ORDINANCE NO.

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING
PART 1 OF CHAPTER 13.36 OF TITLE 13 OF THE SAN
JOSE MUNICIPAL CODE TO GOVERN RIGHT-OF-WAY
WORK PERMITS AND ADDING A NEW CHAPTER TO
TITLE 13 TO GOVERN ENCROACHMENTS

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Chapter 13.36 of Title 13 of the San José Municipal Code is hereby
amended to be entitled as follows:

Chapter 13.36
Public Right-of-Way Work Permits
Public Works Street Permits

SECTION 2. Part 1 of Chapter 13.36 of Title 13 of the San José Municipal Code is
hereby amended to read as follows:

Part 1
General Provisions

13.36.010 Application

A. This Chapter is adopted to establish the process and requirements for the
issuance of permits for temporary encroachments on public property in
connection with, and during the course of, the construction of public or private
improvements by an entity other than the City.

B. This Chapter does not authorize or apply to structures, facilities or improvements
in public right-of-way or other public easements after the completion of
construction, or to encroachments placed, installed or constructed other than in connection with work done under a building permit or any public works construction permit.

13.36.0420 Authority

A. No person shall undertake construction or reconstruction within or affecting the City’s existing or proposed public rights-of-way or other public easements without first obtaining a permit from the City pursuant to this Chapter or Chapter 15.50 as applicable.

B. Subject to the provisions of Part 2 of this Chapter 13.36 requiring construction impact mitigation plans for major construction projects, the Director of Public Works may approve plans for construction or reconstruction, not including maintenance, within existing and proposed public rights-of-way or other public easements, and when the cost to the City is not more than five thousand dollars, may approve agreements and issue permits for said work.

13.36.0230 Revocable Permit Terms

A. The Director of Public Works may issue revocable permits for temporary, removable, and non-structural private facilities, including but not limited to, special planters, benches, bicycle parking, facilities for special activities, dining facilities associated with an adjacent business where no food preparation is involved, underground conduit crossings, special driveways, and other similar encroachments within the public right-of-way.

B. Permits issued under this Chapter shall be required for private construction of public improvements, subject to the requirements for such improvements.
B. No encroachment permit shall be issued unless all other required permits for the intended use and encroachment have been obtained by the Applicant.

C. The Director of Public Works may suspend any permit issued under this Chapter when reasonably necessary for the public convenience or safety as the result of conflict with:

1. Public construction work being performed under contract;

2. Major public maintenance operations; or

3. Emergency requirements of any public agency, or as the result of a public disaster, such as, fire, flood or earthquake.

D. The Director of Public Works shall give the permittee seventy-two hours' written notice of such suspension and order to clear the public right-of-way or other public easement; provided, however, that in the case of an emergency, no notice shall be required. In the event of an emergency, or if the permittee fails to clear the public property as ordered, the Director of Public Works may clear the public property or cause it to be cleared, and the costs thereof shall be paid by the permittee. Such costs, if not paid upon demand, shall be deducted from the moneys which have been deposited, or shall be paid by the surety company on its bond.

E. The Director of Public Works may revoke any permit issued in accordance with this Chapter upon thirty days prior written notice; however, the Director of Public Works
Works may revoke such permit upon shorter notice when such encroachment causes a dangerous condition or threat of danger to life or property or when the permittee is in violation of its permit or any provisions of this Chapter.

DF. Each permit issued under this Chapter shall require the permittee to indemnify, defend, and hold harmless the City, its officials, boards, commissions and members thereof, agents, employees, and contractors against any and all liabilities, losses, claims, actions, causes of action, or demands whatsoever against any of them, including any injury to or death of any person or damage to property or other liability of any nature, including, without limitation, attorneys' and expert fees and court costs, arising out of or related to the performance of work under its permit, the installation and maintenance of any facilities or the use of any public property by the permittee or the permittee's employees, officers, officials, agents, transferees, contractors, or subcontractors. This obligation to indemnify the City shall not apply to liabilities, losses, claims, actions, causes of action, or demands arising from City's sole negligence.

