

ORDINANCE NO. 4205

AN ORDINANCE OF THE CITY OF KIRKLAND RELATING TO USE OF RIGHT OF WAY FOR COMMUNICATIONS PURPOSES AND REPEALING AND REENACTING TITLE 26 OF THE KIRKLAND MUNICIPAL CODE.

The City Council of the City of Kirkland do ordain as follows:

Section 1. Title 26 of the Kirkland Municipal Code is hereby repealed.

Section 2. A new Title 26 of the Kirkland Municipal Code, entitled "Right of Way--Communications" is hereby adopted to read as follows:

***Chapter 26.04***  
***PURPOSE***

Sections:

26.04.010 Purpose.

**26.04.010 Purpose**

The purpose of this title is to:

- (a) Permit and manage reasonable access to the rights-of-way of the city for communications purposes on a nondiscriminatory basis;
- (b) Establish clear and nondiscriminatory local guidelines, standards and time frames for the exercise of local authority with respect to the regulation of right-of-way use;
- (c) Encourage the provision of advanced and competitive communications services on the widest possible basis to the businesses, institutions and residents of the city;
- (d) Promote competition in communications;
- (e) Conserve and manage the limited physical capacity of the rights-of-way held in public trust by the city;
- (f) Minimize unnecessary local regulation;
- (g) Ensure that the city's current and ongoing costs of granting and regulating private access to and use of the rights-of-way are fully paid by the persons seeking such access and causing such costs;
- (h) Ensure that all owners of communications facilities within the city comply with the applicable ordinances, rules and regulations of the city;
- (i) Ensure that the city can continue to fairly and responsibly protect the public health, safety and welfare;
- (j) Enable the city to discharge its public trust consistent with rapidly evolving federal and state regulatory policies, industry competition and technological development.

**Chapter 26.08**  
**DEFINITIONS AND RULES OF CONSTRUCTION**

Sections:

- 26.08.010 Rules of construction  
26.08.020 Defined terms

**26.08.010 Rules of construction**

(a) For the purposes of this Ordinance, the following terms, phrases, words, and abbreviations shall have the meanings given herein, unless otherwise expressly stated. Unless otherwise expressly stated, words not defined herein shall be given the meaning set forth in Title 47 of the United States Code, as amended; words not defined therein shall be given the meaning set forth in ESSB 6676; and words not defined therein shall have their common and ordinary meaning.

(b) When not inconsistent with the context, words used in the present tense include the future tense; words in the plural number include the singular number, and words in the singular number include the plural number; the masculine gender includes the feminine gender, and vice versa.

(c) The words "shall" and "will" are mandatory, and "may" is permissive.

(d) The term "written" shall include electronic documents.

**26.08.020 Defined terms**

(a) "Affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person.

(b) "City" means the city of Kirkland.

(c) "City Manager" means the city manager, or the city manager's lawfully appointed designee.

(d) "City property" means all real property now or hereafter owned by the city whether in fee ownership or other interest.

(e) "Claims" means all actions, costs, damages, demands, expenses, fines, injuries, judgments, liabilities, losses, penalties, suits, fees, attorneys' fees, and costs.

(f) "Communications" means information services, telecommunications, video, or similar services.

(g) "Department" means the department of public works.

(h) "Director" means the director of the department of public works, or his or her designee.

(i) "Facility" means all appurtenances or tangible things owned, leased, operated, or licensed by an owner or provider.

(j) "Master permit" means a grant from the city authorizing an owner to make use of the rights-of-way for a specified purpose, other than a cable franchise.

(k) "Master permittee" means a person who has received a master permit from the city.

(l) "Obstruction" means any object or structure that blocks or impedes the construction or maintenance of public works, including private facilities that provide communications services to customers; shrubbery or plants of any kind; and storage materials.

(m) "Overhead facilities" means facilities located above the surface of the ground, including the underground supports and foundations for such facilities.

(n) "Owner" means a person who owns facilities that are installed or maintained in the rights-of-way of the city for communications purposes. To the extent consistent with state law, the term "owner" excludes any governmental or non-profit entity that owns facilities installed or maintained in the rights-of-way of the city for communications purposes if such facilities are combined with facilities owned by the city in such a way that any right-of-way activities affecting the facilities of such governmental or non-profit entity would also affect the city's facilities.

(o) "Permit" means a master permit or use permit.

(p) "Permittee" means a master permittee or use permittee.

(q) "Person" means corporations, companies, associations, firms, partnerships, limited liability companies, government entities, other entities and individuals.

(r) "Personal Wireless Facilities" shall have the same meaning as in 47 U.S.C. § 332(c)(7)(C)(ii), which states as of the date of enactment of this title that this term means facilities for the provision of personal wireless services.

(s) "Personal Wireless Service" shall have the same meaning as in 47 U.S.C. § 332(c)(7)(C)(i), which states as of the date of enactment of this title that this term means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.

(t) "Provider" means an owner whose facilities in rights-of-way are used to provide communications to customers in the city.

(u) "Right-of-way work" means any construction, installation, maintenance, repair, removal, or other work with respect to facilities in or on the surface or subsurface of rights-of-way.

(v) "Rights-of-way" means land acquired or dedicated for public roads and streets. It does not include (a) state highways; (b) structures, including poles and conduits, located within the right of way; (c) federally granted trust lands or forest board trust lands; (d) lands owned or managed by the state parks and recreation commission; (e) federally granted railroad rights of way acquired under 43 U.S.C. Sec. 912 and related provisions of federal law that are not open for motor vehicle use; or (f) parks or other public property not used as a public right-of-way.

(w) "State" means the state of Washington.

(x) "Surplus space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the Washington Utilities and Transportation Commission, to allow its use by a telecommunications carrier for a pole attachment.

(y) "Usable space" means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance as specified in the orders and regulations of the Washington Utilities and Transportation Commission.

(z) "Use permit" means the authorization by which the city grants permission to an owner or provider to enter and access specified right-of-way for the purpose of installing, maintaining, repairing, or removing identified facilities.

(aa) "Use permittee" means a person who has received a use permit from the city under this title.

(bb) "Washington Utilities and Transportation Commission" or "WUTC" means the state administrative agency, or lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers in the state of Washington to the extent prescribed by law.

(cc) "Wireless" means communications using radio frequency or optical emissions to complete one or more communications paths in whole or in part among originating and receiving points without other tangible physical connection, including without limitation radio and unguided optical waves, and the apparatus used for such transmission.

(dd) "Wireline" means communications using conducted electromagnetic or optical emissions by, over, or within a physically tangible means of transmission, including without limitation wire or cable, and the apparatus used for such transmission.

## ***Chapter 26.12*** ***APPLICABILITY***

### Sections:

26.12.010 Persons subject to this title

26.12.020 Authorizations required by persons subject to this title

### **26.12.010 Persons subject to this title**

All owners, providers, master permittees, and use permittees shall be subject to this title.

### **26.12.020 Authorizations required by persons subject to this title**

(a) Any owner must have a master permit prior to installing or maintaining any facilities in the rights-of-way for communications purposes, except as provided in subsections 26.12.020(b) and 26.12.020(c).

(b) Any owner that shows that it has a cable franchise from the city need not obtain a master permit pursuant to this title for its use of the rights-of-way for cable service. It must obtain a master permit pursuant to this title if it uses the rights-of-way for any purposes other than cable service.

(c) Any owner that shows that the state of Washington has granted it the right to operate within the city's rights-of-way without the city's consent may, but is not required to, obtain a master permit pursuant to this title. A person asserting such a state grant consistent with RCW 35.99.010, shall register with the city pursuant to Chapter 26.16 of this title and, in so doing, provide the city with a statement, and supporting documentation, detailing the basis for the assertion of a state-wide grant.

(d) An owner placing wireless facilities in the city's rights-of-way shall comply with the provisions of 26.20.080.

(e) Any owner or permittee conducting right-of-way work in the rights-of-way must obtain a use permit pursuant to this title.

(f) Owners, permittees, and providers that do not require authorizations pursuant to Section 26.12.020 may nonetheless be required to register with the city pursuant to Section 26.16.010.

