

City of Houston, Texas, Ordinance No. 2006-595

AN ORDINANCE AMENDING ARTICLE V OF CHAPTER 40 OF THE CODE OF ORDINANCES, HOUSTON, TEXAS, RELATING TO EXCAVATION IN THE PUBLIC WAY; ESTABLISHING A SCHEDULE OF FEES FOR PERMITS ISSUED IN CONNECTION THEREWITH; CONTAINING FINDINGS AND OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING AN EFFECTIVE DATE; PROVIDING FOR SEVERABILITY; CONTAINING A REPEALER; AND DECLARING AN EMERGENCY.

* * * * *

WHEREAS, the City of Houston is a municipal corporation organized under the Constitution and the general and special laws of the State of Texas and exercises powers granted by the City's Charter and the provisions of Article XI, Section 5 of the Texas Constitution; and

WHEREAS, in the exercise of its lawful authority, the City may enact police power ordinances to promote and protect the health, safety, and welfare of the public; and

WHEREAS, the City Council finds that the City and other public and private entities, including but not limited to Harris County, the Texas Department of Transportation, and the Metropolitan Transit Authority of Harris County, Texas, are performing street reconstruction and resurfacing projects in the public way, and that the City and private owners are installing and maintaining or are proposing to install and maintain facilities in the public way; and

WHEREAS, the City Council finds that the methods used by the owners of facilities for the installation and maintenance of facilities in the public way are sometimes not in accordance with standard City specifications and therefore result in

damage to the structural integrity of the public way and in interference with the public's use of the public way; and

WHEREAS, the City Council of the City of Houston adopted Ordinance No. 2000-115, which amended Chapter 40 of the Code of Ordinances, Houston, Texas, (the "Ordinance") to regulate excavations in the public way within the City to;

1. Provide a means for controlling the excavation and restoration of the public way whereby the structural integrity of the public way is maintained in accordance with acceptable standards and specifications;
2. Provide for safe and orderly movement of vehicular traffic and pedestrians on the public way; and
3. Provide a means whereby the public is notified of excavations in the public way and of the responsible party; and

WHEREAS, the City Council finds that the Ordinance has been beneficial to the health, safety, and welfare of the public by generally accomplishing its objectives; and

WHEREAS, the City Council finds that it is appropriate to recover its costs of administering the program established by the Ordinance through the assessment of permits fees; and

WHEREAS, the City Council finds that the Department of Public Works and Engineering has analyzed its costs of administering the program, taken into account the appropriate costs of the program, and related the costs to the types of permits issued by the City, and

WHEREAS, the City Council finds that the fees are reasonably related to the cost

of administering the program; and

WHEREAS, the City Council finds that the adoption of amendments to the Ordinance would further enhance the benefits derived to the public health, safety, and welfare through regulation of excavations in the public way; **NOW, THEREFORE;**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:

Section 1. That the findings contained in the preamble of this Ordinance are determined to be true and correct and are hereby adopted as part of this Ordinance.

Section 2. That Section 40-121 of the Code of Ordinances, Houston, Texas, is hereby amended by amending the definitions of "excavation," "permit," "public way" and "transportation improvement," respectively, to read as follows:

"Excavation means an activity that cuts, penetrates, or bores under any portion of the public way that has been improved with a paved surface for street, sidewalk, surface drainage, or related public transportation infrastructure purposes. The term includes but is not limited to cutting, tunneling, jacking and boring, backfilling, restoring, repairing, and installing and maintaining a temporary surface in, the public way. The term does not include a transportation improvement; however, it does include excavations that are undertaken for the improvement or maintenance of publicly owned utility systems, such as water and wastewater lines and facilities. The term also does not include utility maintenance or other activities that are performed within already existing structures, vaults, conduits, or cable ways that are located underneath street improvements, provided that any access required for the work is obtained through manholes, or other previously constructed entrances that may be utilized without cutting or penetrating any pavement or other street improvement."

"Permit means a current and valid authorization issued under division 2 of this article."