G. Any damage done directly or indirectly to any public improvements, public property, utility facilities, survey markers, monuments or benchmarks by the permittee or the permittee’s employees, officers, officials, agents, transferees, contractors, or subcontractors, shall be promptly repaired at the permittee’s sole cost and expense to the satisfaction of the Director of Public Works. Alternatively, the City may, in its sole discretion, choose to perform the repair work itself, in which case the permittee shall reimburse the City for the full costs of the repair work within thirty days after receiving an invoice from the City.

H. The City Manager, in conjunction with the Director of Public Works, may adopt administrative guidelines, rules and regulations addressing the location, construction, form, size, safety, maintenance, repair, and any other manner of
conduct of the encroachments governed by this Chapter, and may include such provisions and require additional conditions specific to the encroachment in the permit that are not inconsistent with this Chapter.

13.36.0340 Temporary Closures

The Director may issue permits under this Chapter for temporary street closures of public right-of-way and other public easements and detours necessary in connection with street improvements, adjacent private construction and construction related safety.

13.36.0450 Special Costs

In connection with permits issued under this Chapter by the Director of Public Works, a charge may be included to recover City costs for special services, including but not limited to pavement marking, overtime hours, parking meter removal/replacement, TV sewer inspection, signal installations, and traffic safety control.

13.36.0560 Completion Deposit

In connection with permits issued under this Chapter by the Director of Public Works, a completion deposit of not less than five percent of the estimated cost of the construction shall be provided. Said completion deposit may be increased if the Director finds such increase necessary to assure public safety. The Director may require a one hundred percent completion deposit in lieu of bonds where the estimated cost of the project is less than five thousand dollars. In the event of noncompliance with permit conditions, the Director may act on behalf of the permittee to cause the work to be done by others and authorize payment directly from the completion deposit, and may also recover City costs in taking such action. Upon acceptance, the unexpended portion of the completion deposit shall be returned to the party making payment.
13.36.0670 Performance and Labor and Materials Bonds

In connection with permits issued under this Chapter by the Director of Public Works, except as noted under "Completion deposit", bonds in the amount of one hundred percent of the estimated cost are to be provided and approved by the Director assuring performance and for labor and materials.

13.36.06580 Removal Deposit

In connection with permits issued under this Chapter by the Director of Public Works, the Applicant shall provide the City with a deposit or adequate security in an amount sufficient as determined by the Director of Public Works and in a manner acceptable to the City Attorney, to remove the encroachment and restore the public right-of-way to its pre-encroachment condition in the event that the permittee fails to timely or adequately maintain or repair the encroachment, remove the encroachment upon termination of the permit, or when the encroachment causes a dangerous condition or threat of danger to life or property. Such a removal deposit may be reduced in amount or waived by the Director of Public Works when the Director makes written findings specifying the reasons that it is in the public interest to reduce or waive the removal deposit.

13.36.070090 Fees

In connection with permits issued under this Chapter by the Director of Public Works, a service cost recovery fee will be collected.
13.36.080100  Insurance

A. In connection with permits issued under this Chapter by the Director of Public Works, the City's Risk Manager shall determine the insurance coverage, if any, including amounts thereof, which shall be required.

B. Any insurance required by the risk manager shall name the City of San José, its officers and employees as additional insureds.

C. Permits issued for awnings and signs erected in the Downtown Core Area, Downtown Frame Area or any Neighborhood Business District which meet the following standards are exempt from the foregoing insurance requirements:

1. Awnings erected in accordance with plans approved by the City Building Department and:
   a. Projecting no closer to the curbline than three feet; and
   b. Located at least eight feet above grade with valances, if any, that are located at least seven feet above grade.