### ***Chapter 26.16*** **REGISTRATION**

**Sections:**

26.16.010	Registration required
26.16.020	Purpose of registration
26.16.030	Exception to registration

**26.16.010 Registration required**

All owners and permittees, and all providers that offer or provide communications to customers within the city, shall register with the city hereunder on forms provided by the Department. The information provided in this registration shall include the following:

- (a) The identity and legal status (*e.g.*, corporation, partnership, limited partnership) of the registrant;
- (b) The address and telephone number of the registrant;
- (c) The name, address, telephone number, and electronic mail address of the officer, agent or employee responsible for the accuracy of the registration statement;
- (d) A description of the registrant's existing or proposed facilities within the city;
- (e) Information sufficient for the city to determine whether the registrant is subject to this title pursuant to Section 26.12.010;
- (f) Information sufficient for the city to determine whether any communications services provided or to be provided by the registrant constitute an occupation or privilege subject to any municipal tax, permit, license or franchise fee;
- (g) To the extent allowed by law, copies of the applicant's registration filed with the Washington Utilities and Transportation Commission pursuant to Chapter 480-121 WAC. Alternatively, applicant shall submit a statement detailing the basis (along with pertinent supporting materials) for its authorizations to provide telecommunications services or, in the further alternative, the reasons that registration with the WUTC is not required;
- (h) To the extent allowed by law, information sufficient for the city to determine that the applicant has applied for and received any permit, operating license or other right or approvals required by the Federal Communications Commission to provide telecommunications services or facilities;
- (i) If the registrant believes that it is not required to obtain a master permit or franchise from the city, the showing referred to in Section 26.12.020(b) or 26.12.020(c);
- (j) Such other information as the city may reasonably require with respect to its authority to manage, regulate and control public rights-of-way.

**26.16.020 Purpose of Registration**

The registration requirement is an exercise of the City's police power to obtain information the City needs to effectively and efficiently plan,

organize and manage demands placed on its rights of way. Registration does not constitute a grant or deprivation of the right to occupy the rights of way, but simply provides the City with necessary information to manage the rights of way in a manner consistent with the City's rights under state law. The purpose of registration is to:

- (a) Provide the city with accurate and current information necessary for the management and regulation of city right-of-way;
- (b) Assist the city in enforcement of this title;
- (c) Assist the city in the collection and enforcement of any municipal taxes, fees, or charges that may be due to the city; and
- (d) Assist the city in monitoring compliance with local, laws.

**26.16.030 Exception to Registration**

A person which provides telecommunications services solely to itself, its affiliates or members between points in the same building, or between closely located buildings under common ownership or control; provided, that such company or person does not use or occupy any rights-of-way of the city or other ways within the city, is excepted from the registration requirements pursuant to this title.

**Chapter 26.20  
MASTER PERMITS**

**Sections:**

- 26.20.010 Authority granted by master permit
- 26.20.020 Treatment of franchises and licenses
- 26.20.030 Applications for master permits
- 26.20.040 Acceptance
- 26.20.050 Characteristics of master permits
- 26.20.060 Amendment of master permit
- 26.20.070 Renewal of master permit
- 26.20.080 Personal wireless facilities in rights-of-way
- 26.20.090 Use of poles and conduit
- 26.20.100 Removal

**26.20.010 Authority granted by master permit**

(a) Owners must obtain master permits pursuant to Section 26.12.020(a).

(b) A master permit authorizes the master permittee to use the rights-of-way, and only the rights-of-way, for a specified purpose. Use of city property other than the rights-of-way, including any use of city poles or other facilities, requires a separate site license from the city.

(c) A master permit shall state the specific purpose for which it authorizes the master permittee to use the rights-of-way. The issuance of a master permit does not relieve the applicant from obtaining any other legal authority that may be necessary to use the rights-of-way for any other purpose.

(d) A master permit shall apply either to wireline or to wireless use of the rights-of-way, but not both. If an owner wishes to install both sorts of facilities, it must obtain separate master permits. The master permit shall expressly state the type of facility to which it applies.

**26.20.020 Treatment of franchises and licenses**

Any franchise granted pursuant to Section 26.04.050 as amended in 2006, and any license granted pursuant to Section 26.04.040 as amended in 2006, shall be treated as a master permit for purposes of this title during the remainder of its term.

**26.20.030 Applications for master permits**

(a) An application for a master permit shall be submitted in the form and manner specified by the Department.

(b) An application for a master permit shall include the following information, as specified in the form provided by the Department:

(1) The information required in Section 26.16.010(a) through 26.16.010(c);

(2) A copy of the applicant's registration pursuant to Section 26.16.010 (which may be submitted simultaneously with the master permit application);

(3) Such other information as the city may reasonably require.

(c) Within twenty-eight calendar days after the date of submittal of the application, the city shall provide the applicant a written determination of whether the application is complete, and, if the application is not complete, what must be submitted by the applicant in order for the application to be complete. The procedures for approval of a license and the requirements for a complete application shall be available in written form.

(d) Within one hundred twenty days after receiving a complete application hereunder, the City Council shall make a determination granting or denying the application in whole or in part. The one-hundred-twenty-day period may be extended by a specific number of days or to a defined date by written agreement between the city and the applicant. The one-hundred-twenty-day period shall not apply in any case the City Council cannot reasonably act within the one-hundred-twenty-day period.

(e) The following standards shall apply when determining to grant or deny the application:

(1) The capacity of the rights-of-way to accommodate the applicant's facilities;

(2) The capacity of the rights-of-way to accommodate additional utility and telecommunications facilities if the application is granted;

(3) The damage or disruption, if any, to public or private facilities, improvements, service, travel or landscaping if the application is granted, giving consideration to an applicant's willingness and ability to mitigate and/or repair same;

(4) The public interest in minimizing the cost and disruption of construction within the rights-of-way;

(5) The availability of alternate routes or locations that are reasonable for placement of the proposed facilities;

(6) Such other factors as may relate to the city's authority to manage, regulate and control public rights-of-way.

(f) If the application is denied, the determination shall include the reasons for denial. Denial of a master permit shall be supported by substantial evidence contained in a written record.

(g) If the application is approved, the city shall issue the permit as a written document with any conditions necessary to preserve and maintain the public health, safety, welfare, and convenience.

#### **26.20.040 Acceptance**

No master permit granted hereunder shall be effective until it has been approved by the city council by ordinance and the applicant has accepted the master permit, in writing, in a form acceptable to the city.

#### **26.20.050 Characteristics of master permits**

(a) A master permit shall be nonexclusive.

(b) No master permit shall be in effect for a term of more than ten years, unless a longer term is expressly specified in the master permit.

(c) If a master permittee does not provide communications to customers in the city, the master permit shall authorize the master permittee to use only those specific portions of the rights-of-way indicated in the master permit. If a master permittee does provide communications to customers in the city, the master permit may specify limited portions of the rights-of-way, or it may allow the master permittee to use any portion of the rights-of-way.

(d) In accepting any master permit, the permittee acknowledges that its rights hereunder are subject to the lawful exercise of the police power and zoning power of the city to adopt and enforce ordinances necessary to protect the safety and welfare of the public, and it agrees to comply with all applicable laws enacted by the city pursuant to such powers.

(e) No master permit shall convey any right, title or interest in rights-of-way, but shall be deemed authorization only to use and occupy the rights-of-way for the limited purposes and term stated in the master permit.

(f) No master permit shall excuse the master permittee from securing any further easements, leases, permits or other approvals that may be required to lawfully occupy and use rights-of-way.

(g) No master permit shall be construed as any warranty of title.

#### **26.20.060 Amendment of master permit**

(a) If a master permittee wishes to modify the conditions of the master permit, including the portions of the rights-of-way it is authorized to use and occupy, it shall make a new application to the city pursuant to the procedures set forth in Section 26.20.030.

(b) If a master permittee is ordered by the city to locate or relocate its facilities in rights-of-way not included in a previously granted master permit, the city shall grant an amendment making that change without further application.

