

ORDINANCE NO. 1149

AN ORDINANCE OF THE CITY OF DES MOINES, WASHINGTON granting Southwest Suburban Sewer District, King County, Washington, a municipal corporation, the right, privilege, authority, and franchise to install, construct, maintain, and operate a sewer utility along, under, and across city of Des Moines rights-of-way and public easements within the franchise service area.

WHEREAS, Southwest Suburban Sewer District ("district") operates a sewer utility system in southwest King County and a portion of the area served by the district lies within the city of Des Moines, and

WHEREAS, the current franchise between the district and King County has expired and the franchise renewal with King County will not include areas within the city of Des Moines that have been recently annexed, and

WHEREAS, the district has applied to the city of Des Moines for a franchise to operate a sewer utility in those portions of the district within the city of Des Moines, and

WHEREAS, the city council finds it to be in the interest of public health, safety, and welfare to grant a franchise to the district for operation of a sewer utility within a portion of the city of Des Moines, which is known as the franchise service area; now therefore,

THE CITY COUNCIL OF THE CITY OF DES MOINES DO ORDAIN AS FOLLOWS:

Sec. 1. Definitions. As used in this ordinance, unless the context or subject matter clearly requires otherwise, the words or phrases defined in this section shall have the indicated meanings.

(1) "Administrator" means the city manager of the city of Des Moines or the designee of the city manager.

(2) "City" means the city of Des Moines, a municipal corporation of the state of Washington, and its respective successors and assigns. The city is also known as "grantor" or a "party" in this ordinance.

(3) "Construction" or "construct" means constructing, laying, maintaining, testing, operating, extending, renewing, removing, replacing, repairing, and using a sewer utility and its appurtenances.

(4) "District" means the Southwest Suburban Sewer District, King County, Washington, a Washington municipal corporation. The district is also known as "grantee" or a "party" in this ordinance.

(5) "Franchise service area" means that portion of the district service area located within the city. The franchise service area is shown graphically on Exhibit "A", attached to this ordinance and by this reference incorporated in this ordinance.

(6) "Maintenance", "maintaining", or "maintain" means and includes relaying, repairing, replacing, examining, adjusting, testing, inspecting, removing, digging, excavating, and restoring operations incidental thereto.

(7) "System" and "lines" used either in the singular or plural means and includes the pipe lines, mains, structures, manholes, connections, and all attachments, appurtenances, and

appliances necessary and incidental thereto or in any way appertaining to the conveyance of and use of sewer, and which are located within public properties.

(8) "Public properties" means the public highways, streets, alleys, and public easements within the corporate limits of the city.

Sec. 2. Grant of franchise. The city grants to the district the right, privilege, authority, and franchise to install, construct, maintain, and operate a sewer utility along, under and across Des Moines public properties, subject to all the terms and conditions of this ordinance.

Sec. 3. Conditions of grant of franchise.

(1) The city, acting through its administrator, reserves the right, as the interest of the public may require, to require the installation or construction of new facilities of the city or district, or reconstruction of an existing facility, proposed by grantee to be constructed in arterial thoroughfares, to be installed instead in alternate public properties which are substantially comparable in terms of the expense to grantee for installation or construction, and which provide distribution to all affected parcels of property that is equal or better to the requested installation route.

The administrator shall give particular preference to the alternate installation location in cases in which the existing improvements to the public right-of-way would be affected by the proposed installation and in which the improvements were completed by the city less than thirty-six months prior to the grantee's request, or where the structural integrity of the surface of the right-of-way, or inconvenience to the public caused by the proposed installation cannot be mitigated through alternative means. If public properties other than highways within the corporate limits of the city form a part of the route of a state highway, the grantee shall determine the requirements of the state of Washington, and take them into account with respect to the use thereof by the grantee.

(2) The sewer utility and associated facilities constructed, operated, or maintained across city streets, public easements or public places covered by this franchise shall be constructed, operated and maintained in compliance with all applicable laws, codes and regulations of any government agency with jurisdiction.

Sec. 4. Term of franchise--Termination--Right to amend.

(1) Term of franchise. The rights and privileges granted by this franchise will be in effect for a period of ten (10) years after the date on which this ordinance becomes effective, unless sooner terminated or forfeited as provided in this ordinance or as subsequently amended.

