

ORDINANCE NO. 02-2023

**AN ORDINANCE TO CREATE REGULATIONS CONCERNING
OBSTRUCTIONS AND ENCROACHMENTS IN TOWN RIGHTS-OF-WAY**

WHEREAS, the Town Board of the Town of Aztalan has received a recommendation that the Town create an Ordinance to regulate obstructions and excavations taking place in the Town right-of-way and to regulate the placement of facilities in the rights-of-way; and

WHEREAS, the Town Board of the Town of Aztalan deems it necessary to place reasonable restrictions on the public right of way.

NOW, THEREFORE BE IT RESOLVED, the Town Board of the Town of Aztalan, Jefferson County, Wisconsin does hereby ordain as follows:

Section 1: The Town of Aztalan Town Board hereby creates "Town of Aztalan Obstructions and Encroachments in Right-of-Way" as follows:

(1) **Purpose and Findings.** In the exercise of governmental functions the Town has priority over all other uses of the public rights-of-way. The Town desires to anticipate and minimize the number of obstructions and excavations taking place therein and to regulate the placement of facilities in the rights-of-way to ensure that the rights-of-way remain available for public services and safe for public use. The taxpayers of the Town bear the financial burden for the upkeep of the rights-of-way and a primary cause for the early and excessive deterioration of its rights-of-way is the frequent excavation by Persons who locate facilities therein.

The Town finds with increased use of the public rights-of-way there are increased costs to the taxpayers of the Town and that these costs are likely to continue into the foreseeable future.

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

- (a) Administrative costs associated with public right-of-way projects, such as registration, permitting, inspection and supervision, supplies and materials.
- (b) Management costs associated with ongoing management activities necessitated by public right-of-way users.
- (c) Repair or restoration costs to the roadway associated with the actual excavation into the public right-of-way.
- (d) Degradation costs defined as depreciation caused to the roadway in terms of decreased useful life, due to excavations into the public rights-of-way.
- (e) In response to the foregoing facts, the Town hereby enacts this ordinance relating to administration of and permits to excavate, obstruct and/or occupy

the public rights-of-way which results in above grade or underground use of the right-of-way. This ordinance imposes reasonable regulations on the maintenance of obstructions above grade or underground currently within its rights-of-way or to be placed therein at some future time. It is intended to complement the regulatory roles of state and federal agencies.

- (f) The purpose of this ordinance is to provide the Town a legal framework within which to regulate and manage the public rights-of-way, and to provide for recovery of the costs incurred in doing so. This ordinance provides for the health, safety and welfare of the residents of the Town as they use the right-of-way of the Town, as well as to ensure the structural integrity of the public rights-of-way.
- (2) Prohibited. No person shall encroach upon or obstruct or encumber any street, alley, sidewalk, public grounds or land dedicated to public use, or any part thereof, or permit such encroachment or encumbrance to be placed or remain on any public way adjoining the premises of which he is the owner or occupant, except as provided in Subsection (3) and (4).
- (3) Exceptions. The prohibition of Subsection (2) shall not apply to the following:
 - (a) Signs and clocks attached to buildings which project not more than six feet from the face of such building and which do not extend at any point lower than 10 feet above the sidewalk, street or alley.
 - (b) Awnings which do not extend at any point lower than seven feet above the sidewalk, street or alley.
 - (c) Official signage, official traffic control devices, and utilities owned or leased by the Town.
 - (d) Goods, wares, merchandise or fixtures being loaded or unloaded which do not extend more than three feet on a sidewalk, provided that such goods, wares, etc., do not remain thereon for more than three hours.
 - (e) Obstructions or encroachments lawfully existing prior to August 9, 2023.
 - (f) Temporary encroachments or obstructions authorized by permit granted pursuant to § 66.0425, Wis. Stats.
- (4) Permit Required. Any above grade or underground use or installation, encroachment or obstruction of the right-of-way requires a right-of-way permit from the Town prior to such installation, use, encroachment or obstruction being established.
 - (a) Application requirements.
 1. An above grade or underground right-of-way permit application shall be filed with the Town Highway Supervisor.