#### **26.20.070 Renewal of master permit**

A person that wishes to renew its master permit hereunder shall, not more than one hundred eighty days nor less than ninety days before the expiration of the current master permit, make a new application to the city for an additional term pursuant to the procedures set forth in Section 26.20.030.



### **26.20.080 Personal wireless facilities in rights-of-way**

(a) The city may impose a site-specific charge pursuant to an agreement with a service provider of personal wireless services for:

(1) The placement of new personal wireless facilities in the right-of-way regardless of height, unless the new facility is the result of a city-mandated relocation, in which case the city will not charge the service provider if the previous location was not charged;

(2) The placement of replacement structures when the replacement is necessary for the installation or attachment of personal wireless facilities, and the overall height of the replacement structure and the personal wireless facility is more than sixty feet; or

(3) The placement of personal wireless facilities on structures owned by the city located in the right-of-way; however, a site-specific charge shall not apply to the placement of personal wireless facilities on existing structures unless the structure is owned by the city.

(b) The city is not required to approve a permit for the placement of personal wireless facilities that meets one of the criteria in this section 26.20.080 absent such an agreement. If the parties are unable to agree on the amount of the charge, the service provider may submit the amount of the charge to binding arbitration by serving notice on the city. Within thirty days of receipt of the initial notice, each party shall furnish a list of acceptable arbitrators. The parties shall select an arbitrator; failing to agree on an arbitrator, each party shall select one arbitrator and the two arbitrators shall select a third arbitrator for an arbitration panel. The arbitrator or arbitrators shall determine the charge based on comparable siting agreements involving public land and rights-of-way. The arbitrator or arbitrators shall not decide any other disputed issues, including but not limited to size, location and zoning requirements. Costs of the arbitration, including compensation for the services of the arbitrator(s), must be borne equally by the parties participating in the arbitration and each party shall bear its own costs and expenses, including legal fees and witness expenses in connection with the arbitration proceeding.

### **26.20.090 Use of poles and conduit**

(a) The city may, in accordance with RCW 35.99.070, require a telecommunications or cable service provider that is constructing, relocating or placing ducts or conduits in the rights-of-way to provide the city with additional duct or conduit and related structures necessary to access the conduit.

(b) Subject to such reasonable rules and regulations as may be prescribed by the pole owner and subject to the limitations prescribed by RCW 70.54.090 or any other applicable law, the city may post city signs on an owner's poles within the city.

(c) Subject to the owner's prior written consent, which may not be unreasonably withheld, the city may install and maintain city-owned overhead wires upon an owner's poles for communications purposes, subject to the following:

(1) Such installation and maintenance shall be done by the city at its sole risk and expense, in accordance with all applicable laws, and subject to such reasonable requirements as the owner may specify from time to time (including, without limitation, requirements

accommodating its facilities or the facilities of other parties having the right to use the pole);

(2) The owner shall have no indemnification obligations in connection with any city-owned wires so installed and maintained;

(3) The owner shall not charge the city a fee for the use of such poles in accordance with this Section 26.20.090 as a means of deriving revenue therefrom; provided, however, that nothing herein shall require the owner to bear any cost or expense in connection with such installation and maintenance by the city.

(4) The owner shall not enter into an agreement with a third person which would require the owner to exclude the city or any other person from use of such poles.

(5) The owner may not condition the city's use of such poles on the city's acceptance of limitations on the purpose or use of the city's facilities.

### **26.20.100 Removal**

(a) Within thirty days following written notice from the city, any owner of facilities in the city's rights-of-way that are not authorized pursuant to Section 26.12.020(a) through 26.12.020(c) shall, at its own expense, remove such facilities from the rights-of-way. If such owner fails to remove such facilities, the city may cause the removal and charge the owner for the costs incurred. Facilities are unauthorized and subject to removal in the following circumstances:

(1) Upon termination of the owner's authorization under Section 26.12.020(a) through 26.12.020(c);

(2) If the facilities were constructed or installed without the prior grant of a franchise or master permit;

(3) Upon abandonment of a facility within the rights-of-way;

(4) If the facilities were constructed or installed at a location not permitted by the master permit or franchise.

(b) The city retains the right to cut or move any facilities located within the city's rights-of-way to the extent the city may determine such action to be necessary in response to any public health or safety emergency.

## ***Chapter 26.24 USE PERMITS***

### **Sections:**

26.24.010	Use permit required
26.24.020	Applications for use permits
26.24.030	Maintenance permits
26.24.040	Surveyor
26.24.050	Duration and validity; non-transferability
26.24.060	Permit to excavate in recently paved rights-of-way
26.24.070	Permit to be available at site
26.24.080	Completion of construction
26.24.090	As-built drawings

### **26.24.010 Use permit required**

(a) A person may not enter or use the rights-of-way for the purpose of installing, maintaining, repairing, or removing identified facilities without first obtaining a use permit from the Department.

(b) In the event of an unexpected repair or emergency, an owner may commence such repair and emergency response work as required under the circumstances, provided that the owner shall notify the Director as promptly as possible, either before such repair or emergency work begins or as soon thereafter as possible if advance notice is not practicable.

#### **26.24.020 Applications for use permits**

(a) An application for a use permit shall be submitted in the form and manner specified by the Department and must be signed by the owner or the agent of the firm that will actually be performing the work.

(b) An application for a use permit shall include the following information, as specified in the form provided by the Department:

(1) The information required in Section 26.16.010(a) through 26.16.010(c);

(2) A copy of, or specifically identifiable citation to, the applicant's registration pursuant to Section 26.16.010;

(3) A statement of, and citation to, the specific authority according to which the applicant is authorized to use and occupy the rights-of-way, including the category under which the applicant falls as outlined in Section 26.12.020(a) through 26.12.020(d);

(4) A statement that any land use application that must be considered in conjunction with the use permit has been filed with the city, and a copy of, or specifically identifiable citation to, each such application;

(5) A specific description of the portions of the rights-of-way that will be affected by the applicant's right-of-way work under the use permit;

(6) The location and route of all facilities to be installed on existing utility poles;

(7) The location and route of all facilities to be located under the surface of the ground, including line and grade proposed for the burial at all points along the route which are within the rights-of-way;

(8) The location of any other facilities to be constructed within the city, but not within the rights-of-way, in connection with the proposed right-of-way work, in accordance with applicable city building and land use regulations;

(9) The construction methods to be employed for protection of existing structures, fixtures and facilities within or adjacent to the rights-of-way;

(10) The location, dimension and types of any trees that will be impacted during construction within or adjacent to the rights-of-way along the route proposed by the applicant, together with a landscape plan for protecting, trimming, removing, replacing and restoring any trees or areas to be disturbed during construction; and

(11) Such other information as the city may reasonably require.

(c) If the applicant for a use permit has obtained a master permit or cable franchise from the city, the city shall act on the

application within thirty days of receiving a complete application, unless the applicant consents to a different time period. For purposes of this paragraph, "act" means that the city makes the decision to grant, condition, or deny the use permit, or notifies the applicant in writing of the amount of time that will be required to make the decision and the reasons for this time period. Such a notice shall state the amount of additional time required, and the reasons for the additional time. Conditioned or denied permits may be appealed to the city hearing examiner within fourteen days of the date of the permit or permit denial.

(d) Unless otherwise provided by law or by a master permit or franchise, no use permit shall be issued unless the applicant has paid all fees required pursuant to this title.

(e) The Director may approve, conditionally approve, or deny an application for a use permit.

(f) If an application is approved, the Director shall issue a use permit to the applicant.

(g) If an application is conditionally approved, the Director may condition the use permit with specified requirements that preserve and maintain the public health, safety, welfare, and convenience.

(h) If an application is denied, the Director shall advise the applicant by a written communication of the basis for the denial. Such basis shall include findings of fact and conclusions of law that support the denial.

(i) When the city in its capacity as a provider engages in any activity that includes right-of-way work in the paved portion of a right-of-way, the city need not obtain a use permit, but it shall keep a record of the date, location, purpose, and size of the right-of-way work.

#### **26.24.030 Maintenance permits**

(a) The Director may issue a maintenance permit on an annual basis to a provider instead of issuing individual use permits for activities in the rights-of-way covered by the maintenance permit.

