CITY OF SAMMAMISH
WASHINGTON
ORDINANCE NO. O2008-241

AN ORDINANCE OF THE CITY OF SAMMAMISH, WASHINGTON, GRANTING THE NE SAMMAMISH SEWER & WATER DISTRICT A NON-EXCLUSIVE FRANCHISE TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR A WATER AND SEWER SYSTEM WITHIN PUBLIC RIGHTS-OF-WAY OF THE CITY OF SAMMAMISH, WASHINGTON.

WHEREAS, RCW 35A.11.020 grants the City broad authority to regulate the use of the public right-of-way; and

WHEREAS, RCW 35A.47.040 authorizes the City "to grant nonexclusive franchises for the use of public streets, bridges or other public ways, structures or places above or below the surface of the ground for facilities for public conveyances, for poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof for transmission and distribution of electrical energy, signals and other methods of communication, for gas, steam and liquid fuels, for water, sewer and other private and publicly owned and operated facilities for public service;" and

WHEREAS, the City Council finds that it is in the best interests of the health, safety and welfare of residents of the City of Sammamish to grant a non-exclusive franchise to the NE Sammamish Sewer & Water District for the operation of a water and sewer system within the City right-of-way; NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF SAMMAMISH, WASHINGTON, DO ORDAIN AS FOLLOWS:

1. **Definitions.** The following terms contained herein, unless otherwise indicated, shall be defined as follows:

   1.1. City: The City of Sammamish, a municipal corporation of the State of Washington, specifically including all areas incorporated therein as of the effective date of this ordinance and any other areas later added thereto by annexation or other means.

   1.2. Days: Calendar days.

   1.3. Director: The City Manager or designee.

   1.4. District: The NE Sammamish Sewer & Water District, a municipal corporation organized under RCW 57.

   1.5. Facilities: All pipes, access ways, pump stations, storage facilities, equipment, manholes, valves, connections, appurtenances and supporting structures, located in

the City's right-of-way, utilized by the District in the operation of activities authorized by this Ordinance.

1.6. Permittee: A person who has been granted a permit by the Permitting Authority, and District operating under this agreement.

1.7. Permitting Authority: The head of the City department authorized to process and grant permits required to perform work in the City's right-of-way, or the head of any agency authorized to perform this function on the City's behalf. Unless otherwise indicated, all references to Permitting Authority shall include the designee of the department or agency head.

1.8. Person: An entity or natural person.

1.9. Right-of-way: As used herein shall refer to the surface of and the space along, above, and below any street, road, highway, freeway, lane, sidewalk, alley, court, boulevard, parkway, drive, utility easement, and/or road right-of-way now or hereafter held or administered by the City of Sammamish.

2. **Franchise Granted.**

2.1. Pursuant to RCW 35A.47.040, the City hereby grants to the District, its successors and assigns, subject to the terms and conditions hereinafter set forth, a Franchise beginning on the effective date of this Ordinance.

2.2. This Franchise shall grant the District the right, privilege and authority, subject to the terms and conditions hereinafter set forth, to construct, operate, maintain, replace, and use all necessary equipment and facilities for a water and sewer system, in, under, on, across, over, through, along or below the public right-of-way located in the City of Sammamish, as approved under City permits issued by the Permitting Authority pursuant to this Franchise and City ordinances.

2.3. 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 right-of-way. Such Franchise shall in no way prevent or prohibit the City from using any right-of-way or other City property or affect its jurisdiction over them or any part of them, and the City shall retain the authority to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of the same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new rights-of-way or other public properties of every type and description, subject to the provisions of Section 5 herein.

3. **Franchise Term.** The term of the Franchise granted hereunder shall be for the period commencing upon the effective date of this ordinance through December 31, 2014 (6 years). This Franchise will automatically renew for three additional six-year periods (total of 24 years) unless either party requests in writing to renegotiate the Franchise at least sixty days prior to the expiration date of each six-year term.

4. **City Ordinances and Regulations.**

4.1. Nothing herein shall be deemed to direct or 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 reasonable ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control, by appropriate regulations, the location, elevation, and manner of construction and maintenance of any facilities of the District located within the City right-of-way. The District shall promptly conform with all such regulations, unless compliance would cause the District to violate other requirements of law.

