ORDINANCE NO. 1653

AN ORDINANCE OF THE CITY OF DES MOINES, WASHINGTON, granting Midway Sewer District a non-exclusive franchise to construct, maintain, operate, replace and repair a sewer system within public rights-of-way of the City of Des Moines, Washington, and fixing a time when the same shall become effective.

WHEREAS, Midway Sewer District, a Washington special purpose municipal corporation ("District"), owns sewer facilities ("Facilities") located in the City of Des Moines, a Washington non-charter municipal code city ("City"), and a portion of such Facilities are located within the City right-of-way as hereinafter defined, and

WHEREAS, RCW 57.08.005(5) authorizes the District to conduct sewage throughout the District and any city and town therein, and construct and lay facilities along and upon public highways, roads and streets within and without the District, and

WHEREAS, RCW 35A.47.040 authorizes the City to grant non-exclusive franchises for the use of the public streets above or below the surface of the ground by publicly owned and operated sewer facilities, and

WHEREAS, the City and the District have prepared a Franchise Agreement to provide for the operation of District Facilities within the City right-of-way; now, therefore,

THE CITY COUNCIL OF THE CITY OF DES MOINES ORDAINS AS FOLLOWS:

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

"City" means the City of Des Moines, a Washington municipal corporation, and its respective successors and assigns.

"Director" means the Director of the City's Planning, Building and Public Works Department, or the Director's designee.

"District" means the Midway Sewer District, a Washington municipal corporation, and its respective successors and assigns.

"Facility" or "Facilities" means meters, pipes, mains, services, valves, vaults, risers, generators, electrical control panels, power meters, telephone connections, meter stations, pump stations, lift stations, lines, wastewater treatment plants and facilities and all other necessary or convenient facilities and appurtenances thereto for the purpose of operating a wastewater utility system, whether the same be located over or underground.

"Franchise Area" means every and all of the public roads, streets, avenues, alleys, highways and rights-of-way of the City as now or hereafter laid out, platted, dedicated or improved; and any and all public City roads, streets, avenues, alleys, highways, and other rights-of-way that may hereafter be laid out, platted, dedicated or improved in the District's service area within the present corporate boundaries of the City (as depicted in Exhibit "B", attached hereto, which is by this reference incorporated as if fully set forth herein), and as such corporate boundaries may be extended within District's service area by annexation or otherwise, but shall not include private roads, streets, avenues and alleys. The Franchise Area shall not include or convey any right to the District to install facilities on, or to otherwise use, City owned or leased properties.

"Ordinance" means this Ordinance No. 1653, which sets forth the terms and conditions of this Franchise.

"Party" or "Parties" means the City or the District individually, or collectively as addressed in this Franchise.

"Revenue" means income received by the District from the provision of sewer service to direct retail customers whose properties receiving such service from the District's sewer system are located within the City. Revenue shall not include: late fees; shut-off and reconnect fees; delinquent service charge collection costs and expenses; surcharges; impact or mitigation fees; permit fees and costs; any type of connection charges, general facilities charges, or local facilities charges; local improvement district and utility local improvement district assessments and payments; grants; contributed assets (contributions in aid of construction); loans; income from legal settlements not related to the provision of sewer service to District customers; income from telecommunication leases or licenses; income from real property or from real property sales; income from the sale of surplus

equipment, tools or vehicles; interest income; penalties; hydraulic modeling fees; sewer system extension agreement fees and charges; income from street lights; labor, equipment and materials charges; or any other fees and charges.

Sec. 2. Franchise.

(1) In addition to the authority granted by State law to the District to locate, operate and maintain its Facilities in public roads and streets, the City does hereby grant to District the right, privilege, authority and franchise to construct, install, lay, support, attach, maintain, repair, renew, replace, remove, enlarge, operate and use Facilities in, upon, over, under, along, through and across the Franchise Area for purposes of its sewer utility functions as defined in Title 57 RCW beginning on the Effective Date of this Franchise; provided the City's grant of the right to use the Franchise Area to the District as provided herein for its Facilities shall not be construed to require the District to provide such Facilities to the City.

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

(3) At all times during the term of this Franchise, District shall fully comply with all applicable federal and state laws and regulations and required permits, including, but not limited to, RCW 39.04.180 for construction trench safety systems, chapter 19.122 RCW for utility damage prevention, the State Environmental Policy Act, the State of Washington Pollution Control Law, and the Federal Clean Water Act.

Sec. 3. Non-interference of Facilities.

