the person appeals.

(2) An appeal of an expenditure must be filed within two years of the date of the alleged improper expenditure. Appeals of any other decision must be filed within 10 days of the date of the decision.

(3) The council shall determine whether the city recorder's decision or the expenditure is in accordance with Dayton Code section 6.3 and the provision of ORS 223.297 to 223.314 and may affirm, modify, or overrule the decisions. If the council determines that there has been an improper expenditure of systems development charge revenues, the council shall direct that a sum equal to the misspent amount shall be deposited within one year to the credit of the account or fund from which it was spent.

(4) A legal action challenging the calculation method adopted by the council pursuant to Dayton Code section 6.3.4 shall not be filed later than 60 days after the adoption.

6.3.15 Prohibited Connection. No person may connect to the water or sewer systems of the city unless the appropriate systems development charge has been paid or the lien or installment payments method has been applied for and approved.

6.3.16 Violation. Violation of Dayton Code section 6.3.15 is a class A infraction.

6.4 Special Assessments to Finance Improvements. *(Added by Ordinance #486, 10/03/94 and effective 11/03/94)*

6.4.1 Enacting Ordinance. Section 6.4 of Dayton Code is enacted by Dayton City Ordinance #486.

6.4.2 Engineer's Report. City Council shall initiate the construction, demolition or repair of a public improvement, that will require the city to levy a special assessment, by directing the city engineer to prepare a project description, including:

(1) a description of the boundaries of the district to be benefited and assessed for such improvement,

(2) a description of each parcel of land within the district,

(3) the names of recorded owners of land within the district,

(4) an estimate of all costs attributable to the project, and

(5) a recommendation of a fair apportionment of the cost of the project to the property specially benefited.

6.4.3 Notice of Hearing. If, after reviewing the engineer's report, the city council finds it is in the best interest of the city to proceed with the project, it shall direct the city recorder to give notice of a hearing, set for a date at least 10 days following first publication of notice, including the following:

(1) Statement that engineer's report of proposed project is available for public inspection at city hall;

(2) Statement that if prior to scheduled hearing, there are presented to the city recorder valid, written remonstrances by owners of two-thirds of the frontage of the property to be specially affected by such a project, the project will be abandoned for at least six months;

(3) A description of the property to be benefited by the project, the estimate of the unit cost and the total cost of the project to be paid by special assessments; and

(4) Date, time and place of the hearing.

Notice shall be given by the following:

(a) Two publications, one week apart, in a newspaper of general circulation within the city; and

(b) Written notice sent by certified mail to each recorded owner of property to be assessed for the project.

6.4.4 Assessment. If, following a public hearing about the proposed project the city council finds that it is in the best interest of the city to proceed, it shall adopt by ordinance a detailed plan for the project, including the engineer's report, any subsequent amendments to the engineer's report and a time line for the project. The council shall specify and levy assessments by ordinance, after the work is completed and total costs have been determined.

6.4.5 Additional Financing. When city council finds it is in the best interest of the city, it may pay a proportion of the cost of the project from other sources, including the general funds of the city; and the amount to be assessed to the property benefitted shall be proportionately reduced.

6.5 Standards and Specifications. *(Added by Ordinance #486, 10/03/94 and effective 11/03/94)*

6.5.1 Enacting Ordinance. Section 6.5 of Dayton Code is enacted by Dayton City Ordinance #483, and is amended by Dayton City Ordinance #486.

6.5.2 American Public Works Association. The City of Dayton adopts the specifications of the American Public Works Association, in its current edition and as it may be subsequently amended, as the standards and specifications for public improvements within the city.

6.5.3 Street Width. City street rights-of-way shall be 60 feet wide.

6.5.4 Sidewalks. Sidewalks shall be 5 feet wide and installed against the curb of the paved street surface.

6.6 Control of Public Improvements. *(Added by Ordinance #486, 10/03/94 and effective 11/03/94)*

6.6.1 Enacting Ordinance. Section 6.6 of Dayton Code is enacted by Dayton City Ordinance #486.

6.6.2 Procedure.

(1) All public improvements shall be designed and inspected under the direction of a Professional Engineer registered in the State of Oregon. At the completion of construction this Engineer shall submit a completion certificate to the city stating that all work has been completed in accordance with the approved project plans and specifications.

(2) All surveys for public improvements shall be performed under the direction of a Professional Engineer or Professional Land Surveyor registered in the State of Oregon.

(3) Materials and workmanship shall meet or exceed the adopted standards and at all time they shall be subject to the approval of the Public Works Superintendent.

(4) Approval by the City of plans and specifications for water and sewage facilities is contingent upon prior approval from the State Health Division and the Department of Environmental Quality.

(5) Upon completion of a public improvement project, the Developer shall submit one complete set of reproducible "As-Built" drawings, showing any deviations from the original construction drawings to the Superintendent.

(6) Prior to acceptance of public improvements by the City for operation and maintenance, a one-year guarantee on all materials and workmanship shall be provided to the City Administrator.

6.7 Procedure for Constructing Public Improvement Serving Single Living Unit. *(Added by Ordinance #486, 10/03/94 and effective 11/03/94)*

6.7.1 Enacting Ordinance. Section 6.7 of Dayton Code is enacted by Dayton City Ordinance #486.

6.7.2 Permit. Any developer wishing to construct a public improvement to serve a single living unit shall obtain a copy of Dayton Code chapter 6 and apply for a "Type A Construction Permit" from the City Administrator, prior to beginning construction. The base fee for a "Type A construction Permit" shall be set by city council by resolution. A "Type A Construction Permit" will normally be processed at the same time as any building permits.

6.7.3 Costs. In addition to the base permit fee, developer shall reimburse the City for any actual costs incurred by the City (e.g. engineer's or attorney's fees) in the inspection of the project or processing of the permit, within 30 days of billing by the City. In the event the developer does not reimburse the City for actual cost incurred by the City in the inspection of the project or processing of the permit, within 30 days of billing by the City, the City Recorder shall record a lien against the property in the amount of the sum to be reimbursed plus interest accruing at the rate of 9% per year. Superintendent shall determine when professional consultation is needed for an inspection.

6.7.4 Inspections. A tentative schedule for inspection of construction work will be established by the Superintendent at the time the permit is issued. In every case, inspection is required before any concrete is poured or any pipe is covered. The

developer shall obtain approval from the Superintendent before proceeding with construction.

6.7.5 Developer's Agreement. By his or her signature on a Type A Permit, the developer agrees as follows:

(1) To construct the improvement in accordance with the City's adopted standards;

(2) To guarantee all materials and workmanship incorporated into the work for a period of one year following final inspection and acceptance of the improvement by the City; and

(3) To indemnify and hold harmless the City and its agents from any liability resulting from the performance of the developer.

6.7.6 Acceptance. Upon completion of all work, the developer shall notify the Superintendent, who shall make a final inspection of the project. If the Superintendent finds that the public improvement project meets all requirements, he or she will accept the improvement and establish the term of the one-year guarantee period from the date of acceptance. This section of Dayton Code pertaining to acceptance does not apply to sidewalks, which shall be maintained pursuant to Dayton Code section 5.5.

