



CITY OF KIRKLAND
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MEMORANDUM

To: Kurt Triplett, City Manager

From: Marilynne Beard, Deputy City Manager
Tracey Dunlap, Director of Finance and Administration
William Evans, Assistant City Attorney

Date: November 3, 2014

Subject: NORTSHORE UTILITY FRANCHISE AGREEMENT EXTENSION

RECOMMENDATION:

City Council provides direction regarding extension of the franchise agreement between the City and the Northshore Utility District.

BACKGROUND DISCUSSION:

The Northshore Utility District (NUD) operates a water and sewer utility for properties in the northern portion of the City including most of the new neighborhoods of Finn Hill, Juanita and Kingsgate. NUD operates under a franchise agreement whereby they are granted use of City rights-of-way for providing utility services. In consideration of the use of City rights-of-way, NUD pays a franchise fee to the City based on the lineal feet of their plant in the ground. The franchise agreement provides the conditions under which NUD will use the City's rights-of-way for placement of their system and equipment, assigns responsibility and standards for pavement repairs following construction and establishes the franchise fee (see Attachment A – O-4141). Two interrelated provisions of the franchise relate to the term of the agreement and a non-assumption clause (emphasis provided):

Section 8. Franchise Term. Subject to the provisions of Section 9 and 10 below, this Franchise is and shall remain in full force and effect from January 1, 2009 until December 31, 2013, provided that on January 1, 2014, and on January 1 every five (5) years thereafter, the term shall automatically be extended for an additional five (5) years, unless either NUD or the City gives the other party written notice of non-renewal prior to any such renewal date, in which case this franchise shall terminate five (5) years after such renewal date; and provided further, however, NUD shall have no rights under this Franchise nor shall NUD be bound by the terms and conditions of the Franchise unless NUD shall, within thirty (30) days after the passage date of the Ordinance, file with the City its written acceptance of this Franchise, in a form acceptable to the City Attorney. On any renewal date, the City has the option of extending the term for more than 5 years but all subsequent renewal dates would remain automatically five (5) years unless the City again opted to extend any of them for more than five (5) years.

Section 9: Non-assumption. In consideration for the franchise fee and acceptance of the other terms and conditions of this Franchise, the City agrees that it will not exercise its statutory authority to assume jurisdiction over NUD or any NUD responsibilities, property, facilities or equipment within the City's corporate limits while this Franchise is in effect.

Note that the current agreement was extended for one year through 12/31/14, as described later in this memo.

Recent Policy Issues

Over the past five years, a number of policy issues have arisen with regard to the NUD Franchise agreement as a result of the 2011 annexation and various court decisions regarding the relative authorities of a city and a utility district operating within its corporate boundaries.

Impacts of Annexation

NUD operated within the City limits long before the 2011 annexation. Districts that operate within the corporate boundaries of a city may be assumed by the City under certain conditions specified in state law. RCW 35.13A provides the conditions under which a municipality can assume all or a portion of a water and sewer utility located within its corporate boundaries (see Attachment B – RCW 35.13A). If the district lies completely within the corporate boundaries of a municipality, the City may, by ordinance, assume the district including all of its operations and assets. If more than 60% of the assessed value of the district lies within the municipality, the City may still assume all or instead that portion of the district within its limits by ordinance, depending on whether the balance of the district lies within another city or cities (RCW 35.13A.030). If the district's assessed value within the corporate boundaries is less than sixty percent, the City may only assume that portion of the district within its limits. As of January 30, 2014, the portion of NUD's assessed valuation lying within Kirkland's corporate boundaries were 58.08%. State law dictates how the disposition of assets and operational responsibilities will be transferred, however, many of the details are left to be negotiated between the City and the District.

The Growth Management Act encourages the assumption of special purpose districts following annexation as a way to centralize and simplify municipal services. However, it should be noted that, in any of the scenarios provided for in RCW 35.13A, assumption of a utility district the size of NUD is a difficult process that takes years to accomplish, even when both parties have agreed to the assumption.

When the City annexed the Finn Hill, Juanita and Kingsgate areas, staff was asked to determine whether the City should pursue assumption of the special purpose districts within its boundaries. There were three different water and sewer providers within the annexed area – NUD, the Woodinville Water District and the City of Redmond, which served a small portion of the annexed area (see Attachment C for map of utility districts). Since the annexation took place, the City has negotiated a franchise agreement with the Woodinville district and transferred the Redmond accounts to Kirkland's utility. The NUD franchise agreement already contained provisions that contemplated the annexation. NUD also serves the cities of Bothell, Kenmore and Lake Forest Park.

Fire Protection Services

In addition to providing residential and commercial utility services, NUD also maintains fire protection devices (hydrants). Historically, maintenance of hydrants and the system serving the hydrants was the responsibility of the water and sewer utility serving the area. In Kirkland's case, the City's Public Works Department maintains hydrants within its utility boundaries and NUD and Woodinville maintained hydrants within their respective service areas with the cost incorporated in the utility rate. In 2008, the Washington State Supreme Court ruled that fire hydrant costs are a general government function and should be paid out of general tax revenues (*Lane v. Seattle*). By implication, this includes the costs for other fire suppression facilities as well. The result of the decision was that hydrants could not be funded from utility rates. In response, Kirkland followed the practice of other utilities and reduced the utility rate to remove hydrant and fire suppression facilities costs and made a corresponding increase in the water utility tax so that the impact to the ratepayer was minimal.

NUD approached the City to request a similar solution to transfer its costs for hydrants and fire suppression facilities to the City. The District proposed that it would increase the franchise fee charged to customers with a corresponding decrease in water rates. The City would then remit back to NUD that increased portion of the franchise fee, which would be equivalent to fire protection costs. However, the City believed it was unclear whether the above referenced *Lane* decision applied to a relationship such as existed between the City and the District. Therefore, the City informed the district it would wait until this uncertainty was resolved before agreeing to the solution proposed. NUD, believing there was no such uncertainty, sent a bill to the City on December 23, 2011, in the amount of \$293,736 for the past three years of its hydrant and fire suppression facilities costs.

Before the City responded, the Washington State Supreme Court decided the case of *City of Tacoma v. City of Bonney Lake* in January of 2012. There the Court held that the franchise agreement between a city and a water/sewer utility is also a contract to which it would apply general tools of contract interpretation. The Court needed such tools because the contract was silent on whether the utility there was supposed to provide hydrants. The Court concluded the best tool to determine who was responsible for those costs would be using the course of dealing between the parties to see who had been paying them. In that case, it had been the utility and the Court therefore held that the franchise agreement contractually required the utility to provide and maintain the hydrants and, presumptively, the other fire suppression facilities.

From this, the City concluded NUD was responsible for covering the cost of fire hydrant and suppression facilities as they had been providing and billing customers for those services since the inception of the franchise agreement and advised the District of this interpretation. However, in December of 2012, the City received another bill from NUD for the past four years and totaling \$654,841. According to the letter from NUD General Manager, Fanny Yee, "The billing represents the costs for the District to provide fire hydrants within the City limits for the five years ending December 31st 2012, along with the statutory judgment interest of 12% per annum." The City Manager declined to pay the invoice and replied with the following rationale:

Thank you for your letter of December 31, 2012. Respectfully, I must disagree with your conclusion that Kirkland must reimburse Northshore Utility District (NUD) for its fire hydrants and other fire suppression infrastructure within Kirkland city limits. Since the case you cite was decided, the Washington Supreme Court has issued its opinion in City of Tacoma v. City of Bonney Lake, 269 P.3d 1,017, 173 Wn.2d 584 (Wash 2012). There the Court made it clear that a utility could provide fire hydrants and other such facilities pursuant to a course of dealing under a franchise agreement with a city.

Here, NUD has been providing fire hydrants and other fire suppression facilities within Kirkland city limits under a franchise agreement with the City for many years. Clearly, a course of dealing has been established that NUD shall bear these costs. Consequently, the City does not believe any reimbursement is due to NUD for providing these facilities and no payment will be made.

As you are aware, a consortium of agencies and interests (FirePALS) will be pursuing a legislative change that, if passed, should clarify the District's ability to collect these costs in rates rather than pursue reimbursement from cities within which NUD provides these facilities.

That coalition of cities, counties and utility districts worked together to draft legislation to clarify that a utility can provide hydrants and fire suppression facilities as part of its basic services to ratepayers (the so-called "FirePALS" legislation) and collect those costs in its rates. The legislation was approved in during the 2013 session and did specifically provide that utilities, including districts, could do so.

After the FirePALS legislation was passed, NUD agreed to continue to maintain the hydrants as part of their utility's functions. However, they contended that the City owed them for past hydrant charges for the period since the Lane case was decided.

Notwithstanding the Tacoma case and the FirePals legislation, NUD sent another invoice at the end of 2013 for \$754,563.42 and the City replied in the same manner as it had previously and declined to pay the invoice. NUD has indicated that they will continue to send annual invoices and the City will continue to decline to pay them. The City Attorney's Office believes that the cost of providing hydrants and other fire suppression facilities incurred before the date of the FirePals legislation are the responsibility of the district due to the course of dealing between the parties. Further, that even in the absence of the FirePals legislation, those same costs incurred going forward are also the responsibility of NUD on that same theory. However, in addition to the foregoing, the Legislation makes it clear that, even absent a contractual obligation to pay those costs, NUD can pay them. Consequently no change is needed to the franchise agreement to formalize that fact. However, the District has suggested clarifying this in the franchise agreement and formally acknowledging that NUD will not pursue collection of back charges. While the City would have no objection to this as a stand-alone proposition, in consideration of such an amendment to the franchise agreement, NUD was seeking other language changes regarding non-assumption as described below, to which the City does object.

Street Lights

As noted during the 2015-2016 Budget process, most of the street lights in the annexation area are billed to residents through lighting districts that were established when new developments

were built when the area was unincorporated King County. Earlier in 2014, NUD notified the City that they no longer had the legal authority to form lighting districts within incorporated cities. The City Attorney's Office researched this claim and concluded that they did still have the authority to form such districts but they were not obligated to do so. The City asked that NUD continue billing the existing street utilities (see Attachment D, Budget Issue Paper regarding street lights in the annexation area). The Council has given preliminary approval to the staff's recommended approach to assuming responsibility for street lights beginning in mid-2015, which will eliminate this outstanding issue with the district.

