

Proposed Ordinance 09-O-51

ORDINANCE NO. 5192

**AN ORDINANCE REPEALING ORDINANCE NUMBERS 2237, 2686, 2926
AND 2936; AND ESTABLISHING A NEW EXCAVATION ORDINANCE
FOR THE CITY OF ELKHART, INDIANA.**

WHEREAS, Ordinance No. 2237, as amended by Ordinance Numbers 2686, 2926 and 2936, (collectively, the "Excavation Ordinances") regulates any excavations in or upon any public lands or public right of ways within the City of Elkhart, Indiana; and

WHEREAS, the Common Council of the City of Elkhart believes it is in the best interest of the City to require anyone doing excavation work of any kind in the public right of way to register as an excavation contractor with the City and furnish a bond; and

WHEREAS, the Common Council believes it is in the best interest of the City to require anyone doing any excavations in the public right of way and work on sewer and water lines between the building and the right of way to obtain an excavation permit for a reasonable fee; and

WHEREAS, said charges are intended to defray the cost of the City inspections of all such excavations; and

WHEREAS, the Common Council has determined that the current Excavation Ordinance no longer meets the City's needs and believes that the changes are necessary and proper to carry out the needs of the City.

**NOW THEREFORE BE IT ORDAINED BY THE COMMON COUNCIL
OF THE CITY OF ELKHART, INDIANA THAT:**

Section 1. This Ordinance repeals Ordinances Numbered 2237, 2686, 2926 and 2936, and replaces them with this Ordinance.

Section 2. Purpose and Intent. The purpose of this Ordinance is to establish a regulatory scheme to provide standards and regulations for persons engaged in Excavation activities in the City of Elkhart. This Ordinance applies to: (a) all Excavations of any nature as may be done in the public right of way, including the installation or repair of any sewer or water mains within the public right of way, and (b) all Excavation required for the installation or repair of sewer and water lines between the public right of way and any connection made at any building provided with sewer or water service.

Section 3. Title. This Ordinance shall be known as the “Excavation Ordinance” of the City of Elkhart.

Section 4. Definitions. When used in this ordinance, the following words, terms, and phrases, and their derivations shall have the meanings ascribed to them in this Section, except where the context clearly indicates a different meaning:

- (a) **“Applicant”** means any person who makes application for an Excavation Contractor’s registration or Excavation permit pursuant to the provisions in this Ordinance.
- (b) **“Board”** means the Board of Public Works of the City of Elkhart, Indiana.
- (c) **“City”** means the City of Elkhart, Indiana
- (d) **“City Engineer”** means the person serving as City Engineer of the City or his authorized deputy or representative.

(e) **“Emergency”** means any unforeseen circumstances or occurrences, the existence of which constitutes a clear and immediate danger to the health and welfare of a citizen or citizens of this community, or which cause the interruption of services being furnished by a public utility under the jurisdiction of the Public Service Commission of Indiana, when said interruption would cause a gross inconvenience or endanger the health and welfare of the citizens of this City.

(f) **“Excavation”** means the act of tunneling, digging, removing, boring, excavating, drilling, or undermining of soil, fill material, asphalt, concrete or other material. The term shall not include the setting or erection of a utility pole, a guy wire or a street light standard, provided, however, that such installation does not fall within that portion of a street traveled and used by automotive vehicles. Any installation of any kind within the portion of a street traveled or used by automotive vehicles shall be considered an Excavation.

(g) **“Excavation Contractor”** means any person who for compensation, undertakes, or submits a bid to, or does himself or by others, excavations of any nature in the public right of way, including the construction, repair, alteration, remodeling, adding to, subtracting from, or improving sewers, sewage disposal systems, water distribution or drainage lines and who is responsible for substantially all the work within the entire project.

(h) **“He, His, or Him”** means when appropriate, “she”, “her”, “its” and “it”.

(i) **“Pavement”** means any paved, improved or unimproved, area of a street.

(j) **“Person”** means any individual, partnership, co-partnership firm, company, corporation, association, joint stock company, trust, estate, governmental entity or any other legal entity, or their legal representatives, agents or assigns. The masculine gender shall include the feminine, the singular shall include the plural where indicated by the context.

(k) **“Public Right of Way”** means any public traveled way and/or any public easement, including streets, alleys, and sidewalks of the City.

(l) **“Sewer”** means a pipe or conduit, which carries wastewater or drainage water.

(m) **“Street”** means a public street, public highway, public alley, public easement, public right of way, public road, or all other public lands under the jurisdiction of the Board of Public Works.

Section 5. Excavation Contractor Registration. Any person who undertakes any work in the public right of way that will require excavation shall register with the City. Each registration shall be for a maximum period of one year. The following information shall be provided on the Excavation Contractor Registration Form approved by the Board of Public Works:

- (a) Business name of the excavation contractor;
- (b) Address of the place of business for the excavation contractor;
- (c) Telephone number and/or email for the excavation contractor;

- (d) Personal information of the excavation contractor, such as his/her name; and
- (e) Identification information deemed suitable by the City Engineer.

