

ORDINANCE NO. 434

AN ORDINANCE OF THE CITY OF LAKEWOOD, WASHINGTON, GRANTING TO THE LAKEWOOD WATER DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF WASHINGTON, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY, AND NONEXCLUSIVE FRANCHISE, FOR TWENTY YEARS, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE, AND REPAIR WATER SYSTEMS, IN, ACROSS, OVER, ALONG, UNDER, THROUGH, AND BELOW THE PUBLIC RIGHTS-OF-WAY OF THE CITY.

WHEREAS, The Lakewood Water District, ("District"), a special purpose municipal corporation, owns and operates a water supply system located partially within the City of Lakewood ("City"), a municipal corporation; and

WHEREAS, the District and the City desire to enter into a franchise to install, operate, and maintain the District's water supply system in the public rights-of-way of the City; and

WHEREAS, the District has been a willing partner with the City in many important infrastructure projects; and

WHEREAS, the District has shown a continued willingness to partner with the City for use of their facility crossing under Interstate 5 to assist with the Tillicum/American Lake Garden sewer project; and

WHEREAS, the District has provided a reliable and cost effective service to the citizens of Lakewood; and

WHEREAS, the City Council has the authority to grant franchises for the use of its streets and other public properties (RCW 35A.47.040).

NOW, THEREFORE, THE CITY OF LAKEWOOD, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Franchise Granted. Subject to the terms and conditions hereinafter set forth, the City grants to the district a franchise for a water supply and distribution system. The initial term of the franchise shall be twenty (20) years commencing on the date of acceptance by the district. Within the initial twenty (20) year term shall be one formal review period, which shall commence nine years into the initial term of the franchise with each party notifying the other of any of the following issues:

- Issues of capacity regarding fire flow when it is out of compliance with state law and regulations.
- Issues regarding water quality when it is out of compliance with either or both the local or state departments of health.

At the commencement of the tenth year of the initial term of the agreement, the parties shall have sixty (60) days to resolve any of the properly noticed issues from the above list or any issues that the parties mutually agree would benefit the franchise. Without resolution of the issues, the franchise shall terminate at the end of the tenth year.

Without review at the tenth year, or if the review resolves properly noticed issues, the initial term of the agreement shall continue to completion of the initial twenty (20) year term. At the expiration of the initial twenty (20) year term, the franchise shall automatically extend for an additional term of five (5) years, unless either party gives notice to the other written notice of termination at least six (6) months before the expiration date, At the expiration of the extended term, this franchise shall be automatically extended for an additional term of five (5) years, unless either party gives notice to the other written notice of termination at least six (6) months before the expiration date.

This franchise grants to the district the right, privilege, and authority to construct, operate, maintain, remove, replace, and repair all necessary facilities for a water supply and distribution system, in, under, on, across, over, through, along, or below the public right-of-way located in the City, as approved under City permits issued pursuant to applicable City codes and regulations.

Public “rights-of-way” means all public streets, roads, alleys, highways, and easements of the City as now or hereafter laid out, platted, dedicated, or improved. Whenever the City vacates a public right-of-way in which District facilities are located, the City shall reserve to the District a 20-foot easement for access to the facility for operation, maintenance, repair and replacement, which shall be described as ten feet in width on either side of the center line of the as built location of the District’s facility as subject to and limited by the boundaries of the right-of-way being vacated.

Section 2. Non-Exclusive Franchise. This franchise is non-exclusive, and the City reserves the right to grant other or further franchises in, along, over, through, under, below, or across any of its public rights-of-way. This franchise shall in no way prevent or prohibit the City from using any of its public rights-of-way or other public properties or affect its jurisdiction over them or any part of them, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, and dedication of same, including the dedication, establishment, maintenance, and improvement of all new rights-of-way, thoroughfares, and other public properties of every type and description.

Section 3. Cooperative Administration.