Utility Taxes

Historically, cities has not been allowed to impose utility taxes in utility districts located within its boundaries. Utility taxes on water, sewer, surface water, electricity, natural gas, cable and telecommunications are considered a general government revenue and collectively account for 15.4% of General Fund revenue. Franchise fees are also considered a general government revenue and, while not imposed on the same basis or through the same statutory authority, provide some level of tax equity for all City residents contributing to the support of general government services such as public safety, parks and streets. A State Court of Appeals decision, *City of Wenatchee v. Chelan County Public Utility District #1*, issued in May 2014 held that cities do have authority to impose utility taxes on utility district revenue collected within the City's boundaries (see Attachment E, MRSC Insight excerpt "Important New Court Decision on a City's Utility Tax Authority). NUD had inquired as to whether the City was interested in imposing a utility tax in lieu of the franchise fee or creating a new formula for calculating the franchise fee that would mirror the tax rate. Because this decision is from the Court of Appeals, the City is reluctant to do either of these things until the Supreme Court at some point reviews the issue and confirms taxation of one municipality by another is acceptable. Staff is recommending that no action on this be taken until such a decision occurs.

Current Franchise Negotiations with NUD

The last NUD Franchise agreement term was January 1, 2009 through December 31, 2013. Based on the Council's interest in exploring a possible assumption and the number of policy issues that arose over the course of the franchise period, the City began meeting with NUD staff in 2013. Both parties agreed that the complexity of the issues were such that it was agreed that more time was needed. Staff of the City and District requested that their respective governing bodies approve a one-year extension of the franchise which was subsequently approved (see Attachment E, staff memo and Resolution 5021).

Therefore, in 2014, the City continued meeting with district staff. After the first meeting, the following list of interests and issues was developed:

- 1) *Clarify hydrant responsibility (past/current/future)*
- 2) *Provide for ongoing discussion about the possibility of Kirkland assuming all or its portion of NUD.*
 - a. *2011 Kirkland AV in District is approximately 58%, approaching 60%*
 - b. *Discuss rules of engagement, agree on legal parameters, anticipate process with language in the franchise extension agreement*

- c. *Consider the interests of other cities (Lake Forest Park, Bothell, Kenmore) -- does NUD continue serving or should COK serve, or does each city take their respective parts – more research needed*
- d. *Consider the timing considerations -- Kirkland is not interested in providing a five year notice now but may want to adjust franchise agreement to allow for a 3 year extension plus 5 years notice for assumption ...*
- 3) *Billing of street lights – it is a valuable service the district provides and the City would like to continue for now until we can transition street lights to City*
- 4) *Discuss the franchise fee calculation and the franchise fee's relationship to City's utility tax – recent case law suggests that the franchise fee can be replaced with a percentage-based fee or tax that can be uniform with the existing City's utility tax rates. Does the City want to pursue?*
- 5) *Recognition that proposed/potential legislative changes may impact most of these topics.*

Over the ensuing months, City staff also evaluated the financial feasibility of assuming all or a portion of the District, and determined that, unless the entire District were assumed through an agreement between all of the cities served by NUD, assumption of the district would have a negative financial impact on the City's water/sewer utility. The City contacted Bothell, Kenmore and Lake Forest Park to determine their interest in assuming the District. There were various responses, however, not enough positive responses to merit further discussion at this time. Staff indicated to NUD that the City would not be in a position to assume the District for at least eight years, but asked whether the District would be willing to amend the Franchise agreement so that the renewal period coincided with Bothell's (the only other City with an existing water and sewer utility) at the end of 2017. This would shorten the next franchise renewal period from five years to three years.

NUD staff responded with the following email indicating that their Commissioners were willing consider this provision provided the following conditions were also included:

There are four major obstacles to reaching a new franchise agreement. Assuming we reach agreement on these, all other provisions of the existing agreement can stay the same.

The "Every three-year opener with five-year notice" is acceptable if:

1. *The first notice cannot be given until ten years after the date of the updated franchise agreement.*

The Bothell franchise agreement opens up for notice every three years from 12/31/2013, then 2016, 2019, 2022, 2025, etc. The City can give notice in 2025 to match the city of Bothell.

2. *The updated franchise will require NUD to provide future fire protection functions within its distribution system for facilities like hydrant and fire flow storage and waive its claim for past fire protection costs billed to the City.*

According to most legal experts, the City has responsibility for the fire protection costs within city limits per the Lane decision. Even if the City doesn't agree, it will eventually take over that responsibility when it assumes control over the system. Nevertheless, the City can have the District assume that responsibility under the Firepal bill. In other words, the District can accept that responsibility if it is something we agree to do in the franchise agreement. The District cannot simply do it for no consideration. We are not asking for anything in particular; we will accept the ten-year no notice period reference in 1 above as sufficient consideration. We have already negotiated franchise containing similar terms with Kenmore to shoulder its fire protection costs.

3. *Street Lights*

The City is responsible for street lights in the newly annexed area based on the Okesson decision. While we understand that there may have been some issues following the annexation, this needs to get resolved. The current arrangements put both agencies at risk. We do not want to put undue pressure on the City, but the City should find a way to take over the costs of street lighting in the annexed area by the end of the first quarter of 2015.

4. *Placeholder for discussion about the City's road restoration requirements.*

We are not clear about the City's requirements for street paving. Section 3 makes reference to OCI

...Overall Condition Index (OCI) rating of 40 or less prior to NUD's excavation, then the area shall be restored with a permanent asphalt patch per City of Kirkland Pre-approved Plans in lieu of an asphalt street overlay...*

and

The City of Kirkland's Overall Condition Index (OCI) rating is based upon standard pavement condition rating methodologies as recognized by the Washington State Department of Transportation (WSDOT) and the Northwest Pavement Managers Association (NWPMA).

We understand that the City cannot continuously update the OCI of all of its streets to keep them current. We propose that the District establish the OCI rating based on the above criteria at the time paving is needed. If the City disagrees with the District's assessment, it can provide an alternate rating within five business days of the District's submittal. If the parties cannot agree, our representatives can meet for a resolution. This allows the District to proceed with the project promptly and does not require additional work on part of the City unless there is a disagreement.

Following receipt of this email, staff spoke with the District and indicated a preference to allow the franchise agreement to roll over as is for another five year period pending a final check-in with the City Council. The District was advised of the pending budget recommendation to assume responsibility for the lights and the question about street repair responsibility can be handled administratively between staff.

Recommendation

Staff is recommending that the City take no action on the franchise agreement in 2014, effectively continuing all existing provisions for the next five year period. There is no compelling reason to amend the franchise agreement for the following reasons:

1. The street light issue will be resolved providing the City assumes responsibility for all street lights in 2015.
2. The utility tax option has still not been considered by the Supreme Court and, once it is, the City would still need to consider whether and how to replace the franchise fee with a utility tax in a way that does not negatively impact ratepayers and City revenue.
3. The City and NUD are not in agreement about the hydrant maintenance charges and this issue will remain unresolved. NUD is the only utility district we are aware of seeking back hydrant payments and, presumably, payments going forward from cities following the FirePALS legislation.
4. The financial and operational implications of assuming the district are problematic, particularly in light of the fact the City does not comprise 60% of the assessed value of the District. In addition, NUD has not indicated a desire to have that portion assumed by Kirkland, although they agreed to work with Kirkland in the best interests of the customers.
5. The District is effective in providing utility services to its customers and the City has a good working relationship on operational matters.

An alternative to "no action" would be to request another one-year extension on the current franchise and attempt to resolve the outstanding policy issues within the next year. The City can also provide a non-renewal notice before the end of 2014, which would end the current agreement at the end of five years (December 31, 2019). After that date, the City would no longer receive a franchise fee from NUD. However, assuming the notice would be given to initiate an assumption process, loss of the fee might not matter. If that is the alternative chosen and assumption is the reason for that choice, staff would prepare an ordinance in accordance with 35A.13.050 for the Council to consider at the appropriate time. However, because less than 60% of the value of the property comprising NUD territory is within Kirkland City limits, only the partial assumption could be undertaken, which would not be financially advantageous for the City or its residents.

If the Council accepts the staff recommendation, the fact that the franchise agreement is silent on some of the unresolved policy issues described above will require continued collaboration between the City and District to bring them to some resolution in the future. If needed, the franchise agreement can be amended with both parties' agreement over the course of the next five year franchise period. Staff will continue to work with District representatives regarding outstanding policy issues.

ORDINANCE NO. 4141

AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING NORTSHORE UTILITY DISTRICT, A WASHINGTON MUNICIPAL CORPORATION, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT AND MAINTAIN, REPAIR, REPLACE, OPERATE UPON, OVER, UNDER, ALONG AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF ITS WATER AND SEWER UTILITY BUSINESS.

WHEREAS, Northshore Utility District ("NUD") was previously granted a franchise agreement to operate within the City of Kirkland ("City") limits under ordinance number 3767, approved on December 11th, 2000; and

WHEREAS, this existing agreement needed to be updated and NUD and the City have therefore re-negotiated the agreement;

NOW THEREFORE, City Council of the City of Kirkland do ordain as follows:

Section 1. Definitions. Where used in this franchise (the "Franchise") these terms have the following meanings:

(a) "NUD" means Northshore Utility District, a Washington municipal corporation, and its respective successors and assigns.

(b) "City" means the City of Kirkland, a municipal corporation of the State of Washington, and its respective successors and assigns.

(c) "Franchise Area" means any, every and all of the roads, streets, avenues, alleys, highways and rights-of-way of the City as now laid out, platted, dedicated or improved in NUD's service area within the present limits of the City.

(d) "Facilities" means tanks, meters, pipes, mains, services, valves, manholes, pressure reducing valves ("PRVs"), pump stations, meter stations, lines, and all necessary or convenient facilities and appurtenances thereto, whether the same be located over or under ground.

(e) "Ordinance" means this Ordinance No. _____, which sets forth the terms and conditions of this Franchise.

Section 2. Franchise.

A. Facilities within Franchise Area. The City does hereby grant to NUD the right, privilege, authority and franchise to:

(a) Construct, support, attach, and connect Facilities between, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along, through and across the Franchise Area for purposes of its water and sewer utility business as defined in RCW 82.04.065.

B. Permission Required to Enter Onto Other City Property. Nothing contained in this Ordinance is to be construed as granting permission to NUD to go upon any other public place other than those types of public places specifically designated as the Franchise Area in this Ordinance. Permission to go upon any other property owned or controlled by the City must be sought on a case-by-case basis from the City.

C. Compliance with Laws and Regulations. At all times during the term of this Franchise, NUD shall fully comply with all applicable federal, state, and local laws and regulations.

Section 3. Non-interference of Facilities.