2. Attached signs erected in accordance with plans approved by the City Building Department and:
   a. Projecting no more than four feet six inches from the surface to which attached; and
   b. Located at least eight feet above grade.
D. “Downtown Core Area,” “Downtown Frame Area” and "Neighborhood Business District" as used in this Section mean those areas delineated as such on the land use/transportation diagram of the general plan of the City of San José, as amended.

SECTION 3. Title 13 of the San José Municipal Code is hereby amended by adding a Chapter to be numbered and entitled and to read as follows:

Chapter 13.37
Encroachment Permits

Part 1
Purpose and Definitions

13.37.100 Purpose

This Chapter is adopted to protect and preserve access to and unobstructed use of public property; provide standards for the control, inspection and maintenance of private improvements within public property; and protect the safety, health and general welfare of the public.

13.37.110 Definitions

The definitions set forth in this Section shall have the following meanings for the purposes of this Chapter.

A. “Applicant” means a person or entity who applies for a Permit pursuant to this Chapter.
B. "Director" means the Director of Public Works for the City of San José or such other person that the City Manager may designate to administer the provisions of this Chapter.

C. "Encroachment" means any structure, improvement or object of any kind or character, that is placed, installed or constructed, temporarily or permanently on, under, over or across any Public Property, but excludes improvements required to be installed or constructed on Public Property as a condition of approval of a land use entitlement or pursuant to a public works project, or anything placed, installed, constructed or maintained on Public Property by or for the City.

D. "Encroachment Agreement" means an agreement substantially in the form approved by the City Council that shall be executed as a condition of approval of an Encroachment governed by this Chapter.

E. "Major Encroachment" means any Encroachment that is a non-temporary improvement or object not readily removable with minimal alteration or damage to adjoining Public Property or private property, including, without limitation, footings, foundations, basements, vaults, earth retaining structures, walls, roof overhangs and ramps. Major Encroachment shall include any Encroachment that is not a Minor Encroachment.

F. "Minor Encroachment" means any Encroachment that is a temporary, non-structural improvement or object readily removable with minimal alteration or damage to adjoining Public Property or private property, such as planters, benches, bicycle parking, facilities for special activities, dining facilities associated with an adjacent business, underground conduit crossings, special driveways and similar Encroachments.
G. “Permit” means the license issued by the City pursuant to this Chapter that authorizes an Encroachment.

H. "Permittee" means the person or entity who has obtained a Permit pursuant to this Chapter.

I. "Public Property" means any right-of-way or other public easement owned or controlled by the City that has been offered for dedication to the public, whether express or implied, or has been dedicated to the public, whether express or implied. Public Property encompasses all of the physical area that the public or City may be entitled to use pursuant to law, including below-grade and air space areas.

Part 2
General Provisions

13.37.200 Unauthorized Encroachments Prohibited

Encroachments placed, installed, constructed or maintained without authorization from the City are unlawful and the owner of the Encroachment shall either remove it at their sole expense or obtain authorization under this Chapter or another provision of this code. The Director shall send written notice notifying the owner of the unlawful Encroachment. If the owner does not remove the Encroachment and restore the Public Property or apply for authorization to maintain the Encroachment within thirty (30) days of the City’s notification, the City shall have the right to immediately remove the illegal Encroachment and restore the Public Property, and the owner shall be liable for all of the City’s direct and indirect costs and expenses.
13.37.210  No Waiver of Rights or Immunities

A. Any authorization from the City to maintain an Encroachment shall be subject to the right of the City and the general public, or any other person, firm, corporation, district or other body of persons entitled thereto, to use the Public Property for any purpose for which it may be lawfully used, and no part of the Public Property shall be unduly obstructed at any time. All work or use under a Permit shall be planned and executed in a manner that will least interfere with the safe and convenient use of the Public Property. Without the pre-authorization of the City Council, no Public Property shall be closed, public access or use to Public Property be denied, or access to adjacent private property be impaired.

B. The City’s approval or issuance of a Permit shall not be construed to waive its immunities under applicable law or limit its regulatory, governmental or legislative authority, including police powers to protect the public health, safety and welfare or to protect the environment.