A. Planning. The District and the City each recognize its respective obligation to plan in accordance with the laws of the State. In furtherance of that obligation, the District will prepare its comprehensive plan(s) consistent with the Washington State Growth Management Act, both substantively and procedurally, so that it is compatible with City planning documents and the planning documents of other jurisdictions that are served by, or are adjacent to, the District. To assure such compatibility, the District will solicit input from the City with regard to District planning activities early in the planning process, so that City comments may be considered by the District and, if appropriate, incorporated into the draft District plan(s). To facilitate the District's efforts to comply with Growth Management Act requirements, the City will supply the District with requested information in a timely manner.

B. Budgeting. The City recognizes that relocation costs impose a significant burden on the District's budget, particularly when such relocations are not anticipated. To reduce potential impacts from unanticipated relocations, the City shall provide the District with the City's current capital improvement plan and any future amendments thereto or replacements thereof. Understanding the city's final budget is not adopted until December, no later than the end of November of each year, the City shall provide the district with a list of Public Works improvement projects included in the preliminary budget planned for implementation the following year. In addition thereto, upon receipt of a Street Use permit application for work within the City right-of-way by a public or private applicant, the City will provide a copy thereof to the District.

C. District Facilities. The City will require its contractors and private parties when constructing within the right-of-way with City permission or when doing maintenance work within the right-of-way which could impact District facilities to exercise due care to protect District facilities and to apply District standards when working near District facilities, provided that the District has provided the City a copy of its construction standards.

Section 4. Relocation of Water System Facilities.

4.1 The District shall, at its sole cost and expense, protect, support, temporarily disconnect, relocate, or remove from any public right-of-way within the City's corporate limits as it exists now or in the future, any of its installations when so required by the City by reason of traffic conditions or public safety, dedications of new rights of-way and the establishment and improvement thereof, widening and improvement of existing rights-of-way, street vacations, freeway construction, change or establishment of street grade, or the construction within the right-of-way by the City of any public works project provided that, with City approval, the District may temporarily bypass, in the authorized portion of the same street, any section of main required to be temporarily disconnected or removed. Provided, however, the City and the District shall be 50/50 responsible for costs associated with City facilities that generate revenue such as storm drainage or sanitary sewer facilities excluding those relocations where the District failed to comply with its obligations under chapter 19.122 of the RCWs or legal obligations..

4.2 Any condition or requirement imposed by the City upon any person or entity which reasonably necessitates the relocation of the District's facilities within the franchise area shall be a required relocation under subsection 4.1, subject to the District's right to establish terms for such utility relocation with such person; provided, such arrangements do not unduly delay a City construction project. Whenever the cost of relocating District facilities results from improvements installed pursuant to a City formed local improvement district or a utility local improvement district, the cost of such relocation shall be paid by the City and District, 50/50.

4.3 Except as stated in section 4.5 herein, if the City determines that a project necessitates the relocation of District facilities, the City shall:

A. At least ninety (90) days before commencement of the improvement project, provide the District with written notice requiring a utility relocation; provided that, the City shall notify the District of a relocation required by a City capital improvement project as soon as the City acting with reasonable diligence learns that relocation of utilities are required; and

B. Provide the District with copies of pertinent portions of 30 percent plans for such improvement project and a proposed location for District facilities so that the District may relocate its facilities in other City rights-of-way in order to accommodate such improvement project.

C. After receipt of such notice and such plans and unless the City disagrees that the relocation should occur in conjunction with the City's project, the District shall complete relocation of its facilities at least ten (10) days prior to commencement of the City's project at no charge or expense to the City. Relocation shall be accomplished in such a manner as to accommodate the City's project. The District shall not be considered in breach of this Section if the City fails to give the required notice or if it is delayed by the time required

(i) to comply with state bid law requirements for contracting out any of the relocation work and the District has diligently pursued the award of the necessary contract; or

(ii) to obtain or comply with any permits necessitated by environmental or endangered species requirements.

D. The District shall not be required at its own expense to relocate the same portion of its facilities more than once for each project. Should the District relocate facilities and it is subsequently requested to relocate the same facilities again within five years of the date of the original relocation, the City shall bear the expense.

4.4 Except as stated in section 4.5 herein, the District may submit to the City written alternatives to any requested relocation, to which the City shall give full and fair consideration. The District shall submit additional information requested by the City to aid its evaluation. The City shall advise the District in writing if one or more of the alternatives are acceptable. If the City determines that no other reasonable or feasible alternative exists, the District shall relocate its facilities as otherwise provided in this Section.