NUD's Facilities shall be located, relocated and maintained within the Franchise Area so as not to unreasonably interfere with the free and safe passage of pedestrian and vehicular traffic and ingress or egress to or from the abutting property and in accordance with the laws of the State of Washington. Nothing herein shall preclude NUD from effecting temporary road closures as reasonably necessary during construction or maintenance of its Facilities provided NUD receives prior City approval, which shall not be unreasonably withheld. Whenever it is necessary for NUD, in the exercise of its rights under this Franchise, to make any excavation in the Franchise Area, NUD shall, upon completion of such excavation, restore the surface of the Franchise Area to the specifications established within the City of Kirkland Public Works Policies and pre-approved plans and in accordance with standards of general applicability imposed by the City by ordinance or administrative order; provided, however, if the surface of the affected Franchise Area has an Overall Condition Index (OCI)* rating of 40 or less prior to NUD's excavation, then the area shall be restored with a permanent asphalt patch per City of Kirkland Pre-approved Plans in lieu of an asphalt street overlay.

If NUD should fail to leave any portion of any Franchise Area so excavated in a condition that meets the City's specifications per the Public Works Policies and Standards, then, subject to the foregoing sentence, the City may after notice of not less than five (5) days to NUD, which notice shall not be required in case of an emergency, order any and all work considered necessary to restore to a safe condition that portion of the Franchise Area so excavated, and NUD shall pay to the City the reasonable cost of such work; which shall include among other things the overhead expense of the City in obtaining completion of said work. The parties agree that this provision may be renegotiated upon the request of either party.

*The City of Kirkland's Overall Condition Index (OCI) rating is based upon standard pavement condition rating methodologies as recognized by the Washington State Department of Transportation (WSDOT) and the Northwest Pavement Managers Association (NWPMA).

B. Any surface or subsurface failure occurring during the term of this Agreement and caused by any excavation by NUD shall be repaired to the City's specifications, within fifteen (15) days or upon five (5) days written notice to NUD by the City; if NUD fails to so timely repair, then the City shall order all work necessary to restore the damaged area to a safe and acceptable condition and NUD shall pay the reasonable costs of such work to the City.

Section 4. Relocation of Facilities.

A. Whenever the City causes the grading or widening of the Franchise Area or undertakes construction of any water, sanitary sewer or storm drainage line, lighting, signalization, sidewalk improvement, pedestrian amenities, or other public street improvement [for purposes other than those described in section 4(B) below] and such project requires the relocation of NUD's then existing Facilities within the Franchise Area, the City shall:

(a) Provide NUD, at least ninety (90) days prior to the commencement of such project, written notice that a project is expected to require relocation; and

(b) Provide NUD with reasonable plans and specifications for such grading, widening, or construction and a proposed new location within the Franchise Area for NUD's Facilities.

After receipt of such notice and such plans and specifications, NUD shall relocate such Facilities within the Franchise Area so as to accommodate such street and utility improvement project; provided, however, NUD may, after receipt of written notice requesting a relocation of its Facilities, submit to the City written alternatives to such relocations. The City shall within a reasonable time evaluate such alternatives and advise NUD in writing whether one or more of the alternatives is suitable to accommodate work that would otherwise necessitate relocation of the Facilities. If so requested by the City, NUD shall submit such additional information as is reasonably necessary to assist the City in making such evaluation. The City shall give each alternative full and fair consideration. In the event the City ultimately reasonably determines that there is no other reasonable or feasible alternative, then NUD shall relocate its Facilities as otherwise provided in this Section 4. The City shall cooperate with NUD to designate a substitute location for its Facilities within the Franchise Area. City will establish a date by which Facilities will be relocated, which date will be not less than sixty (60) days after written notice to NUD as to the facility to be relocated. NUD must finish relocation of each such Facility by the date so established. The cost of relocating such Facilities existing within the present limits of the City shall be paid as follows:

- (a) if the relocation occurs within six (6) years after NUD initially constructed such Facility, then the relocation shall be at the City's sole cost;
- (b) if the relocation occurs more than six (6) years but within ten (10) years after NUD initially constructed such Facility, then the City shall pay fifty percent (50%) of the cost of such relocation and NUD shall pay the remaining fifty percent (50%); and
- (c) if the relocation occurs more than ten (10) years after NUD initially constructed such Facility, then the relocation shall be at NUD's sole cost.

- (d) For the purpose of planning, NUD and the City shall provide each other with a copy of their respective current adopted Capital Improvement Plan annually and upon request by the other party.

B. Whenever any person or entity, other than the City, requires the relocation of NUD's Facilities to accommodate the work of such person or entity within the Franchise Area, or whenever the City requires the relocation of NUD's Facilities within the Franchise Area for the benefit of any person or entity other than the City, then NUD shall have the right as a condition of such relocation to require such person or entity to:

- (a) make payment to NUD at a time and upon terms acceptable to NUD for any and all costs and expense incurred by NUD in the relocation of NUD's Facilities; and
- (b) protect, defend, indemnify and save NUD harmless from any and all claims and demands made against it on account of injury or damage to the person or property of another arising out of or in conjunction with the relocation of NUD's Facilities, to the extent such injury or damage is caused by the negligence or willful misconduct of the person or entity requesting the relocation of NUD's Facilities or other negligence or willful misconduct of the agents, servants or employees of the person or entity requesting the relocation of NUD's Facilities.

C. Any condition or requirement imposed by the City upon any person or entity (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals or permits for zoning, land use, construction or development) which necessitates the relocation of NUD's Facilities within the Franchise Area shall be subject to the provisions of subsection 4(B). However, in the event the City reasonably determines (and promptly notifies NUD in writing of such determination) that the primary purpose of imposing such condition or requirement upon such person or entity which necessitates such relocation is to cause the construction of an improvement on the City's behalf and in a manner consistent with City approved improvement plans [as described in 4(A) above] within a segment of the Franchise Area then:

NUD shall require only those costs and expenses incurred by NUD in integrating and connecting such relocated Facilities with NUD's other Facilities to be paid to NUD by such person or entity, and NUD shall otherwise relocate its Facilities within such segment of the Franchise Area in accordance with the provisions of subsection 4(A) above.

The provisions of this Section 4(C) shall in no manner preclude or restrict NUD 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 such 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.

E. This Section 4 shall govern all relocations of NUD's Facilities required in accordance with this Franchise. Any cost or expense in connection with the location or relocation of any Facilities existing under benefit of easement or other rights not in the Franchise Area, excluding rights arising under any prior King County franchise, shall be borne by the City. Costs for location or relocation of any Facilities existing under any prior King County franchise shall be borne solely by NUD.

F. NUD recognizes the need for the City to maintain adequate width for installation and maintenance of City owned utilities such as, but not limited to, sanitary sewer, water, storm drainage and telecommunication facilities. Thus, the City reserves the right to maintain reasonable clear zones within the public right-of-way for installation and maintenance of said utilities. The clear zones for each right-of-way segment shall be noted and conditioned with the issuance of each right-of-way permit. If adequate clear zones are unable to be achieved on a particular right-of-way, NUD shall locate in an alternate right-of-way, obtain easements from private property owners, or propose alternate construction methods, which maintain and/or enhance the existing clear zones.

G. For the purpose of this Section 4, a project or improvement is considered to be caused by the City [as described in 4(A) above] if it is permitted by the City and both of the following conditions exist:

1. the City is lead agency for the project or improvement, and
2. the City is responsible for over 50% of the overall costs of said improvement or project, which 50%, if applicable, includes any grant money received from another entity for the project.

However, regardless of its percentage of participation, the City will never be liable for NUD's costs of location or relocation simply because a participating agency that would have been responsible for those costs was able to avoid paying NUD for those costs on a claim of exemption under state or federal law so long as the exempt agency was the entity to initiate the project.

Section 5. Indemnification. NUD shall indemnify, defend and hold the City, its agents, officers, employees, volunteers and assigns harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever, including all costs and attorney's fees, made against them on account of injury, sickness, death or damage to persons or property which is caused by or arises out of, in whole or in part, the willful, tortious or negligent acts, failures and/or omissions of NUD or its agents, servants, employees, contractors, subcontractors or assigns in the construction, operation or maintenance of its Facilities or in exercising the rights granted NUD in this Franchise; provided, however, such indemnification shall not extend to injury or damage caused by the negligence or willful misconduct of the City, its agents, officers, employees, volunteers or assigns.

In the event any such claim or demand be presented to or filed with the City, the City shall promptly notify NUD thereof, and NUD shall have the right, at its election and at its sole cost and expense, to settle and compromise such claim or demand, provided further, that in the event any suit or action be begun against the City based upon any such claim or demand, the City shall likewise promptly notify NUD

thereof, and NUD shall have the right, at its election and its sole cost and expense, to settle and compromise such suit or action, or defend the same at its sole cost and expense, by attorneys of its own election.

Section 6. Default. If NUD shall fail to comply with any of the provisions of this Franchise, unless otherwise provided for herein, the City may serve upon NUD a written order to so comply within thirty-days from the date such order is received by NUD. If NUD is not in compliance with this Franchise after expiration of said thirty-day period, the City may act to remedy the violation and may charge the costs and expenses of such action to NUD. The City may act without the thirty-day notice in case of an emergency. The City may in addition, by ordinance adopted no sooner than five (5) days after notice of the City Council hearing (at which NUD will have an opportunity to be heard) on the impending ordinance is given to NUD, declare an immediate forfeiture of this Franchise, provided, however, if any material failure to comply with this Franchise by NUD cannot be corrected with due diligence within said thirty (30) day period (NUD's obligation to comply and to proceed with due diligence being subject to unavoidable delays and events beyond its control, in which case the time within which NUD may so comply shall be extended for such time as may be reasonably necessary and so long as NUD commences promptly and diligently to effect such compliance), provided good faith dispute does not exist concerning such compliance.

In addition to other remedies provided herein, if NUD is not in compliance with requirements of the Franchise, and if a good faith dispute does not exist concerning such compliance, the City may place a moratorium on issuance of pending NUD right-of-way use permits until compliance is achieved.

Section 7. Non-exclusive Franchise. This Franchise is not and shall not be deemed to be an exclusive Franchise. This Franchise shall not in any manner prohibit the City from granting other and further franchises over, upon, and along the Franchise Area, which do not interfere with NUD's rights under this Franchise. This Franchise shall not prohibit or prevent the City from using the Franchise Area or affect the jurisdiction of the City over the same or any part thereof.

Section 8. Franchise Term. Subject to the provisions of Section 9 and 10 below, this Franchise is and shall remain in full force and effect from January 1, 2009 until December 31, 2013, provided that on January 1, 2014, and on January 1 every five (5) years thereafter, the term shall automatically be extended for an additional five (5) years, unless either NUD or the City gives the other party written notice of non-renewal prior to any such renewal date, in which case this Franchise shall terminate five (5) years after such renewal date; and provided further, however, NUD shall have no rights under this Franchise nor shall NUD be bound by the terms and conditions of this Franchise unless NUD shall, within thirty (30) days after the passage date of the Ordinance, file with the City its written acceptance of this Franchise, in a form acceptable to the City Attorney. On any renewal date, the City has the option of extending the term for more than 5 years but all subsequent renewal dates would remain automatically five (5) years unless the City again opted to extend any of them for more than five (5) years.