(b) A maintenance permit covers:

(1) Emergency activity in the paved or unpaved area of the rights-of-way that is necessary for the preservation of life, health, or property or for the restoration of interrupted service; and

(2) Those non-emergency activities, excluding right-of-way work in or under the paved rights-of-way, that are specified in the permit, which may include:

(A) An activity that makes no material change to the footprint of the facility or to the surface or subsurface of right-of-way but disturbs or impedes traffic on a neighborhood access road;

(B) Replacing overhead facilities; or

(C) New individual services to a residence or building from existing facilities that are on the same side of the rights-of-way, so long as the activity related to the service does not exceed 300 feet.

#### **26.24.040 Surveyor**

If the use permit specifies the location of facilities by depth, line, grade, proximity to other facilities or other standards, the Director may require the use permittee to cause the location of its facilities to be verified by a registered Washington land surveyor. The use

permittee, at its expense, shall relocate any facilities which are not located in compliance with use permit requirements.

**26.24.050 Duration and validity; non-transferability**

(a) A use permit other than a maintenance permit shall expire 90 days after issuance, but the Department may extend the expiration date for good cause.

(b) A use permit is not transferable.

**26.24.060 Permit to excavate in recently paved rights-of-way**

The Director may not issue a use permit to excavate in a public right-of-way that was reconstructed, repaved, or resurfaced in the preceding five-year period, unless the Director finds good cause for issuance. No use permit shall be issued to cut any right-of-way the surface of which is less than five years old, unless the use permittee overlays the surface of any rights-of-way that are cut by the use permittee.

**26.24.070 Permit to be available at site**

A use permit or a copy of the use permit shall be available for review upon request (at the work site or via a Web site accessible to the Department) for the duration of the activity allowed by the use permit.

**26.24.080 Completion of construction**

A use permittee shall promptly complete all right-of-way work so as to minimize disruption of the rights-of-way and other public and private property. All right-of-way work authorized by a use permit, including restoration, must be completed within ninety days of the date of issuance or by such other time as the city may specify in writing upon issuance of the use permit.

**26.24.090 As-built drawings**

In the event the permittee installs facilities for the city, the permittee shall provide the city with as-built or record drawings of the city facilities, submitted in formats as stipulated in the Kirkland Pre-Approved Plans and Policies.

**Chapter 26.28  
INSPECTION, REPORTS AND NOTICE**

**Sections:**

26.28.010	Inspection of Right of Way Construction and Restoration Activities
26.28.020	Maps
26.28.030	Reports to the City
26.28.040	Notice to Department
26.28.050	Notice to Public

**26.28.010 Inspection of Right-of-Way Construction and Restoration Activities**

(a) The city or its designee may inspect all right-of-way construction and restoration activities and conduct any tests that the

city finds necessary to ensure compliance with the terms of this title and any other applicable law or agreements.

(b) An owner shall allow the city or its designee to make such inspections referred to in subsection (a) at any time on at least ten days' notice or, in case of an emergency, on demand without prior notice.

#### **26.28.020 Maps**

Within three months after enactment of this title, each owner shall file with the Department existing plats or drawings that show the location of any underground facilities in the city's rights-of-way for which the owner has existing plats or drawings. Thereafter, on an annual basis, the owner shall file in the form required by the Department a full and complete survey, including descriptions and as-built maps, of the location of underground facilities installed in the city's rights-of-way in the previous year. All maps shall be submitted in formats as set forth in the Kirkland Pre-Approved Plans and Policies. If applicable law allows the city to keep electronic copies confidential, then each owner shall use its best efforts to provide electronic versions to the city in a format compatible, in the city's judgment, with the city's GIS system.

#### **26.28.030 Reports to the City**

(a) The city or its designee may require such reports and information as the city finds necessary to ensure compliance with the terms of this title and any other applicable law or agreements.

(b) Within ten days of receipt of a written request from the city manager, or such other reasonable time as the city manager may specify in writing, each owner, permittee or provider shall furnish the city manager with information sufficient to demonstrate:

(1) That it has complied with all requirements of this title;

(2) That all fees due the city in connection with the services and facilities provided by the owner, permittee or provider have been properly collected and paid; and

(3) That the owner, permittee or provider has furnished the city with all necessary information with respect to its facilities in city rights-of-way.

#### **26.28.040 Notice to Department**

For emergency activity, a use permittee shall notify the Department within 24 hours after completion of the right-of-way work. For non-emergency activities, the use permittee shall notify the Department at least five working days before the right-of-way work takes place. For both emergency and non-emergency activities, the use permittee shall provide information about the right-of-way work as required by the Department.

#### **26.28.050 Notice to Public**

(a) Except in the case of an emergency involving public safety or an outage, or service interruption to a large number of customers, an owner or permittee shall give reasonable advance notice to private property owners of construction work on or in adjacent rights-of-way, as provided in subsection (b) of this section.

(b) In particular, the following requirements shall apply to non-emergency activity in the city's rights-of-way when the activity adjoins

residentially zoned and developed property and will not be completed and restored in a period of two weeks or less.

(1) A use permittee shall either:

(A) At least 72 hours before commencement of the right-of-way work, (i) post and maintain a notice that is located at the beginning and end points of the activity, and (ii) deliver notice to each address in the area of the activity and within 175 feet of its boundaries; or

(B) At least 15 calendar days before commencement of the right-of-way work, provide written notice individually to each address in the area of the right-of-way work and within 175 feet of its boundaries.

(2) For good cause, the Director may require a use permittee to employ a combination of the notices required by Section 26.28.050(b)(1).

(3) The notices required by Section 26.28.050(b)(1) shall include the name, telephone number, and address of the owner and use permittee, a description of the work to be performed, the duration of the work, and the name, address, and telephone number of a person who will provide information to and receive complaints from any member of the public concerning the work. Posted notices shall be in a format and size acceptable to the Department.

**Chapter 26.32  
FEES**

**Sections:**

26.32.010	Purpose
26.32.020	Registration fees
26.32.030	Master permit application fees
26.32.040	Use permit application fees
26.32.050	Other city costs
26.32.060	Appeal to hearing examiner
26.32.070	Compensation
26.32.080	Regulatory fees and compensation not taxes

**26.32.010 Purpose**

The purpose of the fees established in this chapter is to ensure the recovery of the city's direct and indirect costs and expenses, including, but not limited to, actual costs of city staff time and resources as well as any outside consultation expenses which the city reasonably determines are necessary. The fees set forth are in addition to any construction fees which may be required under Section 19.12.090 and Section 5.74 of the Kirkland City Code.

**26.32.020 Registration fees**

Each application for registration pursuant to Chapter 26.16 shall be accompanied by a fee in such amount as the city determines is required to cover all direct and indirect costs associated with the registration process.

**26.32.030 Master permit application fees**

(a) Prior to the acceptance of a master permit application by the city, the applicant shall participate in a pre-application conference with the city for the purpose of establishing the minimum application fee.

(b) The city shall establish a minimum application fee, based on the city's estimated reasonable costs in reviewing the application, after the conference referred to in Section 26.32.030(a). The minimum fee may be up to two thousand five hundred dollars. The applicant shall deposit the minimum fee with the city within thirty days after the city notifies the applicant of the amount. This application fee shall be applied towards actual expenses and costs of the city.

(c) The City shall establish the final application fee after it acts on the application, reflecting the city's actual reasonable costs in reviewing the application. The city shall notify the applicant of the reimbursement amount and a description of the costs incurred by the city in reviewing the application. If the city's actual reasonable costs are less than the minimum application fee, the city shall refund the unused application fees, within thirty days after granting or denial of the permit. If the city's actual reasonable costs exceed the minimum application fee, the applicant shall reimburse the city within thirty days of receiving written notice from the city requesting reimbursement.

(d) An applicant that withdraws or abandons its application shall, within sixty days of its application and review fee payment, be refunded the balance of its deposit under this section, less (1) the registration fee; and (2) all reasonable costs and expenses incurred by the city in connection with the application.

(e) All disputes as to the amounts required shall be resolved by an appeal to a hearing examiner.