13.37.220  Compliance with Plans, Laws and Other Permits

A. No Permit shall be issued unless the proposed Encroachment complies with the City of San José General Plan and any applicable Specific or Area Plan, this Chapter and other chapters of this code, and all other applicable laws, ordinances, codes and regulations.

B. The issuance of a Permit shall not exempt the Permittee from obtaining and complying with any other required permits or approvals.
C. An Encroachment Agreement shall be executed before any permit is issued by the City that would allow the installation or construction of an Encroachment governed by this Chapter.

13.37.230 **Encroachments Not Requiring Permit Under This Chapter**

A Permit pursuant to this Chapter shall not be required for any of the following:

A. Encroachments authorized by other provisions of this code, including, without limitation, Chapters 13.08, 13.14, 13.18, 13.20, 13.36, 15.50, 17.48 and 20.100, which shall be governed by such other code provision;

B. Encroachments authorized prior to the adoption of this Chapter by resolution of the City Council or a written agreement with or permit from the City, which shall be governed by the terms of such resolution, agreement or permit; and

C. Encroachments for windows, balconies and architectural features as set forth in Section 3202.3.2 of the California Building Code, as adopted by the City and as the same may be amended from time to time, provided that such Encroachments are part of a project located in a General Plan-designated Planned Growth Area and shall otherwise be governed by this Chapter.

**Part 3**

**Permit Terms and Conditions**

13.37.300 **Conditions to Issuance of Permit**

A. Each Permit for a Major Encroachment shall not be effective until all of the following conditions have been satisfied:
1. The Encroachment has been approved by the City Council in accordance with this Chapter;

2. The Applicant has executed an Encroachment Agreement;

3. The Applicant has filed with the City satisfactory evidence of compliance with required insurance coverages; and

4. The Permit has been recorded on the Permittee's property.

B. Each Permit for a Minor Encroachment shall not be effective until all of the following conditions have been satisfied:

1. The Encroachment has been approved by the Director in accordance with this Chapter;

2. The Applicant has filed with the City satisfactory evidence of compliance with required insurance coverages; and

3. The Applicant has executed the Permit, which shall incorporate the terms of the Encroachment Agreement.

13.37.310 Encroachment Terms and Conditions

A. All Encroachments governed by this Chapter shall be subject to the terms of an Encroachment Agreement. For privately owned or maintained Encroachments governed by this Chapter, an Encroachment Agreement shall be executed even if a Permit under this Chapter is not required.
B. All Encroachments shall be allowed only as a revocable license. The City may revoke or terminate Permits issued under this Chapter if: (i) the City determines to use the Public Property for a public purpose; (ii) the City determines that the Encroachment conflicts with the public’s current or prospective use of the Public Property; (iii) the City determines that the Encroachment constitutes a public nuisance; (iv) the Encroachment is declared unlawful by a court of competent jurisdiction; or (v) the Permittee is in default under the Encroachment Agreement.

C. Upon the revocation or termination of a Permit, it shall be the Director’s responsibility to require the Permittee, at its sole expense and within thirty (30) days after revocation or termination, to remove the Encroachment and restore the Public Property to its pre-Encroachment condition, all to the Director’s satisfaction.

D. The Permittee shall agree to indemnify the City with an indemnification agreement satisfactory to the City Attorney.

E. The City’s Risk Manager shall establish and may modify the minimum public liability insurance requirements for Permits. The policy of insurance shall be maintained by the Permittee at its sole expense at all times during the term of the Permit.

F. For Major Encroachments, an Encroachment Agreement shall be recorded on the Permittee’s property and be binding on the Permittee’s transferees and successor owners. The Permittee shall notify successor owners of the Encroachment’s existence and the Encroachment Agreement’s terms prior to the sale or transfer of its property. Successor owners shall submit written consent to
the Encroachment Agreement’s terms at least sixty (60) days prior to their acquisition of the property.