4.5 Where the City has relied upon the as-built maps, plans, and/or the best available information submitted by the District to determine that the District's pipe and/or facilities (live/or abandoned) will not be affected by a proposed City improvement project, and subsequently during the construction of the City improvement project, the City finds that the District's pipe and/or facilities are in the construction area, the City shall notify the District, and the District shall expeditiously remove and relocate its facilities.

4.6 The District may establish terms for any utility relocation that is requested by a third party if the utility is not being relocated at the direction of the City; provided such arrangements do not unduly delay a City construction project.

Section 5. Maps and Records. After construction of new facilities in the City rights-of-way, the District shall provide to the City, upon request and at no cost, a copy of all as-built plans, maps, and records detailing the location and condition of its facilities within the public rights-of-way and public places.

Section 6. Abandonment of Water Pipe and System Facilities. Whenever the District proposes to abandon in place any District property containing asbestos cement that is located in right-of-way, the District shall provide the City with (1) as-built drawings showing the location of the facilities to be abandoned; and (2) written documentation showing its plans for compliance with all applicable regulations pertaining to abandonment of asbestos materials.

Whenever a conflict cannot be resolved except by removal from the right-of-way of abandoned district property containing asbestos, then the District shall, at the District's expense, remove that abandoned property. In removing such material, the District shall conform to all local, state, and federal regulations applicable to asbestos abatement.

Section 7. Excavations. All work performed by the District or its contractors shall be accomplished in a safe and workmanlike manner and in a manner that will minimize interference with traffic and the use of adjoining property. The District shall post and maintain proper barricades and comply with all applicable safety regulations during construction as required by the ordinances of the City or the laws of the State of Washington.

The District shall submit to the Director or Public Works or his/her designee ("Director") for review and approval the requested number of plan sets drawn to an accurate scale showing the location, character, position, dimension, depth, and height of the work to be done. The plans shall provide sufficient detail, as determined by the Director with respect to the relative position and location of all pipes, conduits, mains, manholes, facilities, and appurtenances to be constructed, laid, re-laid, installed, replaced, repaired, connected or disconnected, and the existing street, avenue alley, highway, right-of-way or property line including the local improvements therein.

Except as otherwise provided herein, the District shall apply for and secure all necessary City permit(s) to work in the public rights-of-way and, in addition, shall give the City at least five (5) working days' notice of its intent to commence work in the public rights-of-way.

If either party plans to excavate in the public rights-of-way, then upon a written request from the other, that party may share such excavation upon mutually agreed terms and conditions.

Section 8. Restoration. After completion of work in a public right-of-way, the District shall restore the surface of the right-of-way to a condition as good as or better than existed immediately prior to the work and to the standards established on the approved plans, or permit conditions, whichever is greater. The Public Works Director shall have final approval of the condition of such streets and public places after restoration, such approval not being unreasonably withheld. All concrete encased monuments which have been disturbed or displaced by such work shall be restored pursuant to all federal, state, and local standards and specifications. The District shall complete all restoration work promptly and promptly repair any damage caused by such work.

Section 9. Emergency Work—Permit Waiver. Whenever a District facility located in a right-of-way endangers property, health, or safety, the District shall immediately take proper emergency measures, without first obtaining a permit as required by this franchise. However, the District shall notify the City of the work no later than the next succeeding business day and apply for a right-of-way permit within two (2) business days.

Section 10. Dangerous Conditions, Authority for City to Abate. If work related to facilities authorized by this franchise endangers property or the public's health and safety, the Public Works Director may direct the District, at the District's own expense, to take appropriate protective action, including compliance within a prescribed time. Unless otherwise notified in writing by the District, the City shall notify the District as follows: name: _____; phone number: _____; cell/pager number: _____.

If the District does not comply with such directions, or if immediate action is required to protect property or the public's health and safety, the City may take reasonable emergency measures, and the District shall be liable to the City for the costs thereof.