5. **Right-of-Way Management.**

5.1. Applications for work in the City Right-of-Way

5.1.1. All applications for work in the City's Right-of-Way will be processed according to the Permitting Authority's Right-of-Way Application Process.

5.2. Safety.

5.2.1. The District, in accordance with applicable federal, state, and local safety rules and regulations shall, at all times, employ ordinary care in the installation, maintenance, and repair of its facilities utilizing methods and devices commonly accepted in their industry of operation to prevent failures and accidents that are likely to cause damage, injury, or nuisance to persons or property.

5.2.2. All of the District's facilities in the right-of-way shall be constructed and maintained in a safe and operational condition including any utility trenching and associated pavement patching.

5.3. Dangerous Conditions, Authority for City to Abate.

5.3.1. Whenever Facilities or the operations of the District cause or contribute to a condition that appears to endanger any person or substantially impair the lateral support of the adjoining right-of-way, public or private property, the Director may direct the District, at no charge or expense to the City, to take actions to resolve the condition or remove the endangerment. Such directive may include compliance within a prescribed time period.

5.3.2. In the event the District fails or refuses to promptly take the directed action, or fails to fully comply with such direction, or if emergency conditions exist which require immediate action to prevent imminent injury or damages to persons or property, the City may take such actions as it believes are necessary to protect persons or property and the District shall be responsible to reimburse the City for its costs.

5.3.3. At any time during the term of this Franchise, if a District Facility or trench within the Franchise Area causes a street to crack, settle, or otherwise fail, the City will notify the District of the deficiency and the District agrees to restore the deficiency and repair the damage within thirty (30) days of written notice by the City.

5.3.4. For purposes of this Section, "street" shall mean all City owned improvements within a Franchise Area right-of-way, include, but is not limited to, the following: pavement, sidewalks, curbing, above and below-ground utility facilities, and traffic control devices.

6. Relocation of System Facilities.

6.1. The District agrees and covenants to protect, support, temporarily disconnect, relocate or remove from any right-of-way its facilities without cost to the City, when so required by the City to facilitate the completion of or as a result of a public project, provided that the District shall in all such cases have the privilege to temporarily bypass, in the authorized portion of the same right-of-way and upon approval by the City, any facilities required to be temporarily disconnected or removed.

6.1.1. All Facilities utilized for providing water and sewer service within the District's service area and within the right-of-way shall be considered owned, operated and maintained by the District.

6.1.2. If the City determines that a public project necessitates the relocation of the District's existing facilities, the City shall:

6.1.2.1. As soon as possible prior to commencing construction of such project, provide District with written notice requiring such relocation; and

6.1.2.2. Provide the District with copies of any plans and specifications pertinent to the requested relocation and a proposed temporary or permanent location for the District's facilities (location proposed is assumed to be very general and will be up to the District to determine the feasibility of said location).

6.1.2.3. After receipt of such notice and such plans and specifications, the District shall complete relocation of its facilities at no charge or expense to the City at least ten (10) days prior to the City commencing construction of the project.

6.1.3. The District may, after receipt of written notice requesting a relocation of its facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise the District in writing if any of the alternatives are suitable to accommodate the work that necessitates the relocation of the facilities. If so requested by the City, the District shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by the District full and fair consideration. In the event the City ultimately determines that there is no other reasonable alternative, the District shall relocate its facilities as provided in this Section.

6.1.4. If the City requires the relocation of Facilities within five (5) years of their installation or the subsequent relocation of Facilities within five (5) years from the date of relocation of such Facilities pursuant to this Section, then the City shall bear the entire cost of such subsequent relocation.

6.1.5. When any Person, other than the City, requires the relocation of the District's Facilities to accommodate the work of facilities of such Person, the District shall

have the right as a condition of such relocation to require such Person to make payment to the District at a time and upon reasonable terms acceptable to the District for all reasonable costs, fees and expenses incurred by the District in the relocation of the District's Facilities, provided that such arrangements do not unduly delay or increase the cost of a planned City construction project.