G. Once a Permit is issued for a Major Encroachment, no changes may be made to the Permit without the City Council’s approval. Once a Permit is issued for a Minor Encroachment, no changes may be made to the Permit without the Director’s written authorization; provided, however, that the City Council must approve any changes that would result in a Minor Encroachment becoming a Major Encroachment.

H. By applying for authorization to maintain an Encroachment under this Chapter, the owner of the proposed Encroachment shall be deemed to have consented to the terms of the Permit and agrees to comply with and be bound by all applicable provisions of this Chapter.

Part 4
Major Encroachments – Permit Authority, Approval, and Denial

13.37.400 Authority and Approval Criteria for Major Encroachments

A. The City Council shall approve Permits for Major Encroachments. Permits issued for Major Encroachments shall only be revoked or terminated by the City Council.

B. No Major Encroachment Permit shall be approved unless:

1. The Encroachment will provide a public benefit to those using the Public Property;
2. No other reasonable method of obtaining the desired results is available except for the Encroachment as proposed by the Applicant;

3. The granting of the Permit will not unreasonably interfere with or disrupt use of the Public Property;

4. The Public Property has the capacity to accommodate the proposed Encroachment and any other existing or foreseeable public or private facilities;

5. The granting of the Permit will not be detrimental to the public interest, safety, health or welfare or have the potential to injure the property interests of others, whether public or private; and

6. The Applicant has demonstrated the Permittee's ability to install, maintain, repair and remove the Encroachment.

13.37.410 Permit Procedure for Major Encroachments

A. Applicants shall file an application with the Department of Public Works for each Major Encroachment. Each application shall be accompanied by:

1. Location map, plan view and elevations showing the dimensions and exact location of the proposed Encroachment and its relationship to adjoining properties, Public Property and any structures, utilities or other improvements;

2. A detailed written description of the Encroachment, including the manner of all proposed uses;
3. Evidence of consent, in a form acceptable to the Director, of any public agencies, public or quasi-public utilities and adjacent property owners that may be required for the placement, installation, construction, maintenance or removal of the Encroachment;

4. Satisfactory evidence that the Permittee will have the ability to construct, maintain, repair and remove the proposed Encroachment; and

5. Any additional information requested by the Director of Public Works.

B. After a complete application has been filed, the Director shall cause an investigation to be made of the site where the proposed Major Encroachment would be installed. The Director shall recommend the approval, conditional approved or denial of the Major Encroachment application and forward all recommendations and findings to the City Council.

C. If the City Council approves a Permit for a Major Encroachment, the City Council shall by resolution prescribe the terms and conditions for issuance of the Permit as it deems necessary.

D. If the City Council denies a Permit its decision on the matter shall be final, and the Applicant shall be entitled to no further administrative appeals.

Part 5
Minor Encroachments – Permit Authority, Approval, and Denial

13.37.500 Authority and Approval Criteria for Minor Encroachments
A. The Director is authorized to approve, issue, revoke and terminate Permits for Minor Encroachments in accordance with this Chapter.

B. The Director may adopt administrative guidelines, rules and regulations addressing the location, construction, form, size, safety, maintenance, repair and other manner of conduct of Minor Encroachments, and may include such provisions and additional conditions in a Permit that are not inconsistent with this Chapter.

C. No Minor Encroachment Permit shall be approved unless:

1. The granting of the Permit will not unreasonably interfere with or disrupt use of the Public Property;

2. The Public Property has the capacity to accommodate the proposed Encroachment and any other existing or foreseeable public or private facilities;

3. The granting of the Permit will not be detrimental to the public interest, safety, health or welfare or have the potential to injure the property interests of others, whether public or private; and

