

ORDINANCE NO. 2429

AN ORDINANCE OF THE CITY OF ISSAQUAH, WASHINGTON, GRANTING UNTO TALUS RESIDENTIAL ASSOCIATION, ITS SUCCESSORS AND ASSIGNS, FOR THE RIGHT, PRIVILEGE, AUTHORITY AND NONEXCLUSIVE FRANCHISE FOR 10 YEARS, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR STORM WATER AND IRRIGATION SYSTEMS, IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW THE PUBLIC RIGHTS-OF-WAY OF THE CITY OF ISSAQUAH, WASHINGTON.

WHEREAS, Talus Residential Association, ("TRA") has requested that the City Council grant it a nonexclusive franchise, and

WHEREAS, the City of Issaquah holds environmentally sustainable development in high regard; the City's expectation is that TRA will use cost effective sustainable building and construction materials and practices when working within the City, 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 COUNCIL OF THE CITY OF ISSAQUAH, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Franchise Granted. Pursuant to RCW 35A.47.040, the City of Issaquah, a Washington municipal corporation (hereinafter the "City"), hereby grants to TRA, its heirs, successors, legal representatives and assigns, subject to the terms and conditions hereinafter set forth, a franchise beginning on the effective date of this ordinance, set forth in Section 22

herein. The term of the franchise shall be for an initial term of 10 years and shall automatically renew on the anniversary date each year thereafter unless one party gives the other party written

notice of intent to terminate the franchise at least six (6) months in advance of the anniversary date.

This franchise shall grant TRA the right, privilege and authority to construct, operate, maintain, replace, and repair all necessary facilities for storm water and irrigation delivery, in, under, on, across, over, through, along or below the public right-of-ways of Talus.

Section 2. Non-Exclusive Franchise Grant. This franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in, along, over, through, under, below or across any of said right-of-ways. Such franchise shall in no way prevent or prohibit the City from using any of said roads, streets 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, dedication of same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new rights-of-ways, thoroughfares and other public properties of every type and description.

Section 3. Franchise Fee. In consideration that the TRA stormwater was required by the City to be placed in City Right of Way because it is the only feasible route and the stormwater recharges the wetlands as outlined in the Cougar Mountain East Village Development Agreement, the City will not impose a franchise fee. In the event the City is unable to utilize the stormwater for wetland recharge, then the City will impose a franchise fee equal to 6% of the then current rate for stormwater based on the volume of stormwater that is being transmitted in the system subject to this Franchise.

In consideration for TRA providing and paying the costs of water necessary for irrigation of landscape improvements on City owned property, at no charge, the City will not impose a franchise fee.

Section 4. Relocation of Storm Water and Irrigation System Facilities.

4.1 TRA agrees and covenants at its sole cost and expense, to protect, support, temporarily disconnect, or relocate any of its installations within City Right-of-Ways 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 of any public improvement or structure by any governmental agency acting in a governmental capacity.

4.2 Any condition or requirement (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals for permit for zoning, land use, construction or development) imposed by the City upon any person or entities or agreed upon between the City and any person or entities which reasonably necessitates the relocation of TRA facilities within the franchise area shall be deemed to be at the request of and to accommodate such person or entity.

4.3 If the City determines that the project necessitates the relocation of TRA's then existing facilities, the City shall:

- A. At least sixty (60) days prior to the commencement of such improvement project, provide TRA with written notice requiring such relocation; and
- B. Provide TRA with copies of pertinent portions of the plans and

specifications for such improvement project and a proposed location for TRA's facilities so that TRA may relocate its facilities in other City right-of-way in order to accommodate such improvement project.

- C. After receipt of such notice and such plans and specifications, TRA 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.

4.4 TRA may, after receipt of written notice requesting a relocation of its facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise TRA in writing if one or more of the alternatives is suitable to accommodate the work which would otherwise necessitate relocation of the facilities. If so requested by the City, TRA shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by TRA full and fair consideration. In the event the City ultimately determines that there is no other reasonable or feasible alternative, TRA shall relocate its facilities as otherwise provided in this Section. The provisions of this Section shall survive the expiration or termination of this franchise agreement.

4.5 The provisions of this Section shall in no manner preclude or restrict TRA from making any arrangements it may deem appropriate when responding to a request for relocation of its facilities by any person or entity other than the City, where the facilities to be constructed by said person or entity are not or will not become City-owned, operated or maintained facilities, provided that such arrangements do not unduly delay a City construction project.

4.6 TRA shall subscribe to and maintain membership in the regional "One-Call" utility location service and shall promptly locate all of its lines upon request. The City shall not be liable for any damages to system components or for interruptions in service to TRA customers which are a direct result of work performed for any City project for which TRA has failed to properly locate its lines and facilities within the prescribed time limits and guidelines established by One-Call. The City shall also not be liable for any damages to the TRA system components or for interruptions in service to TRA customers resulting from work performed under any franchise utility permit issued by the City.