(1) District's Facilities shall be located, relocated and maintained within the Franchise Area so as not to unreasonably interfere with the free and safe passage of pedestrian, bicycle, and vehicular traffic and ingress or egress to or from the abutting property and in accordance with the laws of the State of Washington, and the ordinances, resolutions, rules and regulations

of the City of Des Moines. Nothing herein shall preclude District from effecting temporary road closures as reasonably necessary during construction or maintenance of its Facilities provided District receives prior City approval, which shall not be unreasonably withheld, and, provided further, District shall have the right to effect temporary road closures in the event of emergencies to maintain, repair and replace its Facilities without prior City approval but the District shall obtain City approval of such road closures as soon as reasonably possible.

(2) Whenever it is necessary for District, in the exercise of its rights under this Franchise, to make any excavation in the Franchise Area, District shall, upon completion of such excavation, restore the surface of the Franchise Area to City standards, as issued by the City's Planning, Building and Public Works Department, as nearly as reasonably possible to its condition prior to any such excavation, installation, construction, relocation, maintenance or repair, at no expense to the City; PROVIDED, HOWEVER, that no such work shall be done prior to the obtaining of a permit therefor issued by the Director, which permit shall set forth conditions pertaining to the work to be done and specifications for the restoration of the streets and right-of-ways.

(3) If the City determines that the District has failed to restore the right-of-way in accordance with the conditions set forth in this Franchise, the City shall provide the District with written notice, which shall include a description of actions the City believes necessary to restore the right-of-way. If the right-of-way is not restored in accordance with the City's notice within fifteen (15) days of that notice, or such longer period as may be specified in the notice, the City, or its authorized agent, may restore the right-of-way and District shall be responsible for all reasonable costs and expenses incurred by the City in restoring the right-of-way in accordance with this section. The rights granted to the City under this section shall be in addition to those otherwise provided by this Franchise.

(4) The District shall, at no expense to the City, expeditiously repair all existing Facilities that it owns, operates and maintains within the Franchise Area, including any damage caused directly or indirectly by its Facilities. The District shall also coordinate and manage the repair of service

lines in the Franchise Area connecting its system to users.

(5) Survey monuments shall not be removed or destroyed without the District first obtaining the required Department of Natural Resources (DNR) permit in accordance with RCW 58.09.130 and WAC 332-120-030, and as such statute and regulation may be modified and amended. A Professional Land Surveyor (PLS) shall be responsible for perpetuating and documenting existing monuments in compliance with the Application Permit to Remove or Destroy a Survey Monument in accordance with WAC 332-120. Following approval by the Public Land Survey Office, copies of the approved permits shall be forwarded to the City. All survey monuments, which have been distributed or displaced by such work, shall be restored pursuant to all federal, state and local standards and specifications. District agrees to promptly complete all restoration work and to promptly repair any damage caused by such work at its sole expense.

Sec. 4. Relocation of Facilities.

(1) Whenever the City causes the grading or widening of the Franchise Area or undertakes construction of City-owned utilities, storm drainage lines, lighting, signalization, sidewalk improvements, pedestrian and bicycle amenities, or other public street improvements and such project requires the relocation of the District's then-existing Facilities within such Franchise Area, the City shall:

(a) Pursuant to RCW 35.21.905, or as amended, consult with the District in the predesign phase of any such project in order to coordinate the project's design with District Facilities within such project's area; and

(b) Provide the District, at least three hundred sixty (360) days prior to the advertisement for bid of construction of such project, written notice that a project is expected to require the relocation of District Facilities, together with reasonably accurate and specific plans and specifications for such grading, widening, or construction and a proposed new location within the Franchise Area for the District's Facilities; and

(c) Coordinate and work diligently with the District to minimize conflicts between existing Facilities and the

project improvements where possible, and to avoid having the District relocate their facilities, whenever possible. The District acknowledges that there may be situations and circumstances where no other feasible alternatives are available.

(2) After receipt of such notice and such plans and specifications, District shall relocate such Facilities within the Franchise Area so as to accommodate such street and city utility improvement project; provided, however, District may, after receipt of written notice requesting a relocation of its Facilities, submit to the City written alternatives to such relocations. The City shall within a reasonable time evaluate such alternatives and advise the District in writing whether one or more of the alternatives is suitable to accommodate work that would otherwise necessitate relocation of the Facilities. If so requested by the City, District shall submit such additional information as is reasonably necessary to assist the City in making such evaluation. The City shall give each alternative full and fair consideration. If the City reasonably determines that there is no other feasible alternative, the City shall provide the District with further written notice to that effect, and the District shall then relocate its Facilities by its own forces, by separate public works contract or by participating in the City's public works project in accordance with section 4(7). The City shall cooperate with the District to designate a substitute location for its Facilities within the Franchise Area. The City will establish a date by which Facilities will be relocated, which date will be not less than one hundred eighty (180) days after further written notice to the District as to the Facility to be relocated. District must finish relocation of each such Facility by the date so established.

(3) The cost of relocating such Facilities existing within the Franchise Area shall be paid as follows:

(a) If the relocation occurs within ten (10) years after the District or a third party on the District's behalf constructed such Facility, then the City shall pay fifty percent (50%) of the cost of such relocation and the District shall pay the remaining fifty percent (50%).

(b) If the relocation occurs more than ten (10) years after the District or a third party on the District's behalf

constructed such Facility, then the relocation shall be at the District's sole cost.

(c) However, if the City requires the relocation of Major Facilities defined as gravity sewer of twelve (12) inch diameter or greater, lift stations and pump stations and related force mains, siphon lines and boxes, or vault structures ("Major Facilities" or "Major Facility") to accommodate the completion of or as a result of a City project, where such facility cannot reasonably be supported, disconnected, relocated or removed, then the City shall pay fifty percent (50%) of the cost of the relocation of the Major Facility and the District shall pay the remaining fifty percent (50%) without limitation on the age of the facility; provided, the City and District agree to give full and fair consideration to any lower-cost alternatives to relocating the Major Facility meeting the minimum operational requirements of the Parties, and the City and the District shall each pay fifty percent (50%) of the lower-cost alternative.

(d) For the purposes of this section 4, the date of the Facility's acceptance by the District Board of Commissioners, or the date of final contract payment for the Facility's installation (whichever occurs first), shall determine the age of the Facility.

(e) Whenever any State or Federal Agency with legal authority within the Franchise Area requires the relocation of District Facilities, the relocation shall be at the District's sole cost. This provision does not limit the District's rights to seek reimbursement for the costs of such relocation from the State or Federal Agency requiring the relocation.

(f) Subsections (a) and (c) of this section 4(3) shall not apply to:

(i) Relocations of District facilities required as part of a formal declaration of emergency as defined by RCW 39.04.280 (3) by the City, which is ratified by Resolution of the City Council. In such cases, relocation, if necessary, shall be at the District's sole cost; and

(ii) Relocation of District facilities located on, over, or under bridges, and culverts conveying creeks and streams (identified as Des Moines Creek, Barnes Creek, Massey

Creek, McSorley Creek, Woodmont Creek, Redondo Creek, Cold Creek), where relocation of such facilities, if necessary, shall be at the District's sole cost.

(4) Whenever the City is undertaking a road or City-owned utility project or improvement, the City will not use its authority to require the District to relocate sewer facilities [excluding sewer services] for third party franchise utilities (private utilities) on City-initiated aerial-to-underground conversion projects. If conflicts between the aerial-to-underground joint-trench and the District Facilities cannot be resolved, and relocation of District Facility's is necessary, the District shall have the right as a pre-condition of such relocation to require payment to the District for any and all costs and expenses incurred by the District in the relocation of such District Facilities. On City-initiated projects requiring aerial-to-aerial relocation of third party franchise utilities (private utilities), the District shall relocate that portion of its Facilities which are in direct conflict with the new locations of the third party franchise utility facilities, such as utility poles, or participate in securing the necessary easements where no reasonable alternative location for the third party franchise utility facilities exists within the then existing right-of-way.

(5) For the purpose of this section 4, a project or improvement is considered to be caused by the City (as described in section 4(1) above) if the project is City-initiated and is part of the City's annually adopted Capital Improvement Project (CIP) Program, and can include projects or improvements where a third party has made an in lieu payment for a portion of the City's capital improvement project, provided, the City is responsible for the majority of the cost of the project or improvement, which, if applicable, includes any grant funding received by the City from any federal or state agency. A project or improvement is not considered to be caused by the City if the project or improvement is constructed by the City on behalf of a third party, where the third party is responsible for the majority of the project or improvement cost, and makes payment to the City in lieu of performing the project or improvement.

