

ORDINANCE NO. 11-0362

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF EDGEWOOD, WASHINGTON, GRANTING UNTO MT. VIEW-EDGEWOOD WATER COMPANY, A NONPROFIT CORPORATION OF THE STATE OF WASHINGTON, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY AND NONEXCLUSIVE FRANCHISE, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR WATER SYSTEM INFRASTRUCTURE, IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW THE PUBLIC RIGHTS-OF-WAY OF THE CITY OF EDGEWOOD, WASHINGTON; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, Mt. View-Edgewood Water Company, Inc., (hereinafter referred to as "MTVE") has requested that the City Council grant it a nonexclusive franchise; and

WHEREAS, MTVE has authority to contract with municipal corporations, and to construct, add to, maintain and supply water works; and

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

WHEREAS, MTVE is an Essential Public Facility that provides public drinking water to the citizens of the City of Edgewood as a privately owned nonprofit municipal water corporation regulated by the Washington State Department of Health; and

WHEREAS, MTVE's public water system infrastructure and facilities are identified as critical infrastructure and its staff is classified as first responders by the Federal Government.

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

Section 1. Franchise Granted; Term. Pursuant to RCW 35A.47.040, the City of Edgewood, a Washington municipal corporation (hereinafter the "City"), hereby grants to MTVE, a non-profit public utility owned by City taxpayers and organized under the laws of the state of Washington, its heirs, successors, legal representatives and assigns, subject to the terms and conditions hereinafter set forth and all applicable City codes and regulations, a nonexclusive franchise beginning on the effective date set forth in Section 21 herein. The term of the franchise shall be five (5) years.

This franchise shall grant MTVE the right, privilege and authority to construct, operate, maintain, replace, and repair all necessary facilities for water delivery, in, under, on, across, over, through, along or below the public rights-of-way located in the City of Edgewood ("the Franchise Area"), as approved under City permits issued pursuant to this franchise. "Rights-of-way" as used herein means all public streets, roads, alleys and highways of the City as now or hereafter laid out, platted, dedicated or improved.

Section 2. Non-Exclusive Franchise Grant. This franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in, along, over, through, under, below or across any of said rights-of-way. Such franchise shall in no way prevent or prohibit the City and/or the public from using any of said roads, streets or other public properties or affect its jurisdiction over them or any part of them, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of same as the City may deem fit, including the dedication, vacation, establishment, maintenance, and improvement of all new rights-of-way, thoroughfares and other public properties of every type and description.

Section 3. Relocation of Water System Facilities.

3.1 MTVE agrees and covenants to, at MTVE's sole expense, protect, support, temporarily disconnect, relocate or remove from any rights-of-way any of MTVE's facilities when so required by the City by reason of traffic conditions, public safety, dedications of new rights-of-way and the establishment and improvement thereof, widening and improvement of existing rights-of-way, street vacations, road and walkway construction, change or establishment of street grade, the construction of any public improvement or structure by any governmental agency acting in a governmental capacity.

3.2 Any condition or requirement imposed by the City upon any person or entity (including without limitation any condition or requirement imposed pursuant to any contract or in conjunction with approvals for permit for zoning, land use, construction or development) which reasonably necessitates the relocation of MTVE's Facilities within the franchise area shall be a required relocation for purposes of subsection 3.1 above.

3.3 If the City determines that a project, event or condition, as defined in subsections 3.1 and 3.2, necessitates the relocation of MTVE's Facilities, the City shall, to the extent reasonably practicable:

- A. Notify MTVE during the planning phase to ensure collaborative effort is made to reduce project expense (to the City and MTVE), allow budgeting for the project and facilitate joint applications for grants and low-interest funding by the parties. The City will provide written notification requiring relocation of MTVE's Facilities at least one hundred eighty (180) days prior to the commencement of City project.
- B. Provide MTVE with copies of pertinent portions of the plans and specifications for such improvement project and where possible propose an alternative location for MTVE's Facilities so that MTVE may relocate its facilities within the current right-of-way or to other rights-of-way.
- C. After receipt of such notice and such plans and specifications, MTVE shall complete relocation of its facilities at least ten (10) days prior to commencement of the City's project at no charge or expense to the City. Relocation shall be accomplished in such a manner as to accommodate the project, event or condition necessitating the relocation.