6.8 Procedure for Constructing Public Improvement to Serve Anything Other than a Single Living Unit. *(Added by Ordinance #486, 10/03/94 and effective 11/03/94)*

6.8.1 Enacting Ordinance. Section 6.8 of Dayton Code is enacted by Dayton City Ordinance #486.

6.8.2 Permit. Any developer wishing to construct a public improvement to serve any structure or property other than a single living unit shall obtain a copy of Dayton Code chapter 6 and apply for a "Type B Construction Permit" from City Administrator, prior to beginning construction. Requirements for issuance of a Type B permit include:

(1) Prior satisfaction of planning, zoning, and building code requirements;

(2) Submission in triplicate to City Administrator of detailed construction plans and specifications prepared by a registered Professional Engineer, and return of one set of plans marked "Approved";

(3) Submission to the City Administrator of a copy of a construction performance bond or other written guarantee acceptable to the City in the full amount of the construction cost, guaranteeing materials and workmanship for a period of one year following acceptance of the improvements by the City, and ensuring the satisfactory repair or replacement of any public property or improvement damaged during construction;

(4) Submission to the City Administrator of a copy of a certificate indicating that the developer and each of his contractors is covered by public liability and property damage insurance in amounts of not less than $100,000/$200,000 liability and $50,000 property damage;

(5) Submission to the City Administrator of letters from applicable State agencies approving the plans and specifications; and

(6) Payment to the City Administrator of a base permit fee adopted by resolution of City Council.

6.8.3 Costs. In addition to the base permit fee, developer shall reimburse the City for actual costs incurred by the City (e.g. engineer's or attorney's fees) in the inspection of the project or processing of the permit, within 30 days of billing by the City. In the event the developer does not reimburse the City for actual costs incurred by the City in the inspection of the project or processing of the permit, within 30 days of billing by the City, the City Recorder shall record a lien against the property in the amount of the sum to be reimbursed plus interest accruing at the rate of 9% per year. Superintendent shall determine when professional consultation is needed for an inspection.

6.8.4 Inspections. A tentative schedule for inspection of construction work will be established by the Superintendent at the time the permit is issued. In every case, inspection is required before any concrete is poured or any pipe is covered. The developer shall obtain approval from the Superintendent before proceeding with construction.

6.8.5 Acceptance. Upon completion of all work, the developer shall notify the Superintendent, who shall make a final inspection of the project. If the Superintendent finds that the public improvement project meets all requirements, including the following, he or she will accept the improvement and establish the term of the one-year guarantee period from the date of acceptance:

(1) Construction is complete;

(2) The developer's engineer has submitted to the City Administrator a certificate of completion, reproducible "As-Built" plans and copies of any water and sewer line leakage tests;

(3) The developer has furnished the City Administrator with a copy of a non-lien affidavit certifying that all bills in connection with the work have been paid in full; and

(4) The developer has recorded plats or easements, acceptable to the city attorney, to ensure the City's access to the public improvement for the purposes of operation and maintenance.

This section of Dayton Code pertaining to acceptance does not apply to sidewalks, which shall be maintained pursuant to Dayton Code section 5.5.

6.9 Required Sidewalk Installation. *(Added by Ordinance #486, 10/03/94 and effective 11/03/94)*

6.9.1 Enacting Ordinance. Section 6.9 of Dayton Code is enacted by Dayton City Ordinance #486, adopted 10/03/94 and effective 11/03/94.

6.9.2 Requirements. Sidewalks, curbs and storm sewers, running the full length of contact between the property line and the public street right-of-way, shall be constructed, between the property line and the paved portion of the street, by any contractor constructing new construction or performing property renovations, that increase the

value of an improvement by 50% or more. Any recorded owner of property which is improved without the installation of sidewalks, curbs and storm sewers required by this section of Dayton Code, shall be guilty of a Class A infraction. Any real property which is improved without the sidewalks, curbs and storm sewers required by this section of Dayton Code, shall be a public nuisance which may be abated pursuant to the procedure contained in Dayton Code Chapter 5.

6.10 Reimbursement Districts. *(Added by Ordinance #565, 03/07/05 and effective same date)*

6.10.1 Definitions. For this subchapter the following terms are defined:

(1) **"City engineer"** or **"engineer"** means the person holding that designed by the council or city manager to perform the duties set out for the city engineer in this subchapter.

(2) **"City"** means the city of Dayton.

(3) **"Person"** means a natural person, firm, partnership, corporation, association or any other legal entity or any agent, employee or representative.

(4) **"Applicant"** means a person who is required or chooses to finance some or all of the cost of a street, water or sanitary sewer or storm water improvement, where the improvement is also available to serve or benefit property other than that of the applicant, and who applies to the city for reimbursement of the expense of the improvement.

(5) **"Street improvement," "water improvement," "sewer improvement" and "storm water improvement"** mean respectively:

A. A street or street improvement, including streets, storm drains, curbs, gutters, sidewalks, bike paths, traffic control devices, street trees, lights and signs and public rights-of-way;

B. A water or water line improvement, including extending a water line to property other than property owned by the applicant so that water service can be provided this property without further extension of the line;

C. A sanitary sewer, sewer line improvement or sewer pump station, including extending a sewer line to property other than property owned by the applicant so that sewer service can be provided this property without further extension of the line; and

D. A storm water improvement, including extending a storm water line to property other than property owned by the applicant so that storm water disposal for such property can be provided without further extension of the line.

(6) **"Public improvement"** means water, sanitary sewer, storm water, street, or sidewalk facilities, or the under grounding of public utilities.

(7) **"Reimbursement agreement"** means the agreement between an applicant and the city providing for the installation of and payment for public improvements within a reimbursement district.

(8) **"Reimbursement district"** means the area determined by the city council to derive a benefit from the construction of public improvements financed in whole or in part by an applicant.

(9) **"Reimbursement fee"** means the fee established by resolution of the city council and required to be paid by persons within a reimbursement district once they utilize the public improvement.

(10) **"Utilize"** means to use or benefit from a public improvement, to apply for a building or other permit which will allow for the use or increase in the use of a public improvement or to connect to a public improvement.

6.10.2 Application for a Reimbursement District.

(1) Any applicant who finances some or all of the cost of a public improvement available to provide service or benefit to property other than property owned by that person may, by written application filed with the city manager, request the city establish a reimbursement district. The improvement must be in a size greater than that which would otherwise ordinarily be required and must be available to provide service to property other than that owned by the applicant. Examples include:

A. Full-street improvements instead of half-street improvements;

B. Off-site sidewalks;

C. Connection of street sections for continuity;

D. Extension of water lines;

E. Extension of sewer lines; and

F. Sewer pump station.

(2) All applications must include the following:

A. A description of the location, type, size and cost of the public improvement eligible for reimbursement;

B. A map showing the properties to be included in a proposed reimbursement district;

C. The zoning for the properties;

D. The front or square footage of those properties (or other data appropriate for calculating the apportionment of the cost of the improvement among the properties); and

E. A listing of the property owned by applicant.

All applications must be accompanied by a fee in an amount sufficient to cover the cost of administrative review and notice required by this subchapter as set by city council resolution.