Section 9. Non-assumption. In consideration for the franchise fee and acceptance of the other terms and conditions of this Franchise, the City agrees that it will not exercise its statutory authority to assume jurisdiction over NUD or any NUD responsibilities, property, facilities or equipment within the City's corporate limits while this Franchise is in effect.

Section 10. Franchise Fee. In consideration for the rights granted NUD under this Agreement for Facilities in the Franchise Area, NUD agrees to pay to the City an annual franchise fee of \$3.25 per foot of the ~~126,627~~ 125,668 feet of the roads, streets, avenues, alleys, highways and rights-of-way of the City as now laid out, platted, dedicated or improved in NUD's service area within the present limits of the City. For 2009 this results in a fee of ~~\$411,538~~ \$408,421 which fee will be raised by inclusion in NUD's rate calculation for ratepayers within City limits. The fee will be adjusted for inflation each January 1st thereafter during the term of this agreement using the June-to-June CPI-U index for the Seattle - Tacoma - Bremerton area for the preceding year, as the CPI-U more closely reflects the changes in real estate value. Said annual Franchise Fee shall be paid in four equal quarterly installments. Fees for each calendar quarter shall be due thirty (30) days following the end of the calendar quarter. Should NUD be prevented by judicial or legislative action from paying any or all of the franchise fee, NUD shall be excused from paying that portion of the franchise fee. Should a court of competent jurisdiction declare, or a change in law make the franchise fee invalid, in whole or in part, or should a court of competent jurisdiction hold that the franchise fee is in violation of a pre-existing contractual obligation of NUD, then NUD's obligation to pay the fee to the City under this Section shall be terminated in accordance with and to the degree required to comply with such court action. NUD agrees that the franchise fee established by this Section is appropriate and that NUD will not be a party to or otherwise support legal or legislative action intended to result in judicial determinations or legislative action referred to above. City shall defend, indemnify and hold NUD harmless from and against any and all claims, suits, actions or liabilities (including costs and attorneys' fees) incurred or asserted against NUD directly or indirectly arising out of NUD's payment of the franchise fee as provided in this Franchise. If new roads, streets, avenues, alleys, highways and rights-of-way of the City are added to the Franchise Area, the City will notify NUD no more than once per year of the number of feet added, which amount will then be added to the calculation of the franchise fee for the next calendar quarter.

Section 11. Compliance With Codes And Regulations.

A. The rights, privileges and authority herein granted are subject to and governed by this ordinance and all other applicable ordinances and codes of the City of Kirkland, as they now exist or may hereafter be amended. Nothing in this ordinance limits the City's lawful power to exercise its police power to protect the safety and welfare of the general public. Any location, relocation, erection or excavation by NUD shall be performed by NUD in accordance with applicable federal, state and city rules and regulations, including the City Public Works Policies and Pre-approved Plans, and any required permits, licenses or fees, and applicable safety standards then in effect or any Memorandum of Understanding with NUD.

B. Upon written inquiry, NUD shall provide a specific reference to either the federal, state or local law or the Washington Utilities and Transportation Commission ("WUTC") order or action establishing a basis for NUD's actions related to a specific franchise issue.

C. In the event that any territory served by NUD is annexed to the City after the effective date of this Franchise, this franchise agreement shall be deemed to be the new agreement required to be granted to a franchisee in annexed territory by RCW 35A.14.900 for whatever period of time is then required under that statute or the remaining time left under this franchise agreement for the Franchise Area, whichever is longer. Such territory shall then be governed by the terms and conditions contained herein upon the effective date of such annexation. The first franchise fee for any annexed area shall be calculated pro rata from the effective date of the annexation to the end of the next calendar quarter and paid to the City at the same time as the fee for the Franchise Area is paid for that quarter.

Section 12. Location of Facilities and Equipment. With the exception of components that are traditionally installed above ground such as fire hydrants, blow-offs, vault lids, risers and utility markers, all Facilities and equipment to be installed within the Franchise Area shall be installed underground; provided, however, that such Facilities may be installed above ground if so authorized by the City, which authorization shall not be unreasonably withheld, conditioned or delayed, consistent with the provisions of the City's Land Use Code and applicable development pre-approved plans.

Section 13. Record of Installations and Service. With respect to excavations by NUD and the City within the Franchise Area, NUD and the City shall each comply with its respective obligations pursuant to Chapter 19.122, RCW and any other applicable state law.

Upon written request of the City, NUD shall provide the City with the most recent update available of any plan of potential improvements to its Facilities within the Franchise Area; provided, however, any such plan so submitted shall be for informational purposes within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

As-built drawings of the precise location of any Facilities placed by NUD in any street, alley, avenue, highway, easement, etc., shall be made available to the City within ten (10) working days of request.

Section 14. Shared Use of Excavations. NUD and the City shall exercise best efforts to coordinate construction work either may undertake within the Franchise Area so as to promote the orderly and expeditious performance and completion of such work as a whole. Such efforts shall include, at a minimum, reasonable and diligent efforts to keep the other party and other utilities within the Franchise Areas informed of its intent to undertake such construction work. NUD and the City shall further exercise best efforts to minimize any delay or hindrance to any construction work undertaken by themselves or other utilities within the Franchise Area.

If at any time, or from time to time, either NUD, the City, or another franchisee, shall cause excavations to be made within the Franchise Area, the party causing such excavation to be made shall afford the others, upon receipt of a written request to do so, an opportunity to use 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. The parties shall each cooperate with other utilities in the Franchise Area to minimize hindrance or delay in construction.

The City reserves the right to not allow open trenching for five (5) years following a street overlay or improvement project. NUD shall be given written notice at least ninety (90) days prior to the commencement of the project. Required trenching due to an emergency will not be subject to five (5) year street trenching moratoriums.

The City reserves the right to require NUD to joint trench with other facilities if both parties are anticipating trenching within the same portion of the Franchise Area and provided that the terms of (a) and (b) above are met.

Section 15. Insurance. NUD shall maintain in full force and effect throughout the term of this Franchise, a minimum of One Million Dollars (\$ 1,000,000.00) liability insurance for property damage and bodily injury.

The City shall be named as an additional insured on any policy of liability insurance obtained by NUD for the purpose of complying with the requirements of this Section.

In satisfying the insurance requirement set forth in this section, NUD may self-insure against such risks in such amounts as are consistent with good utility practice. NUD shall provide the City with sufficient written evidence, the sufficiency of which shall be determined at the reasonable discretion of the City, upon request, that such insurance (or self-insurance) is being so maintained by NUD. Such written evidence shall include, to the extent available from NUD's insurance carrier, a written certificate of insurance with respect to any insurance maintained by NUD in compliance with this Section.

Section 16. Tariff Changes. If NUD shall file, pursuant to Chapter 80.28 RCW, with the WUTC (or its successor) any tariff affecting the City's rights arising under this Franchise, NUD shall give the City Clerk written notice thereof within five (5) days of the date of such filing.

Section 17. Assignment. All of the provisions, conditions, and requirements herein contained shall be binding upon NUD, and no right, privilege, license or authorization granted to NUD hereunder may be assigned or otherwise transferred without the prior written authorization and approval of the City, which

the City may not unreasonably withhold, condition or delay. Notwithstanding the foregoing, NUD may assign this agreement to an affiliate, parent or subsidiary or as part of any corporate financing, reorganization or refinancing which does not require assignment to any but an affiliate, parent or subsidiary without the consent of, but upon notice to, the City.

Section 18. Notice. Unless applicable law requires a different method of giving notice, any and all notices, demands or other communications required or desired to be given hereunder by any party (collectively, "notices") shall be in writing and shall be validly given or made to another party if delivered either personally or by Federal Express or other overnight delivery service of recognized standing, or if deposited in the United States Mail, certified, registered, or express mail with postage prepaid, or if sent by facsimile transmission with electronic confirmation. If such notice is personally delivered, it shall be conclusively deemed given at the time of such delivery. If such notice is delivered by Federal Express or other overnight delivery service of recognized standing, it shall be deemed given one (1) business day after the deposit thereof with such delivery service. If such notice is mailed as provided herein, such shall be deemed given three (3) business days after the deposit thereof in the United States Mail. If such notice is sent by facsimile transmission, it shall be deemed given at the time of the sender's receipt of electronic confirmation. Each such notice shall be deemed given only if properly addressed to the party to whom such notice is to be given as follows:

To City: Multimedia Communications Manager
City of Kirkland
123 Fifth Avenue
Kirkland, WA 98033-6169
Fax: (425) 576-2921

To NUD: General Manager
Northshore Utility District
6830 NE 185th St.
Kenmore, WA 98028
Fax:(425) 398-4435

With copy to: Kinnon Williams
Williams & Williams, PSC
18806 Bothel Way NE Bothell, Washington 98011-1933
Fax: (425) 485-8449

Any party hereto may change its address for the purpose of receiving notices as herein provided by a written notice given in the manner aforesaid to the other party hereto.

Section 19. Miscellaneous. If any term, provision, condition or portion of this Franchise shall be held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Franchise, which shall continue in full force and effect. The headings of sections and paragraphs of this Franchise are

for convenience of reference only and are not intended to restrict, affect, or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs.

In addition to the franchise fee due under Section 10 above, NUD shall pay for the City's reasonable administrative costs in drafting and processing this franchise agreement and all work related thereto. NUD shall further be subject to all permit fees associated with activities undertaken through the authority granted in this franchise ordinance or under the laws of the City. Where the City incurs cost and expenses for review, inspection, or supervision of activities undertaken through the authority granted in this franchise or any ordinances relating to the subject for which a permit fee is not established, NUD shall pay such costs and expenses directly to the City. In addition to the above, NUD shall promptly reimburse the City for any and all costs it reasonably incurs in response to any emergency involving NUD's facilities.

City has the right, but not the obligation, to take over control and ownership of Franchisee's Facilities in the Franchise Area, specifically including the water and sewer plant network, without compensation, if (1) such facilities are abandoned; or (2) in the event this Franchise is terminated and Franchisee does not remove such facilities at its own expense within a reasonable period of time. Furthermore, the City is specifically interested in retaining abandoned water and sewer lines for use as conduit for communication purposes and NUD shall notify the City at least 180 days prior to abandonment of any water or sewer line.

This Franchise may be amended only by written instrument, signed by both parties, which specifically states that it is an amendment to this Franchise, and is approved and executed in accordance with the laws of the State of Washington. Without limiting the generality of the foregoing, this Franchise (including, without limitation, Section 5 above) shall govern and supersede and shall not be changed, modified, deleted, added to, supplemented or otherwise amended by any permit, approval, license, agreement or other document required by or obtained from the City in conjunction with the exercise (or failure to exercise) by NUD of any and all rights, benefits, privileges, obligations, or duties in and under this Franchise, unless such permit, approval, license, agreement or document specifically:

- (a) references this Franchise; and
- (b) states that it supersedes this Franchise to the extent it contains terms and conditions which change, modify, delete, add to, supplement or otherwise amend the terms and conditions of this Franchise.