Section 11. Indemnification. The District shall release, indemnify, and defend the City, its officers, employees, agents, and representatives from any and all claims, costs, judgments, awards, or liability to any person for injury or death of any person or damage to property caused by or arising out of the negligent acts or omissions of the District, its agents, servants, officers, or employees, performed under authority of this franchise; provided, that for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the District and the City, its officers, employees, and agents, the District's obligation shall be only to the extent of the District's negligence. This indemnification includes claims by the District's own employees for which the District might otherwise be immune under Title 51 RCW, and the District waives its immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

The foregoing obligation and waiver shall also extend to any claims, costs, judgments, awards, fines or penalties or liability to any person for injury or death of any person or damage to

property caused by or arising out of the District's abandonment or removal of asbestos material under section 6.

Inspection or acceptance by the City of any work performed by the District at the time of completion of construction shall not relieve the District of any of its obligations under this Section.

If a court or other tribunal agreed upon by the parties determines that the District wrongfully refused the tender of defense in any suit or any claim made pursuant to this indemnification provision, the District shall pay all of the City's costs for defense of the action, including all expert witness fees, costs, and attorney's fees, including costs and fees incurred in recovering under this indemnification provision.

Section 12. Insurance. The District shall procure and maintain for the duration of the franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges, and authority granted hereunder to the District, its agents, representatives, or employees. The District shall provide an insurance endorsement, naming the City as an additional insured, to the City for its inspection prior to the adoption of this franchise Ordinance, and such endorsement shall evidence a policy of insurance that includes:

- A. Automobile Liability insurance with limits no less than \$1,000,000 Combined Single Limit per occurrence for bodily injury and property damage; and
- B. Commercial General Liability insurance, written on an occurrence basis with limits no less than \$1,000,000 combined single limit per occurrence and \$2,000,000 aggregate for personal injury, bodily injury, and property damage. Coverage shall include but not be limited to: blanket contractual; products and completed operations; broad form property damage; explosion, collapse, and underground (XCU); and employer's liability.

The District may satisfy the requirements of this section by a self-insurance program or membership in an insurance pool providing coverage substantially the same as set forth above.

Section 13. Agreement not to Compete – Non-Assumption.

13.1. a. Each year during the term of this franchise, the District agrees to pay to the City annually an amount equal to (6%) of the total prior year's water operating revenue billed to property within the City of Lakewood's city limits. This payment may be recovered from the affected customer and reflected on that customer's monthly bill as a separate line item.

b. In consideration of the District's agreement to allow the City to use, without charge, the District's bore under Interstate 5 and the railroad tracks within Sound Transit's right of way at Tillicum for sewer line purposes in perpetuity, the City agrees that unless both parties agree

otherwise the amount established in 13.1 shall not increase during the term of this franchise. Further the District grants to the City the right to transfer its sewer purposes rights granted herein to Pierce County and that these rights shall continue on in perpetuity and shall survive the expiration of this franchise agreement.

13.2 For the purposes of this section 13, "operating revenue" is defined as accrued revenue realized from selling water to the District's retail customers located within the City, excluding the 6% paid under section 13.1 by the District's water customers and any state excise tax imposed thereon. District "operating revenue" shall be recorded and reported on the District's financial statements as of December 31 of the prior fiscal year.

13.3 The District shall determine the amount payable to the City before the end of first quarter of the next calendar (fiscal) year. The District shall pay one-fourth amount payable to the City no later than thirty days after the end of each calendar quarter.

13.4 Upon the City's request, the District shall, within thirty days, make available to the City for examination, audit and review the District's books and records pertaining to all revenue derived by the District by virtue of this Franchise, to verify the accuracy of payments. The City shall maintain confidentiality of information provided by the District to the extent permitted by law when the District has notified the City of the confidential nature of the information.

13.5 Should such a review result in the discovery of an error in payment (over or under payment), the City shall notify the District in writing of its findings and the error shall be mitigated by the District in the next quarterly payment cycle.