#### **26.32.040 Use permit application fees**

(a) Prior to issuance of a use permit, the use permittee shall pay a permit fee to be calculated in accordance with Section 5.74.040 and Section 19.12.090 of this code. The purpose of the use permit fee shall be to recover the city's actual direct and indirect construction plan review and inspection costs, as well as any damage or diminution of the value of the rights-of-way that result from the use permittee's right-of-way work.

(b) The recipient of an annual maintenance permit pursuant to Section 26.24.030 shall pay an annual permit fee set by the Department from time to time at a level sufficient to recover the city's annual costs as described in Section 26.32.040(a) for the recipient of the maintenance permit.

#### **26.32.050 Other city costs**

To the extent allowed by law, all owners, permittees, and providers shall, within thirty days after written demand therefor, reimburse the city for all direct and indirect costs incurred by the city in connection with any modification, amendment, renewal or transfer of a master permit.

#### **26.32.060 Appeal to hearing examiner**

Any applicant or permittee may initiate a review of the fees established in Sections 26.32.030 through 26.32.050 of this title. Within ten days of notice of the fee from the city, the applicant or permittee may appeal to the hearing examiner. Pursuant to the



provisions of Chapter 3.34 of this code, the hearing examiner is authorized to review and make determinations as provided herein.

### **26.32.070 Compensation**

To the extent permitted by law, each master permit granted hereunder is subject to the city's right, which is expressly reserved, to annually fix a fair and reasonable compensation to be paid for use of property pursuant to the master permit, provided that nothing in this title shall prohibit the city and a master permittee from agreeing upon the compensation to be paid.

### **26.32.080 Regulatory fees and compensation not taxes**

The regulatory fees provided for in this title, and any compensation charged and paid for the rights-of-way provided for herein, are separate from and additional to any and all federal, state, local and city taxes as may be levied, imposed or due from an owner or provider or its customers or subscribers.

## ***Chapter 26.36*** ***WORK IN RIGHTS-OF-WAY***

### Sections:

26.36.010	Placement of facilities
26.36.020	Obstructions in rights-of-way
26.36.030	Completion of make-ready work.
26.36.040	Restoration
26.36.050	Relocation of facilities
26.36.060	Underground conversions
26.36.070	Maintenance
26.36.080	Compliance with applicable laws and standards
26.36.090	Traffic control plan
26.36.100	Coordination of right-of-way work
26.36.110	Damage to facilities
26.36.120	Obligations of developers

### **26.32.010 Placement of facilities**

(a) All facilities placed by an owner in rights-of-way within the city shall be so located as to minimize interference with the proper use of rights-of-way and other public places, and to minimize interference with the rights or reasonable convenience of property owners who adjoin any of these rights-of-way.

(b) An owner with written authorization to install overhead facilities shall install its facilities on pole attachments to existing utility poles only, and then only if surplus space is available.

(c) Whenever existing telephone, electric utilities, or telecommunications facilities are located or relocated underground within rights-of-way, an owner with written authorization to occupy the same rights-of-way must also locate or relocate its facilities underground.

(d) Whenever new telephone, electric utilities or telecommunications facilities are located underground within the city's rights-of-way, an owner that currently occupies or will occupy the

same rights-of-way shall concurrently place its telecommunications facilities underground at its expense. The provider may seek reimbursement for its expenses pursuant to RCW 35.99.060 only by making a valid written request specifying the reason for the reimbursement and including evidence of the costs incurred.

(e) An owner or permittee shall utilize existing poles and conduit wherever possible. New poles (other than replacement poles) will not be allowed without specific written authorization from the city manager.

#### **26.36.020 Obstructions in rights-of-way**

(a) A person who places or maintains an obstruction in, on, over, under or through the city's rights-of-way shall promptly shift, adjust, accommodate, or remove the obstruction on reasonable notice from the city.

(b) If a person fails or refuses to shift, adjust, accommodate, or remove an obstruction after reasonable notice, the Department may shift, adjust, accommodate, or remove the obstruction, and the Director may charge the person having or maintaining the obstruction for the cost of performing the work.

(c) Any opening or obstruction in the rights-of-way made by an owner in the course of its operation shall be guarded and protected at all times by the placement of adequate barriers, fences or boardings, the bounds of which, during periods of dusk and darkness, shall be clearly designated by warning lights.

#### **26.36.030 Completion of make-ready work**

To the extent consistent with state law, an owner shall have thirty days to perform any requested "make ready" work (work required to prepare the owner's poles or other facilities for attachment by another party) or alterations to its facilities upon request by persons authorized to use or be present in or upon the rights-of-way. If an owner fails to perform such work within thirty days, then the authorized persons may perform such "make ready" work or alterations at their own cost.

#### **26.36.040 Restoration**

(a) No owner or permittee shall take any action or allow any action to be done which may permanently impair or damage any rights-of-way or other property located in, on or adjacent thereto.

(b) In case of any disturbance of pavement, sidewalk, driveway or other surfacing, or any public or private property, the owner or permittee shall, in a manner acceptable to the city, replace, repair, and restore all paving, sidewalk, utility covers, survey monuments, driveway or surface of any rights-of-way, or other public or private property, that has been disturbed by the owner or permittee's activities in as good condition as before said work was commenced.

(c) In particular, and without limitation, all trees, landscaping and grounds removed, damaged or disturbed as a result of right-of-way work by owners or permittees shall be replaced or restored to the condition existing prior to performance of the work. An owner or permittee shall comply with all applicable provisions of the Kirkland Zoning Code and the Pre-Approved Plans regarding all trees, landscaping and grounds.

(d) If weather or other conditions do not allow for the complete restoration required hereunder, the owner shall temporarily

restore the affected rights-of-way or property. Such temporary restoration shall be at the owner's sole expense, and the owner shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.

(e) All restoration work within the rights-of-way shall be done in accordance with landscape plans approved by the Director.

(f) Restoration pursuant to this section shall be at the owner's or permittee's cost and expense, except to the extent otherwise required by applicable law.

(g) In the event that the owner or permittee fails to complete any work required for the repair, protection, or restoration of the rights-of-way or private property, or any other work required by law or ordinance, within the time specified by and to the reasonable satisfaction of the city, the city, following notice and an opportunity to cure, may cause such work to be done. In such a case, the owner or permittee shall reimburse the city the cost thereof within thirty (30) days after receipt of an itemized list of such costs, or the city may recover such costs through any bond or other security instrument provided by the owner or permittee, except to the extent otherwise required by applicable law.

#### **26.36.050 Relocation of facilities**

(a) The city may require a grantee to relocate authorized facilities within the right-of-way when reasonably necessary for construction, alteration, repair or improvement of the right-of-way for the purpose of public health, welfare and safety, at no cost to the city, except to the extent otherwise required by applicable law.

(b) The city shall notify the owner as soon as practicable of the need for relocation and shall specify the date by which relocation shall be completed. In calculating the date by which relocation must be completed, the city shall consult with the affected owners and consider the extent of the facilities to be relocated, the owners' service requirements, and the construction sequence required, within the city's overall project construction sequence and constraints, to safely complete the relocation. Owners shall complete the relocation by the date specified unless the city or a reviewing court establishes a later date for completion, after showing by an owner that the relocation cannot be completed by the date specified, using best efforts and meeting safety and service requirements.

(c) Subject to Section 26.36.050(d), whenever any person, other than the city or one of its departments or agencies, requires the relocation of an owner's facilities to accommodate work of such person within the franchise area, then owner shall have the right as a condition of any such relocation to require payment to owner, at a time and upon terms acceptable to owner, for any and all costs and expenses incurred by owner in the relocation of owner's facilities.

(d) Notwithstanding the provisions of Section 26.36.050(c), if the City reasonably determines and notifies the owner that the primary purpose of imposing such condition or requirement upon such person is to cause or facilitate the construction of a public works project to be undertaken within a segment of the franchise area on the city's behalf and consistent with the City's Capital Improvement Plan, Transportation Improvement Program or the Transportation Facilities Program, then only those costs and expenses incurred by the

owner in reconnecting such relocated facilities with owner's other facilities shall be paid to owner by such person, and owner shall otherwise relocate its facilities within such segment of the franchise area in accordance with subsection (a) of this section.