(3) If an application is submitted after the construction of the public improvement, the application must also include the date the city accepted the public improvement and evidence of the actual cost of the improvements shown by receipts, invoices or other documents. An application will not be complete until all such information is submitted to the city.

(4) If an application is submitted prior to the construction of the improvement, the application must be accompanied by an estimate of the cost of the improvement as evidenced by bids, projections, or other data. The application must also include the estimated date of completion of the public improvement. An application will not be complete until all such information is submitted to the city.

(5) An application may be submitted at any time prior to the installation of the public improvement but not later than 180 days after city acceptance of the improvement for which reimbursement is sought. The city manager may waive this limitation.

6.10.3 City Engineer's Report.

The city engineer will review the application and other materials submitted and prepare a written report for the city council that addresses the following factors:

(1) Whether the public improvement for which reimbursement is sought has capacity sufficient to allow use thereof by property other than property owned by the applicant;

(2) The area proposed to be included in the reimbursement district;

(3) The actual or estimated cost of the improvements within the area of the proposed reimbursement district and the portion of the cost for which the applicant should be reimbursed;

(4) A methodology for allocating the cost among the properties within the proposed district. Where appropriate, defining a "unit" for applying the reimbursement fee to property that may be partitioned, subdivided or otherwise modified at some future date. The methodology will include consideration of the improvement cost, prior contributions by property owners, the value of the unused capacity, rate-making principles associated with the financing of public improvements, and such other factors deemed relevant by the city engineer;

(5) The amount charged by the city for administering the agreement will be fixed by city council and included in the resolution approving and forming the reimbursement district. The administrative fee is payable to the city at the time the reimbursement agreement is signed;

(6) The time period for the right to reimbursement of not greater than 10 years; and

(7) Whether the street, water and sewer improvements will meet or have met city standards and specifications.

6.10.4 Amount to be Reimbursed.

(1) The potential amount of the reimbursement is limited to the following:

A. The costs of construction;

B. Engineering (including surveying and inspection) costs in an amount not to exceed 15 percent of the construction costs;

C. Off-site right-of-way purchase costs, limited to the reasonable market value of land or easements purchased by the applicant from third parties to complete off-site improvements;

D. Financing costs associated with the improvement to the extent the financing costs are not attributable to the applicant's property or project; and

E. Legal and other expenses incurred by the applicant to the extent such expenses relate to the preparation and filing of the application, the preparation of the report required by 6.10(3) and the hearing process set out in Sections 6.10(5) and 6.10(6).

(2) Regardless of amount or category, costs reimbursable or eligible for traffic impact fee credits or systems development charge credits which cannot be clearly documented or which are attributable to the applicant's property or project are not reimbursable.

(3) By submitting an application that seeks reimbursement of legal expenses, the applicant waives any attorney/client or attorney work product privilege that may exist in attorney billing statements or records in support of such application.

(4) A reimbursement fee will be determined for all properties that fall within the proposed reimbursement district. However, the applicant will not be reimbursed for that portion of the reimbursement fee representing the benefit to the applicant's property.

(5) The applicant will not be reimbursed for the portion of the reimbursement fee computed for any property owned by the city or other government.

6.10.5 Public Hearing.

(1) After the city engineer completes the report required by Section 6.10(3), the city council will hold an informational public hearing to give persons affected by the creation of the reimbursement district an opportunity to comment.

(2) Notice of the hearing will be given not less than two weeks or more than three week before the public hearing date. Notice will be given to the applicant and all property owners within the proposed district by certified mail, return receipt

requested or by personal service. Notice will be deemed complete as of the date it is mailed or served. The failure to receive actual notice of the hearing will not invalidate or effect any action of the city relative to the creation of the reimbursement district or any costs associated with such district.

(3) Formation of a district does not create either an assessment or a lien against property. The hearing is informational only and the creation of a district is not subject to termination by remonstrances to its formation. The city council has the sole discretion to decide whether or not a district is formed. If the city council decided to form a district, it will adopt resolution approving and creating the reimbursement district.

(4) If a reimbursement district is created prior to construction of the improvement, a second public hearing will be held after the improvement is accepted by the city. The city council may adopt a second resolution to reflect the actual cost of the improvement.

6.10.6 City Council Action.

At the conclusion of the first public hearing, the city council will by resolution approve, reject or modify the recommendations contained in the city engineer's report. If a reimbursement district is created, the resolution will include a copy of the city engineer's report as approved or modified and specify that payment of the reimbursement fee as determined by the council for each property is a precondition to receipt of any city permit necessary for development of that property. Any reimbursement district is deemed created of the date the council adopts a resolution under Section 6.10(5).

6.10.7 Reimbursement Agreement.

If the council creates a district, the city manager will enter into an agreement with the applicant containing the following:

(1) The public improvement will or do meet all applicable city standards;

(2) The amount of the potential reimbursement the applicant may receive along with an acknowledgement that the total amount of any reimbursement will not exceed the actual cost of the public improvement;

(3) The annual fee adjustment, if any;

(4) An applicant guarantee of the quality of the public improvement for at least 12 months after the date of city acceptance;

(5) An applicant agreement to defend, indemnify and hold the city harmless from any and all losses, claims, damage, judgments or other costs or expense arising from or related to the creation of the reimbursement district; and

(6) An applicant acknowledgement that the city is not obligated to collect the reimbursement fee from the affected property owners.

The city manager may include other provisions necessary to ensure compliance with this chapter.

6.10.8 Annual Fee Adjustment.

The city council in its sole discretion may grant an annual adjustment to the amounts established as the reimbursement fee at the time of the hearing on the engineer's report. If an adjustment is deemed appropriate, it will be applicable to the fee beginning on the first anniversary of the date of the city council resolution and computed on the reimbursement fees as simple interest. The adjustment will remain at the same percent for each year the district exists.

6.10.9 Notice of Adoption of Resolution.

The city will notify all property owners within the district and the applicant of the adoption of the resolution creating the district. The notice will include a copy of the resolution, a short explanation of when property owners are obligated to pay the reimbursement fee, and the amount of the fee and if there will be any annual adjustments to that fee.

6.10.10 Recording the Resolution.

The city recorder will record notice of the creation and nature of the reimbursement district with the Yamhill County Clerk to give notice of the district to potential purchasers of property within the district. Failure to make such recording will not effect the legality of the resolution nor any obligation to pay the reimbursement fee.

6.10.11 Contesting the Reimbursement District.

Any legal action intended to contest the creation of a reimbursement district or fee must be filed within 60 days of the city council adoption of a resolution relating to the application and must comply with the terms of ORS 34.010 to 34.100 (Writ of Review).

