

ORDINANCE NO. 529

AN ORDINANCE OF THE CITY OF LAKEWOOD, WASHINGTON, GRANTING TO PIERCE COUNTY THE RIGHT, PRIVILEGE, AUTHORITY AND NONEXCLUSIVE FRANCHISE FOR TWENTY YEARS TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR A SANITARY SEWER SYSTEM IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW THE PUBLIC RIGHTS-OF-WAY OF THE CITY; AGREEING NOT TO ESTABLISH A CITY-OWNED SEWER UTILITY IN COMPETITION WITH PIERCE COUNTY SUBJECT TO MONTHLY COMPENSATION FROM PIERCE COUNTY OR CITY RATEPAYERS; AND SETTING AN EFFECTIVE DATE.

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

WHEREAS, Pierce County, (the “County”), a political subdivision of the State of Washington, through its Department of Public Works and Utilities owns, operates and maintains a sanitary sewer system, which includes a wastewater treatment plant, throughout portions of Pierce County, as well as within the City, pursuant to Chapter 36.94 RCW; and,

WHEREAS, the County has been a willing partner with the City in the City’s sewer extension project to American Lake Gardens and Tillicum neighborhoods; and,

WHEREAS, in accordance with the Joint Agreement for Sewer Extension Project to American Lake Gardens and Tillicum Neighborhoods, which agreement was entered into between the City and County on June 29, 2005, the City is required to grant, subject to mutually acceptable terms, the County a franchise necessary to operate such sewer facilities; and,

WHEREAS, the County and the City have negotiated the contractual requirements contained within this franchise and desire to enter into the franchise as set forth below to install, operate and maintain the County’s system of sewerage in the public rights-of-way of the City.

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

This franchise grants to the County the right, privilege and authority to construct, operate, maintain, remove, replace and repair all necessary facilities for a sanitary sewer system in, under, on,

across, over, through, along or below the public rights-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 County facilities are located, the City shall reserve to the County an easement for access to its facility for operation, maintenance, repair, and replacement, which said width thereof shall in accordance with County standards as subject to and limited by the boundaries of the right of way being vacated.

**Section 1. 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 2. Cooperative Administration.**

The County and the City each recognize its respective obligation to plan in accordance with the laws of the State. In furtherance of that obligation, the County will prepare its Unified Sewer Plan pursuant to RCW Chapter 36.94, both substantively and procedurally, so that it is compatible with City planning documents and the planning documents of other jurisdictions that are served by the County's sewerage system. To assure such compatibility, the County will solicit input from the City with regard to County's sewerage planning activities early in the planning process, so that City comments may be considered by the County and, if appropriate, incorporated into the Unified Sewer Plan. To facilitate the County's efforts to comply with Growth Management Act requirements to provide urban government services in urban growth areas, the City will supply the County with requested information in a timely manner.

**Section 3. Relocation of Sanitary Sewer System Facilities.**

3.1 As consideration for the County's agreement to pay to the City the monthly compensation stated in Section 12, the City shall fully reimburse the County for all costs and expenses to protect, support, temporarily disconnect, relocate, adjust 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 County may temporarily bypass, in the authorized portion of the same street, any section or portion of its sanitary sewer system required to be temporarily disconnected or removed. The County shall invoice the City for such costs and expenses each calendar month and the City shall pay such costs and expenses within 25 days from

the billing date, after which time the payment of such respective costs and expenses shall be delinquent. Delinquent charges shall accrue interest on the unpaid balance from the date of delinquency until paid, at an interest rate of 1% per month.

3.2 Any condition or requirement imposed by the City upon any person or entity which reasonably necessitates the relocation of the County's facilities within the franchise area shall be subject to full reimbursement to the County for all costs and expenses for such utility relocation and the County's right to establish terms for such utility relocation with such person or entity; provided, such arrangements do not unduly delay a City construction project. The County shall invoice the person or entity for such costs and expenses each calendar month and the person or entity shall pay such costs and expenses within 25 days from the billing date, after which time the payment of such respective costs and expenses shall be delinquent. Delinquent charges shall accrue interest on the unpaid balance from the date of delinquency until paid, at an interest rate of 1% per month.

3.3 Except as stated in section 3.5 herein, if the City determines that a project necessitates the relocation of County facilities, the City shall:

A. At least ninety (90) days before commencement of the improvement project, provide the County with written notice requiring a utility relocation; provided that, the City shall notify the County 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 County with copies of pertinent portions of thirty (30) percent plans for such improvement project and a proposed location for County facilities so that the County may relocate its facilities in other City rights-of-way in order to accommodate such improvement project; and

C. The City and County shall work cooperatively during the design process to resolve conflict issues between existing City/County facilities; and

D. After receipt of such notice and such plans, and unless the City agrees that the relocation should occur in conjunction with the City's project, the County shall complete relocation of its facilities at least ten (10) days prior to commencement of the City's project. Relocation shall be accomplished in such a manner as to accommodate the City's project. The County 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 County 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; or

(iii) to obtain sole source materials necessary for the relocation work.