(2) Right to amend. The grantor reserves for itself the right at any time upon thirty (30) days written notice to the grantee, to so change, amend, modify or amplify any of the provisions or conditions of this ordinance enumerated to conform to any state statute (including authority to levy a franchise fee or similar payment), order of the Washington Utilities and Transportation Commission or city regulation, relating to the public welfare, health, safety or right-of-way regulation, as may hereafter be enacted, adopted or promulgated, and this franchise may be terminated at any time that the grantee's lines and facilities are not operated or maintained in accordance with such statute or regulation.

Sec. 5. Reservation of police power. All the rights granted in this ordinance are subject to and governed by this franchise; except, the Des Moines city council expressly reserves all of its police power to adopt ordinances necessary to protect the health, safety, and welfare of the general public in relation to the rights granted in this franchise.

Sec. 6. Construction on public properties.

(1) Permits required. Except in the case of an emergency, prior to commencing construction or maintenance work on public properties covered by this franchise, grantee shall first file with the grantor detailed plans, specifications and profiles of the intended work as may be prescribed by the city council and administrator, and shall apply for and receive an appropriate permit or permits from the city prior to commencing such work. Grantee shall comply with all terms, conditions, standards and insurance coverage as may be required under the terms of the permit.

(2) Entry upon public properties. After obtaining the necessary permit from the administrator in the manner prescribed by ordinance, the grantee may enter upon, dig, and excavate the public properties as hereinabove specified, as now laid out or which may hereafter be established or acquired, for the purpose of constructing, laying, operating, and maintaining the grantee's system, either in whole or in part, used, to be used, or which may be used in conveying sewer from any point or points within the franchise service area as specified in section 1(5). The work will be done in accordance with the terms of the permits and ordinances of the city regulating the opening and breaking of public properties and all building and fire codes and ordinances of the city.

(3) Location of improvements. In all cases where practicable, the mains and pipes of the grantee shall be maintained and improved so as not to unnecessarily or unreasonably tear up the streets except where necessary and required to cross streets as determined by the grantee and approved by the administrator. The location of all mains, laterals, and appurtenances, and their depth below the surface of the ground or grade of any public properties, shall be determined and fixed by the administrator, so long as the location or depth is not inconsistent with applicable regulations of federal or state agencies having jurisdiction over the grantee.

(4) Preference in installations. The city shall have prior and superior right to the use of its streets and alleys and public properties for installation and maintenance of its utilities and other governmental purposes, and should a conflict arise with the grantee's lines, the grantee shall, at its own expense and cost, conform to the utilities and other government purposes of the grantor in the event that a reasonably feasible alternative is available. The grantee shall have preference over the owners of all utilities, other than grantor's installed in such public properties after installation of the lines and facilities of the grantee. Such preference shall continue in the event of the necessity of relocating or changing the grade of any such public properties. Grantee shall pay all reasonable costs of and expense necessarily incurred by grantor in the examination, inspection and approval of all plans and specifications for, and all details of construction of, all facilities involved herein.

(5) Relocation of facilities. If the city should pave or otherwise improve public properties, including utility facilities, relocate the same or change the grade thereof, or provide for the relocation of any such street, and the city determines that such work requires the relocation or moving of any portion of the system of the grantee, including relocating or

readjusting the elevation of its lines and facilities to conform to such new grades as may be established, such work shall be done expeditiously by the grantee and its successors and assigns at its own cost and expense. All work to be performed by the grantee under this section shall be performed as may be required by the terms of this franchise. If relocation of the facility is determined to be required, the grantor agrees to give preferences to the grantee's relocation of the system within the grantor's public properties.

(6) Construction standards. All pipelines and appurtenant facilities shall be laid and installed in conformity with the maps and specifications filed with the city except in instances in which deviation may be allowed thereafter in writing by the administrator pursuant to application by the grantee. All plans and specifications shall specify the class and type of material and equipment to be used, manner of excavation, construction and installation, backfill, erection of temporary structures, erection of permanent structures, and the traffic control mitigation measures as provided by the Manual on Uniform Traffic Control Devices, or similar standards as may be applicable from time to time. No such construction shall be commenced without the grantee first securing a permit in writing from the administrator. All such work shall be subject to the approval of and shall pass the inspection of the city by and through its administrator or other designated official. All such construction shall meet the standards set forth in the Control Zone Guidelines promulgated by the State of Washington, Department of Transportation for protection of utility objects in traffic hazard areas to the extent the guidelines are applicable.