6.10.12 Obligation to Pay Reimbursement Fee.

(1) In addition to all other applicable fees and charges, a person applying for a permit related to property within a reimbursement district must pay to the city the reimbursement fee established by the city council under this subchapter. This obligation applies to the following activities if the person applies for a permit within the time specified in the resolution establishing the district:

A. A building permit for a new building or a permit for an addition, modification, repair or alteration to an existing building exceeding 25 percent of its value within any 12 month period. This does not apply to damage or destruction of the building by fire or natural disaster. "Value" means the amount shown on Yamhill County assessment and taxation records for the building real market value;

B. Approval of a final plat for a subdivision, re-plat or partition; or

C. Connection to or use of a water, sanitary sewer, storm water or street improvement, if the district is based on that improvement.

(2) The obligation to pay the reimbursement fee arises and accrues as of the time property within the district is deemed by the city to utilize the public improvement regardless of whether a person applies for or receives a permit connected with that utilization.

(3) City council determination of the properties liable for payment of the reimbursement fee is final. Neither the city nor any officer or employee of the city is liable for payment of any reimbursement fee as a result of this determination.

(4) A permit applicant whose property is subject to payment of a reimbursement fee related to the construction of street improvements is deemed to utilize the improvement regardless of whether access is taken or provided directly onto such street at any time. Nothing in this sub chapter modifies or limits the authority of the city to provide or require access management.

(5) No person will be required to pay the reimbursement fee on an application or upon property for which the reimbursement fee has been previously paid, unless such payment was for a different improvement.

(6) The right to reimbursement does not extend beyond 10 years from the date of creation of the district. The city council has the discretion to extend that right for one additional 10 year period.

6.10.13 Public Improvements Become Property of the City.

Public improvements installed under reimbursement district agreements become and remain the sole property of the city. More than one public improvement may be the subject of a reimbursement district.

6.10.14 Collection and Payment--Other Fees and Charges.

(1) Applicants will receive all reimbursement monies collected by the city for the public improvements subject to a reimbursement agreement. Reimbursements will be delivered to the applicant for as long as the reimbursement district agreement is in effect. The city will make such payments within 90 days of receipt of the reimbursement monies.

(2) The reimbursement fee does not replace or limit any other another city fees or charges.

6.11 Telecommunications Facilities *(Added by Ordinance #516, 04/03/00 and effective 05/03/00)*

6.11.1 Jurisdiction and Management of the Public Rights of Way

(1) The City has jurisdiction and exercises regulatory management over all public rights of way within the City under authority of the City charter and state law.

(2) Public rights of way include, but are not limited to, streets, roads, highways, bridges, alleys, sidewalks, trails, paths, public easements and all other public ways or areas, including the subsurface under and air space over these areas.

(3) The City has jurisdiction and exercises regulatory management over each public right of way whether the City has a fee, easement, or other legal interest in the right of way. The City has jurisdiction and regulatory management of each right of way whether the legal interest in the right of way was obtained by grant, dedication, prescription, reservation, condemnation, annexation, foreclosure or other means.

(4) No person may occupy or encroach on a public right of way without the permission of the City. The City grants permission to use rights of way by franchises and permits.

(5) The exercise of jurisdiction and regulatory management of a public right of way by the City is not official acceptance of the right of way, and does not obligate the City to maintain or repair any part of the right of way.

(6) The City retains the right and privilege to cut or move any telecommunications facilities located within the public rights of way of the City, as the City may determine to be necessary, appropriate or useful in response to a public health or safety emergency.

6.11.2 Regulatory Fees and Compensation Not a Tax

(1) The fees and costs provided for in this Chapter, and any compensation charged and paid for use of the public rights of way provided for in this Chapter, are separate from, and in addition to, any and all federal, state, local, and City charges as may be levied, imposed, or due from a telecommunications carrier, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of telecommunications services.

(2) The City has determined that any fee provided for by this Chapter is not subject to the property tax limitations of Article XI, Sections 11 and 11b of the Oregon Constitution. These fees are not imposed on property or property owners, and these fees are not new or increased fees.

(3) The fees and costs provided for in this Chapter are subject to applicable federal and state laws.

6.11.3 Definitions

For the purpose of this Chapter the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number and words in the singular number include the plural number. The words "shall" and "will" are mandatory and "may" is permissive. Words not defined herein shall be given the meaning set forth in the Communications Policy Act of 1934, as amended, the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996. If not defined there, the words shall be given their common and ordinary meaning.

(1) **Aboveground Facilities** - see "Overhead Facilities."

(2) **Affiliated Interest** - shall have the same meaning as ORS 759.010.

(3) **Cable Act** - shall mean the Cable Communications Policy Act of 1984, 47 U.S.C. § 521, et seq., as now and hereafter amended.

(4) **Cable Service** – is to be defined consistent with federal laws and means the one-way transmission to subscribers of video programming, or other programming service; and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

(5) **City** - means the City of Dayton, an Oregon municipal corporation, and individuals authorized to act on the City's behalf.

(6) **City Council** - means the elected governing body of the City of Dayton, Oregon.

(7) **Control or Controlling Interest** - means actual working control in whatever manner exercised.

(8) **City Property** - means and includes all real property owned by the City, other than public rights of way and utility easements as those are defined herein, and all property held in a proprietary capacity by the City, which are not subject to right of way franchising as provided in this Chapter.

(9) **Conduit** - means any structure, or portion thereof, containing one or more ducts, conduits, manholes, hand-holes, bolts, or other facilities used for any telegraph, telephone, cable television, electrical, or communications conductors, or cable right of way, owned or controlled, in whole or in part, by one or more public utilities.

(10) **Construction** – means any activity in the public rights of way resulting in physical change thereto, including excavation or placement of structures, but excluding routine maintenance or repair of existing facilities.

(11) **Days** - means calendar days unless otherwise specified.

(12) **Duct** - means a single enclosed raceway for conductors or cable.

(13) **Emergency** – has the meaning provided for in ORS 401.025.

(14) **Federal Communications Commission or FCC** - means the federal administrative agency, or its lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers on a national level.

(15) **Franchise** - means an agreement between the City and a grantee which grants a privilege to use public right of way and utility easements within the City for a dedicated purpose and for specific compensation.

(16) **Grantee** - means the person to which a franchise is granted by the City.

(17) **Oregon Public Utilities Commission or OPUC** - means the statutorily created state agency in the State of Oregon responsible for licensing, regulation and

administration of certain telecommunications carriers as set forth in Oregon Law, or its lawful successor.

(18) **Overhead or Aboveground Facilities** - means utility poles, utility facilities and telecommunications facilities above the surface of the ground, including the underground supports and foundations for such facilities.

(19) **Person** - means an individual, corporation, company, association, joint stock company or association, firm, partnership, or limited liability company.

(20) **Private Telecommunications Network** - means a system, including the construction, maintenance or operation of the system, for the provision of a service or any portion of a service which is owned or operated exclusively by a person for their use and not for resale, directly or indirectly. "Private telecommunications network" includes services provided by the State of Oregon pursuant to ORS 190.240 and 283.140.

(21) **Public Rights of Way** - include, but are not limited to, streets, roads, highways, bridges, alleys, sidewalks, trails, paths, public easements, and all other public ways or areas, including the subsurface under and air space over these areas. This definition applies only to the extent of the City's right, title, interest or authority to grant a franchise to occupy and use such areas for telecommunications facilities. "Public rights of way" shall also include utility easements as defined below.