"Public way means any public street right-of-way located in the city, including the entire area between the boundary lines of every way (including but not limited to roads, streets, alleys, highways, boulevards, bridges, tunnels, or similar thoroughfares), whether acquired by purchase, grant, or dedication and acceptance by the city or by the public, that has been opened to the use

of the public for purposes of vehicular travel.”

“*Transportation improvement* means the portion of work within the finished paved surface of a public way undertaken by or pursuant to contract for the state or a political subdivision of the state for the purpose of improving or maintaining public way transportation and related storm drainage and street lighting infrastructure, but does not include any activity, such as connection to other facilities, that cuts, penetrates, or bores under a public way other than the one being improved or maintained pursuant to the contract or that cuts, penetrates or bores under the public way after installation of new paving.”

Section 3. That Section 40-122 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

“40-122. Prohibited Activities.

(a) It shall be unlawful for any person to excavate or cause an excavation within the city unless the person is a permittee to whom a permit has been issued for the excavation pursuant to this article.

(b) It shall be unlawful for a permittee to excavate or cause an excavation within the city in violation of any term of a permit issued pursuant to this article.

(c) It shall be unlawful for any permittee to fail to exhibit a permit upon request as required by section 40-142 of this Code. In any prosecution under this article, it shall be presumed that there is no permit if the permit is not properly exhibited.

(d) It shall be unlawful for any permittee to fail to restore the public way following excavation as required by this article.

(e) It is an affirmative defense to prosecution under subsections (a) and (c) above that the excavation was begun in response to an emergency and that a permit was timely applied for in compliance with section 40-139 of this Code.”

Section 4. That Subsection (a) of Section 40-123 of the Code of Ordinances, Houston, Texas, is hereby amended by adding the following sentence at the end of the Subsection:

"In addition, this article shall not be construed to require an owner to pay any fee that is prohibited by applicable state or federal law or valid city utility franchise."

Section 5. That Subsection (a) of Section 40-128 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

"(a) The director of public works and engineering is authorized to promulgate rules and regulations regarding any aspect of the operation of this article, including without limitation requirements for drawings and specifications, methods by which excavations will be performed, traffic control procedures, application processing and hearing procedures, debarment procedures, construction management procedures, and inspection procedures. The rules and regulations shall be consistent with applicable federal and state laws, city ordinances, and sound engineering practices, and the City Council Committee on Transportation, Infrastructure and Aviation, or its successor committee, shall conduct a public hearing on the proposed rules and regulations not less than ten days following the publication of notice of intent in a newspaper of general circulation, and the proposed rules and regulations shall be approved by a majority vote of the City Council Committee on Transportation, Infrastructure and Aviation, or its successor committee, prior to implementation. The director of public works and engineering shall make copies of the rules and regulations available for inspection in the director's office, and copies may be purchased at the fees prescribed by law."

Section 6. That Subsection (b) Section 40-136 of the Code of Ordinances, Houston, Texas, are hereby amended to read as follows:

"(b) Applications for permits shall be in the form prescribed by the director, who may provide for the filing and processing of applications by electronic means. Each application shall be submitted to the city engineer, shall be signed and sworn to before an officer authorized to administer oaths by each applicant and shall include the following:

- (1) The name, assumed name, or business name, business type (corporation, partnership, individual/sole proprietor or other) of each applicant;
- (2) Each applicant's mailing address (and street address if different), telephone number, facsimile number, and e-mail

address;

- (3) The location (including key map number), depth, length, and width of each excavation to be made in each block and/or intersection, which may alternatively be set forth on the provided drawings and specifications;
- (4) The purpose of the excavation, including a description of the facilities to be installed, maintained, and/or repaired;
- (5) The method of excavation;
- (6) The proposed excavation start date and duration;
- (7) A statement that each person executing the application is fully authorized to act on behalf of and bind his principal in executing and filing the application;
- (8) A statement that each applicant accepts and obligates itself to the following release and indemnification provisions:

'RELEASE

PERMITTEE AGREES TO AND SHALL RELEASE THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THE PERMIT, EVEN IF THE INJURY, DEATH, DAMAGE, OR LOSS IS CAUSED BY THE CITY'S ACTUAL OR ALLEGED JOINT OR CONCURRENT NEGLIGENCE AND/OR THE CITY'S STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY.