(7) Supervision of installations. Notwithstanding any provision herein to the contrary, any excavations and installations by the grantee in any of the public properties within the corporate limits of the city shall be done in accordance with such reasonable rules, regulations, resolutions, and ordinances of general application now enacted or to be enacted by the city council, relating to excavations in public properties of the city, and under the direction and supervision of the administrator. All of the city's actual administrative expenses directly related to such supervision, shall be paid by the grantee to the city no later than thirty days after receipt of invoice.

(8) Repair of grantor's facilities. The grantee shall leave all streets, avenues, roads, alleys, lanes, public places, and ways of city after laying and installing mains and doing construction work, making repairs to equipment, and the like, in as good and safe condition in all respects as is practicable, as they were before the commencement of such work by the grantee, its agents, or contractors. In case of any damage to streets, avenues, utilities systems, roads, alleys, lanes, public places and ways, to the pavement, turnouts, gutters, ditches, walks, utility lines, rails, bridges, trestles, wharves or landings, and other improvements by the grantor, the grantee shall immediately repair all damage at its sole cost and expense. The city council may at any time, after giving prior written notice to grantee, do, order and have done any and all work considered necessary to restore to a safe condition any such streets, avenues, utility systems, roads, alleys, lanes, public places and ways, or wharves or landings left by the grantee or its agent in a condition dangerous to life or property, and the grantee, upon demand, shall pay to the city all costs of such construction or repair and of doing such work. In the event of any excavation through a paved public property, grantee shall restore the paved area to a standard and condition acceptable to the administrator as specified in the permit to be issued for the work. Patching methods approved by the administrator to repair the excavation and the surface of the paving to as near the standards of the original pavement as is possible may include the use of a thermal in-place asphalt patch or approved equal and/or the full overlay

of the paved area, for asphalt paved streets, and the replacement of the affected portion of the panel to the nearest existing expansion joints for concrete paved streets.

(9) Other permits required. Nothing in this franchise shall relieve the grantee of the obligations to obtain any and all necessary federal, state and city permits for the construction, reconstruction, maintenance and operation of its facilities within the city.

(10) Record of installations. The grantee shall at all times keep full and complete plans, specifications, profiles and records showing the exact location and size of all lines heretofore laid in the city within the franchise public properties, and showing the location of all manhole, catch basins, outlets and such plans, specifications, profiles, and records shall be kept current by the grantee. These records shall be subject to inspection at all reasonable times by the proper officials and agents of the grantor, and a copy of these plans, specifications, profiles and records shall be furnished to the grantor upon request.

Sec. 7. Temporary removal of facilities. When necessary, in order to permit any duly authorized person across, upon, along or within any public properties within the franchise service area, the grantee shall temporarily raise or remove its pipes, fixtures, and appurtenances upon public properties, upon reasonable notice in advance from such person, such notice to bear the approval of the administrator, and at such time and in such manner as may be reasonably necessary to accommodate such moving, consistent with the maintenance of proper service to the grantee's customers. The cost to the grantee of such temporary raising or removal and of any interruption of the grantee's service to its customers caused thereby, shall first be paid or provided for by the owner or mover of such building or facility. The temporary removal of facilities shall be done at the grantee's expense.

Sec. 8. Indemnification and release.

(1) In the construction, monitoring, installation, repair, replacement, operation, and maintenance of the sewer utility, the district shall use reasonable and proper precautions to avoid damage to persons, public property, and private property.

(2) The parties to this franchise agree to protect and save harmless the other party, officers, agents, and employees from all claims, actions or damages of every kind or description which may accrue to or be suffered by any person or persons, corporation or property by reason of or occasioned in whole or in part by any act or activity carried on by either party, its officers, agents, contractors, or employees in the exercise of or in the furtherance of the privileges and authority granted herein. To this extent, each party waives whatever rights against such suit it may have by virtue of the State Worker's Compensation laws. This waiver is specifically and mutually negotiated.

In the event any claim or demand is presented to or filed with either party which may give rise to either party's duty to hold the other harmless, each party shall, within a reasonable time, notify the other party of such claim and demand. City shall have the right, at its sole election, to settle or compromise such claim or demand. In the event any suit or action is commenced in which city is named as a party, and which suit or demand alleges facts which might give rise to the district's obligation to hold the city harmless, the district shall be notified thereof, and the district shall have the right, at its sole cost and expense, to defend, settle or compromise such suit or action by attorneys of its own election. Should the district

decline to defend such suit or action and it is determined by a court of law that the district has a duty under this agreement to hold the city harmless in connection with the cause of action alleged in such suit or action, the district agrees to reimburse the city for the city's costs and expenses, including reasonable attorney's fees incurred in defending such suit or action, and in prosecuting the city's right to be held harmless.