In the event of any conflict or inconsistency between the provisions of this Franchise and the provisions of any such permit, approval, license, agreement or other document that does not comply with subsections (a) and (b) referenced immediately above, the provisions of this Franchise shall control.

This Franchise is subject to the provisions of any applicable tariff now or hereafter on file with the WUTC or its successor. In the event of any conflict of inconsistency between the provisions of this Franchise and such tariff, the provisions of such tariff shall control.

Section 20. Termination of Prior Franchise Agreement. Upon NUD's acceptance of this franchise agreement in accordance with Section 8 above, the prior Franchise Agreement negotiated in December 2000 and previously approved under City Ordinance No. 3767 and NUD Resolution No. 2000-11-20 shall be deemed terminated on December 31, 2008. The terms and conditions of that 2000 Franchise Agreement shall have no further force and effect after that date.

Section 21. Effective Date. The franchise agreement established in this ordinance shall go into effect and become the new NUD Franchise Agreement as of January 1, 2009.

Section 22. This ordinance shall be in force and effect five days from and after its passage by the Kirkland City Council and publication pursuant to Section 1.08.017, Kirkland Municipal Code in the summary form attached to the original of this ordinance and by this reference approved by the City Council.

Passed by majority vote of the Kirkland City Council in regular meeting this 21st day of October, 2008.

Signed in authentication thereof this 21st day of October, 2008.



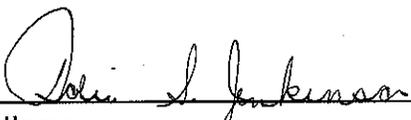
Mayor

Attest:

Acting 

City Clerk

Approved as to Form:



City Attorney

PUBLICATION SUMMARY OF
ORDINANCE NO. 4141

AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING NORTHSORE UTILITY DISTRICT, A WASHINGTON MUNICIPAL CORPORATION, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT, AND MAINTAIN, REPAIR, REPLACE, REMOVE AND OPERATE UPON, OVER, UNDER, ALONG AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF ITS WATER AND SEWER UTILITY BUSINESS.

SECTIONS 1-15. Provide for: the grant to Northshore Utility District of a franchise for a water and sewer utility business for 10 years on specified terms and conditions with the possibility of 5 year or, at the City's discretion, longer, extensions thereafter, payment of franchise fees to the City and non-assumption of NUD facilities within Kirkland for as long as the franchise is in effect or, in the event of annexation, as long as required by RCW 35A.14.900, whichever is later.

SECTIONS 16-21. Sets forth administrative provisions and establishes the effective date of this new franchise.

SECTION 21. Authorizes publication of the ordinance by summary, which summary is approved by the City Council pursuant to Section 1.08.017 Kirkland Municipal Code and establishes the effective date as five days after publication of summary.

The full text of this ordinance will be mailed without charge to any person upon request made to the City Clerk for the City of Kirkland. The ordinance was passed by the Kirkland City Council at its regular meeting on the 21st day of October, 2008.

I certify that the foregoing is a summary of Ordinance 4141 approved by the Kirkland City Council for summary publication.

Acting Karen R. Juel
City Clerk

Chapter 35.13A RCW

WATER OR SEWER DISTRICTS — ASSUMPTION OF JURISDICTION

[Chapter Listing](#) | [RCW Dispositions](#)

RCW Sections

- [35.13A.010](#) Definitions.
- [35.13A.020](#) Assumption authorized -- Disposition of properties and rights -- Outstanding indebtedness -- Management and control.
- [35.13A.030](#) Assumption of control if sixty percent or more of area or valuation within city.
- [35.13A.0301](#) Assumption of water-sewer district before July 1, 1999 -- Limitations.
- [35.13A.040](#) Assumption of control if less than sixty percent of area or valuation within city.
- [35.13A.050](#) Territory containing facilities within or without city -- Duties of city or district -- Rates and charges -- Assumption of responsibility -- Outstanding indebtedness -- Properties and rights.
- [35.13A.060](#) District in more than one city -- Assumption of responsibilities -- Duties of cities.
- [35.13A.070](#) Contracts.
- [35.13A.080](#) Dissolution of water district or sewer district.
- [35.13A.090](#) Employment and rights of district employees.
- [35.13A.100](#) Assumption of substandard water system -- Limited immunity from liability.
- [35.13A.111](#) Assumption of water-sewer district with fewer than two hundred fifty customers.
- [35.13A.900](#) Severability -- 1971 ex.s. c 95.

35.13A.010

Definitions.

Whenever used in this chapter, the following words shall have the following meanings:

(1) The words "district," "water district," and "sewer district" shall mean a "water-sewer district" as that term is used in Title

[57](#) RCW.

(2) The word "city" shall mean a city or town of any class and shall also include any code city as defined in chapter [35A.01](#) RCW.

(3) The word "indebtedness" shall include general obligation, revenue, and special indebtedness and temporary, emergency, and interim loans.

[1998 c 326 § 1; 1971 ex.s. c 95 § 1.]

Notes:

Effective date -- 1998 c 326: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 3, 1998]." [1998 c 326 § 4.]

35.13A.020

Assumption authorized — Disposition of properties and rights — Outstanding indebtedness — Management and control. (*Effective until January 1, 2015.*)

(1) Except as provided in RCW

[35.13B.030](#), whenever all of the territory of a district is included within the corporate boundaries of a city, the city legislative body may adopt a resolution or ordinance to assume jurisdiction over all of the district.

(2) Upon the assumption, all real and personal property, franchises, rights, assets, taxes levied but not collected for the district for other than indebtedness, water, sewer, and drainage facilities, and all other facilities and equipment of the district shall become the property of the city subject to all financial, statutory, or contractual obligations of the district for the security or performance of which the property may have been pledged. The city, in addition to its other powers, shall have the power to manage, control, maintain, and operate the property, facilities and equipment and to fix and collect service and other charges from owners and occupants of properties so served by the city, subject, however, to any outstanding indebtedness, bonded or otherwise, of the district payable from taxes, assessments, or revenues of any kind or nature and to any other contractual obligations of the district.

(3) The city may by resolution or ordinance of its legislative body, assume the obligation of paying such district indebtedness and of levying and of collecting or causing to be collected the district taxes, assessments, and utility rates and charges of any kind or nature to pay and secure the payment of the indebtedness, according to all of the terms, conditions and covenants incident to the indebtedness, and shall assume and perform all other outstanding contractual obligation of the district in accordance with all of their terms, conditions, and covenants. An assumption shall not be deemed to impair the obligation of any indebtedness or other contractual obligation. During the period until the outstanding indebtedness of the district has been discharged, the territory of the district

and the owners and occupants of property therein, shall continue to be liable for its and their proportionate share of the indebtedness, including any outstanding assessments levied within any local improvement district or utility local improvement district thereof. The city shall assume the obligation of causing the payment of the district's indebtedness, collecting the district's taxes, assessments, and charges, and observing and performing the other district contractual obligations. The legislative body of the city shall act as the officers of the district for the purpose of certifying the amount of any property tax to be levied and collected therein, and causing service and other charges and assessments to be collected from the property or owners or occupants thereof, enforcing the collection and performing all other acts necessary to ensure performance of the district's contractual obligations in the same manner and by the same means as if the territory of the district had not been included within the boundaries of a city.

When a city assumes the obligation of paying the outstanding indebtedness, and if property taxes or assessments have been levied and service and other charges have accrued for this purpose but have not been collected by the district prior to the assumption, the same when collected shall belong and be paid to the city and be used by the city so far as necessary for payment of the indebtedness of the district existing and unpaid on the date the city assumes the indebtedness. Any funds received by the city which have been collected for the purpose of paying any bonded or other indebtedness of the district, shall be used for the purpose for which they were collected and for no other purpose. Any outstanding indebtedness shall be paid as provided in the terms, conditions, and covenants of the indebtedness. All funds of the district on deposit with the county treasurer at the time of title transfer shall be used by the city solely for the benefit of the assumed utility and shall not be transferred to or used for the benefit of the city's general fund.

[2010 c 102 § 6; 1999 c 153 § 28; 1998 c 326 § 2; 1971 ex.s. c 95 § 2.]

Notes:

Application -- Expiration date -- 2010 c 102: See notes following RCW [35.13B.010](#).

Part headings not law -- 1999 c 153: See note following RCW [57.04.050](#).

Effective date -- 1998 c 326: See note following RCW [35.13A.010](#).

35.13A.020

Assumption authorized — Disposition of properties and rights — Outstanding indebtedness — Management and control. (*Effective January 1, 2015.*)

(1) Whenever all of the territory of a district is included within the corporate boundaries of a city, the city legislative body may adopt a resolution or ordinance to assume jurisdiction over all of the district.

(2) Upon the assumption, all real and personal property, franchises, rights, assets, taxes levied but not collected for the district for other than indebtedness, water, sewer, and drainage facilities, and all other facilities and equipment of the district shall become the property of the city subject to all financial, statutory, or contractual obligations of the district for the security or performance of which the property may have been pledged. The city, in addition to its other powers, shall have the power to manage, control, maintain, and operate the property, facilities and equipment and to fix and collect service and other charges from owners and occupants of properties so served by the city, subject, however, to any outstanding indebtedness, bonded or otherwise, of the district payable from taxes, assessments, or revenues of any kind or nature and to any other contractual obligations of the district.

(3) The city may by resolution or ordinance of its legislative body, assume the obligation of paying such district indebtedness and of levying and of collecting or causing to be collected the district taxes, assessments, and utility rates and charges of any kind or nature to pay and secure the payment of the indebtedness, according to all of the terms, conditions and covenants incident to the indebtedness, and shall assume and perform all other outstanding contractual obligation of the district in accordance with all of their terms, conditions, and covenants. An assumption shall not be deemed to impair the obligation of any indebtedness or other contractual obligation. During the period until the outstanding indebtedness of the district has been discharged, the territory of the district and the owners and occupants of property therein, shall continue to be liable for its and their proportionate share of the indebtedness, including any outstanding assessments levied within any local improvement district or utility local improvement district thereof. The city shall assume the obligation of causing the payment of the district's indebtedness, collecting the district's taxes, assessments, and charges, and observing and performing the other district contractual obligations. The legislative body of the city shall act as the officers of the district for the purpose of certifying the amount of any property tax to be levied and collected therein, and causing service and other charges and assessments to be collected from the property or owners or occupants thereof, enforcing the collection and performing all other acts necessary to ensure performance of the district's contractual obligations in the same manner and by the same means as if the territory of the district had not been included within the boundaries of a city.