INDEMNIFICATION

PERMITTEE AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH,

DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS PERMIT, INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:

- (i) PERMITTEE'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', PRINCIPALS', OR SUBCONTRACTORS OF PERMITTEES' (COLLECTIVELY IN NUMBERED PARAGRAPHS (i)--(iii), "PERMITTEE") ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;
- (ii) THE CITY'S AND PERMITTEE'S ACTUAL OR ALLEGED CONCURRENT NEGLIGENCE, WHETHER PERMITTEE IS IMMUNE FROM LIABILITY OR NOT; AND
- (iii) THE CITY'S AND PERMITTEE'S ACTUAL OR ALLEGED STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY, WHETHER PERMITTEE IS IMMUNE FROM LIABILITY OR NOT.

PERMITTEE SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY HARMLESS DURING THE TERM OF THE PERMIT AND FOR FOUR YEARS AFTER THE PERMIT TERMINATES.

WHERE APPLICABLE, THE PROVISIONS OF SECTION 283.057 OF THE TEXAS LOCAL GOVERNMENT CODE SHALL CONTROL IN LIEU OF THE FOREGOING; ADDITIONALLY, TO THE EXTENT THAT THE APPLICANT HOLDS A CURRENT AND VALID UTILITY FRANCHISE FROM THE CITY, THE RELEASE AND INDEMNIFICATION PROVISIONS OF THE FRANCHISE SHALL CONTROL IN LIEU OF THE FOREGOING.'

- (9) The name of the owner of the facility;
- (10) The 24-hour telephone number at which each applicant's representative who will respond to emergencies may be contacted;

- (11) The name, mailing address, telephone number, facsimile number, and e-mail address of a person who is authorized to receive all notices authorized to be given by the city under this article to each applicant;
- (12) Confirmation that all materials necessary for construction will be on hand and ready for use so as not to delay the excavation;
- (13) A transmittal number issued by the Texas Underground Facility Notification Corporation evidencing that the applicant has complied with the Texas Underground Facility Damage Prevention and Safety Act or an assurance that the transmittal number will be provided to the city engineer before the excavation commences;
- (14) Evidence of insurance as required in section 40-147 of this Code;
- (15) Drawings and specifications, as provided in section 40-137 of this Code;
- (16) The work warranty as required by section 40-140 of this Code; and
- (17) The nonrefundable application fee established pursuant to this article.

If the director provides for the filing of applications by electronic means, each application for a permit or permit extension not submitted by electronic means shall also be accompanied by an additional application fee established pursuant to this article for the cost of data entry."

Section 7. That the caption of Section 40-138 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

"Sec. 40-138. Approval of application; issuance or denial of permit; hearing; validity."

Section 8. That Section 40-138 of the Code of Ordinances, Houston, Texas, is hereby amended by adding a new Subsection (d), which reads as follows:

“(d) A permit shall no longer be valid if there are material changes to the excavation, including but not limited to a change in the scope of the work or the method of performing the work of such consequence that the drawings and specifications no longer accurately depict the work, extending the excavation into any geographical area not included in the permit or an excavation that is not authorized by the original permit.”

Section 9. That Section 40-140 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

“Sec. 40-140. Work warranty.

Each applicant shall execute and provide a work warranty in a form approved by the city attorney, which shall be incorporated into the application form. The purpose of the work warranty is to undertake and ensure that the permittee will:

- (1) Timely perform the excavation in accordance with the permit, the drawings and specifications, all applicable laws, rules, and regulations, and the construction standards adopted in or pursuant to this article, subject to remediation as provided in section 40-159 of this Code; and
- (2) Warrant the excavation following its completion for two years, subject to remediation as provided in section 40-160 of this Code.”

Section 10. That Subsection (b) of Section 40-142 of the Code of Ordinances, Houston, Texas, is hereby amended by adding the following sentence at the end of the Subsection:

“Failure to post and maintain the required notice shall be unlawful.”