(e) The city may require relocation of facilities at no cost to the city in the event of an unforeseen emergency that creates an immediate threat to public health, welfare and safety.

(f) If an owner is required to relocate, change or alter facilities hereunder and fails to do so, the city may cause such to occur and charge the owner for the costs incurred.

### **26.36.060 Underground conversions.**

In the event that conversion of an owner's overhead facilities to underground is required for reasonably necessary for construction, alteration, repair, or improvement of the rights-of-way for purposes of public welfare, health, or safety (such as projects that may include, without limitation, road widening, surface grade changes or sidewalk installation), an owner, to the extent permitted by applicable law, shall bear the costs of converting the owner's facilities from an overhead system to an underground system as follows:

(a) Engineering – To ensure proper space and availability in the supplied joint trench, an owner shall pay for the work (time and materials) necessary to complete related engineering and coordination with the other utilities involved in the project.

(b) Cost(s) – An owner shall pay its proportionate share of the cost of labor and materials necessary to place its cables, conduits and vaults/pedestals in the supplied joint trench and/or stand-alone cable trench. If, however, the city's costs for owner are not agreeable to owner, then the owner shall have the right to hire its own contractor(s) to complete its work within the joint trench.

(c) If an owner decides to use its own contractor(s) to complete its portion of the work, then the owner and its contractor(s) are responsible for coordinating with the city to provide reasonable notice and time to complete the placement of the owner's cables, conduits and vaults/pedestals in the trench. If the owner fails to complete the above work within the time prescribed and to the city's reasonable satisfaction, the city may cause such work to be done and bill the reasonable cost of the work to the owner, including all reasonable costs and expenses incurred by the city due to the owner's delay. In such an event, the city shall not be liable for any damage to any portion of the owner's facilities. Within forty-five (45) days of receipt of an itemized list of those costs, the owner shall pay the city.

(d) Within the underground conversion area, an owner shall cooperate with the city and its contractor on any on-site coordination. The city shall be responsible for traffic control, trenching, backfill, and restoration of all work performed by its contractor. An owner shall be responsible for traffic control, trenching, backfill, and restoration of all work performed by its contractor for stand-alone cable trenches. In the event a Local Improvement District (LID) has been created to fund a relocation or conversion project, an owner shall be reimbursed by the LID for all expenses incurred as a result of the project.

### **26.36.070 Maintenance**

An owner of aerial facilities shall be required to trim trees upon and overhanging rights-of-way and other public places of the city so as to

prevent the branches of such trees from coming in contact with the facilities of the owner, all trimmings to be done at the expense of the owner, except to the extent otherwise required by applicable law. An owner shall comply with all provisions of KMC Ch. 19.36 (Street Trees).

**26.36.080 Compliance with applicable laws and standards**

(a) All right-of-way work, including work by the city in its capacity as a provider, shall be performed in accordance with all applicable law and regulations, including, where applicable, the Occupational Safety and Health Act of 1970, as amended; the National Electrical Safety Code, prepared by the National Bureau of Standards; and the National Electrical Code of the National Board of Fire Underwriters.

(b) All right-of-way work shall comply with the requirements of the most recently adopted city Pre-Approved Plans and Policies, and in the event of a conflict between the aforesaid Pre-Approved Plans and Policies and this title, the standards of the Pre-Approved Plans and Policies shall control.

(c) All of an owner's facilities shall be installed in accordance with good engineering practice. All of an owner's facilities shall be maintained in a safe condition, in good order and repair, and in compliance with all applicable federal, state and local requirements.

(d) All safety practices required by law shall be used during construction, maintenance, and repair of an owner's facilities.

(e) An owner or permittee shall at all times employ ordinary care and shall use commonly accepted methods and devices for preventing failures and accidents that are likely to cause damage, injury, or nuisance to the public.

(f) One Call. An owner or permittee shall maintain membership in good standing with the Utilities Underground Location Center or other similar or successor organization which is designated to coordinate underground equipment locations and installations. An owner shall abide by the State's "Underground Utilities" statutes (Chapter 19.122 RCW) and will further comply with and adhere to city regulations related to the One Call locator service program.

**26.36.090 Traffic control plan**

(a) All use permittees shall comply with the Manual on Uniform Traffic Control Devices with respect to traffic control. The city may require a traffic control plan demonstrating the protective measures and devices that will be employed.

(b) A use permittee shall use suitable barricades, flags, flagmen, 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 its right-of-way work.

**26.36.100 Coordination of right-of-way work**

(a) An owner or permittee shall joint trench or share bores or cuts and work with other owners or permittees so as to reduce the number of right-of-way cuts within the City, to the extent such joint work would not impose undue economic burdens or delay upon the owner or permittee.

(b) The city shall provide as much advance notice as reasonable of plans to open the rights-of-way to those providers who

are current users of the rights-of-way or who have filed notice with the clerk of the city within the past twelve months of their intent to place facilities in the city.

(c) If applicable law allows the city to keep electronic copies confidential, then by the first day of February each year, each owner shall prepare and submit to the Department a plan, in a format specified by the Department, that shows all reasonably foreseeable right-of-way work in the paved portion of the rights-of-way anticipated to be done in the next year, or a statement that no right-of-way work is proposed. The owner shall report to the Department promptly any changes in the plan as soon as those changes become reasonably foreseeable.

(1) The Department may disclose information contained in such a plan to another party only on a need-to-know basis in order to facilitate coordination and avoid unnecessary right-of-way work, or as otherwise required by law. If an owner clearly and appropriately identifies information contained in the plan as proprietary, a trade secret, or otherwise protected from disclosure, then to the maximum extent permissible under federal, state, and local laws applicable to public records, the Department may not disclose that information to the public. If the Department determines that information is not clearly or appropriately identified, the Department shall notify the owner that the Department intends to disclose the requested information unless ordered otherwise by a court.

(2) The Department shall review the annual plans submitted by owners and identify conflicts and opportunities for coordination of right-of-way work in the paved rights-of-way. Each applicant shall coordinate, to the extent practicable, with the city and with each potentially affected owner and permittee to minimize disruption in the rights-of-way.

(d) If a communication provider is to be placed underground in a new subdivision, the communication provider shall give written notice to other known providers in the area within which the property is located. Such notice shall be given at least 48 hours before commencement of trenching construction.

(e) The city may facilitate joint use of the property, structures, and appurtenances of each owner located in the rights-of-way and other public places, insofar as such joint use may be reasonable and practicable.

#### **26.36.110 Damage to facilities**

To the extent permitted by Washington law, the city shall not be liable for any damage to or loss of any facilities within the rights-of-way as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind in the rights-of-way by or on behalf of the city.

#### **26.36.120 Obligations of Developers**

A developer shall provide for underground facilities for providers to serve a development in accordance with applicable law for underground facilities. The developer shall execute all required agreements relating to the underground facilities, including easements, and provide proof to the city that the agreements have been executed.

**Chapter 26.40**  
**LIABILITY, INDEMNIFICATION AND SECURITY**

Sections:

26.40.010	Warranty and liability
26.40.020	Insurance
26.40.030	Indemnification
26.40.040	Security fund
26.40.050	Construction bond
26.40.060	Work of contractors and subcontractors

**26.40.010 Warranty and liability**

(a) For a period of two years after satisfactory completion of work in a right-of-way, the owner and use permittee warrant and guarantee the quality of the work performed and are responsible for maintaining the site free from any defects resulting from the quality of the work and, in the event of such defects, for repairing or restoring the site to a condition that complies with all applicable law and regulations. Any repair or restoration during the warranty period shall cause the warranty period to run for one additional year beyond the original two-year period with respect only to what was repaired.

(b) The issuance of a use permit or any inspection, repair, suggestion, approval, or acquiescence of any person affiliated with the city does not relieve the owner or permittee from the warranty and liability provisions of this section, the indemnification provisions of Section 26.40.030, or any other term or condition of this title.