(3) The provisions of this section shall not be construed to require the district to hold harmless, appear, and defend, pay any judgment or reimburse the city costs as to any claim, demand, suit, or action which arises out of the sole negligence of the city. In the event of concurrent negligence between the city and the district, the provisions of this section shall apply to the extent of each party's negligence.

(4) The city shall have the right at all times to participate through its own attorney in any suit or action which arises out of any right, privilege, and authority granted by or exercised pursuant to this agreement where the city in its sole discretion determines that such participation is required to protect the interests of the city or the public.

Sec. 9. Vacation of right-of-way. If at any time the city shall vacate any street or right-of-way or other city property which is then used for utility purposes pursuant to the rights granted by this franchise, the grantor will, at the request of grantee, in its vacation procedure, reserve an easement for any existing franchise holder to the extent it is lawful to do so.

Sec. 10. Non-exclusive franchise. This franchise shall not be deemed to be an exclusive franchise. It shall in no manner prohibit the city from granting other franchises of a like nature or franchises for other public or private utilities under, along, across, over, and upon any of the city streets, alleys, or public thoroughfares or properties subject to this franchise, and shall in no way prevent or prohibit the city from constructing, altering, maintaining, or using any of said streets, utility systems, alleys, draining facilities, irrigation structures, or facilities or public places, or affects its jurisdiction over them or any part of them, with full power to make all necessary changes, relocations, repairs, and maintenance as the may deem fit from time to time.

Sec. 11. Dispute resolution - Remedies and forfeiture. In the event of the occurrence of any dispute between the grantor and grantee arising by reason of this agreement, or any obligation of either party under this agreement, that dispute shall be resolved under the terms of this section which shall be the sole remedy for resolution of any such dispute.

(1) Initial recourse. Upon request of either party, such dispute shall be first referred to operational officers designated by the administrator and the grantee to have oversight over the administration of this agreement. Such officers shall meet within fifteen (15) days and make a good faith attempt to mediate a resolution of the dispute.

(2) Determination by administrator/general manager. In the event that the parties are unable to mediate a resolution of the dispute under the procedure set forth above within thirty (30) days, then the dispute shall be referred to the administrator and the grantee's superintendent for resolution of the dispute.

(3) Arbitration. If the dispute has not been resolved pursuant to subparagraphs (1) or (2), then the matter shall, at the request of either party, be referred to the American Arbitration Association for resolution in accordance with its rules governing commercial arbitrations. An award of the

expenses of the arbitration, and the attorney's fees and arbitration expenses incurred by the prevailing party, as determined by the arbitrator, shall be included as a part of the award.

(4) Other remedies. In addition to other remedies provided herein, the grantor reserves and has the right to pursue any remedy to compel or force the grantee to comply with the terms hereof, and to furnish the service herein called for. The pursuit of any right or remedy by the grantor shall not prevent the grantor from thereafter declaring a forfeiture for any reason herein stated after giving the notice required under subsection (5) below, nor shall the delay of the grantor in declaring a forfeiture preclude it from thereafter doing so, unless the action of the grantor shall have prevented, caused, or contributed materially to the failure to perform or do the act or thing complained of.

(5) Forfeiture. In addition to other remedies provided herein, in case of failure on the part of the grantee, to comply with any of the provisions of this franchise agreement, or if the grantee does or causes to be done any act or thing prohibited by, or in violation of the terms of this franchise agreement, the grantor shall give fifteen (15) days' written notice of such violation and of its intention to revoke the franchise if such violation is not corrected within such fifteen (15) day period, or such longer period of time as may be provided by the grantor. Upon expiration of such period and failure of the grantee to eliminate such violation, the grantee shall forfeit all rights and privileges granted by this ordinance, and all of its rights thereunder shall cease and terminate.

In the event the rights and privileges hereby granted are not diligently exercised and/or in the event the grantee shall fail for a period of one (1) month to operate its system, except in the case of any reasons beyond the control of the grantee, this franchise shall terminate and all of the rights and privileges granted hereunder shall cease without any further action being necessary on the part of the city.