When a city assumes the obligation of paying the outstanding indebtedness, and if property taxes or assessments have been levied and service and other charges have accrued for this purpose but have not been collected by the district prior to the assumption, the same when collected shall belong and be paid to the city and be used by the city so far as necessary for payment of the indebtedness of the district existing and unpaid on the date the city assumes the indebtedness. Any funds received by the city which have been collected for the purpose of paying any bonded or other indebtedness of the district, shall be used for the purpose for which they were collected and for no other purpose. Any outstanding indebtedness shall be paid as provided in the terms, conditions, and covenants of the indebtedness. All funds of the district on deposit with the county treasurer at the time of title transfer shall be used by the city solely for the benefit of the assumed utility and shall not be transferred to or used for the benefit of the city's general fund.

[1999 c 153 § 28; 1998 c 326 § 2; 1971 ex.s. c 95 § 2.]

Notes:

Part headings not law -- 1999 c 153: See note following RCW [57.04.050](#).

Effective date -- 1998 c 326: See note following RCW [35.13A.010](#).

35.13A.030

Assumption of control if sixty percent or more of area or valuation within city. (*Effective until January 1, 2015.*)

Except as provided in RCW

[35.13B.030](#), whenever a portion of a district equal to at least sixty percent of the area or sixty percent of the assessed valuation of the real property lying within such district, is included within the corporate boundaries of a city, the city may assume by ordinance the full and complete management and control of that portion of the entire district not included within another city, whereupon the provisions of RCW [35.13A.020](#) shall be operative; or the city may proceed directly under the provisions of RCW [35.13A.050](#).

[2010 c 102 § 7; 1999 c 153 § 29; 1971 ex.s. c 95 § 3.]

Notes:

Application -- Expiration date -- 2010 c 102: See notes following RCW [35.13B.010](#).

Part headings not law -- 1999 c 153: See note following RCW [57.04.050](#).

35.13A.030

Assumption of control if sixty percent or more of area or valuation within city. (*Effective January 1, 2015.*)

Whenever a portion of a district equal to at least sixty percent of the area or sixty percent of the assessed valuation of the real property lying within such district, is included within the corporate boundaries of a city, the city may assume by ordinance the full and complete management and control of that portion of the entire district not included within another city, whereupon the provisions of RCW [35.13A.020](#) shall be operative; or the city may proceed directly under the provisions of RCW [35.13A.050](#).

[1999 c 153 § 29; 1971 ex.s. c 95 § 3.]

Notes:

Part headings not law -- 1999 c 153: See note following RCW [57.04.050](#).

35.13A.0301

Assumption of water-sewer district before July 1, 1999 — Limitations.

During the period commencing with April 3, 1998, and running through July 1, 1999, a city may not assume jurisdiction of all or a portion of a water-sewer district under RCW

[35.13A.030](#) or [35.13A.040](#), unless voters of the entire water-sewer district approve a ballot proposition authorizing the assumption under general election law with the city paying for the election costs, and during the same period a water-sewer district may not:

(1) Merge or consolidate with another water-sewer district unless each city that is partially included within any of the districts proposing to merge or consolidate indicates that it has no interest in assuming jurisdiction of the district; or

(2) Take any action that would establish different contractual obligations, requirements for retiring indebtedness, authority to issue debt in parity with the district's existing outstanding indebtedness, rates of compensation, or terms of employment contracts, if a city assumes jurisdiction of all or a portion of the district. Nothing in this subsection shall be construed to prevent a district from issuing obligations on a parity with its outstanding obligations, to repeat terms and conditions of obligations provided with respect to earlier parity obligations, or to provide covenants that are customary for obligations of similar utilities whether those utilities are operated by cities or special purpose districts.

[1998 c 326 § 3.]

Notes:

Effective date -- 1998 c 326: See note following RCW [35.13A.010](#).

35.13A.040

Assumption of control if less than sixty percent of area or valuation within city. (*Effective until January 1, 2015.*)

Except as provided in RCW

[35.13B.030](#), whenever the portion of a district included within the corporate boundaries of a city is less than sixty percent of the area of the district and less than sixty percent of the assessed valuation of the real property within the district, the city may elect to proceed under the provisions of RCW [35.13A.050](#).

[2010 c 102 § 8; 1999 c 153 § 30; 1971 ex.s. c 95 § 4.]

Notes:

Application -- Expiration date -- 2010 c 102: See notes following RCW [35.13B.010](#).

Part headings not law -- 1999 c 153: See note following RCW [57.04.050](#).

35.13A.040

Assumption of control if less than sixty percent of area or valuation within city. (Effective January 1, 2015.)

Whenever the portion of a district included within the corporate boundaries of a city is less than sixty percent of the area of the district and less than sixty percent of the assessed valuation of the real property within the district, the city may elect to proceed under the provisions of RCW [35.13A.050](#).

[1999 c 153 § 30; 1971 ex.s. c 95 § 4.]

Notes:

Part headings not law -- 1999 c 153: See note following RCW [57.04.050](#).

35.13A.050

Territory containing facilities within or without city — Duties of city or district — Rates and charges — Assumption of responsibility — Outstanding indebtedness — Properties and rights.

When electing under RCW

[35.13A.030](#) or [35.13A.040](#) to proceed under this section, the city may assume, by ordinance, jurisdiction of the district's responsibilities, property, facilities and equipment within the corporate limits of the city: PROVIDED, That if on the effective date of such an ordinance the territory of the district included within the city contains any facilities serving or designed to serve any portion of the district outside the corporate limits of the city or if the territory lying within the district and outside the city contains any facilities serving or designed to serve territory included within the city (which facilities are hereafter in this section called the "serving facilities"), the city or district shall for the economically useful life of any such serving facilities make available sufficient capacity therein to serve the sewage or water requirements of such territory, to the extent that such facilities were

designed to serve such territory at a rate charged to the municipality being served which is reasonable to all parties.

In the event a city proceeds under this section, the district may elect upon a favorable vote of a majority of all voters within the district voting upon such propositions to require the city to assume responsibility for the operation and maintenance of the district's property, facilities and equipment throughout the entire district and to pay the city a charge for such operation and maintenance which is reasonable under all of the circumstances.

A city acquiring property, facilities and equipment under the provisions of this section shall acquire such property, facilities and equipment, and fix and collect service and other charges from owners and occupants of properties served by the city, subject, to any contractual obligations of the district which relate to the property, facilities, or equipment so acquired by the city or which are secured by taxes, assessments or revenues from the territory of the district included within the city. In such cases, the property included within the city and the owners and occupants thereof shall continue to be liable for payment of its and their proportionate share of any outstanding district indebtedness. The district and its officers shall continue to levy taxes and assessments on and to collect service and other charges from such property, or owners or occupants thereof, to enforce such collections, and to perform all other acts necessary to insure performance of the district's contractual obligations in the same manner and by the same means as if the territory of the district had not been included within the boundaries of a city.

[1971 ex.s. c 95 § 5.]

35.13A.060

District in more than one city — Assumption of responsibilities — Duties of cities.

Whenever more than one city, in whole or in part, is included within a district, the city which has within its boundaries sixty percent or more of the area of the assessed valuation of the district (in this section referred to as the "principal city") may, with the approval of any other city containing part of such district, assume responsibility for operation and maintenance of the district's property, facilities and equipment within such other city and make and enforce such charges for operation, maintenance and retirement of indebtedness as may be reasonable under all the circumstances.

Any other city having less than sixty percent in area or assessed valuation of such district, within its boundaries may install facilities and create local improvement districts or otherwise finance the cost of installation of such facilities and if such facilities have been installed in accordance with reasonable standards fixed by the principal city, such other city may connect such facilities to the utility system of such district operated by the principal city upon providing for payment by the owners or occupants of properties

served thereby, of such charges established by the principal city as may be reasonable under the circumstances.

[1999 c 153 § 31; 1971 ex.s. c 95 § 6.]

Notes:

Part headings not law -- 1999 c 153: See note following RCW [57.04.050](#).

35.13A.070

Contracts.

Notwithstanding any provision of this chapter to the contrary, one or more cities and one or more districts may, through their legislative authorities, authorize a contract with respect to the rights, powers, duties, and obligation of such cities, or districts with regard to the use and ownership of property, the providing of services, the maintenance and operation of facilities, allocation of cost, financing and construction of new facilities, application and use of assets, disposition of liabilities and debts, the performance of contractual obligations, and any other matters arising out of the inclusion, in whole or in part, of the district or districts within any city or cities, or the assumption by the city of jurisdiction of a district under *RCW

[35.13A.110](#). The contract may provide for the furnishing of services by any party thereto and the use of city or district facilities or real estate for such purpose, and may also provide for the time during which such district or districts may continue to exercise any rights, privileges, powers, and functions provided by law for such district or districts as if the district or districts or portions thereof were not included within a city or were not subject to an assumption of jurisdiction under *RCW [35.13A.110](#), including but not by way of limitation, the right to promulgate rules and regulations, to levy and collect special assessments, rates, charges, service charges, and connection fees, to adopt and carry out the provisions of a comprehensive plan, and amendments thereto, for a system of improvements, and to issue general obligation bonds or revenue bonds in the manner provided by law. The contract may provide for the transfer to a city of district facilities, property, rights, and powers as provided in RCW [35.13A.030](#), [35.13A.050](#), and *[35.13A.110](#), whether or not sixty percent or any of the area or assessed valuation of real estate lying within the district or districts is included within such city. The contract may provide that any party thereto may authorize, issue, and sell revenue bonds to provide funds for new water or sewer improvements or to refund any water revenue, sewer revenue, or combined water and sewer revenue bonds outstanding of any city, or district which is a party to such contract if such refunding is deemed necessary, providing such refunding will not increase interest costs. The contract may provide that any party thereto may authorize and issue, in the manner provided by law, general obligation or revenue bonds of like amounts, terms, conditions, and covenants as the outstanding bonds of any other party to the contract, and such new bonds may be substituted or exchanged for such outstanding bonds. However, no such exchange or

substitution shall be effected in such a manner as to impair the obligation or security of any such outstanding bonds.

[1997 c 426 § 2; 1971 ex.s. c 95 § 7.]

Notes:

*Reviser's note: RCW [35.13A.110](#) expired December 31, 1998.

35.13A.080

Dissolution of water district or sewer district.

In any of the cases provided for in RCW

[35.13A.020](#), [35.13A.030](#), [35.13A.050](#), and *[35.13A.110](#), and notwithstanding any other method of dissolution provided by law, dissolution proceedings may be initiated by either the city or the district, or both, when the legislative body of the city and the governing body of the district agree to, and petition for, dissolution of the district.