**26.40.020 Insurance**

(a) Unless otherwise provided by a master permit or franchise, each owner shall, as a condition of the grant, secure and maintain the following liability insurance policies (which may be evidenced by an acceptable certificate of insurance) insuring both the owner and the city, and its elected and appointed officers, officials, agents, representatives and employees, as additional insureds:

(1) Commercial general liability insurance with limits not less than five million dollars combined single limit for bodily injury (including death) and property damage; including premises operation, products and completed operations and explosion, collapse and underground coverage extensions;

(2) Automobile liability for owned, non-owned and hired vehicles with a combined single limit of three million dollars for each accident for bodily injury and property damage; and

(3) Worker's compensation within statutory limits and employer's liability insurance with limits of not less than one million dollars for each accident/disease/policy limit.

(b) Commercial General Liability and Automobile Liability limits may be attained by a combination of primary and excess/umbrella liability insurance.

(c) The insurance policies required by this section shall be maintained at all times by the owner. Each such certificate of insurance 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 thirty days

after receipt by the city, by registered mail, of a written notice addressed to the city manager of such intent to cancel or not to renew."

Within ten days after receipt by the city of said notice, and in no event later than twenty days prior to said cancellation, the owner shall obtain and furnish to the city replacement insurance policies or a certificate of insurance meeting the requirements of this title.

#### **26.40.030 Indemnification**

(a) In addition to and distinct from the insurance requirements of this title, by accepting a permit each owner and permittee agrees to defend, indemnify and hold the city and its officers, officials, employees, agents and representatives harmless from and against any and all damages, losses and expenses, including reasonable attorneys' fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or result from the acts, omissions, failure to act or misconduct of the owner or permittee or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of its facilities in the city, and in providing or offering services over the facilities, whether or not such acts or omissions are authorized, allowed or prohibited by this title or by an agreement made or entered into pursuant to this title; provided, however, that an owner or permittee shall not be required to indemnify the city to the extent the damages, loss and expenses are the result of negligence by the city or its employees, agents or contractors.

(b) The indemnification obligations assumed under a permit survive expiration of the permit and completion of the activities authorized by the permit.

#### **26.40.040 Security fund**

(a) Each owner shall establish a permanent security fund with the city by depositing the amount of up to fifty thousand dollars with the city in cash, an unconditional letter of credit, or other instrument acceptable to the city (the "security fund"), which fund shall be maintained at the sole expense of the owner so long as any of the owner's facilities are located within the rights-of-way. This security fund shall be separate and distinct from any other bond or deposit required under other code provisions or agreements.

(b) The owner shall deposit the security fund with the city on or before the effective date of its master permit, or, if the owner does not have a master permit, on or before the date the owner places in service its facilities in the rights-of-way.

(c) The security fund shall serve as security for the full and complete performance of the owner's obligations under this title and under any agreement between the owner and the city, including any costs, expenses, damages or loss the city pays or incurs because of any failure attributable to the owner to comply with the codes, ordinances, rules, regulations or permits of the city.

(d) Before any sums are withdrawn from the security fund, the city manager or designee shall give written notice to the owner:

(1) Describing the act, default or failure to be remedied, or the damages, cost or expenses which the city has incurred by reason of the owner's act or default;



(2) Providing a reasonable opportunity for the owner to remedy the existing or ongoing default or failure, if applicable;

(3) Providing a reasonable opportunity for the owner to pay any moneys due the city before the city withdraws the amount thereof from the security fund, if applicable; and

(4) Stating that the owner will be given an opportunity to review the act, default or failure described in the notice with the city manager or designee.

(e) The owner shall replenish the security fund within fourteen days after written notice from the city that the city has withdrawn an amount from the security fund.

#### **26.40.050 Construction bond**

(a) This provision shall apply to any owner or permittee that is not required to provide a security deposit pursuant to Section 19.12.090 or a construction bond pursuant to Section 19.12.095.

(b) Unless otherwise provided in a master permit or franchise agreement, each use permittee shall deposit with the city, before a use permit is issued, a construction bond written by a surety acceptable to the city equal to at least one hundred percent of the estimated cost of the right-of-way work covered by the use permit.

(c) The construction bond shall remain in force until ninety days after substantial completion of the work, as determined by the Director, including restoration of rights-of-way and other property affected by the right-of-way work. However, in addition to the foregoing, the city reserves the right to require a maintenance bond pursuant to Chapter 175 of the Kirkland zoning code.

(d) The construction bond 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 rights-of-way and other property affected by the right-of-way work;

(5) The submission of "as-built" maps after completion of right-of-way work as required by this title;

(6) Timely payment and satisfaction of all claims, demands or liens for labor, material or services provided in connection with the right-of-way work.

#### **26.40.060 Work of contractors and subcontractors**

The contractors and subcontractors of an owner or permittee shall be licensed and bonded in accordance with the City's generally applicable regulations. Work by contractors and subcontractors is subject to the same restrictions, limitations and conditions as if the work were performed by the owner or permittee itself. The owner or permittee shall be responsible for all work performed by its contractors and subcontractors and others performing work on its behalf as if the work were performed by it, and shall ensure that all such work is performed in compliance with this title and other applicable laws. The owner or permittee shall be jointly and severally liable for all damage, and for correcting all damage, caused by its contractors or subcontractors. It is the responsibility of the owner or permittee to ensure that

contractors, subcontractors or other persons performing work on the owner or permittee's behalf are familiar with the requirements of this title and other applicable laws governing the work they perform.

### **Chapter 26.44 ENFORCEMENT**

**Sections:**

26.44.010	Enforcement procedures and remedies
26.44.020	Stop work order
26.44.030	Order to cure
26.44.040	Fines
26.44.050	Revocation
26.44.060	Standards for sanctions

#### **26.44.010 Enforcement procedures and remedies**

(a) If the city determines that an owner or permittee has failed to perform any obligation under this title or has failed to perform in a timely manner, the city may:

- (1) Issue a stop work order pursuant to Section 26.44.020; and/or
- (2) Issue an order to cure pursuant to Section 26.44.030.

(b) If the violation is contested (as provided in 26.44.020 and 26.44.030 below), the Director shall consider the written communication provided by the owner or permittee and shall notify same of his or her final decision in writing within a reasonable time period.

(c) If the violation has not been remedied or is not in the process of being remedied to the satisfaction of the city within a reasonable time period following the later of: (i) the expiration of the time period for contesting a violation; and (ii) the notification by the Director to the owner or permittee of his or her final decision in respect of a contestation of the violation, the city may:

- (1) Enforce the provisions of this title through injunctive proceedings, an action for specific performance, or any other appropriate proceedings;
- (2) Impose a fine upon the owner or permittee pursuant to Section 26.44.040;
- (3) Assess against the owner or permittee any monetary damages provided for such violation in any agreement between the owner or permittee and the city;
- (4) Assess and withdraw the amounts specified above from the owner's or permittee's security fund or other applicable security instrument;
- (5) Revoke any master permit held by the owner or permittee pursuant to Section 26.44.050; or
- (6) Pursue any legal or equitable remedy available under any applicable law or under any agreement between the owner or permittee and the city.

(d) Remedies available to the city for violations under this title and under a master permit or franchise agreement shall be construed,

except as otherwise provided in this title, as cumulative and not alternative.

(e) An owner or permittee shall pay civil penalties or liquidated damages within 30 days after receipt of notice from the city.

(f) The filing of an appeal to any regulatory body or court shall not stay or release the obligations of an owner or permittee under applicable law or any agreements with the city.

(g) An assessment of liquidated damages or civil penalties does not constitute a waiver by the city of any other right or remedy they may have under applicable law or agreements, including the right to recover from the owner or permittee any additional damages, losses, costs, and expenses, including actual attorney fees, that were incurred by the city by reason of the violation. However, the city's election of liquidated damages under the franchise agreement shall take the place of any right to obtain actual damages over and above the payment of any amounts otherwise due. This provision may not be construed to prevent the city from electing to seek actual damages for a continuing violation if it has imposed civil penalties or liquidated damages for an earlier partial time period for the same violation.