(22) **State** - means the State of Oregon.

(23) **Telecommunications** - means the transmission between and among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(24) **Telecommunications Act** - means the Communications Policy Act of 1934, as amended by subsequent enactments including the Telecommunications Act of 1996 (47 U.S.C. 151 et seq.) and as hereafter amended.

(25) **Telecommunications Carrier** - means any provider of telecommunications services and includes every person that directly or indirectly owns, controls, operates or manages telecommunications facilities within the City.

(26) **Telecommunications Facilities** - means the plant and equipment, other than customer premises equipment, used by a telecommunications carrier.

(27) **Telecommunications Service** - means two-way switched access and transport of voice communications but does not include: a) services provided by radio common carrier; b) one-way transmission of television signals; c) surveying; d) private telecommunications networks; or e) communications of the customer which take place on the customer side of on-premises equipment.

(28) **Telecommunications System** - see "Telecommunications Facilities" above.

(29) **Telecommunications Utility** - has the same meaning as ORS 759.005(1).

(30) **Underground Facilities** - means utility and tele-communications facilities located under the surface of the ground, excluding the underground foundations or supports for "Overhead facilities."

(31) **Usable Space** - means all the space on a pole, except the portion below ground level, the 20 feet of safety clearance space above ground level, and the safety clearance space between communications and power circuits. There is a rebuttable presumption that six feet of a pole is buried below ground level.

(32) **Utility Easement** - means any easement granted to or owned by the City and acquired, established, dedicated or devoted for public utility purposes.

(33) **Utility Facilities** - means the plant, equipment and property, including but not limited to the poles, pipes, mains, conduits, ducts, cable, wires, plant and equipment located under, on, or above the surface of the ground within the public right of way of the City and used or to be used for the purpose of providing utility or telecommunications services.

6.11.4 Registration of Telecommunications Carriers

(1) **Purpose:** The Purpose of Registration is:

A. To assure that all telecommunications carriers who have facilities and/or provide services within the City comply with the ordinances, rules and regulations of the City.

B. To provide the City with accurate and current information concerning the telecommunications carriers who offer to provide telecommunications services within the City, or that own or operate telecommunications facilities within the City.

C. To assist the City in the enforcement of this Code and the collection of any city franchise fees or charges that may be due the City.

(2) **Registration Required**: Except as provided in Subsection D hereof, all telecommunications carriers having telecommunications facilities within the corporate limits of the City, and all telecommunications carriers that offer or provide telecommunications service to customer premises within the City, shall register. The appropriate application and license from: a) the Oregon Public Utility Commission (PUC); or b) the Federal Communications Commission (FCC) qualify as necessary registration information. Applicants also have the option of providing the following information:

A. The identity and legal status of the registrant, including the name, address, and telephone number of the duly authorized officer, agent, or employee responsible for the accuracy of the registration information.

B. The name, address, and telephone number for the duly authorized officer, agent, or employee to be contacted in case of an emergency.

C. A description of the registrant's existing or proposed telecommunications facilities within the City, a description of the telecommunications facilities that the registrant intends to construct, and a description of the telecommunications service that the registrant intends to offer or provide to persons, firms, businesses, or institutions within the City.

D. Information sufficient to determine whether the transmission, origination or receipt of the telecommunications services provided, or to be provided, by the registrant constitutes an occupation or privilege subject to any business license requirements. A copy of the business license or the license number must be provided.

(3) **Registration Fee:** Each application for registration as a telecommunications carrier shall be accompanied by a nonrefundable registration fee according to the City's Fee Schedule, or as otherwise established by resolution of the City Council. *(Amended Ordinance 615, 10/7/13- Effective 11/06/13)*

(4) **Exceptions to Registration:** The following telecommunications carriers are excepted from registration:

A. Telecommunications facilities that are owned and operated exclusively for its own use by the State or a political subdivision of this State.

B. A private telecommunications network, provided that such network does not occupy any public rights of way of the City.

6.11.5 Construction Standards

(1) **General:** No person shall commence or continue with the construction, installation or operation of telecommunications facilities within a public right of way except as provided in this Code and in compliance with all applicable codes, rules, and regulations.

(2) **Construction Codes:** Telecommunications facilities shall be constructed, installed, operated and maintained in accordance with all applicable federal, state and local codes, rules and regulations including the National Electrical Code and the National Electrical Safety Code.

(3) **Construction Permits:** No person shall construct or install any telecommunications facilities within a public right of way without first obtaining a construction permit, and paying the construction permit fee established pursuant to Subsection G of this Section. No permit shall be issued for the construction or installation of telecommunications facilities within a public right of way:

A. Unless the telecommunications carrier has first filed a registration statement with the City pursuant to Section 6.11.4.B of this Code; and if applicable,

B. Unless the telecommunications carrier has first applied for and been granted a franchise pursuant to Section 6.11.7 of this Code.

(4) **Permit Applications:** Applications for permits to construct telecommunications facilities shall be submitted upon forms to be provided by the City and shall be accompanied by drawings, plans and specifications in sufficient detail to demonstrate:

A. That the facilities will be constructed in accordance with all applicable codes, rules and regulations.

B. That the facilities will be constructed in accordance with the franchise agreement.

C. The location and route of all facilities to be installed aboveground or on existing utility poles.

D. The location and route of all new facilities on or in the public rights of way to be located under the surface of the ground, including the line and grade proposed for the burial at all points along the route which are within the public rights of way. Applicant's existing facilities shall be differentiated on the plans from new construction.

E. The location of all of applicant's existing underground utilities, conduits, ducts, pipes, mains and installations which are within the public rights of way along the underground route proposed by the applicant. A cross section shall be provided showing new or existing facilities in relation to the street, curb, sidewalk or right of way.

F. The construction methods to be employed for protection of existing structures, fixtures, and facilities within or adjacent to the public rights of way, and description of any improvements that applicant proposes to temporarily or permanently remove or relocate.

(5) **Applicant's Verification:** All permit applications shall be accompanied by the verification of a registered professional engineer, or other qualified and duly authorized representative of the applicant, that the drawings, plans and specifications submitted with the application comply with applicable technical codes, rules and regulations.

(6) **Construction Schedule:** All permit applications shall be accompanied by a written construction schedule, which shall include a deadline for completion of construction. The construction schedule is subject to approval by the City.

(7) **Construction Permit Fee:** Unless otherwise provided in a franchise agreement, prior to issuance of a construction permit, the applicant shall pay a permit fee in an amount consistent with this Code or as otherwise determined by resolution of the City Council. Such fee shall be designed to defray the costs of city administration of the requirements of this Chapter.

(8) **Issuance of Permit:** If satisfied that the applications, plans and documents submitted comply with all requirements of this Code and the franchise agreement, the City shall issue a permit authorizing construction of the facilities, subject to such further conditions, restrictions or regulations affecting the time,

place and manner of performing the work as they may deem necessary or appropriate.

(9) **Notice of Construction:** Except in the case of an emergency, the permittee shall notify the City not less than two (2) working days in advance of any excavation or construction in the public rights of way.