Section 11. That Subsection (a) of Section 40-144 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

“(a) On or before June 1 of each year, owners shall submit a plan of excavations anticipated to be done in the public way during the five-year period commencing on July 1 of that year. Additionally, the city engineer shall annually solicit a five year transportation improvement plan from the

various public way construction entities. As soon as practicable following receipt and compilation of the plans, the city engineer shall make available for inspection a composite list of all projects and transportation improvements designated in the various plans. Applicants are responsible for keeping themselves apprised of the current status of the list. An owner or public way construction entity may change, add, or delete any project in its five year business plan, and if any modification is made, the owner and/or public way construction entity shall notify the city engineer."

Section 12. That Subsection (a) of Section 40-146 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

"(a) The city engineer shall not issue a permit to any person who is in default or breach of any obligation to the city under this article on a prior permit or on a warranty obligation under section 40-159 or 40-160 of this Code."

Section 13. That Subsection (a) of Section 40-147 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

"(a) As a condition of the issuance of a permit, the applicant shall provide evidence that the applicant holds a current policy of comprehensive general liability insurance covering the excavation, with an endorsement for any liability assumed under this article and policy limits of not less than \$150,000.00 for property damage, per occurrence, and of not less than \$150,000.00, per person, and \$500,000.00, per occurrence, for bodily injury or death. Each policy shall include a provision obligating the insurer to furnish to the city engineer at least 10 days prior written notice of any cancellation."

Section 14. That Section 40-148 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

"Sec. 40-148. Extensions.

For good cause not relating to any fault of the permittee in diligently prosecuting the excavation, the city engineer may extend the number of days allowed in the permit pursuant to section 40-138(c)(5) of this Code for completion of the excavation. To obtain an extension, the permittee shall submit an application therefor, including the nonrefundable application fee established pursuant to this article and indicating the number of additional

days needed for final completion. Extensions of time granted under this subsection shall be noted on the records regarding the permit.”

Section 15. That Division 2 of Article V of Chapter 40 of the Code of Ordinances, Houston, Texas, is hereby amended by adding a new Section 40-149, which shall read as follows:

“Sec. 40-149. Application fees.

The director shall, from time to time, prepare and submit for approval by motion of the city council a schedule of nonrefundable application fees that shall be paid by an applicant for a permit, permit extension or data entry. Payment of any applicable fees when due is a condition of the processing of any application under this article.”

Section 16. That Division 3 of Article V of Chapter 40 of the Code of Ordinances, Houston, Texas, is hereby amended by renumbering Sections 40-158 through 40-162, inclusive, as Sections 40-159 through 40-163, respectively, and adding a new Section 40-158, which shall read as follows:

“Sec. 40-158. Steel plate temporary surfaces.

It shall be unlawful to place a steel plate at an excavation without a permit. The director may authorize as a condition of a permit the use of a steel plate as a temporary surface for an excavation. Any such permit shall specify the length of time the steel plate is allowed to remain in the public way. It shall be unlawful for any permittee or former permittee to maintain or cause to be maintained a steel plate in the public way after the time specified in the permit for the excavation at which the steel plate is located. Each steel plate shall be clearly marked with the name of the owner of the steel plate, and a permittee's failure to use a steel plate so marked shall be a violation of this article.”

Section 17. That Section 40-159 of the Code of Ordinances, Houston, Texas, as renumbered by this Ordinance, is hereby amended to read as follows:

“Sec. 40-159. Completion of excavation; warranty.

(a) In accordance with the rules and regulations promulgated under section 40-128 of this Code, a permittee shall notify the city engineer before commencing and obtain permission to commence the excavation before it enters into the public way. In connection with the notification and permission, the authorized date of entry on the public way, for purposes of section 40-138(c)(5) of this Code shall be established. In connection with the notification, the permittee shall also furnish the transmittal number required under section 40-136(b)(13) of this Code, if it has not previously been provided. The permittee shall diligently prosecute the excavation to its final completion within the time authorized under the permit. It shall be unlawful for a permittee to fail, refuse or neglect to diligently prosecute or to timely complete the excavation in accordance with the permit and all applicable rules and regulations and the construction standards adopted in or pursuant to this article.