4. The Applicant has demonstrated the Permittee's ability to install, maintain, repair and remove the Encroachment.

13.37.510 Permit Procedure for Minor Encroachments

A. Applicants shall file an application with the Department of Public Works for each Minor Encroachment. Each application shall be accompanied by:
1. Location map, plan view and elevations showing the dimensions and location of the proposed Encroachment and its relationship to adjoining properties, Public Property and any structures, utilities or other improvements;

2. A written description of the Encroachment, including all proposed uses;

3. Evidence of consent, in a form acceptable to the Director, of any public agencies, public or quasi-public utilities and adjacent property owners that may be required for the placement, installation, construction, maintenance or removal of the Encroachment;

4. Satisfactory evidence that the Permittee will have the ability to install, maintain, repair and remove the proposed Encroachment; and

5. Any additional information requested by the Director of Public Works.

B. After a complete application has been filed, the Director shall cause an investigation to be made of the site where the proposed Minor Encroachment would be installed. The Director shall approve, conditionally approve or deny the application.

13.37.520 Minor Encroachment Permit Denials and Appeals

A. The Director shall deny a Minor Encroachment application when the application is incomplete or the Permit, if granted, would not be in accordance with this Chapter.
B. The Director shall notify an Applicant in writing of the decision to deny a Permit, including the grounds for denial and a notice of the hearing opportunity pursuant to this Section. The notice of decision shall become final, unless a written request for hearing is received within five (5) business days after the date of notice of decision.

C. Upon receipt of a timely written request for a hearing, the Director shall schedule a hearing within thirty (30) days after receipt of the request for hearing. The Director shall notify the Applicant of the hearing date, time and location.

D. At the hearing, the Applicant may present any relevant evidence. The hearing will be conducted informally and the technical rules of evidence shall not apply. The Applicant may be represented by any person.

E. After closing the hearing, the Director shall give a decision sustaining, reversing or modifying the decision to deny the Permit. A written notice of final decision shall be hand-delivered or sent by mail to the Applicant.

F. The Director’s decision may be appealed to the City Council, whose decision on the matter shall be final.

Part 6
Miscellaneous Provisions

13.37.600 Improvement Plans; Plat and Legal

Prior to issuance of a Permit, the Applicant shall submit all of the following for the Director’s review and approval:
A. Improvement plans prepared by or under the direction of a registered civil engineer, including, without limitation, structural design and construction details as required.

1. The form and content of all plans shall be in accordance with the standards of the Public Works Department and good engineering practice.

2. When required by the Director of Public Works, the Applicant shall provide detailed engineering calculations upon which the design of any improvements is based.

B. A plat map and legal description of the Public Property where the Encroachment is proposed to reside.

C. A legal description of the Permittee’s property, prepared by or under the direction of a registered civil engineer.

D. For Minor Encroachments, the Director may waive any of the foregoing requirements if, in the Director's opinion, such a waiver is in the public interest.

13.37.610 Consent of Public Agencies, Utilities and Adjacent Property Owners

Each Applicant and Permittee shall be responsible for securing the consent of any public agencies, public or quasi-public utilities and adjacent property owners that may be required for the placement, installation, construction, maintenance, repair, use or removal of the Encroachment. Applicants and Permittees shall be solely responsible for any costs and expenses necessary to secure such consent.

13.37.620 Records of Facilities
Each Permittee shall maintain accurate and complete drawings, plans, specifications and maps of the precise location, dimensions and character of the Encroachment and shall furnish to the Director of Public Works copies thereof upon his/her demand, at no cost to the City.

13.37.630 Fees

Cost recovery fees shall be collected in connection with Permits processed or issued under this Chapter, as set forth in the Public Works fee schedule and adopted by resolution of the City Council.

13.37.640 Violations of this Chapter

Any person that has violated any provision, or failed to comply with any of the requirements, of this Chapter shall be guilty of a misdemeanor. The Director shall enforce all of the provisions of this Chapter and any Permit issued thereunder by any method specified in Title 1 of the San José Municipal Code.
PASSED FOR PUBLICATION of title this _____ day of ____________, 2017, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk