

City of Kenmore



City of Kenmore - 18120 68th Avenue NE - PO Box 82607, Kenmore WA 98028 - Phone: 425-398-8900
Fax: 425-481-3236 - Email: city_hall@kenmorewa.gov

Revised on 3/22/12

City of Kenmore
City Council Special Meeting Agenda
6:30 p.m., Monday, March 26, 2012
Kenmore City Hall, Council Chambers
18120 68th Ave. NE, Kenmore, WA 98028

City of Kenmore
City Council Regular Meeting Agenda
7:00 p.m., Monday, March 26, 2012
Kenmore City Hall, Council Chambers
18120 68th Ave. NE, Kenmore, WA 98028

AGENDA ITEMS ARE SUBJECT TO CHANGE up to and including the time of the meeting; items may be added or dropped. Please call the City Clerk if you have any questions or to confirm the agenda items prior to the meeting at (425) 398-8900, or stop by City Hall at 18120 68th Avenue NE, Kenmore. The agendas are also available on our website at: www.kenmorewa.gov. We are trying to make our public meetings accessible to all members of the public. If you require special accommodations, please call the City Clerk at least three (3) business days prior to the meeting.

- I. CALL SPECIAL MEETING TO ORDER 6:30 pm**
- II. ADJOURN TO EXECUTIVE SESSION - PURSUANT TO RCW 42.30.110(1)(i) to Discuss Potential Litigation**
- III. RECONVENE BACK TO SPECIAL MEETING**
- IV. ADJOURN TO REGULAR MEETING**
- V. CALL TO ORDER REGULAR MEETING - 7:00 p.m.**
- VI. ROLL CALL**
- VII. FLAG SALUTE**
- VIII. AGENDA APPROVAL**
- IX. CITIZEN COMMENTS**

This is an opportunity to express your views on issues that are important to you and to the community. Please limit your comments to three (3) minutes.

X. CONSENT AGENDA

- A. Approve the Minutes of the January 17, 2012 Special Council Meeting and the February 8, 2012 Special Council Meeting.
- B. Approve Claim Nos. 25509-25574 in the Amount of \$329,702.54 for the Period Ending March 14, 2012.
- C. Authorize the City Manager to Execute a Compromise Settlement Agreement and Release of all Claims with Bucher, Willis & Ratcliff Corporation Resulting in a Payment to the City of \$200,000 – Ron Loewen, City Engineer

XI. PUBLIC HEARING

- A. Public Hearing on Proposed Revisions to Kenmore Municipal Code Section 19.35.060 to Remove Certain State Environmental Policy Act (SEPA) Exemptions in Frequently Flooded Areas - Debbie Bent, Director of Planning and Community Development

XII. BUSINESS AGENDA

- A. Consider Appointments to the Kenmore Library Advisory Board - Joanne Gregory, Finance Director
- B. Discussion and Possible Adoption of Ordinance No. 12-0337 of the City of Kenmore, Washington, Amending Section 19.35.060 of the Kenmore Municipal Code to Revise the City's Categorical Exemptions Relating to the State Environmental Policy Act, and Fixing an Effective Date - Debbie Bent, Director of Planning and Community Development
- C. Adopt Ordinance No. 12-0338 of the City of Kenmore, Washington, Repealing Chapter 1.10 of the Kenmore Municipal Code and Adopting a New Chapter 1.10 of the Kenmore Municipal Code to Update the City's Procedures Relating to the Disclosure of Public Records, and Fixing an Effective Date - Joanne Gregory, Finance Director
- D. Review Ordinance No. 12-0336, of the City of Kenmore, Washington, Granting a Non-Exclusive Cable Franchise with Comcast of Washington IV, Inc., and Comcast of CA/CO/Washington I Inc., and Fixing an Effective Date - Nancy Ousley, Assistant City Manager
- E. Discussion of a City of Kenmore Proposed Transportation Benefit District – Ron Loewen, City Engineer

XIII. COUNCILMEMBER COMMENTS/REPORTS

XIV. ADJOURNMENT

Upcoming Meetings:

April 9, 2012 7:00 p.m. Regular Council Meeting
April 16, 2012 7:00 p.m. Regular Council Meeting

City of Kenmore, Washington
City Council Special Executive Session Meeting
Minutes
January 17, 2012

CALL MEETING TO ORDER – Mayor David Baker called the meeting to order at 6:00 p.m.

EXECUTIVE SESSION – Mayor David Baker adjourned the special meeting at 6:00 p.m. to an executive session to discuss Pursuant to RCW 42.30110(1)(g) EVALUATE QUALIFICATIONS OF APPLICANTS FOR EMPLOYMENT. He announced that the executive session will last for 2 hours and no action is anticipated when the meeting is reconvened back to regular session.

RECONVENE BACK TO REGULAR SESSION – Mayor David Baker reconvened the meeting back to regular session at 8:00 p.m.

ADJOURNMENT

Mayor David Baker adjourned the meeting at 8:00 p.m.

Mayor David Baker

ATTEST:

Lynn Suskin, City Clerk

City of Kenmore, Washington
City Council Special Executive Session Meeting
Minutes
February 8, 2012

CALL MEETING TO ORDER – Mayor David Baker called the meeting to order at 6:30 p.m.

EXECUTIVE SESSION – Mayor David Baker adjourned the special meeting at 6:30 p.m. to an executive session to discuss Pursuant to RCW 42.30110(1)(g) REVIEW PERFORMANCE OF AN EMPLOYEE. He announced that the executive session will last for 60 minutes and no action is anticipated when the meeting is reconvened back to regular session.

RECONVENE BACK TO REGULAR SESSION – Mayor David Baker reconvened the meeting back to regular session at 7:30 p.m.

ADJOURNMENT

Mayor David Baker adjourned the meeting at 7:30 p.m.

Mayor David Baker

ATTEST:

Lynn Suskin, City Clerk

City of Kenmore Voucher Certification and Approval

I, the undersigned, do hereby certify under penalty of perjury that the materials have been furnished, the services rendered or the labor performed as described herein and that the following claims, paid by checks 25509-25574 which total \$329,702.54 are just, due, and unpaid obligations against the City of Kenmore/King County/Washington, and that I am authorized to authenticate and certify to said claims.

City Manager

Date


Finance Director

3/10/12
Date

Check #	Vendor Name	Description	Check Amt
25509	BAKER, DAVID	Expense Reimbursement Feb. 2012	\$ 198.43
25510	VOID	VOID	0.00
25511	VAN NESS, ALLAN	Expense Reimbursement Feb. 2012	73.26
25512	CITY OF KENMORE	Payroll Entry	50.00
25513	NATIONWIDE RETIREMENT SOLUTIONS 457	Payroll Entry	1,570.00
25514	ICMA RETIREMENT TRUST 457 - 304745	Payroll Entry	2,003.84
25515	DRS 457	Payroll Entry	1,737.50
25516	CITY OF KENMORE FS	Payroll Entry	153.26
25517	BANK OF AMERICA 941	Payroll Entry	12,269.60
25518	STATE OF FLORIDA DISBURSEMENT UNIT	Payroll Entry	275.00
25519	NATIONWIDE FINANCIAL 401a	Payroll Entry	11,244.09
25520	DEPARTMENT OF RETIREMENT SYSTEMS	Payroll Entry	9,591.53
25521	KING COUNTY RECORDER'S OFFICE	Kenmore Vill. ROW & Slope Easement	70.00
25522	OM WORKSPACE	Police Office Accessories	858.47
25523	BANG, ROBERT	Prof. Fees Reimbursement	595.00
25524	KAMINS CONSTRUCTION	NE 145th St. Traffic Signal	75,097.58
25525	CARLSON, THOMAS G.	Qtr 4 2011 Sales Tax Audit	214.29
25526	CITY OF LAKE FOREST PARK	Feb. 2012 Maint. Contract	75,232.98
25527	CLYDE/WEST	Street Sweeper Repair Parts	69.46
25528	CODE PUBLISHING COMPANY	Web Hosting Mar. 2012 - Mar. 2013	350.00
25529	CROWN PRODUCTS LLC	Dog Waste Disposal Bags	885.88
25530	ALLIED WASTE SERVICES #172	City Hall & Rhododendron Park Feb. Svc.	795.62
25531	FLEX ONE/AFLAC BENEFIT SERVICES	Feb. 2012 Service Charge	50.00
25532	FULL MAINTENANCE GARDENING	6700 Bldg. Landscape Maint.	373.40
25533	GOVERNMENT FINANCE OFFICERS ASSOC	Membership Fee 5/1/12 - 4/30/12	190.00
25534	GRAY & OSBORNE, INC	Professional Svcs 2/5/12-3/3/12	20,306.88
25535	H.W. LOCHNER, INC.	NE 145th Signal 11/12/11-2/3/12	1,131.77
25536	INSLEE, BEST, DOEZIE & RYDER, P.S.	Legal Svc. through 1/31/12	29,541.96

25537	KING COUNTY ANIMAL SVCS	Feb. 2012 Animal Licensing	345.00
25538	KING COUNTY FINANCE	Jan 2012 Adult /Juvenile Detention	722.74
25539	KING COUNTY RADIO COMM SERVICES	1/31-4/29/12 Emergency Radio System	246.58
25540	LIGHTHOUSE CONSULTING INC	SonicWall Security Suite Renewal	2,376.15
25541	NORTHSHORE FIRE DEPT	CPR Training Classes	400.00
25542	OFFICE TEAM	Temporary svc. 3/2/12	97.30
25543	OTAK	Swamp Creek Monitoring thru 2/3/12	1,959.00
25544	PACIFIC TOPSOILS	Material Disposal 1/31 - 2/22/12	174.10
25545	PETTY CASH CUSTODIAN	Petty Cash Reimbursement	415.27
25546	PUGET SOUND ENERGY	February Electric & Gas Bills	14,675.65
25547	CEMEX	Pothole Repair Materials	128.38
25548	SEATTLE TIMES	Feb. 2012 Classified Advertising	233.92
25549	STEWART BEALL MACNICHOLS	Public Defender Services Feb. 2012	3,300.00
25550	TOTAL LANDSCAPE CORP	Feb. 2012 Landscaping	6,404.21
25551	VERIZON SELECT SERVICES INC.	Unpaid Chgs from Verizon Bus. Acct.	724.86
25552	DAY WIRELESS SYSTEMS	Calibration	81.91
25553	OAC SERVICES, INC	Kenmore Village Design Svc Feb. 2012	290.00
25554	PROTHMAN COMPANY	Expenses for City Mgr. Recruitment	1,733.54
25555	BANNER BANK LB	Council Photo Session	273.70
25556	BANNER BANK DB	Parking	9.76
25557	BANNER BANK JG	Advertising, Training, Membership	317.84
25558	A+ CONFERENCING	Conference Call - 2/23/12 & 3/2/12	48.69
25559	BANNER BANK JGORDON	Fence Rails, Supplies, APWA Dues	284.44
25560	ZONAR SYSTEMS	Street Sweeper GPS Annual Renewal	525.33
25561	FPOD LLC	Release of Himmelman Plat ROW	7,500.00
25562	GORDON THOMAS HONEYWELL	Govt. Affairs Consulting Feb. 2012	3,580.45
25563	TOWNE CENTRE HARDWARE	Supplies, Materials, Sweeper Parts	179.29
25564	SARAH ROBERTS	Feb. Prosecution/ Domestic Violence	10,100.00
25565	WA STATE DEPT OF LABOR & INDUSTRIES	Annual Operating Cert. 05/12-05/13	120.20
25566	FRONTIER	City Hall Phone Svc 2/28-3/27	746.01
25567	PROTECTION TECHNOLOGIES, INC	City Hall Access System Repair	462.51
25568	WELLS FARGO FINANCIAL	3/10-4/10/12 Xerox Copier Lease	803.43
25569	SNOHOMISH COUNTY SHERIFF'S OFFICE	Jail Service Fees - Feb. 2012	18,987.41
25570	SNOHOMISH COUNTY SHERIFF'S OFFICE	Inmate Medical Billing Feb. - 2012	2,443.77
25571	RCS VALUATION CORP	Review of Grocery Outlet Appraisal	750.00
25572	CHANDLER, RONALD	Reimbursement of Travel Expenses	937.47
25573	LAWRENCE, HENRY	Reimbursement of Travel Expenses	752.54
25574	BARTON, ANDREW	Reimbursement of Travel Expenses	1,641.29
			<u>\$ 329,702.54</u>

2012 PRIOR VENDOR ACTIVITY**Previous YTD**

A+ CONFERENCING	59.49
AAA FLAG & BANNER MFG. CO., INC.	1,042.44
ACTION ENTERTAINMENT	350.00
ADAMSON POLICE PRODUCTS	947.00
ADT SECURITY SERVICES	280.50
AFLAC	1,025.30
ALCALDE & FAY	10,188.95
ALLIED WASTE SERVICES #172	753.85
AM TEST, INC	250.00
AMERICAN GENERAL	982.36
AMERICAN PLANNING ASSOCIATION	411.00
ASSOCIATION OF WA CITIES	14,058.00
AUTOMATED CONTROLS	516.84
AWC EMPLOYEE BENEFITS	72,068.16
BAKER, DAVID	451.49
BANK OF AMERICA 941	46,122.02
BANNER BANK BH	986.68
BANNER BANK CS	434.24
BANNER BANK DB	544.00
BANNER BANK JG	57.16
BANNER BANK JGORDON	557.71
BANNER BANK KENMORE	5,736.89
BANNER BANK LD	182.16
BANNER BANK NO	662.26
BASTYR UNIVERSITY	50,000.00
BENT, DEBORAH A	576.00
BIS	350.00
BLACKBAUD	4,956.23
BRAVO ENVIRONMENTAL SERVICE	1,341.15
BULGER SAFE & LOCK, INC.	546.36
CALPORTLAND COMPANY	62.78
CASCADE PEST CONTROL	284.70
CB RICHARD ELLIS, INC	7,750.00
CEDARBROOK	287.55
CEMEX	696.64
CITY OF BELLEVUE	7,581.02
CITY OF KENMORE	\$ 50.00
CITY OF KENMORE FS	665.64
CITY OF LAKE FOREST PARK	65,918.46
CITY OF SHORELINE	914.77
CLYDE/WEST	1,184.56
COASTWIDE LABORATORIES	407.28
CODE 4 PUBLIC SAFETY EDUCATION	99.00
CODE PUBLISHING COMPANY	10,932.92

COLUMBIA RIDGE LANDFILL	4,394.35
COMCAST	233.80
CONSOLIDATED PRESS	845.11
COX PRINTING & SIGNS	235.43
CSAT, LLC	800.00
DAILY JOURNAL OF COMMERCE	125.80
DAY & NITE PLUMBING & HEATING	2,955.41
DEPARTMENT OF LABOR AND INDUSTRIES	5,812.72
DEPARTMENT OF RETIREMENT SYSTEMS	37,389.91
DRS 457	6,950.00
EFFICIENCY INC	967.98
EMERGENCY SERVICE COORDINATING AGCY	47,288.00
EMPLOYMENT SECURITY DEPT	1,972.46
ESA ADOLFSON	300.00
ESPRESSO WORKS	75.00
EVERGREEN SAFETY COUNCIL	175.00
FERGUSON ENTERPRISES INC	503.23
FINANCIAL CONSULTANTS INT'L INC	76.02
FLEX ONE/AFLAC BENEFIT SERVICES	50.00
FRONTIER	968.31
FRUHLING SAND & TOPSOIL	263.00
FULL MAINTENANCE GARDENING	373.40
GALLS, LLC	26.25
GORDON DERR	5,411.50
GORDON THOMAS HONEYWELL	4,048.90
GOVERNMENTAL ACCT STANDARDS BOARD	215.00
GREENWOOD HEATING & AC	39.45
H.W. LOCHNER, INC.	25,972.71
HDR	2,293.31
ICMA RETIREMENT TRUST 457 - 304745	8,015.36
INDEPENDENT STATIONERS	883.75
INGLEMOOR VIKING BASKETBALL BOOSTER	50.00
INGLEWOOD GOLF COURSE	1,047.92
INTEGRA TELECOM	1,473.35
INTERNATIONAL CITY/CNTY MGMT ASSOC	1,015.97
INTERNATIONAL INST OF MUNI CLERKS	175.00
iWORQ SYSTEMS	1,000.00
JACOBSON, BETTS & COMPANY	3,008.00
JAU JOU, STANLEY	222.80
JEFF DURRANT	739.90
JET CITY PRINTING	359.16
JURASSIC PARLIAMENT	235.34
KELLY PRINTING & GRAPHICS	456.62
KESSELRING'S	343.47
KING COUNTY W.L.R.D.	52,836.02
KING COUNTY ANIMAL SVCS	255.00
KING COUNTY FINANCE	6,077.86

KING COUNTY LIBRARY SYS	169,633.00
KING COUNTY RECORDER'S OFFICE	130.00
KING COUNTY SHERIFF	7,263.84
LIGHTHOUSE CONSULTING INC	1,545.32
MAIL FINANCE	501.52
McKEE & SCHALKA	4,000.00
MINZGHOR, NICHOLAS	1,214.22
MR. T'S TROPHIES	122.66
NATIONAL ASSOC OF PARLIAMENTARIANS	85.00
NATIONAL IMPRINT CORPORATION	427.87
NATIONAL LEAGUE OF CITIES	1,784.00
NATIONAL LIFE OF VERMONT	656.68
NATIONWIDE FINANCIAL 401a	43,535.15
NATIONWIDE RETIREMENT SOLUTIONS 457	6,280.00
NEXTEL COMMUNICATIONS	896.09
NORTH COAST ELECTRIC	13.83
NORTHSHORE FIRE DEPT	160.00
NORTHSHORE UTILITY DIST	8,183.40
OAC SERVICES, INC	1,776.25
OFFICE CLEANING CREW	960.00
OFFICE MAX	1,775.01
OLYMPIC ENVIRONMENTAL RESOURCES INC	910.00
ORB ARCHITECTS	16,144.67
OTAK	14,480.76
PACIFIC TOPSOILS	562.14
PAWS	320.00
PENDLETON CONSULTING LLC	6,199.73
PEOPLES STORAGE	354.00
PERKINS COIE	109.00
PERTEET INC.	4,802.76
PHOTOTAINMENT	963.60
PHSI PURE WATER FINANCE	301.89
PLYWOOD SUPPLY INC	496.40
PRIME PACIFIC BANK	60.00
PROTHMAN COMPANY	10,333.34
PRUDENTIAL	373.13
PSR MECHANICAL	752.27
PUGET SOUND CLEAN AIR AGENCY	11,308.00
PUGET SOUND ENERGY	20,589.36
PUGET SOUND FINANCE OFFICERS ASSOC	50.00
QUALITY BUSINESS SYSTEMS	845.75
ROLLABELS	37.15
SARAH ROBERTS	10,100.00
SEATTLE TIMES	172.00
SEES TREES AND EXCAVATION INC	5,568.09
SESAC	15.00
SHRED-IT	99.00

SMITH, BRENT	219.23
SNOHOMISH COUNTY SHERIFF'S OFFICE	35,241.24
SOUND PUBLISHING, INC.	882.00
STAPLES ADVANTAGE	245.30
STATE OF FLORIDA DISBURSEMENT UNIT	1,100.00
STEPHENS, MARY	2,500.00
STEWART BEALL MACNICHOLS	3,000.00
STOUDER, FRED	154.00
STRIPE RITE, INC.	3,969.38
SUBURBAN CITIES ASSOC	11,632.64
SUSSMAN/PREJZA & CO, INC	2,173.80
THE KIPLINGER TAX LETTER	99.00
TOTAL LANDSCAPE CORP	6,404.21
TOWN & COUNTRY FENCE, INC	366.83
TOWNE CENTRE HARDWARE	85.34
TRANE U.S. INC.	396.08
UNITED WAY OF KING COUNTY	284.00
UNIVERSAL FIELD SERVICES	1,679.98
VAN NESS, ALLAN	812.09
WA ASSOC OF CODE ENFORCEMENT	25.00
WA CITIES INSURANCE AUTHORITY	148,649.00
WA FINANCE OFFICERS ASSOCIATION	50.00
WA FINANCE OFFICERS ASSOCIATION	150.00
WA GUARANTEED EDUCATION TUITION	830.00
WA RECREATION & PARK ASSOCIATION	104.00
WA STATE DEPT OF ENTERPRISE SVCS	500.00
WA STATE DEPT OF TRANSPORTATION	75.00
WASHINGTON STATE DEPT OF REVENUE	89.97
WELLS FARGO FINANCIAL	1,606.86
WESTERN METAL ART & SIGN	187.85
WETLANDS & WOODLANDS INC	1,238.72

\$ 1,123,874.53

CITY OF KENMORE, WASHINGTON			
AGENDA BILL SUMMARY			
AGENDA TITLE			MEETING DATE
Authorize the City Manager to execute a Compromise Settlement Agreement and Release of All Claims with Bucher, Willis & Ratliff Corporation resulting in a payment to the City of \$200,000			March 26, 2012
DEPARTMENT	DIRECTOR	CONTACT PERSON	PHONE
Engineering	Ron Loewen	Ron Loewen	425 398 8900
COST OF PROPOSAL: Staff Costs: Negotiating Settlement 40 hours Attorney's fees: \$2,000 Preparing Agenda Bill 3 hours		ACCOUNT NUMBER: 09 00 7019 09 00 7020	
AMOUNT BUDGETED: 2011-12 Project Budget: \$578,598		NAME AND FUND #: Arterial Street Fund No. 09	
ATTACHMENT(S) TO AGENDA PACKET ITEM: • Compromise Settlement Agreement and Release of All Claims			
SUMMARY STATEMENT: Bucher, Willis & Ratliff (BWR) was retained by the City to design the SR 522 Phase I improvements. During construction of the Stage 1 improvements (65 th to 73 rd Avenues) a number of design flaws were identified requiring the contractor to stop work and requiring the City to redesign the improvements. After discussions with BWR an agreement was reached to reimburse the City for these impacts. A settlement amount to be paid to the City of \$200,000 has been proposed. Staff recommends the agreement be accepted. The agreement continues to allow the City to enforce the original contract agreement if a 3 rd party seeks damages from the City related to the design.			
CONSISTENT WITH OR COMPARISON TO PAST COUNCIL POLICIES, ORDINANCES, DIRECTION: Improve transportation for local residents by implementing the 6-year Transportation Improvement Plan.			
RECOMMENDED CITY COUNCIL ACTION/SUGGESTED MOTION: Authorize the City Manager to execute a Compromise Settlement Agreement and Release of All Claims with Bucher, Willis & Ratliff Corporation resulting in a payment to the City of \$200,000			
REVIEWED BY FINANCE DIRECTOR: 	REVIEWED BY CITY ATTORNEY:	APPROVED BY CITY MANAGER: 	
TODAY'S DATE: May 9, 2012	REVISION DATE(S):	FILE NAME & PATH (HYPERLINK): S:\0050 SR 522 Phase I\BWR Claim\031912 AGB BWR.docx	

COMPROMISE SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

1. This Settlement Agreement and Release ("Agreement") is executed relative to a dispute that has arisen between the City of Kenmore, Washington (Kenmore or the "City") and H.W. Lochner, Inc. the current Owner of Bucher, Willis & Ratliff Corporation – (Lochner/BWR).

The dispute relates to services provided by BWR on the Project known as SR522 Corridor Improvements, Phase I, Stage I (The Project) pursuant to a Consultant Agreement and all Amendments to said Agreement executed between BWR and The City of Kenmore on or about January 14, 2002. Subsequent to BWR providing said services, in November 2010, BWR merged with H. W. Lochner, Inc. Every term and provision contained in this Settlement and Release Agreement applies equally and in the same manner and to the same extent to both BWR and H. W. Lochner, Inc.

It is the purpose of this Agreement to accomplish a complete, mutual and full and final settlement of all claims, differences and causes of action which Kenmore has or may have in the future against Lochner/BWR related directly or indirectly to the scope of services provided by BWR on this Project.. Specifically excluded from this Settlement Agreement and Release are claims by third parties for claims related directly or indirectly to BWR's scope of services and BWR's previously agreed to contractual obligations for said claims as stated in the Consultant Agreement executed on or about January 14, 2002.

RELEASE BY KENMORE

2. In exchange for payment from Lochner/BWR to Kenmore of the Total Settlement Amount of Two Hundred Thousand Dollars (\$200,000.00) to be paid within thirty (30) days from execution of this Agreement, Kenmore, its affiliates, officers, employees, and agents hereby release, acquit, and forever discharge Lochner/BWR, and all of Lochner/BWR consultants who provided services to the City on this Project, their officers, members, current and former employees, shareholders, insurers, attorneys, successors and assigns from all claims any and all manner of action or actions, cause or causes of action, debts, liabilities, losses, suits, damages, costs, expenses, attorney's fees, and claims, whatsoever in law or in equity, direct or indirect, known and unknown, currently or later accruing. .

3. The City of Kenmore, its assigns and successors, hereby assign to Lochner/BWR all of its right, title and interest to and for any claim for damages, actions or causes of actions, which the City now has or may hereafter have concerning any deficient or defective design element and any and all issues related to surveying, observation or construction, or any other services, associated with this Project. This assignment includes, but is not limited to, an assignment of all claims, actions or causes of action, which the City now has or may hereafter have against Hammond, Collier, Wade & Livingstone (HCWL), including their officers, directors, current and former employees, shareholders, insurers, predecessors and successors in interest, and attorneys, arising out of any deficient or defective services provided by HCWL or their consultants and related to this Project. The City makes no representations or warranties concerning this assignment of claims including but not limited to any assurances of the viability or collection of any such assigned claims. If Lochner/BWR determines to pursue any assigned claims,

Lochner/BWR agrees to indemnify, defend, and hold the City harmless from any and all damages, claims, and defense costs (including costs of appeal if necessary) related directly or indirectly to the assigned claims. As part of such indemnity, defense, and hold harmless obligations, Lochner/BWR agrees to defend the City even if some or all of the duties to defend, indemnify and hold harmless are wholly or partially contested by Lochner/BRW. Included in any defense shall be the payment and retention of separate legal counsel acceptable to the City. In addition, Lochner/BWR agrees to assume all liabilities, judgments, court costs, attorney fees, and liability under any judgment that may be assessed against Lochner/BWR and/or the City related directly or indirectly to the assigned claims.

ACKNOWLEDGEMENT AND REPRESENTATIONS OF ALL PARTIES

4. Neither Party to this Agreement admits any liability of any kind on any claim released herein. Both Parties adamantly deny any liability whatsoever for any act or omission included in the released events and occurrences or other act and that payment is being made for the sole purpose of terminating further expense as well as the potential cost of litigation.

5. This Agreement is executed without reliance upon any statement or representation by or on behalf of the undersigned or any of them or their representatives. The undersigned have had the advantage of advice and counseling of an attorney prior to executing this Agreement and fully understand legal effect of this Agreement.

6. Both Parties acknowledge that there is no mistake of fact with respect to the nature or extent of the consequences of the Agreement or the nature and extent of the claims made or damages suffered. Both parties warrant and represent they are unaware of any existing claims that are not being settled and released by this Agreement.

7. Both Parties understand and agree that except as otherwise provided herein this Agreement may be pled by releasees as a complete defense to any claims or entitlement which may hereafter be asserted by the undersigned in any suit or claim against releasees for or on account of any of the claims or relief release by this Agreement.

8. To the extent of the claims waived herein, both Parties agree that the consideration specified herein is accepted as a complete compromise of disputed issues of law and fact and the undersigned assume the risk that the facts or the law may be otherwise than believed by any or all Parties to the Releases set forth herein.

9. Both Parties agree not to disparage or make any negative statements, or induce others to disparage or make negative statements, concerning each other or any issues related to the Project.

10. Both Parties expressly acknowledge, represent and warrant that they are the proper and duly authorized Parties to execute this Agreement and that they have the express authority to voluntarily execute this Agreement and bind their respective entities.

11. Both Parties agree that the terms of this Agreement are contractual and not merely a recital. Both Parties agree that this Agreement shall be subject to and governed by the laws of the State of Washington. In the event one or more provisions or parts of this Agreement is held to be invalid, illegal or unenforceable, this Agreement shall be reformed and construed as if said provision or part had never been contained herein.

12. This Agreement may be executed in one or more counter-parts, and the counter-parts signed in the aggregate shall constitute a single, original instrument.

13. This Agreement contains the entire agreement between the parties hereto

14. This Agreement shall become effective upon signature by the last party to execute this Agreement.

H.W. LOCHNER, INC./ BUCHER, WILLIS & RATLIFF CORPORATION

Dated _____

By: _____

Printed Name: _____

Its: _____

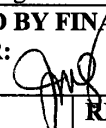
CITY OF KENMORE, WASHINGTON

Dated _____

By: _____

Printed Name: _____

Its _____

CITY OF KENMORE, WASHINGTON			
AGENDA BILL SUMMARY			
AGENDA TITLE			MEETING DATE
Public Hearing and Possible Adoption of Ordinance No. 12-0337 Regarding Minor Amendments to State Environmental Policy Act (SEPA) Procedures			March 26, 2012
DEPARTMENT	DIRECTOR	CONTACT PERSON	PHONE
Community Development	Debbie Bent	Lauri Anderson, Senior Planner	425-398-8900
COST OF PROPOSAL: Staff time to develop approach. Attorney time to prepare ordinance.		ACCOUNT NUMBER: N/A	
AMOUNT BUDGETED: None		NAME AND FUND #: N/A	
ATTACHMENT(S) TO AGENDA PACKET ITEM: Staff memo dated March 9, 2012 with 7 attachments, including proposed ordinance (Attachment 1)			
SUMMARY STATEMENT: The Administration recommends adoption of Ordinance 12-0337 amending Section 19.35.060 of the Kenmore Municipal Code to revise the City's categorical exemptions relating to the State Environmental Policy Act (SEPA) following a public hearing. Adoption of Ordinance 12-0337 would eliminate some SEPA exemptions for proposed projects such as new construction and extension of utilities located in the 100 year floodplain associated with Swamp Creek, Little Swamp Creek and the Sammamish River. SEPA exemptions for ongoing maintenance and repair projects would continue. Through the SEPA process the City could require SEPA mitigation measures (if necessary) for such projects in the 100 year floodplain in order to ensure compliance with FEMA Option #3 (permit by permit option) selected by the City for compliance with the National Flood Insurance Program and the Biological Opinion under the Endangered Species Act. The National Flood Insurance Program (NFIP) administered by the Federal Emergency Management Agency (FEMA) offers flood insurance to homeowners, renters, and business owners if their community participates in the NFIP. As a participant in the program, the City of Kenmore agrees to adopt and enforce ordinances that meet or exceed FEMA requirements to reduce the risk of flooding. In September 2008, the National Marine Fisheries Service (NMFS) issued a Biological Opinion (BiOp) that determined that FEMA's implementation of the NFIP causes "jeopardy" to several species of Puget Sound Salmon and Orca Whales as well as adverse modification to their habitat, conflicting with the Endangered Species Act. In response, FEMA developed three options to be taken by participating NFIP communities to address the BiOp concerns. The city has pursued Option 3, the permit by permit compliance option, rather than adopting FEMA's model ordinance (Option 1) or Option 2 (verifying that use of existing regulations address the concerns).			
CONSISTENT WITH OR COMPARISON TO PAST COUNCIL POLICIES, ORDINANCES, DIRECTION: This issue has not previously been in front of the City Council. Control of development in frequently flooded areas is presently addressed in the city's flood hazard regulations, stream regulations, and fish and wildlife habitat of importance regulations in KMC Chapter 18.55 and in the flood damage prevention regulations in KMC Chapter 16.40, as well as by the Shoreline Master Program. However, these regulations may not address all of the possible habitat impacts resulting from proposed development in the 100-year floodplain.			
RECOMMENDED CITY COUNCIL ACTION/SUGGESTED MOTION: Hold a public hearing and potentially adopt Ordinance 12-0337 amending Section 19.35.060 of the Kenmore Municipal Code to revise the City's categorical exemptions relating to the State Environmental Policy Act (SEPA).			
REVIEWED BY FINANCE DIRECTOR:	REVIEWED BY CITY ATTORNEY:	APPROVED BY CITY MANAGER:	
			
TODAY'S DATE:	REVISION DATE(S):	FILE NAME & PATH (HYPERLINK):	
March 9, 2012			



The City of Kenmore

18120 68TH AVENUE NE PO Box 82607
KENMORE, WASHINGTON 98028

MEMO

TO: Nancy Ousley, Assistant City Manager

FROM: Debbie Bent, Director of Planning & Community Development *DB*
Lauri Anderson, Senior Planner *WA*

DATE: March 9, 2012

SUBJECT: Amendments to KMC 19.35.060, State Environmental Policy Act (SEPA)
Categorical Exemptions

Summary and Recommendation: Staff recommends that Council hold a public hearing and approve a motion to adopt Ordinance 12-0337 (Attachment #1) which includes minor amendments to the City's SEPA regulations to aid in compliance with the National Marine Fisheries Biological Opinion (BiOp) for Implementation of the Federal Emergency Management Agency (FEMA) National Flood Insurance Program (NFIP). The BiOp determined that FEMA's implementation of the NFIP causes jeopardy to several species of Puget Sound Salmon and Orca Whales as well as adverse modification to their habitat, conflicting with the Endangered Species Act (ESA).

As a result of the BiOp, a project applicant proposing work in the floodplain must prepare a habitat assessment. The habitat assessment would describe the project area, identify habitats associated with Endangered Species Act listed species (e.g. Coho and Chinook Salmon), determine project impacts to habitat (e.g. clearing and grading of habitat areas, location of structures in habitat areas, modifying wetland areas, contribution to sedimentation). If habitat impacts are identified, a mitigation plan also must be prepared. A permit applicant would weigh the cost of preparing the assessment and the mitigation plan, should one be needed, against the cost of locating the project outside the floodplain.

The minor SEPA amendments that are the subject of the proposed ordinance would remove some projects from the list of SEPA exemptions if they are located in the 100 year floodplain associated with Swamp Creek, Little Swamp Creek and the Sammamish River so that BiOp compliance can be addressed through SEPA, if existing critical area regulations do not adequately cover these requirements. The proposed amendment would eliminate some SEPA exemptions for new construction and extension of utilities, but would not eliminate the exemption for ongoing maintenance and repair.

Background on the BiOp and Compliance Requirements: The National Flood Insurance Program (NFIP) administered by FEMA offers flood insurance to homeowners, renters, and business owners if their community participates in the NFIP. As a participating community, Kenmore agrees to adopt and enforce ordinances that

meet or exceed FEMA requirements to reduce the risk of flooding. The City's flood hazard regulations, stream regulations, and fish and wildlife habitats of importance regulations are contained in Chapter 18.55 of the Zoning Code. Chapter 16.40 addresses flood damage prevention.

In September of 2008, the National Marine Fisheries Service (NMFS) issued a Biological Opinion (BiOp) that determined that FEMA's implementation of the NFIP causes jeopardy to several species of Puget Sound Salmon and Orca Whales as well as adverse modification to their habitat, conflicting with the Endangered Species Act (ESA).

In the Biological Opinion, NMFS provided a Reasonable and Prudent Alternative (RPA) to modify the implementation of the NFIP in a manner that would remove the jeopardy situation (Attachment #2). The RPA says no adverse effects to habitat function are allowed in the riparian (stream) buffer zone which includes the floodway, channel migration zone plus 50 feet and the riparian buffers. FEMA refers to this area as the "Protected Area". FEMA has jurisdiction over Special Flood Hazard Areas (the 100 year floodplain) which may be smaller in scope than the Protected Area. In Kenmore, Special Flood Hazard Areas are found along the Sammamish River, Swamp Creek and Little Swamp Creek.

The BiOp provided a tiered approach to compliance for the 122 communities within Region X. The City of Kenmore is designated as a Tier 3 community which means compliance was required by 9/22/11 with one of the three options described below. As of summer 2011, 81 of the 122 communities in the Puget Sound region affected by the BiOp had chosen the permit by permit approach. Four jurisdictions had adopted the model ordinance; 37 had selected Option 2, but only 6 of those had received approval from FEMA.

The attached 9/19/11 letter (Attachment #3) from the City to FEMA states that the City will be utilizing the permit by permit approach of Option 3 along with recommending to the City Council that the categorical exemptions for some development in flood hazard areas be deleted. The three compliance options are described below along with the City's rationale:

- **Option #1: Adoption of the FEMA Model Ordinance.** FEMA's draft model ordinance was available for review in 2010 and the final model ordinance was available April 2011. The model ordinance integrates floodplain requirements (structure based) with habitat requirements (species based) for compliance with the Endangered Species Act. The model ordinance addresses lands beyond FEMA's jurisdiction (the 100-year floodplain). The City did not select this option as compliance would have required significant regulatory changes involving substantial City resources and time.
- **Option #2 FEMA Current Regulatory Environment Checklist.** This approach requires a community to fill out a FEMA checklist and demonstrate that current and proposed ordinances, policies, and written procedures meet or exceed the performance standards of the BiOp. The City of Kenmore's current regulations do not appear to meet all of the performance standards of the BiOp. The City did

not select this option as compliance would have required significant regulatory changes involving substantial City resources and time.

- **Option # 3: Permit by Permit Compliance.** This approach is the default compliance position and means that an applicant for a development project within the floodplain will be required to provide a habitat assessment that determines that the project will not have an adverse effect, or obtain concurrence from FEMA and NMFS that the project is compliant with the Endangered Species Act. This City selected this compliance option along with a recommendation that the Council adopt minor clarifying amendments to the City's adopted SEPA regulations that are the subject of the enclosed ordinance.

The permit by permit compliance option is particularly prudent given the evolving nature of the BiOp implementation discussion. Staff has received two letters (Attachments #4 and #5, dated 7/5/11 and 9/5/11) from an attorney (Molly Lawrence from Gordon Derr) representing a non-profit community group, Property Owners for Sensible Floodplain Regulation (POSFR) outlining legal positions regarding the City of Kenmore's obligations relative to compliance with the BiOp. These letters provided a legal analysis and essentially asked that local jurisdictions not overact to the BiOp by unnecessarily restricting either existing or future development in the floodplain. The City Attorney reviewed the letters and did not concur with the legal arguments presented.

In December 2011, EarthJustice, acting on behalf of the National Wildlife Federation (NWF), filed a lawsuit requesting that an injunction be issued against FEMA prohibiting further issuance of flood insurance policies in Puget Sound's Tier 1 and Tier 2 communities as they contend FEMA has not met the standards of the BiOp (see Attachment #6). As a Tier 3 community, Kenmore would be unaffected by this injunction if authorized, but could, ultimately, be impacted by FEMA's response to the NWF lawsuit. Oral arguments on the injunction are scheduled for March 27, 2012.

Background on the Proposed SEPA Amendment: The city's critical area regulations, including flood hazard regulations, stream regulations, and fish and wildlife habitats of importance regulations that are contained in Chapter 18.55 of the Zoning Code, address many of the issues raised by the BiOp. KMC chapters that address shoreline management and flood damage prevention provide additional standards. However, there are gaps in these regulations, particularly along Little Swamp Creek, that could result in the need for further analysis and mitigation measures to achieve complete compliance with the BiOp. For example, the BiOp includes buffer standards that may exceed the city's critical area buffer requirements and contains more restrictive standards for development of impervious surfaces and vegetation removal.

WAC 197-11-908 allows each city to select certain categorical exemptions (SEPA exemptions) that do not apply in critical areas. The choice of these exemptions is limited by the statute to those exemptions shown in Attachment #7. By eliminating some SEPA exemptions in frequently flooded areas, the city will be able to use SEPA to address the BiOp, if necessary. The proposed amendment would eliminate SEPA exemptions in frequently flooded areas for new construction and extension of utilities, but would not eliminate the exemption for ongoing maintenance and repair.

Memo to Nancy Ousley
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March 9, 2012

Attachments

1. Ordinance 12-0337
2. February 2011 information on the Reasonable and Prudent Alternative
3. 9/19/11 Letter from Fred Stouder (City Manager) to Mark Carey (director of FEMA Region X Mitigation Division)
4. 7/5/11 Letter from Molly Lawrence (attorney with Gordon Derr) to Debbie Bent, Community Development Director.
5. 9/9/11 Letter from Molly Lawrence (attorney with Gordon Derr) to Debbie Bent, Community Development Director.
6. 12/21/11 Article in the Seattle Times about Motion for Injunction
7. SEPA exemptions that could be eliminated in critical areas.

CITY OF KENMORE
WASHINGTON
ORDINANCE NO. 12-0337

**AN ORDINANCE OF THE CITY OF KENMORE,
WASHINGTON, AMENDING SECTION 19.35.060 OF THE
KENMORE MUNICIPAL CODE TO REVISE THE CITY'S
CATEGORICAL EXEMPTIONS RELATING TO THE STATE
ENVIRONMENTAL POLICY ACT, AND FIXING AN
EFFECTIVE DATE.**

WHEREAS, the City of Kenmore adopted Chapter 19.35 of the Kenmore Municipal Code (KMC), which established the City's environmental procedures under the State Environmental Policy Act (SEPA); and

WHEREAS, WAC 197-11-908 provides that cities may determine that certain categorical exemptions from SEPA do not apply in certain critical areas adopted under the Growth Management Act; and

WHEREAS, the City adopted KMC 19.35.060, which establishes categorical exemptions from SEPA review, including certain activities in critical areas, such as flood hazard areas; and

WHEREAS, the City Council desires to amend KMC 19.35.060 to make certain activities in frequently flooded areas (flood hazard areas) subject to SEPA review, by removing them from the list of categorical exemptions; and

WHEREAS, pursuant to RCW 36.70A.106, the City submitted the proposed revisions to KMC 19.35.060 to the Washington State Department of Commerce for its review of the same;

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

Section 1. Amendment. Section 19.35.060 of the Kenmore Municipal Code is amended to read as follows:

19.35.060 Categorical exemptions.

The *city* adopts by reference the following sections of the WAC which contain information on categorical exemptions:

197-11-305	Categorical exemptions;
197-11-800	Categorical exemptions;

- 197-11-880 Emergencies;
- 197-11-890 Petitioning DOE to change exemptions;
- 197-11-908 Critical areas.

A. The following exempt threshold levels are hereby established pursuant to WAC 197-11-800(1)(c) except as provided in WAC 197-11-305 and 197-11-800(1)(a):

1. The construction or location of any residential structures of 20 or fewer dwelling units;
2. The construction of a barn, loafing shed, farm equipment storage building, produce storage or packing structure, or similar agricultural structure, covering 30,000 square feet and to be used only by the property owner or his or her agent in the conduct of farming the property. This exemption shall not apply to feed lots;
3. The construction of an office, school, commercial, recreational, service or storage building with 12,000 square feet of gross floor area, and with associated parking facilities designed for 40 automobiles;
4. The construction of a parking lot designed for 40 automobiles;
5. Any fill or excavation of 500 cubic yards throughout the total lifetime of the fill or excavation and any fill or excavation classified as a Class I, II, or III forest practice under RCW 76.09.050 or regulation thereunder.

B. The following categorical exemptions do not apply in frequently flooded areas (flood hazard areas) pursuant to WAC 197-11-908:

1. 197-11-800(1);
2. 197-11-800 (2)(a), (b), (c), (d), (e), and (g);
3. 197-11-800(6)(a);
4. 197-11-800(13)(c);
5. 197-11-800(23)(a), (b), (c), (d), and (g), except that repair and maintenance that does not change the action from an exempt class shall continue to be exempt; and
6. 197-11-800(24)(e) and (g)

C. The determination of whether a proposal is categorically exempt shall be made by the *department*.

Section 2. Effective Date. This ordinance shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title.

APPROVED by the City Council this ____ day of _____, 2012.

David Baker, Mayor

ATTEST/AUTHENTICATED:

Lynn Suskin, City Clerk

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY:

BY _____
Rod Kaseguma, City Attorney

FILED WITH THE CITY CLERK:
PASSED BY THE CITY COUNCIL:
PUBLISHED:
EFFECTIVE DATE:
ORDINANCE NO. 12-0337

National Marine Fisheries Service's Biological Opinion (BiOp)
on the National Flood Insurance Program (NFIP)

February 2011



**NOAA
FISHERIES
SERVICE**



Photo: John McMillan

Reasonable & Prudent Alternative Element 3: Floodplain Management Criteria

Summary

- A. FEMA shall modify its Floodplain Management Criteria ASAP for PS NFIP communities to carry out the following measures:
 1. Allow no development in the Riparian Buffer Zone (RBZ, identified as the greater of the channel migration zone plus a 50-foot buffer, the riparian buffer width specified by stream type, and the floodway), OR
 2. Local jurisdiction must demonstrate to FEMA that proposed RBZ development does not adversely affect salmon habitat needs.
 3. In addition to either 1 or 2 above, either:
 - a) Prohibit development in the 100 yr floodplain, OR
 - b) Avoid, rectify or compensate for any loss of floodplain storage and fish habitat from development in the 100 yr floodplain (outside RBZ). Any development allowed must use Low Impact Development methods to minimize or avoid stormwater effects. Any indirect adverse effects must be mitigated.
 - c) Structural improvements/repairs resulting in greater than 10% increase in structure footprint must mitigate adverse effects to fish or their habitat.
- B. FEMA shall ensure that all PS NFIP communities implement land-use management measures consistent with criteria in 3.A.¹
 1. Prioritized FEMA implementation schedule and benchmarks
 - a) 35% of all PS NFIP jurisdictions shall implement RPA 3.A. criteria, including 100% of Tier 1 jurisdictions (see Appx 3)
 - b) 75% of all PS NFIP jurisdictions shall implement RPA 3.A. criteria, including 100% of Tier 2 jurisdictions (see Appx 3)
 - c) 100% of all PS NFIP jurisdictions shall implement RPA 3.A. criteria
 2. FEMA shall report annually to NMFS until all PS NFIP jurisdictions have implemented RPA 3.A.
- C. Until all PS NFIP jurisdictions have implemented RPA 3.A., they must track and report to FEMA all floodplain permits issued. Any unmitigated

¹ The original times frames for compliance with RPA element 3 were modified by letter from NMFS to FEMA on September 10, 2010, extending the time frame for compliance for tier 1 and 2 communities to be uniform with the tier 3 communities. The compliance date is now September 22, 2011 for all three tiers.

**National Marine Fisheries Service's Biological Opinion (BiOp) on the National Flood Insurance Program (NFIP)
Reasonable & Prudent Alternative Element 3: Floodplain Management Criteria**

development must be mitigated by FEMA. Any mitigation shall comport with WA State Fish Passage & Habitat Enhancement Restoration Programmatic (7-08-08).

- D. Any communities allowing projects in the floodplain using the mitigated cut and fill option, shall report to FEMA semi-annually. If NMFS finds that any mitigation actions taken are not fully effective, FEMA shall ensure further mitigation is provided through RPA 6 or other means available to the community (e.g., mitigation banks).

Reasonable & Prudent Alternative full text

The FEMA shall modify its implementation of the NFIP minimum criteria in NFIP communities in the Puget Sound Region in order to prevent and/or minimize the degradation of channel and floodplain habitat, as described below. In addition FEMA will report progress to NMFS on an annual basis on all sub-elements below.

A. As soon as possible upon issuance of this Opinion, FEMA shall revise its implementation of the current NFIP minimum criteria so that the following measures, necessary for protecting listed salmonids, are carried out in the Puget Sound Region as described in Appendix 4 (Minimum Criteria) and summarized below:

1. Allow no development in the floodway, the CMZ plus 50 feet (as identified according to Ecology 2003), and the riparian buffer zone (RBZ, as described by the Department of Natural Resources 2007 stream typing system and WDFW's 1997 stream buffer guidelines), and floodway (as mapped by the FIRM). OR
2. The local jurisdiction with permitting authority must demonstrate to FEMA that any proposed development in the FEMA designated floodway, the CMZ plus 50 feet (as identified according to Ecology 2003), and the riparian buffer zone (RBZ, as described by the Department of Natural Resources 2007 stream typing system and WDFW's 1997 stream buffer guidelines) does not adversely affect water quality, water quantity, flood volumes, flood velocities, spawning substrate, and/or floodplain refugia for listed salmonids.
3. In addition to either 1 or 2 above, either:

a. Prohibit development in the 100-year floodplain, OR

b. If development within the 100-year floodplain but outside the RBZ, is permitted, any loss of floodplain storage shall be avoided, rectified or compensated for. An example of compensation is the creation of an equivalent area and volume of floodwater storage and fish habitat through a balanced cut and fill program that provides fish refugia habitat and prevents fish stranding. Additionally, indirect adverse effects of development in the floodplain (effects to stormwater, riparian vegetation, bank stability, channel migration, hyporheic zones, wetlands, etc.) must also be mitigated such that equivalent or better salmon habitat protection is provided. (See Appendix 4 for more detail on how to comply with this criteria). Using option 3.A.3.b will require tracking the projects that occur and reporting to FEMA on a semi-annual basis (see 3.D. below).

For development within the 100-year floodplain permitted under 3.A.3.b, construction in the floodplain shall use Low Impact Development (LID) methods (generally requiring infiltration of all on-site stormwater), such as those described in the Low Impact Development Technical Guidance Manual for Puget Sound (Puget Sound Action Team and WSU/Pierce County Extension 2002) to minimize or avoid stormwater effects.

4. Any improvements or repairs to existing structures that result in a greater than 10 percent increase of the structure footprint must mitigate for any adverse effects to species or their habitat as described in 3.A.3.b.

B. The FEMA shall implement RPA Element 3.A by ensuring that all participating NFIP communities in the Puget Sound region implement land-use management measures consistent with the criteria as soon as practicable, but in no event later than three years from the date of this Opinion.

1. The FEMA shall focus its implementation efforts first on communities located in areas of "Tier 1" salmon populations, secondly on communities located in areas of "Tier 2" salmon populations, and then on the remaining Puget Sound NFIP communities (see Appendix 3 for

National Marine Fisheries Service's Biological Opinion (BiOp) on the National Flood Insurance Program (NFIP)
Reasonable & Prudent Alternative Element 3: Floodplain Management Criteria

an explanation of Tier 1 and 2 populations and a list of jurisdictions where they are located). The FEMA shall demonstrate compliance with the following benchmarks:

- a. Thirty-five percent of NFIP jurisdictions in the Puget Sound Region shall have implemented the criteria set forth in RPA Element 3.A within two years of this issuance of this opinion, including 100 percent of Tier I jurisdictions;
 - b. Seventy percent of NFIP jurisdictions in the Puget Sound Region shall have implemented the criteria set forth in RPA Element 3.A within two and a half years of the issuance of this opinion, including 100 percent of Tier 2 jurisdictions; and
 - c. One hundred percent of NFIP jurisdictions within the Puget Sound Region shall have implemented the criteria set forth in RPA Element 3.A within three years of the issuance of this Opinion.
2. Until all Puget Sound communities have implemented the criteria set forth in RPA Element 3.A, the FEMA shall report annually to NMFS on the status of its efforts to implement the RPA and the number of Puget Sound NFIP jurisdictions that have implemented the revised criteria.
- C. Interim Actions. In the time period between the issuance of this Opinion, and the full implementation of RPA 3.A by participating communities, FEMA shall advise the Puget Sound NFIP communities that they must keep track of all floodplain permits that they issue and report this information to FEMA on an annual basis. The FEMA will provide this information to NMFS annually, highlighting any permits that allowed development affecting channel or floodplain habitat, or resulted in indirect effects to salmonid habitat from stormwater, removal of riparian vegetation, bank armoring, changes in the CMZ, large wood input, or gravel recruitment, etc. If NMFS finds that any unmitigated actions affecting listed species have occurred as a result of these permits, NMFS will advise FEMA to this effect, and FEMA will ensure that mitigation is provided prior to the next reporting period. Mitigation actions shall comport with those habitat restoration and enhancement actions consulted on in the programmatic consultation between NMFS

and the COE, entitled *Washington State Fish Passage and Habitat Enhancement Restoration Programmatic*, NMFS Tracking No. 2008-03598.

D. Long term actions. Communities that have adopted the minimum criteria option allowing equivalent cut and fill (3.A.3.b. above), must report to FEMA on the number of projects that take place in the floodplain and the effectiveness of the mitigation. If based on FEMA's annual reporting, NMFS finds that the mitigation is not fully effective, FEMA shall ensure that further mitigation is provided for these actions through RPA Element 6 or through other means available to the community (e.g., mitigation banks) and shall reflect these actions in the next annual report. Mitigation actions shall comport with those habitat restoration and enhancement actions consulted on in the programmatic consultation between NMFS and the COE, entitled *Washington State Fish Passage and Habitat Enhancement Restoration Programmatic*, NMFS Tracking No. 2008-03598.

Appendix 4: Minimum Criteria

It is the purpose of the following criteria to maintain streams and floodplains in their natural state to the maximum extent possible so they support healthy biological ecosystems, by: 1) assuring that flood loss reduction measures under the NFIP protect natural floodplain functions and riparian habitat, and the natural processes that create and maintain fish habitat, and 2) preventing or minimizing loss of hydraulic, geomorphic, and ecological functions of freshwater and estuarine floodplains and stream channels.

In all 100-year floodplain areas (SFHAs) the following criteria apply:

1. Restrict Development in the Riparian Buffer Zone
for all watercourses including off channel areas (areas outside this zone but within the Special Flood Hazard Area) to provide necessary protection to the RBZ. The RBZ is the greater of the following:

- 250 feet measured perpendicularly from ordinary high water for Type S (Shorelines of the State) streams, 200 feet for Type F streams (fish bearing streams) greater than 5 feet wide, 150 feet for Type F streams less than 5 feet wide, and 150 feet for N (nonsalmonid-bearing) streams, lakes and marine shorelines².

2 2nd Errata Letter

National Marine Fisheries Service's Biological Opinion (BiOp) on the National Flood Insurance Program (NFIP)
Reasonable & Prudent Alternative Element 3: Floodplain Management Criteria

- the Channel Migration Zone³ plus 50 feet; and
- the mapped Floodway.

The Riparian Buffer Zone is an overlay zone that encompasses lands as defined above on either side of all streams, and for all other watercourses including off channel areas. The RBZ is a no-disturbance zone, other than for activities that will not adversely affect habitat function. Any property or portion thereof that lies within the RBZ is subject to the restrictions of the RBZ, as well as any zoning restrictions that apply to the parcel in the underlying zone. Restrictions in this area apply to all development, per the definition of development.⁴ Uses that are not permitted unless shown not to adversely affect water quality, water quantity, flood volumes, flood velocities, spawning substrate, and/or floodplain refugia for listed salmon, include the following: new buildings, including accessory buildings; new impervious surfaces; removal of native vegetation; new clearing, grading, filling, land-disturbing activity or other "development" (see definition), other than for the purpose of replacing non-native vegetation with native vegetation, and for other

³ The lateral extent of likely movement along a stream reach during the next one hundred years with evidence of active stream channel movement over the past one hundred years. Evidence of active movement can be provided from aerial photos or specific channel and valley bottom characteristics. A time frame of one hundred years was chosen because aerial photos and field evidence can be used to evaluate movement in this time frame. Also, this time span typically represents the time it takes to grow mature trees that can provide functional large woody debris to most streams. In large meandering rivers a more detailed analysis can be conducted to relate bank erosion processes and the time required to grow trees that function as stable large woody debris.

With the exception of shorelands in or meeting the criteria for the "natural" and "rural conservancy" environments, areas separated from the active channel by legally existing artificial channel constraints that limit bank erosion and channel avulsion without hydraulic connections shall not be considered within the CMZ. All areas, including areas within the "natural" and "rural conservancy" environments, separated from the natural channel by legally existing structures designed to withstand the 100-year flood shall not be considered within the CMZ. A tributary stream or other hydraulic connection allowing listed species fish passage draining through a dike or other constricting structure shall be considered part of the CMZ.

⁴ Development. Any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations, storage of equipment or materials, or any other activity which results in the removal of substantial amounts of vegetation or in the alteration of natural site characteristics located within the area of special flood hazard.

approved restoration work; septic tanks and drain fields, dumping of any materials, hazardous or sanitary waste landfills; receiving areas for toxic or hazardous waste or other contaminants; and, stream relocations, unless the primary function of the action is to restore natural ecological function.

In the RBZ the following uses are allowed: [1] repair or remodel of an existing building in its existing footprint, including buildings damaged by fire or other casualties; [2] removal of noxious weeds; [3] replacement of non-native vegetation with native vegetation; [4] ongoing activities such as lawn and garden maintenance; [5] removal of hazard trees; [6] normal maintenance of public utilities and facilities; and [7] restoration or enhancement of floodplains, riparian areas and streams that meets Federal and State standards.

2. Protect fish habitat and flood storage in the remaining 100-year floodplain (outside the RBZ) by either:

- a.) Prohibiting development in the 100-year floodplain, OR
- b.) Providing compensation for any effects to floodwater storage and fish habitat function within the 100-year floodplain.

Any development in the 100-year floodplain must be compensated, for example, through the creation of an equivalent area and volume of floodwater storage and fish habitat through a balanced cut and fill program. The new flood storage/habitat area must be graded and vegetated to allow fish refugia during flood events and return to the main channel as floodwaters recede without creating stranding risks. In addition, equivalent area, if not located on site, must be located in priority floodplain restoration areas identified in the ESU Recovery Plan for listed species.

3. Mitigate for all indirect effects of development in the floodplain (effects to stormwater, riparian vegetation, bank stability, channel migration, hyporheic zones, wetlands, LWD, etc.) such that equivalent or better salmon habitat protection is provided.

Stormwater. Reduce flood volumes and stormwater runoff from new development by ensuring that increased volumes of stormwater reach the river at the same frequency, timing, and duration as historical runoff. Low Impact Development (LID) methods are required to treat and infiltrate runoff as described in PSAT 2002. These methods generally include various

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practices for infiltrating stormwater to provide water quality treatment, match historical runoff durations, and preserve base flows.

Riparian vegetation: Maintain or replace riparian function by providing equivalent area, diversity, and function of riparian vegetation as currently exists on the site (per WDFW riparian management recommendations (Knutson and Naef 1997)).

Bank Stability: Bank stabilization measures along salmonid-bearing streams, channel migration zones, and along estuarine and marine shorelines must be minimized to the maximum extent possible. If bank stabilization measures are necessary, bioengineered armoring of streambanks and shorelines must be used (per the Integrated Streambank Protection Guidelines 2003 (for riverine shorelines) or the State Shorelines Guidelines on bank stabilization (2003) (for estuarine and marine shorelines)).

Channel migration. No activity is allowed that limits the natural meandering pattern of the channel migration zone, however, natural channel migration patterns may be enhanced or restored (see Rapp and Abbe 2003, for delineating channel migration zones).

Hyporheic zones. No activity is allowed that interferes with the natural exchange of flow between surface water, groundwater and the hyporheic zone, however, natural hyporheic exchange may be enhanced or restored (see Bolton and Shelberg. 2001 for hyporheic zone issues).

Wetlands. Wetland function must be maintained or replaced by providing equivalent function per Washington State Department of Ecology (McMillan 1998) regulations.

LWD. Any LWD removed from the floodplain must be replaced in kind, replicating or improving the quantity, size, and species of the existing LWD (per WDFW Aquatic Habitat guidelines).

In the 100-year floodplain outside the Riparian Buffer Zone the following apply:

1) For buildable lots partially in the floodplain, require structures to be located on the portion of the lot outside of the mapped floodplain. Where a buildable lot is fully in the floodplain, structures must be sited in the location that has the least impact on listed salmon, e.g., located as far from the stream or river as possible on the lot, placing structures on the highest land on the lot, orienting

structures parallel to flow rather than perpendicular, and avoiding disruption of active hyporheic exchange on a site.

2) Require zoning to maintain a low density (e.g., 5-acre lots or greater) of floodplain development to reduce the damage potential within the floodplain to both property and habitat, and help maintain flood storage and conveyance capacity.

3) All structures must be set back at least 15 feet from the RBZ and shall be sited as close to the 100-year floodplain boundary as possible.

4) In an effort to site structures as far away from the watercourse and RBZ as possible, the applicant will be apprised of the elevations of the 10-year and 50-year floods in detailed study areas at the same time that the (city, county) provides the 100-year elevation as a part of the permit review. The applicant, in addition to plotting the 100-year elevation near the building site, will also plot the 10 and 50-year elevations on the land. The purpose is to show the applicant the significantly lower risk of placing the structure further away from the watercourse.

5) Structures built using post, pier, piling or stemwall construction may require less mitigation than structures built on earth fill, but must provide equivalent mitigation for lost fish habitat and indirect effects from development.

6) Creation of new impervious surfaces⁵ shall not exceed 10 percent of the surface area of the portion of the lot in the floodplain unless mitigation is provided.

7) Removal of native vegetation must leave 65 percent of the surface area of the portion of the lot in the floodplain in an undeveloped state; the 65 percent pertains to the entire portion of the lot in the floodplain, including that area in the RBZ, where removal of native vegetation is generally prohibited.

8) The proposed action must be designed and located so that it will not require new structural flood protection (e.g., levees).

⁵ Any material or land alteration (i.e. clearing, grading, etc.) which reduces or prevents absorption of storm water into the ground. That hard surface area which either prevents or retards the entry of water into the soil, water that had entered under natural conditions prior to development; and/or that hard surface area that causes water to run off the surface in greater quantities or at an increased rate of flow from that present under natural conditions prior to development. Common impervious surfaces include, but are not limited to: roof tops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, gravel roads, and packed earthen materials.

National Marine Fisheries Service's Biological Opinion (BiOp) on the National Flood Insurance Program (NFIP)
Reasonable & Prudent Alternative Element 3: Floodplain Management Criteria

9) During the floodplain permit review process, applicants shall be notified that their property contains land within the Riparian Buffer Zone and/or 100-year floodplain, and that the applicant is required to record a Notice on Title on the property before a permit may be issued. Applicants shall be further notified that development in the RBZ and 100-year floodplain can only occur according to the above criteria.

10) New road crossings over streams are prohibited.

11) Concepts of cluster development, density transfer, credits and bonuses, planned unit development, and transfer of development rights shall be employed wherever possible.

12) Any flood information that is more restrictive or detailed than the FEMA data can be used for flood loss reduction and/or fisheries habitat management purposes, including data on channel migration, more restrictive floodways, maps showing future build-out and global climate change conditions, specific maps from watershed or related studies that show riparian habitat areas, or similar maps.

In the RBZ and the floodplain the following re-development criteria apply:

1) Require that expansion to existing buildings in the floodplain be limited to no more than 10 percent of the existing footprint (i.e., when building and other structures such as garages are substantially damaged or expanded in the floodplain), unless mitigation for any adverse effects to floodplain habitat is provided, as described above.

4. Communities choosing to implement the mitigation option (2.b. above) must track the projects for which they issue floodplain development permits, including effects to flood storage, fish habitat, and all indirect direct of development. The expected development effects, the equivalent mitigation provided, and the success of the mitigation in replacing the affected fish habitat and flood storage functions shall be reported to FEMA on a semi-annual basis (according to the monitoring requirements in RPA element 3.D).



Attachment 3

City Of Kenmore, Washington

September 19, 2011

Mark Carey, Director
Mitigation Division, Federal Emergency Management Agency
U.S. Department of Homeland Security
Region X
130 228th Street, S.W.
Bothell, WA 98021-9796

Dear Mr. Carey,

The City of Kenmore (City) is in receipt of your letters dated July 28, 2010, and August 17, 2011, which discuss the National Flood Insurance Program (NFIP), and the three options associated with the September 22, 2008 Biological Opinion issued by the National Marine Fisheries Services (NMFS).

The City will be utilizing the permit by permit approach of Option 3. Such an approach will include review of development in flood hazard areas under the following provisions of the Kenmore Municipal Code (KMC):

Shoreline Management: Chapters 16.05, 16.10, 16.15, 16.20, 16.25, 16.30 and 16.35 KMC;¹
Critical Areas Regulations: Chapter 18.55 KMC;
Flood Hazards: Chapter 16.40 KMC;
Environmental Regulations (SEPA): Chapter 19.35 KMC

In addition, upon review of the City's SEPA regulations, City Staff will be recommending to the City Council that the categorical exemptions for development in flood hazard areas be deleted. Based upon its existing code and future amendment to the same (Shoreline Management and SEPA), the City is confident that the adopted regulatory framework identified above will provide the necessary approach to ensure that development within flood hazard areas complies with all applicable state and federal laws.

The City appreciates the offer from the Federal Emergency Management Agency (FEMA) of future technical assistance and clarifying guidance on implementing Option 3 in local communities. We also welcome a coordinated and cooperative relationship with FEMA in order to avoid, protect and mitigate adverse effects in flood hazard areas.

Sincerely,


Fred Stouder, City Manager
City of Kenmore

¹ The referenced chapters have been enclosed with this letter. Also, please note that the City's Shoreline Management Program has been substantially revised and awaits Department of Ecology approval prior to becoming effective. A copy of the draft update to the program has also been enclosed.

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July 5, 2011

Debbie Bent
Director, Community Development Dept.
City of Kenmore
P. O. Box 82607
Kenmore, WA 98028

Re: Property Owners for Sensible Floodplain Regulation
Status of Implementation of the NFIP Biological Opinion

Dear Ms. Bent:

I am writing to you today for three reasons. First, I would like to introduce the City of Kenmore to Property Owners for Sensible Floodplain Regulation ("POSFR"). POSFR is a new Washington non-profit corporation formed by property owners and industry groups concerned about the potential unnecessary over-regulation of floodplain areas in the Puget Sound region. Second, I would like to provide a brief preview of POSFR's legal position regarding the City of Kenmore's obligations relative to the Biological Opinion issued by NOAA-National Marine Fisheries Service ("NOAA-Fisheries") in September 2008 to the Federal Emergency Management Agency ("FEMA") regarding the National Flood Insurance Program ("NFIP"). As explained more fully below, POSFR believes that FEMA and NOAA-Fisheries are reaching beyond their legal authority in suggesting to local jurisdictions that they have an obligation to implement the recommendations set forth in the NFIP Biological Opinion. Third, I am requesting that you add POSFR as an "interested party" or "party of record" regarding any efforts by the City of Kenmore related to the NFIP Biological Opinion.

I. Who is POSFR?

For the last several years, numerous industry groups, including the Association of Washington Business, the Washington REALTORS, the Building Owners and Managers Association of Seattle-King County, and the Master Builders Association of King and Snohomish Counties (to name a few), have been tracking two related activities affecting floodplains in the Puget Sound region. First, we have been tracking FEMA's efforts to update the Flood Insurance Rate Maps ("FIRMs") for many of the jurisdictions in the Puget Sound region, including King, Snohomish, Pierce and Skagit counties and the cities within those counties. Initially we had significant concerns regarding the preliminary FIRMs that FEMA produced for much of the Puget Sound region. At this time, however, it seems that our concerns have been allayed – or at least deferred – by FEMA's recent decision to re-evaluate its "without levees" policy. Until FEMA issues a decision regarding how it will account for non-accredited

levees in its upcoming FIRMs, it is our understanding that FEMA's mapping efforts are "on hold" in much of the region.

Second, we have been tracking FEMA's efforts to implement the NFIP Biological Opinion issued by NOAA-Fisheries related to the operation of the NFIP in the Puget Sound region. As you know doubt know, FEMA has been pressing local governments to modify their development regulations to implement Element 3 of the "Reasonable and Prudent Alternative" set forth in the Biological Opinion ("RPA Element 3").

POSFR came together earlier this year to provide a vehicle for the various industry groups, as well as myriad property owners who may be affected by the remapping, BiOp implementation, or both, to more intentionally track and weigh in on these activities. To be clear, POSFR understands and supports sensible floodplain regulation. We do not, however, believe that RPA Element 3 represents sensible floodplain regulation. RPA Element 3 proposes to severely restrict nearly all development in floodplains irrespective of existing conditions or actual habitat impacts – and goes beyond what FEMA or NOAA-Fisheries can legally require of local jurisdictions under the NFIP as currently enacted. Consequently, POSFR is reaching out to local jurisdictions to encourage you to evaluate carefully both the legal and technical bases underpinning RPA Element 3 and FEMA's efforts to implement it.

II. Local Government Duty Relative to the Biological Opinion

Right now POSFR's key concern is how local jurisdictions respond to the Biological Opinion. We want to be sure that local governments do not misunderstand their legal obligations and overreact to perceived pressure.

As you know, FEMA has offered local jurisdictions participating in the NFIP three options to implement RPA Element 3:

- (1) Adopt a Model Ordinance prepared by FEMA.
- (2) Demonstrate how their existing regulations satisfy RPA Element 3. To the extent FEMA determines there are gaps between a local jurisdiction's existing regulations and the requirements of RPA Element 3, FEMA is proposing that local jurisdictions modify their flood hazard regulation to fill those gaps.
- (3) Demonstrate ESA compliance within the floodplain on a permit-by-permit basis. FEMA has articulated that this may occur in one of two ways: (a) direct consultation pursuant to ESA Section 7(a)(2) for projects with a federal nexus (i.e., projects authorized, funded or carried out by a federal agency); or (b) review by the local jurisdiction (without NOAA-Fisheries involvement).¹

¹Because flood hazard permits are issued by the local jurisdiction, not any federal agency, they do not trigger a federal nexus. A project may, however, include a separate federal component (e.g., a Section 404 Clean Water Act permit), which would trigger a federal nexus and ESA consultation regarding that federal permit.

Since FEMA began offering local jurisdictions these three options, POSFR has been actively monitoring local jurisdictions' decisions regarding which option to pursue and their progress toward implementation. As part of this monitoring, we have seen significant confusion and ambiguity regarding FEMA's and NOAA-Fisheries' interpretation and explanation of what exactly RPA Element 3 requires. Recent meetings and conferences sponsored by FEMA and NMFS (the March 1 & 2 "Demystifying the NFIP Alignment with ESA" in Edmonds, and the several "Biological Assessment Workshops" held throughout the region in April and May) had left POSFR feeling optimistic that FEMA and NMFS were moving away from "one size fits all" prescriptive standards toward environment-specific, function-based performance standards (i.e., conserve floodplain functions as they currently exist where they currently exist) that acknowledge local circumstances and past development.

FEMA and NMFS, however, have been reluctant to memorialize this interpretation of RPA Element 3 in a meaningful way on which local jurisdictions and property owners may rely. Further, we understand that FEMA has been unwilling, in reviewing several local jurisdictions' option 2 checklists, to accept local jurisdictions' scientific rationale for something different than the "one size fits all" buffers set forth in RPA Element 3. Consequently, we are increasingly skeptical of whether FEMA and NMFS actually intend to offer the flexibility and environment-specific, function-based approach outlined during the meetings earlier this spring.²

Until FEMA and NMFS are willing to take a more sensible (and legally defensible) approach to RPA Element 3, local jurisdictions should reflect on the scope of FEMA's legal authority to attempt to demand compliance with RPA Element 3. Review of FEMA's existing NFIP regulations demonstrates that FEMA does not have the authority to require local governments to implement RPA Element 3. Instead, pursuant to FEMA's existing regulations, FEMA may only require that local governments require project applicants to obtain all other "necessary permits" from applicable federal and state agencies. In the context of the ESA, the only "permit" that could be required is an Incidental Take Permit – which is only "necessary" if required under Section 10 of the ESA.³ See 44 C.F.R. §60.3(a)(2). Pursuant to Section 10, an Incidental Take Permit *is only required for projects that "take" endangered species*. This is a very different standard than the "no adverse effects" standard set forth in RPA Element 3.

It is also notable that this is not a new requirement. Since the various ESA fish listings in the Puget Sound region (beginning in the late 1990s), local jurisdictions have borne the obligation to ensure that permits they issue for development proposals throughout their jurisdictions – not just in floodplains – do not trigger "take." 16 U.S.C. §1538. To date, we are not aware of any

² We understand that the Washington State Department of Commerce and the National Fish and Wildlife Foundation recently initiated a "Technical Assistance Project" aimed at helping local jurisdictions work through option 2 using an environment-specific, functions-based approach. We will continue to monitor this effort and suggest that local jurisdictions do the same before proceeding with option 2.

³ For projects with a federal nexus (i.e., that are authorized, funded or carried out by a federal agency), the project applicant has an independent obligation to consult regarding impacts to endangered species and critical habitat pursuant to Section 7(a)(2) of the ESA. This obligation rests with the applicant, not the local jurisdiction.

July 5, 2011

jurisdiction in the Puget Sound region that has been challenged for failing to meet this requirement.

We understand that the ESA is complicated with numerous technical terms and requirements. We would suggest that if you have questions about this, you review FEMA's regulations (44 C.F.R. §60.3(a)(2)) and the ESA (16 U.S.C. §1531, *et seq.*) with your City Attorney. The bottom line is that FEMA has not taken the necessary steps to require any jurisdiction to implement RPA Element 3, but only to require an Incidental Take Permit where necessary because a project causes "take." Consequently, POSFR asks that local jurisdictions not overreact to the Biological Opinion by unnecessarily restricting either existing or future development in the floodplain.

III. Notice of Activities related to the NFIP Biological Opinion

Finally, please add me on behalf of POSFR to the list of interested parties or parties of record on any effort that your jurisdiction may undertake related to RPA Element 3 or other provisions of the NFIP Biological Opinion. To date, FEMA has not engaged in a public process in which all interested persons may participate. One of POSFR's goals is to ensure public participation in this process and ultimately the adoption of sensible floodplain development standards. Notice is a critical step.

Thank you in advance for your consideration. We anticipate that this will be the first of several communications between the City of Kenmore and POSFR. We would also welcome the opportunity to meet with appropriate members of your staff to discuss these issues if that would be useful at this point. Otherwise, we look forward to hearing from you regarding any efforts related to the NFIP Biological Opinion or other efforts affecting floodplain development.

Very truly yours,



Molly A. Lawrence

cc: POSFR Board of Directors

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ATTORNEYS AT LAW^{LP}

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ATTACHMENT
5

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September 9, 2011

Debbie Bent
Director, Community Development Dept.
City of Kenmore
P. O. Box 82607
Kenmore, WA 98028

Re: Status of Efforts to Related to the NFIP Biological Opinion

Dear Ms. Bent:

In July, I sent letters to the more than 100 local jurisdictions participating in the National Flood Insurance Program ("NFIP") introducing Property Owners for Sensible Floodplain Regulations ("POSFR") and explaining our position regarding each jurisdiction's obligations related to the NFIP Biological Opinion ("BiOp").¹ As you may recall, POSFR is a Washington non-profit corporation formed by property owners and industry groups concerned about the potential unnecessary and/or over-regulation of floodplain areas in the Puget Sound region. Since sending that initial letter, I have received numerous phone calls and correspondence from local jurisdictions both explaining how you have responded to the BiOp to date, and supporting our efforts. We thank you for taking these issues seriously and hearing and understanding our concerns.

Several jurisdictions also asked for more in-depth legal analysis regarding their obligations relative to the BiOp. This second letter responds to that request. Put simply, each jurisdiction's obligation is to comply with NFIP regulation 44 CR §60.3(a)(2), which provides that you must require applicants for floodplain development permits to obtain all other necessary federal or state permits. This is different – and significantly less onerous – than any of the options that FEMA is currently articulating. POSFR acknowledges that FEMA would like the local jurisdictions to do more than is required by existing law to help FEMA meet its obligations to NOAA-National Marine Fisheries Service ("NMFS") under the BiOp. It is extremely important, however, that local governments understand that their obligations under the NFIP are not the same as FEMA's obligations resulting from the BiOp. We suggest and request that you simply comply with existing law as outlined below.

¹ Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation, Implementation of the National Flood Insurance Program in the State of Washington, Phase One Document – Puget Sound Region, dated September 22, 2008, NMFS Tracking No: 2006-00472.

A. General NFIP Framework & ESA Obligations

The existing NFIP regulations establish the boundaries of each jurisdiction's obligations to maintain participation in the NFIP. To participate in the NFIP, Kenmore was required to adopt – and now has as part of its zoning and/or building code – development regulations applicable within the special flood hazard area (generally referred to as the floodplain) that are at least as stringent as FEMA's minimum standards set forth in 44 CFR §60.3. One section of those FEMA minimum standards, 44 CFR §60.3(a)(1), requires: 'The community shall review proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law...' FEMA is now interpreting 44 CFR §60.3(a)(2) to include Endangered Species Act ("ESA") related permits.

As we explained in our first letter, for projects that do not have an independent federal nexus (i.e., projects authorized, funded or carried out by a federal agency) triggering a Section 7 ESA Consultation, the only "necessary" permit under the ESA is a Section 10 permit, known as an "Incidental Take Permit." As the ESA clearly explains, a Section 10 Incidental Take Permit is required only where a project causes a "take." As defined in the ESA, the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, a listed species or attempt to engage in any such conduct." 16 U.S.C. §1532(19). As NMFS has explained, "The term 'harm' refers to an act that actually kills or injures a protected species." 65 FR 42422-01, 42426 (Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units (ESUs), July 10, 2000). Further, NMFS has explained "[h]arm can arise from significant habitat modification or degradation where it *actually kills or injures* protected species *by significantly impairing essential behavioral patterns*, including breeding, spawning, rearing, migrating, feeding, or sheltering." *Id.*, 50 C.F.R. §17.3 (emphasis added).

In practice, very few development projects ever reach the "take" threshold triggering the obligation to obtain a Section 10 Incidental Take Permit. (This is something that both FEMA and NMFS acknowledge.) If "take" were a lower bar, more projects would be required to obtain such permits, and/or would face challenges by the various environmental groups in our region. As you may know, that has not been the case in the Puget Sound region (or anywhere else in the country).

Further, it is important that local jurisdictions realize that this is not a new obligation triggered by the BiOp. To the contrary, each jurisdiction in the Puget Sound region has been under the obligation, pursuant to Section 9 of the ESA, not to permit development projects that cause "take" (without a Section 10 Incidental Take Permit or other NMFS authorization) since the various ESA-listings beginning in the late-1990s. 16 USC §1538. In general, Kenmore has already been meeting this obligation to avoid permitting projects that will cause a "take" by applying your existing critical areas and shoreline regulations. Recall that the BiOp evaluated only FEMA's minimum floodplain regulations – and not the adequacy of each jurisdiction's critical areas ordinances and shoreline regulations. FEMA's minimum floodplain regulations are much less restrictive than any local jurisdiction's critical areas or SMP regulations. Thus, by concluding that FEMA's existing minimum regulations do not satisfy the ESA, NMFS did not conclude that any jurisdiction's local regulations do not satisfy the ESA.

If you require projects that cause a “take” to obtain a Section 10 Incidental Take Permit or other approval from NMFS, you will satisfy the current requirements for participation in the NFIP. While FEMA may wish for Kenmore to do more to help FEMA meet its obligation under the BiOp, Kenmore will be compliant with the letter of the NFIP.

B. Options for Implementing the BiOp and FEMA’s August Letter

On or about August 17, 2011, FEMA issued a 30-day notice letter to all NFIP-participating jurisdictions in the Puget Sound region. The purpose of FEMA’s letter was to remind local jurisdictions of the upcoming September 22, 2011, BiOp implementation “deadline,” and to reiterate FEMA’s position regarding the three options available to each jurisdiction to implement the BiOp. As FEMA’s letter outlines, FEMA has offered local jurisdictions three options:

- (1) Adopt an ESA compliant ordinance (e.g., FEMA’s “Model Ordinance”);
- (2) Use FEMA’s “Biological Opinion Checklist” to document that your jurisdiction’s existing regulations meet or exceed the performance standards set forth in Element 3 of the Reasonable and Prudent Alternative in the BiOp (“RPA Element 3”); or
- (3) Use a permit-by-permit approach through which you require the applicant to demonstrate that its project “will not have an adverse effect or provide concurrence from the Services that the project is compliant with the ESA.”²

Put simply, FEMA cannot require Kenmore to take any of these three actions under the existing NFIP regulations. This is where FEMA is attempting to transfer *its* obligation under the BiOp onto local jurisdictions *without adequate legal authority*.

As explained above, local jurisdictions’ only obligation related to the ESA under the NFIP is its obligation not to approve development that will cause a “take” without a Section 10 Incidental Take Permit or other approval from NMFS. Nowhere in the statutes, regulations or case law is “take” defined to require that an action/project have “no adverse effect.” The vast majority of activities that could be found to have an “adverse effect” do not approach the “take” standard. Thus, for FEMA to assert that you must demonstrate that a project “will not have an adverse effect” is legally inaccurate.

When pressed on this during the various public meetings and conferences between March and May this year, FEMA and NMFS conceded that “no adverse affect” does not really mean no

²There has been some confusion regarding who FEMA expects to review the permit-by-permit submittals. FEMA has clarified that it expects local jurisdictions to review the applicant’s habitat assessment and determine what impact, if any, a proposed project will have on endangered species or their habitat. Local jurisdictions are not required to consult with NOAA-Fisheries for projects that do not require a Section 10 Incidental Take Permit. (Applicants should consult directly with NOAA-Fisheries on projects with the federal nexus.) Local jurisdictions are free to approach FEMA and/or NMFS for “technical assistance” at any time if the local jurisdiction feels that is necessary or appropriate, but it is not required.

adverse effect. Instead, they assert that “no adverse effect” is equivalent to a “not likely to adversely affect” determination, which is a standard applied in a Section 7 ESA Consultation to projects that have a federal nexus (i.e., projects authorized, funded or carried out by a federal agency), and that any project that would meet the “likely to have an adverse effect” standard, were it reviewed in a Section 7 ESA Consultation, will have an “adverse effect.” Again, however, the statutes, regulations and case law also do not equate “likely to adversely affect” under Section 7 with “take.” The standard applicable to local jurisdictions under the existing NFIP regulation is simply that you not authorize a project that causes “take” absent a Section 10 Incidental Take Permit or other NMFS approval.

Further, Kenmore’s obligation under 44 CFR §60.3(a)(2) does not require you either to adopt FEMA’s Model Ordinance, which is based on the performance standards in RPA Element 3, or demonstrate that your existing regulations meet or exceed those performance standards. First, FEMA has not amended its minimum criteria from that quoted above – 44 CFR §60.3(a)(2) – which simply requires local jurisdictions not to permit projects that will cause “take” absent a Section 10 Incidental Take Permit or other NMFS approval. Those standards do not import any of the provisions of RPA Element 3. Second, and perhaps more importantly, the performance standards set forth in RPA Element 3 are only one way that FEMA could modify its existing minimum criteria to comply with the ESA. Just as local jurisdictions use different regulations to satisfy their GMA critical areas and Shoreline Management Act requirements, FEMA is free to use any of a number of other methods and combinations of development standards to satisfy the ESA. Thus, to assert that any local government must comply with the performance standards in RPA Element 3 to maintain participation in the NFIP is legally erroneous.

Finally, FEMA’s August letter hints at, but does not fully disclose, that FEMA and NMFS are currently in the process of developing interpretative guidance and/or revisions to the BiOp to address many of the concerns that jurisdictions and private property owners have raised regarding the BiOp since its issuance in September 2008. That guidance should significantly ease some of the more difficult to manage provisions of the BiOp. Based on discussions with FEMA and NMFS, a few examples of the proposed guidance/revisions include: (1) recognition of the differences between developed and undeveloped floodplain areas; (2) revision or modification of the prescriptive “one size fits all” buffer standards; and (3) permission to use mitigation within the Riparian Buffer Zone in many instances. Until the interpretative guidance and/or revisions are issued, it is not possible for FEMA to complete its evaluation of any jurisdiction’s existing regulations (Option 2), or for any local jurisdiction to know what “target” FEMA would like it to hit with its BiOp implementation efforts. This is all the more reason simply to apply the existing provisions of 44 CFR §60.3(a)(2) (i.e., no “take” without a Section 10 Incidental Taker Permit or other approval from NMFS).

C. Concerns regarding Potential ESA Liability

POSFR understands that Kenmore may be concerned about potential liability if NMFS or a third party asserts in the future that you have made the wrong decision and issued a floodplain development permit for a project that does cause a “take” without requiring the applicant to obtain a Section 10 Incidental Take Permit or other NMFS approval. We would like to allay your concern to the extent possible.

Although you are not expected or obligated to send flood hazard permit applications to NMFS or FEMA for approval before issuing a development permit, your staff could send any flood hazard permit application about which you are concerned to FEMA and/or NMFS for their review prior to approval. FEMA and NMFS would then have an opportunity to review and weigh in regarding any proposal. If FEMA and/or NMFS do not respond within the comment period, you could document that in the application file for your next Community Assistance Visit. Alternatively, if either agency were to submit comments, your staff could require the applicant to address those comments as part of the permitting process. In either case, you would have taken additional steps to guard against future challenges.³

Further, if you were ever sued in the future on the grounds that you allegedly issued a permit that allowed a “take,” the plaintiff will have to carry the burden of proof – i.e., they will have to prove that your action caused a “take.” Returning to the “take” standard outlined above, that means they will have to prove that the approved project will “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, a listed species or attempt to engage in any such conduct.” 16 U.S.C. §1532(19). To prove “take” due to habitat modification, the plaintiff will be required to demonstrate that the challenged project “actually kills or injures protected species by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering.” 50 CFR 17.3. This has proven to be very difficult standard of proof. *See, e.g., Animal Welfare Institute v. Martin*, 668 F.Supp.2d 254, 264-272 (D.Me. 2009); *Nat’l Wildlife Fed’n v. Burlington Northern R.R.*, 23 F.3d 1508, 1512-13 (9th Cir. 1994). Moreover, if the plaintiff is a citizen or environmental group, that plaintiff will be limited to injunctive relief – i.e., either stopping the permitted project or mandating prospective changes to your development regulations. The ESA does not authorize citizens or environmental groups to seek damages against a local jurisdiction for permitting take. 16 U.S.C. §1540(g).

In sum, although the risk of litigation can never be entirely eliminated, the risk of Kenmore facing a challenge for “take” under the ESA based on a decision to issue a flood hazard permit is very low. And the risk of the plaintiff prevailing in such a suit is even lower. This is born out by the dearth of ESA-based challenges in the Puget Sound region since NMFS originally began listing various anadromous fish species in the region in the late 1990s.

D. POSFR’s Recommendation and Request

In deciding how to address the BiOp, POSFR recommends and requests that local jurisdictions simply fulfill their existing obligations under 44 CFR §60.3(a)(2). That means reviewing project applications for “take” (not FEMA’s unsubstantiated “no adverse effect” standard), and requiring the applicant to demonstrate NMFS approval if their project will cause a “take.”

³ Also, if Kenmore is really concerned about potential ESA liability, you may submit your existing development regulations to NMFS and request an exception from the Section 9 “take” prohibition through the 4(d) Rule (municipal, residential, commercial, and industrial development activities). 50 CFR §223.203(b)(12). It is notable, however, that while this regulation was adopted in 2000, to POSFR’s knowledge, Washington jurisdictions have gone through this process.

Debbie Bent,
City of Kenmore

- 6 -

September 9, 2011

As part of this evaluation, local jurisdictions should understand that the ESA regulations routinely permit projects to use mitigation to avoid triggering a "take." This is true both within the Riparian Buffer Zone ("RBZ") and the portion of the floodplain outside of the RBZ. The rationale for this is that any applicant going through a Section 7 ESA Consultation would be permitted to use mitigation to offset impacts. Consequently, it is only fair to permit applicants outside of the federal permitting process to have the same mitigation opportunities.

Further, to the extent Kenmore chooses to pursue FEMA's Option 2 (above), POSFR requests that you retain within your regulations the ability for an applicant to opt for a permit-by-permit review consistent with 44 CFR §60.3(a)(2). While some applicants with smaller projects may prefer uniform development standards, most sophisticated developers prefer the flexibility to evaluate their property, identify any habitat or floodplain functions on their property, and tailor their project to avoid or mitigate for any impacts to that habitat or those functions. That should remain an option for all flood hazard permits going forward.

Finally, as noted above, since POSFR's first letter in July, I have received reports from numerous jurisdictions regarding the status of their efforts to implement the BiOp. If Kenmore has not yet provided POSFR with any feedback or update regarding the status of your efforts related to the BiOp, we would appreciate hearing your plans. In particular, please send me a copy of any correspondence that you may have with FEMA in response to its August letter, as well as notice of any meetings that Kenmore may have with FEMA and/or NMFS related to the BiOp or your implementation efforts. Also, as requested in my July letter, please include my name, on behalf of POSFR, on any "interested parties" or applicable notice lists for your jurisdiction for any actions related to the BiOp.

If you have any questions or comments regarding the content of this letter, or any of POSFR's efforts, please feel free to contact me or any member of POSFR's Board. I am including a copy of POSFR's Mission Statement and Board member for your records. We look forward to continuing to work with you on this complex issue.

Very truly yours,



Molly A. Lawrence

MAL:mal

cc: POSFR Board of Directors
Ken Murphy, FEMA Region X
Will Stelle, NOAA-National Marine Fisheries Service
David Williams, Association of Washington Cities
Josh Weiss, Washington Association of Counties

The Seattle Times

Winner of Eight Pulitzer Prizes

Local News

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Battle escalates over building in floodplains

Environmentalists have asked a federal judge for an injunction that would effectively halt a sizable chunk of the building that occurs in flood-prone areas that may harm endangered fish or whales.

By Craig Welch

Seattle Times environment reporter

More than a decade after government biologists first warned the Federal Emergency Management Agency (FEMA) that allowing development in floodplains is helping kill salmon and orcas, environmental groups on Wednesday turned to their most potent — and controversial — weapon:

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They asked a federal judge in Seattle for an emergency injunction that would effectively halt a sizable chunk of the building in flood-prone areas until FEMA finds a way to make sure it won't harm endangered fish or whales.

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U.S. District Judge Ricardo Martinez likely won't rule on the matter until next year, but environmental groups have consistently won in federal court when challenging how the agency deals with construction in Puget Sound river valleys. Federal fisheries biologists already determined in 2008 that FEMA's flood plain insurance program violates the Endangered Species Act.

And while it's impossible to know how much construction might be curtailed, the National Wildlife Federation says its review of FEMA data suggests 700 to 800 new structures have been built in floodplains in the three years since the biologists said the practice must change.

"Salmon are going over the edge, and we've waited years for it to change and it hasn't," said Jan Hasselman, an attorney with the environmental legal firm Earthjustice, which filed the motion in federal court. "As far as we can tell, not one project has been prevented, delayed, reconfigured or reconsidered" since 2008.

Mike Pattison, with the Master Builders Association of King and Snohomish Counties, called the move "unfortunate" and said an injunction could stop hundreds of projects around a region still struggling with an economic downturn.

"The effect would not be widespread, but those whom it does affect will be hit substantially," he said. "Will homebuilders as a unit get clobbered? Probably not. But those who do will lose all utility of their property, even for remodels or small changes."

A FEMA official Thursday wouldn't comment directly on the legal challenge, but said in the three years since hearing that the flood insurance program violated the Endangered Species Act, his agency has completely overhauled what kind of development in flood zones it will insure. Local communities, from King and Pierce counties to the small cities on the Kitsap Peninsula, must now show development won't adversely impact salmon.

At issue is what happens when streets, homes, businesses and parking lots are built near rivers that occasionally overflow their banks.

Scientists with the state Department of Ecology and the National Marine Fisheries Service have warned since the mid-1990s — before orcas and Puget Sound chinook were listed under the Endangered Species Act — that such building can destroy stream-side channels that fish use when trying to escape rushing floodwaters. It can also change stream hydrology and increase the pollution that drains into salmon-bearing streams after heavy rains.

In addition, the fisheries service determined that kind of development contributes to the decline of southern resident killer whales, which depend heavily on chinook.

While FEMA doesn't directly permit development — cities and counties do — it often only happens because FEMA provides insurance for builders in flood zones who meet minimum requirements to reduce risk.

But a federal judge in 2004 ruled the flood-insurance program had wrongly allowed tens of thousands of buildings to go up without considering the impact on Puget Sound's troubled marine species. Four years later, the fisheries service said the program also violated the Endangered Species Act.

After years of negotiating with federal fisheries biologists to tighten building rules, FEMA's program still lacks many strict requirements, environmentalists said. So far, most of the 120 or so communities affected by FEMA flood insurance plan to tackle new development on a "project-by-project" basis that doesn't address cumulative impacts.

Earlier this fall, FEMA didn't know which flood plain rules communities are following. In a letter to FEMA earlier this fall, Will

http://seattletimes.nwsource.com/html/localnews/2017067377_floodplain22.html

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"The bottom line, overall, is that not much has changed," said Dan Siemann with the National Wildlife Federation. "Salmon habitat is still being harmed or destroyed."

"As of today, we believe we are fully compliant" with the Endangered Species Act. He also said FEMA knows which rules each community is following.

Carey also disputed the notion that the very existence of flood insurance encourages people to build in dangerous places. In order for communities to be eligible for flood insurance they have to mitigate potential hazards, he said. And payouts to people whose properties are later damaged don't come from taxpayers — they come from premiums paid by other flood insurance recipients.

Meanwhile, Molly Lawrence, an attorney for a coalition of property owners and industry groups opposed to the filing by environmentalists, said the injunction request — and even the fisheries service's concern about floodplains in 2008 — doesn't take into account how the flood insurance program really works on the ground. It evaluated the program in isolation when it is actually just one of a number of local government regulations that dictate how fish habitat is to be protected.

So far, Hasselman said, "it's clear to us that it's not going to happen without somebody else getting involved. That somebody else is the court."

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WAC 197-11-908 allows cities to select certain categorical exemptions (SEPA exemptions) that do not apply in one or more critical areas. The selection may be made from the following subsections of WAC 197-11-800:

197-11-800(1) Minor new construction, including (i) The construction or location of any residential structures of 20 or fewer dwelling units; (ii) The construction of a barn, loafing shed, farm equipment storage building, produce storage or packing structure, or similar agricultural structure, covering 30,000 square feet, and to be used only by the property owner or his or her agent in the conduct of farming the property. This exemption shall not apply to feed lots; (iii) The construction of an office, school, commercial, recreational, service or storage building with 12,000 square feet of gross floor area, and with associated parking facilities designed for 40 automobiles; (iv) The construction of a parking lot designed for 40 automobiles; and (v) Any landfill or excavation of 500 cubic yards throughout the total lifetime of the fill or excavation; and any fill or excavation classified as a Class I, II, or III forest practice under RCW 76.09.050 or regulations thereunder.

197-11-800(2)(a) The construction or designation of bus stops, loading zones, shelters, access facilities and pull-out lanes for taxicabs, transit and school vehicles.

197-11-800(2)(b) The construction and/or installation of commercial on-premise signs, and public signs and signals.

197-11-800(2)(c) The construction or installation of minor road and street improvements such as pavement marking, freeway surveillance and control systems, railroad protective devices (not including grade-separated crossings), grooving, glare screen, safety barriers, energy attenuators, transportation corridor landscaping (including the application of Washington state department of agriculture approved herbicides by licensed personnel for right of way weed control as long as this is not within watersheds controlled for the purpose of drinking water quality in accordance with WAC 248-54-660), temporary traffic controls and detours, correction of substandard curves and intersections within existing rights of way, widening of a highway by less than a single lane width where capacity is not significantly increased and no new right of way is required, adding auxiliary lanes for localized purposes, (weaving, climbing, speed change, etc.), where capacity is not significantly increased and no new right of way is required, channelization and elimination of sight restrictions at intersections, street lighting, guard rails and barricade installation, installation of catch basins and culverts, and reconstruction of existing roadbed (existing curb-to-curb in urban locations), including adding or widening of shoulders, addition of bicycle lanes, paths and facilities, and pedestrian walks and paths, but not including additional automobile lanes.

197-11-800(2)(d) Grading, excavating, filling, septic tank installations, and landscaping necessary for any building or facility exempted by subsections (1) and (2) of this section, as well as fencing and the construction of small structures and minor facilities accessory thereto.

197-11-800(2)(e) Additions or modifications to or replacement of any building or facility exempted by subsections (1) and (2) of this section when such addition, modification or replacement will not change the character of the building or facility in a way that would remove it from an exempt class.

ATTACHMENT 7

197-11-800(2)(f) The demolition of any structure or facility, the construction of which would be exempted by subsections (1) and (2) of this section, except for structures or facilities with recognized historical significance.

197-11-800(2)(g) The installation of impervious underground tanks, having a capacity of 10,000 gallons or less.

197-11-800(2)(h) The vacation of streets or roads.

197-11-800(3) The repair, remodeling, maintenance, or minor alteration of existing private or public structures, facilities or equipment, including utilities, involving no material expansions or changes in use beyond that previously existing; except that, where undertaken wholly or in part on lands covered by water, only minor repair or replacement of structures may be exempt (examples include repair or replacement of piling, ramps, floats, or mooring buoys, or minor repair, alteration, or maintenance of docks). The following maintenance activities shall not be considered exempt under this subsection: (a) Dredging; (b) Reconstruction/maintenance of groins and similar shoreline protection structures; or (c) Replacement of utility cables that must be buried under the surface of the bedlands. Repair/rebuilding of major dams, dikes, and reservoirs shall also not be considered exempt under this subsection.

197-11-800(5) Purchase or sale of real property.

197-11-800(6)(a) Except upon lands covered by water, the approval of short plats or short subdivisions pursuant to the procedures required by RCW 58.17.060, but not including further short subdivisions or short platting within a plat or subdivision previously exempted under this subsection.

197-11-800(13)(c) All licenses to operate or engage in amusement devices and rides and entertainment activities, including but not limited to cabarets, carnivals, circuses and other traveling shows, dances, music machines, golf courses, and theaters, including approval of the use of public facilities for temporary civic celebrations, but not including licenses or permits required for permanent construction of any of the above.

197-11-800(23)(a) Installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class, of all communications lines, including cable TV, but not including communication towers or relay stations.

197-11-800(23)(b) Installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class, of all storm water, water and sewer facilities, lines, equipment, hookups or appurtenances including, utilizing or related to lines eight inches or less in diameter.

197-11-800(23)(c) Installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class, of all electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of 55,000 volts or less; and the overbuilding of existing distribution lines (55,000 volts or less) with transmission lines (more than 55,000 volts); and the undergrounding of all

ATTACHMENT 7

electric facilities, lines, equipment or appurtenances.

197-11-800(23)(d) Installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class, of all natural gas distribution (as opposed to transmission) lines and necessary appurtenant facilities and hookups.

197-11-800(23)(e) Installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class, of all developments within the confines of any existing electric substation, reservoir, pump station or well: Provided, That additional appropriations of water are not exempted by this subsection.

197-11-800(23)(f) Periodic use of chemical or mechanical means to maintain a utility or transportation right of way in its design condition: Provided, That chemicals used are approved by the Washington state department of agriculture and applied by licensed personnel. This exemption shall not apply to the use of chemicals within watersheds that are controlled for the purpose of drinking water quality in accordance with WAC 248-54-660.

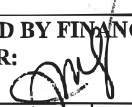
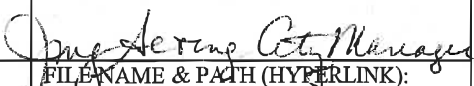
197-11-800(23)(g) All grants of rights of way by agencies to utilities for use for distribution (as opposed to transmission) purposes.

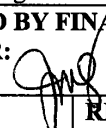
197-11-800(24)(c) Issuance of agricultural leases covering one hundred sixty contiguous acres or less.

197-11-800(24)(e) Issuance of leases for school sites.

197-11-800(24)(g) Development of recreational sites not specifically designed for all-terrain vehicles and not including more than twelve campsites.

197-11-800(24)(h) Periodic use of chemical or mechanical means to maintain public park and recreational land: Provided, That chemicals used are approved by the Washington state department of agriculture and applied by licensed personnel. This exemption shall not apply to the use of chemicals within watersheds that are controlled for the purpose of drinking water quality in accordance with WAC 248-54-660.

CITY OF KENMORE, WASHINGTON			
AGENDA BILL SUMMARY			
AGENDA TITLE			MEETING DATE
Consider Appointments to the Kenmore Library Advisory Board			March 26, 2012
DEPARTMENT	DIRECTOR	CONTACT PERSON	PHONE
Support Services	Joanne Gregory	Councilmember Laurie Sperry	425-398-8900
COST OF PROPOSAL: N/A		ACCOUNT NUMBER: N/A	
AMOUNT BUDGETED: N/A		NAME AND FUND #: N/A	
ATTACHMENT(S) TO AGENDA PACKET ITEM: None			
SUMMARY STATEMENT:			
The City Council will consider appointments to the Kenmore Library Advisory Board to fill three regular positions for three-year terms, one young adult position for a one-year term, and two alternate positions. Requests for applications were advertised and applicant interviews were conducted by the Library Advisory Board and Councilmember Laurie Sperry on March 20, 2012. A total of six people submitted applications: five adults and one young adult. The Kenmore Library Advisory Board's recommendation for appointments are as follows: • Paige Almond, young adult member • Marilyn White, regular position • Lisa Keller, regular position • William McCoy, regular position • Mathew Martin, alternate • Eric Simon, alternate An alternate will be appointed to a regular position by the Library Advisory Board if an existing member can no longer serve the remainder of their term.			
CONSISTENT WITH OR COMPARISON TO PAST COUNCIL POLICIES, ORDINANCES, DIRECTION:			
Consistent with Kenmore Municipal Code Chapter 2.35			
RECOMMENDED CITY COUNCIL ACTION/SUGGESTED MOTION:			
Confirm Appointments to the Kenmore Library Advisory Board			
REVIEWED BY FINANCE DIRECTOR:	REVIEWED BY CITY ATTORNEY:	APPROVED BY CITY MANAGER:	
			
TODAY'S DATE: March 21, 2012	REVISION DATE(S):	FILE NAME & PATH (HYPERLINK): i:\city clerk\agenda items\finance\2012 council meetings\march 26, 2012\ab draft library bd appts.docx	

CITY OF KENMORE, WASHINGTON			
AGENDA BILL SUMMARY			
AGENDA TITLE			MEETING DATE
Public Hearing and Possible Adoption of Ordinance No. 12-0337 Regarding Minor Amendments to State Environmental Policy Act (SEPA) Procedures			March 26, 2012
DEPARTMENT	DIRECTOR	CONTACT PERSON	PHONE
Community Development	Debbie Bent	Lauri Anderson, Senior Planner	425-398-8900
COST OF PROPOSAL: Staff time to develop approach. Attorney time to prepare ordinance.		ACCOUNT NUMBER: N/A	
AMOUNT BUDGETED: None		NAME AND FUND #: N/A	
ATTACHMENT(S) TO AGENDA PACKET ITEM: Staff memo dated March 9, 2012 with 7 attachments, including proposed ordinance (Attachment 1)			
SUMMARY STATEMENT: The Administration recommends adoption of Ordinance 12-0337 amending Section 19.35.060 of the Kenmore Municipal Code to revise the City's categorical exemptions relating to the State Environmental Policy Act (SEPA) following a public hearing. Adoption of Ordinance 12-0337 would eliminate some SEPA exemptions for proposed projects such as new construction and extension of utilities located in the 100 year floodplain associated with Swamp Creek, Little Swamp Creek and the Sammamish River. SEPA exemptions for ongoing maintenance and repair projects would continue. Through the SEPA process the City could require SEPA mitigation measures (if necessary) for such projects in the 100 year floodplain in order to ensure compliance with FEMA Option #3 (permit by permit option) selected by the City for compliance with the National Flood Insurance Program and the Biological Opinion under the Endangered Species Act. The National Flood Insurance Program (NFIP) administered by the Federal Emergency Management Agency (FEMA) offers flood insurance to homeowners, renters, and business owners if their community participates in the NFIP. As a participant in the program, the City of Kenmore agrees to adopt and enforce ordinances that meet or exceed FEMA requirements to reduce the risk of flooding. In September 2008, the National Marine Fisheries Service (NMFS) issued a Biological Opinion (BiOp) that determined that FEMA's implementation of the NFIP causes "jeopardy" to several species of Puget Sound Salmon and Orca Whales as well as adverse modification to their habitat, conflicting with the Endangered Species Act. In response, FEMA developed three options to be taken by participating NFIP communities to address the BiOp concerns. The city has pursued Option 3, the permit by permit compliance option, rather than adopting FEMA's model ordinance (Option 1) or Option 2 (verifying that use of existing regulations address the concerns).			
CONSISTENT WITH OR COMPARISON TO PAST COUNCIL POLICIES, ORDINANCES, DIRECTION: This issue has not previously been in front of the City Council. Control of development in frequently flooded areas is presently addressed in the city's flood hazard regulations, stream regulations, and fish and wildlife habitat of importance regulations in KMC Chapter 18.55 and in the flood damage prevention regulations in KMC Chapter 16.40, as well as by the Shoreline Master Program. However, these regulations may not address all of the possible habitat impacts resulting from proposed development in the 100-year floodplain.			
RECOMMENDED CITY COUNCIL ACTION/SUGGESTED MOTION: Hold a public hearing and potentially adopt Ordinance 12-0337 amending Section 19.35.060 of the Kenmore Municipal Code to revise the City's categorical exemptions relating to the State Environmental Policy Act (SEPA).			
REVIEWED BY FINANCE DIRECTOR:	REVIEWED BY CITY ATTORNEY:	APPROVED BY CITY MANAGER:	
			
TODAY'S DATE:	REVISION DATE(S):	FILE NAME & PATH (HYPERLINK):	
March 9, 2012			



The City of Kenmore

18120 68TH AVENUE NE PO Box 82607
KENMORE, WASHINGTON 98028

MEMO

TO: Nancy Ousley, Assistant City Manager

FROM: Debbie Bent, Director of Planning & Community Development *DB*
Lauri Anderson, Senior Planner *WKA*

DATE: March 9, 2012

SUBJECT: Amendments to KMC 19.35.060, State Environmental Policy Act (SEPA)
Categorical Exemptions

Summary and Recommendation: Staff recommends that Council hold a public hearing and approve a motion to adopt Ordinance 12-0337 (Attachment #1) which includes minor amendments to the City's SEPA regulations to aid in compliance with the National Marine Fisheries Biological Opinion (BiOp) for Implementation of the Federal Emergency Management Agency (FEMA) National Flood Insurance Program (NFIP). The BiOp determined that FEMA's implementation of the NFIP causes jeopardy to several species of Puget Sound Salmon and Orca Whales as well as adverse modification to their habitat, conflicting with the Endangered Species Act (ESA).