Section 6. Excavation Contractor Fees for Registration and Bond. Every applicant for an excavation contractor's registration shall pay a fee of fifty dollars (\$50.00) and a renewal fee of twenty five dollars (\$25.00) if necessary made payable to the City. Each applicant shall furnish a bond guaranteeing performance, issued by a surety company or bank approved by the issuing authority, in an amount of ten thousand dollars (\$10,000.00). The bond will be released, but not before two (2) years after the completion and acceptance of the work. Furthermore, the work must meet with the approval of the City's engineer. In lieu of the this requirement, any person may post a performance bond in the amount of one hundred thousand dollars (\$100,000.00), and this bond shall remain in force for a period of two (2) years after completion of the last work performed.

Section 7. Non-Transferable Excavation Registration. An excavation registration secured by an excavation contractor under this Ordinance is not transferable. Furthermore, no person shall act as an agent for any company, who has not been registered and complied with Section 5 and Section 6 of this Ordinance. Any person granted an excavation registration or renewal thereof, in accordance with the provision of this Ordinance, shall keep said registration on display in their place of business. The City Engineer and/or his representative

may request to inspect said registration during the business normal business hours.

Failure to have the excavation registration displayed may result in revocation.

Section 8. Revocation or Suspension of Registration. The Board of Works shall have the power and authority to revoke, suspend, or place on probation any person granted an excavation registration pursuant to this Ordinance and to hear all cases of alleged violations of said Ordinance. The Board shall give the registration holder written notice in person or by certified mail, return receipt requested, of a violation and its intention to hold a hearing. The hearing shall be held with thirty (30) day of the receipt of the notice.

The registration holder or any other interested party shall have the right to present evidence and testimony to contest the allegation. After the conclusion of the hearing the Board shall notify the registration holder in writing within ten (10) days of its decision. If the Board revokes a registration, the excavation contractor and his direct affiliates shall be disqualified from consideration for further registration for a period of one (1) year from the date of revocation.

Section 9. Excavation Permit. It shall be unlawful for any person to make an excavation of any kind in or under the surface of any street in the City without having secured an excavation permit. An excavation permit shall also be required for any excavations for the installation or repair of sewers and water supply lines between the public right of way, and any building provided with sewer or water service.

Exceptions to this provision shall be made only for emergency as set out in Section 13. The City Engineer shall have the authority to waive the permit requirement for minor repairs. Any work that requires only a driveway permit shall not require an excavation permit.

Section 10. Excavation Permit Application & Fee. An application for an excavation permit shall be completed on forms approved by the Board of Public Works and shall contain the following:

1. The location and depth of the proposed excavation;
2. The approximate date that the excavation work is expected to commence, and the date it is expected to be completed, including the replacement of any pavement.
3. Fees:
 - A. Excavation of one hundred (100) linear feet or less, and for each tunnel opening \$25.00;
 - B. An additional charge of \$25.00 required for each additional one hundred (100) linear feet. Payment of the fees shall be paid to the City.

The excavation permit fee shall be waived whenever an excavation is required to raise or lower manholes or valve boxes or for any other utility facilities where the necessity for such work has been initiated by the City.

Section 11. Permit Duration. An excavation permit, once issued, will become null and void if the excavation is not begun within thirty (30) days from

the date of issuance. If work is commenced before 30 days, the permit shall expire upon the date listed on the application as the expected date of completion.

Section 12. Permit Condition. The excavation permit shall be subject to all of the provisions of the ordinance, and all applicable regulations and standards of the industry. The acceptance of said excavation permit by the applicant shall be held as an acknowledgment that the permit holder understands the provision contained in the Ordinance.

Section 13. Emergency. Whenever an emergency clearly exists and an excavation permit cannot reasonably be obtained, then an excavation can be made immediately without an excavation permit. The person who made the emergency excavation shall apply for an excavation permit on the first regular business day on which the Public Works and Utilities Department is open for business. The excavation permit shall be accompanied by a written explanation explaining the reason for said emergency excavation.

All emergency excavations may be subject to review by the Board to determine if an emergency did actually exist. The purpose of such authority is to prevent the misuse of the emergency clause to make excavations without first obtaining an excavation permit. The Board may require that the person making the emergency excavation request appear personally before the Board to give testimony regarding the reason constituting the emergency request. If the Board finds that no actual emergency exist, the Board may assign penalties it deems proper, and in accordance with the Section 10, of this Ordinance.

Section 14. Indemnification. Each applicant for an excavation permit agree to indemnify and hold the City and its agents, official and employees harmless from any and all costs, damages, injuries and liabilities of any kind arising out of or in relation to the excavation work.