The petition for dissolution shall be signed by the chief administrative officer of the city and the district, upon authorization of the legislative body of the city and the governing body of the district, respectively and such petition shall be presented to the superior court of the county in which the city is situated.

If the petition is thus authorized by both the city and district, and title to the property, facilities, and equipment of the district has passed to the city pursuant to action taken under this chapter, all indebtedness and local improvement district or utility local improvement district assessments of the district have been discharged or assumed by and transferred to the city, and the petition contains a statement of the distribution of assets and liabilities mutually agreed upon by the city and the district and a copy of the agreement between such city and the district is attached thereto, a hearing shall not be required and the court shall, if the interests of all interested parties have been protected, enter an order dissolving the district.

In any of the cases provided for in RCW [35.13A.020](#), [35.13A.030](#), and *[35.13A.110](#), if the petition for an order of dissolution is signed on behalf of the city alone or the district alone, or there is no mutual agreement on the distribution of assets and liabilities, the superior court shall enter an order fixing a hearing date not less than sixty days from the day the petition is filed, and the clerk of the court of the county shall give notice of such hearing by publication in a newspaper of general circulation in the district once a week for three successive weeks and by posting in three public places in the district at least twenty-one days before the hearing. The notice shall set forth the filing of the petition, its purposes, and the date and place of hearing thereon.

After the hearing the court shall enter its order with respect to the dissolution of the district. If the court finds that such district should be dissolved and the functions

performed by the city, the court shall provide for the transfer of assets and liabilities to the city. The court may provide for the dissolution of the district upon such conditions as the court may deem appropriate. A certified copy of the court order dissolving the district shall be filed with the county auditor. If the court does not dissolve the district, it shall state the reasons for declining to do so.

[1997 c 426 § 3; 1971 ex.s. c 95 § 8.]

Notes:

***Reviser's note:** RCW [35.13A.110](#) expired December 31, 1998.

35.13A.090

Employment and rights of district employees.

Whenever a city acquires all of the facilities of a district, pursuant to this chapter, such a city shall offer to employ every full time employee of the district who is engaged in the operation of such a district's facilities on the date on which such city acquires the district facilities. When a city acquires any portion of the facilities of such a district, such a city shall offer to employ full time employees of the district as of the date of the acquisition of the facilities of the district who are not longer needed by the district.

Whenever a city employs a person who was employed immediately prior thereto by the district, arrangements shall be made:

(1) For the retention of all sick leave standing to the employee's credit in the plan of such district.

(2) For a vacation with pay during the first year of employment equivalent to that to which he or she would have been entitled if he or she had remained in the employment of the district.

[2009 c 549 § 2011; 1999 c 153 § 32; 1971 ex.s. c 95 § 9.]

Notes:

Part headings not law -- 1999 c 153: See note following RCW [57.04.050](#).

35.13A.100

Assumption of substandard water system — Limited immunity from liability.

A city assuming responsibility for a water system that is not in compliance with state or federal requirements for public drinking water systems, and its agents and employees, are immune from lawsuits or causes of action, based on noncompliance with state or federal requirements for public drinking water systems, which predate the date of assuming responsibility and continue after the date of assuming responsibility, provided that the city has submitted and is complying with a plan and schedule of improvements approved by the department of health. This immunity shall expire on the earlier of the date the plan of improvements is completed or four years from the date of assuming responsibility. This immunity does not apply to intentional injuries, fraud, or bad faith.

[1994 c 292 § 5.]

Notes:

Findings -- Intent -- 1994 c 292: See note following RCW [57.04.050](#).

35.13A.111

Assumption of water-sewer district with fewer than two hundred fifty customers.

The board of commissioners of a water-sewer district, with fewer than two hundred fifty customers on July 24, 2005, and the city council of a code city with a population greater than one hundred thousand on July 24, 2005, may provide for assumption by the city of the district in accordance with RCW

[35.13A.020](#), except as provided herein, pursuant to the terms and conditions of a contract executed in accordance with RCW [35.13A.070](#). None of the territory of the water-sewer district need be included within the territory of the city. The contract and assumption shall be approved by resolution of the board of commissioners and ordinance of the city council. If the water-sewer district has no indebtedness or monetary obligations on the date of assumption, the city shall use any surplus funds only for water services delivered to and water facilities constructed in the former territory of the district, unless provided otherwise in the contract. In connection with the assumption, the water-sewer district or the city, or both, may provide for dissolution of the district pursuant to RCW [35.13A.080](#).

[2005 c 43 § 1.]

35.13A.900

Severability — 1971 ex.s. c 95.

If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

[1971 ex.s. c 95 § 12.]



CITY OF KIRKLAND
Department of Public Works
123 Fifth Avenue, Kirkland, WA 98033 425.587.3800
www.kirklandwa.gov

MEMORANDUM

To: Kurt Triplett, City Manager

From: Ray Steiger, P.E., Streets and Public Grounds Manager
Erin Devoto, Public Works Superintendent
Marilynne Beard, Interim Public Works Director

Date: September 29, 2014

Subject: STREET LIGHTING ADMINISTRATION IN THE JFK ANNEXATION AREA

The purpose of this memo is to provide background on street light power costs in the JFK annexation area, describe the current status and provide options for City Council consideration in the 2015-2016 Budget process.

Background

Prior to annexation, the City's practice was to pay the power costs for all street lights in the City, regardless of whether they were located on arterials and collectors or neighborhood (local) streets. When the City requested an inventory of street lights from King County, there were 600 street lights identified for which the County paid power costs. King County does not require street lights on local streets as a condition of a development permit, unlike the City of Kirkland which requires street lights on arterials, collectors and local streets when a short plat is developed or any significant redevelopment occurs. Based on the inventory of 600 street lights, staff included an initial budget of \$100,000 that was later reduced to \$84,000 for street light power in the annexation budget. During the City's franchise negotiations with the Northshore Utility District and the Woodinville Water District, it was discovered that as many as 1,500 additional street lights located on local residential streets existed that were paid for through lighting districts established through the water/sewer utility districts. The utility districts bill each parcel \$3.00 per month for lighting district charges and Puget Sound Energy in turn bills the utility districts for actual power costs. Based on the information available at that time, staff estimated an additional annual funding need of \$190,000 to assume the remaining street lights in the area.

The updated information about street lights was obtained after the annexation election and just prior to the effective date of annexation (June 1, 2011). The City Council was advised by staff of the update and staff requested direction regarding how to proceed (see attached memo from Public Works for the June 7, 2011 City Council meeting). At the June 7, 2011 meeting, the City Council approved Ordinance #4309 that relates to the provision of street lighting services in the JFK Annexation Area. Key provisions stated that:

"WHEREAS, the City intends to assume the costs associated with street lighting in the JFK Annexation Area in accordance with a phasing plan that will be developed by no later than 2014"

"The cost of providing and maintaining street light service in existing street light districts in the JFK Annexation Areas and street lights districts subsequently created in the JFK Annexation Areas shall be borne by the lots and lot residents within the street light districts who are billed for utility services provided to the lots."

"The City shall develop a phasing plan by no later than 2014 which identifies how and when the City shall assume responsibility for providing and paying for street light utility services in the portions of the JFK Annexation Area currently or hereafter serviced by a street light district. The street light districts in the JFK Annexation Area shall be disbanded at such time as the City assumes responsibility for providing and paying for street light utility services in the portions of the JFK Annexation Area served by street light districts."

In short, the City deferred assuming responsibility for local street lights for three years and required that any new street lights installed on neighborhood streets be paid for through new street light districts established with the local water/sewer utilities. The Council did express their intent to eventually assume responsibility for all street lights (consistent with the practice in pre-annexation Kirkland) and committed to establishing a phasing plan by 2014.

Between June 2011 and 2014, new street lights were installed for a number of development and redevelopment projects that have occurred in the annexation area that were permitted by the City under the City's development regulations. One example is the construction of Sandburg Elementary School. The school is located on one parcel, a portion of which is located on a collector with another portion located along a local access street. Under King County's development standards, street lights would not have been required on the local access street, only on the collector. The County would have assumed responsibility for utility costs on the lights located on the collector. Under the City's development standards, the school district was required to install street lights along the collector and the local access street and was directed to form a lighting district to pay for the utilities on street lights located on the local access street (and the City would assume responsibility for the street lights on the collector) consistent with the adopted ordinance.

Current Status

The Sandburg Elementary School project is nearly complete and the street lights are being installed. Earlier this year, City staff contacted Northshore Utility District (NUD) regarding the street light installation at Sandburg Elementary and NUD advised City staff that no longer had the legal authority to form new lighting districts that were for properties located within an incorporated city that would otherwise provide street lighting as a general service. The legal rationale for NUD's conclusion was reviewed by the City Attorney's Office who agreed with their conclusion. Cities do not have legal authority to form lighting districts. As a result, new lighting districts cannot be created as provided for in Kirkland's ordinance, although existing lighting districts could be continued provided they were established prior to annexation.

At the same time, several new subdivisions have been permitted and are under construction. PSE has advised us that there is no practical way for PSE to bill the utility costs of shared street lights to multiple parcels, even if a homeowners association is formed. PSE will either bill the lighting district or the City. The only other alternative would be to turn off the lights until funding is established. Since 2011, a physical inventory of street lights was conducted by City staff. There are 160 street lights on arterials and collectors in the annexation area (billed directly to the City) and 1,800 street lights on neighborhood (local) streets that are billed through lighting districts. PSE's current rate for an average street light (rates vary based on wattage and type of light fixture) is \$13.10 per month. If the City assumes the cost of power for all street lights in the annexation area, additional funding of \$283,000 would be needed to cover the costs.

City-sponsored roadway improvements are designed to include roadway lighting in order to provide safe and efficient systems. During private development projects, developers are required to meet similar lighting standards, and the developer installs them at their own cost and then, turns them over to the City for the ongoing operation and maintenance. A city has no statutory obligation to provide street lights. However failing to require them would be contradictive to a long standing City standard to provide street lights along all types of streets (neighborhood access to Arterials) and would set us up for long-term challenges as neighbors come to the City requesting street lights at a later date

Given this new information – no new lighting districts and cost of assuming existing lights -- the City will need amend the existing ordinance and reconsider its approach to requiring and paying for new street lights in the annexation area when developing the phasing plan called for in the 2011 ordinance.

Options

As long as the water/sewer utility districts are willing to continue billing for pre-existing lighting districts, there is not a pressing legal or financial need to assume lighting districts at this time. However, some provision will need to be made to account for new street lights that are required by the City but that are not eligible for a lighting district or that cannot be assessed to a property owners. The following options describe different financial approaches to assuming street light costs.