As a result of the BiOp, a project applicant proposing work in the floodplain must prepare a habitat assessment. The habitat assessment would describe the project area, identify habitats associated with Endangered Species Act listed species (e.g. Coho and Chinook Salmon), determine project impacts to habitat (e.g. clearing and grading of habitat areas, location of structures in habitat areas, modifying wetland areas, contribution to sedimentation). If habitat impacts are identified, a mitigation plan also must be prepared. A permit applicant would weigh the cost of preparing the assessment and the mitigation plan, should one be needed, against the cost of locating the project outside the floodplain.

The minor SEPA amendments that are the subject of the proposed ordinance would remove some projects from the list of SEPA exemptions if they are located in the 100 year floodplain associated with Swamp Creek, Little Swamp Creek and the Sammamish River so that BiOp compliance can be addressed through SEPA, if existing critical area regulations do not adequately cover these requirements. The proposed amendment would eliminate some SEPA exemptions for new construction and extension of utilities, but would not eliminate the exemption for ongoing maintenance and repair.

Background on the BiOp and Compliance Requirements: The National Flood Insurance Program (NFIP) administered by FEMA offers flood insurance to homeowners, renters, and business owners if their community participates in the NFIP. As a participating community, Kenmore agrees to adopt and enforce ordinances that

meet or exceed FEMA requirements to reduce the risk of flooding. The City's flood hazard regulations, stream regulations, and fish and wildlife habitats of importance regulations are contained in Chapter 18.55 of the Zoning Code. Chapter 16.40 addresses flood damage prevention.

In September of 2008, the National Marine Fisheries Service (NMFS) issued a Biological Opinion (BiOp) that determined that FEMA's implementation of the NFIP causes jeopardy to several species of Puget Sound Salmon and Orca Whales as well as adverse modification to their habitat, conflicting with the Endangered Species Act (ESA).

In the Biological Opinion, NMFS provided a Reasonable and Prudent Alternative (RPA) to modify the implementation of the NFIP in a manner that would remove the jeopardy situation (Attachment #2). The RPA says no adverse effects to habitat function are allowed in the riparian (stream) buffer zone which includes the floodway, channel migration zone plus 50 feet and the riparian buffers. FEMA refers to this area as the "Protected Area". FEMA has jurisdiction over Special Flood Hazard Areas (the 100 year floodplain) which may be smaller in scope than the Protected Area. In Kenmore, Special Flood Hazard Areas are found along the Sammamish River, Swamp Creek and Little Swamp Creek.

The BiOp provided a tiered approach to compliance for the 122 communities within Region X. The City of Kenmore is designated as a Tier 3 community which means compliance was required by 9/22/11 with one of the three options described below. As of summer 2011, 81 of the 122 communities in the Puget Sound region affected by the BiOp had chosen the permit by permit approach. Four jurisdictions had adopted the model ordinance; 37 had selected Option 2, but only 6 of those had received approval from FEMA.

The attached 9/19/11 letter (Attachment #3) from the City to FEMA states that the City will be utilizing the permit by permit approach of Option 3 along with recommending to the City Council that the categorical exemptions for some development in flood hazard areas be deleted. The three compliance options are described below along with the City's rationale:

- **Option #1: Adoption of the FEMA Model Ordinance.** FEMA's draft model ordinance was available for review in 2010 and the final model ordinance was available April 2011. The model ordinance integrates floodplain requirements (structure based) with habitat requirements (species based) for compliance with the Endangered Species Act. The model ordinance addresses lands beyond FEMA's jurisdiction (the 100-year floodplain). The City did not select this option as compliance would have required significant regulatory changes involving substantial City resources and time.
- **Option #2 FEMA Current Regulatory Environment Checklist.** This approach requires a community to fill out a FEMA checklist and demonstrate that current and proposed ordinances, policies, and written procedures meet or exceed the performance standards of the BiOp. The City of Kenmore's current regulations do not appear to meet all of the performance standards of the BiOp. The City did

not select this option as compliance would have required significant regulatory changes involving substantial City resources and time.

- **Option # 3: Permit by Permit Compliance.** This approach is the default compliance position and means that an applicant for a development project within the floodplain will be required to provide a habitat assessment that determines that the project will not have an adverse effect, or obtain concurrence from FEMA and NMFS that the project is compliant with the Endangered Species Act. This City selected this compliance option along with a recommendation that the Council adopt minor clarifying amendments to the City's adopted SEPA regulations that are the subject of the enclosed ordinance.

The permit by permit compliance option is particularly prudent given the evolving nature of the BiOp implementation discussion. Staff has received two letters (Attachments #4 and #5, dated 7/5/11 and 9/5/11) from an attorney (Molly Lawrence from Gordon Derr) representing a non-profit community group, Property Owners for Sensible Floodplain Regulation (POSFR) outlining legal positions regarding the City of Kenmore's obligations relative to compliance with the BiOp. These letters provided a legal analysis and essentially asked that local jurisdictions not overact to the BiOp by unnecessarily restricting either existing or future development in the floodplain. The City Attorney reviewed the letters and did not concur with the legal arguments presented.

In December 2011, EarthJustice, acting on behalf of the National Wildlife Federation (NWF), filed a lawsuit requesting that an injunction be issued against FEMA prohibiting further issuance of flood insurance policies in Puget Sound's Tier 1 and Tier 2 communities as they contend FEMA has not met the standards of the BiOp (see Attachment #6). As a Tier 3 community, Kenmore would be unaffected by this injunction if authorized, but could, ultimately, be impacted by FEMA's response to the NWF lawsuit. Oral arguments on the injunction are scheduled for March 27, 2012.

Background on the Proposed SEPA Amendment: The city's critical area regulations, including flood hazard regulations, stream regulations, and fish and wildlife habitats of importance regulations that are contained in Chapter 18.55 of the Zoning Code, address many of the issues raised by the BiOp. KMC chapters that address shoreline management and flood damage prevention provide additional standards. However, there are gaps in these regulations, particularly along Little Swamp Creek, that could result in the need for further analysis and mitigation measures to achieve complete compliance with the BiOp. For example, the BiOp includes buffer standards that may exceed the city's critical area buffer requirements and contains more restrictive standards for development of impervious surfaces and vegetation removal.

WAC 197-11-908 allows each city to select certain categorical exemptions (SEPA exemptions) that do not apply in critical areas. The choice of these exemptions is limited by the statute to those exemptions shown in Attachment #7. By eliminating some SEPA exemptions in frequently flooded areas, the city will be able to use SEPA to address the BiOp, if necessary. The proposed amendment would eliminate SEPA exemptions in frequently flooded areas for new construction and extension of utilities, but would not eliminate the exemption for ongoing maintenance and repair.

Memo to Nancy Ousley
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March 9, 2012

Attachments

1. Ordinance 12-0337
2. February 2011 information on the Reasonable and Prudent Alternative
3. 9/19/11 Letter from Fred Stouder (City Manager) to Mark Carey (director of FEMA Region X Mitigation Division)
4. 7/5/11 Letter from Molly Lawrence (attorney with Gordon Derr) to Debbie Bent, Community Development Director.
5. 9/9/11 Letter from Molly Lawrence (attorney with Gordon Derr) to Debbie Bent, Community Development Director.
6. 12/21/11 Article in the Seattle Times about Motion for Injunction
7. SEPA exemptions that could be eliminated in critical areas.

CITY OF KENMORE
WASHINGTON
ORDINANCE NO. 12-0337

**AN ORDINANCE OF THE CITY OF KENMORE,
WASHINGTON, AMENDING SECTION 19.35.060 OF THE
KENMORE MUNICIPAL CODE TO REVISE THE CITY'S
CATEGORICAL EXEMPTIONS RELATING TO THE STATE
ENVIRONMENTAL POLICY ACT, AND FIXING AN
EFFECTIVE DATE.**

WHEREAS, the City of Kenmore adopted Chapter 19.35 of the Kenmore Municipal Code (KMC), which established the City's environmental procedures under the State Environmental Policy Act (SEPA); and

WHEREAS, WAC 197-11-908 provides that cities may determine that certain categorical exemptions from SEPA do not apply in certain critical areas adopted under the Growth Management Act; and

WHEREAS, the City adopted KMC 19.35.060, which establishes categorical exemptions from SEPA review, including certain activities in critical areas, such as flood hazard areas; and

WHEREAS, the City Council desires to amend KMC 19.35.060 to make certain activities in frequently flooded areas (flood hazard areas) subject to SEPA review, by removing them from the list of categorical exemptions; and

WHEREAS, pursuant to RCW 36.70A.106, the City submitted the proposed revisions to KMC 19.35.060 to the Washington State Department of Commerce for its review of the same;

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

Section 1. Amendment. Section 19.35.060 of the Kenmore Municipal Code is amended to read as follows:

19.35.060 Categorical exemptions.

The *city* adopts by reference the following sections of the WAC which contain information on categorical exemptions:

197-11-305	Categorical exemptions;
197-11-800	Categorical exemptions;

- 197-11-880 Emergencies;
- 197-11-890 Petitioning DOE to change exemptions;
- 197-11-908 Critical areas.

A. The following exempt threshold levels are hereby established pursuant to WAC 197-11-800(1)(c) except as provided in WAC 197-11-305 and 197-11-800(1)(a):

1. The construction or location of any residential structures of 20 or fewer dwelling units;
2. The construction of a barn, loafing shed, farm equipment storage building, produce storage or packing structure, or similar agricultural structure, covering 30,000 square feet and to be used only by the property owner or his or her agent in the conduct of farming the property. This exemption shall not apply to feed lots;
3. The construction of an office, school, commercial, recreational, service or storage building with 12,000 square feet of gross floor area, and with associated parking facilities designed for 40 automobiles;
4. The construction of a parking lot designed for 40 automobiles;
5. Any fill or excavation of 500 cubic yards throughout the total lifetime of the fill or excavation and any fill or excavation classified as a Class I, II, or III forest practice under RCW 76.09.050 or regulation thereunder.

B. The following categorical exemptions do not apply in frequently flooded areas (flood hazard areas) pursuant to WAC 197-11-908:

1. 197-11-800(1);
2. 197-11-800 (2)(a), (b), (c), (d), (e), and (g);
3. 197-11-800(6)(a);
4. 197-11-800(13)(c);
5. 197-11-800(23)(a), (b), (c), (d), and (g), except that repair and maintenance that does not change the action from an exempt class shall continue to be exempt; and
6. 197-11-800(24)(e) and (g)

C. The determination of whether a proposal is categorically exempt shall be made by the *department*.

Section 2. Effective Date. This ordinance shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title.

APPROVED by the City Council this ____ day of _____, 2012.

David Baker, Mayor

ATTEST/AUTHENTICATED:

Lynn Suskin, City Clerk

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY:

BY _____
Rod Kaseguma, City Attorney

FILED WITH THE CITY CLERK:
PASSED BY THE CITY COUNCIL:
PUBLISHED:
EFFECTIVE DATE:
ORDINANCE NO. 12-0337

National Marine Fisheries Service's Biological Opinion (BiOp)
on the National Flood Insurance Program (NFIP)

February 2011



**NOAA
FISHERIES
SERVICE**



Photo: John McMillian

Reasonable & Prudent Alternative Element 3: Floodplain Management Criteria

Summary

- A. FEMA shall modify its Floodplain Management Criteria ASAP for PS NFIP communities to carry out the following measures:
 1. Allow no development in the Riparian Buffer Zone (RBZ, identified as the greater of the channel migration zone plus a 50-foot buffer, the riparian buffer width specified by stream type, and the floodway), OR
 2. Local jurisdiction must demonstrate to FEMA that proposed RBZ development does not adversely affect salmon habitat needs.
 3. In addition to either 1 or 2 above, either:
 - a) Prohibit development in the 100 yr floodplain, OR
 - b) Avoid, rectify or compensate for any loss of floodplain storage and fish habitat from development in the 100 yr floodplain (outside RBZ). Any development allowed must use Low Impact Development methods to minimize or avoid stormwater effects. Any indirect adverse effects must be mitigated.
 - c) Structural improvements/repairs resulting in greater than 10% increase in structure footprint must mitigate adverse effects to fish or their habitat.
- B. FEMA shall ensure that all PS NFIP communities implement land-use management measures consistent with criteria in 3.A.¹
 1. Prioritized FEMA implementation schedule and benchmarks
 - a) 35% of all PS NFIP jurisdictions shall implement RPA 3.A. criteria, including 100% of Tier 1 jurisdictions (see Appx 3)
 - b) 75% of all PS NFIP jurisdictions shall implement RPA 3.A. criteria, including 100% of Tier 2 jurisdictions (see Appx 3)
 - c) 100% of all PS NFIP jurisdictions shall implement RPA 3.A. criteria
 2. FEMA shall report annually to NMFS until all PS NFIP jurisdictions have implemented RPA 3.A.
- C. Until all PS NFIP jurisdictions have implemented RPA 3.A., they must track and report to FEMA all floodplain permits issued. Any unmitigated

¹ The original times frames for compliance with RPA element 3 were modified by letter from NMFS to FEMA on September 10, 2010, extending the time frame for compliance for tier 1 and 2 communities to be uniform with the tier 3 communities. The compliance date is now September 22, 2011 for all three tiers.

**National Marine Fisheries Service's Biological Opinion (BiOp) on the National Flood Insurance Program (NFIP)
Reasonable & Prudent Alternative Element 3: Floodplain Management Criteria**

development must be mitigated by FEMA. Any mitigation shall comport with WA State Fish Passage & Habitat Enhancement Restoration Programmatic (7-08-08).

- D. Any communities allowing projects in the floodplain using the mitigated cut and fill option, shall report to FEMA semi-annually. If NMFS finds that any mitigation actions taken are not fully effective, FEMA shall ensure further mitigation is provided through RPA 6 or other means available to the community (e.g., mitigation banks).

Reasonable & Prudent Alternative full text

The FEMA shall modify its implementation of the NFIP minimum criteria in NFIP communities in the Puget Sound Region in order to prevent and/or minimize the degradation of channel and floodplain habitat, as described below. In addition FEMA will report progress to NMFS on an annual basis on all sub-elements below.

A. As soon as possible upon issuance of this Opinion, FEMA shall revise its implementation of the current NFIP minimum criteria so that the following measures, necessary for protecting listed salmonids, are carried out in the Puget Sound Region as described in Appendix 4 (Minimum Criteria) and summarized below:

1. Allow no development in the floodway, the CMZ plus 50 feet (as identified according to Ecology 2003), and the riparian buffer zone (RBZ, as described by the Department of Natural Resources 2007 stream typing system and WDFW's 1997 stream buffer guidelines), and floodway (as mapped by the FIRM). OR
2. The local jurisdiction with permitting authority must demonstrate to FEMA that any proposed development in the FEMA designated floodway, the CMZ plus 50 feet (as identified according to Ecology 2003), and the riparian buffer zone (RBZ, as described by the Department of Natural Resources 2007 stream typing system and WDFW's 1997 stream buffer guidelines) does not adversely affect water quality, water quantity, flood volumes, flood velocities, spawning substrate, and/or floodplain refugia for listed salmonids.
3. In addition to either 1 or 2 above, either:

a. Prohibit development in the 100-year floodplain, OR

b. If development within the 100-year floodplain but outside the RBZ, is permitted, any loss of floodplain storage shall be avoided, rectified or compensated for. An example of compensation is the creation of an equivalent area and volume of floodwater storage and fish habitat through a balanced cut and fill program that provides fish refugia habitat and prevents fish stranding. Additionally, indirect adverse effects of development in the floodplain (effects to stormwater, riparian vegetation, bank stability, channel migration, hyporheic zones, wetlands, etc.) must also be mitigated such that equivalent or better salmon habitat protection is provided. (See Appendix 4 for more detail on how to comply with this criteria). Using option 3.A.3.b will require tracking the projects that occur and reporting to FEMA on a semi-annual basis (see 3.D. below).

For development within the 100-year floodplain permitted under 3.A.3.b, construction in the floodplain shall use Low Impact Development (LID) methods (generally requiring infiltration of all on-site stormwater), such as those described in the Low Impact Development Technical Guidance Manual for Puget Sound (Puget Sound Action Team and WSU/Pierce County Extension 2002) to minimize or avoid stormwater effects.

4. Any improvements or repairs to existing structures that result in a greater than 10 percent increase of the structure footprint must mitigate for any adverse effects to species or their habitat as described in 3.A.3.b.

B. The FEMA shall implement RPA Element 3.A by ensuring that all participating NFIP communities in the Puget Sound region implement land-use management measures consistent with the criteria as soon as practicable, but in no event later than three years from the date of this Opinion.

1. The FEMA shall focus its implementation efforts first on communities located in areas of "Tier 1" salmon populations, secondly on communities located in areas of "Tier 2" salmon populations, and then on the remaining Puget Sound NFIP communities (see Appendix 3 for

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Reasonable & Prudent Alternative Element 3: Floodplain Management Criteria

an explanation of Tier 1 and 2 populations and a list of jurisdictions where they are located). The FEMA shall demonstrate compliance with the following benchmarks:

- a. Thirty-five percent of NFIP jurisdictions in the Puget Sound Region shall have implemented the criteria set forth in RPA Element 3.A within two years of this issuance of this opinion, including 100 percent of Tier I jurisdictions;
 - b. Seventy percent of NFIP jurisdictions in the Puget Sound Region shall have implemented the criteria set forth in RPA Element 3.A within two and a half years of the issuance of this opinion, including 100 percent of Tier 2 jurisdictions; and
 - c. One hundred percent of NFIP jurisdictions within the Puget Sound Region shall have implemented the criteria set forth in RPA Element 3.A within three years of the issuance of this Opinion.
2. Until all Puget Sound communities have implemented the criteria set forth in RPA Element 3.A, the FEMA shall report annually to NMFS on the status of its efforts to implement the RPA and the number of Puget Sound NFIP jurisdictions that have implemented the revised criteria.
- C. Interim Actions. In the time period between the issuance of this Opinion, and the full implementation of RPA 3.A by participating communities, FEMA shall advise the Puget Sound NFIP communities that they must keep track of all floodplain permits that they issue and report this information to FEMA on an annual basis. The FEMA will provide this information to NMFS annually, highlighting any permits that allowed development affecting channel or floodplain habitat, or resulted in indirect effects to salmonid habitat from stormwater, removal of riparian vegetation, bank armoring, changes in the CMZ, large wood input, or gravel recruitment, etc. If NMFS finds that any unmitigated actions affecting listed species have occurred as a result of these permits, NMFS will advise FEMA to this effect, and FEMA will ensure that mitigation is provided prior to the next reporting period. Mitigation actions shall comport with those habitat restoration and enhancement actions consulted on in the programmatic consultation between NMFS

and the COE, entitled *Washington State Fish Passage and Habitat Enhancement Restoration Programmatic*, NMFS Tracking No. 2008-03598.

D. Long term actions. Communities that have adopted the minimum criteria option allowing equivalent cut and fill (3.A.3.b. above), must report to FEMA on the number of projects that take place in the floodplain and the effectiveness of the mitigation. If based on FEMA's annual reporting, NMFS finds that the mitigation is not fully effective, FEMA shall ensure that further mitigation is provided for these actions through RPA Element 6 or through other means available to the community (e.g., mitigation banks) and shall reflect these actions in the next annual report. Mitigation actions shall comport with those habitat restoration and enhancement actions consulted on in the programmatic consultation between NMFS and the COE, entitled *Washington State Fish Passage and Habitat Enhancement Restoration Programmatic*, NMFS Tracking No. 2008-03598.

Appendix 4: Minimum Criteria

It is the purpose of the following criteria to maintain streams and floodplains in their natural state to the maximum extent possible so they support healthy biological ecosystems, by: 1) assuring that flood loss reduction measures under the NFIP protect natural floodplain functions and riparian habitat, and the natural processes that create and maintain fish habitat, and 2) preventing or minimizing loss of hydraulic, geomorphic, and ecological functions of freshwater and estuarine floodplains and stream channels.

In all 100-year floodplain areas (SFHAs) the following criteria apply:

1. Restrict Development in the Riparian Buffer Zone
for all watercourses including off channel areas (areas outside this zone but within the Special Flood Hazard Area) to provide necessary protection to the RBZ. The RBZ is the greater of the following:

- 250 feet measured perpendicularly from ordinary high water for Type S (Shorelines of the State) streams, 200 feet for Type F streams (fish bearing streams) greater than 5 feet wide, 150 feet for Type F streams less than 5 feet wide, and 150 feet for N (nonsalmonid-bearing) streams, lakes and marine shorelines².

National Marine Fisheries Service's Biological Opinion (BiOp) on the National Flood Insurance Program (NFIP)
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- the Channel Migration Zone³ plus 50 feet; and
- the mapped Floodway.

The Riparian Buffer Zone is an overlay zone that encompasses lands as defined above on either side of all streams, and for all other watercourses including off channel areas. The RBZ is a no-disturbance zone, other than for activities that will not adversely affect habitat function. Any property or portion thereof that lies within the RBZ is subject to the restrictions of the RBZ, as well as any zoning restrictions that apply to the parcel in the underlying zone. Restrictions in this area apply to all development, per the definition of development.⁴ Uses that are not permitted unless shown not to adversely affect water quality, water quantity, flood volumes, flood velocities, spawning substrate, and/or floodplain refugia for listed salmon, include the following: new buildings, including accessory buildings; new impervious surfaces; removal of native vegetation; new clearing, grading, filling, land-disturbing activity or other "development" (see definition), other than for the purpose of replacing non-native vegetation with native vegetation, and for other

³ The lateral extent of likely movement along a stream reach during the next one hundred years with evidence of active stream channel movement over the past one hundred years. Evidence of active movement can be provided from aerial photos or specific channel and valley bottom characteristics. A time frame of one hundred years was chosen because aerial photos and field evidence can be used to evaluate movement in this time frame. Also, this time span typically represents the time it takes to grow mature trees that can provide functional large woody debris to most streams. In large meandering rivers a more detailed analysis can be conducted to relate bank erosion processes and the time required to grow trees that function as stable large woody debris.

With the exception of shorelands in or meeting the criteria for the "natural" and "rural conservancy" environments, areas separated from the active channel by legally existing artificial channel constraints that limit bank erosion and channel avulsion without hydraulic connections shall not be considered within the CMZ. All areas, including areas within the "natural" and "rural conservancy" environments, separated from the natural channel by legally existing structures designed to withstand the 100-year flood shall not be considered within the CMZ. A tributary stream or other hydraulic connection allowing listed species fish passage draining through a dike or other constricting structure shall be considered part of the CMZ.

⁴ Development. Any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations, storage of equipment or materials, or any other activity which results in the removal of substantial amounts of vegetation or in the alteration of natural site characteristics located within the area of special flood hazard.

approved restoration work; septic tanks and drain fields, dumping of any materials, hazardous or sanitary waste landfills; receiving areas for toxic or hazardous waste or other contaminants; and, stream relocations, unless the primary function of the action is to restore natural ecological function.

In the RBZ the following uses are allowed: [1] repair or remodel of an existing building in its existing footprint, including buildings damaged by fire or other casualties; [2] removal of noxious weeds; [3] replacement of non-native vegetation with native vegetation; [4] ongoing activities such as lawn and garden maintenance; [5] removal of hazard trees; [6] normal maintenance of public utilities and facilities; and [7] restoration or enhancement of floodplains, riparian areas and streams that meets Federal and State standards.

2. Protect fish habitat and flood storage in the remaining 100-year floodplain (outside the RBZ) by either:

- a.) Prohibiting development in the 100-year floodplain, OR
- b.) Providing compensation for any effects to floodwater storage and fish habitat function within the 100-year floodplain.

Any development in the 100-year floodplain must be compensated, for example, through the creation of an equivalent area and volume of floodwater storage and fish habitat through a balanced cut and fill program. The new flood storage/habitat area must be graded and vegetated to allow fish refugia during flood events and return to the main channel as floodwaters recede without creating stranding risks. In addition, equivalent area, if not located on site, must be located in priority floodplain restoration areas identified in the ESU Recovery Plan for listed species.

3. Mitigate for all indirect effects of development in the floodplain (effects to stormwater, riparian vegetation, bank stability, channel migration, hyporheic zones, wetlands, LWD, etc.) such that equivalent or better salmon habitat protection is provided.

Stormwater. Reduce flood volumes and stormwater runoff from new development by ensuring that increased volumes of stormwater reach the river at the same frequency, timing, and duration as historical runoff. Low Impact Development (LID) methods are required to treat and infiltrate runoff as described in PSAT 2002. These methods generally include various

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practices for infiltrating stormwater to provide water quality treatment, match historical runoff durations, and preserve base flows.

Riparian vegetation: Maintain or replace riparian function by providing equivalent area, diversity, and function of riparian vegetation as currently exists on the site (per WDFW riparian management recommendations (Knutson and Naef 1997)).

Bank Stability: Bank stabilization measures along salmonid-bearing streams, channel migration zones, and along estuarine and marine shorelines must be minimized to the maximum extent possible. If bank stabilization measures are necessary, bioengineered armoring of streambanks and shorelines must be used (per the Integrated Streambank Protection Guidelines 2003 (for riverine shorelines) or the State Shorelines Guidelines on bank stabilization (2003) (for estuarine and marine shorelines)).

Channel migration. No activity is allowed that limits the natural meandering pattern of the channel migration zone, however, natural channel migration patterns may be enhanced or restored (see Rapp and Abbe 2003, for delineating channel migration zones).

Hyporheic zones. No activity is allowed that interferes with the natural exchange of flow between surface water, groundwater and the hyporheic zone, however, natural hyporheic exchange may be enhanced or restored (see Bolton and Shelberg. 2001 for hyporheic zone issues).

Wetlands. Wetland function must be maintained or replaced by providing equivalent function per Washington State Department of Ecology (McMillan 1998) regulations.

LWD. Any LWD removed from the floodplain must be replaced in kind, replicating or improving the quantity, size, and species of the existing LWD (per WDFW Aquatic Habitat guidelines).

In the 100-year floodplain outside the Riparian Buffer Zone the following apply:

1) For buildable lots partially in the floodplain, require structures to be located on the portion of the lot outside of the mapped floodplain. Where a buildable lot is fully in the floodplain, structures must be sited in the location that has the least impact on listed salmon, e.g., located as far from the stream or river as possible on the lot, placing structures on the highest land on the lot, orienting

structures parallel to flow rather than perpendicular, and avoiding disruption of active hyporheic exchange on a site.

2) Require zoning to maintain a low density (e.g., 5-acre lots or greater) of floodplain development to reduce the damage potential within the floodplain to both property and habitat, and help maintain flood storage and conveyance capacity.

3) All structures must be set back at least 15 feet from the RBZ and shall be sited as close to the 100-year floodplain boundary as possible.

4) In an effort to site structures as far away from the watercourse and RBZ as possible, the applicant will be apprised of the elevations of the 10-year and 50-year floods in detailed study areas at the same time that the (city, county) provides the 100-year elevation as a part of the permit review. The applicant, in addition to plotting the 100-year elevation near the building site, will also plot the 10 and 50-year elevations on the land. The purpose is to show the applicant the significantly lower risk of placing the structure further away from the watercourse.

5) Structures built using post, pier, piling or stemwall construction may require less mitigation than structures built on earth fill, but must provide equivalent mitigation for lost fish habitat and indirect effects from development.

6) Creation of new impervious surfaces⁵ shall not exceed 10 percent of the surface area of the portion of the lot in the floodplain unless mitigation is provided.

7) Removal of native vegetation must leave 65 percent of the surface area of the portion of the lot in the floodplain in an undeveloped state; the 65 percent pertains to the entire portion of the lot in the floodplain, including that area in the RBZ, where removal of native vegetation is generally prohibited.

8) The proposed action must be designed and located so that it will not require new structural flood protection (e.g., levees).

⁵ Any material or land alteration (i.e. clearing, grading, etc.) which reduces or prevents absorption of storm water into the ground. That hard surface area which either prevents or retards the entry of water into the soil, water that had entered under natural conditions prior to development; and/or that hard surface area that causes water to run off the surface in greater quantities or at an increased rate of flow from that present under natural conditions prior to development. Common impervious surfaces include, but are not limited to: roof tops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, gravel roads, and packed earthen materials.

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9) During the floodplain permit review process, applicants shall be notified that their property contains land within the Riparian Buffer Zone and/or 100-year floodplain, and that the applicant is required to record a Notice on Title on the property before a permit may be issued. Applicants shall be further notified that development in the RBZ and 100-year floodplain can only occur according to the above criteria.

10) New road crossings over streams are prohibited.

11) Concepts of cluster development, density transfer, credits and bonuses, planned unit development, and transfer of development rights shall be employed wherever possible.

12) Any flood information that is more restrictive or detailed than the FEMA data can be used for flood loss reduction and/or fisheries habitat management purposes, including data on channel migration, more restrictive floodways, maps showing future build-out and global climate change conditions, specific maps from watershed or related studies that show riparian habitat areas, or similar maps.

In the RBZ and the floodplain the following re-development criteria apply:

1) Require that expansion to existing buildings in the floodplain be limited to no more than 10 percent of the existing footprint (i.e., when building and other structures such as garages are substantially damaged or expanded in the floodplain), unless mitigation for any adverse effects to floodplain habitat is provided, as described above.

4. Communities choosing to implement the mitigation option (2.b. above) must track the projects for which they issue floodplain development permits, including effects to flood storage, fish habitat, and all indirect direct of development. The expected development effects, the equivalent mitigation provided, and the success of the mitigation in replacing the affected fish habitat and flood storage functions shall be reported to FEMA on a semi-annual basis (according to the monitoring requirements in RPA element 3.D).



Attachment 3

City Of Kenmore, Washington

September 19, 2011

Mark Carey, Director
Mitigation Division, Federal Emergency Management Agency
U.S. Department of Homeland Security
Region X
130 228th Street, S.W.
Bothell, WA 98021-9796

Dear Mr. Carey,

The City of Kenmore (City) is in receipt of your letters dated July 28, 2010, and August 17, 2011, which discuss the National Flood Insurance Program (NFIP), and the three options associated with the September 22, 2008 Biological Opinion issued by the National Marine Fisheries Services (NMFS).

The City will be utilizing the permit by permit approach of Option 3. Such an approach will include review of development in flood hazard areas under the following provisions of the Kenmore Municipal Code (KMC):

Shoreline Management: Chapters 16.05, 16.10, 16.15, 16.20, 16.25, 16.30 and 16.35 KMC;¹
Critical Areas Regulations: Chapter 18.55 KMC;
Flood Hazards: Chapter 16.40 KMC;
Environmental Regulations (SEPA): Chapter 19.35 KMC

In addition, upon review of the City's SEPA regulations, City Staff will be recommending to the City Council that the categorical exemptions for development in flood hazard areas be deleted. Based upon its existing code and future amendment to the same (Shoreline Management and SEPA), the City is confident that the adopted regulatory framework identified above will provide the necessary approach to ensure that development within flood hazard areas complies with all applicable state and federal laws.

The City appreciates the offer from the Federal Emergency Management Agency (FEMA) of future technical assistance and clarifying guidance on implementing Option 3 in local communities. We also welcome a coordinated and cooperative relationship with FEMA in order to avoid, protect and mitigate adverse effects in flood hazard areas.

Sincerely,


Fred Stouder, City Manager
City of Kenmore

¹ The referenced chapters have been enclosed with this letter. Also, please note that the City's Shoreline Management Program has been substantially revised and awaits Department of Ecology approval prior to becoming effective. A copy of the draft update to the program has also been enclosed.

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July 5, 2011

Debbie Bent
Director, Community Development Dept.
City of Kenmore
P. O. Box 82607
Kenmore, WA 98028

Re: Property Owners for Sensible Floodplain Regulation
Status of Implementation of the NFIP Biological Opinion

Dear Ms. Bent:

I am writing to you today for three reasons. First, I would like to introduce the City of Kenmore to Property Owners for Sensible Floodplain Regulation ("POSFR"). POSFR is a new Washington non-profit corporation formed by property owners and industry groups concerned about the potential unnecessary over-regulation of floodplain areas in the Puget Sound region. Second, I would like to provide a brief preview of POSFR's legal position regarding the City of Kenmore's obligations relative to the Biological Opinion issued by NOAA-National Marine Fisheries Service ("NOAA-Fisheries") in September 2008 to the Federal Emergency Management Agency ("FEMA") regarding the National Flood Insurance Program ("NFIP"). As explained more fully below, POSFR believes that FEMA and NOAA-Fisheries are reaching beyond their legal authority in suggesting to local jurisdictions that they have an obligation to implement the recommendations set forth in the NFIP Biological Opinion. Third, I am requesting that you add POSFR as an "interested party" or "party of record" regarding any efforts by the City of Kenmore related to the NFIP Biological Opinion.

I. Who is POSFR?

For the last several years, numerous industry groups, including the Association of Washington Business, the Washington REALTORS, the Building Owners and Managers Association of Seattle-King County, and the Master Builders Association of King and Snohomish Counties (to name a few), have been tracking two related activities affecting floodplains in the Puget Sound region. First, we have been tracking FEMA's efforts to update the Flood Insurance Rate Maps ("FIRMs") for many of the jurisdictions in the Puget Sound region, including King, Snohomish, Pierce and Skagit counties and the cities within those counties. Initially we had significant concerns regarding the preliminary FIRMs that FEMA produced for much of the Puget Sound region. At this time, however, it seems that our concerns have been allayed – or at least deferred – by FEMA's recent decision to re-evaluate its "without levees" policy. Until FEMA issues a decision regarding how it will account for non-accredited

levees in its upcoming FIRMs, it is our understanding that FEMA's mapping efforts are "on hold" in much of the region.

Second, we have been tracking FEMA's efforts to implement the NFIP Biological Opinion issued by NOAA-Fisheries related to the operation of the NFIP in the Puget Sound region. As you know doubt know, FEMA has been pressing local governments to modify their development regulations to implement Element 3 of the "Reasonable and Prudent Alternative" set forth in the Biological Opinion ("RPA Element 3").

POSFR came together earlier this year to provide a vehicle for the various industry groups, as well as myriad property owners who may be affected by the remapping, BiOp implementation, or both, to more intentionally track and weigh in on these activities. To be clear, POSFR understands and supports sensible floodplain regulation. We do not, however, believe that RPA Element 3 represents sensible floodplain regulation. RPA Element 3 proposes to severely restrict nearly all development in floodplains irrespective of existing conditions or actual habitat impacts – and goes beyond what FEMA or NOAA-Fisheries can legally require of local jurisdictions under the NFIP as currently enacted. Consequently, POSFR is reaching out to local jurisdictions to encourage you to evaluate carefully both the legal and technical bases underpinning RPA Element 3 and FEMA's efforts to implement it.

II. Local Government Duty Relative to the Biological Opinion

Right now POSFR's key concern is how local jurisdictions respond to the Biological Opinion. We want to be sure that local governments do not misunderstand their legal obligations and overreact to perceived pressure.

As you know, FEMA has offered local jurisdictions participating in the NFIP three options to implement RPA Element 3:

- (1) Adopt a Model Ordinance prepared by FEMA.
- (2) Demonstrate how their existing regulations satisfy RPA Element 3. To the extent FEMA determines there are gaps between a local jurisdiction's existing regulations and the requirements of RPA Element 3, FEMA is proposing that local jurisdictions modify their flood hazard regulation to fill those gaps.
- (3) Demonstrate ESA compliance within the floodplain on a permit-by-permit basis. FEMA has articulated that this may occur in one of two ways: (a) direct consultation pursuant to ESA Section 7(a)(2) for projects with a federal nexus (i.e., projects authorized, funded or carried out by a federal agency); or (b) review by the local jurisdiction (without NOAA-Fisheries involvement).¹

¹Because flood hazard permits are issued by the local jurisdiction, not any federal agency, they do not trigger a federal nexus. A project may, however, include a separate federal component (e.g., a Section 404 Clean Water Act permit), which would trigger a federal nexus and ESA consultation regarding that federal permit.

Since FEMA began offering local jurisdictions these three options, POSFR has been actively monitoring local jurisdictions' decisions regarding which option to pursue and their progress toward implementation. As part of this monitoring, we have seen significant confusion and ambiguity regarding FEMA's and NOAA-Fisheries' interpretation and explanation of what exactly RPA Element 3 requires. Recent meetings and conferences sponsored by FEMA and NMFS (the March 1 & 2 "Demystifying the NFIP Alignment with ESA" in Edmonds, and the several "Biological Assessment Workshops" held throughout the region in April and May) had left POSFR feeling optimistic that FEMA and NMFS were moving away from "one size fits all" prescriptive standards toward environment-specific, function-based performance standards (i.e., conserve floodplain functions as they currently exist where they currently exist) that acknowledge local circumstances and past development.

FEMA and NMFS, however, have been reluctant to memorialize this interpretation of RPA Element 3 in a meaningful way on which local jurisdictions and property owners may rely. Further, we understand that FEMA has been unwilling, in reviewing several local jurisdictions' option 2 checklists, to accept local jurisdictions' scientific rationale for something different than the "one size fits all" buffers set forth in RPA Element 3. Consequently, we are increasingly skeptical of whether FEMA and NMFS actually intend to offer the flexibility and environment-specific, function-based approach outlined during the meetings earlier this spring.²

Until FEMA and NMFS are willing to take a more sensible (and legally defensible) approach to RPA Element 3, local jurisdictions should reflect on the scope of FEMA's legal authority to attempt to demand compliance with RPA Element 3. Review of FEMA's existing NFIP regulations demonstrates that FEMA does not have the authority to require local governments to implement RPA Element 3. Instead, pursuant to FEMA's existing regulations, FEMA may only require that local governments require project applicants to obtain all other "necessary permits" from applicable federal and state agencies. In the context of the ESA, the only "permit" that could be required is an Incidental Take Permit – which is only "necessary" if required under Section 10 of the ESA.³ See 44 C.F.R. §60.3(a)(2). Pursuant to Section 10, an Incidental Take Permit *is only required for projects that "take" endangered species*. This is a very different standard than the "no adverse effects" standard set forth in RPA Element 3.

It is also notable that this is not a new requirement. Since the various ESA fish listings in the Puget Sound region (beginning in the late 1990s), local jurisdictions have borne the obligation to ensure that permits they issue for development proposals throughout their jurisdictions – not just in floodplains – do not trigger "take." 16 U.S.C. §1538. To date, we are not aware of any

² We understand that the Washington State Department of Commerce and the National Fish and Wildlife Foundation recently initiated a "Technical Assistance Project" aimed at helping local jurisdictions work through option 2 using an environment-specific, functions-based approach. We will continue to monitor this effort and suggest that local jurisdictions do the same before proceeding with option 2.

³ For projects with a federal nexus (i.e., that are authorized, funded or carried out by a federal agency), the project applicant has an independent obligation to consult regarding impacts to endangered species and critical habitat pursuant to Section 7(a)(2) of the ESA. This obligation rests with the applicant, not the local jurisdiction.

July 5, 2011

jurisdiction in the Puget Sound region that has been challenged for failing to meet this requirement.

We understand that the ESA is complicated with numerous technical terms and requirements. We would suggest that if you have questions about this, you review FEMA's regulations (44 C.F.R. §60.3(a)(2)) and the ESA (16 U.S.C. §1531, *et seq.*) with your City Attorney. The bottom line is that FEMA has not taken the necessary steps to require any jurisdiction to implement RPA Element 3, but only to require an Incidental Take Permit where necessary because a project causes "take." Consequently, POSFR asks that local jurisdictions not overreact to the Biological Opinion by unnecessarily restricting either existing or future development in the floodplain.

III. Notice of Activities related to the NFIP Biological Opinion

Finally, please add me on behalf of POSFR to the list of interested parties or parties of record on any effort that your jurisdiction may undertake related to RPA Element 3 or other provisions of the NFIP Biological Opinion. To date, FEMA has not engaged in a public process in which all interested persons may participate. One of POSFR's goals is to ensure public participation in this process and ultimately the adoption of sensible floodplain development standards. Notice is a critical step.

Thank you in advance for your consideration. We anticipate that this will be the first of several communications between the City of Kenmore and POSFR. We would also welcome the opportunity to meet with appropriate members of your staff to discuss these issues if that would be useful at this point. Otherwise, we look forward to hearing from you regarding any efforts related to the NFIP Biological Opinion or other efforts affecting floodplain development.

Very truly yours,



Molly A. Lawrence

cc: POSFR Board of Directors

GordonDerr
ATTORNEYS AT LAW^{LP}

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CITY OF KENMORE

ATTACHMENT
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www.GordonDerr.com

September 9, 2011

Debbie Bent
Director, Community Development Dept.
City of Kenmore
P. O. Box 82607
Kenmore, WA 98028

Re: Status of Efforts to Related to the NFIP Biological Opinion

Dear Ms. Bent:

In July, I sent letters to the more than 100 local jurisdictions participating in the National Flood Insurance Program ("NFIP") introducing Property Owners for Sensible Floodplain Regulations ("POSFR") and explaining our position regarding each jurisdiction's obligations related to the NFIP Biological Opinion ("BiOp").¹ As you may recall, POSFR is a Washington non-profit corporation formed by property owners and industry groups concerned about the potential unnecessary and/or over-regulation of floodplain areas in the Puget Sound region. Since sending that initial letter, I have received numerous phone calls and correspondence from local jurisdictions both explaining how you have responded to the BiOp to date, and supporting our efforts. We thank you for taking these issues seriously and hearing and understanding our concerns.

Several jurisdictions also asked for more in-depth legal analysis regarding their obligations relative to the BiOp. This second letter responds to that request. Put simply, each jurisdiction's obligation is to comply with NFIP regulation 44 CR §60.3(a)(2), which provides that you must require applicants for floodplain development permits to obtain all other necessary federal or state permits. This is different – and significantly less onerous – than any of the options that FEMA is currently articulating. POSFR acknowledges that FEMA would like the local jurisdictions to do more than is required by existing law to help FEMA meet its obligations to NOAA-National Marine Fisheries Service ("NMFS") under the BiOp. It is extremely important, however, that local governments understand that their obligations under the NFIP are not the same as FEMA's obligations resulting from the BiOp. We suggest and request that you simply comply with existing law as outlined below.

¹ Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation, Implementation of the National Flood Insurance Program in the State of Washington, Phase One Document – Puget Sound Region, dated September 22, 2008, NMFS Tracking No: 2006-00472.

A. General NFIP Framework & ESA Obligations

The existing NFIP regulations establish the boundaries of each jurisdiction's obligations to maintain participation in the NFIP. To participate in the NFIP, Kenmore was required to adopt – and now has as part of its zoning and/or building code – development regulations applicable within the special flood hazard area (generally referred to as the floodplain) that are at least as stringent as FEMA's minimum standards set forth in 44 CFR §60.3. One section of those FEMA minimum standards, 44 CFR §60.3(a)(1), requires: 'The community shall review proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law...' FEMA is now interpreting 44 CFR §60.3(a)(2) to include Endangered Species Act ("ESA") related permits.

As we explained in our first letter, for projects that do not have an independent federal nexus (i.e., projects authorized, funded or carried out by a federal agency) triggering a Section 7 ESA Consultation, the only "necessary" permit under the ESA is a Section 10 permit, known as an "Incidental Take Permit." As the ESA clearly explains, a Section 10 Incidental Take Permit is required only where a project causes a "take." As defined in the ESA, the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, a listed species or attempt to engage in any such conduct." 16 U.S.C. §1532(19). As NMFS has explained, "The term 'harm' refers to an act that actually kills or injures a protected species." 65 FR 42422-01, 42426 (Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units (ESUs), July 10, 2000). Further, NMFS has explained "[h]arm can arise from significant habitat modification or degradation where it *actually kills or injures* protected species *by significantly impairing essential behavioral patterns*, including breeding, spawning, rearing, migrating, feeding, or sheltering." *Id.*, 50 C.F.R. §17.3 (emphasis added).

In practice, very few development projects ever reach the "take" threshold triggering the obligation to obtain a Section 10 Incidental Take Permit. (This is something that both FEMA and NMFS acknowledge.) If "take" were a lower bar, more projects would be required to obtain such permits, and/or would face challenges by the various environmental groups in our region. As you may know, that has not been the case in the Puget Sound region (or anywhere else in the country).

Further, it is important that local jurisdictions realize that this is not a new obligation triggered by the BiOp. To the contrary, each jurisdiction in the Puget Sound region has been under the obligation, pursuant to Section 9 of the ESA, not to permit development projects that cause "take" (without a Section 10 Incidental Take Permit or other NMFS authorization) since the various ESA-listings beginning in the late-1990s. 16 USC §1538. In general, Kenmore has already been meeting this obligation to avoid permitting projects that will cause a "take" by applying your existing critical areas and shoreline regulations. Recall that the BiOp evaluated only FEMA's minimum floodplain regulations – and not the adequacy of each jurisdiction's critical areas ordinances and shoreline regulations. FEMA's minimum floodplain regulations are much less restrictive than any local jurisdiction's critical areas or SMP regulations. Thus, by concluding that FEMA's existing minimum regulations do not satisfy the ESA, NMFS did not conclude that any jurisdiction's local regulations do not satisfy the ESA.

If you require projects that cause a "take" to obtain a Section 10 Incidental Take Permit or other approval from NMFS, you will satisfy the current requirements for participation in the NFIP. While FEMA may wish for Kenmore to do more to help FEMA meet its obligation under the BiOp, Kenmore will be compliant with the letter of the NFIP.

B. Options for Implementing the BiOp and FEMA's August Letter

On or about August 17, 2011, FEMA issued a 30-day notice letter to all NFIP-participating jurisdictions in the Puget Sound region. The purpose of FEMA's letter was to remind local jurisdictions of the upcoming September 22, 2011, BiOp implementation "deadline," and to reiterate FEMA's position regarding the three options available to each jurisdiction to implement the BiOp. As FEMA's letter outlines, FEMA has offered local jurisdictions three options:

- (1) Adopt an ESA compliant ordinance (e.g., FEMA's "Model Ordinance");
- (2) Use FEMA's "Biological Opinion Checklist" to document that your jurisdiction's existing regulations meet or exceed the performance standards set forth in Element 3 of the Reasonable and Prudent Alternative in the BiOp ("RPA Element 3"); or
- (3) Use a permit-by-permit approach through which you require the applicant to demonstrate that its project "will not have an adverse effect or provide concurrence from the Services that the project is compliant with the ESA."²

Put simply, FEMA cannot require Kenmore to take any of these three actions under the existing NFIP regulations. This is where FEMA is attempting to transfer *its* obligation under the BiOp onto local jurisdictions *without adequate legal authority*.

As explained above, local jurisdictions' only obligation related to the ESA under the NFIP is its obligation not to approve development that will cause a "take" without a Section 10 Incidental Take Permit or other approval from NMFS. Nowhere in the statutes, regulations or case law is "take" defined to require that an action/project have "no adverse effect." The vast majority of activities that could be found to have an "adverse effect" do not approach the "take" standard. Thus, for FEMA to assert that you must demonstrate that a project "will not have an adverse effect" is legally inaccurate.

When pressed on this during the various public meetings and conferences between March and May this year, FEMA and NMFS conceded that "no adverse affect" does not really mean no

²There has been some confusion regarding who FEMA expects to review the permit-by-permit submittals. FEMA has clarified that it expects local jurisdictions to review the applicant's habitat assessment and determine what impact, if any, a proposed project will have on endangered species or their habitat. Local jurisdictions are not required to consult with NOAA-Fisheries for projects that do not require a Section 10 Incidental Take Permit. (Applicants should consult directly with NOAA-Fisheries on projects with the federal nexus.) Local jurisdictions are free to approach FEMA and/or NMFS for "technical assistance" at any time if the local jurisdiction feels that is necessary or appropriate, but it is not required.

adverse effect. Instead, they assert that “no adverse effect” is equivalent to a “not likely to adversely affect” determination, which is a standard applied in a Section 7 ESA Consultation to projects that have a federal nexus (i.e., projects authorized, funded or carried out by a federal agency), and that any project that would meet the “likely to have an adverse effect” standard, were it reviewed in a Section 7 ESA Consultation, will have an “adverse effect.” Again, however, the statutes, regulations and case law also do not equate “likely to adversely affect” under Section 7 with “take.” The standard applicable to local jurisdictions under the existing NFIP regulation is simply that you not authorize a project that causes “take” absent a Section 10 Incidental Take Permit or other NMFS approval.

Further, Kenmore’s obligation under 44 CFR §60.3(a)(2) does not require you either to adopt FEMA’s Model Ordinance, which is based on the performance standards in RPA Element 3, or demonstrate that your existing regulations meet or exceed those performance standards. First, FEMA has not amended its minimum criteria from that quoted above – 44 CFR §60.3(a)(2) – which simply requires local jurisdictions not to permit projects that will cause “take” absent a Section 10 Incidental Take Permit or other NMFS approval. Those standards do not import any of the provisions of RPA Element 3. Second, and perhaps more importantly, the performance standards set forth in RPA Element 3 are only one way that FEMA could modify its existing minimum criteria to comply with the ESA. Just as local jurisdictions use different regulations to satisfy their GMA critical areas and Shoreline Management Act requirements, FEMA is free to use any of a number of other methods and combinations of development standards to satisfy the ESA. Thus, to assert that any local government must comply with the performance standards in RPA Element 3 to maintain participation in the NFIP is legally erroneous.

Finally, FEMA’s August letter hints at, but does not fully disclose, that FEMA and NMFS are currently in the process of developing interpretative guidance and/or revisions to the BiOp to address many of the concerns that jurisdictions and private property owners have raised regarding the BiOp since its issuance in September 2008. That guidance should significantly ease some of the more difficult to manage provisions of the BiOp. Based on discussions with FEMA and NMFS, a few examples of the proposed guidance/revisions include: (1) recognition of the differences between developed and undeveloped floodplain areas; (2) revision or modification of the prescriptive “one size fits all” buffer standards; and (3) permission to use mitigation within the Riparian Buffer Zone in many instances. Until the interpretative guidance and/or revisions are issued, it is not possible for FEMA to complete its evaluation of any jurisdiction’s existing regulations (Option 2), or for any local jurisdiction to know what “target” FEMA would like it to hit with its BiOp implementation efforts. This is all the more reason simply to apply the existing provisions of 44 CFR §60.3(a)(2) (i.e., no “take” without a Section 10 Incidental Taker Permit or other approval from NMFS).

C. Concerns regarding Potential ESA Liability

POSFR understands that Kenmore may be concerned about potential liability if NMFS or a third party asserts in the future that you have made the wrong decision and issued a floodplain development permit for a project that does cause a “take” without requiring the applicant to obtain a Section 10 Incidental Take Permit or other NMFS approval. We would like to allay your concern to the extent possible.

Although you are not expected or obligated to send flood hazard permit applications to NMFS or FEMA for approval before issuing a development permit, your staff could send any flood hazard permit application about which you are concerned to FEMA and/or NMFS for their review prior to approval. FEMA and NMFS would then have an opportunity to review and weigh in regarding any proposal. If FEMA and/or NMFS do not respond within the comment period, you could document that in the application file for your next Community Assistance Visit. Alternatively, if either agency were to submit comments, your staff could require the applicant to address those comments as part of the permitting process. In either case, you would have taken additional steps to guard against future challenges.³

Further, if you were ever sued in the future on the grounds that you allegedly issued a permit that allowed a “take,” the plaintiff will have to carry the burden of proof – i.e., they will have to prove that your action caused a “take.” Returning to the “take” standard outlined above, that means they will have to prove that the approved project will “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, a listed species or attempt to engage in any such conduct.” 16 U.S.C. §1532(19). To prove “take” due to habitat modification, the plaintiff will be required to demonstrate that the challenged project “actually kills or injures protected species by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering.” 50 CFR 17.3. This has proven to be very difficult standard of proof. *See, e.g., Animal Welfare Institute v. Martin*, 668 F.Supp.2d 254, 264-272 (D.Me. 2009); *Nat’l Wildlife Fed’n v. Burlington Northern R.R.*, 23 F.3d 1508, 1512-13 (9th Cir. 1994). Moreover, if the plaintiff is a citizen or environmental group, that plaintiff will be limited to injunctive relief – i.e., either stopping the permitted project or mandating prospective changes to your development regulations. The ESA does not authorize citizens or environmental groups to seek damages against a local jurisdiction for permitting take. 16 U.S.C. §1540(g).

In sum, although the risk of litigation can never be entirely eliminated, the risk of Kenmore facing a challenge for “take” under the ESA based on a decision to issue a flood hazard permit is very low. And the risk of the plaintiff prevailing in such a suit is even lower. This is born out by the dearth of ESA-based challenges in the Puget Sound region since NMFS originally began listing various anadromous fish species in the region in the late 1990s.

D. POSFR’s Recommendation and Request

In deciding how to address the BiOp, POSFR recommends and requests that local jurisdictions simply fulfill their existing obligations under 44 CFR §60.3(a)(2). That means reviewing project applications for “take” (not FEMA’s unsubstantiated “no adverse effect” standard), and requiring the applicant to demonstrate NMFS approval if their project will cause a “take.”

³ Also, if Kenmore is really concerned about potential ESA liability, you may submit your existing development regulations to NMFS and request an exception from the Section 9 “take” prohibition through the 4(d) Rule (municipal, residential, commercial, and industrial development activities). 50 CFR §223.203(b)(12). It is notable, however, that while this regulation was adopted in 2000, to POSFR’s knowledge, Washington jurisdictions have gone through this process.

Debbie Bent,
City of Kenmore

- 6 -

September 9, 2011

As part of this evaluation, local jurisdictions should understand that the ESA regulations routinely permit projects to use mitigation to avoid triggering a "take." This is true both within the Riparian Buffer Zone ("RBZ") and the portion of the floodplain outside of the RBZ. The rationale for this is that any applicant going through a Section 7 ESA Consultation would be permitted to use mitigation to offset impacts. Consequently, it is only fair to permit applicants outside of the federal permitting process to have the same mitigation opportunities.

Further, to the extent Kenmore chooses to pursue FEMA's Option 2 (above), POSFR requests that you retain within your regulations the ability for an applicant to opt for a permit-by-permit review consistent with 44 CFR §60.3(a)(2). While some applicants with smaller projects may prefer uniform development standards, most sophisticated developers prefer the flexibility to evaluate their property, identify any habitat or floodplain functions on their property, and tailor their project to avoid or mitigate for any impacts to that habitat or those functions. That should remain an option for all flood hazard permits going forward.

Finally, as noted above, since POSFR's first letter in July, I have received reports from numerous jurisdictions regarding the status of their efforts to implement the BiOp. If Kenmore has not yet provided POSFR with any feedback or update regarding the status of your efforts related to the BiOp, we would appreciate hearing your plans. In particular, please send me a copy of any correspondence that you may have with FEMA in response to its August letter, as well as notice of any meetings that Kenmore may have with FEMA and/or NMFS related to the BiOp or your implementation efforts. Also, as requested in my July letter, please include my name, on behalf of POSFR, on any "interested parties" or applicable notice lists for your jurisdiction for any actions related to the BiOp.

If you have any questions or comments regarding the content of this letter, or any of POSFR's efforts, please feel free to contact me or any member of POSFR's Board. I am including a copy of POSFR's Mission Statement and Board member for your records. We look forward to continuing to work with you on this complex issue.

Very truly yours,



Molly A. Lawrence

MAL:mal

cc: POSFR Board of Directors
Ken Murphy, FEMA Region X
Will Stelle, NOAA-National Marine Fisheries Service
David Williams, Association of Washington Cities
Josh Weiss, Washington Association of Counties

The Seattle Times

Winner of Eight Pulitzer Prizes

Local News

Originally published Wednesday, December 21, 2011 at 9:20 PM

Battle escalates over building in floodplains

Environmentalists have asked a federal judge for an injunction that would effectively halt a sizable chunk of the building that occurs in flood-prone areas that may harm endangered fish or whales.

By Craig Welch

Seattle Times environment reporter

More than a decade after government biologists first warned the Federal Emergency Management Agency (FEMA) that allowing development in floodplains is helping kill salmon and orcas, environmental groups on Wednesday turned to their most potent — and controversial — weapon:

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They asked a federal judge in Seattle for an emergency injunction that would effectively halt a sizable chunk of the building in flood-prone areas until FEMA finds a way to make sure it won't harm endangered fish or whales.

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U.S. District Judge Ricardo Martinez likely won't rule on the matter until next year, but environmental groups have consistently won in federal court when challenging how the agency deals with construction in Puget Sound river valleys. Federal fisheries biologists already determined in 2008 that FEMA's flood plain insurance program violates the Endangered Species Act.

And while it's impossible to know how much construction might be curtailed, the National Wildlife Federation says its review of FEMA data suggests 700 to 800 new structures have been built in floodplains in the three years since the biologists said the practice must change.

"Salmon are going over the edge, and we've waited years for it to change and it hasn't," said Jan Hasselman, an attorney with the environmental legal firm Earthjustice, which filed the motion in federal court. "As far as we can tell, not one project has been prevented, delayed, reconfigured or reconsidered" since 2008.

Mike Pattison, with the Master Builders Association of King and Snohomish Counties, called the move "unfortunate" and said an injunction could stop hundreds of projects around a region still struggling with an economic downturn.

"The effect would not be widespread, but those whom it does affect will be hit substantially," he said. "Will homebuilders as a unit get clobbered? Probably not. But those who do will lose all utility of their property, even for remodels or small changes."

A FEMA official Thursday wouldn't comment directly on the legal challenge, but said in the three years since hearing that the flood insurance program violated the Endangered Species Act, his agency has completely overhauled what kind of development in flood zones it will insure. Local communities, from King and Pierce counties to the small cities on the Kitsap Peninsula, must now show development won't adversely impact salmon.

At issue is what happens when streets, homes, businesses and parking lots are built near rivers that occasionally overflow their banks.

Scientists with the state Department of Ecology and the National Marine Fisheries Service have warned since the mid-1990s — before orcas and Puget Sound chinook were listed under the Endangered Species Act — that such building can destroy stream-side channels that fish use when trying to escape rushing floodwaters. It can also change stream hydrology and increase the pollution that drains into salmon-bearing streams after heavy rains.

In addition, the fisheries service determined that kind of development contributes to the decline of southern resident killer whales, which depend heavily on chinook.

While FEMA doesn't directly permit development — cities and counties do — it often only happens because FEMA provides insurance for builders in flood zones who meet minimum requirements to reduce risk.

But a federal judge in 2004 ruled the flood-insurance program had wrongly allowed tens of thousands of buildings to go up without considering the impact on Puget Sound's troubled marine species. Four years later, the fisheries service said the program also violated the Endangered Species Act.

After years of negotiating with federal fisheries biologists to tighten building rules, FEMA's program still lacks many strict requirements, environmentalists said. So far, most of the 120 or so communities affected by FEMA flood insurance plan to tackle new development on a "project-by-project" basis that doesn't address cumulative impacts.

Earlier this fall, FEMA didn't know which flood plain rules communities are following. In a letter to FEMA earlier this fall, Will

http://seattletimes.nwsource.com/html/localnews/2017067377_floodplain22.html

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"The bottom line, overall, is that not much has changed," said Dan Siemann with the National Wildlife Federation. "Salmon habitat is still being harmed or destroyed."

"As of today, we believe we are fully compliant" with the Endangered Species Act. He also said FEMA knows which rules each community is following.

Carey also disputed the notion that the very existence of flood insurance encourages people to build in dangerous places. In order for communities to be eligible for flood insurance they have to mitigate potential hazards, he said. And payouts to people whose properties are later damaged don't come from taxpayers — they come from premiums paid by other flood insurance recipients.

Meanwhile, Molly Lawrence, an attorney for a coalition of property owners and industry groups opposed to the filing by environmentalists, said the injunction request — and even the fisheries service's concern about floodplains in 2008 — doesn't take into account how the flood insurance program really works on the ground. It evaluated the program in isolation when it is actually just one of a number local government regulations that dictate how fish habitat is to be protected.

So far, Hasselman said, "it's clear to us that it's not going to happen without somebody else getting involved. That somebody else is the court."

Craig Welch: 206-464-2093 or cwelch@seattletimes.com. On Twitter @craigawelch.

ATTACHMENT 7

WAC 197-11-908 allows cities to select certain categorical exemptions (SEPA exemptions) that do not apply in one or more critical areas. The selection may be made from the following subsections of WAC 197-11-800:

197-11-800(1) Minor new construction, including (i) The construction or location of any residential structures of 20 or fewer dwelling units; (ii) The construction of a barn, loafing shed, farm equipment storage building, produce storage or packing structure, or similar agricultural structure, covering 30,000 square feet, and to be used only by the property owner or his or her agent in the conduct of farming the property. This exemption shall not apply to feed lots; (iii) The construction of an office, school, commercial, recreational, service or storage building with 12,000 square feet of gross floor area, and with associated parking facilities designed for 40 automobiles; (iv) The construction of a parking lot designed for 40 automobiles; and (v) Any landfill or excavation of 500 cubic yards throughout the total lifetime of the fill or excavation; and any fill or excavation classified as a Class I, II, or III forest practice under RCW 76.09.050 or regulations thereunder.

197-11-800(2)(a) The construction or designation of bus stops, loading zones, shelters, access facilities and pull-out lanes for taxicabs, transit and school vehicles.

197-11-800(2)(b) The construction and/or installation of commercial on-premise signs, and public signs and signals.

197-11-800(2)(c) The construction or installation of minor road and street improvements such as pavement marking, freeway surveillance and control systems, railroad protective devices (not including grade-separated crossings), grooving, glare screen, safety barriers, energy attenuators, transportation corridor landscaping (including the application of Washington state department of agriculture approved herbicides by licensed personnel for right of way weed control as long as this is not within watersheds controlled for the purpose of drinking water quality in accordance with WAC 248-54-660), temporary traffic controls and detours, correction of substandard curves and intersections within existing rights of way, widening of a highway by less than a single lane width where capacity is not significantly increased and no new right of way is required, adding auxiliary lanes for localized purposes, (weaving, climbing, speed change, etc.), where capacity is not significantly increased and no new right of way is required, channelization and elimination of sight restrictions at intersections, street lighting, guard rails and barricade installation, installation of catch basins and culverts, and reconstruction of existing roadbed (existing curb-to-curb in urban locations), including adding or widening of shoulders, addition of bicycle lanes, paths and facilities, and pedestrian walks and paths, but not including additional automobile lanes.

197-11-800(2)(d) Grading, excavating, filling, septic tank installations, and landscaping necessary for any building or facility exempted by subsections (1) and (2) of this section, as well as fencing and the construction of small structures and minor facilities accessory thereto.

197-11-800(2)(e) Additions or modifications to or replacement of any building or facility exempted by subsections (1) and (2) of this section when such addition, modification or replacement will not change the character of the building or facility in a way that would remove it from an exempt class.

ATTACHMENT 7

197-11-800(2)(f) The demolition of any structure or facility, the construction of which would be exempted by subsections (1) and (2) of this section, except for structures or facilities with recognized historical significance.

197-11-800(2)(g) The installation of impervious underground tanks, having a capacity of 10,000 gallons or less.

197-11-800(2)(h) The vacation of streets or roads.

197-11-800(3) The repair, remodeling, maintenance, or minor alteration of existing private or public structures, facilities or equipment, including utilities, involving no material expansions or changes in use beyond that previously existing; except that, where undertaken wholly or in part on lands covered by water, only minor repair or replacement of structures may be exempt (examples include repair or replacement of piling, ramps, floats, or mooring buoys, or minor repair, alteration, or maintenance of docks). The following maintenance activities shall not be considered exempt under this subsection: (a) Dredging; (b) Reconstruction/maintenance of groins and similar shoreline protection structures; or (c) Replacement of utility cables that must be buried under the surface of the bedlands. Repair/rebuilding of major dams, dikes, and reservoirs shall also not be considered exempt under this subsection.

197-11-800(5) Purchase or sale of real property.

197-11-800(6)(a) Except upon lands covered by water, the approval of short plats or short subdivisions pursuant to the procedures required by RCW 58.17.060, but not including further short subdivisions or short platting within a plat or subdivision previously exempted under this subsection.

197-11-800(13)(c) All licenses to operate or engage in amusement devices and rides and entertainment activities, including but not limited to cabarets, carnivals, circuses and other traveling shows, dances, music machines, golf courses, and theaters, including approval of the use of public facilities for temporary civic celebrations, but not including licenses or permits required for permanent construction of any of the above.

197-11-800(23)(a) Installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class, of all communications lines, including cable TV, but not including communication towers or relay stations.

197-11-800(23)(b) Installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class, of all storm water, water and sewer facilities, lines, equipment, hookups or appurtenances including, utilizing or related to lines eight inches or less in diameter.

197-11-800(23)(c) Installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class, of all electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of 55,000 volts or less; and the overbuilding of existing distribution lines (55,000 volts or less) with transmission lines (more than 55,000 volts); and the undergrounding of all

ATTACHMENT 7

electric facilities, lines, equipment or appurtenances.

197-11-800(23)(d) Installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class, of all natural gas distribution (as opposed to transmission) lines and necessary appurtenant facilities and hookups.

197-11-800(23)(e) Installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class, of all developments within the confines of any existing electric substation, reservoir, pump station or well: Provided, That additional appropriations of water are not exempted by this subsection.

197-11-800(23)(f) Periodic use of chemical or mechanical means to maintain a utility or transportation right of way in its design condition: Provided, That chemicals used are approved by the Washington state department of agriculture and applied by licensed personnel. This exemption shall not apply to the use of chemicals within watersheds that are controlled for the purpose of drinking water quality in accordance with WAC 248-54-660.

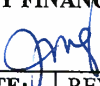
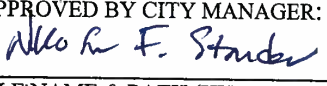
197-11-800(23)(g) All grants of rights of way by agencies to utilities for use for distribution (as opposed to transmission) purposes.

197-11-800(24)(c) Issuance of agricultural leases covering one hundred sixty contiguous acres or less.

197-11-800(24)(e) Issuance of leases for school sites.

197-11-800(24)(g) Development of recreational sites not specifically designed for all-terrain vehicles and not including more than twelve campsites.

197-11-800(24)(h) Periodic use of chemical or mechanical means to maintain public park and recreational land: Provided, That chemicals used are approved by the Washington state department of agriculture and applied by licensed personnel. This exemption shall not apply to the use of chemicals within watersheds that are controlled for the purpose of drinking water quality in accordance with WAC 248-54-660.

CITY OF KENMORE, WASHINGTON			
AGENDA BILL SUMMARY			
AGENDA TITLE			MEETING DATE
Adopt Ordinance No. 12-0338 of the City of Kenmore, Washington, Repealing Chapter 1.10 of the Kenmore Municipal Code and Adopting a New Chapter 1.10 of the Kenmore Municipal Code to Update the City's Procedures Relating to the Disclosure of Public Records, and Fixing an Effective Date.			March 26, 2012
DEPARTMENT	DIRECTOR	CONTACT PERSON	PHONE
Support Services	Joanne Gregory	Joanne Gregory	425-398-8900
COST OF PROPOSAL: N/A		ACCOUNT NUMBER: N/A	
AMOUNT BUDGETED: N/A		NAME AND FUND #: N/A	
ATTACHMENT(S) TO AGENDA PACKET ITEM:			
1. Ordinance No. 12-0338 2. Revised City of Kenmore Code Chapter 1.10 Public Records 3. Repealed City of Kenmore Code Chapter 1.10 Public Records			
SUMMARY STATEMENT:			
The City of Kenmore last updated its procedures relating to the disclosure of public records, established under Chapter 1.10 of the Kenmore Municipal Code, in 2006. Since that time, the Washington State Legislature re-codified the statutory procedures governing the disclosure of public records to Chapter 42.56 RCW, the Public Records Act ("Act"). State law also requires the City to maintain an index of public records unless it would be unduly burdensome, or interfere with agency operation. During the 2011 risk management review by Washington Cities Insurance Authority, it was recommended that the City Council make a finding that to create and maintain such an index would be unduly burdensome and interfere with City operations. The City Attorney's office recommended that a complete re write of Chapter 1.10 of the Kenmore Municipal Code would be desirable in order to incorporate all the changes to the RCW since 2006 in addition to addressing the public records index. The recommended revised Code Chapter 1.10 is Attachment 2 and the current (repealed) Code Chapter 1.10 is Attachment 3.			
CONSISTENT WITH OR COMPARISON TO PAST COUNCIL POLICIES, ORDINANCES, DIRECTION:			
Maintain compliance with Chapter 42.56 RCW, the Public Records Act; and implement recommendation resulting from 2011 Washington Cities Insurance Authority risk management review.			
RECOMMENDED CITY COUNCIL ACTION/SUGGESTED MOTION:			
Adopt Ordinance No. 12-0338 of the City of Kenmore, Washington, Repealing Chapter 1.10 of the Kenmore Municipal Code and Adopting a New Chapter 1/10 of the Kenmore Municipal Code to Update the City's Procedures Relating to the Disclosure of Public Records and Fixing an Effective Date.			
REVIEWED BY FINANCE DIRECTOR:	REVIEWED BY CITY ATTORNEY:	APPROVED BY CITY MANAGER:	
			
TODAY'S DATE:	REVISION DATE(S):	FILE NAME & PATH (HYPERLINK):	
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XIIC. Adopt Ordinance No. 12-0338 of the City of Kenmore, Washington, Repealing Chapter 1.10 of the Kenmore Municipal Code and Adopting a New Chapter 1.10 of the Kenmore Municipal Code to

CITY OF KENMORE
WASHINGTON
ORDINANCE NO. 12-0338

AN ORDINANCE OF THE CITY OF KENMORE, WASHINGTON, REPEALING CHAPTER 1.10 OF THE KENMORE MUNICIPAL CODE AND ADOPTING A NEW CHAPTER 1.10 OF THE KENMORE MUNICIPAL CODE TO UPDATE THE CITY'S PROCEDURES RELATING TO THE DISCLOSURE OF PUBLIC RECORDS, AND FIXING AN EFFECTIVE DATE.

WHEREAS, in 2006, the City last updated its procedures relating to the disclosure of public records, established under Chapter 1.10 of the Kenmore Municipal Code; and

WHEREAS, since the City's last update, the Legislature re-codified the statutory procedures governing the disclosure of public records to Chapter 42.56 RCW, the Public Records Act ("Act"); and

WHEREAS, the City Council desires to update its procedures by repealing the existing Chapter 1.10 KMC, Public Records and adopting a new Chapter 1.10 KMC, Public Records to be consistent with the Act; and

WHEREAS, state law also requires the City to maintain an index of public records unless it would be unduly burdensome, or interfere with agency operation, and the City Council desires to make such a finding in the new Chapter 1.10 KMC; and

WHEREAS, the City will fully comply with the provisions of the Act as they relate to the disclosure of public records;

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

Section 1. Repealer. Chapter 1.10 of the Kenmore Municipal Code is hereby repealed in its entirety.

Section 2. Adoption. A new Chapter 1.10 of the Kenmore Municipal Code, entitled "Public Records", is hereby adopted as set for on Exhibit 1, attached hereto and incorporated by this reference.

Section 3. Effective Date. This ordinance shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title.

APPROVED by the City Council this ____ day of _____, 2012.

David Baker, Mayor

ATTEST/AUTHENTICATED:

Lynn Suskin, City Clerk

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY:

BY _____
Rod Kaseguma, City Attorney

FILED WITH THE CITY CLERK:
PASSED BY THE CITY COUNCIL:
PUBLISHED:
EFFECTIVE DATE:
ORDINANCE NO. _____

CHAPTER 1.10 PUBLIC RECORDS

Sections:

1.10.010	Authority and Purpose
1.10.020	Contract Information - Public Records Officer
1.10.030	Availability of Public Records
1.10.040	Processing of Public Records Requests – General
1.10.050	Processing of Public Records Requests – Electronic Records
1.10.060	Exemptions
1.10.070	Cost of Providing Copies of Public Records
1.10.080	Retention of Records

1.10.010 **Authority and Purpose.**

A. Public Records Act. The Public Records Act, Chapter 42.56 RCW ("Act") requires the City to make identifiable, non-exempt public records available for inspection and copying upon request, and to publish rules of procedures to inform the public how access to public records will be accomplished.

B. Purpose of Rules. The purpose of this Chapter is to provide full access to public records and establish procedures for responding to public records disclosure requests. This Chapter provides information to persons wishing to request access to public records of the City and establish processes for both requestors and City staff that are designed to assist members of the public in obtaining such access.

C. Full Access. The purpose of the Act is to provide the public full access to information concerning the conduct of government, while balancing individuals' privacy rights and the desirability of the efficient administration of government. In carrying out its responsibilities under the Act, the City will be guided by the provisions of the Act describing its purposes and interpretation.

1.10.020 **Contact Information – Public Records Officer.**

A. City Business Office. The City is a municipal corporation of the State of Washington. The City's Business Office is located at: 18120 68th Avenue NE, Kenmore Washington 98028.

B. Public Records Officer. The City Clerk and her or his designee shall be the Public Records Officer for the City. Any person wishing to inspect City public records, or seeking assistance in making such a request, should contact the Public Records Officer at the City:

City of Kenmore
Attention: Public Records Officer

18120 68th Avenue NE
P.O. Box 82607
Kenmore, WA 98028
Phone: 425-398-8900
Fax: 425-481-3236

C. Duties and designee. The Public Records Officer shall oversee compliance with the Act and this Chapter, but other City staff members may also assist in processing requests.

1.10.030 Availability of Public Records.

A. Business hours. Public records shall be available for inspection and copying during the City's normal business hours: **Monday through Friday, 9:00 a.m. to 5:00 p.m., excluding legal holidays.** City public records must be inspected at the address listed in Section 1.10.020, unless another location is designated for a particular request by the Public Records Officer.

B. Records index. Due to the small size of City staff, maintaining a central index of City's records is unduly burdensome, costly, and would interfere with City operations due to the number and complexity of records generated as a result of the wide range of the City's activities. However, the City maintains an index of ordinances and resolutions adopted by the City Council, which may be accessed on the City's website online or by requesting them from the Public Records Officer.

C. Organization of records. The City shall maintain its records in a reasonably organized manner. The City shall take reasonable actions to protect records from damage and disorganization. A requestor shall not take City public records from the City's office, or from a location designated by the Public Records Officer, without the permission of the Public Records Officer.

D. Records request - form. Any person wishing to inspect or copy public records of the City shall make the request in writing on a form approved by the Public Records Officer and City Attorney. The request may be submitted by way of letter, and shall include the following information:

1. Name of requestor;
2. Adequate contact information, including telephone number, a mailing address, e-mail address, etc.;
4. Identification of the public records adequate for the Public Records Officer to locate the records; and
5. The date and time of day of the request.

E. Notice of request. A requestor must provide the City with reasonable notice that the request being made is for public records. If a request is contained in a larger document unrelated to a public records request, the requestor should point out the public records request by

labeling the front page of the document as containing a public records request or otherwise calling the request to the attention of the Public Records Officer to facilitate timely response to the request.

F. Request for copies. If the requestor wishes to have copies of the records made instead of simply inspecting them, the requestor should so indicate and make arrangements to pay for copies of the records or to pay a deposit as required by the City.

G. Other form. The Public Records Officer may accept, but shall not be required to accept, requests for public records that contain the above information by telephone or in person. If the Public Records Officer accepts such a request, the officer shall confirm receipt of the information and the substance of the request in writing.

H. Purpose of request. A requestor need not state the purpose of the request. However, in an effort to clarify or prioritize a request and provide responsive documents, the Public Records Officer may inquire about the nature or scope of the request. If the request is for a list of individuals, the Public Records Officer may ask the requestor if they intend to use the records for a commercial purpose. The City is prohibited by statute from disclosing lists of individuals for commercial purposes. RCW 42.56.070(9).

1.10.040 Processing of Public Records Requests – General.

A. Providing access and assistance. This Chapter identifies how the City will provide full access to public records, protect records from damage or disorganization, prevent excessive interference with other essential functions of the City, provide fullest assistance to requestors, and provide the most timely possible action on public records requests. All assistance necessary to help requestors locate particular responsive records shall be provided by the Public Records Officer, provided that the giving of such assistance does not unreasonably disrupt the daily operations of the City.

B. Order of processing requests. The Public Records Officer will process requests in the order allowing the most requests to be processed in the most efficient manner.

C. Acknowledging and fulfilling requests. Within five (5) business days of receipt of the request, the Public Records Officer will do one or more of the following:

1. Provide the records available for inspection or copying;
2. Provide an internet address and link on the City's website to the specific records requested;
3. Acknowledge receipt of the request and provide a reasonable estimate of time the City will require to respond to the request; or
4. Deny the request.

D. Clarification. If the request is unclear or does not sufficiently identify the requested records, the City may ask the requestor to clarify what information the requestor is seeking. Such clarification may be requested and provided by telephone. The Public Records

Officer may revise the estimate of when records will be available. If the requestor fails to clarify the request, the City need not respond to it.

E. Failure to respond. If the City does not respond in writing within five (5) business days of receipt of the request for disclosure, the requestor should contact the Public Records Officer to determine the reason for the failure to respond.

F. Third party notice. If the requested records contain information that may affect the rights of others and may be exempt from disclosure, the Public Records Officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure. The notice to the affected persons shall include a copy of the request.

G. Redaction. Some records are exempt from disclosure, in whole or in part. If the City believes that a record is exempt from disclosure and should be withheld, the Public Records Officer will state the specific exemption and provide a brief explanation of why the record or a portion of the record is being withheld. If only a portion of a record is exempt from disclosure, but the remainder is not exempt, the Public Records Officer will redact the exempt portions, provide the non-exempt portions, and indicate to the requestor why portions of the record are being redacted.

H. Access to and preserving records. The City shall promptly provide space to inspect public records. No member of the public may remove public records from the viewing area or disassemble or alter any public record. The requestor shall indicate which records they wish to have copied using a mutually agreed upon non-permanent method of marking the desired record. If the requestor cannot access the records made available on the City's website, the City shall allow the requestor to view the records using a City computer designated for the public inspection of records.

I. Consequence of failure to review request. The requestor must claim or review the assembled records within thirty (30) days of the City notification to the requestor that the records are available for inspection or copying. The City will notify the requestor in writing of this requirement, and that the requestor must contact the City to make arrangements to claim or review the records. If the requestor or a representative of the requestor fails to claim or review the records within the thirty-day period or make other arrangements, the City may close the request and re-file the assembled records.

J. Copying request. After inspection is complete, the Public Records Officer shall make the requested copies or arrange for copying.

K. Installments. If the request is for a large number of public records, the Public Records Officer shall provide access for inspection and copying in installments, if the Public Records Officer reasonably determines that it would be practical to provide the records in that way. If, within thirty (30) days, the requestor fails to inspect the entire set of records or one or more of the installments, the Public Records Officer shall no longer be obligated to fulfill the balance of the request, and shall stop searching for the remaining records and close the request.

L. Completion of search. When the inspection of the requested records is complete and all requested copies are provided, the Public Records Officer shall indicate that the City has completed a diligent search for the requested records and made any located non-exempt records available for inspection.

M. Closing request. When the requestor either withdraws the request or fails to fulfill the requestor's obligations to inspect the records or pay the deposit or final payment for the requested copies, the Public Records Officer shall close the request and indicate to the requestor that the City has closed the request.

N. Later discovered records. If, after the City has informed the requestor that it has provided all available records, the City becomes aware of additional public records existing at the time of the request that are responsive to the request, it shall promptly inform the requestor of the additional public records and make them available for inspection on an expedited basis.

O. Consequence of disclosing record in error. The City, and its officials and employees are not liable for loss or damage based on release of a public record if the City official or employee acted in good faith in attempting to comply with the Act.

P. No duty to create records. The City is not obligated to create a new record to satisfy a records request; however, the City may, in its discretion, create such a new record to fulfill the request where it may be easier for the City to create a record responsive to the request than to collect and make available voluminous records that contain small pieces of information responsive to the request.

Q. No duty to supplement responses. The City is not obligated to hold current records requests open to respond to requests for City public records that may be created in the future. If a public record is created or comes into the possession of the City after a request is received by the City, it is not responsive to the request and will not be provided. A new request must be made to obtain later-created public records.

1.10.050 Processing of Public Records Requests – Electronic Records.

A. Processing electronic records. The process for requesting electronic public records is the same as for requesting paper public records.

B. Format. When a requestor requests records in an electronic format, the Public Records Officer shall provide the non-exempt records or portions of such records that are reasonably locatable in an electronic format that is used by the City and is generally commercially available, or in a format that is reasonably translatable from the format in which the City keeps the record. Redacted records may be produced in paper form.

1.10.060 Exemptions.

A. Exemptions listed for informational purposes. The Act provides that a number of categories of public records are exempt from public inspection and copying. In addition, the Act provides that certain public records may be exempt from disclosure if any other statute or

law exempts or prohibits disclosure. For informational purposes only, the City has set forth a list of exemptions below. This list is not inclusive or exhaustive of all exemptions. The City's failure to list an exemption below shall not affect the efficacy of any exemption. RCW 42.56.070(2). Requestors should be aware that the following exemptions may restrict the availability of inspection or copying of some public records, or portions thereof:

1. Personal information: Personal information in files maintained for employees and appointed or elected officials of the City to the extent disclosure would violate their right to privacy; and financial information including credit card numbers, debit card numbers, electronic check numbers, card expiration dates, and bank or other financial account numbers. RCW 42.56.230.
2. Employment and licensing: Applications for public employment and related materials submitted with respect to an applicant; examination information (test questions, scoring keys and other data used to administer a license, employment or academic examination); and personal contact information in files maintained for City employees or volunteers, and their dependents (address, telephone number, email address, social security number, emergency contacts and date of birth). RCW 42.56.250.
3. Real estate appraisals: Real estate appraisals made for or by the City relative to the acquisition or sale of property until the project is abandoned or sold, except disclosure may not be denied for more than three years after the appraisal. RCW 42.56.260.
4. Financial, commercial and proprietary information: Valuable formulae, designs, drawings, computer source code or object code, and research data obtained by the City within five years of the request for disclosure when disclosure would produce private gain and public loss. RCW 42.56.270.
5. Preliminary drafts, notes, recommendations and interagency memorandums: Records in which opinions are expressed or policies formulated or recommended, except if the opinion or policy is implemented or the record is publicly cited in connection with City action. RCW 42.56.280.
6. Work product: Records which are relevant to a controversy to which the City is a party but which records would not be available to another party under the rules of pretrial discovery for Superior Courts. RCW 42.56.290.
7. Public utilities information: Records filed with the utilities and transportation commission or attorney general under RCW 80.04.095; and records containing the residential addresses and residential telephone numbers of City customers. RCW 42.56.330.
8. Security: Records assembled or prepared to prevent, mitigate or respond to terrorist acts, the disclosure of which would have a substantial likelihood

of threatening public safety; specific and unique vulnerability assessments or emergency response plans and records containing information regarding the infrastructure and security of computer and telecommunications networks. RCW 42.56.420.

9. Attorney-client privileged information: Records reflecting communications transmitted in confidence between the City and its attorney for the purposes of legal advice. RCW 5.60.060(2)(a).
10. Medical records: Medical records in employee personnel files. Chapter 70.02 RCW.
11. Trade secrets: Records containing trade secrets of businesses the City regulates. Chapter 19.108 RCW.
12. Other statutes which exempt or prohibits disclosure of specific information or records. RCW 42.56.070(1).

1.10.070. Costs of Providing Copies of Public Records.

- A. Inspection.** There is no fee for inspecting public records.
- B. Standard copies.** The charge for standard (8-1/2" x 11" and 8-1/2" x 14") black-and-white photocopies shall be fifteen (15) cents per page.
- C. Non-Standard copies.** The City will periodically update and post a fee schedule for the copying of other non-standard public records or those in other formats or media.
- D. Off-site vendor copying.** If the City has to pay an off-site vendor for copying public records in non-standard formats, including but not limited to photographs, blueprints or tape recordings, the requestor shall pay the actual costs of such duplication. If the Public Records Officer determines it is reasonable to send a request to an off-site vendor for copying, the City may: (1) arrange for the requestor to pay the vendor directly for copies made; or (2) charge the requestor the actual amount charged by the off-site vendor to the City for the copies made.
- E. Deposit.** Before beginning to make the copies, the Public Records Officer may require a deposit of up to ten (10) percent of the estimated cost of copying all the public records selected by the requestor. The Public Records Officer may also require the payment of the remainder of the copying costs before providing all the records, or the payment of the costs of copying an installment before providing that installment. The City shall not charge sales tax when it makes copies of public records, unless required by law to do so.
- F. Facsimile/Mail.** The City shall also charge actual costs of long distance facsimile transmission and/or mailing, including postage and the cost of the shipping container.
- G. Certified copies.** Where the request is for a certified copy of public records, an additional charge of Five Dollars (\$5.00) may be applied to cover the additional expense and time required for certification.

H. Payment methods. The requestor shall pay for copies of public records by cash, check, or money order payable to the City.

1.10.080 Retention of records. The City shall retain its records in accordance with retention schedules approved by the State Local Records Committee. Public records may not be destroyed per retention schedule if a public records request or actual or anticipated litigation is pending.

**Chapter 1.10
PUBLIC RECORDS****Sections:**

- 1.10.005** Disclosure of public records.
- 1.10.010** Procedure for inspection or copying.
- 1.10.020** Request for public records – Review of decision – Grant or denial of public records.
- 1.10.030** Administrative rules.
- 1.10.040** Cost for inspection and copying.

1.10.005 Disclosure of public records.

Unless exempt from disclosure under this chapter, public records shall be available for inspection and copying in accordance with this chapter. The city shall make public records promptly available, and shall provide them on a partial or installment basis as they are assembled or are available for inspection or disclosure. The city shall not deny a public records request for identifiable public records solely on the basis that the request is overbroad. The city clerk is designated as the city's public records officer, who shall oversee the city's compliance with the public records requirements of this chapter and Chapter 42.17 RCW. The city clerk may delegate the duties and responsibilities of complying with a public records request to a deputy city clerk or other city employee. The city clerk shall make available for public inspection and copying in accordance with this chapter all public records filed with the city, including but not limited to ordinances, resolutions, general city policies, city council meeting minutes, contracts, agreements, deeds, and leases. [Ord. 06-0241 § 1.]

1.10.010 Procedure for inspection or copying.

Persons wishing to inspect or copy city records shall file a written request for records form with the city clerk. All assistance necessary to help the requestor locate the particular record shall be provided by the city clerk or the person delegated by the city clerk to provide such assistance; provided, that the giving of such assistance does not unreasonably disrupt the duties and responsibilities of the city clerk or the assigned employee. [Ord. 06-0241 § 2; Ord. 98-0036 § 1.]

1.10.020 Request for public records – Review of decision – Grant or denial of public records.

A. Upon receiving a completed written request for records form, the city clerk shall determine whether the record requested is exempt by law from inspection and copying in whole or in part. The city clerk shall consult with the city manager in making such determination. Within five business days of the date of receipt by the city of the written request for a record, the city clerk shall:

1. Provide the record; or
2. Acknowledge that the city has received the request and provide a reasonable estimate of the time the city will require to respond to the request; or

3. Deny the public record request in whole or in part.

Additional time to respond to a request under subsection (A)(2) of this section may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt.

If a public records request is unclear, the city clerk may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the city need not respond to it.

B. If the city clerk determines that the document is exempt in part but can be made available after deletion of exempt portions, the request shall be granted; provided, that such exempt portions shall first be deleted. If the city clerk determines to deny the request, in whole or in part, a written statement of the specific reasons for the denial shall be provided to the requestor, including a specific exemption as provided by law.

C. A decision by the city clerk denying inspection shall be reviewed by the city manager. Such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final city action for the purposes of judicial review. The requestor shall be notified by mail of the decision to grant or deny the request. [Ord. 98-0036 § 2.]

1.10.030 Administrative rules.

The city manager, upon recommendation of the city clerk, may issue rules for the implementation of this chapter. [Ord. 98-0036 § 3.]

1.10.040 Cost for inspection and copying.

No fee shall be charged for inspecting public records or locating public records and making them available for copying. There shall be a charge for providing copies of public records as set forth in the current city fee schedule adopted by city council resolution. The city may require a deposit in an amount not to exceed 10 percent of the estimated cost of providing copies. If the city makes public records available on a partial or installment basis, the city may charge for each part of the partial disclosure or installment. If an installment of a records request is not claimed or reviewed, the city need not fulfill the balance of the request. In addition, whenever the actual cost of reproducing a public record exceeds the customary reproduction cost identified in the current fee schedule, the city manager shall have the authority to review and approve such costs, and to require reimbursement to the city. [Ord. 06-0241 § 3; Ord. 98-0036 § 4.]

This page of the Kenmore Municipal Code is current through Ordinance 11-0330, and legislation passed through September 12, 2011.

Disclaimer: The City Clerk's Office has the official version of the Kenmore Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

City Website: <http://www.kenmorewa.gov/>
City Telephone: (425) 398-8900
Code Publishing Company
eLibrary

CITY OF KENMORE, WASHINGTON			
AGENDA BILL SUMMARY			
AGENDA TITLE			MEETING DATE
Review Ordinance No. 12-0336, An Ordinance of the City of Kenmore, Washington, Granting a Non-Exclusive Cable Franchise with Comcast of Washington IV, Inc., and Comcast of CA/CO/Washington I, Inc. and Fixing an Effective Date			26 March 2012
DEPARTMENT	DIRECTOR	CONTACT PERSON	PHONE
Executive	Frederick Stouder	Nancy Ousley	425-398-8900
COST OF PROPOSAL: Staff and City Attorney Time; Consortium Costs to develop agreement template =\$13,706		ACCOUNT NUMBER: 01.19.5507	
AMOUNT BUDGETED: N/A		NAME AND FUND #: General Fund	
ATTACHMENT(S) TO AGENDA PACKET ITEM: Ordinance No. 12-336 with Exhibits 2) Comparison Chart of Proposed Franchise Agreement, Original Franchise and Verizon(now Frontier) Franchise Agreement Provisions			
SUMMARY STATEMENT: This Ordinance grants a non-exclusive cable franchise for Comcast, which succeeds the existing agreement. When the City of Kenmore incorporated in 1998, through Ordinance No. 98-0014 the Council adopted King County's cable franchise agreement with TCI, which was originally adopted in 1996. The franchise agreement has been extended by Ordinance seven times since 1998. The proposed agreement was negotiated through a Consortium of eleven cities and Snohomish County, which was formed in 2008; once the template was completed in 2010, individual cities negotiated directly with Comcast on specific terms of the agreement. This agreement has a seven year term with a two year extension available, provides customer service standards, and lists public facilities that are to be provided cable service at no cost. The Agreement also provides for reimbursement of City administrative costs to process the Agreement. State law requires that Ordinances adopting franchise agreements be heard and adopted at subsequent meetings. Adoption of the proposed Ordinance is on the April 9, 2012 Council meeting agenda. Kathy Nelson Putt, Director of Franchising and Government Affairs for Comcast North Puget Sound, will attend the March 26 Council meeting.			
CONSISTENT WITH OR COMPARISON TO PAST COUNCIL POLICIES, ORDINANCES, DIRECTION: Council approved Contract No. 08-C731 and Amendment #1 establishing the Consortium; and approved the following Ordinances to extend the existing franchise agreement: No. 05-0232; No. 09-0297; No.09-0303; No. 10-0308; No. 10-0316; No. 11-0321; No.11-0325			
RECOMMENDED CITY COUNCIL ACTION/SUGGESTED MOTION: Review Ordinance No. 12-0336 for future action.			
REVIEWED BY FINANCE DIRECTOR: 		REVIEWED BY CITY ATTORNEY:	APPROVED BY CITY MANAGER: 
TODAY'S DATE: 14 March 2012	REVISION DATE(S):		FILE NAME & PATH (HYPERLINK): i:\acm\acm nko\agenda bill drafts\ab 26 march 2012 comcast ordinance.doc

XIID. Review Ordinance No. 12-0336, of the City of Kenmore, Washington, Granting a Non-Exclusive Cable Franchise with Comcast of Washington IV, Inc., and Comcast of

CITY OF KENMORE
WASHINGTON
ORDINANCE NO. 12- 0336

AN ORDINANCE OF THE CITY OF KENMORE,
WASHINGTON, GRANTING A NONEXCLUSIVE CABLE
FRANCHISE WITH COMCAST OF WASHINGTON IV, INC.,
AND COMCAST OF CA/CO/WASHINGTON I, INC., AND
FIXING AN EFFECTIVE DATE.

WHEREAS, the City of Kenmore (City) is authorized to grant and renew franchises for the installation, operation and maintenance of cable television systems within the City; and

WHEREAS, in 1998 the City Council adopted Ordinance No. 98-0014 approving and granting a cable franchise agreement with Comcast of California/Colorado/Texas/Washington, Inc. and Comcast of Washington IV, Inc., formerly known as Tele-View Systems Inc. and TCI Cablevision of Washington, Inc., and Comcast of California/Colorado/Texas/Washington, Inc., for a period of seven years; and

WHEREAS, on July, 25, 2005 the City Council adopted Ordinance No. 05-0232, which granted a four year extension of the franchise to Comcast, through August 31, 2009; and

WHEREAS, the City entered into an Interlocal Agreement with nine other jurisdictions in October, 2008 to establish a consortium for the purpose of negotiating a franchise agreement template with Comcast; and

WHEREAS, on June 15, 2009 the City Council adopted Ordinance 09-0297, which granted an extension of the franchise to Comcast through December 31, 2009 in order to allow negotiations on a new franchise agreement template to continue; and

WHEREAS, on December 7, 2009 the City Council adopted Ordinance No. 09-0303 which granted an extension of the franchise to Comcast through May 31, 2010 to allow completion of negotiations on a new franchise agreement template; and

WHEREAS, Comcast and the Cable Franchise Consortium engaged in negotiations in accordance with the provisions of 47 U.S.C. § 546 and the franchise agreement template was completed in March, 2010; and

WHEREAS, on May 24, 2010 the City Council adopted Ordinance No. 10-0308, which granted an extension of the franchise to Comcast through December 31, 2010 to allow completion of negotiations on a new franchise agreement; and

WHEREAS, on November 22, 2010 the City Council adopted Ordinance No. 10-0316, which granted an extension of the franchise to Comcast through March 31, 2011 to allow completion of negotiations on a new franchise agreement; and

WHEREAS, the City Council adopted Ordinance No. 11-0321, which granted an extension of the franchise to Comcast through December 31, 2011 to allow completion of negotiations on a new franchise agreement; and

WHEREAS, the City Council adopted Ordinance No. 11-0325, which granted an extension of the franchise to Comcast through June 30, 2012 to allow completion of negotiations on a new franchise agreement; and

WHEREAS, the City and Comcast have concluded negotiations on a franchise agreement specific to the City; and

WHEREAS, pursuant to RCW 35A.47.040, the proposed franchise agreement was introduced to the City Council at its regular meeting on March 19, 2012; and

WHEREAS, Comcast of WA IV, INC. and Comcast of CA/CO/WA I. Inc. desires to accept the proposed franchise in accordance with the requirements of this Ordinance and agrees to abide by the terms and conditions of the proposed franchise; and

WHEREAS, the City Council finds that it would serve the public interest to grant a new franchise agreement to Comcast of WA IV, INC. and Comcast of CA/CO/WA I. Inc. on the terms and conditions set forth in the proposed franchise;

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

Section 1. Grant of Franchise. A non-exclusive franchise for the provision of cable television services within the City of Kenmore is granted to Comcast of WA IV, INC. and Comcast of CA/CO/WA I. Inc. on the terms and conditions set forth in Exhibit 1, attached hereto and incorporated herein by this reference.

Section 2. Acceptance of Franchise. The franchise granted by this Ordinance shall be accepted by to Comcast of WA IV, INC. and Comcast of CA/CO/WA I. Inc., and said franchise shall be deemed accepted only when a duly authorized representative of Comcast of WA IV, INC. and Comcast of CA/CO/WA I. Inc. has signed Exhibit 2, Acceptance of Franchise, and delivered to the City Clerk on or before _____ 2012 one (1) signed copy of this Ordinance together with one (1) signed copy of the franchise, Exhibit 1.

Section 3. Franchise Effective Date. Provided the franchise granted by this Ordinance has been accepted as set forth in Section 2 above, the franchise shall be effective as of 12:01 a.m. on _____ 2012.

Section 4. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance.

Section 5. Ordinance Date of Ordinance. This ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title; provided that this Ordinance shall become null and void, and no franchise shall be granted hereby, unless the requirements of Section 2 above have been fulfilled.

APPROVED by the City Council this ____ day of _____, 2012.

David Baker, Mayor

ATTEST/AUTHENTICATED:

Lynn Suskin, City Clerk

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY:

BY _____
Rod Kaseguma, City Attorney

FILED WITH THE CITY CLERK:
PASSED BY THE CITY COUNCIL:
PUBLISHED:
EFFECTIVE DATE:
ORDINANCE NO. _____

Exhibit 1

**Franchise Between Kenmore, Washington and
Comcast of WA IV, Inc. and Comcast of CA/CO/WA I, Inc.**

Exhibit 2:

Acceptance of Franchise between City of Kenmore Washington and
Comcast of WA IV, Inc. and Comcast of CA/CO/WA I, Inc.

ACCEPTANCE OF FRANCHISE

The undersigned, _____ is duly authorized to accept this Franchise on behalf of Comcast of WA IV, Inc. and Comcast of CA/CO/WA I, Inc., and by and through his/her signature below, Comcast of WA IV, Inc. and Comcast of CA/CO/WA I, Inc. hereby accepts the franchise granted by this Ordinance on the terms and conditions set forth herein.