Section 15. Excavation Limitations. Unless otherwise authorized by the Board, the following limitations will apply to all excavations:

1. Not more than one street intersection shall be closed at any one time except in the case of an emergency.
2. No excavation in the right of way which is allowed to remain open overnight and not backfilled shall exceed a length of two hundred fifty (250) feet at any one time except in the case of an emergency.
3. An excavation contractor shall notify the Public Works an Utilities Department at least one working day prior to starting any excavation in the public right of way, except in the case of an emergency. In case of an emergency, the City's Communication Center shall be notified immediately.

Section 16. Temporary Replacement or Repair. Upon the completion of the backfilling of an excavation in that portion of a paved street subject to vehicular traffic of any kind, and where the permanent replacement of the pavement is not immediately permissible or possible, the surface area of said excavation shall be temporarily hard-surfaced by installing an asphalt patch of not less than two (2") inches in thickness. The temporary patch shall conform to the

contour and grade of the surrounding pavement and shall be maintained such that it does not cause a safety or traffic problem. The temporary patch shall be completely removed upon installation of the permanent replacement pavement.

Section 17. Permanent Replacement or Repair. The permanent replacement or repair of a street shall be in accordance with the requirements of the City Engineer. All materials used shall be only those approved by the City Engineer and shall be the same as the existing material. Unless otherwise directed or approved by the City Engineer, all replacements shall meet the minimum requirements as set forth in the City of Elkhart's Standard Specifications for Construction, as amended.

Section 18. Additional Paving Required. Whenever an excavation is made in that part of a paved area of a street that is subject to automotive traffic and the surface area of the excavation exceeds 10% of said total paved area, then the person making the excavation shall be required to pave or resurface said total paved area, unless specifically exempted from doing so by the City Engineer.

For the purpose of this Section, the "total paved area subject to automotive traffic" shall be defined as follows:

- a. The total area within an intersection of streets, the boundaries of which are to be determined by the extension of intersecting right of way lines.
- b. The total area between intersections of streets, the boundaries of which are to be determined by the distance between right

of way lines of said intersecting streets closest to each other.

In those instances where (a) and (b) immediately above are not applicable, then the “total paved area subject to automotive traffic” shall be determined by the City Engineer.

Section 19. Inspection. Underground work; the excavation contractor in charge of the work must notify the City Engineer or designated inspector at least two (2) hours before the work is ready for inspection. All work must be left uncovered and convenient for examination until inspected and approved. No notice shall be made for inspection until the work is entirely ready for thorough inspection.

Road/surface work; upon completion of the restoration and repair of the surface in the public right of way, the excavation contractor shall notify the City Engineer. If the City Engineer, upon the inspection of the completed work, determines that the restoration and repair has not been properly done in accordance with Section 16 and Section 17, he shall request that the applicant making the excavation to do whatever may be necessary to cause said repair and restoration to comply with the provisions of this Ordinance within fifteen (15) working days. The contractor shall maintain the restoration and repair for a period of two (2) years. Failure to comply with these requirements shall cause the applicant to be in violation of this Ordinance and subject to the penalties as set forth hereafter. In addition, said repair and restoration shall be made by the City and the cost thereof paid by the applicant.

Section 20. Penalties. Any person found to be in violation of any of the provisions of this Ordinance may be subject to the following actions by the Board:


- a. Revocation of an issued excavation permit and an order to restore the street in accordance with Section 17 and Section 18 of this Ordinance; and/or
- b. Suspension of an excavation permit or an application for a period of not more than one (1) year from date of Board action; and/or
- c. Fine not more than one thousand dollars (\$1000.00); and/or
- d. Cities into City Court, or the appropriate Court having jurisdiction.

Section 21. Severability. The provisions of this Ordinance are declared to be severable. If any section, sentence, clause, or phrase of the Ordinance shall for any reason be held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this Ordinance, but they shall remain in effect; it being the legislative intent that this Ordinance shall remain in effect notwithstanding the invalidation of any section.

Section 22. Conflicting Ordinances. This Ordinance repeals Ordinances No. 2237, 2686, 2926 and 2936. Any other Ordinance of the City in conflict with this Ordinance is repealed to the extent of such conflict.


Section 23. Effective Date. This Ordinance shall be in effect from and after its passage, approval and publication, according to law.

ORDAINED this 16th day of November, 2009



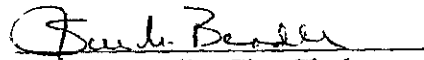
Rod Roberson
President of the Common Council

ATTEST:




Sue M. Beadle, City Clerk

PRESENTED to the Mayor by me this 20th day of November, 2009



Sue M. Beadle, City Clerk

APPROVED by me this 20th day of November, 2009



Dick Moore, Mayor

ATTEST:



Sue M. Beadle, City Clerk