6.2. District's Maps and Records. As a condition of this Franchise, upon request from the City, and without charge to the City, the District agrees to provide the City with all requested as-built plans, maps, and records that show the vertical and horizontal location of its facilities within the right-of-way, measured from the center line of the right-of-way, using a minimum scale of one inch equals one hundred feet (1"=100') relating to a specific City project. The District shall endeavor to provide maps in Geographical Information System (GIS) or other digital electronic format used by the City and, upon request, in hard copy plan form used by the District, provided that such information is in the District's possession or can be reasonably developed from the information in the District's possession at reasonable expense. This information shall be provided within five working days and shall be updated upon reasonable request by the City.

6.3. Vacation of Right-of-way. If at any time the City shall vacate a street or Right-of-way or other City property which is then used for utility purposes pursuant to the rights granted by this Franchise to the District, the City will reserve at no cost to the District a continuing grant of easement to the District in accordance with the District's then-current standards and specifications for easements and the construction, repair, operation, replacement and maintenance of its existing or future Facilities located within such vacated street or Right-of-way.

7. **Planning Coordination.**

7.1. Growth Management. The parties agree, as follows, to participate in the development of, and reasonable updates to, the each other's planning documents:

7.1.1. For the District's service within the City limits, the District will provide information relevant to the City's development of the Comprehensive Plan Capital Facilities Plan Element to assist the City in complying with the requirements described in RCW 36.70A.070(3), provided that such information is in the District's possession, or can be reasonably developed from the information in the District's possession

7.1.2. The District will participate in a cooperative effort with the City to ensure that the Utilities Element of the City's Comprehensive plan is accurate as it relates to the District's operations and is updated to ensure its continued relevance at reasonable intervals.

7.1.3. The District shall submit information related to the general location, proposed location, and capacity of all existing and proposed Facilities within the City as requested by the Director within a reasonable time, not exceeding sixty (60) days from receipt of a written request for such information.

7.1.4. The District will update information provided to the City under this Section whenever there are major changes in the District's system plans for Sammamish.

7.1.5. The City will provide information relevant to the District's operations within a reasonable period of written request to assist the District in the development or update of its Comprehensive Water System Plan, provided that such information is in the City's possession, or can be reasonably developed from the information in the City's possession.

7.2. System Development Information. The District will assign a representative whose responsibility shall be to coordinate with the City on planning for CIP projects including those that involve undergrounding. At a minimum, such coordination shall include the following:

7.2.1. By February 1st of each year, District shall provide the City Manager or designee with a schedule of its planned capital improvements, which may affect the right of way for that year;

7.2.2. By September 1 of each year, the City shall provide the District General Manager or designee an updated version of the City's Capital Improvement Plan and 6-Year Transportation Plan.

7.2.3. The District shall meet with the City, other franchisees and users of the right-of-way, according to a schedule to be determined by the City, to schedule and coordinate construction; and

7.2.4. All construction locations, activities, and schedules shall be coordinated, as required by the City Manager or his designee, to minimize public inconvenience, disruption, or damages.

7.3. Emergency Operations. The City and District agree to cooperate in the planning and implementation of emergency operations response procedures.

8. **Indemnification.**

8.1. District hereby releases, covenants not to bring suit, and agrees to indemnify, defend and hold harmless the City, its elected officials, employees, agents, and volunteers from any and all claims, costs, judgments, awards, attorney's fees, or liability to any person, including claims by District's own employees to which District might otherwise be immune under Title 51 RCW, arising from personal injury or damage to property allegedly due to the negligent or intentional acts or omissions of District, its agents, servants, officers or employees in performing activities authorized by this Franchise. This covenant of indemnification shall include, but not be limited by this reference, claims against the City arising as a result of the acts or omissions of District, its agents, servants, officers or employees except to the extent any claims for injuries and damages are caused by the negligence of the City. If final judgment is rendered against the City, its elected officials, employees, agents, and volunteers, or any of them, District shall satisfy the same. The City may appear in any proceeding it deems necessary to protect the City's or the public's interests.

8.2. Inspection or acceptance by the City of any work performed by District at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Said indemnification obligations shall extend to claims that are not reduced to a suit and any claims that may be settled prior to the culmination of any litigation or the institution of any litigation.