By: _____
Its: _____
Dated: _____

CITY OF KENMORE, WASHINGTON
COMPARISON TABLE
PROPOSED COMCAST
AND EXISTING COMCAST (TCI) AND FRONTIER FRANCHISE AGREEMENTS

Proposed Comcast Agreement	Original TCI/Comcast Agreement	Verizon – Transfer to Frontier Ordinance No. 08-0284
Term of Franchise (2.9, p. 7) 7 years from the Effective Date; May be extended for an additional 2 years, subject to written agreement of both parties.	Grant of Authority (2, p. 4) Original adoption by King County in 1996; Adopted by City of Kenmore on August 31, 1998. Numerous extensions through June 2012	Term (2.3): 12 years; Effective August 15, 2008
Customer Service (6, p. 18, Exhibit) <i>Accessibility (4)</i> - Customer service shall be available able at a service center at least 9 consecutive hours on Monday through Friday, ending no earlier than 6:00 p.m. and at least 4 consecutive hours on Saturdays, ending no earlier than 1:00 p.m. - Service Centers to provide the following services: bill payment, equipment return, processing of change of service requests, and response to other customer inquiries and requests. - Free exchanges of faulty converters at the customer's address at a convenient time that is mutually agreed upon. - Maintain local telephone access lines or a toll free telephone number that shall be available 24 hours a day, 7 days a week for service/repair request and billing inquiries. - Dispatchers and technicians on call 24 hours a day, 7 days a week, including legal holidays. - Trained customer service representatives available to respond to telephone inquiries during Normal Business Hours. For normal operating conditions, telephone answer time should not exceed 30 seconds when the connection is made. Transfer time shall not exceed 30 seconds. Meet standard 90 percent of the time measured on calendar quarter. - After Normal Business Hours, telephone lines may be answered by a service or an automated response system. Calls will be responded to on the next business day. - The total number of calls receiving busy signals shall not exceed 3% of the total telephone calls. Meet standard 90% of the time measured on quarterly calendar. <i>Installation (5A)</i> - Standard residential installations requested by customers shall be completed within 7 business days after the order is place. - Underground cable drops from the curb to the home shall be buried at a depth of no less than 12 inches, and within a reasonable period of time from the initial installation. <i>Service Appointments (5B)</i> - Customers requesting installation of cable service or service to an existing installation may choose a 4-hour block of time for the service appointment between 8:00 a.m. and 6:00 p.m. Cannot cancel appointment window after close of business of day before appointment. Contact customer if running late and cannot keep appointment.	Customer Service (15, p. 34) - The Franchisee shall meet or exceed any customer service standards adopted by the Federal Communications Commission, and, to the extent the same are stricter or address different matters, customer service standards set forth in the Cable Ordinance and Cable Rules. <i>Customer Service Monitoring (p. 45)</i> - The Franchisee shall install such devices as are required to enable it to determine whether it is complying with all telephone answering standards required by applicable customer service regulations. <i>Local Office (p. 46)</i> - Maintain a minimum of 2 customer service centers conveniently located to unincorporated King County subscribers. These centers will provide subscribers the opportunity for the receipt and pickup of subscriber equipment and for the receipt of subscriber payments and complaints. - Franchisee shall install telephones and other equipment so that customer complaints and service requests can be received by Franchisee on a 24-hour basis on a local, toll-free telephone number.	Customer Service (8, Exhibit D): <i>Telephone availability (2):</i> - Standards begin 6 months after initial service date; in first 6 months, use best efforts to comply. - Have a toll free number. - Trained and qualified representatives available 24 hours, 7 days for service interruption reports, 45 hours per week for other types or reports and requests. - Telephone number listed in directory of local telephone company or companies serving area. - May use automated response unit or voice response unit to distribute calls. - May provide foreign language routing option. After first tier menu is run 3 times, forward to queue for live representative. - Answer within 30 seconds for normal operating conditions. Meet this standard 90% on quarterly calendar basis. - For normal operating conditions, receive busy signal no more than 3% of time in calendar quarter. - If requested by City, provide once a quarter a report regarding calls. <i>Installations and Service Appointments (3):</i> - Standard installation within 7 business days after order placed if ONT already installed on customer's premises, and within 14 business days if ONT not installed. Meet standard 95% of time measured on calendar quarter. - Provide report upon request once a quarter. - Offer "appointment" window alternatives for arrival of 4 hours scheduled time block during daylight available weekday hours. If subscriber agrees, may offer arrival times other than 4 hour time blocks. Cannot cancel appointment window after close of business of day before appointment. - Contact customer if running late and cannot keep appointment. - Provide for pickup or drop off of equipment free of charge through visit to residence, mailer, or business office in area. If mobility-limited customer, arrange for pickup or replacement of converters and other equipment. <i>Service interruption and outages (4):</i> - Notify city promptly of significant outage. May schedule significant outage for more than 4 hours only after city and subscriber given 15 days prior notice. - May perform modifications, repairs and upgrades between 12:01 a.m. and 6 a.m. which may interrupt service; notice of these provided to subscribers upon installation and in annual subscriber notice. - Representatives available for service interruptions 24 hours, 7 days. Under

Outages and Service Interruptions (5C) • If there is a system outage (loss of reception on all channels) resulting from Grantee equipment failure affecting 5 or more customers, the Grantee shall respond in accordance with its outage response procedures, and in no event more than 2 hours after the third Customer call is received. • Grantee shall use its best efforts to correct service interruptions resulting from Grantee's equipment failure by the end of the next calendar day, but in no event longer than 48 hours. TV Reception (5D) • Scheduled interruptions shall be preceded by notice and shall occur during periods of minimum use of the system, preferably between midnight and 6 a.m. • Grantee shall respond and repair poor signal quality no later than the day following the customer call, provided that the customer is available and the repair can be made within the allotted time. Problem Resolution (5E) • A Customer Service Representative shall have the authority to provide credit, waive fees, schedule service appointments and change billing cycles, where appropriate. • Any difficulties that cannot be resolved by the Customer Service Representative shall be referred to the appropriate supervisor who shall contact the customer within 24 hours and resolve the problem within 48 hours or an agreeable timeframe with the customer. Billing, Credits, and Refunds (5F) • Grantee shall provide a clear and concise bill every month and shall allow at least a reasonable number of days from the beginning date of the applicable service period for payment of a customer's bill for that period. • Grantee shall issue refund checks no later than the customer's next billing cycle following resolution of the request or within 30 days, or the return of the equipment supplied by the Grantee if service is terminated. • Credits for service will be issued no later than the customer's next billing cycle following the determination that a credit is warranted. • No fee or charge for service calls to a customer's premises to perform any repair or maintenance work related to Grantee's equipment necessary to receive cable service. • City may request copy of rate card with all applicable rates and charges related to cable service. • City may request copy of any billing insert related to rates or customer service. Notice/Work (5G) • Grantee shall give reasonable notice to property owners or legal tenants prior to entering private premises, unless in an emergency involving public safety or service interruption to a large number of customers. Services for Customers with Disabilities (6) • Grantee shall, at no charge, deliver and pick up converters at the customer's home. • Grantee shall make available TDD/TTY service with trained operators at no charge. • Grantee shall provide free use of a remote control unit to mobility-impaired Customers.		normal operating conditions, respond to call from subscriber within 24 hours, including weekends. Begin corrective actions for non-service interruption problems on next business day. Complete service calls within 72 hours, not including weekends. Meet standard 90% of time, measured quarterly. Upon request, provide report. • Provide credit upon subscriber request when all channels out of service for 4 consecutive hours or more. Credit is proportionate amount of bill. To qualify, subscriber must promptly report problem and allow Verizon to verify problem. • Under normal operating conditions, if significant outage affects all video programming service for more than 24 consecutive hours, give automatic credit to subscribers for proportionate amount of bill. • Respond to inquiries from City regarding cable services within 4 hours and commence repairs with 24 hours under normal operating conditions. Customer complaints referred by City (5): • Notify city of matters that need more than 5 days to resolve, and attempt to resolve within 10 business days. Billing (6): • Itemize bills by type of cable services and equipment charges. • May itemize separately franchise fees, taxes and governmental imposed fees. • Payment due date is 20 days after statements mailed. • Due date for delinquent accounts may be date of receipt. • Subscriber who disputes bill shall have option of withholding disputed amount without disconnect or late fee, if subscriber pays undisputed charges, notifies Verizon of dispute within 5 days before due date, and cooperates in determining accuracy of charges in dispute. Initiate investigation within 5 business days, and not unreasonably delay final resolution. • Allow subscribers to pay by check or automatic payment option. • May in future allow payment by major credit card on preauthorized basis. • City may request Verizon to omit city name, address and telephone number from bills. Deposits, refunds and credits (7): • May require refundable deposits from subscribers with poor credit or payment history, who refuse credit history information or rent equipment. Deposit maximum is 6 times average monthly charge, or cost of equipment. Rates, fees and charges (8): • Mail notice of delinquency and impending termination prior to termination. • Restore service terminated in error without charge within 24 hours. Communications with subscribers (10): • Employees having contact with subscribers must wear picture identification card, which has photograph, name and ID number. • Send annual notice to subscribers informing them that complaints or inquiries not satisfactorily handled may be referred to City. Provide reasonable notice to subscribers and city of pricing change or additional changes, including channel line-up changes. Notice is a minimum of 30 days. • Make available a parental control or lockout device. Availability of device shall be given to subscribers at initial subscription and periodically thereafter.
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Customer Information (7) • Customer may request a list of items outlined in section 7A. • Customers will be notified of any changes in rates, programming services or channel positions in writing at least 30 days in advance. Satisfaction Guarantee (10) • The Grantee currently offers a customer satisfaction guarantee to every customer that requests installation of cable service or who adds any additional programming service to the customer's cable subscription. Complaints to the Grantee (11) • Grantee shall have written procedures for receiving, acting upon, and resolving complaints without intervention from the City. • Grantee shall notify the customer of the results of its investigation and its proposed action or credit.		
Complimentary Cable Service (4.4, p. 15) • Free—one service outlet for Basic Service to public schools, police and fire stations, public library, government offices and other governmental administration offices identified in Exhibit B, provided that they are located within 125 aerial feet of its cable system.	Full Cable Service to Certain Facilities (p. 44) • Upon the request of the County, the Franchisee shall provide full basic and satellite tier Cable Service, and all open and closed PEG channels activated on the system to the locations designated below. Franchisee shall provide equivalent service if Franchisee discontinues such tiers of service in their current form. • These services shall be free of charge to each of the following locations: all locations listed in Attachment I; each public school and public school administrative facility located in unincorporated King County; each King County Library System facility; each fire station; each Public Access Center; each County office and agency; each County-owned and County-leased facility. • To the extent any drop to facilities other than public schools and public libraries exceeds 75 feet underground or 150 feet aerial, Franchisee may request compensation for its time and materials for installations in excess of those distances.	Complimentary Service--Public Buildings (3.3): • Free—one service outlet for Basic Service to public schools, police and fire stations, public library, government offices and other governmental administration offices designated by city, if also required by other cable operators. • Additional outlets will be provided to new Kenmore City Hall. (See Exhibit B) • If necessary to extend trunk or feeder line more than 150' , pay for extension or release free service. Can recover cost of installing more than one outlet or concealed wire inside, or outlet more than 150' from drop cable.
Educational and Government (EG) Access (11, p. 29) • Grantee shall provide one Governmental Access Channel for the City's use and one Educational Access Channel for the use of the local school district(s). • Such channels shall be made available within 120 days of the request, unless additional time is required to facilitate such change. Support for Access Capital Costs (11.6, p. 30) • EG Fee may be used for access related capital expenditures, such as production equipment or studio. • Grantee shall commence collection of an EG Fee from subscribers an amount no greater than 25 cents per subscriber per month. • City may change amount of fee at any time.	Channels, Facilities, Equipment and Services for Public, Educational and Governmental Use (17, p. 47) • The Franchisee shall activate and make available free of charge to the County public, educational and governmental channels • The Franchisee shall provide within the rebuilt areas a minimum of 10 and a maximum of 25 video channels for Public, Educations, and Governmental programming on the Subscriber Network throughout the remaining term of this Franchise. No fewer than 10 and no more than 13 of those channels may be analog format channels. There shall be no more than 13 PEG channels until the Subscriber Network begins to carry digitally transmitted video channels. • The County will initially allow the first 10 available channels as follows: 2 - Public, 6 - Educational and 2 - Governmental. • Public Access: Franchisee shall provide an additional channel whenever the channels set aside by the County for public access programming are programmed with qualified programming at least 80 percent of the cumulative time between the test hours of 9 a.m. to 11 p.m., Monday through Friday, over a consecutive 16 week period. • Educational Access: Franchisee shall provide an additional channel whenever the channels set aside by the County for education access programming are programmed with qualified programming at least 80 percent of the cumulative time of 60 hours per week. • Governmental Access: Franchisee shall provide an additional channel whenever the channels set aside by the County for public access programming are programmed with qualified programming at least 80 percent of the cumulative time of 60 hours per week over a consecutive 16	Education and Government (EG) Channels (6.1.1): • Reserve, without charge, one educational channel and one government channel in the Basic Service Tier, but only if other cable operators also provide similar free channels. • To activate, city must have planned program schedule of at least 4 hours per day, not including repeat programming. • May change channel assignments in sole discretion. • May access site and equipment. • Install equipment to transmit signal within 180 days of notice. EG Grant (6.2.1): • If other cable operators provide a grant, match grant of City (up to \$1.00, per subscriber per month). • City may change amount of grant no more than once per year. • City must use money for EG access equipment. • City indemnifies Verizon from damages and claims arising from defamation and failure to comply with laws. • City shall establish rules for use of EG facilities. EG Grant Cost Recovery (6.4): • May recover costs of EG grant from subscribers, to extent allowed by federal law.

hour week period.		
Franchise Fees (7.1, p. 18) - Franchise fees are an amount equal to 5 percent of Gross Revenues derived from the operation of the Cable System to provide Cable Service in the Franchise Area. - Pay fee 45 days after the end of the calendar quarter. Submit quarterly report showing the basis for the computation of fee calculations. - Statute of limitations for fee recovery is 6 years. - Late payment interest charge is 12% or maximum under RCW 19.52.020. - City may still impose other types of taxes, fees or assessments.	Franchise Fees (5, p. 13) - Franchise fee is 5% of gross revenue. - Pay fee in accordance with the schedule set forth in the Cable Ordinance. - Late payment interest is charged at a rate equal to the maximum rate permitted under Washington State law. - City may still impose other types of taxes, fees or assessments.	Franchise Fees (7, 1.16, 7.9): - Franchise fee is 5% of gross revenue. Gross revenue is in accordance with generally accepted accounting principles. Gross revenue includes long list of items, which long list is applicable if all other cable operators include the same in their gross revenue. - Pay fee 45 days after end of calendar quarter. Submit annual summary of fee calculations 45 days after end of calendar year. - Statute of limitations for fee recovery is 4 years. - Late payment interest charge is 12% or maximum under RCW 19.52.020. - City may still impose other types of taxes, fees or assessments. - Fee only applicable to cable services (clarifies how to treat Verizon, which provides both cable and non-cable bundled services).
Incidental Costs (15.4, p. 34) - In lieu of the franchise grant, the grantee shall pay the City the reasonable incidental costs of processing the Franchisee, which amount shall be determined and agreed upon prior to adoption of this Franchise. - City may use the incidental costs for any lawful purpose.	Capital Grant for Access Equipment and Facilities (pg. 54): - The Franchisee shall provide the County capital grants as specified below to be used by the County in its sole discretion for cable related and institutional network related purposes. These grants are not franchisee fees and Franchisee waives any claim otherwise. - Beginning on the date of the renewal of the Franchise, the Franchisee shall provide the County a series of cash or cash equivalent grants in equal \$50,000 amounts over a five year period, totaling \$250,000. - In addition, beginning on the date of the renewal, the Franchisee shall provide the County a grant of \$250,000 in the form of work order credits to the County. These works credits will be applied by the County toward engineering, design and consulting services provided by the Franchisee to the County for cable-related facilities, primarily the Institutional Network and the County's related Wide Area Network. - Over the terms of the Franchise, commencing on March 1, 1996 or the effective date of the Franchise, whichever date is later, the Franchisee shall provide the County a payment equal to \$1.00 per month multiplied by the number of cable subscribers served by the Franchisee pursuant to this Franchise.	Franchise Grant (14.1): Pay to City \$7152.98 for administration of franchise, which grant may be used for any lawful purpose. City agrees to require similar obligation from cable operators upon future grant or renewal of franchise agreement. May recover amount from subscribers if allowed by federal law.

FRANCHISE

Between

KENMORE, WASHINGTON

And

**COMCAST OF WA IV, INC. AND COMCAST OF
CA/CO/WA I, INC.**

November 1, 2011

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Franchise

This Cable Franchise (hereinafter, the "Franchise") is entered into by and between the City of Kenmore (hereinafter, "City") and Comcast of WA IV, Inc. and Comcast of CA/CO/WA I, Inc., two corporations duly organized under the applicable laws of the State of Washington (hereinafter, "Grantee").

WHEREAS, the City wishes to grant Grantee a nonexclusive franchise to construct, install, maintain, extend and operate a cable communications system in the Franchise Area as designated in this Franchise;

WHEREAS, the City is a "franchising authority" in accordance with Title VI of the Cable Act (*see* 47 U.S.C. §522(10)) and Washington State law;

WHEREAS, the Grantee has installed a Hybrid Fiber Coax Cable System that occupies the Rights-of-Way within the Franchise Area, and Grantee desires to use the Hybrid Fiber Coax Cable System to provide Cable Services (as hereinafter defined) in the Franchise Area;

WHEREAS, the City has identified the future cable-related needs and interests of the City, has considered the financial, technical and legal qualifications of Grantee, and has determined that Grantee's Cable System is adequate, in a full public proceeding affording due process to all parties;

WHEREAS, the City desires to protect and manage the Rights-of-Way, require standards of customer service, receive financial compensation for Grantee's use of the Rights-of-Way as provided by federal law, obtain complimentary Cable Services for public buildings, obtain use of educational and governmental channels, establish certain reporting and record access requirements, and provide for the future cable-related needs of its residents;

WHEREAS, the City has determined that the renewal of a nonexclusive cable franchise to Grantee is consistent with the public interest; and

WHEREAS, the City and Grantee have reached agreement on the terms and conditions set forth herein and the parties have agreed to be bound by those terms and conditions.

NOW, THEREFORE, in consideration of the City's renewal of a franchise to Grantee, Grantee's promise to provide Cable Service to residents of the Franchise Area pursuant to and consistent with the Cable Act (as hereinafter defined), the promises and undertakings herein, and other good and valuable consideration, the receipt and the adequacy of which are hereby acknowledged,

THE SIGNATORIES DO HEREBY AGREE AS FOLLOWS:

The City, having determined that the financial, legal, and technical ability of Grantee is reasonably sufficient to provide the services, facilities, and equipment necessary to meet the future cable-related needs of the community, desires to enter into this Franchise with Grantee for

the construction, operation and maintenance of a Cable System on the terms and conditions set forth herein.

SECTION 1. Definition of Terms

For the purpose of this Franchise, capitalized terms, phrases, words, and abbreviations shall have the meanings ascribed to them herein. The word "shall" is always mandatory and not merely directory.

1.1 "Access" means the availability for noncommercial use by various educational and governmental agencies, institutions and organizations in the community, including the City and its designees, of Channels on the Cable System designated for such use as permitted under applicable law:

(A) "Educational Access" means Access where Schools are the primary users having editorial control over programming.

(B) "Governmental Access" means Access where governmental institutions or their designees are the primary users having editorial control over programming.

(C) "Educational and Governmental Access" or "EG Access" means the availability for noncommercial use of a Channel or Channels on the Cable System by various governmental and educational agencies including the City and its designees.

1.2 "Access Channel" means any Channel, or portion thereof, designated for noncommercial Access purposes or otherwise made available to facilitate or transport Access programming.

1.3 "Affiliate" means, when used in connection with Grantee, any Person who owns or controls, is owned by or controlled by, or is under common ownership or control with Grantee.

1.4 "Bad Debt" means amounts lawfully owed by a Subscriber and accrued as revenue on the books of Grantee, but not collected after reasonable efforts by Grantee.

1.5 "Basic Service" means, at a minimum, all signals of domestic television broadcast stations provided to any Subscriber (except a signal secondarily transmitted by satellite carrier beyond the local Franchise Area of such station, regardless of how such signal is ultimately received by the Cable System), any educational and governmental programming required by the Franchise to be carried on the Basic Service Tier, and any additional Video Programming signals and service voluntarily added to the Basic Service Tier by the Cable Operator.

1.6 "Cable Act" means the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, and as amended by the Telecommunications Act of 1996, and any amendments thereto, 47 U.S.C. § 521 *et. seq.*

1.7 "Cable Operator" means any Person or group of Persons, including Grantee, who provide Cable Service over a Cable System and directly or through one or more Affiliates own a significant interest in such Cable System or who otherwise Control or are responsible for, through any arrangement, the management and operation of such a Cable System.

1.8 "Cable Service(s)" means (1) the one-way transmission to Subscribers of (a) video programming, or (b) other programming service, and (2) Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service, 47 U.S.C. § 522(6).

1.9 "Cable System" means Grantee's facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service which includes video programming and that is provided to multiple Subscribers within a community, but such term does not include (1) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (2) a facility that serves Subscribers without using any public right-of-way; (3) a facility of a common carrier that is subject, in whole or in part, to the provisions of Title II of the federal Communications Act (47 U.S.C. § 201 *et seq.*), except that such facility shall be considered a cable system (other than for purposes of 47 U.S.C. § 541(c) to the extent such facility is used in the transmission of Video Programming directly to Subscribers, unless the extent of such use is solely to provide interactive on-demand services; (4) an open video system that complies with § 653 of the Cable Act; or (5) any facilities of any electric utility used solely for operating its electric utility systems, 47 U.S.C. Sec. 522 (7). When used herein, the term "Cable System" shall mean Grantee's Cable System in the Franchise Area.

1.10 "Channel" means a portion of the electromagnetic frequency spectrum which is used in a Cable System and which is capable of delivering a television channel, whether delivered in an analog or digital format.

1.11 "City" means the City of Kenmore, Washington.

1.12 "Control" means the ability to exercise *de facto* or *de jure* control over day-to-day policies and operations or the management of Grantee's affairs.

1.13 "Dwelling Units" means any building or portion thereof that has independent living facilities, including provisions for cooking, sanitation and sleeping, and that is designed for residential occupancy.

1.14 "FCC" means the Federal Communications Commission or successor governmental entity thereto.

1.15 "Franchise" means this document and any amendments or modifications hereto.

1.16 "Franchise Area" means the area within the present legal boundaries of the City as of the Effective Date, and shall also include any additions thereto, by annexation or other legal means.

1.17 "Gross Revenues" means any and all revenue derived by Grantee or its Affiliates from the operation of the Cable System in the Franchise Area to provide Cable Services, calculated in accordance with Generally Accepted Accounting Principles ("GAAP").

1.17.1 Gross revenues shall include but shall not be limited to the following:

- (a) fees charged for Basic Service;
- (b) fees charged to Subscribers for any service tier other than Basic Service;
- (c) fees charged for premium Channel(s), e.g. HBO, Cinemax, or Showtime;
- (d) fees charged to Subscribers for any optional, per-Channel, or per-program services;
- (e) charges for installation, additional outlets, relocation, disconnection, reconnection, and change-in-service fees for Cable Service;
- (f) fees for service calls;
- (g) rental of Customer equipment, including converters (e.g. set top boxes, high definition converters, and digital video recorders) and remote control devices;
- (h) advertising sales revenue, minus commissions due to advertising agencies that arrange for the advertising buy, as calculated under GAAP;
- (i) revenue from leased Access Channel(s);
- (j) revenues received in connection with the carriage of home shopping Channels;
- (k) fees for any and all music services that are deemed to be a Cable Service over a Cable System;
- (l) revenue from the sale of program guides;
- (m) late payment fees;
- (n) franchise fees.

1.17.2 Gross Revenues shall not include:

- (a) Sales of capital assets or sales of surplus equipment;
- (b) Program launch fees;

(c) Any fees or charges collected from Subscribers or other third parties for EG Grant.

(d) Bad Debt; provided, however, that all or part of any such Bad Debt that is written off but subsequently collected shall be included in Gross Revenues in the period collected.

(e) Any taxes on services furnished by the Grantee which are imposed directly on any Subscriber or user by the State, the City or other governmental unit and which are collected by the Grantee on behalf of said governmental unit.

1.16.3 The value of the complimentary Cable Services provided herein shall not increase or decrease Gross Revenues for the purpose of calculating Franchise Fees.

1.18 "Locally Scheduled Original Programming" means Government Access or Educational Access programming that is created by the City or their designated Access provider(s) including edited coverage of live programming. Such Locally Scheduled Original Programming shall not be considered as qualifying as such after two (2) cablecasts (initial airing and first repeat). Automated Video Programming filler, such as cablecasts of highways and roads, AM/FM Radio programming, NASA or video bulletin boards does not constitute Locally Scheduled Original Programming that qualifies herein.

1.19 "Person" means any natural person or any association, firm, partnership, joint venture, corporation, limited liability company or other legally recognized entity, whether for-profit or not-for profit, but shall not mean the City.

1.20 "Public Rights-of-Way" or "Rights-of-Way" means the surface of, and the space above and below, any public street, highway, freeway, bridge, land path, alley, court, boulevard, sidewalk, lane, drive, circle or other public right-of-way, including, but not limited to, utility easements, dedicated utility strips, or rights-of-way dedicated for compatible uses now or hereafter held by the City in the Franchise Area, which shall entitle the City and Grantee to the use thereof for the purpose of constructing, installing, operating, repairing, upgrading and maintaining the Cable System. Public Rights-of-Way shall also mean any easement now or hereafter held by the City within the Franchise Area for the purpose of public travel, or for utility or public service use dedicated for compatible uses, and shall include other easements or rights-of-way as shall within their proper use and meaning entitle Grantee to the use thereof for the purposes of constructing, installing, operating, and maintaining Grantee's Cable System over existing poles and wires, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, attachments, and other property as may be ordinarily necessary and appurtenant to the Cable System.

1.21 "School" means any State accredited K-12 educational institution, public or private, but excluding home schools.

1.22 "State" means the State of Washington.

1.23 “Subscriber” or “Customer” means a Person who lawfully receives Cable Service over the Cable System with Grantee’s express permission.

SECTION 2. Grant of Authority

2.1 Grant. The City hereby grants to Grantee under the Cable Act a nonexclusive Franchise authorizing Grantee to construct and operate a Cable System in, along, among, upon, across, above, over, under, or in any manner connected with Public Rights-of-Way within the Franchise Area, and for that purpose to erect, install, construct, repair, replace, reconstruct, maintain, or retain in, on, over, under, upon, across, or along any Public Rights-of-Way and all extensions thereof and additions thereto, such poles, wires, cables, conductors, ducts, conduits, vaults, manholes, pedestals, amplifiers, appliances, attachments, and other related property or equipment as may be necessary or appurtenant to the Cable System.

2.2 Grant of Authority. Subject to the terms and conditions of this Franchise and the Cable Act, the City hereby grants Grantee the right to own, construct, operate and maintain a Cable System along the Rights-of-Way within the Franchise Area, in order to provide Cable Service. No privilege or power of eminent domain is bestowed by this grant; nor is such a privilege or power bestowed by this Franchise.

2.3 Franchise Subject to Federal, State and Local Law. Notwithstanding any provision to the contrary herein, this Franchise is subject to and shall be governed by all applicable provisions now existing or hereafter amended of federal, State and local laws and regulations.

2.4 Use of Rights of Way for non-Cable Service. This Franchise is an express authorization to provide Cable Services. This Franchise is not a bar to the imposition of any lawful condition on Grantee with respect to non-Cable Services provided by Grantee. This Franchise does not relieve Grantee of any obligation it may have to obtain from the City an authorization to provide non-Cable Services nor relieve Grantee of its obligation to comply with any such authorization(s) that may be lawfully required. However, this Franchise shall not be read as a concession by Grantee that it needs authorization to provide non-Cable Services.

2.5 No Rights by Implication. No rights shall pass to Grantee by implication. Without limiting the foregoing, by way of example and not limitation, this Franchise shall not include or be a substitute for:

2.5.1 Any other permit or authorization required for the privilege of transacting and carrying on a business within the City that may be required by the ordinances and laws of the City;

2.5.2 Any permit, agreement or authorization required by the City for Rights-of-Way users in connection with operations on or in Rights-of-Way or public property; or

2.5.3 Any permits or agreements for occupying any other property of the City or private entities to which access is not specifically granted by this Franchise.

2.6 Conveyance of Rights. This Franchise is intended to convey limited rights and interests only as to those Rights-of-Way in which the City has an actual interest. It is not a warranty of title or interest in any Rights-of-Way; it does not provide the Grantee with any interest in any particular location within the Rights-of-Way; and it does not confer rights other than as expressly provided in the grant hereof.

2.7 No Waiver. The failure of City on one or more occasions to exercise a right or to require compliance or performance under this Franchise, the Cable Act or any other applicable State or Federal law shall not be deemed to constitute a waiver of such right or a waiver of compliance or performance by the City nor to excuse Grantee from complying or performing, unless such right or such compliance or performance has been specifically waived in writing.

2.8 Other Ordinances. Grantee agrees to comply with the terms of any lawful, generally applicable local ordinance in effect upon adoption of this Franchise. In the event of a conflict between any ordinance and a specific provision of this Franchise, the Franchise shall control, provided however that the Grantee agrees that it is subject to the lawful exercise of the police power of the City.

2.9 Term of Franchise. The term of this Franchise and all rights, privileges, obligations and restrictions pertaining thereto shall be seven (7) years (the "Term") from the Effective Date of this Franchise. The Franchise term may be extended for an additional two (2) years, subject to written agreement of both parties. Upon commencement of the franchise renewal period described in the Cable Act, the parties will meet to discuss a possible extension of this Franchise.

2.10 Effective Date.

2.10.1 This Franchise and the rights, privileges and authority granted hereunder shall take effect and be in force from and after the Effective Date of this Franchise. The Effective Date of this Franchise shall be _____.

2.10.2 Within sixty (60) days receipt of the City's approval of this Franchise agreement, Grantee shall signify its acceptance of this Franchise by executing a written acceptance of this Franchise. Grantee shall file such written acceptance of the Franchise along with any accompaniments as required by this Section 2.10.2 with the City Clerk. Such written acceptance shall be accompanied by the certificates of insurance specified in Section 9.2 and the evidence of the Security as specified in Section 9.4. This Franchise is voidable unless accepted in writing with the required accompaniments as specified by this Section 2.10.2 by Grantee within this timeframe.

2.10.3 The grant of this Franchise shall have no effect on Grantee's duty under the prior franchise, in effect prior to the Effective Date of this Franchise, to indemnify or insure the City against acts or omissions occurring during the period that the prior franchise was in effect, nor shall it affect Grantee's liability to pay all Franchise Fees which were due and owed under a prior franchise.

2.11 Effect of Acceptance. By accepting the Franchise, Grantee: (1) acknowledges and accepts the City's legal right to issue and enforce the Franchise; (2) accepts and agrees to comply with each and every provision of this Franchise subject to applicable law; and (3) agrees that the Franchise was granted pursuant to processes and procedures consistent with applicable law, and that it will not raise any claim to the contrary.

2.12 Reservation of Authority. Nothing in this Franchise shall (1) abrogate the right of the City to perform any public works or public improvements of any description, (2) be construed as a waiver of any codes or ordinances of general applicability promulgated by the City, or (3) be construed as a waiver or release of the rights of the City in and to the Public Rights-of-Way.

2.13 Grant Not Exclusive. The Franchise and the rights granted herein to use and occupy the Rights-of-Way to provide Cable Services shall not be exclusive, and City reserves the right to grant other franchises for similar uses or for other uses of the Rights-of-Way, or any portions thereof, to any Person, or to make any such use themselves, at any time during the Term of this Franchise. Any such rights which are granted shall not adversely impact the authority as granted under this Franchise and shall not interfere with existing facilities of the Cable System.

2.14 Grant of Other Franchises; Competitive Equity. Grantee acknowledges and agrees that the City reserves the right to grant one or more additional franchises subsequent to this Franchise to provide Cable Service within the Franchise Area; provided, the City agrees that it shall amend this Franchise to include any material terms or conditions that it makes available to the new entrant within ninety (90) days of Grantee's request, so as to ensure that the regulatory and financial burdens on each entity are materially equivalent. "Material terms and conditions" include, but are not limited to: Franchise Fees; insurance; System build-out requirements; security instruments; Access Channel and support; customer service standards; required reports and related record keeping; and notice and opportunity to cure breaches. The parties agree that this provision shall not require a word-for-word identical franchise or authorization so long as the regulatory and financial burdens on each entity are materially equivalent. If any subsequent franchise is granted by the City or by transfer, extension or renewal which, in the reasonable opinion of Grantee, contains materially more favorable or less burdensome terms or conditions than this Franchise, the City agrees that it shall amend this Franchise to include any more materially favorable or less burdensome terms or conditions in a manner mutually agreed upon by City and Grantee.

2.14.1 In the event an application for a new cable television franchise is filed with the City proposing to serve the Franchise Area, in whole or in part, the City shall serve or require to be served a copy of such application upon Grantee by registered or certified mail or via nationally recognized overnight courier service.

2.14.2 In the event that a wireline multichannel video programming distributor provides video service to the residents of the City under the authority granted by federal or State legislation or other regulatory entity, Grantee shall have a right to request Franchise amendments that relieve Grantee of regulatory burdens that create a competitive disadvantage to Grantee. In requesting amendments, Grantee shall file a petition seeking to amend the Franchise. Such petition shall: (1) indicate the presence of such wireline competitor; (2)

identify the basis for Grantee's belief that certain provisions of the Franchise place Grantee at a competitive disadvantage; and (3) identify the regulatory burdens to be amended or repealed in order to eliminate the competitive disadvantage. The City shall not unreasonably withhold consent to Grantee's petition.

2.15 Conditions of Sale. If a renewal or extension of Grantee's Franchise is denied or the Franchise is lawfully terminated, and the City lawfully acquires ownership of the Cable System or by its actions lawfully effects a transfer of ownership of the Cable System to another party, any such acquisition or transfer shall be at the price determined pursuant to the provisions set forth in Section 627 of the Cable Act.

2.16 Transfer upon Revocation. Grantee and the City agree that in the case of a final determination of a lawful revocation of the Franchise, the City shall give Grantee at least one hundred twenty (120) days to effectuate a transfer of its Cable System to a qualified third party. Furthermore, Grantee shall be authorized to continue to operate pursuant to the terms of its prior Franchise during this period. If, at the end of that time, Grantee is unsuccessful in procuring a qualified transferee or assignee of its Cable System which is reasonably acceptable to the City, Grantee and the City may avail themselves of any rights they may have pursuant to federal or State law. It is further agreed that Grantee's continued operation of the Cable System during the one hundred twenty (120) day period shall not be deemed to be a waiver, nor an extinguishment of, any rights of either the City or Grantee.

2.17 Police Powers. Grantee's rights hereunder are subject to the police powers of City to adopt and enforce ordinances necessary to the safety, health and welfare of the public, and Grantee agrees to comply with all applicable laws, ordinances and regulations lawfully enacted pursuant to the police powers of the City, or hereafter enacted in accordance therewith, by City or any other legally constituted governmental unit having lawful jurisdiction over the subject matter hereof. The City reserves the right to exercise its police powers, notwithstanding anything in this Franchise to the contrary.

SECTION 3. Construction and Maintenance of the Cable System

3.1 Permits and General Obligations. Grantee shall be responsible for obtaining, at its own cost and expense, all permits, licenses, or other forms of approval or authorization necessary to construct, operate, maintain or repair the Cable System, or any part thereof, prior to the commencement of any such activity. Construction, installation, and maintenance of the Cable System shall be performed in a safe manner using materials that meet or exceed industry standards. All facilities, poles, conduits, cables, and equipment installed by Grantee for use in the Cable System in accordance with the terms and conditions of this Franchise shall be located so as to minimize interference with the designated use of the Public Rights-of-Way at the time of Cable System facilities installation.

3.2 Conditions on Occupancy of Public Rights-of-Way.

3.2.1 Relocation at Request of City. Except as provided herein, upon thirty (30) days prior written notice to Grantee, City shall have the right to require Grantee to relocate any part of Grantee's Cable System within the Public Rights-of-Way when the safety, health or

welfare of the public requires such change, and the expense thereof shall be paid by Grantee. City is not required to provide thirty (30) days prior written notice in the event of an emergency. Should Grantee fail to remove or relocate any such facilities by the date established by the City, City may remove or relocate such facilities, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by City due to Grantee's delay. If City requires Grantee to relocate its facilities located within the Public Rights-of-Way, City shall make a reasonable effort to provide Grantee with an alternate location within the Public Rights-of-Way. This Section 3.2.1 does not apply to overhead facilities that are converted to underground facilities, consistent with Section 3.4. If public funds are available to any Person using such Public Rights-of-Way for the purpose of defraying the cost of any of the foregoing, the City shall upon written request of Grantee make application for such funds on behalf of Grantee.

3.2.2 Temporary Relocation at Request of Third Party. Grantee shall, upon reasonable prior written request of any Person holding a permit issued by the City to move any structure, temporarily move its facilities to permit the moving of such structure; provided (i) Grantee may impose a reasonable charge on any Person for the movement of its facilities, and such charge may be required to be paid in advance of the movement of its wires or cables; (ii) Grantee is granted a permit for such work by the City if a permit is needed; and (iii) Grantee is given not less than ten (10) business days advance written notice to arrange for such temporary relocation.

3.2.3 Restoration of Rights-of-Way. Whenever Grantee disturbs the surface of any Rights-of-Way for any purpose, Grantee shall promptly restore the Rights-of-Way to a condition reasonably comparable to the condition of the Rights-of-Way immediately prior to such disturbance. When any opening is made by Grantee in a hard surface pavement in any Rights-of-Way, Grantee shall promptly refill the opening and restore the surface as required by its permit. If Grantee fails to promptly restore the Rights-of-Way, the City may, after providing reasonable notice to Grantee, refill or repave any opening made by Grantee in the Rights-of-Way, and the reasonable expense thereof shall be paid by Grantee. The City may, after providing reasonable notice to Grantee, repair any work done by Grantee that, in the determination of the City, does not conform to applicable City specifications. The reasonable cost thereof, including the costs of inspection and supervision, shall be paid by Grantee.

3.3 Safety Requirements. The Grantee shall, at its own cost and expense, undertake all necessary and appropriate efforts to maintain its work sites in a safe manner in order to prevent accidents that may cause damage or injuries. All work undertaken on the Cable System shall be performed in substantial accordance with applicable FCC or other federal and State regulations. The Cable System shall not unreasonably endanger or interfere with the safety of Persons or property in the Public Rights-of-Way.

3.4 Aerial and Underground Construction. If all of the distribution lines of all of the wireline service providers, such as telecommunications service providers, as defined in RCW 35.99.010, a utility service provider or a Cable Operator (collectively "Service Providers") in any portion of the Franchise Area are underground, Grantee shall place its Cable System's distribution cables underground within that area; provided that such underground locations are actually capable of accommodating Grantee's cable and other equipment without technical degradation of the Cable System's signal quality. In any portion(s) of the Franchise Area where

the distribution lines of any of the respective Service Providers are both aerial and underground, Grantee shall have the discretion to construct, operate, and maintain all of its distribution cables, or any part thereof, aerially or underground. In areas where a Service Provider's wiring is aerial, Grantee may install aerial cable, except when a property owner or resident requests underground installation and agrees to bear the additional cost in excess of aerial installation. If funds exist, are set aside for such purpose, or provided by a third party, Grantee shall be entitled to seek reimbursement for its share of funds to offset the cost of placing its facilities underground. Grantee shall utilize existing conduit wherever possible.

3.4.1 The City shall not be required to obtain easements for Grantee. Grantee shall, to the extent economically feasible, participate with other providers in joint trench projects to relocate its overhead facilities underground and remove its overhead facilities in areas where utilities are being converted to underground facilities.

3.4.2 Nothing in this Section shall be construed to require Grantee to construct, operate, or maintain underground any ground-mounted appurtenances such as Customer taps, line extenders, system passive devices, amplifiers, power supplies, fiber splices, nodes, pedestals, or other related equipment.

3.4.3 In the event of a City driven facilities relocation project that requires conversion of overhead facilities to underground for purposes of health, safety or public welfare, Grantee agrees to bear its proportionate share of the costs to convert Grantee's Cable System from an overhead system to an underground system as follows:

A. Utility Trench and Vault/Pedestal Engineering: To ensure proper space and availability in the supplied joint trench, Grantee shall only pay for the work hours necessary to complete Cable System related engineering coordination with the other utilities involved in the project.

B. Conduit and Vaults/Pedestals Placement: Grantee shall only pay for the direct cost of labor and materials it takes to place its conduits and vaults/pedestals in the supplied joint trench and/or solo cable trench as follows:

1. If the City contractor is completing this task, Grantee shall only pay the direct costs in accordance with Grantee's approved labor and materials exhibits at the time of the project.

2. If the direct costs of Grantee's approved labor and materials exhibits are not agreeable to the City or its contractor, Grantee shall have the option to hire its own contractor(s) to complete the work in accordance with Grantee's approved labor and materials exhibits at the time of the project.

3. If Grantee chooses to hire its own contractor(s), the City and its contractor(s) are responsible to coordinate with Grantee's contractor(s) to provide reasonable notice and time to complete the placement of Grantee's conduits and vaults/pedestals in the supplied joint trench.

C. Within the conversion area, Grantee shall not be responsible for any on-site coordination and performance of traffic control, trenching, backfill, and restoration, unless it is work related to solo cable trench. In those areas, Grantee shall pay the direct cost of labor and materials in accordance with the provisions listed in Section 3.4.3 B above.

3.4.4 In the event of a Local Improvement District (LID) project that requires relocation of Grantee's facilities, Grantee shall be reimbursed by the LID funding for all expenses incurred as a result of the project.

3.4.5 In the event an underground conversion of cable facilities is required as part of the street improvement condition(s) of a new subdivision and/or planned development, the developer shall be responsible for all time and material costs associated with the conditioned underground conversion of cable facilities.

3.4.6 Grantee shall utilize existing poles and conduit wherever possible.

3.5 Work of Contractors and Subcontractors. Grantee's contractors and subcontractors shall be licensed and bonded in accordance with the City's Ordinances, regulations and requirements. Work by contractors and subcontractors is subject to the same restrictions, limitations and conditions as if the work were performed by Grantee. Grantee shall be responsible for all work performed by its contractors and subcontractors and others performing work on its behalf as if the work were performed by it and shall ensure that all such work is performed in compliance with this Franchise and applicable law. Grantee shall be jointly and severally liable for all property and personal damages and for correcting all damage caused by any contractor or subcontractor working on Grantee's behalf.

3.6 Construction and Maintenance.

3.6.1 Subject to applicable laws and this Franchise, Grantee shall perform all maintenance, construction, repair and upgrades necessary for the operation of its Cable System in the Rights-of-Way. All work regarding Grantee's System shall, regardless of who performs the work, be and remain Grantee's responsibility.

3.6.2 Grantee's Cable System shall be constructed and maintained in such a manner as not to interfere with sewers, water pipes or any other property of the City, or with any other pipes, wires, conduits, pedestals, structures or other facilities that may have been laid in Rights-of-Way by, or under, the City's authority.

3.6.3 Grantee shall provide and use any equipment necessary to control and carry Grantee's signals so as to prevent damage to the City's property or property belonging to any Person. Grantee, at its own expense, shall repair, renew, change and improve its facilities and equipment to keep them in good repair and in a safe and presentable condition.

3.6.4 Grantee's Cable System shall be located, erected and maintained so as not to endanger the lives of Persons, or to unnecessarily hinder or obstruct the free use of Rights-of-Way or other public property.

3.6.5 Grantee shall give reasonable notice to private property owners of construction work in adjacent Rights-of-Way.

3.6.6 In the event that emergency repairs are necessary, Grantee shall notify the City of the repairs made on the next business day. Grantee may initiate such emergency repairs and shall apply for appropriate permits within two (2) business days after discovery of the emergency, or as soon as reasonably practical.

3.7 One Call Notification. Prior to doing any work in the Rights-of-Way, Grantee shall follow established procedures, including contacting the Utility Notification Center in Washington and comply with all applicable State statutes. Grantee shall also comply with generally applicable ordinances and permitting requirements before digging in the Rights-of-Way.

3.8 Rights-of-Way Vacation. If any Rights-of-Way or portion thereof used by Grantee is vacated by the City during the Term of this Franchise, unless the City specifically reserves to Grantee the right to continue the use of vacated Rights-of-Way, Grantee shall, without delay or expense to the City, remove its facilities from such Rights-of-Way and restore, repair or reconstruct the Rights-of-Way where such removal has occurred. In the event of failure, neglect or refusal of Grantee to restore, repair or reconstruct such Rights-of-Way after thirty (30) days written notice from the City, the City may do such work or cause it to be done, and the reasonable cost thereof shall be paid by Grantee within thirty (30) days of receipt of an invoice and documentation.

3.9 Standards. All work authorized and required hereunder shall be done in a safe, thorough and workmanlike manner. Grantee must comply with all federal, State and local safety requirements, rules, regulations, laws and practices, and deploy all necessary devices as required by applicable law during construction, operation and repair of its Cable System. By way of illustration and not limitation, Grantee must comply with the National Electrical Code, National Electrical Safety Code and Occupational Safety and Health Administration (OSHA) Standards in effect at the time of the work being performed.

3.9.1 Grantee shall ensure that all cable drops are properly bonded and grounded at the home, consistent with applicable code requirements. All non-conforming or non-performing cable drops shall be replaced by Grantee as necessary.

3.9.2 Grantee shall endeavor to maintain all equipment lines and facilities in an orderly manner, including, but not limited to, the removal of all bundles of unused cable.

3.9.3 All installations of equipment, lines and facilities shall be installed in accordance with good engineering practices and of sufficient height to comply with all federal, State and local regulations, ordinances and laws.

3.9.4 Any opening or obstruction in the Rights-of-Way or other public places made by Grantee in the course of its operations shall be guarded and protected at all times by the placement of adequate barriers, fences or boarding, the bounds of which, during periods of dusk and darkness, shall be clearly marked and visible at night.

3.9.5 Grantee and the City agree that nothing in this Franchise shall give Grantee the right to construct new poles without prior City approval. Furthermore, nothing contained in this Franchise gives Grantee a right of pole attachment to City facilities or facilities owned by third parties.

3.10 Stop Work. On notice from the City that any work is being conducted contrary to the provisions of this Franchise, or in an unsafe or dangerous manner as determined by the City, or in violation of the terms of any applicable permit, laws, regulations, ordinances or standards, the work may immediately be stopped by the City. The stop work order shall:

3.10.1 Be in writing;

3.10.2 Be given to the Person doing the work and be posted on the work site;

3.10.3 Be sent to Grantee by overnight delivery at the address given herein;

3.10.4 Indicate the nature of the alleged violation or unsafe condition; and

3.10.5 Establish conditions under which work may be resumed.

3.11 Joint Trenching/Boring. To the extent it is technically and economically feasible, Grantee shall joint trench or share bores or cuts and work with other providers (such as, but not limited to, telecommunications, gas and electric companies), licensees, permittees and franchisees so as to reduce the number of Right-of-Way cuts within the City.

3.12 GIS Mapping. Upon thirty (30) days written request by the City, Grantee shall provide a route map of those basic portions of the Cable System that are located within the Public Right-of-Way in either a digital format or hard copy. The format of the data for overlaying on the City's GIS mapping system shall utilize NAD 83 as the horizontal datum. The data shall indicate overhead cables and underground cables, pole mounted features and ground mounted features

3.13 Trimming of Trees and Shrubbery. Grantee shall have the authority to trim trees or other natural growth interfering with, damaging, or restricting access to any of its Cable System facilities in the Rights-of-Way. All such trimming shall be done at Grantee's sole cost and expense. Grantee shall be responsible for any damage caused by such trimming and shall make every attempt to trim such trees and shrubbery in a fashion that maintains their aesthetic appeal. Grantee shall comply with all local laws and regulations with respect to trimming of trees and shrubbery and with all generally applicable landscaping regulations.

3.14 Reservation of Rights-of-Way. Nothing in this Franchise shall prevent the City or public utilities from constructing any public work or improvement in the Public Rights-of-Way. All such work shall be done insofar as practicable so as not to obstruct, injure or prevent the use and operation of Grantee's Cable System.

3.15 Inspection of Facilities. Upon reasonable notice, the City may inspect any of Grantee's Facilities or equipment within the Rights-of-Way and on other public property. If an

unsafe condition is found to exist, the City, in addition to taking any other action permitted under applicable law, may order Grantee to make the necessary repairs and alterations specified therein forthwith to correct the unsafe condition by a time the City establishes. The City has the right to inspect, repair and correct the unsafe condition if Grantee fails to do so, and to reasonably charge Grantee therefore.

SECTION 4. Service Obligations

4.1 General Service Obligation. Grantee shall make Cable Service available to every residential dwelling unit within the Franchise Area where the minimum density is at least twenty-five (25) Dwelling Units per strand mile in areas served by overhead facilities and sixty (60) Dwelling Units per strand mile in areas served by underground facilities. Subject to this density requirement, Grantee shall offer Cable Service at standard installation rates to all new Dwelling Units or previously unserved Dwelling Units located within one hundred twenty-five (125) aerial feet or sixty (60) underground trench feet of the Grantee's distribution cable. Grantee may elect to provide Cable Service to areas not meeting the above density and distance standards. Grantee may impose an additional charge in excess of its regular installation charge for any service installation requiring a line extension or a drop in excess of the above standards. Any such additional charge shall be the fully allocated cost of the installation that exceeds the standards set forth above.

4.2 Broad Programming Categories. Grantee shall provide at least the following initial broad categories of programming to the extent such categories are reasonably available:

- (A) Educational programming;
- (B) News, weather and information;
- (C) Sports;
- (D) General entertainment (including movies);
- (E) Children/family-oriented; and
- (F) Government affairs.

4.3 Deletion or Reduction of Broad Programming Categories. Grantee shall not delete or so limit as to effectively delete any broad category of programming within its control without the prior written consent of the City. In the event of a modification proceeding under federal law, the mix and quality of Cable Services provided by Grantee on the Effective Date of this Franchise shall be deemed the minimum mix and quality of Cable Services required under this Franchise throughout its term.

4.4 Complimentary Cable Service. Historically, Grantee has provided complimentary Cable Service to municipal buildings, fire stations, police stations, Schools and libraries throughout the Franchise Area. The Cable Service described herein is a voluntary

initiative that Grantee agrees to continue throughout the Term of this Franchise. As part of Grantee's voluntary initiative, Grantee will provide without charge, for service or installation, at least one outlet of Basic Service to those buildings identified on Exhibit B, provided that they are located within 125 aerial feet (a Standard Installation) of its Cable System. Grantee shall not be required to provide complimentary Cable Service to those buildings or portions of buildings that are not identified in Exhibit B, that are not occupied and used by and for governmental, administrative or educational purposes (i.e. utility offices, storage facilities, etc.) or where it would normally enter into a commercial contract to provide Cable Service, such as a prison/jail or a golf course. In instances where the City is leasing and occupying the building, the City shall be responsible for acquiring any necessary right of entry agreement and paying any associated fees that may be required by the building's owner. If the City wishes to discontinue its use of this service, it is responsible for the return of any and all equipment to the Grantee. The City and/or its designees are responsible for all Grantee's on premise equipment.

4.4.1. The Cable Service provided in accordance with this subsection shall not be distributed beyond the originally installed outlet without authorization from Grantee. If additional outlets are requested, the building owner and/or occupant shall be required to pay the usual installation fees associated therewith; but no recurring monthly fees. To the extent that complimentary service is provided, there shall be no offset against Franchise Fees for such service. Outlets of Cable Service provided in accordance with this Section may be used to distribute Cable Services throughout such buildings, provided such distribution can be accomplished without causing Cable System disruption and general technical standards are maintained. Such outlets may only be used for lawful purposes consistent with Grantee's regular service practices. In the event that there is another wireline service provider (or providers) providing Cable Service within the City, the decision of which service provider will provide the complimentary service shall be decided on a case by case basis in an effort to maintain equitable burdens on each provider.

4.4.2 The Cable Service provided herein, shall not be used for commercial purposes, and the City shall take reasonable steps to limit display in public areas. In addition, the City shall take reasonable precautions to prevent any inappropriate use of the Cable Service or the Cable System that could result in damage to the Cable System.

4.5 Obscenity. Grantee shall not transmit, or permit to be transmitted, over any Channel subject to its editorial Control any programming that is obscene under applicable federal, State or local laws.

4.6 Services for the Disabled. Grantee shall comply with the Americans with Disabilities Act and any amendments or successor legislation thereto.

4.7 Parental Control Device. Upon request by any Subscriber, Grantee shall make available at no charge a parental control or lockout device, traps or filters to enable a Subscriber to control access to both the audio and video portions of any Channels. Grantee shall inform its Subscribers of the availability of the lockout device at the time of their initial subscription and periodically thereafter.

4.8 No Discrimination. Neither Grantee nor any of its employees, agents, representatives, contractors, subcontractors, or consultants, nor any other Person, shall discriminate or permit discrimination between or among any Persons in the availability of Cable Services provided in connection with the Cable System in the Franchise Area. It shall be the right of all Persons to receive all available services provided on the Cable System so long as such Person's financial, and other business obligations to Grantee are satisfied. Grantee shall not however be required to continue service to a Subscriber who cannot meet their financial obligations to Grantee or who is verbally or physically abusive, harassing, or threatening to Grantee or any of its employees, agents, representatives, contractors, subcontractors, or consultants. Nothing contained herein shall prohibit Grantee from offering bulk discounts, promotional discounts, package discounts, or other such pricing strategies as part of its business practice.

4.9 New Developments. The City shall provide Grantee with written notice of the issuance of formal approvals for new subdivisions and/or planned developments within the Franchise Area requiring underground installation and/or conversion of cable facilities as part of the approval condition(s). The City agrees to require the developer, as a condition of issuing land use and building permits, to give Grantee access to all open trenches for deployment of cable facilities throughout the development and at least ten (10) business days written notice of the date of availability of open trenches. The developer shall be responsible for the digging and backfilling of all trenches. Grantee shall be responsible for engineering and deployment of labor relative to its installation of cable facilities within the development.

SECTION 5. Rates, Fees, Charges and Deposits

5.1 Rate Regulation. All of Grantee's rates and charges related to Cable Services shall be subject to regulation by the City to the full extent authorized by applicable federal, State and local laws. Grantee shall notify both the City and its Customers of any changes to its rates in conformance with federal law.

5.2 No Rate Discrimination. All rates and charges shall be published (in the form of a publicly available rate card), and shall be nondiscriminatory for all Persons of similar classes, under similar circumstances and conditions and without regard to neighborhood or income. Nothing herein shall be construed to prohibit:

5.2.1 The temporary reduction or waiving of rates or charges in conjunction with valid promotional campaigns;

5.2.2 The offering of reasonable discounts to similarly situated Persons;

5.2.3 The offering of bulk discounts for multiple Dwelling Units.

5.3 Low Income Discount. Grantee has historically granted a 30% discount to Subscribers who are low income and are aged 65 years or older or disabled to its Basic Cable Service (provided they are not already receiving a package discount and provided further they are the legal owner or lessee/tenant of the dwelling unit). Grantee, as a voluntary initiative, is encouraged to continue to offer a discount to these individuals. For purposes of this discount,

Subscribers are considered low income if their combined disposable income from all sources does not exceed the Housing and Urban Development Standards for the Seattle/Everett Area for the current and preceding calendar year. As of the Effective Date of this Franchise, Grantee is offering this low income discount as described herein.

5.4 Leased Access Channel Rates. Grantee shall offer Leased Access Channel capacity on such terms and conditions and rates as may be negotiated with each lessee, subject to the requirements of Section 612 of the Cable Act. Upon request, Grantee shall provide a complete schedule of current rates and charges for any and all Leased Access Channels or portions of such Channels.

5.5 Late Fees. For purposes of this subsection, any assessment, charge, cost, fee or sum, however characterized, that Grantee imposes upon a Subscriber solely for late payment of a bill is a late fee and shall be applied in accordance with State law.

SECTION 6. Customer Service

6.1 Customer Service Standards. Customer Service requirements are set forth in Exhibit A, which shall be binding unless amended by written consent of the parties.

6.2 Privacy Protection. Grantee shall comply with all applicable federal and State privacy laws, including Section 631 of the Cable Act and regulations adopted pursuant thereto.

SECTION 7. Oversight and Regulation

7.1 Franchise Fees. Grantee shall pay to the City a Franchise Fee in an amount equal to five percent (5%) of Gross Revenues derived from the operation of the Cable System to provide Cable Service in the Franchise Area ("Franchise Fee"). In accordance with Title VI of the Cable Act, the twelve (12) month period applicable under the Franchise for the computation of the Franchise Fee shall be a calendar year provided, however, that Grantee shall not be compelled to pay any higher percentage of Franchise Fees than any other Cable Operator providing Cable Service in the same portion of the Franchise Area. If during the Term of this Franchise, the FCC, federal or State government, or the courts change the amount a City can collect for Franchise Fees, then this Franchise shall be amended and such change shall be imposed on all similarly situated Cable Operators operating in the same portion of the Franchise Area. Franchise Fees are not a tax.