Option 1: Assume responsibility for all street lights in the near term and include the costs in the shortfall that supports the Annexation Sales Tax Credit (ASTC), resulting in an increase in the amount requested from the State. The preliminary budget keeps the ASTC revenues flat with the 2014 budget. Given the growth in sales tax, there is capacity to add these costs to the ASTC reimbursement request for the next State fiscal year, beginning July 1, 2015. If this option is selected, the City will become more reliant on this one-time revenue source that expires in 2021, so an on-going funding source would need to be identified on or before that date. The ASTC would not be available until July 1, 2015 at the earliest (with notice given to the State by March 1, 2015).

Option 2: Continue to leave the street light districts in operation until the City has closed the gap left by the expiring ASTC in 2021, unless additional on-going revenues increase sufficiently to absorb the costs. Amend the current ordinance to provide for gradual assumption of new street lights required as a condition of a development permit. Under this scenario, no action would be taken on assuming pre-existing street light utilities until 2021 and the process for transitioning away from the street light districts would be evaluated at that time.

Option 3: Phase in ongoing funding for all street lights over the next seven years and backfill with one time ASTC revenue and/or street reserves.

Option 4: Incorporate City assumption of all street lights as an ongoing expense in the 2015-2016 Budget.

As a corollary policy to assuming street light utility costs, the City Council may want to consider a phased approach to transitioning to LED light fixtures throughout the City for both street lights and pedestrian lighting. LED lights consume far less energy and are therefore more sustainable and less expensive. The monthly maintenance and energy cost of an LED street light is \$9.07 per month compared to the \$13.10 per month for High Pressure Sodium lights (most of the current inventory). A first step would be to require all new developments and City capital projects (with lighting) to install LED lights. The marginal cost for an LED light ranges

from \$150 to \$400 per light depending on the wattage (cost of a new street light installation with pole is currently estimated at \$4,000).

Ultimately, the City can retrofit all street lights throughout the City. Grants and PSE rebate funding for retrofit of existing High Pressure Sodium lights with LED lights are available periodically, but require a significant City match that would be amortized over about a 10-12 year period. Other agencies have utilized this program to replace their aging electrical system in the region (<http://rentonwa.gov/news/default.aspx?id=37967>), however the current Department of Energy Systems grant program awaits funding during future sessions.

Summary

The disparate approach to streetlight utility and maintenance costs between pre-annexation Kirkland and the annexation area was necessitated as an interim approach until more was known about the cost of providing services to the annexation area. However, new information about lighting utilities requires that the City modify its approach. Staff is seeking Council direction the following policies:

- When should the City assume street light costs throughout the City? (e.g. beginning in 2015, phased-in over the next six years)
- How should the City finance the cost when and if street lights are assumed? (e.g. ongoing revenue, one-time funds, annexation sales tax credit, phase in from one-time to ongoing).
- Should the City require all new street lights to be LED fixtures for new private development and/or City capital improvement projects?

The preliminary 2015-2016 budget reflects assuming the street light costs using the annexation sales tax credit (ASTC) revenue, with the intent of phasing out reliance on the ASTC credit by 2021.

Important New Court Decision on a City's Utility Tax Authority

Posted on May 20, 2014 by Bob Meinig

In a decision issued today (5/20/2014), Division III of the state court of appeals decided that a code city has the legal authority to impose its utility tax on the revenues of a public utility district's provision of water service to customers within the city limits, except to the extent that the district's revenues "were derived from governmental activities." The court's decision in *City of Wenatchee v. Chelan County Pub. Util. Dist. No. 1* will have significance for all classes of cities and for other municipal entities, such as water-sewer districts, that provide utility service within cities.

In reaching its decision, the court first had to determine the scope of a prior state supreme court decision, *King County v. Algona*, 101 Wn.2d 789 (1984), which held that the City of Algona did not have the authority to impose its business and occupation tax on revenues generated by a King County solid waste plant located in the city. The court in *City of Wenatchee v. Chelan County Pub. Util. Dist. No. 1* determined that the supreme court's decision in *King County v. Algona* meant that a governmental entity's immunity from taxation applied only to the sovereign, or governmental, activities of that entity, and not to its proprietary activities. When a municipal entity, such as a public utility district or a water-sewer district, provides utility services, it is, for the most part, acting in its proprietary capacity.

When is a governmental entity acting in its "proprietary capacity"? Quoting the state supreme court, the court of appeals noted that a municipal corporation acting in that capacity "acts as the proprietor of a business," as it does when it operates a utility. Putting it another way, the court of appeals stated that, "If it operates to serve customers, a utility is serving a proprietary function."

However, some aspects of a municipal utility's operation may be governmental, and, as such, its revenues from those aspects of its operation may not be taxed. For example, in providing fire hydrants for fire protection purposes, a municipal corporation is acting in its sovereign or governmental capacity. So, if a municipal utility's revenues include recovering the costs of fire suppression water facilities and services, those revenues may not be taxed.

Although the court's decision concerned the taxing authority of code cities, other classes of cities have similar authority to tax all kinds of businesses within their boundaries, including municipal utilities. See RCW 35.22.195 (first class cities); RCW 35.23.440(8) (second class cities); and RCW 35.27.370(9) (towns).

Also, although the court's decision addressed the city's taxing of the water utility revenues of a public utility district, the decision will affect other municipal corporations, such as water-sewer districts, that provide utility services – and not just water – within cities.

The court's decision here may, of course, be appealed. But its reasoning appears solid to me. Stay tuned!

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CITY OF KIRKLAND

Department of Public Works

123 Fifth Avenue, Kirkland, WA 98033 425.587.3800

www.kirklandwa.gov

MEMORANDUM

To: Kurt Triplett, City Manager

From: Rob Jammerman, Development Engineering Manager
Pam Bissonnette, Interim Public Works Director

Date: November 18, 2013

Subject: ONE-YEAR EXTENSION OF THE NORTSHORE UTILITY DISTRICT FRANCHISE AGREEMENT

RECOMMENDATION:

It is recommended that the City Council approves the attached resolution that authorizes the City Manager to sign a one year extension to the Northshore Utility District (NUD) Franchise Agreement.

BACKGROUND DISCUSSION:

NUD provides water and sewer service to about 45% of the City. A Franchise Agreement gives NUD the authority to own and operate their water and sewer utilities in the Kirkland public right-of-way. The current Franchise Agreement has a five-year term. It is set to automatically rollover for an additional five years on January 1, 2014 unless either party gives written notice of non-renewal. If a non-renewal notice is given, the Franchise Agreement will expire in five years.

Staff is recommending that we extend the Franchise Agreement for one year. During this one-year extension, representatives from NUD and the City will draft some amendments to the Agreement and present a new Franchise Agreement to the City Council and the NUD Board of Commissioners by the end of 2014. NUD has agreed to the one-year extension amendment. A copy of the proposed Amendment signed by the NUD General Manager is included as Exhibit A.

c: William Evans, Assistant City Attorney

Attachments (2)

RESOLUTION R-5021

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND APPROVING AN AMENDMENT TO THE FRANCHISE GRANTED TO NORTHSORE UTILITY DISTRICT PURSUANT TO ORDINANCE NO. 4141 AND AUTHORIZING THE CITY MANAGER TO SIGN THE AMENDMENT.

WHEREAS, the City of Kirkland ("City") granted a franchise to the Northshore Utility District ("NUD") on October 11, 2008, ("Agreement") for the purpose of allowing NUD to use City right of way for its infrastructure; and

WHEREAS, both the City and NUD would like to propose amendments to the Agreement before the next five year term provided by Section 8 of the Agreement begins; and

WHEREAS, pursuant to Section 8, the next five year term begins on January 1, 2014, which does not leave enough time to negotiate the proposed amendments; and

WHEREAS, the City and NUD agree amending the Agreement to allow for a year of negotiations before another five year term begins is in the interest of both parties;

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:

Section 1. The City Manager is authorized and directed to execute an amendment to the Agreement substantially in the form of the attached Exhibit A.

Passed by majority vote of the Kirkland City Council in open meeting this ____ day of December, 2013.

Signed in authentication thereof this ____ day of December, 2013.

MAYOR

Attest:

City Clerk

AMENDMENT TO THE FRANCHISE AGREEMENT GRANTED TO NORTHSORE UTILITY
DISTRICT PURSUANT TO CITY OF KIRKLAND ORDINANCE #4141

This amendment to the franchise granted to the Northshore Utility District ("NUD") by the City of Kirkland ("City") on October 11, 2008 ("Agreement") is entered into this ____ day of November by and between the City and NUD; and

WHEREAS, both the City and NUD would like to propose amendments to the Agreement before the next five year term provided by Section 8 of the Agreement begins; and

WHEREAS, pursuant to Section 8, the next five year term begins on January 1, 2014, which does not leave enough time to negotiate the proposed amendments; and

WHEREAS, the City and NUD agree amending the Agreement to allow for a year of negotiations before another five year term begins is in both parties interest,

NOW THEREFORE, by their signatures below the City and NUD agree as follows:

1. Section 8 of the Agreement is amended as follows:

Section 8. Franchise Term. Subject to the provisions of Section 9 and 10 below, this Franchise is and shall remain in full force and effect from January 1, 2009 until December 31, 2014, provided that on January 1, 2015, and on January 1 every five (5) years thereafter, the term shall automatically be extended for an additional five (5) years, unless either NUD or the City gives the other party written notice of non-renewal prior to any such renewal date, in which case this Franchise shall terminate five (5) years after such renewal date; and provided further, however, NUD shall have no rights under this Franchise nor shall NUD be bound by the terms and conditions of this Franchise unless NUD shall, within thirty (30) days after the passage date of the Ordinance, file with the City its written acceptance of this Franchise, in a form acceptable to the City Attorney. On any renewal date, the City has the option of extending the term for more than 5 years but all subsequent renewal dates would remain automatically five (5) years unless the City again opted to extend any of them for more than five (5) years.

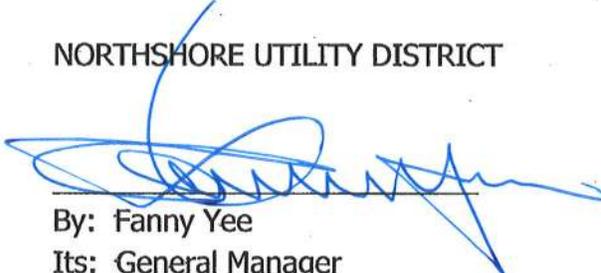
2. The intent of this amendment is only to effect a one year extension of the Agreement. The reproduction of the entirety of Section 8 is not intended to change the existing relations between the parties, create new obligations or require repetition of any duties.

3. Except as modified herein, all terms and conditions of the Agreement remain in full force and effect.

CITY OF KIRKLAND

NORTHSHORE UTILITY DISTRICT

By: Kurt Triplett
Its: City Manager


By: Fanny Yee
Its: General Manager