(b) If a permittee commences an excavation and then fails, refuses, or neglects to diligently prosecute or to timely complete the excavation in accordance with the permit and all applicable rules and regulations and the construction standards adopted in or pursuant to this article, the city engineer may, following written notice to the permittee, perform the excavation or cause a city contractor to perform the excavation. The city engineer shall afford the permittee five days' written notice and opportunity to cure before taking over the excavation, unless the director of public works and engineering determines that hazards to public safety and convenience that are posed by the condition of the excavation require a shorter notice period. ~~The city engineer may charge the cost of having the excavation performed, including related administrative expenses, to the permittee.~~ The city engineer shall so notify the permittee, and the permittee shall be obliged to pay the cost within 30 days following receipt of notification. Disputes over costs assessed shall be subject to the hearing process established under section 40-126 of this Code."

Section 18. That Section 40-161 of the Code of Ordinances, Houston, Texas, as renumbered by this Ordinance, is hereby amended to read as follows:

"Sec. 40-161. Inspections of excavations.

(a) All excavations shall be inspected by the city. Based upon the complexity and nature of the excavation and as specified in the permit, inspections may be required during the performance of the excavation, immediately upon completion of the excavation, or both.

(b) Consistent with applicable laws, sound engineering practices, and the nature of the excavation, the city engineer may, in addition to or in lieu

of the inspections called for under subsection (a), require that a permittee, at the permittee's expense, retain a professional engineer licensed in Texas to observe the excavation and, based upon the observations, to provide written certification upon completion of the excavation stating that the public way has been restored in accordance with the drawings and specifications and all other applicable technical requirements."

Section 19. That Division 4 of Article V of Chapter 40 of the Code of Ordinances, Houston, Texas, is hereby repealed.

Section 20. That the City Council hereby approves the initial schedule of fees attached as Exhibit "A" hereto pursuant to Section 40-149 of the Code of Ordinances, Houston, Texas, as added by this Ordinance.

Section 21. That if any provision, section, subsection, sentence, clause or phrase of this Ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their applicability to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this Ordinance that no portion hereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this Ordinance are declared to be severable for that purpose.

Section 22. That there exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction as requested in writing by the Mayor; therefore, this Ordinance shall be passed finally on that date and shall take effect at 12:01 a.m. on July 1, 2006.

PASSED AND APPROVED this 7th day of June, 2006.



Mayor of the City of Houston

Prepared by the Legal Dep't TERESA F. ALVARADO
 DFM:dfm May 17, 2006 Senior Assistant City Attorney
 Requested by Michael S. Marcotte, P.E., DEE, Director
 Public Works & Engineering Department
 L.D. File No. 042000008004
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AYE	NO	
✓		MAYOR WHITE
••••	••••	COUNCIL MEMBERS
✓		LAWRENCE
✓		JOHNSON
✓		CLUTTERBUCK
✓		EDWARDS
✓		WISEMAN
✓		KHAN
✓		HOLM
✓		GARCIA
✓		ALVARADO
✓		BROWN
✓		LOVELL
✓		SEKULA-GIBBS
✓		GREEN
✓		BERRY
CAPTION	ADOPTED	

MAY 017 Rev 1/04

CAPTION PUBLISHED IN DAILY COURT
 REVIEW
 DATE: JUN 13 2006

EXHIBIT A

SCHEDULE OF PERMIT APPLICATION FEES

ARTICLE V, CHAPTER 40, CITY OF HOUSTON CODE OF ORDINANCES

EXCAVATION IN THE PUBLIC WAY

Initial Permit Application Fee:

Tunneling, Jacking and Boring only	\$125
All other Methods of Excavation	\$175

Permit Extension Application Fee:

Other Than Steel Plate Temporary Surface	\$25
Steel Plate Temporary Surface	\$50

Data Fee for Non-Electronic Submission (per application): \$50