(10) **Compliance with Permit:** All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the facilities. The City and its representatives shall be provided access to the work site and such further information as they may require to ensure compliance with such requirements.

(11) **Noncomplying Work:** Subject to the notice requirements in Section 6.11.6.D all work which does not comply with the permit, the approved or corrected plans and specifications for the work, or the requirements of this Chapter, shall be removed at the sole expense of the permittee.

(12) **Completion of Construction:** The permittee shall promptly complete all construction activities so as to minimize disruption of the city rights of way and other public and private property. All construction work within city rights of way, including restoration, must be completed within 120 days of the date of issuance of the construction permit unless an extension or an alternate schedule has been approved pursuant to the schedule submitted and approved by the appropriate city official as contemplated by Subsection F above.

(13) **As-Built Drawings:** If requested by the City for a necessary public purpose as determined by the City, the permittee shall furnish the City with up to two (2) complete sets of plans drawn to scale and certified to the City as accurately depicting the location of all telecommunications facilities constructed pursuant to the permit. These plans shall be submitted to the City Engineer or designee within sixty (60) days after completion of construction, in a format mutually acceptable to the permittee and the City.

(14) **Restoration of Public Rights of Way and City Property:**

A. When a permittee, or any person acting on its behalf, does any work in or affecting any public rights of way or city property, it shall, at its own expense, promptly remove any obstructions there from and restore such ways or property to good order and condition unless otherwise directed by the City and as determined by the City Engineer or designee.

B. If weather or other conditions do not permit the complete restoration required by this Section, the permittee shall temporarily restore the affected rights of way or property. Such temporary restoration shall be at the permittee's sole expense and the permittee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration. Any corresponding modification to the construction schedule shall be subject to approval by the City.

C. If the permittee fails to restore rights of way or property to good order and condition, the City shall give the permittee written notice and provide the permittee a reasonable period of time not exceeding thirty (30) days to restore the rights of way or property. If, after said notice, the permittee fails to restore the rights of way or property to as good a condition as existed before the work was undertaken, the City shall cause such restoration to be made at the expense of the permittee.

D. A permittee or other person acting in its behalf shall use suitable barricades, flags, flagging attendants, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle or property by reason of such work in or affecting such rights of way or property.

(15) **Performance and Completion Bond:** Unless otherwise provided in a franchise agreement, a performance bond or other form of surety acceptable to the City equal to at least 100% of the estimated cost of constructing permittee's telecommunications facilities within the public rights of way of the City, shall be provided before construction is commenced.

A. The surety shall remain in force until sixty (60) days after substantial completion of the work, as determined in writing by the City, including restoration of public rights of way and other property affected by the construction.

B. The surety shall guarantee, to the satisfaction of the City:

1) Timely completion of construction;

2) Construction in compliance with applicable plans, permits, technical codes and standards;

3) Proper location of the facilities as specified by the City;

4) Restoration of the public rights of way and other property affected by the construction; and

5) Timely payment and satisfaction of all claims, demands or liens for labor, material, or services provided in connection with the work.

6.11.6 Location of Telecommunications Facilities

(1) **Location of Facilities:** All facilities located within the public right of way shall be constructed, installed and located in accordance with the following terms and conditions, unless otherwise specified in a franchise agreement:

A. Whenever all existing electric utilities, cable facilities or telecommunications facilities are located underground within a public right of way of the City, a grantee with permission to occupy the same public right of way must also locate its telecommunications facilities underground.

B. Whenever all new or existing electric utilities, cable facilities or telecommunications facilities are located or relocated underground within a public right of way of the City, a grantee that currently occupies the same public right of way shall relocate its facilities underground concurrently with the other affected utilities to minimize disruption of the public right of way, absent extraordinary circumstances or undue hardship as determined by the City and consistent with applicable state and federal law.

(2) **Interference with the Public Rights of Way:** No grantee may locate or maintain its telecommunications facilities so as to unreasonably interfere with the use of the public rights of way by the City, by the general public or by other persons authorized to use or be present in or upon the public rights of way. All use of public rights of way shall be consistent with City codes, ordinances and regulations.

(3) **Relocation or Removal of Facilities:** Except in the case of an emergency, within ninety (90) days following written notice from the City, a grantee shall, at no expense to Grantor, temporarily or permanently remove, relocate, change or alter the position of any telecommunications facilities within the public rights of way whenever the City shall have determined that such removal, relocation, change or alteration is reasonably necessary for:

A. The construction, repairs, maintenance or installation of any city or other public improvement in or upon the public rights of way.

B. The operations of the City or other governmental entity in or upon the public rights of way.

C. The public interest.

(4) **Removal of Unauthorized Facilities:** Within thirty (30) days following written notice from the City, any grantee, telecommunications carrier, or other person that owns, controls or maintains any unauthorized telecommunications system, facility, or related appurtenances within the public rights of way of the City shall, at its own expense, remove such facilities or appurtenances from the public rights of way of the City. A telecommunications system or facility is unauthorized and subject to removal in the following circumstances:

A. One year after the expiration or termination of the grantee's telecommunications franchise.

B. Upon abandonment of a facility within the public rights of way of the City. A facility will be considered abandoned when it is deactivated, out of service, or not used for its intended and authorized purpose for a period of ninety (90) days or longer. A facility will not be considered abandoned if it is temporarily out of service during performance of repairs or if the facility is being replaced. The City shall make a reasonable attempt to contact the telecommunications carrier before concluding that a facility is abandoned. A facility may be abandoned in place and not removed if there is no apparent risk to the public safety, health or welfare.

C. If the system or facility was constructed or installed without the appropriate prior authority at the time of installation.

D. If the system or facility was constructed or installed at a location not permitted by the grantee's telecommunications franchise or other legally sufficient permit.

(5) **Coordination of Construction Activities:** All grantees are required to make a good faith effort to cooperate with the City.

A. By January 1 of each year, grantees shall provide the City with a schedule of their known proposed construction activities in, around or that may affect the public rights of way.

B. If requested by the City, each grantee shall meet with the City annually or as determined by the City, to schedule and coordinate construction in the public rights of way. At that time, City will provide available information on plans for local, state, and/or federal construction projects.

C. All construction locations, activities and schedules shall be coordinated, as ordered by the City Engineer or designee, to minimize public inconvenience, disruption or damages.

6.11.7 Telecommunications Franchise

(1) **Telecommunications Franchise:** A telecommunications franchise shall be required of any telecommunications carrier who desires to occupy public rights of way of the City.

(2) **Application:** Any person that desires a telecommunications franchise must register as a telecommunications carrier and shall file an application with the City which includes the following information:

A. The identity of the applicant.

B. A description of the telecommunications services that are to be offered or provided by the applicant over its telecommunications facilities.

C. Engineering plans, specifications, and a network map in a form customarily used by the applicant of the facilities located or to be located within the public rights of way in the City, including the location and route requested for applicant's proposed telecommunications facilities.

D. The area or areas of the City the applicant desires to serve and a preliminary construction schedule for build-out to the entire franchise area.