#### **26.44.020 Stop work order**

(a) The Director may issue a stop work order, impose conditions on a use permit, or suspend or revoke a use permit if the Director determines that:

(1) A person has violated applicable law or regulations or any term, condition, or limitation of a permit;

(2) Right-of-way work poses a hazardous situation or constitutes a public nuisance, public emergency, or other threat to the public health, safety, or welfare; or

(3) There is a paramount public purpose.

(b) The Director shall notify the owner or permittee of action taken under Section 26.44.020(a) by a written communication, and the owner or permittee shall comply immediately after receipt of the notice.

(c) A stop work order shall state the conditions under which work may be resumed and shall be posted at the site.

(d) The owner or permittee may contest the stop work order by providing to the Director a written communication detailing the grounds for such contestation, within 15 days of receipt of the stop work order. However, unless the Director promptly orders otherwise for good cause, the submission of such written communication does not excuse the owner or permittee from compliance with the stop work order pending resolution of the dispute.

#### **26.44.030 Order to cure**

(a) The Director may order an owner or permittee that has violated applicable law or regulations, or any term, condition, or limitation of a permit, to cure the violation within the time specified in the order.

(b) An order issued under this section shall warn the person that a failure to comply within the time specified makes the person subject to the imposition of a penalty not to exceed one thousand dollars (\$1000.00) pursuant to the provisions of Section 1.04 of the Kirkland Municipal Code and to liability for any costs incurred by the Department to effectuate compliance.

(c) The owner or permittee may contest the cure order by providing to the Director a written communication detailing the grounds for such contestation within 15 days of receipt of the cure order. Unless the Director promptly orders otherwise for good cause, the submission of such written communication excuses the owner or use permittee from compliance with the cure order pending resolution of the dispute.

(d) If the owner or permittee fails, neglects, or refuses to comply with an order issued under this Section 26.44.030 that involves right-of-way work, the Director may complete the right-of-way work or other work in the rights-of-way in any manner the Director deems appropriate, and the owner or use permittee shall compensate the Department for all costs incurred, including costs for administration, construction, consultants, equipment, inspection, notification, remediation, repair, and restoration. The cost of the work may be deducted from any construction bond or other security instrument of the owner or permittee. The Department's completion of right-of-way work or other work in the rights-of-way does not relieve the owner or permittee from the warranty and liability provisions of Section 26.40.010, the indemnification provisions of Section 26.40.030, or any other term or condition of this title.

#### **26.44.040 Fines**

Any person found violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this title shall be guilty of a misdemeanor. Upon conviction any person violating any provision of this title shall be subject to a fine of up to one thousand dollars or by imprisonment for a period of up to ninety days, or both such fine and imprisonment. A separate and distinct violation shall be deemed committed each day on which a violation occurs or continues.

#### **26.44.050 Revocation**

(a) A master permit granted by the city may be revoked for any one or more of the following reasons:

- (1) Construction or operation at an unauthorized location;
- (2) Material misrepresentation by or on behalf of an owner in any application to the city;
- (3) Abandonment of facilities in the rights-of-way without the express written permission of the city;
- (4) Failure to relocate or remove facilities as required in this title;
- (5) Failure to pay fees or costs when and as due the city;
- (6) Violation of a material provision of this title;
- (7) Violation of a material term of a master permit or use permit.

(b) In the event that the city manager believes that grounds exist for revocation of a master permit, the master permittee shall be given written notice of the apparent violation or noncompliance, be provided a short and concise statement of the nature and general facts of the violation or noncompliance, and be given a reasonable period of time not exceeding thirty days from receipt of notice to furnish evidence on any or all of the following points:

- (1) That corrective action has been, or is being, actively and expeditiously pursued to remedy the violation or noncompliance;
  - (2) That rebuts the alleged violation or noncompliance;
- and
- (3) That it would be in the public interest to impose civil penalties or sanctions less than revocation.

(c) In the event that a master permittee fails to provide evidence reasonably satisfactory to the city manager as provided hereunder, the city manager shall make a preliminary determination as to whether an event of default by the master permittee has occurred and initially prescribe remedies in accordance with Section 26.44.060. In the event that a master permittee wishes to appeal such determination, it shall do so to the hearing examiner. In the event a further appeal is sought by the master permittee, it shall make such appeal to the city council. With respect to apparent violations or noncompliance, appeals provided for herein shall be made within fourteen days of a determination adverse to the master permittee. In any event, the city shall provide the master permittee with notice and a reasonable opportunity to be heard concerning the matter.

#### **26.44.060 Standards for Sanctions**

(a) In order to apply sanctions based on a master permittee's violation of or failure to comply with a material provision of this title, the master permit, or applicable codes, ordinances, statutes, rules or regulations, the city manager shall make a preliminary determination whether to revoke the master permit or to impose lesser sanctions or cure requirements, considering the nature, circumstances, extent and gravity of the violation, as reflected by one or more of the following factors:

- (1) Whether the misconduct was egregious;
- (2) Whether substantial harm resulted;
- (3) Whether the violation was intentional;
- (4) Whether there is a history of prior violations of the same or other requirements;
- (5) Whether there is a history of overall compliance;
- (6) Whether the violation was voluntarily disclosed, admitted or cured.

(b) The city manager shall issue a written decision containing findings of fact and conclusions of law supporting an action taken pursuant to Section 26.44.060(a).

### ***Chapter 26.48*** ***MISCELLANEOUS PROVISIONS***

Sections:	
26.48.010	Further rules and regulations
26.48.020	Captions
26.48.030	Severability
26.48.040	Costs

#### **26.48.010 Further rules and regulations**

The city manager or designee is authorized to establish further rules, regulations and procedures with respect to the city's authority to

manage, regulate and control public rights-of-way for the implementation of this title. Except in cases of emergency, the city shall attempt to notify and provide an opportunity for comment to persons who may be affected by rules, regulations and procedures adopted pursuant to this section.

**26.48.020 Captions**

The captions to sections are inserted solely for information and shall not affect the meaning or interpretation of this title.

**26.48.030 Severability**

If any section, subsection, sentence, clause, phrase, or other portion of this title, or its application to any person, is for any reason declared invalid, in whole or in part by any court or agency of competent jurisdiction, said decision shall not affect the validity of the remaining portions hereof.

**26.48.040 Costs**

Except where otherwise expressly stated herein, all costs incurred by an owner or permittee in connection with any provision of this Ordinance shall be borne by the owner or permittee.

Section 3. If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of the ordinance, or the application of the provision to other persons or circumstances is not affected.


Section 4. This ordinance shall be in force and effect five days from and after its passage by the Kirkland City Council and publication pursuant to Section 1.08.017, Kirkland Municipal Code in the summary form attached to the original of this ordinance and by this reference approved by the City Council.

Passed by majority vote of the Kirkland City Council in open meeting this 1st day of September, 2009.


Signed in authentication thereof this 1st day of September, 2009.

  
\_\_\_\_\_  
MAYOR

Attest:

  
\_\_\_\_\_  
City Clerk

Approved as to Form:

  
\_\_\_\_\_  
City Attorney

PUBLICATION SUMMARY  
OF ORDINANCE NO. 4205

AN ORDINANCE OF THE CITY OF KIRKLAND RELATING TO USE OF RIGHT OF WAY FOR COMMUNICATIONS PURPOSES AND REPEALING AND REENACTING TITLE 26 OF THE KIRKLAND MUNICIPAL CODE.

SECTION 1. Repeals Title 26 of the Kirkland Municipal Code ("KMC").

SECTION 2. Adopts a new Title 26 of the KMC relating to the regulation and use of City right of way for communications purposes.

SECTION 3 Provides a severability clause for the ordinance.

SECTION 4. Authorizes publication of the ordinance by summary, which summary is approved by the City Council pursuant to Section 1.08.017 Kirkland Municipal Code and establishes the effective date as five days after publication of summary.

The full text of this Ordinance will be mailed without charge to any person upon request made to the City Clerk for the City of Kirkland. The Ordinance was passed by the Kirkland City Council at its meeting on the 1st day of September, 2009.

I certify that the foregoing is a summary of Ordinance 4205 approved by the Kirkland City Council for summary publication.

  
\_\_\_\_\_  
City Clerk