7.2 Payments. The payment of Franchise Fees shall be made on a quarterly basis and shall be due forty-five (45) days after the close of each calendar quarter. Grantee shall be allowed to submit or correct any payments that were inadvertently omitted, provided such correction is made within ninety (90) days following the close of the calendar quarter for which such payments were applicable, without incurring any interest expenses pursuant to Section 7.5. At the City's option, if there are overpayments of Franchise Fees, the City may choose to either refund any such overpayments to Grantee, or Grantee shall withhold future Franchise Fee payments until such time as said overpayment is recovered. If the City chooses the option to refund such overpayments, then no interest shall accrue on such overpayments provided the City

refunds the overpayments within sixty (60) days notice from Grantee. Notwithstanding the foregoing, the parties may agree on a different timeframe or terms of repayment.

7.3 Additional Compensation. In the event that Franchise Fees are prohibited by any law or regulation, Grantee shall pay to the City that amount, if any, which is required in accordance with applicable law.

7.4 Quarterly Reports. Each Franchise Fee payment shall be accompanied by a report prepared by a representative of Grantee showing the basis for the computation of the Franchise Fees paid during that period.

7.5 Interest Charge on Late Payments. Late payments for any Franchise Fees due pursuant to this Section, EG Fees due pursuant to Section 11.6 and liquidated damages due pursuant to Section 13.1.1 shall be subject to interest at the then-current rate set forth in RCW 19.52.020, which as of the date of execution of this Franchise is twelve percent (12%) per annum from the date that such payment is due.

7.6 No Release. The City's acceptance of payment shall not be construed as an agreement that the amount paid was correct, nor shall acceptance be construed as a release of any claim which the City may have for additional sums due under this Franchise. The period of limitation for recovery of Franchise Fees payable hereunder shall be six (6) years from the date on which payment by Grantee was due.

7.7 No Limitation on Taxing Authority. Nothing in this Franchise shall be construed to limit any authority of the City to impose any tax, fee, or assessment of general applicability. Nothing in this Franchise is intended to preclude Grantee from exercising any right it may have to challenge the lawfulness of any tax, fee, or assessment imposed by the City or any State or federal agency or authority, or intended to waive any rights the Grantee may have under 47 U.S.C. § 542.

7.8 Additional Commitments Not Franchise Fees. No term or condition in this Franchise shall in any way modify or affect Grantee's obligation to pay Franchise Fees. Although the total sum of Franchise Fee payments and additional commitments set forth elsewhere in this Franchise may total more than five (5%) of Grantee's Gross Revenues in any 12-month period, Grantee agrees that the additional commitments regarding EG funding and Access Channels are excluded from the definition of Franchise Fees herein and are not Franchise Fees, nor are they to be offset or credited against any Franchise Fee payments due to the City. Additionally, complimentary Cable Service, as described in Section 4.4, shall not be offset against Franchise Fees either, unless otherwise mutually agreed upon by Grantee and City. The City and Grantee agree that any utility tax, business and occupation tax or similar tax shall be in addition to any Franchise Fees required herein and there shall be no offset against Franchise Fees subject to applicable law.

7.9 Franchise Fee Audit

7.9.1 Upon thirty (30) days prior written notice, but not more often than once each calendar year, the City shall have the right to inspect Grantee's financial records necessary

to enforce the provisions of the Franchise and to calculate any amounts determined to be payable pursuant to this Franchise. Provided Grantee cooperates in making all relevant records available upon request, the City will in good faith attempt to complete each audit within six (6) months, and the audit period shall not be any greater than the previous three (3) years, unless the City has information relating to previous years beyond the three (3) years which, in its reasonable judgment, raises doubt as to the accuracy of payments made under this or previous franchises, in which case an additional three (3) years may be audited. If the audit shows that there has been an underpayment of Franchise Fees by five percent (5%) or more in a calendar year, then Grantee shall pay the cost of the audit, such amount not to exceed Fifteen Thousand Dollars (\$15,000).

7.9.2 Upon the completion of any such audit by the City, the City shall provide to Grantee a final report setting forth the City's findings in detail, including any and all substantiating documentation. In the event of an alleged underpayment, Grantee shall have thirty (30) days from the receipt of the report to provide the City with a written response agreeing to or refuting the results of the audit, including any substantiating documentation. Based on these reports and responses, the parties shall seek to agree upon a "Final Settled Amount." For purposes of this Section, the term "Final Settled Amount(s)" shall mean the agreed upon underpayment, if any, by Grantee to the City. If the parties cannot agree on a "Final Settled Amount," either party may bring an action to have the disputed amount determined by a court of law.

7.9.3 Any "Final Settled Amount(s)" due to the City as a result of such audit shall be paid to the City by Grantee within sixty (60) days from the date the parties agree upon the "Final Settled Amount." Once the parties agree upon a Final Settled Amount and such amount is paid by Grantee, the City shall have no further rights to audit or challenge the payment for that period. If it was found that there was an underpayment of Franchise Fees pursuant to this Section, Grantee shall pay, in addition to the amount due, interest, calculated from the date the underpayment was originally due until the date payment is made by Grantee.

7.9.4 In the event the "Final Settled Amount(s)" is an overpayment by Grantee, the City shall either reimburse Grantee within sixty (60) days of the date the parties agree upon the Final Settled Amount or, upon Grantee's approval, the City may choose to have Grantee withhold future Franchise Fee payments until such time as said overpayment is recovered. If the City fails to refund the overpayment to Grantee within sixty (60) days, then interest at the rate specified in Section 7.5 shall accrue beginning on the sixty-first (61st) day following the determination of the Final Settled Amount.

7.10 Bundled Services. If Cable Services subject to the Franchise Fee required under this Section 7 are provided to Subscribers in conjunction with Non Cable Services, the Franchise Fee shall be applied only to the Gross Revenues of the Cable Services, as reflected on the books and records of Grantee in accordance with GAAP. Grantee shall equitably allocate charges for Cable/Non Cable Services so as not to unfairly diminish Franchise Fees to the City.

7.11 Maintenance of Books, Records, and Files.

7.11.1 Books and Records. Throughout the Term of this Franchise, Grantee agrees that the City, upon reasonable prior written notice to Grantee, may review Grantee's

books and records necessary to determine compliance with the terms of this Franchise. The review of such books and records shall occur at Grantee's business office (unless a substitute location is otherwise agreed upon), during normal business hours, and without unreasonably interfering with Grantee's business operations. Such books and records shall include any records required to be kept in a public file by Grantee pursuant to the rules and regulations of the FCC. All such documents pertaining to financial matters that may be the subject of an inspection by the City shall be retained by Grantee for a minimum period of six (6) years.

7.11.2 File for Public Inspection. Throughout the Term of this Franchise, Grantee shall maintain a file available for public inspection which shall include all documents required pursuant to the FCC's rules and regulations. The public inspection file shall be maintained at Grantee's business office and will be available to the public during normal business hours.

7.11.3 Proprietary Information. Notwithstanding anything to the contrary set forth in this Section, Grantee shall not be required to disclose information that it reasonably deems to be proprietary or confidential in nature. The City agrees to treat any information disclosed by Grantee as confidential and only to disclose it to those employees, representatives, and agents of the City that have a need to know in order to enforce this Franchise and who agree to maintain the confidentiality of all such information. Grantee shall not be required to provide Subscriber information in violation of Section 631 of the Cable Act or any other applicable federal or State privacy law. For purposes of this Section 7.11, the terms "proprietary or confidential" include, but are not limited to, information relating to the Cable System design, Customer lists, marketing plans, financial information unrelated to the calculation of Franchise Fees or rates pursuant to FCC rules, or other information that is reasonably determined by Grantee to be competitively sensitive. In the event that the City receives a public records request under RCW 42.56 or similar law for the disclosure of information Grantee has designated as confidential, trade secret or proprietary, the City shall promptly provide notice of such disclosure so that Grantee can take appropriate steps to protect its interests.

7.11.4 Records Required. Upon written request, but no more frequently than once a year, City may request a report which may include any or all of the following, depending on the needs of the City:

(A) Records of all written complaints received by Grantee for a period of up to three (3) years. The term "complaint" as used herein refers to escalated concerns about any aspect of the Cable System or Grantee's cable operations;

(B) Records of outages for the previous year, indicating date, duration, area, and the number of Subscribers affected, type of outage, and cause;

(C) Records of service calls for repair and maintenance for the previous year, indicating the date and time service was required, the date of acknowledgment, the date and time service was scheduled (if it was scheduled), and the date and time service was provided, and (if different) the date and time the problem was resolved;

(D) Records of installation/reconnection and requests for service extension for the previous year, indicating the date of request, date of acknowledgment, and the date and time service was extended;

(E) If specifically requested by the City:

1. The most recent annual report.
2. The number of Subscribers with Basic Service; and

(F) Such other reports with respect to its local operation as are necessary to monitor compliance with this Franchise.

7.12 Performance Evaluations. Upon written notification, the City may hold performance evaluation sessions no more than once every twelve months to ensure proper performance of the provisions of this Franchise.

7.12.1 All evaluation sessions shall be open to the public.

7.12.2 Topics which may be discussed at any evaluation session include, but are not limited to, Subscriber figures for each classification of service, construction issues, Cable Service rate structures, Franchise Fee payments, liquidated damages, free or discounted Cable Service, application of new technologies, Cable System performance, Cable Services currently provided and programming offered, future plans of Grantee for new services or programs, Subscriber Complaints, privacy, modifications to this Franchise, judicial and FCC rulings, line extension policies and the City's or Grantee's rules; provided that nothing in this subsection shall be construed as requiring the renegotiation of this Franchise.

7.12.3 During evaluations under this Section 7.12, Grantee shall fully cooperate with the City and shall provide such information and documents as the City may reasonably require to perform the evaluation.

SECTION 8. Transfer or Renewal of Franchise

8.1 Franchise Transfer. Subject to Section 617 of the Cable Act, the Cable System and this Franchise shall not be sold, assigned, transferred, leased or disposed of, either in whole or in part, either by involuntary sale or by voluntary sale, merger or consolidation; nor shall title thereto, either legal or equitable, or any right, interest or property therein pass to or vest in any Person (hereinafter "Transfer of the Franchise") without the prior written consent of the City, which consent shall not be unreasonably withheld.

8.1.1 Grantee shall promptly notify the City of any actual or proposed change in, or transfer of, or acquisition by any other party of Control of Grantee. The word "control" as used herein is not limited to majority stock ownership but includes actual working Control in whatever manner exercised. Every change, transfer or acquisition of Control of Grantee, except as noted in Section 8.1.7, shall make this Franchise subject to cancellation unless and until the City shall have consented thereto which consent shall not be unreasonably withheld.

8.1.2 The parties to the Transfer of the Franchise or change of Control shall make a written request to the City for its approval of the Transfer of the Franchise or change of Control and shall furnish all information required by law. In reviewing a request related to a Transfer of the Franchise or change in Control, the City may inquire into any matter reasonably related to the ability and willingness of the prospective transferee or controlling party to perform, in accordance with 47 CFR § 76.502.

8.1.3 In seeking the City's consent to any change in ownership or Control, the proposed transferee or controlling party shall indicate whether, as applicable, it:

(A) Has ever been convicted or held liable for acts involving deceit including any violation of federal, State or local law, or is currently under an indictment, investigation or complaint charging such acts;

(B) Has ever had a judgment in an action for fraud, deceit, or misrepresentation entered against it by any court of competent jurisdiction;

(C) Has pending any material legal claim, lawsuit, or administrative proceeding arising out of or involving a Cable System;

(D) Is financially solvent, by submitting financial data, including financial information as required by FCC Form 394; and

(E) Has the legal, financial and technical capability to enable it to maintain and operate the Cable System for the remaining Term of the Franchise.

8.1.4 In reviewing a request for the Transfer of the Franchise or change of Control, the City may inquire into the legal, technical and financial qualifications of the prospective controlling party or transferee, and Grantee shall assist the City in so inquiring. The City may condition said Transfer of the Franchise or change of Control upon such terms and conditions as it deems reasonably appropriate and as are consistent with federal law; provided, however, that any such terms and conditions so attached shall be related to the legal, technical and financial qualifications of the prospective controlling party or transferee. Additionally, such Person shall effect changes as promptly as practicable in the operation of the Cable System, if any changes are necessary to cure any violations or defaults presently in effect or ongoing.

8.1.5 The City shall act by ordinance or resolution on the request within one hundred twenty (120) days of the request, provided it has received all information required by law, such as a completed FCC Form 394. Subject to the foregoing, if the City fails to render a final decision on the request within one hundred twenty (120) days, such request shall be deemed granted unless the requesting party and the City agree to an extension of time.

8.1.6 Within sixty (60) days of Closing of any Transfer of the Franchise or change of Control, if approved or deemed granted by the City, Grantee shall file with the City a copy of the deed(s), agreement(s), lease(s) or other written instrument(s) evidencing such Transfer of the Franchise or change of Control, certified and sworn to as correct by Grantee and the transferee or new controlling entity. In the case of a Transfer of the Franchise or change of

Control, the transferee or the new controlling entity shall upon request by the City file its written acceptance agreeing to be bound by all of the provisions of this Franchise, subject to applicable law.

8.1.7 Notwithstanding anything to the contrary in this Section 8.1, the prior approval of the City shall not be required for any sale, assignment or transfer of the Franchise or Cable System to an Affiliate; provided that the proposed assignee or transferee agree in writing to comply with all of the provisions of the Franchise, subject to applicable law. Further, Grantee may pledge the assets of the Cable System for the purpose of financing without the consent of the City; provided that such pledge of assets shall not impair or mitigate Grantee's responsibilities and capabilities to meet all of its obligations under the provisions of this Franchise. In the event of a change in Control, the Grantee will continue to be bound by all provisions of the Franchise.

8.1.8 The consent or approval of the City to any Transfer of the Franchise or change in Control shall not constitute a waiver or release of any rights of the City.

8.2 Renewal of Franchise.

8.2.1 The City and Grantee agree that any proceedings undertaken relative to the renewal of this Franchise shall be governed by and comply with the provisions of Section 626 of the Cable Act.

8.2.2 In addition to the procedures set forth in Section 626 of the Cable Act, the City shall notify Grantee of its assessments regarding the identity of future cable-related community needs and interests, as well as the past performance of Grantee under the current Franchise Term. The City further agrees that such assessments shall be provided to Grantee promptly so that Grantee has adequate time to submit a proposal under Section 626 of the Cable Act.

8.2.3 Notwithstanding anything to the contrary, Grantee and the City further agree that at any time during the Term of the current Franchise, while affording the public appropriate notice and opportunity to comment, the City and Grantee may agree to undertake and finalize informal negotiations regarding renewal of the Franchise and the City may grant a renewal thereof.

SECTION 9. Insurance and Indemnity

9.1 Insurance Requirements.

9.1.1 General Requirement. Grantee shall maintain in full force and effect at its own cost and expense each of the following policies of insurance:

A. Commercial General Liability Insurance coverage for bodily injury, personal injury, and property damage with limits of no less than two million dollars (\$2,000,000) per occurrence.

B. Commercial Automobile Liability Insurance with minimum combined single limits of at least two million dollars (\$2,000,000) per occurrence.

C. Employer's Liability Insurance with limits of at least one million dollars (\$1,000,000).

D. Umbrella/Excess Liability Insurance in the amount of three million dollars (\$3,000,000).

E. Workers' Compensation Insurance shall be maintained during the Term of this Franchise to comply with State law.

9.1.2 Additional Insured. The City shall be included as an additional insured under each of the insurance policies required in this Section except Workers' Compensation and Employer's Liability Insurance. Except for Workers' Compensation and Employer's Liability Insurance, all insurance policies required hereunder shall provide or be endorsed so that the City is covered as, and have the rights of, an additional insured with respect to liability arising out of activities performed by, or on behalf of, Grantee under this Franchise or applicable law, or in the construction, operation, upgrade, maintenance, repair, replacement or ownership of the Cable System. Grantee shall provide to the City either (1) a true copy of an endorsement covering City as an Additional Insured for each insurance policy required in this Section and providing that such insurance shall apply as primary insurance on behalf of such Additional Insureds or (2) a true copy of the blanket additional insured clause from the policies. Receipt by City of any certificate showing less coverage than required is not a waiver of Grantee's obligations to fulfill the requirements. Grantee's insurance coverage shall be primary insurance with respect to the City. Any insurance or self insurance maintained by the Additional Insureds shall be in excess of Grantee's insurance and shall not contribute to it. Grantee's insurance shall apply separately to each insured against whom a claim is made or lawsuit is brought, except with respect to the limits of the insurer's liability.

9.1.3 Each policy shall provide that the insurance shall not be canceled or terminated so as to be out of compliance with these requirements without forty-five (45) days written notice first provided to the City via mail, and ten (10) days notice for nonpayment of any premium. If the insurance is canceled or terminated so as to be out of compliance with the requirements of this Franchise, Grantee shall provide a replacement policy. Grantee agrees to maintain continuous uninterrupted insurance coverage, in at least the amounts required, until all work required to be performed under the terms of this Franchise is satisfactorily completed and, in the case of Commercial General Liability Insurance, for at least one (1) year after expiration of this Franchise. Any failure of Grantee to comply with the claim reporting provisions of the policy(ies) or any breach of an insurance policy warranty shall not affect coverage afforded under the policy to protect the City. However, if coverage is not afforded under these circumstances, Grantee will indemnify the City for losses the City otherwise would have been covered for as an additional insured.

9.1.4 Grantee shall not cancel any required insurance policy without obtaining alternative insurance in conformance with this Franchise. Each of the required insurance policies shall be with sureties qualified to do business in the State of Washington with an A- or better

rating for financial condition and financial performance by Best Key Rating Guide, Property/Casualty Edition.

9.2 Verification of Coverage. In addition to the other requirements of this Section, Grantee shall furnish the City with certificates of insurance reflecting at least the minimum coverage and policy limits required hereunder. The certificates for each insurance policy are to be on standard forms or such forms as are consistent with standard industry practices, and are to be received by the City within forty-five (45) days of the time of acceptance of this Franchise by Grantee with existing insurance coverage to be maintained by Grantee until that date. Grantee hereby warrants that its insurance policies satisfy the requirements of this Franchise.

9.3 Indemnification.

9.3.1 Indemnity. Grantee agrees to indemnify, save and hold harmless, and defend the City, its elected officials, officers, authorized agents, boards and employees, acting in official capacity, from and against any liability, damages or claims, costs, expenses, settlements or judgments arising out of, or resulting from the granting of this Franchise or Grantee's activities, any casualty or accident to Person or property that occurs as a result of any construction, excavation, operation, maintenance, reconstruction or any other act done pursuant to the terms of this Franchise, provided that the City shall give Grantee timely written notice of its obligation to indemnify the City. Notwithstanding the foregoing, Grantee shall not indemnify the City for any damages, liability or claims resulting from the willful misconduct, concurrent negligence, or breach of obligation of the City, its officers, authorized agents, employees, attorneys, consultants, or independent contractors for which the City is legally responsible, or for any activity or function conducted by any Person other than Grantee in connection with EG Access or EAS.

9.3.2 Defense of Claims. With respect to Grantee's indemnity obligations set forth in this Section 9.3, Grantee shall provide the defense of any claims or actions brought against the City. Nothing herein shall be deemed to prevent the City from cooperating with Grantee and participating in the defense of any litigation by its own counsel at its own cost and expense; provided, however, that after consultation with the City, Grantee shall have the right to defend, settle or compromise any claim or action arising hereunder, and Grantee shall have the authority to decide the appropriateness and the amount of any such settlement. In the event that the terms of any such proposed settlement includes the release of the City, and the third party is willing to accept the settlement, but the City does not consent to the terms of any such settlement or compromise, Grantee shall not settle the claim or action, but its obligation to indemnify the City shall in no event exceed the amount of such settlement.

9.3.3 Separate Representation. If separate representation to fully protect the interests of both parties is necessary, such as a conflict of interest between the City and the counsel selected by Grantee to represent the City, Grantee shall pay reasonable attorneys' fees and expenses incurred by the City in defending itself with regard to any action, suit or proceeding indemnified by Grantee. The City's fees and expenses shall include all out-of-pocket expenses, such as consultants and expert witness fees, and shall also include the reasonable value of any services rendered by the City Attorney or his/her assistants or any employees of the City

or its agents but shall not include outside attorneys' fees for services that are unnecessarily duplicative of services provided the City by Grantee.

9.3.4 Indemnification for Relocation. Subject to applicable law, Grantee shall indemnify the City for any damages, claims, additional costs or expenses assessed against, or payable by, the City related to, arising out of, or resulting from Grantee's failure to remove, adjust or relocate any of its facilities in the Rights-of-Way in a timely manner in accordance with any relocation required by the City.

9.3.5 Duty of Defense. The fact that Grantee carries out any activities under this Franchise through independent contractors shall not constitute an avoidance of or defense to Grantee's duty of defense and indemnification under this Section 9.3.

9.3.6 Indemnification of Grantee. To the extent permitted by law, the City shall indemnify, defend and hold harmless Grantee for claims arising out of the City's use of the EG Access Channels and/or the Emergency Alert System.

9.3.7 Grantee's Further Responsibilities. Grantee shall indemnify and hold harmless the City from any workers' compensation claims to which Grantee may become subject during the Term of this Franchise. It is further specifically and expressly understood that, solely to the extent required to enforce the indemnification provided per this Franchise, Grantee waives its immunity under RCW Title 51; provided, however, the foregoing waiver shall not in any way preclude Grantee from raising such immunity as a defense against any claim brought against Grantee by any of its employees or other third party. This waiver has been mutually negotiated by the parties.

9.4 Security. Grantee shall provide a performance bond in the amount of fifteen thousand dollars (\$15,000.00) (the "Security") to ensure the faithful performance of its responsibilities under this Franchise and applicable law. Grantee may be required to obtain additional security, such as generally applicable construction bonds, in accordance with the City's permitting requirements. Grantee shall pay all premiums or costs associated with maintaining the Security, and shall keep the same in full force and effect at all times throughout the term of this Agreement. The form of the security may, at Franchisee's option, be a performance bond, letter of credit, cash deposit, cashier's check or any other security acceptable to the City. If the Grantee posts a performance bond, it shall be substantially in the form of Exhibit C. Except as expressly provided herein or as otherwise specified in the City's construction permitting requirements, the Grantee shall not be required to obtain or maintain other security as a condition of being awarded the Franchise.

9.4.1 In the event the Security provide pursuant to this Franchise is not renewed, is cancelled, is terminated or is otherwise impaired, Grantee shall provide new security pursuant to this Section within sixty (60) days of notice.

9.4.2 Neither cancellation, nor termination nor refusal by surety to extend the bond, nor inability of Grantee to file a replacement bond or replacement security for its obligations, shall constitute a loss to the City recoverable under the bond.

SECTION 10. System Description and System Facilities

10.1 **System Description.** Prior to the Effective Date of this Franchise, Grantee undertook a voluntary upgrade of its Cable System to a hybrid fiber coaxial (HFC) fiber-to-the-node system architecture, with fiber optic cable deployed from its headend to nodes and tying into a coaxial system serving Subscribers. The Cable System is capable of delivering high quality signals that meet or exceed FCC technical quality standards regardless of any particular manner in which the signal is transmitted.

10.2 **Technological Improvements.** Throughout the Term of this Franchise, Grantee shall provide additional Cable System facilities and equipment, expand Cable System Channel capacity and otherwise upgrade or rebuild its Cable System as required to incorporate improvements in technology as necessary to reasonably meet the needs and interests of the community, in light of the cost thereof.

10.3 **Technical Requirement.** Grantee shall operate, maintain and construct the Cable System so as to continue the provision of high quality signals and reliable delivery of Cable Services. The Cable System shall meet or exceed any and all technical performance standards of the FCC as published in subpart K of 47 C.F.R. §76, the National Electrical Safety Code, the National Electrical Code and any other applicable federal law and the laws of the State of Washington as amended (the "Technical Requirements").

10.4 **Cable System Performance Testing.** Grantee shall perform all tests on its Cable System as required by the FCC (including at least one (1) test point located within the City) and shall maintain written records of its test results. Copies of such test results will be provided to the City upon request. Upon request, Grantee shall notify the City prior to any required technical proof of performance testing and, the City may witness such testing. If the Cable System fails to meet any portion of a proof of performance test, Grantee shall promptly take such measures as are necessary to correct any performance deficiencies identified as part of the technical testing. Sites shall be re-tested within five (5) days following correction until correction has been confirmed and satisfactory results are obtained.

10.5 **Additional Tests.** Where there exists a pattern of poor technical performance or signal quality, the City may upon thirty (30) days prior written notice, require Grantee to conduct performance testing on other test points located within the City. Grantee shall fully cooperate with the City in performing such testing and shall prepare the results and a report if requested, within thirty (30) days after such testing. This report shall include the following information:

10.5.1 The nature of the complaint or problem which precipitated the special tests;

10.5.2 The Cable System component tested;

10.5.3 The equipment used and procedures employed in testing;

10.5.4 The method, if any, in which such complaint or problem was resolved; and

10.5.5 Any other information pertinent to said tests and analysis which may be required.

10.6 Standby Power. Grantee shall provide standby power generating capacity at the Cable System Headend capable of providing at least twelve (12) hours of emergency operation. Grantee shall maintain standby power supplies that supply back-up power for at least two (2) hours duration throughout the distribution networks and four (4) hours duration at all nodes and hubs.

10.7 Emergency Alert System. The Grantee shall provide an operating Emergency Alert System in accordance with the provisions of State and federal laws, including FCC regulations.

SECTION 11. Educational and Governmental Access

11.1 Access Channels. Upon written request, Grantee shall provide one Governmental Access Channel for the City's use and one Educational Access Channel for the use of the local school district(s) throughout the Term of this Franchise. Such Channels shall be made available within one hundred twenty (120) days of the request, unless additional time is required to facilitate such change. Provided that the FCC does not declare effective competition, as defined in 47 U.S.C. §543 and 47 C.F.R. §76.905, the Access Channels shall be made available at no extra charge to Subscribers on Grantee's lowest tier of service.

11.2 Change in Cable System Technology. In the event Grantee makes any change in the Cable System technology, which affects the signal quality or transmission of any Access Channel programming, Grantee shall take all necessary technical steps to ensure the delivery of Access programming is not diminished or adversely affected.

11.3 Management and Control of Access Channels. Grantee does not have any editorial Control over the Access Channel programming. The City may authorize Designated Access Providers to Control, operate, and manage the use of any and all Access facilities provided by Grantee under this Franchise, including, without limitation, the operation of the Access Channels. The City or its designee may formulate rules for the operation of the Access Channels. Nothing herein shall prohibit the City from authorizing itself to be a Designated Access Provider. Grantee shall cooperate with the City and Designated Access Providers in the use of the Cable System for the provision of Access Channels.

11.4 Underutilized Access Channels. Grantee and the City agree that it is their mutual goal to fully and efficiently use the Channel capacity of the Cable System, which may include Grantee's use of underutilized Access Channels. If Grantee believes that any Access Channel is underutilized, it may file a request with the City to use that Access Channel. The City shall in its sole discretion render a decision regarding the matter within sixty (60) days of receiving the request. Should the City find that the Access Channel may be used by Grantee, then Grantee may begin using such Channel ninety (90) days after receipt of the decision. If a Designated Access Provider wants to begin using the Channel and has adequate amounts of

programming to place on the Channel, then upon sixty (60) days written notice from the City, Grantee shall discontinue using the Access Channel.

11.5 Access Channel Location. Grantee will use reasonable efforts to minimize the movement of Access Channel assignments. Grantee shall provide to the City a minimum of sixty (60) days notice, and use its best efforts to provide ninety (90) days notice, prior to any relocation of its Access Channels, unless the change is required by federal law, in which case Grantee shall give the City the maximum notice possible. In the event of Access Channel relocation, Grantee shall provide notice to Subscribers in the same manner as notice is provided for any other Channel relocation.

11.6 Support for Access Capital Costs. In an effort to meet the demonstrated community need for Access programming, Grantee shall collect from Subscribers and remit to the City an EG Fee that may be used for Access related capital expenditures, such as production equipment or a studio.

11.6.1 Upon forty-five (45) days written notice, Grantee shall commence collection of an EG Fee from Subscribers an amount no greater than twenty-five cents (\$.25) per Subscriber per month. That amount may be lowered or waived by the City at any time. Grantee shall remit the EG Fee at the same time as quarterly Franchise Fee payments.

11.6.2 Grantee shall not be responsible for paying the EG Fees with respect to gratis or Bad Debt accounts. The City can inquire as to the status of any such accounts, and Grantee agrees to meet with the City, upon request, to discuss such matters as necessary.

11.6.3 The City shall have the discretion to allocate the EG Fees in accordance with applicable law, and shall submit a summary of capital expenditures from the EG Fees to Grantee within sixty (60) days of the end of each calendar year. The summary shall include financial information showing all EG Fees received, EG expenses used for EG Access purposes and the ending balance.

11.6.4 To the extent the City makes Access capital investments using City funds prior to receiving the EG Fees, the City is entitled to apply the EG Fee payments from Grantee toward such City capital investments necessary for the programming of its Access Channels. The City and Grantee agree that any EG Fees shall be referred to on Subscribers' bills as an "EG Fee," or language substantially similar thereto.

11.6.5 The EG Fees provided for in this Section shall not be offset or credited against any Franchise Fee payments.

11.7 Return Connectivity.

11.7.1 Prior to the commencement of this Franchise, Grantee constructed a fiber optic return line from the City's EG origination site to its headend. Upon written request of the City, Grantee may construct and maintain additional EG origination sites at other locations within the Franchise Area, for the purpose of delivering Access programming. All costs for fiber optic connectivity to additional EG origination sites shall be paid by the City in advance of

construction. All requests for construction of additional EG origination sites must be made one year prior to when construction would occur. Grantee may require that a reasonable deposit of the estimated project cost be paid in advance.

11.7.2 Upon completion of the requested work by the City and upon submission by Grantee of a proper invoice for payment of the cost incurred, City shall pay Grantee within thirty (30) days of receipt. All work shall be performed in a cost-effective manner to minimize the costs to the City.

11.8 Interconnection. Grantee shall within six (6) months of written notice from the City interconnect the Access Channels of the Cable System with any other geographically adjacent Cable System not owned or operated by Grantee upon the directive of the City and approval of the Grantee and owner of the other Cable System. Interconnections shall be located at the City's EG origination site or at another location mutually agreed upon by City and Grantee.

SECTION 12. Enforcement of Franchise

12.1 Notice of Violation or Default. In the event the City believes that Grantee has not complied with a term or provision of the Franchise, the City shall informally discuss the matter with Grantee. If these discussions do not lead to resolution of the problem within a reasonable time frame, the City shall then notify Grantee in writing of the exact nature of the alleged noncompliance (the "Noncompliance Notice").

12.2 Grantee's Right to Cure or Respond. Grantee shall have thirty (30) days from the receipt of the City's Noncompliance Notice: (A) to respond to the City, contesting the assertion of the alleged noncompliance or default; (B) to cure such default; or (C) in the event that, by nature of the default, such default cannot be cured within the thirty (30) day period, initiate reasonable steps to remedy such default and notify the City of the steps being taken and the projected date that they will be completed.

12.3 Public Hearing. In the event Grantee fails to respond to the City's Noncompliance Notice or that the alleged default is not remedied within thirty (30) days or the date projected by Grantee (provided such projection is also acceptable to the City), the City may schedule a public hearing to investigate the alleged default. Such public hearing may be held no less than thirty (30) business days therefrom. The City shall notify Grantee in writing of the time and place of such hearing and provide Grantee with a reasonable opportunity to be heard, to present evidence in its defense, and to question witnesses.

12.4 Options Following Public Hearing. If, after the hearing, the City determines that a default exists, Grantee and the City may agree on a plan and schedule to cure the default. Absent such agreement, the City shall order Grantee to correct or remedy the default or breach within such reasonable timeframe as the City shall determine. In the event Grantee does not cure the default within such time to the City's reasonable satisfaction, the City may:

12.4.1 Pursue the revocation of this Franchise pursuant to the procedures in Section 14 in the event of a material breach of this Franchise; or

12.4.2 Pursue any other legal or equitable remedy available under this Franchise or any applicable law.

SECTION 13. Liquidated Damages

13.1 Liquidated Damages. The City and Grantee recognize the delays, expense and unique difficulties involved in proving in a legal proceeding the actual loss suffered by the City as a result of Grantee's breach of certain provisions of this Franchise. Accordingly, instead of requiring such proof, the City and Grantee agree that Grantee shall pay to the City, the sums set forth below for each day or part thereof that Grantee shall be in breach of specific provisions of this Franchise. Such amounts are agreed to by both parties as a reasonable estimate of the actual damages the City would suffer in the event of Grantee's breach of such provisions of this Franchise.

13.1.1 Subject to the provision of written notice to Grantee and a thirty (30) day right to cure period, the City may assess against Grantee liquidated damages as follows: one hundred dollars (\$100.00) per day for failure to provide the Access Channel(s); one hundred fifty dollars (\$150.00) per day for each material violation of the Customer Service Standards; fifty dollars (\$50.00) per day for failure to provide reports or notices as required by this Franchise; and up to two hundred dollars (\$200.00) per day for any other material breaches of the Franchise.

13.1.2 The City shall provide Grantee a reasonable extension of the thirty (30) day right to cure period described in Section 13.1.1 if Grantee has commenced work on curing the violation, is diligently and continuously pursuing the cure to completion and requested such an extension, provided that any such cure is completed within one hundred and twenty (120) days from the written notice of default.

13.1.3 Liquidated damages may be assessed for no more than seventy-five (75) calendar days for any individual incident.

13.1.4 In the event Grantee fails to cure within the specified cure period, or any agreed upon extensions thereof, liquidated damages accrue from the date the City notifies Grantee that there has been a violation.

13.2 Recovery of Amounts. The recovery of amounts under Section 9.4 and 13.1.1 shall not be construed as a limit on the liability of Grantee under the Franchise or an excuse of unfaithful performance of any obligation of Grantee. Similarly, the imposition of liquidated damages are not intended to be punitive, but rather, for the City's cost recovery purposes.

SECTION 14. Termination of Franchise

14.1 Revocation. This Franchise may be revoked and all rights and privileges rescinded if:

14.1.1 There is an uncured violation of any material obligation under this Franchise;

14.1.2 Grantee attempts to evade any material provision of this Franchise or to practice any fraud or deceit upon the City or Subscribers;

14.1.3 Grantee makes a material misrepresentation of fact in the negotiation of this Franchise;

14.1.4 There is a foreclosure or involuntary sale of the Cable System;

14.1.5 Grantee willfully fails to provide services as specified in this Franchise;

14.1.6 Grantee becomes insolvent or if there is an assignment for the benefit of Grantee's creditors; or

14.1.7 There is a pattern or practice of material violation of any requirement of this Franchise.

14.2 Grantee Without Fault. Notwithstanding Section 14.1, none of the foregoing shall constitute a material violation or breach if Grantee is without fault or if the violation or breach occurs as a result of circumstances beyond Grantee's reasonable Control. Grantee shall bear the burden of proof in establishing the existence of such circumstances.

14.3 Revocation Notice. Should the City seek to revoke this Franchise after following the procedures set forth in this Section 14, the City shall give written notice to Grantee of such intent to revoke this Franchise. This notice of intent to revoke ("Revocation Notice") is in addition to the Noncompliance Notice pursuant to Section 12.1. The Revocation Notice shall set forth the specific nature of the noncompliance. Grantee shall have thirty (30) days from receipt of such Revocation Notice to object in writing and to state its reasons for such objection. In the event the City has not received a satisfactory response from Grantee, it may then seek revocation of the Franchise at a second Public Hearing (the "Revocation Hearing"). The City shall cause to be served upon Grantee at least thirty (30) days prior to the Revocation Hearing a written notice specifying the time and place of such hearing and stating its intent to revoke the Franchise.

14.4 Revocation Hearing. At the Revocation Hearing, Grantee shall be provided a fair opportunity for full participation, including the right to be represented by legal counsel, to introduce relevant evidence, to require the production of evidence, to compel the testimony of Persons as permitted by law, and to question and/or cross examine witnesses. The public hearing shall be on the record and a written transcript shall be made available to Grantee within ten (10) business days.

14.5 Findings and Conclusions. Following the Revocation Hearing, Grantee shall be provided up to thirty (30) days to submit its proposed findings and conclusions in writing and thereafter the City shall determine (i) whether an event of default has occurred; (ii) whether such event of default is excusable; and (iii) whether such event or default has been cured or will be cured by Grantee. The City shall also determine whether to revoke the Franchise based on the information presented or, where applicable, grant additional time to Grantee to effect any cure. If the City determines that the Franchise shall be revoked, the City shall promptly provide

Grantee with a written decision setting forth its reasoning. Grantee may appeal such determination of the City to an appropriate court, which shall have the power to review the decision of the City "de novo". Grantee shall be entitled to such relief as the court finds appropriate. Such appeal must be taken within thirty (30) days of Grantee's receipt of the determination of the City.

14.6 Enforcement in Lieu of Revocation. The City may, at its sole discretion, take any lawful action which it deems appropriate to enforce the City's rights under the Franchise in lieu of revocation of the Franchise.

14.7 Technical Violation. The City agrees that it is not its intention to subject Grantee to penalties, fines, forfeitures or revocation of the Franchise for so-called "technical" breach(es) or violation(s) of the Franchise, which shall include, but not be limited, to the following:

14.7.1 Instances or matters where a violation or a breach of the Franchise by Grantee was good faith error that resulted in no or minimal negative impact on the Subscribers within the Franchise Area or on the City; or

14.7.2 Where there existed circumstances reasonably beyond the Control of Grantee and which precipitated a violation by Grantee of the Franchise, or which were deemed to have prevented Grantee from complying with a term or condition of the Franchise.

SECTION 15. Miscellaneous Provisions

15.1 Authority and Changes in the Law. The City shall be vested with the power and right to administer and enforce the requirements of this Franchise and the regulations and requirements of applicable law, including the Cable Act, or to delegate that power and right, or any part thereof, to the extent permitted under law, to any agent in the sole discretion of the City. Grantee and the City shall be entitled to all rights and be bound by all changes in local, State and federal law that occur subsequent to the Effective Date of this Franchise. Grantee and the City acknowledge that their rights and obligations under this Franchise are explicitly subject to all such changes.

15.2 Actions of Parties. In any action by the City or Grantee that is mandated or permitted under the terms hereof, such party shall act in a reasonable, expeditious, and timely manner. Furthermore, in any instance where approval or consent is required under the terms hereof, such approval or consent shall not be unreasonably withheld, delayed or conditioned.

15.3 Amendments. Amendments to this Franchise shall be mutually agreed upon, in writing by the parties.

15.4 Incidental Costs. Upon written request by the City, Grantee shall pay City the reasonable incidental costs of processing the Franchise, which amount shall be determined and agreed upon prior to adoption of this Franchise. The City shall memorialize the amount of incidental costs by notifying Grantee of the same, which notification shall become a part of this

Franchise. The City may use the incidental costs for any lawful purpose. Grantee may recover this amount in accordance with federal law.

15.5 Attorneys' Fees. If any action or suit arises in connection with this Franchise (excluding Franchise renewal proceedings), the substantially prevailing party shall be entitled to recover all of its reasonable attorneys' fees, costs and expenses in connection therewith along with such other relief that the court deems proper.

15.6 Binding Acceptance. This Franchise shall bind and benefit the parties hereto and their respective successors and assigns.

15.7 Captions. The captions and headings of Sections throughout this Franchise are intended solely to facilitate reading and reference to the sections and provisions of this Franchise. Such captions shall not affect the meaning or interpretation of this Franchise.

15.8 Costs to be Borne by Grantee. Grantee shall pay all costs of publication of this Franchise and any and all notices prior to any public meeting or hearing in connection with this Franchise.

15.9 Cumulative Rights. Subject to applicable law, all rights and remedies given to the City by this Franchise or retained by the City herein shall be in addition to and cumulative with any and all other rights and remedies, existing or implied, now or hereafter available to the City, at law or in equity, and such rights and remedies shall not be exclusive, but each and every right and remedy specifically given by this Franchise or otherwise existing or given may be exercised from time to time and as often and in such order as may be deemed expedient by the City and the exercise of one or more rights or remedies shall not be deemed a waiver of the right to exercise at the same time or thereafter any other right or remedy.

15.10 Entire Franchise. This Franchise, including the Exhibit, embodies the entire understanding and agreement of the City and Grantee with respect to the subject matter hereof and supersedes all prior understandings, agreements and communications, whether written or oral.

15.11 Force Majeure. Grantee shall not be held in default under, or in noncompliance with, the provisions of the Franchise, nor suffer any enforcement or penalty relating to noncompliance or default (including termination, cancellation or revocation of the Franchise), where such noncompliance or alleged defaults occurred or were caused by strike, riot, war, earthquake, flood, tidal wave, unusually severe rain or snow storm, hurricane, tornado or other catastrophic act of nature, labor disputes, failure of utility service necessary to operate the Cable System, governmental, administrative or judicial order or regulation or other event that is reasonably beyond Grantee's ability to anticipate or Control. This provision also covers work delays caused by waiting for utility providers to service or monitor their own utility poles on which Grantee's cable or equipment is attached, as well as unavailability of materials or qualified labor to perform the work necessary.

15.12 Governing Law. This Franchise shall be governed, construed and enforced in accordance with the laws of the State of Washington as amended, federal law including the

Cable Act as amended, any applicable rules, regulations and orders of the FCC as amended and applicable local laws now existing or hereafter amended or adopted.

15.13 Equal Employment Opportunity. Grantee shall comply with all applicable federal and State laws affording nondiscrimination in employment to all individuals regardless of their race, color, religion, age, sex, national origin, sexual orientation or physical disability.

15.14 Modification. No provision of this Franchise shall be amended or otherwise modified, in whole or in part, except by an instrument in writing, duly executed by the City and Grantee, which amendment shall be authorized on behalf of the City through the adoption of an appropriate resolution, ordinance or order by the City, as required by applicable law.

15.15 No Joint Venture. Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties, and neither party is authorized to, nor shall either party act toward third Persons or the public in any manner that would indicate any such relationship with the other.

15.16 Notices. All notices shall be in writing and shall be sufficiently given and served upon the other party by hand delivery, first class, registered or certified mail, return receipt requested, postage prepaid, or by reputable overnight courier service and addressed as follows:

To the City:
18120 68th Ave. N.E.
Kenmore, WA 98028

To the Grantee:

Comcast of WA IV, Inc. and Comcast of CA/CO/WA I, Inc.
PO BOX 97007
Redmond, WA 98073-9707

with a copy to:

Comcast of WA IV, Inc. and Comcast of CA/CO/WA I, Inc.
15815 25th Ave. W.
Lynnwood, WA 98087
Attn: Government Affairs Dept.

15.17 No Third-Party Beneficiaries. Nothing in this Franchise is or was intended to confer third-party beneficiary status on any Person or any member of the public to enforce the terms of this Franchise.

15.18 Reservation of Rights. Nothing in this Franchise shall be construed as a waiver of any rights, substantive or procedural, Grantee or City may have under Federal or State law unless such waiver is expressly stated herein.

15.19 Preemption. In the event that federal or State law preempts a provision or limits the enforceability of a provision of this Franchise, the provision shall be read to be preempted to the extent required by law. In the event such federal or State law is subsequently repealed, rescinded, amended or otherwise changed so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon return to full force and effect, and shall thereafter be binding on the parties hereto, without the requirement of further action on the part of the City or Grantee.

15.20 Recitals. The recitals set forth in this Franchise are incorporated into the body of this Franchise as if they had been originally set forth herein.

15.21 Severability. If any section, subsection, sentence, clause, phrase, or other portion of this Franchise is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body, or other authority of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent portion. Such declaration shall not affect the validity of the remaining portions hereof, which other portions shall continue in full force and effect.

15.22 Venue. The venue for any dispute related to this Franchise shall be the United States District Court for the Western District of Washington, or the King County Superior Court.

15.23 Waiver. The failure of either party at any time to require performance by the other of any provision hereof shall in no way be a waiver thereof unless specifically waived in writing. Nor shall the waiver by either party of any breach of any provision hereof be taken or held to be a waiver of any succeeding breach of such provision, or as a waiver of the provision itself or any other provision.

15.24 Independent Review. The City and Grantee each acknowledge that they have had opportunity to receive independent legal advice in entering into this Franchise and that both the City and Grantee understand and fully agree to each and every provision of this Franchise.

IN WITNESS WHEREOF, this Franchise has been executed by the duly authorized representatives of the parties as set forth below, as of the date set forth above:

City:

By: _____

Name: _____

Title: _____

COMCAST _____

By: _____

Name: _____

Title: _____

Approved as to form:

City Attorney

Attest:

City Clerk

EXHIBITS

Exhibit A: Customer Service Standards

Exhibit B: Municipal Buildings and Schools to be Provided Free Cable Service

Exhibit C: Performance Bond

EXHIBIT A

CUSTOMER SERVICE STANDARDS

Section 1. POLICY

- A. The Grantee shall be permitted to resolve citizen Complaints prior to action or involvement by the LFA.
- B. If a Complaint is not resolved by the Grantee to the citizen's satisfaction, the LFA may intervene. In addition, where a pattern of, or unremedied, noncompliance with the Customer Service Standards ("Standards") is identified, the LFA may choose to follow the procedures contained in these Standards. If the noncompliance is not addressed to the satisfaction of the LFA, monetary or other sanctions may be imposed to encourage compliance.
- C. These Standards are intended to be of general application; however, the Grantee shall be relieved of any obligations hereunder if it is unable to perform due to circumstances beyond its reasonable control, as described in Subsection 14.11 of the Franchise. The Grantee shall seek to render efficient service and to make repairs promptly. In addition, the Grantee may, and is encouraged, to exceed these Standards for the benefit of its Customers and such shall be considered performance for the purposes of these Standards.

Section 2. DEFINITIONS

When used in these Standards, the following words, phrases, and terms shall have the meanings given below.

"Complaint" shall mean an initial or repeated Customer expression of dissatisfaction, whether written or oral, that is referred beyond a Customer Service Representative at the Call Center, or to the Grantee's system office or regional office or corporate headquarters, or to the LFA for resolution. This does not include routine inquiries and service requests.

"Customer" shall mean any person who lawfully receives Cable Service from the Grantee.

"Customer Service Representative" or "CSR" shall mean any person employed by the Grantee to assist, or provide service to Customers, whether by answering telephone calls, answering Customers' questions, or performing other customer service related tasks.

"Grantee" shall mean Comcast of WA IV, Inc. and Comcast of CA/CO/WA I, Inc.

"LFA" shall mean the City of Kenmore, Washington.

"Normal Business Hours" shall mean those hours during which most similar businesses in the LFA are open to serve Customers. In all cases, "Normal Business Hours" must include

some evening hours, with Customer Service Representatives available, at least one night per week and some weekend hours.

"Normal Operating Conditions" shall mean those service conditions that are within the control of the Grantee. Those conditions that are not within the control of the Grantee include, but are not limited to, natural disasters, civil disturbances, power outages, and severe or unusual weather conditions. Those conditions that are ordinarily within the control of the Grantee include, but are not limited to, special promotions, pay-per-view events, rate increases, regular peak or seasonal demand periods, and maintenance or upgrade of the Cable System.

"Service Interruption" shall mean the loss of picture or sound on one or more cable channels.

Section 3. **COURTESY**

All employees of the Grantee shall be courteous, knowledgeable and helpful and shall provide effective and satisfactory service in all contacts with Customers.

Section 4. **ACCESSIBILITY**

- A. The Grantee is encouraged to provide customer service centers. If provided, customer service shall be available at a service center or centers at least nine consecutive hours on Monday through Friday, ending no earlier than 6:00 p.m., and at least four consecutive hours on Saturdays, ending no earlier than 1:00 p.m. The service center(s) shall be fully staffed with Customer Service Representatives offering the following services to Customers who come to the service center(s): bill payment, equipment return (at designated locations), processing of change of service requests, and response to other Customer inquiries and requests. The Grantee shall post a sign at the service center(s) advising Customers of its hours of operation and of the addresses and telephone numbers at which to contact the LFA and the Grantee if the service center is not open at the times posted. The Grantee shall also make available its web site and e-mail address to its Customers. The Grantee shall also provide free exchanges of faulty converters at the Customer's address at a convenient time that is mutually agreed upon.
- B. The Grantee shall maintain local telephone access lines or a toll free telephone number that shall be available 24 hours a day, seven days a week for service/repair requests and billing inquiries.
- C. The Grantee shall have dispatchers and technicians on call 24 hours a day, 7 days a week, including legal holidays.
- D. Trained Customer Service Representatives will be available to respond to Customer telephone inquiries during Normal Business Hours. Under Normal Operating Conditions, telephone answer time shall not exceed thirty (30) seconds when the connection is made. If the call needs to be transferred, transfer time shall not exceed thirty (30) seconds. These standards shall be met no less than ninety percent (90%) of the time under Normal Operating Conditions, measured on a quarterly basis. Under Normal Operating

Conditions, the Grantee shall maintain adequate telephone line capacity to ensure that telephone calls are answered as provided in these Standards.

- E. After Normal Business Hours, the telephone lines may be answered by a service or an automated response system, including an answering machine. Inquiries received after Normal Business Hours must be responded to by a trained Customer Service Representative on the next business day.
- F. Under Normal Operating Conditions, the total number of calls receiving busy signals shall not exceed three percent (3%) of the total telephone calls. This standard shall be met ninety percent (90%) or more of the time measured quarterly.
- G. The Grantee shall not be required to acquire equipment or perform surveys to measure compliance with any of the telephone answering standards above unless and until the LFA requests such actions based on a historical record of Customer inquiries or Complaints indicating a clear failure to comply.

Section 5. **RESPONSIVENESS**

A. Residential Installation

- 1. Under Normal Operating Conditions, Grantee shall complete all standard residential installations requested by Customers within seven (7) business days after the order is placed. This standard shall be measured on a quarterly basis and must be met ninety-five percent (95%) of the time. "Standard" residential installations are those located within one hundred twenty-five (125) aerial feet or sixty (60) trench feet if underground, from the existing distribution system. If the Customer requests a nonstandard residential installation, or the Grantee determines that a nonstandard residential installation is required, the Grantee shall provide the Customer in advance with a total installation cost estimate and an estimated date of completion.
- 2. Absent unusual circumstances, all underground cable drops from the curb to the home shall be buried at a depth of no less than twelve inches (12"), and within a reasonable period of time from the initial installation, or at a time mutually agreed upon between the Grantee and the Customer. In all instances, the Grantee must comply with the State's One Call requirements.

B. Service Appointments

- 1. Customers requesting installation of Cable Service or service to an existing installation may choose a four-hour block of time for the service appointment between 8:00 a.m. and 6:00 p.m. or another block of time mutually agreed upon by the Customer and the Grantee. The Grantee may not cancel an appointment with a Customer after 5:00 p.m. on the day before the scheduled appointment, except for appointments scheduled within twelve (12) hours after the initial call.

2. If the Grantee's representative is running late for an appointment with a Customer and will not be able to keep the appointment as scheduled, the Grantee or the Grantee's representative shall contact the Customer. The appointment shall be rescheduled as necessary at a time that is convenient for the Customer.
3. The Grantee shall be deemed to have responded to a request for service under the provisions of this section, when a technician arrives within the agreed upon time to initiate the work specified in the work order. If the Customer is absent when the technician arrives, the technician shall leave written notification of timely arrival.

C. Outages and Service Interruptions

1. Except in times of emergency, if there is a system outage (loss of reception on all channels) resulting from Grantee equipment failure affecting five (5) or more Customers, the Grantee shall respond in accordance with its outage response procedures, and in no event more than two (2) hours after the third (3rd) Customer call is received and shall remedy the problem as quickly as possible.
2. Under Normal Operating Conditions, the Grantee shall use its best efforts to correct service interruptions resulting from Grantee's equipment failure by the end of the next calendar day, but in no event longer than forty-eight (48) hours and Customers will not be charged for such service calls.
3. In the event of a service disruption through Grantee's error, service shall be restored at the earliest time possible and Customers will not be charged for such service calls.
4. The Grantee shall keep an accurate and comprehensive file of any and all Complaints regarding the Cable System or its operation of the Cable System, in a manner consistent with the privacy rights of Customers, and the Grantee's actions in response to those Complaints. Upon request, Grantee shall provide the LFA an executive summary of all Customer Complaints received within the past twelve (12) months.
5. Absent unusual circumstances, the Grantee shall use its best efforts to initiate repairs on all outages and service interruptions for any cause beyond the control of the Grantee within thirty-six (36) hours, after the conditions beyond its control have subsided but not later than forty-eight (48) hours.