E. Information to establish that the applicant has obtained all other governmental approvals and permits to construct and operate the facilities and to offer or provide the telecommunications services proposed.

F. An accurate map showing the location of any existing telecommunications facilities in the City that applicant intends to use or lease.

(3) **Application and Review Fee:**

A. Subject to applicable state law, applicant shall reimburse the City for such reasonable costs as the City incurs in entering into the franchise agreement.

B. An application and review fee according to the City's Fee Schedule shall be deposited with the City as part of the application filed pursuant to Subsection B above. Expenses exceeding the deposit will be billed to the applicant or the unused portion of the deposit will be returned to the applicant following the determination granting or denying the franchise. *(Amended Ordinance 615, 10/7/13- Effective 11/06/13)*

(4) **Determination by the City:** The City shall issue a written determination granting or denying the application in whole or in part. If the application is denied, the written determination shall include the reasons for denial.

(5) **Rights Granted:** No franchise granted pursuant to this Chapter shall convey any right, title or interest in the public rights of way, but shall be deemed a grant to use and occupy the public rights of way for the limited purposes and term stated in the franchise agreement.

(6) **Term of Grant:** Unless otherwise specified in a franchise agreement, a telecommunications franchise granted hereunder shall be in effect for a term of five years.

(7) **Franchise Territory:** Unless otherwise specified in a franchise agreement, a telecommunications franchise granted hereunder shall be limited to a specific geographic area of the City to be served by the franchise grantee, and the public rights of way necessary to serve such areas, and may include the entire city.

(8) **Franchise Fee:** Each franchise granted by the City is subject to the City's right, which is expressly reserved, to fix a fair and reasonable compensation to be paid for the privileges granted; provided, nothing in this Code shall prohibit the City and a grantee from agreeing to the compensation to be paid. The compensation shall be subject to the specific payment terms and conditions contained in the franchise agreement and applicable state and federal laws.

(9) **Amendment of Grant:** Conditions for amending a franchise:

A. A new application and grant shall be required of any telecommunications carrier that desires to extend or locate its telecommunications facilities in public rights of way of the City which are not included in a franchise previously granted under this Chapter.

B. If ordered by the City to locate or relocate its telecommunications facilities in public rights of way not included in a previously granted franchise, the City shall grant an amendment without further application.

C. A new application and grant shall be required of any telecommunications carrier that desires to provide a service which was not included in a franchise previously granted under this Chapter.

(10) **Renewal Applications:** A grantee that desires to renew its franchise under this Chapter shall, not less than 180 days before expiration of the current agreement, file an application with the City for renewal of its franchise which shall include the following information:

A. The information required pursuant to Section 6.11.4.B of this Code.

B. Any information required pursuant to the franchise agreement between the City and the grantee.

(11) **Renewal Determinations:** Within 90 days after receiving a complete application, the City shall issue a written determination granting or denying the renewal application in whole or in part, applying the following standards. If the renewal application is denied, the written determination shall include the reasons for non-renewal.

A. The financial and technical ability of the applicant.

B. The legal ability of the applicant.

C. The continuing capacity of the public rights of way to accommodate the applicant's existing and proposed facilities.

D. The applicant's compliance with the requirements of this Code and the franchise agreement.

E. Applicable federal, state and local telecommunications laws, rules and policies.

F. Such other factors as may demonstrate that the continued grant to use the public rights of way will serve the community interest.

(12) **Obligation to Cure As a Condition of Renewal:** No franchise shall be renewed until any ongoing violations or defaults in the grantee's performance of the agreement, or of the requirements of this Code, have been cured, or a plan detailing the corrective action to be taken by the grantee has been approved by the City.

(13) **Assignments or Transfers of System or Franchise:** Ownership or control of a majority interest in a telecommunications system or franchise may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of the grantee, by operation of law or otherwise, without the prior consent of the City, which consent shall not be unreasonably

withheld or delayed, and then only on such reasonable conditions as may be prescribed in such consent.

A. Grantee and the proposed assignee or transferee of the franchise or system shall agree, in writing, to assume and abide by all of the provisions of the franchise.

B. No transfer shall be approved unless the assignee or transferee has the legal, technical, financial and other requisite qualifications to own, hold and operate the telecommunications system pursuant to this Code.

C. Unless otherwise provided in a franchise agreement, the grantee shall reimburse the City for all direct and indirect fees, costs, and expenses reasonably incurred by the City in considering a request to transfer or assign a telecommunications franchise.

D. Any transfer or assignment of a telecommunications franchise, system or integral part of a system without prior approval of the City under this Code or pursuant to a franchise agreement shall be void and is cause for revocation of the franchise.

(14) **Revocation or Termination of Franchise:** A franchise to use or occupy public rights of way of the City may be revoked for the following reasons:

A. Construction or operation in the City or in the public rights of way of the City without a construction permit.

B. Construction or operation at an unauthorized location.

C. Failure to comply with subsection M above with respect to sale, transfer or assignment of a telecommunications system or franchise.

D. Misrepresentation by or on behalf of a grantee in any application to the City.

E. Abandonment of telecommunications facilities in the public rights of way.

F. Failure to relocate or remove facilities as required in this Code.

G. Failure to pay taxes, compensation, fees or costs when and as due the City under this Code.

H. Insolvency or bankruptcy of the grantee.

I. Violation of material provisions of this Code.

J. Violation of the material terms of a franchise agreement.

(15) **Notice and Duty to Cure:** In the event that the City believes that grounds exist for revocation of a franchise, the City shall give the grantee written notice of the apparent violation or noncompliance, providing a short and concise statement of

the nature and general facts of the violation or noncompliance, and providing the grantee a reasonable period of time, not exceeding thirty (30) days, to furnish evidence that:

A. Corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance;

B. Rebuts the alleged violation or noncompliance; and/or

C. It would be in the public interest to impose some penalty or sanction less than revocation.

(16) **Public Hearing:** In the event that a grantee fails to provide evidence reasonably satisfactory to the City of its compliance with the franchise or with this Code, the City staff shall refer the apparent violation or non-compliance to the City Council. The Council shall provide the grantee with notice and a reasonable opportunity to be heard concerning the matter.

(17) **Standards for Revocation or Lesser Sanctions:** If persuaded that the grantee has violated or failed to comply with material provisions of this Code, or of a franchise agreement, the City Council shall determine whether to revoke the franchise, or to establish some lesser sanction and cure, considering the nature, circumstances, extent, and gravity of the violation as reflected by one or more of the following factors. Whether:

A. The misconduct was egregious.

B. Substantial harm resulted.

C. The violation was intentional.

D. There is a history of prior violations of the same or other requirements.

E. There is a history of overall compliance.

F. The violation was voluntarily disclosed, admitted or cured.

(18) **Other City Costs:** All grantees shall, within thirty (30) days after written demand therefore, reimburse the City for all reasonable direct and indirect costs and expenses incurred by the City in connection with any modification, amendment, renewal or transfer of the franchise or any franchise agreement consistent with applicable state and federal laws.