3.4 The County may submit to the City written alternatives to any requested relocation, to which the City shall give full and fair consideration. The County shall submit additional information requested by the City in a timely manner as necessary to aid the City's evaluation. The City shall advise the County in writing if one or more of the alternatives is acceptable. If the City determines that no other reasonable or feasible alternative exists, the County shall relocate its facilities as otherwise provided in this Section.

3.5 Where the City has relied upon the as-built maps, plans, and/or the best available information submitted by the County to determine that the County'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 County's pipe and/or facilities are in the construction area, the City shall notify the County, and the County shall expeditiously remove and relocate its facilities.

3.6 The County 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 or unduly impact sewer services.

#### **Section 4. Maps and Records.**

After construction of new facilities in the City rights-of-way, the County 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 5. Abandonment of Sanitary Sewer Pipe, Manholes and System Facilities.**

The County shall not abandon in place any County property located in any right-of-way without the written consent of the City, which shall not be unreasonably withheld; provided that the County must provide the City with (1) as-built drawings showing the location of the facilities to be abandoned; and (2) if the County property is composed in whole or in part of hazardous material (i.e. asbestos), the County shall provide the City with written documentation showing its plans for compliance with all applicable regulations pertaining to abandonment of said hazardous materials.

Unless the County has conveyed the abandoned property to the City, the County, when so directed by the City, shall, at the County's expense, remove abandoned County property located in the right-of-way composed in whole or in part of materials containing hazardous materials. In removing such material, the County shall conform to all local, state, and federal regulations applicable to such abatement and shall be responsible for all costs of remediation.

Whenever the direction to remove County facilities is associated with a City project, the parties shall comply with section 3.5. The County shall comply expeditiously subject to permitting requirements, engineering necessity, and laws governing public contracts. The parties working together shall

develop a schedule for removal that is reasonable under the circumstances. If the County fails to comply with the agreed schedule, the City may, at the County's expense, remove the County's facilities.

#### **Section 6. Excavations.**

All work performed by the County 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 County 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 County shall submit to the City's Director of 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, relaid, 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 County 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 7. Restoration.**

After completion of work in a public right-of-way, the County shall restore the surface of the right-of-way to the same condition as existed immediately prior to the work and to the standards established on the approved plans or permit conditions, whichever is greater; however, if such work is to be followed by a City capital improvement project, then the City shall be responsible for any restoration work. The City's Public Works Director shall have final approval of the condition of such streets and public places after restoration, and such approval will not be 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 County shall complete all restoration work promptly and promptly repair any damage caused by such work.

#### **Section 8. Emergency Work (Permit Waiver).**

Whenever a County facility located in a right-of-way endangers property, health or safety, the County shall immediately take proper emergency measures, without first obtaining a permit as required by this franchise. However, the County shall notify the City of the work no later than the next succeeding business day and apply for a right-of-way permit within forty eight (48)

hours.

**Section 9. 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 County, at the County's own expense, to take appropriate protective action, including compliance within a prescribed time. Unless otherwise notified in writing by the County, the City shall notify the County as follows:

Contact Person: Tim Ramsaur, Pierce County Wastewater Utility Manager  
Phone number: 253-798-4050  
Cell/pager number: 253-377-8271

If the County 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 County shall be liable to the City for the costs thereof.

**Section 10. Indemnification.**

The County 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 County, 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 County and the City, its officers, employees, and agents, the County's obligation shall be only to the extent of the County's negligence. This indemnification includes claims by the County's own employees for which the County might otherwise be immune under Title 51 RCW, and the County 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 County's abandonment or removal of hazardous material under section 5.

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

If a court or other tribunal agreed upon by the parties determines that the County wrongfully refused the tender of defense in any suit or any claim made pursuant to this indemnification provision, the County 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.

The City shall defend, indemnify, and hold the County harmless from and against any and all

claims, suits, actions or liabilities (including litigation costs and attorney's fees) arising the execution of this agreement in any way related to the imposition of any fee, compensation or surcharge, the collection of any fee, compensation or surcharge from ratepayers, or the County's payment of any fee, compensation or surcharge to the City.

### **Section 11. Insurance.**

The County 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 County, its agents, representatives, or employees. The County 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 County's maintenance of insurance as required by the Agreement shall not be construed to limit the liability of the County to coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or in equity. The County 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 12. Agreement not to Compete (Non-Assumption) and Mutual Consideration.**

12.1 During the term of this franchise, the County agrees to pay to the City compensation in an amount equal to 6% of the regular rates and charges for the furnishing of service, or for having such service available, collected by the County on all sewer accounts located within the City. This compensation is consideration for the City's agreement not to establish a City-owned sewer utility in competition with the County system, and the City's promise not to exercise its statutory authority under Chapter 36.94.180, as currently written or as may be hereafter amended or modified, to assume jurisdiction over that portion of the County's sanitary sewer system lying within the City's corporate boundaries and provide services to properties within said boundaries or any part thereof during the term of this franchise. The County shall disburse funds collected pursuant to this section to the City on a monthly basis with the first payment being made the first full month after this amount of compensation is collected. This payment may be recovered from ratepayers and reflected on said customers' monthly bills as a separate line item. As consideration for the County's

agreement to pay such compensation to the City, the City shall fully reimburse the County for all costs and expenses for any relocation of County sewer facilities as stated in Section 3. The percentage rate of compensation shall not be increased without the consent and agreement of the City and the County.