D. TV Reception

1. The Cable Service signal quality provided by the Grantee shall meet or exceed technical standards established by the Federal Communications Commission ("FCC"). The Grantee shall interrupt service only for good cause and for the shortest time possible. Scheduled interruptions shall be preceded by notice and shall occur during periods of minimum use of the system, preferably between midnight and six a.m. (6:00 a.m.).

2. If a Customer experiences poor signal quality (whether it relates to a visual or audio problem) which is attributable to the Grantee's equipment, the Grantee shall respond and repair the problem no later than the day following the Customer call, provided that the Customer is available and the repair can be made within the allotted time. If an appointment is necessary, the Customer may choose a block of time, as described in Subsection B.1 of this Section.

E. Problem Resolution

A Customer Service Representative shall have the authority to provide credit, waive fees, schedule service appointments and change billing cycles, where appropriate. Any difficulties that cannot be resolved by the Customer Service Representative shall be referred to the appropriate supervisor who shall contact the Customer within twenty-four (24) hours and resolve the problem within forty-eight (48) hours or within such other timeframe as is acceptable to the Customer and the Grantee.

F. Billing, Credits, and Refunds

1. Grantee shall provide a clear and concise bill every month and shall allow at least a reasonable number of days from the beginning date of the applicable service period for payment of a Customer's bill for that period.
2. The Grantee shall issue refund checks promptly but no later than either the Customer's next billing cycle following resolution of the request or within thirty (30) days, whichever is earlier, or the return of the equipment supplied by the Grantee if service is terminated. Credits for service will be issued no later than the Customer's next billing cycle following the determination that a credit is warranted.
3. Grantee shall not, except to the extent expressly permitted by law, impose any fee or charge for service calls to a Customer's premises to perform any repair or maintenance work related to Grantee's equipment necessary to receive Cable Service, except where such problem is caused by a negligent or wrongful act of the Customer (including, but not limited to a situation in which the Customer reconnects Grantee's equipment incorrectly or installs Customer provided equipment) or by the failure of the Customer to take reasonable precautions to protect Grantee's equipment (for example, a dog chew).
4. Upon request, Grantee shall provide the LFA with a rate card with all applicable rates and charges related to Cable Service. In addition, Grantee shall provide the LFA, upon request, a copy of any billing insert related to rates or customer service, provided it is not promotional material.

G. Notice/Work

1. Except in the case of an emergency involving public safety or service interruption to a large number of Customers, the Grantee shall give reasonable notice to property owners or legal tenants prior to entering private premises. The notice shall specify the type of work to be performed. In the case of an emergency,

however, the Grantee shall attempt to contact the property owner or legal tenant in person, and shall leave a door hanger notice in the event personal contact is not made. Nothing herein shall be construed as authorizing access or entry to private property. Any work on private property shall be conducted in accordance with an agreement between the Grantee and the property owner. If damage is caused by any Grantee activity, the Grantee shall replace or repair the damaged property to as good a condition as before the Grantee's activity commenced. Adjacent or affected property owners shall be notified by mail or door hanger at least one week in advance of the installation of pedestals or other major construction or installation projects in the Rights-of-Way or on private property.

Section 6. SERVICES FOR CUSTOMERS WITH DISABILITIES

- A. For any Customer with a disability, the Grantee shall, at no charge, deliver and pick up converters at the Customer's home. In the case of a malfunctioning converter, the technician shall provide another converter, hook it up and ensure that it is working properly, and shall return the defective converter to the Grantee.
- B. The Grantee shall make available TDD/TTY service with trained operators, who can provide every type of assistance rendered by the Customer Service Representatives, for any hearing-impaired Customer at no charge.
- C. The Grantee shall provide free use of a remote control unit to mobility-impaired Customers (if disabled, in accordance with Subsection D of this Section).
- D. Any Customer with a disability may request the remote control unit described above by providing the Grantee with a letter from the Customer's physician stating the need, or by making the request to the Grantee's installer or service technician, where the need for the special service can be visually confirmed.

Section 7. CUSTOMER INFORMATION

- A. Upon installation and at any time thereafter, the Customer may request, or upon its own initiative, the Grantee shall provide the following information in a legible written form:
 - 1. Products and services offered by the Grantee, including its channel lineup;
 - 2. The Grantee's complete range of service options and the prices for these services;
 - 3. Instruction on the use of cable TV service and standard DVD/VCR hookups;
 - 4. The Grantee's billing, collection and disconnection policies;
 - 5. Customer privacy requirements;
 - 6. All applicable Complaint procedures, including Complaint forms, and the telephone numbers and mailing addresses of the Grantee and the FCC, as well as the contact information for the LFA;

7. Use and availability of parental control/lock out devices;
 8. Special services for Customers with disabilities; and
 9. Days, times of operation, and location of the service center(s).
- B. Customers will be notified of any changes in rates, programming services or channel positions as soon as possible in writing. Notice must be given to Customers a minimum of thirty (30) days in advance of such change(s) if the change is within the control of the Grantee. The Grantee shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, Franchise Fee, or any other fee, tax, assessment or charge of any kind imposed by any federal agency, State or the LFA.
- C. All officers, agents, and employees of the Grantee or its contractors or subcontractors who are in personal contact with Customers shall wear on their outer clothing identification cards bearing their name and photograph. The Grantee shall account for all identification cards at all times. Every vehicle of the Grantee shall be visually identified to the public as working for the Grantee. Every vehicle of a subcontractor or contractor shall be labeled with the name of the contractor or subcontractor, and shall be further identified as contracting or subcontracting for the Grantee. All CSRs shall identify themselves orally to callers immediately following the greeting during each telephone contact with the public.
- D. If possible, each CSR, technician or employee of the Grantee shall notify customers of the estimated cost of the service, repair, or installation prior to delivery of the service or before any work is performed.

Section 8. CUSTOMER PRIVACY

- A. The Grantee shall not monitor cable television signals to determine the individual viewing patterns or practices of any Customer without prior written consent from that Customer, except as needed to maintain system integrity or for other lawful purposes.
- B. The Grantee shall not sell or otherwise make available Customer lists or other personally identifiable information without the prior written consent of the Customer, except as otherwise permitted by law. The Grantee is permitted to disclose such information if necessary to render, or conduct, a legitimate business activity related to a Cable Service provided by the Grantee to its Customers.

Section 9. SAFETY

The Grantee shall install and locate its facilities, cable system, and equipment in compliance with all federal, state and local safety standards, and in such manner as shall not unduly interfere with or endanger persons or property. Whenever the Grantee receives notice that an unsafe condition exists with respect to its equipment, the Grantee shall investigate such condition immediately, and shall take such measures as are necessary to remove or eliminate any unsafe condition.

Section 10. SATISFACTION GUARANTEED

The Grantee currently offers a Customer satisfaction guarantee to every Customer who requests installation of Cable Service or who adds any additional programming service to the Customer's cable subscription.

Section 11. COMPLAINTS TO THE GRANTEE

- A. The Grantee shall establish written procedures for receiving, acting upon, and resolving Complaints without intervention by the LFA (except where necessary) and shall publicize such procedures through printed documents at the Grantee's sole expense.
- B. Said written procedures shall describe a simple process by which any Customer may submit a Complaint by telephone or in writing to the Grantee regarding a disputed matter, or an alleged violation of any provision of these Standards or any terms or conditions of the Customer's contract with the Grantee, or reasonable business practices.
- C. Within a reasonable period of time after receiving a Complaint, the Grantee shall notify the Customer of the results of its investigation and its proposed action or credit.
- D. Upon request, Grantee's Complaint procedures shall be provided to the LFA.

Section 12. VERIFICATION OF COMPLIANCE

The Grantee shall establish its compliance with all of the Standards required through annual reports that demonstrate said compliance, or as requested by the LFA.

Section 13. OVERALL QUALITY OF SERVICE

The LFA may evaluate the overall quality of Customer service provided by the Grantee to Customers:

- A. In conjunction with any performance review provided for in the Franchise; or
- B. At any other time, in its sole discretion, based on the number of Complaints received by the Grantee or the LFA, and the Grantee's response to those Complaints.

Section 14. PROCEDURES FOR REMEDYING VIOLATIONS

If the LFA has reason to believe that the Grantee has failed to comply with any of these Standards, or has failed to perform in a timely manner, or if similar Complaints repetitively arise, the LFA may require in writing that the Grantee remedy the alleged noncompliance as outlined in Section 12 of the Franchise. If the alleged noncompliance is denied or not remedied to the satisfaction of the LFA, the LFA may opt to follow the liquidated damages procedures, revocation procedures or seek other remedies set forth in the Franchise, or pursue any other remedies at law or in equity.

Section 15. SEVERABILITY

Should any section, subsection, paragraph, or provision of these Standards be determined to be illegal, invalid, or unconstitutional by any court or agency of competent jurisdiction, such determination shall have no effect on the validity of any other section, subsection, paragraph, or provision of these Standards, all of which shall remain in full force and effect.

Section 16. NON-WAIVER

Failure of the LFA to enforce any provision(s) of these Standards shall not operate as a waiver of the provision(s) or of the Standards.

EXHIBIT B

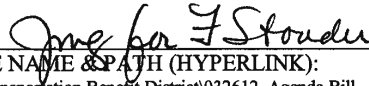
MUNICIPAL BUILDINGS AND PUBLIC SCHOOLS TO BE PROVIDED FREE CABLE SERVICE

Kenmore City Hall:*	18120 68 th Avenue NE
Northshore Fire District Headquarter Station #51:	7220 NE 181 st Street
King County Library System Kenmore Library:	6531 NE 181 st Street
Northshore Utility District Headquarters:	6830 NE 185 th Street
Northshore Fire Station #54**	15036 70 th Avenue NE
Inglemoor High School:	15500 Simonds Road NE
Kenmore Junior High School:	20323 66 th Avenue NE
Arrowhead Elementary School:	6725 NE Arrowhead Drive
Kenmore Elementary School:	19121 71 st Avenue NE
Moorlands Elementary School:	15115 84 th Avenue NE
King County Police Precinct**	18118 73 rd Avenue NE

* For this location only, the Franchisee has provided up to 3 outlets at no additional charge to the City.

** If occupied by a government agency

CITY OF KENMORE, WASHINGTON			
AGENDA BILL SUMMARY			
AGENDA TITLE			MEETING DATE
Discussion of a City of Kenmore Proposed Transportation Benefit District			March 26, 2012
DEPARTMENT	DIRECTOR	CONTACT PERSON	PHONE
Engineering	Ron Loewen	Caroline Brabrook, Lochner Steve Lewis, Lochner Gerry Willhelm, Lochner	425-398-8900
COST OF PROPOSAL: City Staff to date: 20 hours Contract to date: \$14,300		ACCOUNT NUMBER: 01 32 5401	
AMOUNT BUDGETED FOR PLAN: \$30,000.		NAME AND FUND #: General Fund - Engineering	
ATTACHMENT(S) TO AGENDA PACKET ITEM:			
• Attachment 1 - Discussion of Transportation Benefit District (TBD) Study Session Items • Attachment 2 - ESSB 6582 Conf. report • Attachment 3 - SB 6215E • Attachment 4 - RCW 35.74.050 & RCW 36.73.040 • Attachment 5 - July 12, 2010 2011-12 Pavement Management Program Agenda Bill • Attachment 6 - Frequently Asked Questions: Transportation Benefit District			
SUMMARY STATEMENT:			
A City Council public hearing to consider a Transportation Benefit District (TBD) is scheduled for April 16, 2012. The following discussion and attachments provide information to be used at a Council Study session. The study session will provide the Council an opportunity to ask for additional information and give direction on the preparation of a TBD enabling ordinance to be considered at the hearing. Attachment 1 provides an outline of the Study Session topics and background information. The presentation will follow this outline. The TBD enabling ordinance must include several specific items. Those items and Staff recommendations are as follows: District Boundaries: the TBD boundaries should be the same as the City limits. Smaller boundaries are possible however the TBD projects will benefit all residents of the City and therefore all residents should be included. Board Members: the Kenmore City Council should be the TBD board acting in an ex officio and independent capacity. The TBD board must be comprised of residents of the District. Other jurisdictions have named City Council members as board members. This is efficient in that the City Council members are knowledgeable of City finances, capital projects and street maintenance needs. TBD Treasurer – the City’s Finance Director should be the TBD Treasurer. State statutes specify the City’s Finance Director as the TBD Treasurer unless directed otherwise by the City Council. Use of Funds – the use of TBD funds should be as broad as possible. State statutes allow for capital projects, preservation and maintenance. The City’s needs are broad. Several capital projects are insufficiently funded and the current asphalt overlay program is not sustainable in the future. Providing a broad use of the funds allows for flexibility in meeting the City’s future needs. Define Regionally Significant Arterials and Congestion: the Council should adopt a definition for regionally significant arterials based on the current City traffic model. Congestion criteria should also be established based on number of projected vehicle trips on a roadway. The State statutes only allow the expenditure of			

TBD funds on regionally significant arterials with existing or reasonably foreseeable congestion levels. By providing these definitions the Council would provide clear direction on roadways that would be eligible for funding. Dissolution of the TBD: the TBD should be dissolved when all of the indebtedness has been retired and when all obligations have been met. Other options are dissolution at the completion of specific projects or time specific. Based on the Council's direction on these items a draft ordinance will be prepared for consideration at the public hearing. Attachment 2 is legislation that has passed both the Senate and the House but the conference bill has not been approved. The bill is still alive and may be approved in the special session. Attachment 3 has passed the legislature and includes current amendments to the TBD statutes. Attachment 4 is two pertinent sections of the TBD statutes. Attachment 5 is a list of frequently asked question and answers prepared by the Association of Washington Cities.		
CONSISTENT WITH OR COMPARISON TO PAST COUNCIL POLICIES, ORDINANCES, DIRECTION: Improve transportation for local residents by implementing the 6-year Transportation Improvement Plan.		
RECOMMENDED CITY COUNCIL ACTION/SUGGESTED MOTION: Discussion of a City of Kenmore Proposed Transportation Benefit District		
REVIEWED BY FINANCE DIRECTOR: 	REVIEWED BY CITY ATTORNEY:	APPROVED BY CITY MANAGER: 
TODAY'S DATE: March 16, 2012	REVISION DATE(S):	FILE NAME & PATH (HYPERLINK): S:\Transportation Benefit District\032612_Agenda Bill Summary TBD.doc

Attachment 1

Discussion of Transportation Benefit District (TBD) Study Session Items



Discussion of Transportation Benefit District March 26, 2012 City Council Study Session

Process for Forming Transportation Benefit District:

If a TBD is found to be in the interest of the council, the City is required to conduct a public hearing at the time and place specified in a notice published at least once and not less than ten days before the hearing, in a newspaper of general circulation within the City. The notice shall be in addition to any other notices required by state or municipal law to be published. The notice shall specify the function and activities proposed to be provided or funded.

Additional notice of the hearing may be given by mail, by posting within the proposed district, or in any manner the City deems necessary to notify affected persons. Hearings will be public and the City will consider objections from any person affected by the formation of the boundary.

Following the hearing, the City may establish a district if it finds the action to be in the public interest and adopt an ordinance providing for the action. The ordinance establishing a district defines the functions and boundaries of the district as well as the transportation improvements to be completed or funded. The defined functions and improvements may not be expanded beyond those specified in the above mentioned public hearing requirement. If the understood function or improvement is modified, additional hearings on the change or expansion would be required in an effort to determine the public interest to expand the functions or transportation improvements proposed to be provided or funded. Notices for these hearings would again require adherence to the hearing requirements outlined above.

Transportation District Boundaries:

District boundaries can be coterminous with city limits, a portion of the City or an area larger than the City. The boundaries may be smaller in larger jurisdictions where the district is being formed to fund a specific project or the jurisdiction is so large not all residents would benefit from the district. Most districts have been coterminous with their city limits. In this case, it is recommended that the boundaries be coterminous with district boundaries.

Arterial and Congestion Designation:

The 2010 Washington State Legislature amended the transportation benefit district legislation (RCW 36.73) to include projects on local arterials of regional significance with congestion. Previously, projects had to be consistent with existing state and regional transportation plans. A transportation improvement is now defined as:

"A project may include investment in new or existing highways of statewide significance, principal arterials of regional significance, high capacity transportation, public transportation,



Discussion of Transportation Benefit District March 26, 2012 City Council Study Session

and other transportation projects and programs of regional or statewide significance including transportation demand management. Projects may also include the operation, preservation, and maintenance of these facilities or programs.”

The legislature further modified the TBD enabling language as follows:

“The legislative authority of a county or city may establish a transportation benefit district within the county or city area or within the area specified in subsection (2) of this section, for the purpose of acquiring, constructing, improving, providing, and funding a transportation improvement within the district that is consistent with any existing state, regional, or local transportation plans and necessitated by existing or reasonably foreseeable congestion levels.”

The key words “of regional or statewide significance” and “necessitated by congestion levels” are important and need to be defined.

Regional Arterials Defined in Kenmore

For the purposes of the TBD, a *principal arterial of regional significance* should be defined as any roadway that is listed as an arterial street in the City’s Comprehensive Plan, Transportation Element and meets at least one of the following three criteria:

1. At least 80% of the traffic carried by the arterial street is regional – that is, no more than 20% of the traffic on an arterial, based on the City’s forecast model, originates in a City Transportation Analysis Zone and is destined for another City Transportation Analysis Zone; or
2. Is considered as an alternative route when a major regional facility such as SR 520, I-5, or I-405 are closed or impeded (in Kenmore, Simonds Road NE, Juanita Drive NE, 68th Avenue NE from NE 170th Street to SR 522, and SR 522 each serve in this capacity); or
3. Provide a regional connection to a regional destination inside the City of Kenmore, such as Kenmore by the Lake, Kenmore Air, and Bastyr University.

Using this definition, all arterial streets in Kenmore qualify as “regional” including:

- 80th Avenue NE
- 61st Avenue NE
- Simonds Road NE



Discussion of Transportation Benefit District March 26, 2012 City Council Study Session

- 73rd Avenue NE
- The Downtown Loop Road
- 68th Avenue NE to NE 185th Street

Regional Arterial Level of Congestion Defined in Kenmore

The City of Kenmore uses intersection level of service (LOS) as part of its system evaluation within the Comprehensive Plan. While intersection LOS is one way to measure congestion, it probably best represents congestion at intersections (not necessarily along the streets between intersections). Consultant and City staff evaluated a variety of methods to evaluate congestion along City streets, including intersection LOS, volume to capacity, and travel speed and found none adequately measured congestion in the City of Kenmore.

The State of Florida has done additional evaluation of congestion on streets in urbanized areas and suggests that congestion is achieved on 2-lane undivided streets when one-way directional volume achieves approximately 704 peak hour trips.¹ Using this methodology, each of the above listed arterial streets in Kenmore, with the exception of 80th Avenue NE, are considered to be “congested.”

Update on state legislature revisions to state law:

This legislative session there were 5 bills related to Transportation Benefit Districts written. One passed and one is still alive. The one that passed—ESB 6215—authorizes certain transportation benefit districts to create an option rebate program of up to 40% of a fee, tax or toll paid by a low-income person. This passed the Senate on February 14th and the House on March 2nd and will be signed by the governor.

The bill that is still alive is ESSB 6582. Essentially this modifies provisions relating to transportation options allowing for a \$40 fee without a vote of the people in the district. There is much more to the bill since it went to a conference committee. The conference committee revised the bill and gave it back to the Senate rules committee on March 8th. Whether it gets passed by both the senate and house is unclear as now the Legislature has moved into a special session and this might not be a high priority. ESSD 6582 also discusses tolling and requires the district to set and impose tolls in amounts sufficient to implement the district’s transportation improvement plan. Vehicle tolls however must first be reviewed by the tolling authority (Tolling Commission) and it must be determined whether the toll would have any impact on a state facility. The bill also describes how the department of licensing shall administer and

¹ 2009 FDOT Quality/Level of Service Handbook



Discussion of Transportation Benefit District March 26, 2012 City Council Study Session

collect the fee and deduct one percent of fees collected for administration. New sections in the bill include the allowance for larger districts created by counties between four hundred thousand and one million five hundred thousand to collect a motor vehicle excise task of up to one percent annually on the value of vehicle owned by residents of the district. A county of more than one million five hundred thousand may only impose a motor vehicle excise task of up to one percent annual with the approval of the majority of the registered voters in the county. It is specified in the bill that all proceeds of additional excise taxes must be used strictly for transportation purposes in accordance with RCW 82.80.070.

Revenue:

The traditional sources of funding transportation projects in Kenmore include:

- **City Street Fund:** The City Street Fund maintains streets, sidewalks, traffic control devices, illumination, bridges, and provides for the annual asphalt street overlays. Chart 1, attached, depicts recent and projected Street Fund revenue and expenditures. This graphic shows that with current trends the Street Fund expenditures are not sustainable beyond 2015. Either significant reductions in maintenance activities, most likely asphalt overlays, or additional revenue will be required to sustain the fund at current levels.
- **Transfers from the General Fund:** Transfers have held steady since 2007 at \$500,000 with the same in 2010, \$600,000 in 2011 and \$600,000 budgeted in 2012. However, this is down slightly from the 2005 high of approximately \$638,000. Chart 2, attached, depicts recent and projected General Fund revenue and expenditures. Assuming expenses grow by 3%, that a \$600,000 transfer to the City Street is maintained, and the most recent revenue trend continues, the chart shows that the cash balance will be depleted over time. If other demands for general fund, such as improved park maintenance, unforeseen emergencies or other additional City services are added, the general fund expenditures would not be sustainable.
- **Real Estate Excise Tax (REET):** REET fees, which must be used for capital expenditures, have seen a substantial decline since the peak in 2006 of \$1,630,000 to \$605,000 estimated in 2011, a 63% decrease. The 2012 revenues are not expected to improve. Chart 3, attached, depicts recent and projected REET Fund revenue and expenditures.
- **Transfers from the Surface Water Management Fee (SWM):** Prior to 2011 there were Surface Water Fund transfers to the City Street Fund to fund stormwater infrastructure and maintenance. In the 2011-2012 Biennial Budget the transfers were suspended as the Surface Water Management



Discussion of Transportation Benefit District March 26, 2012 City Council Study Session

Fund assumed responsibility for the activities previously performed by the Street Fund. However, a future option could be to transfer SWM funds to capital transportation projects. Approximately 6.5% of transportation project expenditures are for storm water improvements. In the case of the SR 522 Phase I, Stage 2 improvements this would amount to slightly over \$1 million.

- **Transportation Impact Fees:** Transportation impact fees have been declining with the rest of the economy since hitting a peak in 2005; going down over 6% in 2006, another 5% in 2007 and 2% in 2008. With the adoption of a new fee schedule in 2009, coupled with several public building projects, including City Hall, impact fees jumped to over \$680,000 in 2009, but declined to \$237,000 in 2011. This is significantly less than projected in the 2011-12 Biennium Budget. Chart 4, attached, depicts recent and projected Impact Fee Fund revenue and expenditures. The graphic shows that without an increase in revenue the fund will need to borrow funds to meet anticipated expenditures in 2012 and in future years if the City continues with improvements to the SR 522 corridor.
- **Motor Fuel Tax (gas tax):** Over the years, the motor fuel tax has been the most relied upon source of transportation funding for State and local governments. This revenue source has remained fairly constant with one major increase in 2007. With recent wide fluctuations in the cost of gasoline, the recession and more fuel efficient vehicles, the gas tax is anticipated to decrease slightly over time. Revenue from the Motor Fuel Tax peaked in Kenmore in 2007 at \$476,856; it has declined to \$424,935 in 2011. Chart 5, attached, depicts recent and historical Motor Fuel Tax revenue. The graphic shows that revenues are slightly declining.
- **License Tab Fees:** Proposition I-776 eliminated License Tab Fees in the street fund from \$169,700 in 2002, to zero today.
- **Motor Fuel Excise Tax:** A proposition eliminated the Motor Fuel Excise Tax in 1999. According to a budget note, the proposition reduced funds available for transportation projects by approximately \$1.5 million in the 2000 budget year.
- **State and Federal Grants:** Kenmore was extremely fortunate during its early years after incorporation to be awarded a variety of sizeable grants. For the most part, those grants came from either the Federal Transportation Efficiency Act program, direct gas tax allocation or the State Transportation Improvement Board.

TBD Projects:

A Transportation Benefit District (TBD) can fund transportation improvements contained in any existing state or regional transportation plan that is necessitated by existing or reasonably foreseeable



Discussion of Transportation Benefit District March 26, 2012 City Council Study Session

congestion levels. Examples of a state or regional plan include the Washington Transportation Plan² and the Puget Sound Regional Council Destination 2030 or soon to be adopted Transportation 2040.³

A question exists concerning whether funds can be used for maintenance and operations or only for the maintenance and operations of actual facilities specifically identified in a state or regional plan. To obtain information and review what other local communities are doing, Mr. Stephen Clifton, Community Services Director for the City of Edmonds was contacted. Based on the advice of their City Attorney, as well as the research they completed, they feel confident that they can (and do) use the funds for all street operations in the City. Mr. Clifton agreed the language in the statute is unclear or at least poorly written on this issue. According to Ashley Probart of the Association of Washington Cities, this is something they are working to correct in this session (HB 1591). Nonetheless, Edmonds feels confident the funds can be used for operations and maintenance of all city streets.

The language in the State Transportation Plan and PSRC Destination 2030 that they and others rely upon to defend the use of funds for this purpose is as follows:

The number one priority within the "Washington Transportation Plan for 2007-2026" adopted by the Washington Transportation Commission ("State Transportation Plan") is to preserve and extend prior investments in existing transportation facilities and the services they provide to people and commerce.

Investment principles from the Puget Sound Regional Council "Destination 2030 Metropolitan Transportation Plan for the Central Puget Sound Region" states that the first priority should be to maintain, preserve, make safe, and optimize existing transportation infrastructure and services (page 22). Regional Transportation Policy 8.3 identifies the importance of maintaining and preserving the existing urban and rural transportation systems in a safe and usable state. Page 62, (www.psrc.org/projects/mtp/pubs/D2030plan5.07.pdf) notes that adequate maintenance, preservation, and expansion of local roads are an important element of the "system" and that new local options should be put to this purpose.

² Washington Transportation Plan 2007-2026, November 14, 2006, prepared by the Washington State Transportation Commission and the Washington State Department of Transportation.

³ Transportation 2040 will update Destination 2030, the regional transportation plan; the DEIS has been completed.



Discussion of Transportation Benefit District March 26, 2012 City Council Study Session

Capital Projects – In the Comprehensive Plan (2008), and Transportation Improvement Program, the Council identified over \$179 million⁴ in transportation facility needs, not including maintenance.

Specific examples of transportation improvement projects include:

Project	Project Costs
SR 522 from 57 th Avenue to 61 st Avenue	\$10,848,700
61 st Avenue from NE 181 st to NE 175 th Streets	\$5,516,400
SR 522 from 61 st Avenue to 65 th Avenue	\$3,561,400
68 th Avenue NE – NE 175 th Street to Sammamish Bridge	\$3,100,000

Preservation and Maintenance - In 2010 a preliminary evaluation of the City's street rehabilitation needs over the next 10 years identified approximately \$18.2 million of asphalt overlay and roadway rehabilitation projects. This is in addition to the annual road maintenance expenditures that have averaged over \$1.08 million annually.

Revenue Generation:

To meet the identified goals of the TBD, the District is authorized to impose several taxes and fees. Three examples are discussed in the following:

Motor Vehicle License – The City could impose a vehicle license fee of up to \$100. Currently a fee of up to \$20 can be imposed without voter approval. The Department of Licensing estimates there are a total of 16,107 vehicles registered in the City of Kenmore. The Department of Licensing stated that this was their best estimate and to understand that it could be slightly higher or lower at any time. We also understand the actual revenues collected by various jurisdictions have been about 83% of projections. Assuming the number of registered vehicles is correct; the City could expect an annual revenue stream of \$322,140 at the \$20 level and \$644,280 at the \$40 level. The Department of Licensing did note that they would collect an administration fee of 1% so that would leave a total of \$318,919 and \$637,837 respectively for the City.

If it is in the Districts interest to impose a license renewal fee, the TBD would join eight other districts in the region to impose the fee (see Table 1 below).

⁴ See Kenmore Transportation Element & "Allocation of Costs of Kenmore Transportation Projects" for Kenmore's transportation impact fee assessment.



Discussion of Transportation Benefit District
March 26, 2012
City Council Study Session

Table 1. State of Washington Transportation Benefit Districts

District	Fee	Effective Date
Burien No. 1	\$10	Feb. 1, 2011
Des Moines	\$20	Sept. 1, 2009
Edmonds	\$20	Sept. 1, 2009
Lake Forest Park	\$20	Sept. 1, 2009
Olympia	\$20	Oct. 1, 2009
Prosser	\$20	Nov. 1, 2009
Seattle	\$20	Nov. 1, 2011
Shoreline	\$20	Feb. 1, 2010
Snoqualmie	\$20	Mar. 1, 2011

Source: Washington Dept of Licensing, 2010

If a vehicle licensing fee is imposed, those vehicles that are subject to fees as well as those that are exempt are included below:

Vehicles subject to fees

- Passenger vehicles
- Trucks that weigh 6,000 pounds or less
- Motorcycles
- Commercial passenger vehicles and trucks that weigh 6,000 pounds or less
- Combination trucks that weigh 6,000 pounds or less
- Tow trucks
- House moving dollies
- Trucks used exclusively for hauling logs that weigh 6,000 pounds or less
- Taxicabs
- For-hire or stage vehicles with 6 seats or less
- For-hire or stage vehicles with 7 or more seats that weigh 6,000 pounds or less
- Private use trailers over 2,000 pounds
- Motorcycle trailers
- Travel trailers

- Fixed load vehicles that weigh 6,000 pounds or less
- Mobile homes licensed as vehicles

Exempt vehicles

- All farm vehicles
- Campers
- Off-road vehicles
- Snowmobiles
- Mopeds
- Personal use trailers with a single axle and less than 2,000 pounds scale weight
- Commercial trailers
- Combination trailers
- Trailers used exclusively for hauling logs
- Horseless carriage, collector, or restored-plate vehicles
- Converter gear
- Government vehicles
- Private school vehicles
- Vehicles properly registered to disabled American veterans



Discussion of Transportation Benefit District March 26, 2012 City Council Study Session

Sales Tax – A voter approved sales tax of up to 0.2% which may not exceed a ten-year period without voter reauthorization could also be instituted. The total taxable sales in the City of Kenmore are approximately \$192,716,130 annually. A 0.2% sales tax would generate approximately \$385,430. The TBD is required to contract, prior the effective date, with the department of revenue for the administration and collection. The state will deduct a percentage amount, not to exceed two percent with the remainder deposited into a local sales and use tax account created by the state. (RCW 82.14.050)

Tolling – A voter approved toll on the Sammamish River Bridge could be implemented. We spoke to an individual at the Washington State Department of Transportation (WSDOT) who has been working on their tolling projects and obtained some idea of the implementation costs. A single tolling point includes a transponder reader, two cameras (one for each of the front and back license plates), supplemental lighting, another CCTV camera to provide a way to ‘audit’ the system, cabinet, controller and associated communications equipment. Their very rough estimate for recording tolls in a single direction was about \$1 million for design, construction, and implementation. If you were to toll both directions the incremental costs would be an additional few hundred thousand dollars for an additional reader, gantries, cameras and communications equipment. As these costs are for a State Highway; the City’s costs could be lower.

WSDOT could provide the back office support which would include account management, revenue collection, customer service, etc. A fee, per account, would be charged by the vendor providing these services to the state. A separate vendor would be required to install and maintain the toll collection equipment on the bridge. Operating costs were not available.

The estimated Average Daily Traffic using the City’s model is 24,360 trips which is very close to current volumes. Based on the model, the type of trips are as follows:

- 9,660 pass through the city
- 1,360 are trips internal to the city
- 13,340 trips either begin or end within the city

If we assume 20 days of tolling a month, to simplify the calculation, there would be a total of 5,846,400 trips per year. At a \$1 a trip that’s \$5,846,400 and at \$.25 a trip it would generate \$1,461,600.

The state statutes require review and possible approval by the Washington State Tolling Commission before the TBD could implement tolling. In discussions with the Executive Director, Ms. Reema Griffith,



Discussion of Transportation Benefit District March 26, 2012 City Council Study Session

they have never had a local agency toll a facility so there is no precedent for this request. Their interpretation of the statutes is that an agency would have to submit a proposal to the commission with an analysis that shows the tolling will not impact a state facility. Since the Commission has never done this before, the parameters for the analysis have not been defined. If there is no impact to a state facility then the TBD has the authority to operate the system as they wish and do not require approval of the commission to raise/adjust toll rates.

One issue has been the desire to provide variable pricing for local residents. There is no local example (besides the ferry system providing a discount ticket for frequent users) but there is an example of toll discounts for in-state residents in Boston.

Implementing a Transportation Benefit District

The Kenmore City Council would serve as the governing body of the Transportation Benefit District (TBD), acting independently of their elected position. Any council member no longer serving on the City Council would likewise no longer be serving on the TBD governing body.

The State statutes suggest the City's Finance Director become the TBD Treasurer.

The TBD governing body will develop a material change policy to address major plan changes that affect project delivery or the ability to finance the plan. The policy must address material changes to cost, scope, and schedule, the level of change that will require governing body involvement, and how the governing body will address those changes. At a minimum, in the event that a transportation improvement cost exceeds its original cost by more than twenty percent as identified in a district's original finance plan, the governing body is required to hold a public hearing to solicit public comment regarding how the cost change should be resolved.

The TBD is required to produce an annual report, indicating the status of transportation improvement costs, transportation improvement expenditures, revenues, and construction schedules, to the public and to newspapers of record in the district.

The TBD shall be dissolved by the Council when all indebtedness of the district has been retired and when all of the TBD's responsibilities have been satisfied.

Chart 1

CITY OF KENMORE, WASHINGTON
Street Fund Projection
For The Years 2011-2016

DESCRIPTION	ACTUAL 2011	Projected 2012	Projected 2013	Projected 2014	Projected 2015	Projected 2016
Beginning Balance	\$2,040,581	\$1,681,994	\$1,299,652	\$881,585	\$430,500	(\$62,024)
Revenues:						
Motor Vehicle Fuel Tax	429,845	430,000	430,000	430,000	430,000	430,000
Brightwater Mitigation	0	250,000	0	0	0	0
Disaster Assistance Grants	(4,909)	0	0	0	0	0
Interest Earnings	11,520	8,410	6,498	8,816	4,305	0
Transfer From SWM Fund	0	0	0	0	0	0
Transfer From General Fund	600,000	600,000	600,000	600,000	600,000	600,000
Total Revenues	\$1,036,456	\$1,288,410	\$1,036,498	\$1,038,816	\$1,034,305	\$1,030,000
Expenditures						
Personnel	\$157,122	\$166,549	\$176,542	\$187,135	\$198,363	\$210,265
Maintenance	412,899	425,286	438,045	451,186	464,721	478,663
Overlays	606,656	850,000	600,000	600,000	600,000	600,000
King County	36,810	38,282	39,814	41,406	43,062	44,785
Lake Forest Park	181,556	190,634	200,165	210,174	220,682	231,716
Total Expenditures	\$1,395,043	\$1,670,751	\$1,454,566	\$1,489,901	\$1,526,829	\$1,565,429
Net Income/(Loss)	(\$358,587)	(\$382,341)	(\$418,068)	(\$451,085)	(\$492,524)	(\$535,429)
Interfund Loan						
Ending Balance	\$1,681,994	\$1,299,652	\$881,585	\$430,500	(\$62,024)	(\$597,454)

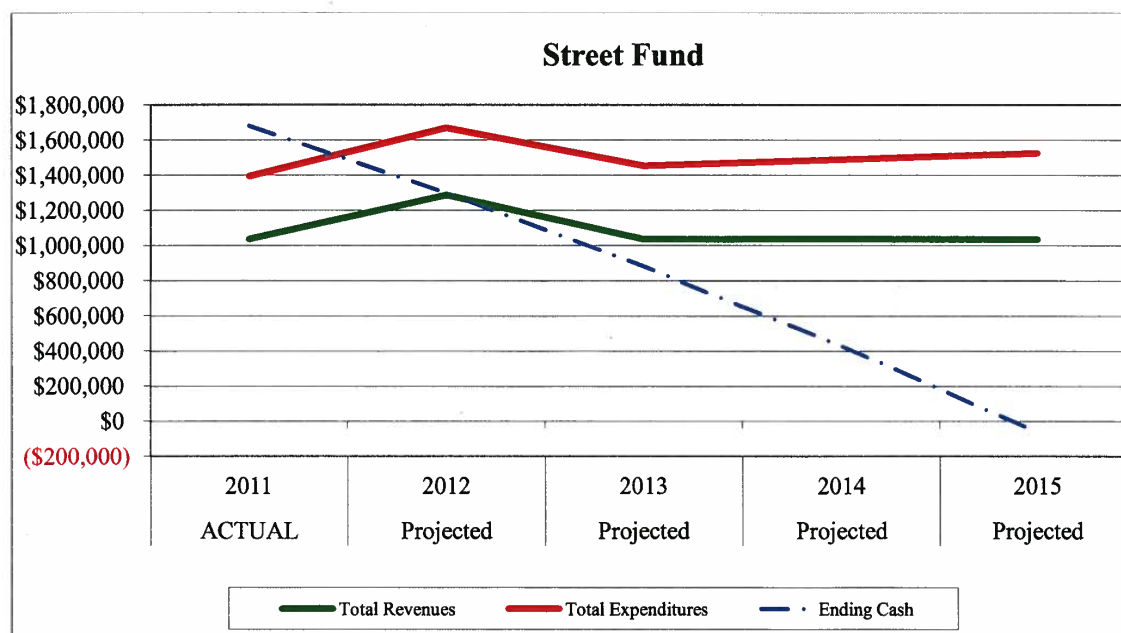
Assumptions:

Revenue Growth

Fuel Tax growth 0%
Interest rate multiplied by beg. fund balance = 1%

Expenditure Growth

Increase of 6% for personnel, 3% for commodities, 4% for King County and 5% for Lake Forest Park services.



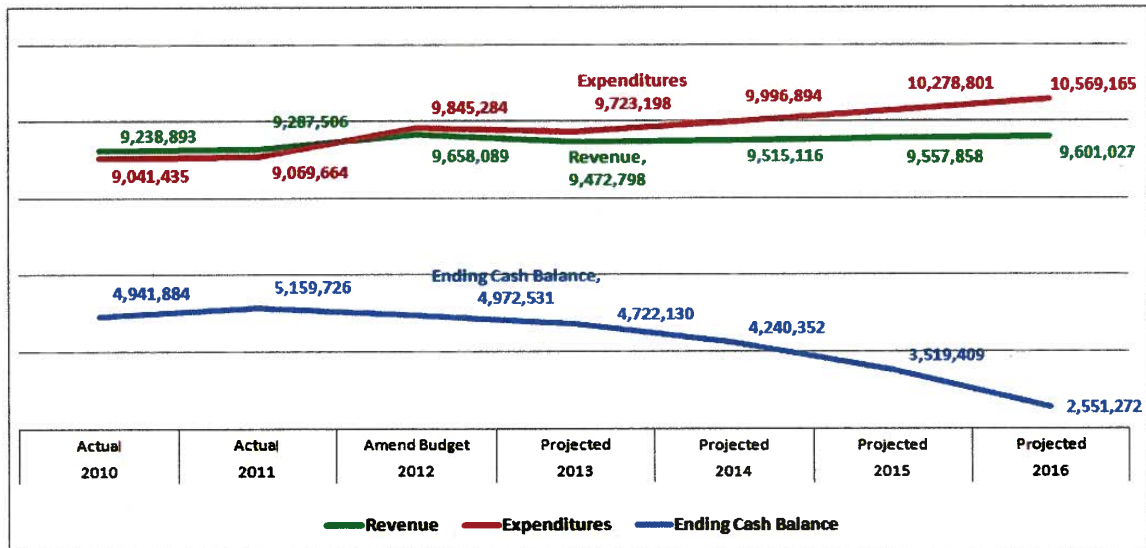
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CITY OF KENMORE, WASHINGTON
General Fund Projection
2010 to 2016

Chart 2

Assumptions:
 1% annual increase in Property Tax Revenue for new construction
 No change in Other Revenues
 No change in \$600,000 Transfer to Street Fund
 3% increase in Operating Expenses

	2010	2011	2012	2013	2014	2015	2016
	Actual	Actual	Amend Budget	Projected	Projected	Projected	Projected
Beginning Cash Balance: Operating	\$4,744,426	4,941,884	5,159,726	4,972,531	4,722,130	4,240,352	3,519,409
ADD: Property Tax	4,059,350	4,148,487	4,189,972	4,231,872	4,274,190	4,316,932	4,360,102
ADD: Other Revenue	5,179,543	5,139,019	5,468,117	5,240,926	5,240,926	5,240,926	5,240,926
SUBTOTAL REVENUE	9,238,893	9,287,506	9,658,089	9,472,798	9,515,116	9,557,858	9,601,027
LESS: Transfer to Street Fund	500,000	600,000	600,000	600,000	600,000	600,000	600,000
LESS: Operating Expense	8,541,435	8,469,664	9,245,284	9,123,198	9,396,894	9,678,801	9,969,165
SUBTOTAL EXPENSES	9,041,435	9,069,664	9,845,284	9,723,198	9,996,894	10,278,801	10,569,165
Beginning Cash Balance: Operating	4,941,884	5,159,726	4,972,531	4,722,130	4,240,352	3,519,409	2,551,272



CITY OF KENMORE, WASHINGTON

Chart 3

**Municipal Capital Reserve Fund (REET) Projection
For The Years 2011-2016**

DESCRIPTION	Actual 2011	Projected 2012	Projected 2013	Projected 2014	Projected 2015	Projected 2016
Beginning Cash	\$1,866,316	\$1,037,411	\$613,214	\$1,218,196	\$1,761,216	\$1,535,926
Revenues:						
REET	\$302,966	\$309,025	\$315,206	\$321,510	\$327,940	\$334,499
REET	\$302,966	\$309,025	\$315,206	\$321,510	\$327,940	\$334,499
Interest Earnings	9,575	-	-	-	-	-
King County Parks Levy	42,676	43,697	44,571	0	0	0
Contributions	0	0	0	0	0	0
Park Grants	0	0	0	0	0	0
Total Revenues	\$658,183	\$661,748	\$674,983	\$643,020	\$655,880	\$668,998
Park Expenditures :						
P 15 Rhododendron Park Imp	0	25,000	0	0	0	0
P 4 Wallace Swamp Creek Imp	0	0	0	0	35,000	10,000
P 2 Tolt Pipeline Trail - levy proceeds	0	210,000	50,000	0	0	0
P 16 0056 Outfall & Shoreline Restora	85,139	0	0	0	0	0
Transportation Transfers :						
T1 SR522 Project -Phase 1, Stage 1, 3	157,468	0	0	0	0	0
T2 SR522 Ph I Stage 2	100,000	0	0	0	0	161,000
T3 SR522 Project - Phase II	215,307	0	0	0	0	0
T7 61st Ave & 181st St Signal, Left tun	0	850,945	0	0	0	0
T12 NE145th signal	29,000	0	0	0	0	0
T32 61st PI Slide	410,000	0	0	0	0	0
T34 Right of Way	390,174	0	0	0	0	0
T8 SR522 57th to 61st with BGT Wall	0	0	20,000	0	655,970	0
T10 SR522 61st to 63rd Ave NE	0	0	0	100,000	90,200	389,500
T 27 sidewalks	100,000	0	0	0	100,000	650,000
Total Expenditures (Transfers)	\$1,487,088	\$1,085,945	\$70,000	\$100,000	\$881,170	\$1,210,500
Net Income/(Loss)	(\$828,905)	(\$424,197)	\$604,983	\$543,020	(\$225,290)	(\$541,502)
Ending Cash	\$1,037,411	\$613,214	\$1,218,196	\$1,761,216	\$1,535,926	\$994,424
Reserved for Sidewalks	861,544	985,544	1,109,544	1,233,544	1,257,544	731,544
Reserved for Park Levy	164,552	(1,751)	(7,180)	0	0	0
Unobligated Ending Cash	\$11,315	(\$370,579)	\$115,832	\$527,672	\$278,382	\$262,880

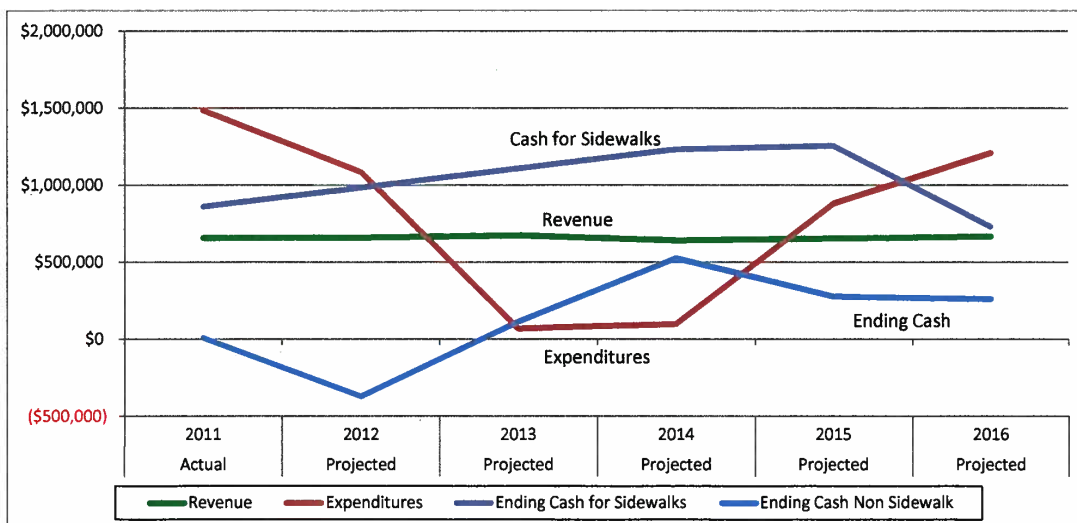
Assumptions:

Revenue Growth

Park Levy=	2%	2%	2%	levy ends	0%	0%
REET=	2%	2%	2%	2%	2%	2%

Expenditure Growth

Capital projects are based on the Capital Facilities Plan (CIP) and Transportation Improvement Plan (TIP)



3/16/2012

Chart 4

CITY OF KENMORE, WASHINGTON
Transportation Impact Fee Fund Projection
For The Years 2010-2016

DESCRIPTION	Actual 2010	Actual 2011	Projected 2012	Projected 2013	Projected 2014	Projected 2015	Projected 2016
Beginning Cash	\$399,287	\$545,655	\$174,235	(\$199,355)	(\$157,575)	(\$110,959)	\$16,890
Revenues:							
Interest Earnings	2,703	2,168	0	0	0	0	169
Transp. Impact Fees	593,665	237,039	237,039	241,780	246,615	251,548	256,579
Total Revenues	\$596,368	\$239,207	\$237,039	\$241,780	\$246,615	\$251,548	\$256,748
Expenditures:							
T3 SR522 Project - Phase II	450,000	387,500	387,500	0	0	0	0
T1 SR522 Project -Phase 1, Stage 1, 3	0	0	0	0	0	0	0
T 7 61st Ave & 181st St Signal, Left turn	0	223,128	223,128	0	0	0	0
T 6 SR 522 61st Ave NE	0	0	0	0	0	0	510,250
T 8 SR 522 57th to 61st with BGT Wall	0	0	0	200,000	200,000	123,698	0
Total Expenditures	\$450,000	\$610,628	\$610,628	\$200,000	\$200,000	\$123,698	\$510,250
Net Income/(Loss)	\$146,368	(\$371,421)	(\$373,589)	\$41,780	\$46,615	\$127,850	(\$253,502)
Ending Cash	\$545,655	\$174,235	(\$199,355)	(\$157,575)	(\$110,959)	\$16,890	(\$236,612)

Assumptions:

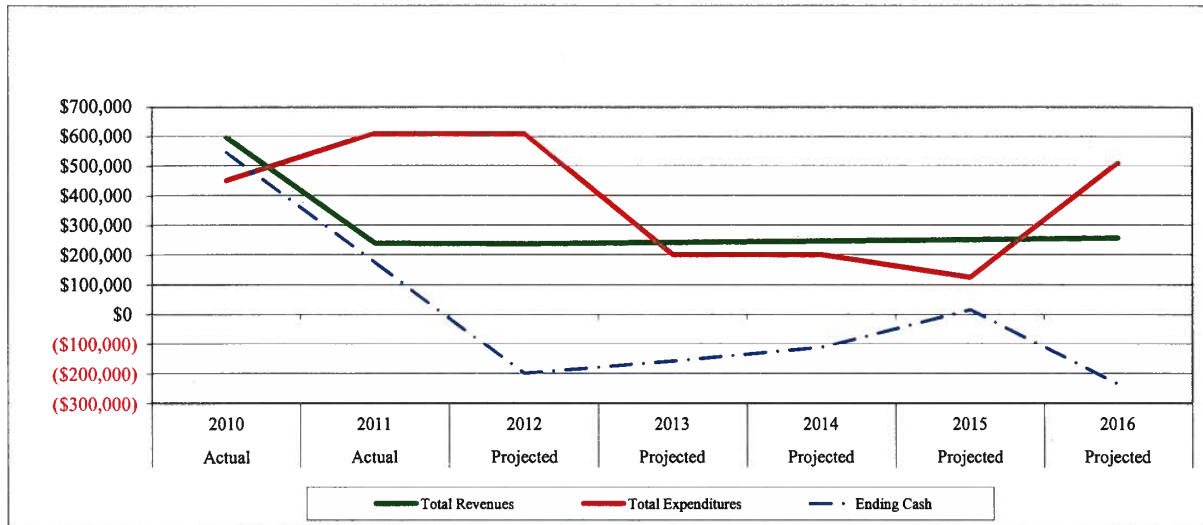
Revenue Growth

Interest rate multiplied by beg. fund balance =
 Impact fees are estimated to increase by =

0.50% 0.50% 0.50% 0.50%
 2.00% 2.00% 2.00% 2.00%

Expenditure Growth

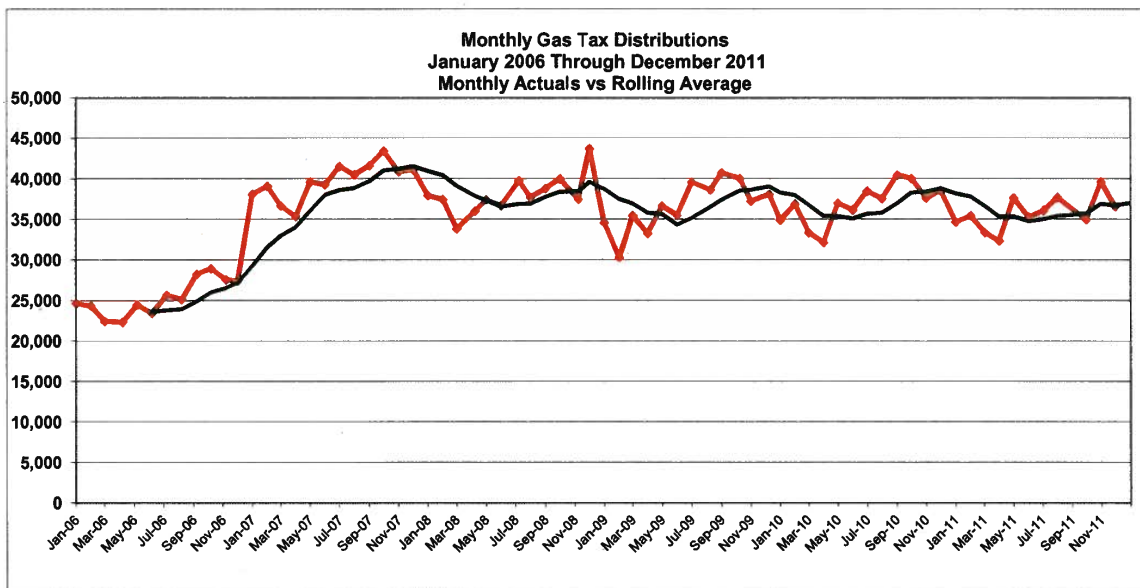
Capital projects are based on the Capital Facilities Plan (CIP) and Transportation Improvement Plan (TIP)



3/15/2012

**CITY OF KENMORE, WASHINGTON
Gas Tax Distributions
For the Years 2006-2011**

Chart 5



Attachment 2

ESSB 6582 Conf. report

ESSB 6582 - CONF REPT
By Conference Committee

1 Strike everything after the enacting clause and insert the
2 following:

3 **"NEW SECTION. Sec. 1.** (1) It is the intent of the legislature to
4 provide diversified local revenue options that may be tailored to the
5 needs of each jurisdiction. It is also the intent that local
6 governments provide countywide transportation planning and coordinate
7 with other municipalities, transit systems, transportation benefit
8 districts, planning organizations, and other transportation agencies.
9 It is critical that all transportation infrastructure is well planned,
10 coordinated, and maintained at the local levels to provide a seamless
11 transportation infrastructure to enable people and goods to move safely
12 and efficiently throughout the state and to bolster and improve the
13 state's economy.