Section 5. Maps and Records. After construction of new facilities in the City right-of-way, and as a condition of this franchise, TRA shall provide to the City and at no cost, a copy (in a format acceptable to Issaquah) of all as-built plans, maps and records revealing the final location and condition of its facilities within the public right-of-ways and public places.

Section 6. Excavations. During any period of relocation, construction or maintenance, all work performed by TRA or its contractors shall be accomplished in a safe and workmanlike manner, so to minimize interference with the free passage of traffic and the free use of adjoining property, whether public or private. TRA shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or the laws of the State of Washington, including RCW 39.04.180 for the construction of trench safety systems.

Whenever TRA shall excavate in the public right-of-way of Talus located in the City of Issaquah, as approved under City utility permits issued pursuant to this franchise and applicable City codes and regulations for the purpose of installation, construction, repair, maintenance or

relocation of its facilities, it shall secure from the City the permit(s) to do so and, in addition, shall give the City at least five (5) working days prior notice of its intent to commence work in the public right-of-way. In no case shall any work commence within any public right-of-way without the required permit(s), except as otherwise provided in this franchise ordinance.

If either the City or TRA shall at any time plan to make excavations in any area covered by this franchise and as described in this Section, the party planning such excavation shall afford the other, upon receipt of a written request to do so, an opportunity to share such excavation, PROVIDED THAT:

- A. Such joint use shall not unreasonably delay the work of the party causing the excavation to be made;
- B. such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties; and
- C. either party may deny such request for safety reasons. The provisions of this Section shall survive the expiration or termination of this franchise agreement.

Section 7. Restoration after Construction. TRA shall, after abandonment approved under Section 14 herein, or installation, construction, relocation, maintenance or repair of its facilities within the franchise area, restore the surface of the right-of-way to at least the same condition the property was in immediately prior to any such installation, construction, relocation, maintenance or repair. The Public Works Director shall have final approval of the condition of such streets and public places after restoration. 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. TRA agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the franchise area or other affected area at its sole cost and expense. The provisions of this Section shall survive the expiration, revocation or termination by other means of this franchise.

Section 8. Emergency Work -- Permit Waiver. In the event of any emergency in which any of TROA's facilities located in or under any street breaks, becomes damaged, or if TROA's construction area is otherwise in such a condition as to immediately endanger the property, life, health or safety of any individual, TRA shall immediately take the proper emergency measures to repair its facilities, to cure or remedy the dangerous conditions for the protection of property, life, health or safety of individuals without first applying for and obtaining a permit as required by this franchise. However, this shall not relieve TRA from the requirement of obtaining any permits necessary for this purpose, and TRA shall apply for all such permits not later than the next succeeding day during which the Issaquah City Hall is open for business.

Section 9. Dangerous Conditions, Authority for City to Abate. Whenever the construction, installation or excavation of facilities authorized by this franchise has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining street or public place, or endangers the public, an adjoining public place, street utilities or City property, the Public Works Director may direct TRA, at TRA's own expense, to take actions to protect the public, adjacent public places, City property or street utilities, and such action may include compliance within a prescribed time.

In the event that TRA fails or refuses to promptly take the actions directed by the City, or fails to fully comply with such directions, or if emergency conditions exist which require

immediate action, before the City can timely contact TRA to request TRA affect the immediate repair, the City may enter upon the property and take such actions as are necessary to protect the public, the adjacent streets, or street utilities, or to maintain the lateral support thereof, or actions regarded as necessary safety precautions, and TRA shall be liable to the City for the costs thereof. The provisions of this Section shall survive the expiration, revocation or termination of this franchise

Section 10. Indemnification. TRA hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person, including claims by TROA's own employees for which TRA might otherwise be immune under Title 51 RCW, for injury or death of any person or damage to property caused by or arising out of the negligent acts or omissions of TROA, its agents, servants, officers or employees in the performance of this franchise, and any rights granted hereunder.

Inspection or acceptance by the City of any work performed by TRA at the time of completion of construction shall not be grounds for avoidance by TRA of any of its obligations under this Section. Said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation.

In the event that TRA refuses the tender of defense in any suit or any claim, said tender having been made pursuant to the indemnification provision contained herein, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of TRA, then

TRA 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.

In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of TRA and the City, its officers, employees and agents, TRA's liability hereunder shall be only to the extent of TRA's negligence. It is further specifically and expressly understood that the indemnification provision provided herein constitutes TRA's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this Section shall survive the expiration or termination of this franchise agreement.

Section 11. Insurance. TRA 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 TROA, its agents, representatives or employees. TRA shall provide a copy of a Certificate of Insurance to the City for its inspection prior to the adoption of this franchise ordinance, and such insurance certificate 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.

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

Section 12. Modification. The City and TRA hereby reserve the right to alter, amend or modify the terms and conditions of this franchise upon written agreement of both parties to such alteration, amendment or modification.