3.4 Without limitation of the foregoing, MTVE shall specifically indemnify the City, its officers, employees, agents and representatives, for any damages, claims, additional costs or

expenses assessed against, or payable by, the City related to, arising out of, or resulting, directly or indirectly, from MTVE's failure to timely remove, adjust or relocate any of its facilities in accordance with any requirement hereunder.

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

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

Section 4. Maps and Records. After construction of any new facilities in the City rights-of-way, and as a condition of this franchise, MTVE shall make available to the City upon request and at no cost, a copy of all as-built plans, maps and records revealing the final location and condition of MTVE's facilities within the public rights-of-way. Said plans will be maintained at MTVE per Department of Homeland Security measures.

Section 5. Excavations. All construction work performed by MTVE or its contractors under or in relation to this franchise, specifically including without limitation any relocation, construction or maintenance of MTVE's facilities, shall be accomplished in a safe and workmanlike manner, so to minimize interference with the free passage of traffic and the free use of adjoining property, whether public or private, and shall comply with all applicable laws and regulations. MTVE shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or the laws of the state of Washington, including RCW 39.04.180 for the construction of trench safety systems.

Excavation in City-owned rights-of-way shall be governed by the provisions of the Edgewood Municipal Code (EMC) Chapter 12.06 - "Right-of-Way Franchises and Permits for Public and Private Utilities", unless otherwise modified herein. MTVE shall secure one annual no fee permit for all excavating in any public right-of-way outside of a road surface. Whenever MTVE shall excavate any public road surface, including chip seal, concrete or asphalt, but excluding gravel shoulders, for the propose of installation, construction, repair, maintenance or relocation of its facilities, it shall secure from the City the permit(s) to do so, as provided for in EMC 12.06.110 and, in addition, shall give the City at least five (5) working days notice of its intent to

commence work in the public right-of-way. In no case shall any work commence on City-owned and maintained public road surfaces, without the required permit(s), except as otherwise provided in this franchise.

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

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

Section 6. Restoration after Construction. MTVE shall, after abandonment, installation, construction, relocation, maintenance or repair of its facilities within the Franchise Area, restore the surface of the right-of-way to at least the same condition in which the property existed immediately prior to any such installation, construction, relocation, maintenance or repair. The City Manager shall have final approval of the condition of such rights-of-way after restoration. All concrete encased monuments which have been disturbed or displaced by such work shall be restored pursuant to all federal, state and local standards and specifications. MTVE agrees to promptly complete all such restoration work and to promptly repair any damage caused by such work at its sole cost and expense. The provisions of this Section shall survive the expiration, revocation or termination by other means of this franchise.

Section 7. WSDOT Standards. The parties expressly acknowledge that some rights-of-way within the franchise area, specifically including without limitation the Meridian Avenue / State Route 161 corridor, are part of the state highway system (“State Highways”) and are governed by the provisions of Chapter 47.24 RCW and applicable Washington State Department of Transportation (WSDOT) requirements in addition to local ordinances and other regulations.

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

Section 9. Dangerous Conditions. Authority for City to Abate. Whenever the construction, installation or excavation of facilities authorized by this franchise has caused or

contributed to a condition that appears to substantially impair the lateral support of the adjoining street or public place, or otherwise endangers the public, an adjoining public place, street utilities or City property, the City Manager may direct MTVE, at MTVE's own expense, to take actions to protect the public, adjacent public places, City property or street utilities, and such action may include compliance within a prescribed time.

In the event that MTVE fails or refuses to promptly take the actions directed by the City, or fails to fully comply with such directions, or if emergency conditions exist which require immediate action, before the City can timely contact MTVE to request MTVE affect the immediate repair, the City may enter upon the property and take such actions as are necessary to protect the public, the adjacent streets, or street utilities, or to maintain the lateral support thereof, or actions regarded as necessary safety precautions. The provisions of this Section shall survive the expiration, revocation or termination of this franchise.

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

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

In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of MTVE and the City, MTVE's liability hereunder shall be only to the extent of MTVE's negligence. The provisions of this Section shall survive the expiration or termination of this franchise.

Section 11. Insurance. MTVE shall procure and maintain for the duration of the franchise the following liability insurance policies, insuring both MTVE and naming the City, and its elected and appointed officers, officials, agents, representatives, and employees as additional insureds:

- A. Comprehensive general liability insurance with limits not less than:
 - 1. \$2,000,000 for bodily injury or death to each person;
 - 2. \$2,000,000 for property damage resulting per occurrence; and
 - 3. \$2,000,000 for all other types of liability.
- B. Automobile liability for owned, non-owned and hired vehicles with a limit of \$1,000,000 for each person and \$3,000,000 for each accident.
- C. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$1,000,000.

- D. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed operation hazard policies with limits of not less than \$2,000,000.
- E. The liability insurance policies required by this Section shall be maintained at all times by the MTVE. Each such insurance policy shall contain the following endorsement:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until 90 days after receipt by the City, by registered mail, of a written notice addressed to the City Risk Manager of such intent to cancel or not to renew."

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

Section 12. Restoration Bond. In lieu of a restoration bond pursuant to EMC 12.06.218, MTVE hereby warrants all work performed under this franchise and further specifically represents and warrants that all required restoration of the right-of-way shall be performed timely, in a workmanlike manner, and in full compliance with all applicable regulatory standards.

Section 13. Modification. The City and MTVE hereby reserve the right to mutually alter, amend or modify the terms and conditions of this franchise upon written agreement of both parties to such alteration, amendment or modification.

Section 14. Forfeiture and Revocation. If MTVE willfully violates or fails to comply with any of the provisions of this franchise, or through willful misconduct or negligence fails to heed or comply with any notice given by the City under the provisions of this franchise, then MTVE shall forfeit all rights conferred hereunder and this franchise may be revoked or annulled by the Edgewood City Council after a hearing held upon notice to MTVE.

Section 15. Remedies to Enforce Compliance. The City may elect, in lieu of revocation and without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling MTVE to comply with the provisions of this franchise. In addition to any other remedy provided herein, the City reserves the right to pursue any remedy to compel or force MTVE and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein.

Section 16. Legal Compliance. City Ordinances and Regulations. MTVE shall comply with applicable federal, state and local laws, rules and regulations, unless otherwise modified as part of this franchise, at all times relevant to this franchise. Nothing herein shall be deemed to restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. In the event of a conflict between the provisions of this franchise and any other ordinance(s)

enacted under the City's police power authority, such other ordinance(s) shall take precedence over the provisions set forth herein.

Section 17. Acceptance. Within sixty days after the passage and approval of this Ordinance, this franchise may be accepted by MTVE by its filing with the City Clerk an unconditional written acceptance thereof. Failure of MTVE to so accept this franchise within said period of time shall be deemed a rejection thereof by MTVE, and the rights and privileges herein granted shall be of no effect whatsoever, unless extended by Ordinance.

Section 18. Survival. All of the provisions, conditions and requirements of Sections 3. Relocation of Water Facilities; Section 5. Excavation; Section 6. Restoration after Construction; Section 8. Dangerous Conditions; and Section 9. Indemnification; of this franchise shall be in addition to any and all other obligations and liabilities MTVE may have to the City at common law, by statute, or by contract, and shall survive the expiration or termination of this franchise. All of the provisions, conditions, regulations and requirements contained in this franchise shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of MTVE and all privileges, as well as all obligations and liabilities of MTVE shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever MTVE is named herein.

Section 19. Assignment. This franchise may not be assigned or transferred without the written approval of the City, except MTVE may freely assign this franchise in whole or in part to a parent, subsidiary, or affiliated corporation or as part of any corporate financing, reorganization or refinancing. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. MTVE shall provide prompt, written notice to the City of any such assignment.

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

CITY OF EDGEWOOD
City Manager
2224 104th Avenue East
Edgewood, Washington 98372

MT. VIEW-EDGEWOOD WATER CO.
General Manager
11610 32nd Street East
Edgewood, Washington 98372

Section 21. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance unless such invalidity or unconstitutionality materially alters the rights, privileges, duties, or obligations hereunder, in which event either party may request renegotiation of those remaining terms of this franchise materially affected by such court's ruling.

Section 22. Effective Date. This ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect (5) days after passage and publication of an approved summary thereof consisting of the title. Provided, that the franchise granted by this ordinance shall not take effect until the City's receipt of

MTVE's signed acceptance of the terms set forth herein in accordance with Section 16.

Section 23. Reciprocal Fee Waiver. For the term of this franchise, MTVE shall waive all fees and charges associated with operation of the water utility that would otherwise be charged to the City for any activity the City shall undertake. This waiver specifically includes without limitation all charges for water utility service to properties and facilities owned and/or operated by the City. In consideration for the waiver of these fees, the City shall waive all fees that would otherwise be charged to MTVE for any function it would undertake requiring a City fee. This waiver specifically includes without limitation all charges for city service to properties and facilities owned and/or operated by MTVE, however, the waiver of fees does not waive MTVE's responsibility to meet all other requirements, to the extent consistent with the City's regulations and applicable law. The parties acknowledge that this waiver has equivalent benefit to both parties and will result in mutual efficiencies and cost savings that will be passed on to the City's taxpayers and MTVE's customers, respectively. However, nothing herein shall be construed as requiring the City to waive, abandon or otherwise abridge its regulatory and police power functions. Without limitation of the forgoing, MTVE shall be required to apply for and obtain all applicable permits and otherwise operate in full compliance with the requirements of such permits.

Section 24. Nonwaiver of Breach. The failure of either party at any time to require performance by the other of any provision hereof shall in no way affect the right of the other party hereafter to enforce the same. 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.

Section 25. Entire Agreement. This franchise represents the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and shall supersede all prior oral negotiations and written agreements between the parties.

Section 26. No Third Party Beneficiary. This franchise has been negotiated and executed for the exclusive benefit of the signatory parties and is enforceable only by the same. Nothing herein shall be construed as creating any rights in or for any third parties.

Section 27. Governing Law. Venue. This franchise shall be governed in all respects by the laws of the state of Washington. The exclusive venue for any dispute related to this franchise shall be the Pierce County Superior Court.

**Presented to Council for first reading on April 12, 2011
Presented to Council for second reading on April 26, 2011**

ADOPTED BY THE CITY COUNCIL ON APRIL 26, 2011

Jeffery Hogan, Mayor

ATTEST/AUTHENTICATED:

Janet Caviezel, Finance Director/City Clerk

APPROVED AS TO FORM:

J. Zachary Lell, City Attorney

Published: May 4, 2011

Effective: May 9, 2011

ACCEPTANCE OF FRANCHISE

The undersigned authorized representative of Mt.View-Edgewood Water Company hereby declares on behalf of Mt.View-Edgewood Water Company, the acceptance of the nonexclusive franchise to Mt. View-Edgewood Water Company approved by the Edgewood City Council on the ____ day of _____, 2011, by the adoption of Edgewood City Ordinance No. 11-0362.

DATED this ____ day of _____, 2011

MT. VIEW-EDGEWOOD WATER COMPANY

By: _____
Its: _____

CITY OF EDGEWOOD
2224 104th Avenue East, Edgewood, WA 98372
(253) 952-3299 Fax: (253) 952-3537

LEGAL NOTICE

NOTICE OF ORDINANCE ADOPTED BY EDGEWOOD CITY COUNCIL

The following is a summary of an Ordinance adopted by the City of Edgewood City Council on the 26th day of April, 2011, and shall take effect and be in full force on the 9th day of May, 2011.

ORDINANCE NO. 11-0362

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF EDGEWOOD, WASHINGTON, GRANTING UNTO MT. VIEW-EDGEWOOD WATER COMPANY, A NONPROFIT CORPORATION OF THE STATE OF WASHINGTON, ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AUTHORITY AND NONEXCLUSIVE FRANCHISE, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR WATER SYSTEM INFRASTRUCTURE, IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW THE PUBLIC RIGHTS-OF-WAY OF THE CITY OF EDGEWOOD, WASHINGTON; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE.

The full text of the Ordinance is available at the City Clerk's office, Edgewood City Hall, 2224 104th Avenue East, Edgewood, WA 98372 (253) 952-3299.

Janet Caviezel, Finance Director/City Clerk

Published in the Pierce County Herald on May 4, 2011