2. The applicant shall pay the above grade or underground right-of-way permit fee. The above grade or underground right-of-way permit fee shall be in the amount as established by Resolution of the Town Board, and may be amended from time to time. Such fee shall not exceed a reasonable approximation of actual costs incurred, shall be limited to objectively reasonable costs, and shall be uniform for similarly situated users of the right-of-way in similar situations. In addition a professional fee charge back agreement shall be signed to ensure compliance with Town Ordinance that professional fees incurred by the Town to review said applications are paid and the permit fee shall be established with this actual professional fee cost recovery in mind, to avoid excess cost recovery.
3. The applicant shall provide a detailed plan with structural engineering, scale drawings, visual rendering, and survey showing the exact location, size, appurtenances and or attachments of the equipment or structure to be placed in the right-of-way, along with the exact location of all streets, sidewalks, utilities, trees, and any other obstructions in the vicinity of the proposed installation, and the location of structures on abutting properties.
4. The applicant shall provide a detailed report describing potential hazards to the public from said equipment, structure, and impacts due to location on safety for the driving public, pedestrians, and owners and users of adjacent property for such things as, but not limited to; fall zone, fire, explosion, chemical, environmental impacts, and vehicle crash impacts. Said report shall indicate the risk of the safety hazard and the proposed design element to address said safety hazard. The Town Highway Supervisor may require the applicant's report to be provided by a structural engineer or other expert approved by the Town Highway Supervisor, if the Town Highway Supervisor deems it to be necessary to have such an expert opinion in light of the circumstances of the application, for the protection of public health and safety, in which case the applicant shall provide such an opinion at the applicant's cost.
5. The plan must show how the installation and maintenance of said above grade or underground right-of-way use will not impact snow or grass removal from the terrace, sidewalk or street, or conflict with the operation or maintenance of vehicular travel and existing utilities above or below ground.
6. An alternative analysis shall be provided to show what options other than locating above grade or underground in the right-of-way exists and the approximate costs of such alternatives.

(b) Application process.

1. The Town Highway Supervisor shall review said permit application and determine if all application materials have been submitted within 10 days of receipt of the initial application.

- a. If the application materials are not complete the Town shall provide written notice to the person on the application that said application is incomplete. The applicant shall have up to 30 days from the date of initial application to provide a complete application or the application shall be deemed insufficient and denied. The Town shall have 60 days to review and act on the permit from the date that the Town determines the application is complete and all fees paid.
2. Existing Uses. Town Staff shall determine whether to approve, deny, or conditionally grant above grade or underground right-of-way permits for any new installation, use, encroachment, obstruction or excavation added to either a previously approved above grade or underground use or one that was legally placed prior to August 9, 2023, unless the Town Staff concludes the new installation, use, encroachment, obstruction, or excavation may obstruct or incommode the public use in which case the application shall be subject to the procedures of subsection 3.
3. New Uses. All above grade or underground right-of-way permit applications other than those described pursuant to subsection 2, shall be considered as follows.
 - a. The Town Board shall hold a public hearing as soon as reasonably possible after application materials have been deemed complete by the Town Highway Supervisor and proper notification period for a class 1 notice and notice to all properties within 200 feet of the proposed installation.
 - b. The Town Board shall give consideration to the application, the testimony received at the public hearing, staff and expert reports, or other information as the Town Board determines appropriate. The Town Board shall consider public safety, alternative options, aesthetic considerations as described in Section (13), and the public good when considering an above grade or underground right-of-way permit. The Town Board may grant the permit, grant the permit with conditions, or deny the permit.

(5) Right-of-Way Restoration. The work to be done under the permit, and the repair and restoration of the right-of-way as required herein, must be completed within the dates specified in the permit to the satisfaction of the Town Board or its duly authorized designee. In addition to repairing its own work, the permittee must restore the general area of the work, and the surrounding areas, including the paving and its foundations, to the same condition that existed before the commencement of the work and must inspect the area of the work and use reasonable care to maintain the same condition for thirty-six (36) months thereafter.

The permittee shall perform repairs and restorations according to the standards and with the materials specified by the Town Board or its duly authorized designee. The Town Board or its duly authorized designee shall have the authority to prescribe the manner and extent of the restoration, and may do so in written

procedures of general application or on a case-by-case basis. The Town Board or its duly authorized designee in exercising this authority shall be guided by the following standards and considerations:

- (a) The number, size, depth and duration of the excavations, disruptions or damage to the right-of-way.
- (b) The traffic volume carried by the right-of-way.
- (c) The character of the neighborhood surrounding the right-of-way; the pre-excavation condition of the right-of-way.
- (d) The remaining life-expectancy of the right-of-way affected by the excavation.
- (e) Whether the relative cost of the method of restoration to the permittee is in reasonable balance with the prevention of an accelerated depreciation of the right-of-way that would otherwise result from the excavation, disturbance or damage to the right-of-way.
- (f) The likelihood that the particular method of restoration would be effective in slowing the depreciation of the right-of-way that would otherwise take place.

Methods of restoration may include, but are not limited to, patching, replacement of the right-of-way base, restoration of landscaping, and milling and overlay of the entire area of the right-of-way affected by the work. During this thirty-six (36) month period, it shall, upon notification from the Town Board or its duly authorized designee, correct all restoration work to the extent necessary using the method required by the Town Board or its duly authorized designee. Said work shall be completed within five (5) calendar days of the receipt of the notice from the Town Board or its duly authorized designee. If the permittee fails to restore the right-of-way in the manner and to the condition required by the Town Board or its duly authorized designee, or fails to satisfactorily and timely complete all repairs required by the Town Board or its duly authorized designee, the Town Board or its duly authorized designee, at his or her option, may do such work. In that event, the permittee shall pay to the Town, within thirty (30) days of billing, the cost of restoring the right-of-way.

- (6) Bond. Prior to commencing the work, any permittee performing work within the right-of-way shall post a financial guarantee in an amount approved by the Town Board or its duly authorized designee and in a form approved by the Town Attorney, provided that the limitations of Wisconsin Statutes Section 66.0425(2) shall apply as applicable. If, thirty-six (36) months after completion of the restoration of the right-of-way, the Town Board or its duly authorized designee determines that the right-of-way has been properly restored, the surety on the performance bond shall be released.
- (7) Indemnification Agreement. Before any person, entity, or utility commences work pursuant to this section, such person, entity or utility shall file an agreement with the Town Clerk to hold the Town harmless, indemnify, and defend the Town from and against any and all injury and damage of any kind caused or occurring as a result of such work. The agreement shall be in a form approved by the Town

Attorney, and shall have continuing effect during the course of such work and for all time that the obstruction or facilities or installation remain within the right-of-way, and thereafter until such obstruction is removed and the site is fully restored to the satisfaction of the Town Board or its duly authorized designee.

(8) **Reservation of Rights.** The Town retains all rights in Town right-of-way. The grant of a right-of-way permit per this section does not constitute a waiver of any Town rights and remedies regarding ongoing compliance obligations toward such installations. All persons, entities and utilities installing obstructions, encroachments or conducting excavation in Town right-of-way shall remove or relocate the obstruction, encroachment or excavation upon 10 day notice, except as otherwise provided by law.

(9) **Compensation.** The Town may require payment of compensation, in an amount determined by the Town Board, for the grant of any permit pursuant to this section, provided that compensation for more than applicable fees and cost recovery shall not be required of utilities that have the right to use the right-of-way by Wisconsin Statutes Section 182.017(1r). The compensation required shall be fair and reasonable, competitively neutral and nondiscriminatory and designed to recover direct and actual costs in connection with the installation, such as the cost for staff to review the siting application, costs associated with the use of the right-of-way, costs associated with maintaining the right-of-way itself or structures within the right-of-way to which the facilities are attached, and these standards apply both to initial fees and any recurring fees. Unless applicable laws or particular circumstances require a different fee based upon the standards described in this paragraph, the fees shall be:

A. **Permit fee.** There shall be a fee imposed and collected for the review of the proposed installation of any line, service or equipment in the Town right-of-way for the transmission of gas, electrical service, telephone service or cable service, and for inspection, as follows:

1. For overhead electrical, cable or telephone service: \$300 per plan review (with each plan set being a maximum of 10 drawing sheets).
2. For underground gas, electrical, cable or television service excavation, with the term "excavation" meaning any location where pipe is placed, whether by open cut or directional drill or other method: \$300 per excavation for up to 100 linear feet; \$0.30 per excavation linear foot for each linear foot beyond the first 100 feet.