Section 13. Forfeiture and Revocation. If TRA willfully violates or fails to comply with any of the provisions of this franchise, or through willful misconduct or gross negligence fails to heed or comply with any notice given TRA by the City under the provisions of this franchise, then TRA shall, at the election of the Issaquah City Council, forfeit all rights conferred hereunder and this franchise may be revoked or annulled by the Council after a hearing held upon notice to TRA.

Section 14. Remedies to Enforce Compliance. The City may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling TRA to comply with the provisions of this Ordinance and to recover damages and costs incurred by the City by reason of TRA's failure to comply. In addition to any other remedy provided herein, the City reserves the right to pursue any remedy to compel or force TRA and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein.

Section 15. City Ordinances and Regulations. Nothing herein shall be deemed to restrict the City's ability to adopt and enforce 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 in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control by appropriate regulations the location, elevation, manner of construction and maintenance of any fiber optic cable or cable facilities by TRA, and TRA shall promptly conform with all such regulations, unless compliance would cause TRA 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 authority, such other ordinance(s) shall take precedence over the provisions set forth herein. The provisions of Chapter 17.24 of the Issaquah Municipal Code shall apply except as inconsistent or in conflict with the provisions of this Franchise Ordinance.

Section 16. Cost of Publication. The cost of the publication of this Ordinance shall be borne by TRA.

Section 17. Acceptance. Within sixty days after the passage and approval of this Ordinance, this franchise may be accepted by TRA by its filing with the City Clerk an unconditional written acceptance thereof. Failure of TRA to so accept this franchise within said period of time shall be deemed a rejection thereof by TRA, and the rights and privileges herein granted shall, after the expiration of the sixty day period, absolutely cease and determine, unless the time period is extended by ordinance duly passed for that purpose.

Section 18. Survival. All of the provisions, conditions and requirements of Sections 4, Relocation of Storm Water and Irrigation Facilities; 6, Excavation; 7, Restoration after

Construction; 9, Dangerous Conditions; and 10, Indemnification; of this franchise shall be in addition to any and all other obligations and liabilities TRA may have to the City at common law, by statute, or by contract, and shall survive the City's franchise to TRA for the use of the areas mentioned in Section 1 herein, and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements contained in this franchise Ordinance shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of TRA and all privileges, as well as all obligations and liabilities of TRA shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever TRA is named herein.

Section 19. Assignment. This agreement may not be assigned or transferred without the written approval of the City. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. TRA shall provide prompt, written notice to the City of any such assignment.

Section 20. Notice. Any notice or information required or permitted to be given to the parties under this franchise agreement may be sent to the following addresses unless otherwise specified:

CITY OF ISSAQUAH

TALUS RESIDENTIAL ASSOCIATION

Public Works Director
P.O. Box 1307
Issaquah, WA 98027

Section 21. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity

or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance unless such invalidity or unconstitutionality materially alters the rights, privileges, duties, or obligations hereunder, in which event either party may request renegotiation of those remaining terms of this franchise materially affected by such courts' ruling.

Section 22. 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:

MAYOR, AVA FRISINGER

ATTEST/AUTHENTICATED:

CHRISTINE EGGERS, CITY CLERK

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY:

BY _____
WAYNE TANAKA

FILED WITH THE CITY CLERK: 8-4-2005
PASSED BY THE CITY COUNCIL: 9-6-2005
PUBLISHED: 9-14-2005
EFFECTIVE DATE: 9-19-2005
AGENDA BILL NO: 5361

SUMMARY OF ORDINANCE NO. 2429

of the City of Issaquah, Washington

On the 6th day of September, 2005, the City Council of the City of Issaquah, passed Ordinance No.2429. A summary of the content of said ordinance, consisting of the title, provides as follows:

AN ORDINANCE OF THE CITY OF ISSAQUAH, WASHINGTON, GRANTING UNTO TALUS RESIDENTIAL ASSOCIATION ITS SUCCESSORS AND ASSIGNS, FOR THE RIGHT, PRIVILEGE, AUTHORITY AND NONEXCLUSIVE FRANCHISE FOR TEN YEARS, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR STORM WATER AND IRRIGATION SYSTEMS, IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW THE PUBLIC RIGHTS-OF-WAY OF THE CITY OF ISSAQUAH, WASHINGTON.

The full text of this Ordinance will be mailed upon request.

DATED this 6th day of September, 2005.

CITY CLERK, CHRISTINE EGGERS

FILED WITH THE CITY CLERK: 8-4-2005
PASSED BY THE CITY COUNCIL: 9-6-2005
PUBLISHED: 9-14-2005
EFFECTIVE DATE: 9-19-2005
AGENDA BILL NO: 5361

ACCEPTANCE OF FRANCHISE

The undersigned authorized representative of Talus Residential Association hereby declares on behalf of Talus Residential Association, the acceptance of the nonexclusive franchise to Talus Residential Association approved by the Issaquah City Council on September 6, 2005, by the adoption of Issaquah City Ordinance No. 2429.

DATED this _____ day of _____, 2005.

Talus Residential Association

By: _____
Its: _____