8.3. In the event District refuses to undertake the defense of any suit or any claim, after the City's request for defense and indemnification has been made pursuant to the indemnification clauses contained herein, and District's refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of District, then District shall pay all of the City's costs and expenses for defense of the action, including reasonable attorneys' fees of recovering under this indemnification clause as well as any judgment against the City.

9. **Insurance.**

9.1. District shall procure and maintain for the duration of the Franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to District, its agents or employees. A combination of self-insurance and excess liability insurance may be utilized by District. District shall provide to the City an insurance certificate and proof of self-insurance, if applicable, evidencing the required insurance and a copy of the additional insured endorsements, for its inspection prior to the commencement of any work or installation of any Facilities pursuant to this Franchise, and such insurance shall evidence the following required insurance:

9.1.1. Automobile Liability insurance for owned, non-owned and hired vehicles with limits no less than $2,000,000 Combined Single Limit per accident for bodily injury and property damage; and

9.1.2. Commercial General Liability insurance policy, written on an occurrence basis with limits no less than $1,000,000 combined single limit per occurrence and $2,000,000 aggregate for personal injury, bodily injury and property damage. Coverage shall include premises, operations, independent contractors, products-completed operations, personal injury and advertising injury. There shall be no endorsement or modification of the Commercial General Liability insurance excluding liability arising from explosion, collapse or underground property damage. The City shall be named as an additional insured under District's Commercial General Liability insurance policy.

9.1.3. Excess Liability in an amount of $5,000,000 each occurrence and $5,000,000 aggregate limit. The City shall be named as an additional insured on the Excess Liability insurance policy.

9.2. Payment of deductible or self-insured retention shall be the sole responsibility of District.

9.3. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, or employees. In addition, the insurance policy shall

contain a clause stating that coverage shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability. District's insurance shall be primary. Any insurance, self insurance, or insurance pool coverage maintained by the City shall be excess of District's insurance and shall not contribute with it. Coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice has been given to the City.

10. **Enforcement.**

10.1. In addition to all other rights and powers retained by the City under this Franchise, the City reserves the right to revoke and terminate this Franchise and all rights and privileges of the District in the event of a substantial violation or breach of its terms and conditions.

10.2. A substantial violation or breach by the District shall include, but shall not be limited to, the following:

10.2.1. An uncured violation of any material provision of this Franchise, or any material rule, order or regulation of the City made pursuant to its power to protect the public health, safety and welfare;

10.2.2. An intentional evasion or knowing attempt to evade any material provision of this Franchise or practice of any fraud or deceit upon the system customers or upon the City;

10.2.3. Failure to provide the services specified in the Franchise;

10.2.4. Misrepresentation of material fact during negotiations relating to this Franchise or the implementation thereof;

10.2.5. A continuous and willful pattern of grossly inadequate service;

10.2.6. An uncured failure to pay fees associated with this Franchise

10.3. No violation or breach shall occur which is without fault of the District or the City, or which is as a result of circumstances beyond the District's or the City's reasonable control. Neither the District, nor the City, shall be excused by economic hardship nor by nonfeasance or malfeasance of its directors, officers, agents or employees; provided, however, that damage to equipment causing service interruption shall be deemed to be the result of circumstances beyond the District's or the City's control if it is caused by any negligent act or unintended omission of its employees (assuming proper training) or agents (assuming reasonable diligence in their selection), or sabotage or vandalism or malicious mischief by its employees or agents. The District, or the City, shall bear the burden of proof in establishing the existence of such conditions.

10.4. Except in the case of termination pursuant to Paragraph 10.2.4.of this Section, prior to any termination or revocation, the City, or the District, shall provide the other with detailed written notice of any substantial violation or material breach upon which it proposes to take action. The party who is allegedly in breach shall have a period of 60 days following such written notice to cure the alleged violation or breach,

demonstrate to the other's satisfaction that a violation or breach does not exist, or submit a plan satisfactory to the other to correct the violation or breach. If, at the end of said 60-day period, the City or the District reasonably believes that a substantial violation or material breach is continuing and the party in breach is not taking satisfactory corrective action, the other may declare that the party in breach is in default, which declaration must be in writing. Within 20 days after receipt of a written declaration of default, the party that is alleged to be in default may request, in writing, a hearing before a "hearing examiner" as provided by the City's development regulations. The hearing examiner's decision may be appealed to any court of competent jurisdiction.