14 (2) The legislature finds that the purchasing power of funds to pay
15 for local transportation needs continues to decline while costs have
16 risen. Without additional funding, counties and cities will continue
17 to struggle financially to preserve and maintain county roads, city
18 streets, and bridges; pavement conditions will to continue to decline;
19 and public transit systems will be forced to cut services at a time
20 when demand for transit services is increasing.

21 **Sec. 2.** RCW 36.73.065 and 2007 c 329 s 1 are each amended to read
22 as follows:

23 (1) Except as provided in subsection (~~(4)~~) (5) of this section,
24 taxes, fees, charges, and tolls may not be imposed by a district
25 without approval of a majority of the voters in the district voting on
26 a proposition at a general or special election. The proposition must
27 include a specific description of the transportation improvement or

1 improvements proposed by the district and the proposed taxes, fees,
2 charges, and the range of tolls imposed by the district to raise
3 revenue to fund the improvement or improvements.

4 (2) Voter approval under this section (~~((shall))~~) must be accorded
5 substantial weight regarding the validity of a transportation
6 improvement as defined in RCW 36.73.015.

7 (3) Except as provided in subsection (4) of this section, a
8 district may not increase any taxes, fees, charges, or range of tolls
9 imposed under this chapter once the taxes, fees, charges, or tolls take
10 effect, unless authorized by the district voters pursuant to RCW
11 36.73.160.

12 (4) A district, solely comprised of a city with a population of
13 five hundred thousand or less, may impose a vehicle fee authorized in
14 RCW 82.80.140 of up to forty dollars by a majority vote of the
15 governing board of the district.

16 (5)(a) A district that includes all the territory within the
17 boundaries of the jurisdiction, or jurisdictions, establishing the
18 district, but not including territory in which a fee is currently being
19 collected under RCW 82.80.140, may impose by a majority vote of the
20 governing board of the district the following fees and charges:

21 (i) Up to twenty dollars of the vehicle fee authorized in RCW
22 82.80.140; (~~((or))~~)

23 (ii) A district, solely comprised of a city with a population of
24 five hundred thousand or less, up to forty dollars of the vehicle fee
25 authorized in RCW 82.80.140; or

26 (iii) A fee or charge in accordance with RCW 36.73.120.

27 (b) The vehicle fee authorized in (a) of this subsection may only
28 be imposed for a passenger-only ferry transportation improvement if the
29 vehicle fee is first approved by a majority of the voters within the
30 jurisdiction of the district.

31 (c)(i) A district solely comprised of a city or cities (~~((shall))~~)
32 may not impose the fees or charges identified in (a) of this subsection
33 within one hundred eighty days after July 22, 2007, unless the county
34 in which the city or cities reside, by resolution, declares that it
35 will not impose the fees or charges identified in (a) of this
36 subsection within the one hundred eighty-day period; or

37 (ii) A district solely comprised of a city or cities identified in
38 RCW 36.73.020(6)(b) (~~((shall))~~) may not impose the fees or charges until

1 after May 22, 2008, unless the county in which the city or cities
2 reside, by resolution, declares that it will not impose the fees or
3 charges identified in (a) of this subsection through May 22, 2008.

4 ~~((5))~~ (6) If the interlocal agreement in RCW 82.80.140(2)(a)
5 cannot be reached, a district that includes only the unincorporated
6 territory of a county may impose by a majority vote of the governing
7 body of the district up to twenty dollars of the vehicle fee authorized
8 in RCW 82.80.140 or up to forty dollars for a district as authorized
9 under subsection (4) of this section.

10 **Sec. 3.** RCW 36.73.040 and 2008 c 122 s 17 are each amended to read
11 as follows:

12 (1) A transportation benefit district is a quasi-municipal
13 corporation, an independent taxing "authority" within the meaning of
14 Article VII, section 1 of the state Constitution, and a "taxing
15 district" within the meaning of Article VII, section 2 of the state
16 Constitution.

17 (2) A transportation benefit district constitutes a body corporate
18 and possesses all the usual powers of a corporation for public purposes
19 as well as all other powers that may now or hereafter be specifically
20 conferred by statute, including, but not limited to, the authority to
21 hire employees, staff, and services, to enter into contracts, to
22 acquire, hold, and dispose of real and personal property, and to sue
23 and be sued. Public works contract limits applicable to the
24 jurisdiction that established the district apply to the district.

25 (3) To carry out the purposes of this chapter, and subject to the
26 provisions of RCW 36.73.065, a district is authorized to impose the
27 following taxes, fees, charges, and tolls:

28 (a) A sales and use tax in accordance with RCW 82.14.0455;

29 (b) A vehicle fee in accordance with RCW 82.80.140;

30 (c) A fee or charge in accordance with RCW 36.73.120. However, if
31 a county or city within the district area is levying a fee or charge
32 for a transportation improvement, the fee or charge ~~((shall))~~ must be
33 credited against the amount of the fee or charge imposed by the
34 district. Developments consisting of less than twenty residences are
35 exempt from the fee or charge under RCW 36.73.120; ~~((and))~~

36 (d) A motor vehicle excise tax in accordance with section 5 of this
37 act; and

1 (e) Vehicle tolls on state routes, city streets, or county roads,
2 within the boundaries of the district, unless otherwise prohibited by
3 law. However, consistent with RCW 47.56.820, the vehicle toll must
4 first be authorized by the legislature if the toll is imposed on a
5 state route. The department of transportation (~~((shall))~~) must
6 administer the collection of vehicle tolls authorized on state routes,
7 unless otherwise specified in law or by contract, and the state
8 transportation commission, or its successor, may approve, set, and
9 impose the tolls in amounts sufficient to implement the district's
10 transportation improvement finance plan. The district (~~((shall))~~) must
11 administer the collection of vehicle tolls authorized on city streets
12 or county roads, and (~~((shall))~~) must set and impose the tolls in amounts
13 sufficient to implement the district's transportation improvement plan.
14 However, consistent with RCW 47.56.850, the vehicle toll, including any
15 change in an existing toll rate, must first be reviewed and approved by
16 the tolling authority designated in RCW 47.56.850 if the toll, or
17 change in toll rate, would have a significant impact, as determined by
18 the tolling authority, on the operation of any state facility.

19 **Sec. 4.** RCW 82.80.140 and 2010 c 161 s 917 are each amended to
20 read as follows:

21 (1) Subject to the provisions of RCW 36.73.065, a transportation
22 benefit district under chapter 36.73 RCW may fix and impose an annual
23 vehicle fee, not to exceed one hundred dollars per vehicle registered
24 in the district, for each vehicle subject to vehicle license fees under
25 RCW 46.17.350(1) (a), (c), (d), (e), (g), (h), (j), or (n) through (q)
26 and for each vehicle subject to gross weight license fees under RCW
27 46.17.355 with a scale weight of six thousand pounds or less.

28 (2)(a) A district that includes all the territory within the
29 boundaries of the jurisdiction, or jurisdictions, establishing the
30 district, but not including territory in which a fee is currently being
31 collected under this section, may impose by a majority vote of the
32 governing board of the district up to twenty dollars of the vehicle fee
33 authorized in subsection (1) of this section. A district, solely
34 comprised of a city with a population of five hundred thousand or less,
35 may impose by a majority vote of the governing board of the district up
36 to forty dollars of the vehicle fee authorized in subsection (1) of
37 this section.

1 (i) If the district is countywide, the revenues of the fee
2 (~~shall~~) must be distributed to each city within the (~~county~~)
3 district by interlocal agreement that must be effective prior to
4 imposition of the fee. The interlocal agreement is effective when
5 approved by the (~~county~~) district and sixty percent of the cities
6 representing seventy-five percent of the population of the cities
7 within the (~~county~~) district in which the countywide fee is
8 collected.

9 (ii) If the district is less than countywide, the revenues of the
10 fee must be distributed to each city within the district by interlocal
11 agreement that must be effective prior to imposition of the fee.

12 (b) A district may not impose a fee under this subsection (2):

13 (i) For a passenger-only ferry transportation improvement unless
14 the vehicle fee is first approved by a majority of the voters within
15 the jurisdiction of the district; or

16 (ii) That, if combined with the fees previously imposed by another
17 district within its boundaries under RCW 36.73.065(~~((4))~~) (5)(a)(i),
18 exceeds twenty dollars or for a district, solely comprised of a city
19 with a population of five hundred thousand or less, exceeds forty
20 dollars.

21 (c) If a district imposes or increases a fee under this subsection
22 (2) that, if combined with the fees previously imposed by another
23 district within its boundaries, exceeds twenty dollars or for a
24 district, solely comprised of a city with a population of five hundred
25 thousand or less, exceeds forty dollars, the district shall provide a
26 credit for the previously imposed fees so that the combined vehicle fee
27 does not exceed twenty dollars or, for a district solely comprised of
28 a city with a population of five hundred thousand or less, forty
29 dollars.

30 (3) The department of licensing shall administer and collect the
31 fee. The department shall deduct a percentage amount, as provided by
32 contract, not to exceed one percent of the fees collected, for
33 administration and collection expenses incurred by it. The department
34 shall remit remaining proceeds to the custody of the state treasurer.
35 The state treasurer shall distribute the proceeds to the district on a
36 monthly basis.

37 (4) No fee under this section may be collected until six months
38 after approval under RCW 36.73.065.

1 (5) The vehicle fee under this section applies only when renewing
2 a vehicle registration, and is effective upon the registration renewal
3 date as provided by the department of licensing.

4 (6) The following vehicles are exempt from the fee under this
5 section:

- 6 (a) Campers, as defined in RCW 46.04.085;
- 7 (b) Farm tractors or farm vehicles, as defined in RCW 46.04.180 and
8 46.04.181;
- 9 (c) Mopeds, as defined in RCW 46.04.304;
- 10 (d) Off-road and nonhighway vehicles, as defined in RCW 46.04.365;
- 11 (e) Private use single-axle trailer, as defined in RCW 46.04.422;
- 12 (f) Snowmobiles, as defined in RCW 46.04.546; and
- 13 (g) Vehicles registered under chapter 46.87 RCW and the
14 international registration plan.

15 NEW SECTION. **Sec. 5.** A new section is added to chapter 82.80 RCW
16 to read as follows:

17 (1) Subject to the provisions of RCW 36.73.065, a transportation
18 benefit district under chapter 36.73 RCW, created by a county with a
19 population between four hundred thousand and one million five hundred
20 thousand, where the majority of the district is comprised of
21 incorporated area within the county, may impose a motor vehicle excise
22 tax of up to one percent annually on the value of every motor vehicle
23 owned by a resident of the district based on the valuation schedules in
24 RCW 82.44.035.

25 (2) The tax under this section may not be imposed on vehicles
26 licensed under RCW 46.17.355, except vehicles with an unladen weight of
27 six thousand pounds or less, RCW 46.16A.425, 46.17.335, or
28 46.17.350(1)(c).

29 (3) The department of licensing must administer and collect the
30 tax. The department must deduct a percentage amount, as provided by
31 contract, not to exceed one percent of the taxes collected, for
32 administration and collection expenses incurred by the department. The
33 department must remit the remaining proceeds to the custody of the
34 state treasurer. The state treasurer must distribute the proceeds to
35 the district on a monthly basis.

36 (4) No tax imposed under this section may be collected until six
37 months after approval under RCW 36.73.065.

1 (5) The tax under this section applies only when renewing a vehicle
2 registration, and is effective upon the registration renewal date as
3 provided by the department of licensing.

4 (6) The proceeds from a motor vehicle excise tax imposed under this
5 section may only be used to support the operations, maintenance, and
6 capital investments for public transportation.

7 NEW SECTION. **Sec. 6.** A new section is added to chapter 82.80 RCW
8 to read as follows:

9 (1) A county with a population of one million five hundred thousand
10 or more may impose, by approval of a majority of the registered voters
11 of the county voting on the proposition at a general or special
12 election, a motor vehicle excise tax of up to one percent annually on
13 the value of every motor vehicle owned by a resident of the county
14 based on the valuation schedules in RCW 82.44.035.

15 (2) The tax under this section may not be imposed on vehicles
16 licensed under RCW 46.17.355, except vehicles with an unladen weight of
17 six thousand pounds or less, RCW 46.16A.425, 46.17.335, or
18 46.17.350(1)(c).

19 (3) Counties imposing a tax under this section shall contract,
20 before the effective date of the resolution or ordinance imposing a
21 motor vehicle excise tax, with the department of licensing. The
22 department of licensing must administer and collect the tax. The
23 department must deduct a percentage amount, as provided by contract,
24 not to exceed one percent of the taxes collected, for administration
25 and collection expenses incurred by the department. The department
26 must remit the remaining proceeds to the custody of the state
27 treasurer. The state treasurer must distribute the proceeds to the
28 county on a monthly basis.

29 (4) No tax imposed under this section may be collected until six
30 months after approval.

31 (5) The tax under this section applies only when renewing a vehicle
32 registration, and is effective upon the registration renewal date as
33 provided by the department of licensing.

34 (6) Counties imposing a tax under this section must use the funds
35 in a manner consistent with RCW 35.58.2795, 36.70A.070, and 36.70.330,
36 and chapters 36.73 and 47.80 RCW.

1 (7)(a) The legislative authority of each county shall convene a
2 meeting with representatives of each city and town located within the
3 county for the purpose of establishing a collaborative process that
4 will provide a framework for the adoption of a ballot measure pursuant
5 to chapter 29A.36 RCW.

6 (b) The legislative authority of each county that includes a public
7 transit system under chapter 36.57A RCW, 36.56, 35.95A, or 36.57 RCW,
8 or RCW 35.58.2721 or 36.57.100, shall convene a meeting with
9 representatives of the respective transit system for the purpose of
10 establishing a collaborative process that will provide a framework for
11 the adoption of a ballot measure pursuant to chapter 29A.36 RCW.

12 (8) Any county that has implemented a congestion reduction charge
13 under RCW 82.80.055 must sunset the congestion reduction charge prior
14 to the implementation date of the county motor vehicle excise tax
15 imposed in accordance with this section.

16 (9) The proceeds from a motor vehicle excise tax imposed under this
17 section may only be used to support the operations, maintenance, and
18 capital investments for public transportation.

19 (10)(a) A county that is eligible to impose a tax under this
20 section may, as a public authority, allow the purchase of air rights
21 and associated property interests above transit facilities that include
22 parking facilities and ferry terminals and provide, at no or reduced
23 costs, for nonprofit organizations or public housing authorities to
24 provide, for purchase or lease, affordable workforce housing. For
25 purposes of this subsection, "affordable workforce housing" means
26 housing for a single person, family, or unrelated persons living
27 together whose income is between thirty percent and eighty percent of
28 the median income, adjusted for household size, for the county in which
29 the housing is located. Any commercial use located in these facilities
30 must pay a commercial market rate when purchasing or leasing in one of
31 these facilities. The Washington state ferries shall not exercise the
32 authorization under this authority until after June 30, 2013.

33 (b) In furtherance of the public health and welfare and public
34 transportation purposes, a county with a population of one million five
35 hundred thousand or more, a metropolitan municipal corporation, a
36 regional transit authority, and the Washington state ferries may sell,
37 transfer, exchange, lease, or otherwise dispose of the air rights and
38 associated property interests in any parcel of real property owned by

1 such entities, and used and improved by those entities for public
2 transportation facilities, for the development of and use of the air
3 rights and associated property interests for affordable workforce
4 housing so long as any such sale, transfer, exchange, lease, or other
5 disposition of the air rights and associated property interests for
6 affordable housing is compatible with the public transportation use of
7 the underlying property or facility. The Washington state ferries
8 shall not exercise the authorization under this authority until after
9 June 30, 2013.

10 (c) Any sale, transfer, exchange, lease, or other disposition of
11 air rights and associated property interests made under the authority
12 of this section is exempt from any statutory or other requirement to
13 obtain fair market value, and a sale, transfer, exchange, lease, or
14 other disposition of air rights and associated property interests at
15 less than fair market value made under this section is not invalid,
16 provided that such sale, transfer, exchange, lease, or other
17 disposition of air rights and associated property interests is
18 discounted below fair market value not more than any proportional
19 reduction in value resulting from the requirement for affordable
20 housing.

21 (d) Any sale, transfer, exchange, lease, or other disposition of
22 air rights and associated property interests to a private entity made
23 under the authority of this section must include a restrictive covenant
24 requiring that any subsequent transfer of the air rights and associated
25 property interests be prohibited unless the property continues to be
26 used for affordable housing purposes for the duration of the term of
27 the restrictive covenant.

28 (e) Any sale, transfer, exchange, lease, or other disposition of
29 air rights and associated property interests for affordable housing
30 purposes is considered a legitimate public transportation purpose.

31 **Sec. 7.** RCW 82.80.010 and 2003 c 350 s 1 are each amended to read
32 as follows:

33 (1) For purposes of this section:

34 (a) "Distributor" means every person who imports, refines,
35 manufactures, produces, or compounds motor vehicle fuel and special
36 fuel as defined in RCW 82.36.010 and 82.38.020, respectively, and sells
37 or distributes the fuel into a county;

1 (b) "Person" has the same meaning as in RCW 82.04.030.

2 (2) Subject to the conditions of this section(~~(7)~~): (a) Any county
3 may levy, by approval of its legislative body and a majority of the
4 registered voters of the county voting on the proposition at a general
5 or special election, additional excise taxes equal to (~~ten percent of~~
6 ~~the statewide motor vehicle fuel tax rate under RCW 82.36.025)~~ one
7 cent, two cents, or three cents on each gallon of motor vehicle fuel as
8 defined in RCW 82.36.010 and on each gallon of special fuel as defined
9 in RCW 82.38.020 sold within the boundaries of the county; and (b) any
10 city with a population of over five hundred thousand may levy, by
11 approval of its legislative body and a majority of the registered
12 voters of the city voting on the proposition at a general or special
13 election, additional excise taxes equal to one cent on each gallon of
14 motor vehicle fuel as defined in RCW 82.36.010 and on each gallon of
15 special fuel as defined in RCW 82.38.020 sold within the boundaries of
16 the city. Vehicles paying an annual license fee under RCW 82.38.075
17 are exempt from the county fuel excise tax. An election held under
18 this section must be held not more than twelve months before the date
19 on which the proposed tax is to be levied. The ballot setting forth
20 the proposition (~~(shall)~~) must state the tax rate that is proposed.
21 The county's authority to levy additional excise taxes under this
22 section includes the incorporated and unincorporated areas of the
23 county to the extent that the tax has not been imposed by the city.
24 The additional excise taxes are subject to the same exceptions and
25 rights of refund as applicable to other motor vehicle fuel and special
26 fuel excise taxes levied under chapters 82.36 and 82.38 RCW. The
27 proposed tax (~~(shall)~~) may not be levied less than one month from the
28 date the election results are certified by the county election officer.
29 The commencement date for the levy of any tax under this section
30 (~~(shall be)~~) is the first day of January, April, July, or October.

31 (3) The local option motor vehicle fuel tax on each gallon of motor
32 vehicle fuel and on each gallon of special fuel is imposed upon the
33 distributor of the fuel.

34 (4) A taxable event for the purposes of this section occurs upon
35 the first distribution of the fuel within the boundaries of a county or
36 city to a retail outlet, bulk fuel user, or ultimate user of the fuel.

37 (5) All administrative provisions in chapters 82.01, 82.03, and

1 82.32 RCW, insofar as they are applicable, apply to local option fuel
2 taxes imposed under this section.

3 (6) Before the effective date of the imposition of the fuel taxes
4 under this section, a county (~~((shall))~~) or city must contract with the
5 department of revenue for the administration and collection of the
6 taxes. The contract must provide that a percentage amount, not to
7 exceed one percent of the taxes imposed under this section, will be
8 deposited into the local tax administration account created in the
9 custody of the state treasurer. The department of revenue may spend
10 money from this account, upon appropriation, for the administration of
11 the local taxes imposed under this section.

12 (7) The state treasurer (~~((shall))~~) must distribute monthly to the
13 levying county and cities contained therein the proceeds of the
14 additional excise taxes collected under this section, after the
15 deductions for payments and expenditures as provided in RCW
16 46.68.090(1) (a) and (b) and under the conditions and limitations
17 provided in RCW 82.80.080.

18 (8) The proceeds of the additional excise taxes levied under this
19 section (~~((shall))~~) must be used strictly for transportation purposes in
20 accordance with RCW 82.80.070.

21 (9) A county or city may not levy the tax under this section if
22 they are levying the additional fuel tax in RCW 82.80.110 or if they
23 are a member of a regional transportation investment district levying
24 the additional fuel tax in RCW 82.80.120.

25 **Sec. 8.** RCW 36.73.015 and 2010 c 251 s 2 and 2010 c 105 s 1 are
26 each reenacted and amended to read as follows:

27 The definitions in this section apply throughout this chapter
28 unless the context clearly requires otherwise.

29 (1) "City" means a city or town.

30 (2) "District" means a transportation benefit district created
31 under this chapter.

32 (3) "Supplemental transportation improvement" or "supplemental
33 improvement" means any project, work, or undertaking to provide public
34 transportation service, in addition to a district's existing or planned
35 voter-approved transportation improvements, proposed by a participating
36 city member of the district under RCW 36.73.180.

1 (4) "Transportation improvement" means a project contained in the
2 transportation plan of the state, a regional transportation planning
3 organization, city, county, or eligible jurisdiction as identified in
4 RCW 36.73.020(2). A project may include, but is not limited to,
5 investment in new or existing highways of statewide significance,
6 principal arterials of regional significance, high capacity
7 transportation, public transportation, and other transportation
8 projects and programs of local, regional, or statewide significance
9 including transportation demand management. Projects may also include
10 the operation, preservation, and maintenance of these facilities or
11 programs."

ESSB 6582 - CONF REPT
By Conference Committee

12 On page 1, line 1 of the title, after "options;" strike the
13 remainder of the title and insert "amending RCW 36.73.065, 36.73.040,
14 82.80.140, and 82.80.010; reenacting and amending RCW 36.73.015; adding
15 new sections to chapter 82.80 RCW; and creating a new section."

--- END ---

Attachment 3

SB 6215E

CERTIFICATION OF ENROLLMENT

ENGROSSED SENATE BILL 6215

62nd Legislature
2012 Regular Session

Passed by the Senate February 14, 2012
YEAS 29 NAYS 20

President of the Senate

Passed by the House March 2, 2012
YEAS 55 NAYS 42

Speaker of the House of Representatives

Approved

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SENATE BILL 6215** as passed by the Senate and the House of Representatives on the dates hereon set forth.

Secretary

FILED

**Secretary of State
State of Washington**

ENGROSSED SENATE BILL 6215

Passed Legislature - 2012 Regular Session

State of Washington 62nd Legislature 2012 Regular Session

By Senators Frockt, Kline, Nelson, Kohl-Welles, and Conway

Read first time 01/16/12. Referred to Committee on Transportation.

1 AN ACT Relating to establishing an optional transportation benefit
2 district rebate program for low-income individuals; amending RCW
3 36.73.065; reenacting and amending RCW 36.73.015; and adding a new
4 section to chapter 36.73 RCW.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** RCW 36.73.015 and 2010 c 251 s 2 and 2010 c 105 s 1 are
7 each reenacted and amended to read as follows:

8 The definitions in this section apply throughout this chapter
9 unless the context clearly requires otherwise.

10 (1) "City" means a city or town.

11 (2) "District" means a transportation benefit district created
12 under this chapter.

13 (3) "Low-income" means household income that is at or below forty-
14 five percent of the median household income, adjusted for household
15 size, for the district in which the fees, taxes, or tolls were imposed.

16 (4) "Rebate program" means an optional program established by a
17 transportation benefit district that includes a city with a population
18 of five hundred thousand persons or more for the purpose of providing
19 rebates to low-income individuals for fees, taxes, and/or tolls imposed

1 by such transportation benefit district for: (a) Vehicle fees imposed
2 under RCW 36.73.040(3)(b); (b) sales and use taxes imposed under RCW
3 36.73.040(3)(a); and/or (c) tolls imposed under RCW 36.73.040(3)(d).

4 (5) "Supplemental transportation improvement" or "supplemental
5 improvement" means any project, work, or undertaking to provide public
6 transportation service, in addition to a district's existing or planned
7 voter-approved transportation improvements, proposed by a participating
8 city member of the district under RCW 36.73.180.

9 ~~((4))~~ (6) "Transportation improvement" means a project contained
10 in the transportation plan of the state, a regional transportation
11 planning organization, city, county, or eligible jurisdiction as
12 identified in RCW 36.73.020(2). A project may include investment in
13 new or existing highways of statewide significance, principal arterials
14 of regional significance, high capacity transportation, public
15 transportation, and other transportation projects and programs of
16 regional or statewide significance including transportation demand
17 management. Projects may also include the operation, preservation, and
18 maintenance of these facilities or programs.

19 NEW SECTION. Sec. 2. A new section is added to chapter 36.73 RCW
20 to read as follows:

21 (1) A district that: (a) Includes a city with a population of five
22 hundred thousand persons or more; and (b) imposes a vehicle fee under
23 RCW 36.73.040(3)(b), sales and use taxes under RCW 36.73.040(3)(a), or
24 tolls under RCW 36.73.040(3)(d), may establish a rebate program for the
25 purposes of providing rebates of up to forty percent of the actual fee,
26 tax, or toll paid by a low-income individual.

27 (2) Funds collected from a vehicle fee under RCW 36.73.040(3)(b),
28 sales and use tax under RCW 36.73.040(3)(a) or tolls under RCW
29 36.73.040(3)(d) may be used for a rebate program established under this
30 section.

31 (3) A district that establishes a rebate program is responsible for
32 the development and administration of the program and all functions and
33 costs associated with the rebate program.

34 (4) A district that establishes a rebate program under this section
35 must report back to the legislature two years after the program takes
36 effect. The report must include, but is not limited to, a detailed

1 description of the structure of the program, the average rebate, the
2 total amount of rebates issued, and the number of people that received
3 rebates.

4 **Sec. 3.** RCW 36.73.065 and 2007 c 329 s 1 are each amended to read
5 as follows:

6 (1) Except as provided in subsection (4) of this section, taxes,
7 fees, charges, and tolls may not be imposed by a district without
8 approval of a majority of the voters in the district voting on a
9 proposition at a general or special election. The proposition must
10 include a specific description of: (a) The transportation improvement
11 or improvements proposed by the district; (b) any rebate program
12 proposed to be established under section 2 of this act; and (c) the
13 proposed taxes, fees, charges, and the range of tolls imposed by the
14 district to raise revenue to fund the improvement or improvements or
15 rebate program, as applicable.

16 (2) Voter approval under this section (~~((shall))~~) must be accorded
17 substantial weight regarding the validity of a transportation
18 improvement as defined in RCW 36.73.015.

19 (3) A district may not increase any taxes, fees, charges, or range
20 of tolls imposed or change a rebate program under this chapter once the
21 taxes, fees, charges, (~~((or))~~) tolls, or rebate program takes effect,
22 unless authorized by the district voters pursuant to RCW 36.73.160.

23 (4)(a) A district that includes all the territory within the
24 boundaries of the jurisdiction, or jurisdictions, establishing the
25 district may impose by a majority vote of the governing board of the
26 district the following fees and charges:

27 (i) Up to twenty dollars of the vehicle fee authorized in RCW
28 82.80.140; or

29 (ii) A fee or charge in accordance with RCW 36.73.120.

30 (b) The vehicle fee authorized in (a) of this subsection may only
31 be imposed for a passenger-only ferry transportation improvement if the
32 vehicle fee is first approved by a majority of the voters within the
33 jurisdiction of the district.

34 (c)(i) A district solely comprised of a city or cities shall not
35 impose the fees or charges identified in (a) of this subsection within
36 one hundred eighty days after July 22, 2007, unless the county in which

1 the city or cities reside, by resolution, declares that it will not
2 impose the fees or charges identified in (a) of this subsection within
3 the one hundred eighty-day period; or

4 (ii) A district solely comprised of a city or cities identified in
5 RCW 36.73.020(6)(b) (~~shall~~) may not impose the fees or charges until
6 after May 22, 2008, unless the county in which the city or cities
7 reside, by resolution, declares that it will not impose the fees or
8 charges identified in (a) of this subsection through May 22, 2008.

9 (5) If the interlocal agreement in RCW 82.80.140(2)(a) cannot be
10 reached, a district that includes only the unincorporated territory of
11 a county may impose by a majority vote of the governing body of the
12 district up to twenty dollars of the vehicle fee authorized in RCW
13 82.80.140.

--- END ---

Attachment 4

RCW 35.74.050 & RCW 36.73.040



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 - ★ Washington Courts
 - ★ OFM Fiscal Note Website

[RCWs](#) > [Title 35](#) > [Chapter 35.74](#) > [Section 35.74.050](#)

[35.74.040](#) << [35.74.050](#) >> [35.74.060](#)

RCW 35.74.050

Authority to operate toll bridges — Toll rate review and approval by tolling authority.

A city or town may build and maintain toll bridges and charge and collect tolls thereon, and to that end may provide a system and elect or appoint persons to operate the same, or the said bridges may be made free, as it may elect.

Consistent with RCW [47.56.850](#), any toll proposed under this section, including any change in an existing toll rate, must first be reviewed and approved by the tolling authority designated in RCW [47.56.850](#) if the toll, or change in toll rate, would have a significant impact, as determined by the tolling authority, on the operation of any state facility.

[2008 c 122 § 15; 1965 c 7 § [35.74.050](#). Prior: 1890 p 55 § 6; RRS § 9328.]





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[RCWs](#) > [Title 36](#) > [Chapter 36.73](#) > [Section 36.73.040](#)

[36.73.030](#) << [36.73.040](#) >> [36.73.050](#)

RCW 36.73.040

General powers of district.

(1) A transportation benefit district is a quasi-municipal corporation, an independent taxing "authority" within the meaning of Article VII, section 1 of the state Constitution, and a "taxing district" within the meaning of Article VII, section 2 of the state Constitution.

(2) A transportation benefit district constitutes a body corporate and possesses all the usual powers of a corporation for public purposes as well as all other powers that may now or hereafter be specifically conferred by statute, including, but not limited to, the authority to hire employees, staff, and services, to enter into contracts, to acquire, hold, and dispose of real and personal property, and to sue and be sued. Public works contract limits applicable to the jurisdiction that established the district apply to the district.

(3) To carry out the purposes of this chapter, and subject to the provisions of RCW [36.73.065](#), a district is authorized to impose the following taxes, fees, charges, and tolls:

(a) A sales and use tax in accordance with RCW [82.14.0455](#);

(b) A vehicle fee in accordance with RCW [82.80.140](#);

(c) A fee or charge in accordance with RCW [36.73.120](#). However, if a county or city within the district area is levying a fee or charge for a transportation improvement, the fee or charge shall be credited against the amount of the fee or charge imposed by the district. Developments consisting of less than twenty residences are exempt from the fee or charge under RCW [36.73.120](#); and

(d) Vehicle tolls on state routes, city streets, or county roads, within the boundaries of the district, unless otherwise prohibited by law. However, consistent with RCW [47.56.820](#), the vehicle toll must first be authorized by the legislature if the toll is imposed on a state route. The department of transportation shall administer the collection of vehicle tolls authorized on state routes, unless otherwise specified in law or by contract, and the state transportation commission, or its successor, may approve, set, and impose the tolls in amounts sufficient to implement the district's transportation improvement finance plan. The district shall administer the collection of vehicle tolls authorized on city streets or county roads, and shall set and impose the tolls in amounts sufficient to implement the district's transportation improvement plan. However, consistent with RCW [47.56.850](#), the vehicle toll, including any change in an existing toll rate, must first be reviewed and approved by the tolling authority designated in RCW [47.56.850](#) if the toll, or change in toll rate, would have a significant impact, as determined by the tolling authority, on the operation of any state facility.

[2008 c 122 § 17; 2005 c 336 § 4; 1989 c 53 § 3; 1987 c 327 § 4.]

Notes:

Effective date -- 2005 c 336: See note following RCW [36.73.015](#).

Severability -- 1989 c 53: See note following RCW [36.73.020](#).

Attachment 5

July 12, 2010 2011-12 Pavement Management
Program Agenda Bill

CITY OF KENMORE, WASHINGTON			
AGENDA BILL SUMMARY			
AGENDA TITLE			MEETING DATE
2011 – 2012 Pavement Management Program			July 12, 2010
DEPARTMENT	DIRECTOR	CONTACT PERSON	PHONE
Engineering	Ron Loewen	Ron Loewen Jennifer Gordon	425 398 8900
COST OF PROPOSAL: City Staff: 100 hours Annually Contract: \$670,270 Annually		ACCOUNT NUMBER: 10.00.6201 Overlay	
AMOUNT BUDGETED: Current: 2009 - 2010 Budget \$350,000 Annually Proposed: 2011 – 2012 Budget \$670,270 Annually		NAME AND FUND #: Street Fund/Street Overlay	
ATTACHMENT(S) TO AGENDA PACKET ITEM: 1) Figure 1 – Arterial Rehabilitation Roadways 2) Table 1 – Overlay Program Options 3) April 6, 2009 Agenda Bill Summary			
SUMMARY STATEMENT:			
The asphalt overlay program was last presented to the City Council on April 6, 2009. Since then we have updated the inventory of streets by deleting several streets for which the City is not responsible. These included Bothell Way NE and 55th Avenue NE. In addition we have updated the projections based on current overlay costs and roadway restoration costs. Overlay costs were previously estimated at \$13.50 per square yard and last year's overlay costs averaged \$15 per square yard. Additionally the Pavement Management Rating Report anticipated a number of roadways would require reconstruction. Recently estimates were prepared for reconstruction based on bid costs on the SR 522 projects. The previous estimate was \$40 per square yard and the new estimate is \$90 per square yard. Table 1 has been attached to provide a comparison between the old report and the new analysis based on the updated estimates and revised street system. Options 1 through 4 were provided in the 2008 report. Option 5 is based on the revised inventory of streets and overlay estimates. The average annual overlay program expenditure over the next 10 years would be \$958,900. This includes the reconstruction of the roadways highlighted in Figure 1. Option 6 in Table 1 provides the estimated cost of only doing asphalt overlays on all streets. The average annual overlay program expenditure over the next 10 years would be \$535,600. The roads requiring reconstruction shown in Figure 1 were determined by averaging the rating scores over the entire street segment. Inspection of the street segments often leads to only significant problems on short stretches. An overlay would be adequate for most of the street segment with reconstruction only required on a small portion. Option 7 and 8 in Table 1 provide a more realistic approach to the reconstructing and overlaying streets. An effective maintenance technique to reduce pavement deterioration includes crack sealing. This			

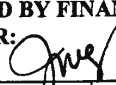
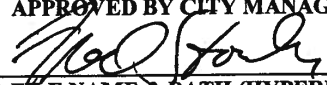
measure retards the penetration of water into the pavement and subgrade. Water destroys the pavement through the freeze thaw cycle expanding and propagating cracks. Water that enters the subgrade results in deterioration or softening of the subgrade resulting in pavement "pumping" and rutting. An aggressive crack sealing program may be able to retard the propagation of cracks and extend the life of the pavement. Option 7 and 8 include an enhancement and continuation of our current crack sealing efforts.

An inspection of the roads shown as requiring reconstruction in Figure 1 revealed that though there is significant pavement raveling and in some cases cracking an overlay will suffice in most locations.

Based on current evaluation of the City's street network we recommend Option 7 (\$209,600 for arterials, \$410,600 for residential streets, and \$50,000 for routine maintenance for a total annual budget of \$670,200) be used to budget overlay program funds for the next two years, 2011 and 2012. This would be an annual increase of nearly double the 2009 and 2010 annual budget.

**CONSISTENT WITH OR COMPARISON TO PAST COUNCIL POLICIES, ORDINANCES, DIRECTION:
Contract Reviews and Management Efficiencies.**

RECOMMENDED CITY COUNCIL ACTION/SUGGESTED MOTION
None at this time.

REVIEWED BY FINANCE DIRECTOR: 	REVIEWED BY CITY ATTORNEY:	APPROVED BY CITY MANAGER: 
TODAY'S DATE: June 21, 2010	REVISION DATE(S):	FILE NAME & PATH (HYPERLINK): S:\Pavement Management\July 12, Agenda Bill.doc

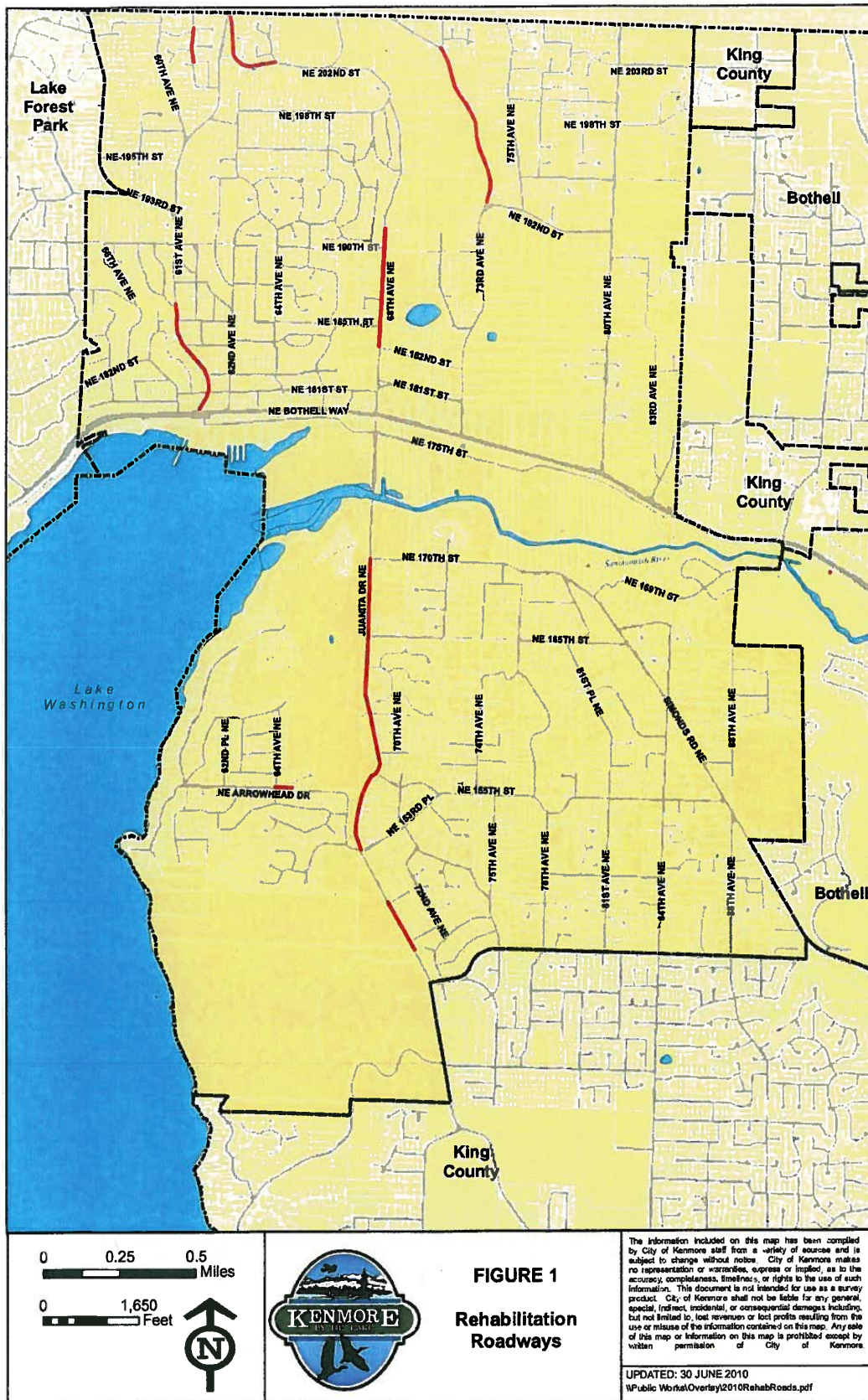
6/30/10

Exhibit B
Ten Year Pavement Management Strategy Analysis

City of Kenmore
Washington

Strategy	Description	Annual Budgets			Total Annual Budget
		Arterial	Residential	Routine Maintenance	
Option 1	2008 Preferred	\$ 550,000	\$ 400,000		\$ 950,000
Option 2	Option 1 with a Budget increase of 20%	\$ 660,000	\$ 480,000		\$ 1,140,000
Option 3	Option 2 with a Budget decrease of 20%	\$ 440,000	\$ 320,000		\$ 760,000
Option 4	Do Everything	\$ 721,000	\$ 683,000		\$ 1,404,000
Option 5	Modified 2010 Analysis	\$ 548,300	\$ 410,600		\$ 958,900
Option 6	2010 only asphalt	\$ 125,000	\$ 410,600		\$ 535,600
Option 7	2010 with 20% reconstruction	\$ 209,600	\$ 410,600	\$ 50,000	\$ 670,200
Option 8	2010 with 40% reconstruction	\$ 294,300	\$ 410,600	\$ 50,000	\$ 754,900

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Attachment 6

Frequently Asked Questions: Transportation Benefit District



Transportation Benefit District Legislation in Effect

Through the cooperative efforts of the Association of Washington Cities (AWC) and the Washington State Associations of Counties (WSAC), significant legislation went into effect in 2007, which resulted in the most important local transportation tool for cities and counties in sixteen years – Transportation Benefit Districts (TBDs). Newly enacted 2010 legislation enhanced the TBD's authority.

TBDs are independent taxing districts that can impose an array of taxes or fees either through a vote of the people or through district board action. TBDs are flexible-- they allow cities and counties to work independently or cooperatively on addressing both local and regional transportation challenges.

Frequently Asked Questions

Background

In 1987, the Legislature created TBDs as an option for local governments to fund transportation improvements. In 2005, the Legislature amended the TBD statute to expand its uses and revenue authority. In 2007, the Legislature amended the TBD statute to authorize the imposition of vehicle fees and transportation impact fees without a public vote. In 2010, the Legislature amended the TBD statute again to clarify project eligibility, the use of impact fees, and sales tax expenditures, and make TBD governance more flexible.

What is a Transportation Benefit District (TBD)?

A TBD is a quasi-municipal corporation and independent taxing district created for the sole purpose of acquiring, constructing, improving, providing, and funding transportation improvements within the district.

Who may create a TBD?

The legislative authority of a county or city may create a TBD by ordinance following the procedures set forth in Chapter 36.73 RCW. The county or city proposing to create a TBD may include other counties, cities, port districts, or transit districts through interlocal agreements.

Who governs the TBD?

The members of the legislative authority (county or city) proposing to establish a TBD serves as the governing body of the TBD. The legislative authority is acting ex officio and independently as the TBD governing body. If a TBD includes

additional jurisdictions through interlocal agreements, then the governing body must have at least five members, including at least one elected official from each of the participating jurisdictions, or may be the governing body of a metropolitan planning organization if the TBD boundaries are identical to the boundaries of the metropolitan planning organization serving the district.

What are the boundaries of a TBD?

The boundaries of a TBD may be less than the boundaries of those jurisdictions participating in the TBD. For example, a county or city may choose to have the TBD boundaries identical with the county or city, or it may choose just to include a portion of the county or city. However, if a TBD chooses to exercise the tax authority that does not require a public vote (e.g. vehicle and impact fees), the boundaries of the TBD must be countywide, citywide, or unincorporated countywide.

Why create a TBD if the county or city legislative authority is the governing board?

A TBD is an independent legal creature. Although a TBD has many of the powers of a county and city (impose taxes, eminent domain powers, can contract and accept gifts, etc.), - it is a separate taxing district. Additionally, by being a separate legal and taxing entity, TBDs have more flexibility. For example, more than one type of jurisdiction can be part of a TBD and the boundaries can be less than countywide or citywide.

continued

Can a TBD be created without imposing fees or proposing voter approved revenue options?

Yes. A county or city takes legislative action through the ordinance process to create a TBD. The ordinance must include a finding that the creation of a TBD is in the public's interest, describe the boundaries of the TBD, and specify the activities or functions to be implemented or funded by the district. The county or city ordinance creating the TBD may also specify and authorize what fees or revenues that the TBD may pursue. The TBD, acting in its own official capacity, has the authority to identify proposed fees or revenue options.

Are TBD revenues required to be spent as they are collected?

No. The governing body which creates a TBD must develop a plan that specifies the transportation improvements to be provided or funded by the TBD. As part of this plan, the TBD's governing board can indicate if the funds will be used immediately, or if they will be collected for a specified period, prior to spending the accumulated funds. Typically, funds that are collected for a specified period before being expended are used to fully fund large projects, when bonding, or serve as a match for state or federal funds that may only become available in a specified time frame.

Does a TBD have to meet certain tests?

There are three threshold tests for transportation improvements in a TBD: 1) the type of transportation improvement contained within the boundaries of the TBD, 2) whether the improvements are identified in any existing state, regional, county, city or eligible TBD jurisdiction's (port or transit) transportation plan and that the improvements are 3) necessitated by existing or reasonably foreseeable congestion levels. The definition of "congestion" does not have a set standard in law; each TBD has the discretion to tailor and make its own determination of congestion levels when implementing its TBD ordinance.

What transportation improvements can be funded by a TBD?

The definition of transportation improvements is broad. This can include maintenance and improvements to city streets, county roads, state highways, investments in high capacity transportation, public transportation, transportation demand management and other transportation projects identified in a regional transportation planning organization plan or state plan.

In developing criteria for a transportation improvement, it can include one or more of the following: reduced risk of transportation facility failure and improved safety; improved travel time; improved air quality; increases in daily and peak period trip capacity; improved modal connectivity; improved freight mobility; cost-effectiveness of the investment; optimal performance of the system through time; and other criteria, as adopted by the governing body.

Note: In 2010, cities within King County are specifically authorized to provide or contract for supplemental

public transportation improvements to meet the mobility needs of the city, and may contract for such improvements with private and nonprofit entities and may also form public-private partnerships.

If a jurisdiction uses the SEPA process to collect impact fees, would this preclude a TBD from using impact fees?

No. However, the law requires the jurisdiction to provide a credit to commercial or industrial developments that are subject to SEPA, or transportation impact fees authorized under GMA. This is commonly called a "no double-dipping" provision.

continued

What revenue options do TBD's have?

TBD's have several revenue options subject to voter approval:

- Property taxes – a 1-year excess levy or an excess levy for capital purposes;
- Up to 0.2% sales and use tax;
- Up to \$100 annual vehicle fee per vehicle registered in the district; and
- Vehicle tolls.

Please Note: There are exemptions or unique requirements when using the vehicle fee or vehicle tolls.

TBD's have two revenue options that do not require voter approval, but are subject to additional conditions:

1. Annual vehicle fee up to \$20. This fee is collected at the time of vehicle renewal and cannot be used to fund passenger-only ferry service improvements.
2. Transportation impact fees on commercial and industrial buildings. Residential buildings are excluded. In addition, a county or city must provide a credit for a commercial or industrial transportation impact if the respective county or city has already imposed a transportation impact fee.

Please Note: Foregoing a vote is an option only. A county or city still has the option of placing either the annual fee of up to \$20 or the impact fees to the vote of the people as an advisory vote or an actual requirement of imposition.

What are the additional conditions required to impose revenue options not subject to voter approval?

To impose either fee, the TBD's boundaries must be countywide or citywide, or if applicable, in the unincorporated county.

Vehicle Fees:

When the Legislature revised the TBD authority in 2007 to enable councilmanic vehicle fees, it was intended to ensure a county-wide or regional approach for first consideration of this new option. That is why counties had the exclusive authority of the \$20 vehicle fee for the first six months

after enactment of the 2007 legislation. Today, a county that creates a countywide TBD (incorporated and unincorporated areas) and proposes to impose up to a \$20 non-voted vehicle fee should first attempt to impose a countywide fee to be shared with cities by interlocal agreement. Sixty percent (60%) of the cities representing seventy-five (75%) of the incorporated population must approve the interlocal agreement for it to be effective. The Legislative expectation is that if an interlocal agreement cannot be reached between a county and city or cities, the county is authorized to create a TBD and impose the fee only in the unincorporated area of the county.

Credits must be provided for previously imposed TBD vehicle fees. Credits are not required for voter approved vehicle fees.

Commercial and Industrial Transportation Impact Fees:

A TBD that is either countywide or citywide must provide a credit for a commercial or industrial transportation impact fee if the respective county or city has already imposed a transportation impact fee. This is commonly called a "no double-dipping" provision.

If we create a countywide TBD for the up to \$20 vehicle fee, how is the revenue distributed to cities?

The revenue must be shared according to the interlocal agreement. The law does not prescribe what the interlocal agreement contains. Consequently, the revenue can be shared by population, number of vehicles within each jurisdiction, project list, a combination of these, or whatever the county and cities can reach agreement on.

What happens if a city imposes the up to \$20 vehicle fee and then the county imposes a countywide fee without voter approval?

The law requires TBDs to provide a credit for vehicle fees previously imposed by a TBD.

continued

For example, if a city was the first to create a TBD and impose a \$20 vehicle fee and subsequently its county creates a countywide TBD imposing a \$20 vehicle fee, the county TBD must provide a \$20 credit against its fee for vehicles registered within the city. As a result, no fee would be collected by the county TBD from vehicles registered within the city. Additionally, the city would not be part of the interlocal agreement with the county or be included in the number/percentages needed for the interlocal agreement to be effective.

However, if in the same example, the city TBD imposed only \$10 of the \$20 vehicle fee and the county TBD imposed a countywide \$20 vehicle fee, only a \$10 credit would be provided for vehicles registered within the city. The county TBD would collect \$10 from vehicles registered in the city. Consequently, the county TBD would need to include the city in the interlocal agreement discussions and the city is included in the number/percentages needed for the interlocal agreement to be effective.

If a county or city is considering the \$20 vehicle fee, how does a county or city estimate revenues?

Currently, no TBD has been in effect for an entire year and therefore revenue estimates and histories are incomplete. What TBDs around the state have learned to date: vehicles per household calculations vary significantly around the state. Statistical data shows that there tends to be about one vehicle per person in rural areas and 0.8 vehicles per person in urban areas. Another factor to strongly consider is seasonality; vehicles sales are not evenly distributed throughout the year and this will affect monthly receipts. Finally, a city or county must understand and recognize that other factors such as people failing to register their vehicles, and data accuracy can affect actual revenues when compared to forecasted revenues.

What other requirements should I be aware of?

Revenue rates, once imposed, may not be increased, unless authorized by voter approval.

If project costs exceed original costs by more than 20 percent, a public hearing must be held to solicit public comment regarding how the cost change should be resolved. This is typically called a material change policy.

The TBD must issue an annual report to include the status of project costs, revenues, expenditures, and construction schedules.

The TBD must be dissolved upon completion of the project(s) and the payment of debt service.

Who has imposed a TBD?

The cities of Lake Forest Park, Edmonds, Des Moines, Olympia, Prosser, and Shoreline imposed the \$20 vehicle fee. Ridgefield and Sequim passed the 2/10% sales tax. Point Roberts and Liberty Lake formed TBD's prior to the legislative changes in 2005.

Checklist

For a checklist that highlights many of the important considerations when creating a Transportation Benefit District (TBD), please see www.awcnet.org/tbd.

Eligibility requirements vary. For additional questions on Transportation Districts, please contact AWC staff Ashley Probart at ashleyp@awcnet.org Sheri Sawyer at sheris@awcnet.org.