12.2 Nothing, however, in this section 12 shall inhibit the City from establishing a City-owned system of sewerage that will assume jurisdiction of that portion, in full or part, of the County's system of sewerage lying within the City's corporate boundaries as said boundaries presently exist or may exist in the future during the term of this franchise should (1) the County and the City be mutually in agreement thereto, or (2) if the County materially breaches this franchise. Provided, further, that a successful citizen initiative that results in an assumption of the County sewerage system and facilities within the City or the creation of a City sewerage utility in competition with the County's sewerage system will terminate the City's obligation to forbear as provided herein.

12.3 Upon the City's request, the County shall within thirty (30) days make available to the City for examination, audit and review the County's books and records pertaining to all revenue and charges derived by the County by virtue of this franchise, to verify the accuracy of payments. The City shall maintain the confidentiality of the information the County provides to the extent permitted by law when the County has notified the City of the confidential nature of said information. Should such a review result in the discovery of an error in payment (over or under payment), the City shall notify the County in writing of its findings and the error shall be mitigated by the County in the next monthly payment cycle.

**Section 13. Modification.** The terms and conditions of this franchise may be modified only upon written agreement of the parties.

**Section 14. Forfeiture and Revocation.** If the County 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 County by the City under the provisions of this franchise, then the City may revoke this franchise after a hearing is held upon notice to the County.

**Section 15. Remedies to Enforce Compliance.** In addition to any other remedy, the City may obtain a superior court order compelling the County to comply with the provisions of this Ordinance and seek to recover damages and costs incurred by the City by reason of the County'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 16. 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. While the design and construction of the County's sewer facilities shall be in accordance with County standards, the City retains its authority to control by reasonable regulations the location of County's system of sewerage in the public rights-of-way, and the County shall conform with all such regulations, unless compliance would cause the County to violate other requirements of law.



**Section 17. Cost of Publication.** The cost of the publication of this Ordinance shall be born by the City.

**Section 18. Acceptance.** Unless extended by Ordinance, the County 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 County shall be deemed to have rejected this franchise.

**Section 19. Survival.** Section 3 (Relocation of Sanitary Sewer System Facilities), Section 5 (Abandonment of Sanitary Sewer Pipe, Manholes and System Facilities), Section 6 (Excavation), Section 7 (Restoration), Section 9 (Dangerous Conditions, Authority for City of Abate) and Section 10 (Indemnification) shall be in addition to any and all other obligations and liabilities the County may have to the City at common law, by statute, or by contract, and shall survive the City's franchise with the County for the use of the City rights-of-way. This Ordinance is binding upon the successors and assigns of the County and all privileges, as well as all obligations and liabilities of the County, shall inure to its successors and assigns.

**Section 20. Assignment.** This franchise may not be assigned or transferred without the written approval of the City, which approval shall not be unreasonably withheld.

**Section 21. 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

Pierce County Public Works and Utilities  
Public Works Director  
9850 64<sup>th</sup> Street West  
University Place, WA 98467-1078

**Section 22. 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 those remaining terms.

**Section 23. Franchise Term.**

This Franchise is and shall remain in full force and effect for a period of twenty (20) years from and after the effective date of the Ordinance; provided, however, the County shall have no rights under this Franchise nor shall the County be bound by the terms and conditions of this Franchise unless the County shall, within sixty (60) days after the effective date of the Ordinance, file with the City its written acceptance of the Ordinance.

**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 \_\_\_ day of \_\_\_\_\_, 2011.

CITY OF LAKEWOOD

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Douglas G. Richardson, Mayor

ATTEST/AUTHENTICATED:

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Alice M. Bush, MMC, City Clerk,

APPROVED AS TO FORM:  
OFFICE OF THE CITY ATTORNEY:

BY \_\_\_\_\_  
Heidi Ann Wachter, City Attorney

FILED WITH CITY CLERK: March 7, 2011  
PASSED BY THE CITY COUNCIL: March 7, 2011  
PUBLISHED: March 10, 2011  
EFFECTIVE DATE: March 14, 2011

ACCEPTANCE OF FRANCHISE

The Pierce County accepts the nonexclusive franchise to the City of Lakewood approved by the Lakewood City Council on March 7, 2011, by the adoption of Lakewood City Ordinance No. 529.

DATED this \_\_\_\_ day of March, 2011.

PIERCE COUNTY

By: \_\_\_\_\_  
County Executive