10.5. The City may, in its discretion, provide an additional opportunity for the District to remedy any violation or breach and come into compliance with this agreement so as to avoid the termination or revocation.

10.6. Any District violation existing for a period greater then 30 days may be remedied by the City at the District's expense.

11. **Survival.** All of the provisions, conditions and requirements of Sections 5.3 Dangerous Conditions, Authority For City To Abate, 6 Relocation Of System Facilities, and 8 Indemnification, of this Franchise shall be in addition to any and all other obligations and liabilities the District may have to the City at common law, by statute, or by contract, and shall survive the City's Franchise to the District for the use of the areas mentioned in Section 2 herein, and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements contained in this Franchise Ordinance shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of the District and all privileges, as well as all obligations and liabilities of the District shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever the District is named herein.

12. **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 Franchise Ordinance. The Parties may amend, repeal, add, replace, or modify any provision of this Franchise to preserve the intent of the parties as expressed herein prior to any finding of invalidity or unconstitutionality.

13. **Assignment.** This Franchise shall not be sold, transferred, assigned, or disposed of in whole or in part either by sale, voluntary or involuntary merger, consolidation or otherwise, without the written approval of the City. This paragraph shall not act to require City approval of any District action to mortgage or otherwise encumber its facilities, or other action related to corporate financing, financial reorganization, or refinancing activity.

14. **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:

District Manager	City Manager
NE Sammamish Sewer & Water District	City of Sammamish
3600 Sahalee Way	801 228th Ave SE

Sammamish, WA 98074 Phone: (425) 868-1144 Fax: (425) 868-4005	Sammamish, WA 98075 Phone: (425) 295-0510 Fax: (425) 295-0600

15. **Non-Waiver.** The failure of either party to enforce any breach or violation by the other party of any provision of this Franchise shall not be deemed to be a waiver or a continuing waiver by the non-breaching party of any subsequent breach or violation of the same or any other provision of this Franchise.

16. **Alternate Dispute Resolution.** If the parties are unable to resolve disputes arising from the terms of this Franchise, prior to resorting to a court of competent jurisdiction, the parties shall submit the dispute to a non-binding alternate dispute resolution process agreed to by the parties. Unless otherwise agreed between the parties or determined herein, the cost of that process shall be shared equally.

17. **Entire Agreement.** This Franchise constitutes the entire understanding and agreement between the parties as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon execution and acceptance hereof.

18. **Favored Nation Status.** The Parties agree that if the City enters into a franchise or other agreement with another Person or municipal entity after the date of this franchise, and any term or condition of such franchise or agreement is more favorable than the terms and conditions contained in this Franchise, the same terms and conditions shall be offered to the District with the same effective date.

19. **Directions to City Clerk.** The City Clerk is hereby authorized and directed to forward certified copies of this ordinance to the District set forth in this ordinance. The District shall have sixty (60) days from receipt of the certified copy of this ordinance to accept in writing the terms of the Franchise granted to the District in this ordinance.

20. **Effective Date.** This ordinance shall take effect and be in full force five day after publication.

ADOPTED BY THE CITY COUNCIL AT A REGULAR MEETING THEREOF ON THE 18TH DAY OF NOVEMBER 2008.

CITY OF SAMMAMISH

Mayor Lee Fellinge

ATTEST/AUTHENTICATED:

Melonie Anderson

Melonie Anderson, City Clerk

Approved as to form:

Bruce L. Disend, City Attorney

Filed with the City Clerk:	November 13, 2008
First Reading:	November 4, 2008
Passed by the City Council:	November 18, 2008
Publication Date:	November 21, 2008
Effective Date:	November 26, 2008

WITNESS THE EXECUTION HEREOF on the day and year first herein above written.

NE Sammamish Sewer and Water District	CITY OF SAMMAMISH
By: Laura Sigentes	By
Its: General Manager	Its: City Manager