13.6 In consideration of the payments to the City made under this section 13, the City shall not (1) establish a City owned water utility, or (2) exercise its current statutory authority under Chapter 35.13A RCW (or as that chapter may be amended or recodified) to assume jurisdiction over the District or any part thereof during the term of this Franchise, provided, ~~however, a successful citizen's initiative that results in either an assumption of the District or~~ creation of a City water utility shall terminate the City's obligation to forebear as provided in this paragraph 13.6 and the District's obligation to make payment under paragraph 13.1 hereof.

13.7 The City shall defend, indemnify, and hold the District harmless from and against any and all claims, suits, actions or liabilities (including litigation costs and attorney's fees) arising from or in any way related to the imposition of the water surcharge, its collection from its customers, or payment thereof to the City.

Section 14. Modification. The terms and conditions of this franchise may be modified upon written agreement of the parties.

Section 15. Forfeiture and Revocation. If the District willfully fails to comply with any provision of this franchise, or through willful misconduct or gross negligence fails to comply with

any notice given the District by the City under the provisions of this franchise, then this franchise may be revoked by the City Council after a hearing held upon notice to the District.

Section 16. Remedies to Enforce Compliance. In addition to any other remedy, the City may obtain a superior court order compelling the District to comply with the provisions of this Ordinance and seek to recover damages and costs incurred by the City by reason of the District's failure to comply. The pursuit of any right or remedy by the City shall not prevent the City from acting under Section 14.

Section 17. City Ordinances and Regulations. This franchise shall not prevent the City from adopting and enforcing all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including any valid ordinance made in the exercise of its police powers. The City retains its authority to control by reasonable regulations the location, elevation, manner of construction, and maintenance of District water delivery facilities in the public rights-of-way, and the District shall conform with all such regulations, unless compliance would cause the District to violate other requirements of law. In the event of a conflict between the provisions of this franchise and any other ordinance(s) enacted under the City's police power, such other ordinance(s) shall take precedence.

Section 18. Cost of Publication. The cost of the publication of this Ordinance shall be born by the District.

Section 19. Acceptance. Unless extended by Ordinance, the District shall have sixty (60) days after the passage and approval of this Ordinance to file with the City Clerk its unconditional written acceptance of this franchise; otherwise, the District shall be deemed to have rejected this franchise.

Section 20. Survival. Sections 4, Relocation of Water Facilities; 6, Abandonment of Water Pipe and System Facilities; 7, Excavation; 8, Restoration; 10, Dangerous Conditions, Authority for City of Abate; and 11, Indemnification shall be in addition to any and all other obligations and liabilities the District may have to the City at common law, by statute, or by contract, and shall survive the City's franchise to the District for the use of the City rights-of-way. This Ordinance is binding upon the successors and assigns of the District and all privileges, as well as all obligations and liabilities of the District shall inure to its successors and assigns.

Section 21. Assignment. This franchise may not be assigned or transferred without the written approval of the City, which shall not be unreasonably withheld.

Section 22. Notice. Any notice required or permitted by this franchise may be sent to the following addresses unless otherwise specified in writing:

CITY OF LAKEWOOD
Public Works Director
6000 Main St. SW
Lakewood, WA 98499-5027

LAKEWOOD WATER DISTRICT
General Manager
11900 Gravelly Lake Drive SW
P.O. Box 99729
Lakewood, WA 98496

Section 23. Severability. If any section, sentence, clause, or phrase of this Ordinance should be held to be invalid or unconstitutional by a court, the validity or constitutionality of any other section, sentence, clause, or phrase of this Ordinance shall not be affected, unless the rights, privileges, duties, or obligations hereunder are materially altered, whereupon either party may request renegotiation of these remaining terms. The parties retain the right to modify the terms and conditions of the franchise upon written agreement.

Section 24. Effective Date. This Ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect (5) days after passage and publication of an approved summary thereof consisting of the title.


APPROVED by the Lakewood City Council this 18th day of Dec, 2006.

CITY OF LAKEWOOD




Claudia B. Thomas, Mayor

ATTEST/AUTHENTICATED:


Alice M. Bush, MMC, CITY CLERK

APPROVED AS TO FORM:

BY 
Heidi Ann Wachter, City Attorney

FILED WITH CITY CLERK: 12-18-06
PASSED BY THE CITY COUNCIL: 12-18-06
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EFFECTIVE DATE: 12-25-06