

RESOLUTION NO. 2021-16

AMENDED RESOLUTION PERMITTING
USE OF COUNTY RIGHT-OF-WAY BY UTILITIES

WHEREAS, the Board of County Commissioners of Harper County ("the Board") has the power under Kansas Statutes Annotated 19-101a to regulate activities within the public right-of-way and to authorize and require permits and assess fees in connection with such regulation; and

WHEREAS, the Public Works Supervisor has provided to the Board a study and a recommendation regarding necessary and desirable fees for certain services; and

WHEREAS, the Board has determined that it is necessary and desirable and in the best interests of the County to require a permitting process for the general health, welfare and safety of the public and to require fees for certain services when those services are provided by the Harper County Public Works Department,

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Harper County, Kansas, that it makes the following resolution:

Section 1. Definitions.

(a) "*Public right-of-way*" means only the area of real property in which Harper County has a dedicated or acquired right-of-way interest in the real property. It shall include, but not be limited to: the area on, below or above the present and future roads, highways, and/or public byways dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other non-wire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

(b) "*Occupant*" means any person, firm, corporation, association, utility, or entity, which enters upon the right-of-way of Harper County, or in any manner establishes a physical presence on, upon, in or over the right-of-way of Harper County, for the purpose of installing, constructing, maintaining or operating lines, conduits, wires, fiber optic wires, cables, pipes, pipelines, poles, towers, or vaults. "Occupant" shall not include:

(1) a "*public utility*" as defined by K.S.A. 66-104 and which regularly provides services to an end user customer, nor

(2) a "*rural water district*" as defined by K.S.A. 82a-619, nor

(3) any other entity exempted by state or federal law from this permitting requirement.

(c) "*Agricultural use*" shall include, but not be limited to: the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock, the raising of bees and production of apiary products.

Section 2. **Prohibited.**

(a) No person, firm, corporation, association, utility, or entity, shall enter upon the right-of-way of Harper County, or in any manner establish a physical presence on, upon, in or over the right-of-way of Harper County, for the purpose of installing, construction, maintaining or operating lines, conduits, wires, fiber optic wires, cables, pipes, pipelines, poles, towers, vaults or appliances, or related facilities or appurtenances thereto, without the express written permission of Harper County. The permission of Harper County may be granted by agreement as the governing body determines best protects the public interest in the right-of-way.

(b) Nothing in this Resolution shall be interpreted as granting an occupant the authority to construct, maintain or operate any facility or related appurtenance on property owned by the County outside of the public right-of-way.

(c) Harper County shall process each valid and administratively complete application for use of the right of-way within 30 days.

Section 3. Health, Safety, and Welfare Regulations. The authority of a provider to use and occupy the public right-of-way shall always be subject and subordinate to the reasonable public health, safety and welfare requirements and regulations of Harper County.

Section 4. Compliance With, Manual of Uniform Traffic Control Devices. Any occupant of the public right-of-way shall comply with the provisions of Standards and Guides for Traffic Controls for Street and Highway Construction, Maintenance, Utility, and Incident Management Operations Part VI of the Manual of Uniform Traffic Control Devices (MUTCD), published by the U.S. Department of Transportation, Federal Highway Administration, most current edition, which is incorporated herein by reference as if fully set forth herein.

Section 5. Emergencies. If there is an emergency necessitating response work or repair, any person, firm, corporation, association, utility, or entity which has been granted permission hereunder to occupy the public right-of-way may begin that repair or emergency response work or take any action required under the circumstances, provided that the person, firm, corporation, association, utility, or entity notifies Harper County promptly after beginning the work and timely thereafter meets any permit or other requirement had there not been such an emergency.

Section 6. Repair. Any occupant of the public right-of-way is hereby required to repair all damage to a public right-of-way caused by the activities of that occupant for which permission has been given hereunder, or of any agent affiliate, employee, or subcontractor of that occupant, while occupying, installing, repairing or maintaining facilities in a public right-of-way and to return the right-of-way, to its functional equivalence before the damage pursuant to the reasonable requirements and specifications of Harper County. If the occupant fails to make the repairs required by Harper County, Harper County may affect those repairs and charge the occupant the cost of those repairs.

Section 7. Relocation. Whenever requested by Harper County, in order to accomplish construction and maintenance activities directly related to improvements for the health, safety

and welfare of the public, an occupant promptly shall remove its facilities from the public right-of-way or shall relocate or adjust its facilities within the public right-of-way at no cost to the political subdivision. Such relocation or adjustment shall be completed as soon as reasonably possible within the time set forth in any request by Harper County for such relocation or adjustment. Any damages suffered by Harper County or its contractors as a result of such occupant's failure to timely relocate or adjust its facilities shall be borne by such occupant.

Section 8. Fees. The following shall be required from occupants of the public right-of-way as condition of being granted the permit. Exemptions may be made for any use of the public right-of-way that is deemed to be for agricultural use:

- (a) Permit fee of \$100.00;
- (b) Excavation fee of \$500.00 for each street or pavement bore;
- (c) Excavation fee of \$500.00 for each road trench. The trench may not exceed a width of six(6) inches. Trenching across roadways shall not be permitted unless first approved by the Board, based on the finding that boring, rather than trenching, would create a public hazard; or the county road meets the criteria of a primitive or low-maintenance local service road, as established by the Board and the Public Works Supervisor, in accordance with K.S.A. 68-516;
- (d) Equipment in the County Right of Way, such as portable pump, generator, light trailer - \$ 200.00 per unit permitted, good for thirty(30) days only, then must request new permit with new fee. Permit terminates upon relocation or removal of unit;
- (e) \$250.00 per mile for the use of poly pipe in County Right of Way, plus \$300.00 for each culvert or bridge utilized which crosses a county road, good for thirty (30) days only, then must request new permit with new fee.
- (f) Repair and restoration costs associated with repairing and restoring the public right-of-way because of damage caused by the provider hereunder, its assigns, contractors, and/or subcontractors in the right-of way; and
- (g) Occupant shall provide a Certificate of Insurance for general liability and for auto liability naming Harper County as additional insured in the amount of \$1,000,000 per incident and \$ 4,000,000 total liability for each permit to be approved.

Section 9. Indemnity.

(a) Occupants shall indemnify and hold Harper County and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury (including death), property damage or other harm for which recovery of damages is sought, to the extent that it is found by a court of competent jurisdiction to be caused by the negligence of the occupant, any agent, officer, director, representative, employee, affiliate or subcontractor of the provider, or their respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining facilities in a public right-of-way.

(b) The indemnity provided by this subsection does not apply to any liability resulting from the negligence of Harper County, its officers, employees, contractors or subcontractors. If an occupant and Harper County are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to Harper County under state law and without waiving any defenses of the parties under state or federal law.

(c) This section is solely for the benefit of Harper County and occupant and does not create or grant any rights, contractual or otherwise, to any other person or entity.

Section 10. Claim Notification. An occupant shall promptly advise the other in writing of any known claim or demand against the provider or Harper County related to or arising out of the occupant's activities in a public right-of-way.

Section 11. Penalty Provision. Any person, firm, corporation, association, utility, or entity, or agent, contractor or subcontractor thereof, violating any provision of this Resolution, shall be guilty of a Class C misdemeanor upon the first violation, and a Class B misdemeanor upon the second violation, and shall upon conviction be subject to a maximum fine of \$500.00. Each day of violation shall constitute a separate and distinct offense.

ADOPTED this 2nd day of August, 2021

Brian Waldschmidt, Commissioner

Yes, Via Conference Phone

Darrin Struble, Commissioner

[Signature]

Jeff Vornauf, Commissioner

ATTEST:

[Signature]

Kelsie Murphy, County Clerk