B. **Professional Fee Reimbursement.** Any person shall, on demand, reimburse the Town for all costs and expenses of any type incurred by the Town in connection with the review and approval of the permit, including, but not limited to, the cost of professional services incurred by the Town for the review and preparation of required documents, attendance at meetings or other related professional services as well as to enforce the terms in the permit due to a violation of the terms. Additionally, any unpaid bills owed to the Town by the permit holder, for reimbursement of professional fees (as described above); or for personal property taxes; or for real property taxes; or for licenses, permit fees or any other fees or forfeitures owed to the

Town must be paid on demand and prior to issuance of any permits and shall be placed upon the tax roll for the Subject Property if not paid within thirty (30) days of the billing by the Town, pursuant to Section 66.0627, Wisconsin Statutes. Such unpaid bills also constitute a breach of the requirements of the permit that is subject to all remedies available to the Town, including possible cause for termination of the permit.

- (10) **Waiver of Deadlines.** Timeline deadlines in this process may be waived by written mutual agreement of the applicant and the Town.
- (11) **Appeals.** Any person who wishes to dispute actions taken by the Town pursuant to this Section 8.05 may contact the Town Clerk and request to appear before the Town Board at an upcoming regular Town Board meeting and may, at that time, present the matter to the Town Board for resolution. Appeal from the decision of the Town Board shall be by writ of certiorari to the Jefferson County Circuit Court.
- (12) **Compliance with Laws.** Approval of a permit pursuant to this section does not waive the requirement to comply with all other applicable laws and ordinances. All applicable federal, State, Jefferson County, and Town of Aztalan codes, statutes, regulations, administrative rules, ordinances and other laws must be followed.
- (13) **Aesthetic Requirements.** All users of the Town right-of-way shall comply with the following aesthetic standards:
 - (a) In areas where facilities are currently nonexistent or underground, undergrounding is required.
 - (b) Attachments to existing structures shall be designed to be flush with the existing structure as much as can reasonably be done, shall be a color that matches the existing structure and shall be the smallest size possible to reasonably accommodate the intended purpose. If the structure to which the attachment is made changes color due to repainting, resurfacing or other means, the attachment shall be modified to match the new color.
 - (c) Any party objecting to the requirements of this Subsection (13) shall have an opportunity to demonstrate that the requirement constitutes an effective prohibition in violation of State or Federal law, in an appeal made pursuant to Subsection (11).
- (14) **Debris.** Any debris arising from the permittee's use, whether arising from construction or at any time thereafter, must be promptly removed by the permittee. Debris remaining for more than five (5) business days constitutes a violation of this Ordinance subject to the violations and penalties provisions of Sections 8.15 and 25.04 of this Code. Each day that the debris remains after such time constitutes a separate offense.

Section 2: SEVERABILITY. The several sections of this ordinance are declared to be severable. If any section or portion thereof shall be declared by a court of competent jurisdiction to be invalid, unlawful, or unenforceable, such decision shall apply only to the specific section or portion thereof directly specified in the decision, and shall not affect the validity of any other

provisions, sections, or portions thereof of the ordinance. The remainder of the ordinance shall remain in full force and effect. Any other ordinances whose terms are in conflict with the provisions of this ordinance are hereby repealed as to those terms that conflict.

Section 3: EFFECTIVE DATE. This ordinance shall take effect upon posting and publication as provided by the law.

Passed and adopted by the Town Board of the Town of Aztalan, Jefferson County, Wisconsin
this 9th day of August, 2023

TOWN OF AZTALAN

~~Jeremy Chwala, Town Chair~~

Attest

Kathleen Flynn

Kathleen Pitzner, Town Clerk

Published and/or posted this 9th day of August, 2023