6.11.8 General Franchise Terms

(1) **Facilities:** Unless already provided by the grantee, upon request, each grantee shall provide the City with an accurate map or maps certifying the location of all of its telecommunications facilities within the public rights of way. If necessary for a public purpose, and upon request, each grantee shall provide updated maps.

(2) **Damage to Grantee's Facilities:** Unless directly and proximately caused by negligent, careless, wrongful, willful, intentional or malicious acts by the City,

and consistent with Oregon law, the City shall not be liable for any damage to or loss of any telecommunications facility within the public rights of way of the City as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind in the public rights of way by or on behalf of the City, or for any consequential losses resulting directly or indirectly therefrom.

(3) **Duty to Provide Information:** Except in emergencies, within sixty (60) days of a written request from the City, each grantee shall furnish the City with information sufficient to demonstrate:

A. That grantee has complied with all requirements of this Code.

B. All books, records, maps, and other documents, maintained by the grantee with respect to its facilities within the public rights of way shall be made available for inspection by the City at reasonable times and intervals.

(4) **Service to the City:** If the City contracts for the use of telecommunication facilities, telecommunication services, installation, or maintenance from the grantee, the grantee shall charge the City the grantee's most favorable rate offered at the time of the request charged to similar users within Oregon for a similar volume of service, subject to any of grantee's tariffs or price lists on file with the OPUC. With the City's permission, the grantee may deduct the applicable charges from fee payments. Other terms and conditions of such services may be specified in a separate agreement between the City and grantee.

(5) **Compensation for City Property:** If any right is granted, by lease, franchise or other manner, to use and occupy city property for the installation of telecommunications facilities, the compensation to be paid for such right and use shall be fixed by the City.

(6) **Cable Franchise:** Telecommunication carriers providing cable service shall be subject to the separate cable franchise requirements of the City and other applicable authority.

(7) **Leased Capacity:** A grantee shall have the right, without prior City approval, to offer or provide capacity or bandwidth to its customers; provided that the grantee shall notify the City that such lease or agreement has been granted to a customer or lessee.

(8) **Grantee Insurance:** Unless otherwise provided in a franchise agreement, each grantee shall, as a condition of the grant, secure and maintain the following liability insurance policies insuring both the grantee and the City, and its elected and appointed officers, officials, agents and employees as coinsured:

A. Comprehensive general liability insurance with limits not less than

1) Three Million Dollars ($3,000,000) for bodily injury or death to each person;

2) Three Million Dollars ($3,000,000) for property damage resulting from any one accident; and,

3) Three Million Dollars ($3,000,000) for all other types of liability.

B. Automobile liability for owned, non-owned and hired vehicles with a limit of One Million Dollars ($1,000,000) for each person and Three Million Dollars ($3,000,000) for each accident.

C. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than One Million Dollars ($1,000,000).

D. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than Three Million Dollars ($3,000,000).

E. The liability insurance policies required by this Section shall bemaintained by the grantee throughout the term of the telecommunications franchise, and such other period of time during which the grantee is operating without a franchise hereunder, or is engaged in the removal of its telecommunications facilities. Each such insurance policy shall contain the following endorsement:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until 90 days after receipt by the City, by registered mail, of a written notice addressed to the City of such intent to cancel or not to renew."

F. Within sixty (60) days after receipt by the City of said notice, and in no event later than thirty (30) days prior to said cancellation, the grantee shall obtain and furnish to the City evidence that the grantee otherwise meets the requirements of this Section.

G. As an alternative to the insurance requirements contained herein, a grantee may provide evidence of self-insurance subject to review and acceptance by the City.

(9) **General Indemnification:** Each franchise agreement shall include, to the extent permitted by law, grantee's express undertaking to defend, indemnify and hold the City and its officers, employees, agents and representatives harmless from and against any and all damages, losses and expenses, including reasonable attorney's fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or result from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the grantee or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of its telecommunications facilities, and in providing or offering telecommunications services over the facilities or network, whether such acts or omissions are authorized, allowed or prohibited by this Code or by a franchise agreement made or entered into pursuant to this Code.

(10) **Performance Surety:** Before a franchise granted pursuant to this Code is effective, and as necessary thereafter, the grantee shall provide a performance

bond, in form and substance acceptable to the City, as security for the full and complete performance of a franchise granted under this Code, including any costs, expenses, damages or loss the City pays or incurs because of any failure attributable to the grantee to comply with the codes, ordinances, rules, regulations or permits of the City. This obligation is in addition to the performance surety required for construction of facilities.

6.11.9 General Provisions

(1) **Governing Law:** Any franchise granted under this Code is subject to the provisions of the Constitution and laws of the United States, and the State of Oregon and the ordinances and Charter of the City.

(2) **Written Agreement:** No franchise shall be granted hereunder unless the agreement is in writing.

(3) **Nonexclusive Grant:** No franchise granted under this Code shall confer any exclusive right, privilege, license or franchise to occupy or use the public rights of way of the City for delivery of telecommunications services or any other purposes.

(4) **Severability and Preemption:** If any article, section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Code is for any reason held to be invalid or unenforceable by any court of competent jurisdiction, or superseded by state or federal legislation, rules, regulations or decision, the remainder of the Code shall not be affected thereby but shall be deemed as a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof, and each remaining section, subsection, sentence, clause, phrase, provision, condition, covenant and portion of this Code shall be valid and enforceable to the fullest extent permitted by law. In the event that federal or state laws, rules or regulations preempt a provision or limit the enforceability of a provision of this Code, then the provision shall be read to be preempted to the extent and or the time required by law. In the event such federal or state law, rules or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon return to full force and effect, and shall thereafter be binding, without the requirement of further action on the part of the City, and any amendments hereto.

(5) **Penalties:** Any person found guilty of violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this Chapter shall be fined according to the City's Fee Schedule for each offense. A separate and distinct offense shall be deemed committed each day on which a violation occurs. The enforcement of this provision shall be consistent with the provisions of this Code regulating code enforcement. *(Amended Ordinance 615, 10/7/13- Effective 11/06/13)*

(6) **Other Remedies:** Nothing in this Code shall be construed as limiting any judicial remedies that the City may have, at law or in equity, for enforcement of this Code.

(7) **Captions:** The captions to sections throughout this Code are intended solely to facilitate reading and reference to the sections and provisions contained herein. Such captions shall not affect the meaning or interpretation of this Code.

(8) **Compliance with Laws:** Any grantee under this Code shall comply with all federal and state laws and regulations, including regulations of any administrative agency thereof, as well as all ordinances, resolutions, rules and regulations of the City heretofore or hereafter adopted or established during the entire term any franchise granted under this Code, which are relevant and relate to the construction, maintenance and operation of a telecommunications system.

(9) **Consent:** Wherever the consent of either the City or of the grantee is specifically required by this Code or in a franchise granted, such consent will not be unreasonably withheld.

(10) **Application to Existing Agreements:** To the extent that this Code is not in conflict with and can be implemented with existing franchise agreements, this Code shall apply to all existing franchise agreements for use of the public right of way for telecommunications.

(11) **Confidentiality:** The City agrees to use its best efforts to preserve the confidentiality of information as requested by a grantee, to the extent permitted by the Oregon Public Records Law.