Sec. 12. Abandonment of facilities. In the event grantee decides to discontinue using and abandons any of its facilities, or the city reasonably determines that grantee has discontinued using and abandoned any of its facilities, grantee shall, at its sole cost and as directed by the city, abandon its facilities in a manner rendering them completely safe. Abandoning facilities in place shall not relieve the grantee of the obligation and/or costs to remove or alter such facilities in the event the city determines and requests grantee, in writing, to remove or alter such facilities as is necessary for the installation, operation, or maintenance of any grantor-owned utility or for the health and safety of the public, in which case the grantee shall perform such work in a timely manner at no cost to the grantor. In the event grantee does not perform such work within a reasonable time following written notice from the grantor, the grantor may do, order, or have done, any and all work on such abandoned facilities, and the grantee, upon demand, shall pay to the grantor all costs of such work. Grantee shall be responsible for any environmental review required for the abandonment of any facility and payment of any costs of such environmental review.

Sec. 13. Emergency response plan. Grantee shall prepare and file with the grantor an emergency management plan for responding to any emergency condition related to the operation and maintenance of the franchise facility. The plan shall designate responsible officials and emergency 24-hour on-call personnel and the procedures to be followed when responding to an emergency. After being notified of an emergency, grantee shall cooperate with grantor and make every effort to respond as fast

as practical with action to minimize damage and to protect the health and safety of the public.

Sec. 14. Acceptance by grantee. After passage and legal publication and recording of this ordinance as provided by law relating to granting of franchises, and if accepted thereafter within thirty (30) days by the grantee, the grantee shall indicate such acceptance by its filing with the city clerk an Unconditional Written Acceptance thereof. The failure of the grantee to so accept this franchise within the period of time shall be deemed a rejection thereof by the grantee, and all rights and privileges herein granted shall, after the expiration of the thirty (30) day period, if not so accepted, absolutely cease unless the period of time shall be extended by the grantor by proper ordinance duly passed for that purpose.

Sec. 15. Non-assignable--Binding effect. The franchise rights and privileges granted to the district in this ordinance may not be assigned or transferred by the district to any entity without the written consent of the city. Subject to the previous sentence in this section, this franchise shall be binding upon and inure to the benefit of the parties, their successors, heirs, assigns, and personal representatives.

Sec. 16. Severability - Construction.

(1) If a section, subsection, paragraph, sentence, clause, or phrase of this ordinance is declared unconstitutional or invalid for any reason by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

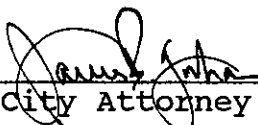
(2) If the provisions of this ordinance are found to be inconsistent with other provisions of the Des Moines Municipal Code, this ordinance is deemed to control.

Sec. 17. Effective date. This ordinance shall take effect and be in full force five (5) days after its passage, approval, and publication in accordance with law and provided it has been duly accepted by grantee in accordance with this ordinance.

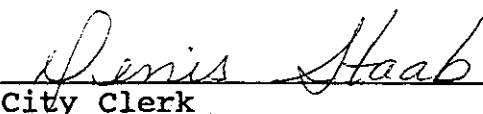
PASSED BY the city council of the city of Des Moines this 12th day of October, 1995 and signed in authentication thereof this 12th day of October, 1995.


MAYOR

APPROVED AS TO FORM:


City Attorney

ATTEST:


City Clerk

Published: October 18, 1995

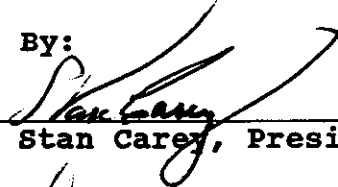
UNCONDITIONAL ACCEPTANCE

The undersigned, on behalf of **SOUTHWEST SUBURBAN SEWER DISTRICT**, hereby accepts all the rights and privileges of the above granted franchise, expressly subject to all the terms, conditions, and obligations contained therein.

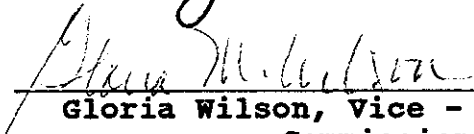
DATED: OCTOBER 30, 1995.

SOUTHWEST SUBURBAN SEWER DISTRICT


By:



Stan Carey, President and Commissioner



Gloria Wilson, Vice - President and
Commissioner



Bill Tracy, Secretary and Commissioner

ATTEST:



Bill Tracy, Secretary of said
Commission