(6) Whenever any person or entity, other than the City, requires the relocation of District Facilities to accommodate the work of such person or entity within the Franchise Area [excluding

State and Federal Agencies with legal authority within the Franchise Area], the City agrees not to use its authority to require the District to relocate the existing facilities. The District shall have the right as a pre-condition of such relocation to require such person or entity to:

(a) Make payment to District at a time and upon terms acceptable to the District for any and all costs and expense incurred by the District in the relocation of District Facilities; and

(b) Protect, defend, indemnify and save the District harmless from any and all claims and demands made against it on account of injury or damage to the person or property of another arising out of or in conjunction with the relocation of District Facilities, to the extent such injury or damage is caused by the negligence or willful misconduct of the person or entity requesting the relocation of District Facilities or other negligence or willful misconduct of the agents, servants or employees of the person or entity requesting the relocation of District Facilities.

(7) If a City project requires the relocation of then existing Facilities within the Franchise Area, the District shall have the right by interlocal agreement with the City to include the relocation of any Facilities as required by the City as part of the City's public works project. Such interlocal agreement shall include and provide for, but not be limited to, the following terms and conditions:

(a) The inclusion of the District's work as part of the City's project;

(b) The District to provide plans and specifications of the District's work to the City for inclusion as a separate bid schedule in the City project, whether such District plans and specifications are prepared by the District at the District's expense, or the City prepares the plans and specifications for the District's work at the District's expense;

(c) The City bidding the project, including the District's work by separate bid schedule, and the District's approval of the contractor's bid for the District's work in the

separate bid schedule, or, alternatively, the District's rejection of the contractor's bid for the District work and the District's right to perform the District's work through a District contractor, provided that in so doing the City's project is not unreasonably delayed;

(d) The City's contractor to install both the City work and the District work, the City's obligation to pay the City's contractor for both the City work and the District work, and the District's obligation to reimburse the City for the cost of the District work performed by the City contractor; and

(e) The District's obligation to reimburse the City for District project administration and inspection fees and costs based on a time and materials basis, provided the City and the District may negotiate a lump sum payment on a per project basis, or a percentage of the total District project construction cost, and provided the District shall not be required to pay for any City-issued permits related to the City work and the District work.

(8) The Parties expressly agree that this section 4 shall not survive the expiration, revocation or termination of this Franchise, unless modified by separate agreement.

Sec. 5. Right-of-Way management.

(1) Excavation. Whenever the District excavates in any right-of-way for the purpose of installation, construction, operation, maintenance, repair or relocation of its Facilities, it shall apply to the City for a permit to do so in accordance with the ordinances and regulations of the City requiring permits to operate in City right-of-way. Except for emergencies or routine maintenance, no District excavation work shall commence within any City right-of-way without a permit, except as otherwise provided in this Franchise and applicable City Ordinance. All work shall be done to the City's reasonable satisfaction.

(2) Restoration after construction. The District shall, after any installation, construction, relocation, operation, maintenance or repair of Facilities within the Franchise Area, restore the right-of-way to City standards as nearly as reasonably possible to its condition prior to any such work. The District agrees to promptly complete all restoration work and to promptly

repair any damage to the right-of-way caused by such work at its sole cost and expense. If it is determined the District has failed to restore the right-of-way in accordance with this Franchise and other applicable City regulations, the City shall provide the District with written notice including a description of the actions the City believes necessary to restore the right-of-way.

(3) Bonding requirement. The District, as a public agency, shall not be required to comply with the City's standard bonding requirement for working in the City's right-of-way.

(4) Emergency work, permit waiver. In the event of an emergency where any District Facilities located in the right-of-way are broken or damaged, or if the District's construction area for the District's Facilities is in a condition as to place health or safety of any person or property in imminent danger, the District shall immediately take any necessary emergency measures to repair, replace or remove its Facilities without first applying for and obtaining a permit as required by this Franchise; provided the District shall notify the City as soon as reasonably possible relative to such emergency activity and shall immediately obtain a permit for such activity if required by this Franchise or City Ordinance.

(5) City work zones. The District shall not be required to obtain a City right-of-way permit to undertake utility work when the District has included its work as part of a City public works project in accordance with section 4(7).

(6) Complete permit applications. If the District is required to obtain a City right-of-way permit to undertake utility work within City right-of-way, the City shall issue a permit within fourteen (14) calendar days of receiving a complete application for such permit from the District.

(7) City invoices. The City shall invoice the District for all City fees and charges relating to the issuance of any City right-of-way permit to the District, including inspection fees and charges, on a monthly basis, and the City's final fees and charges within thirty (30) days of the completion of any District work in City right-of-way subject to a City permit, and the City's final acceptance of any such District work.

Sec. 6. Planning coordination.

(1) The Parties agree to participate in the development of, and reasonable updates to, the other Party's planning documents as follows:

(a) For the District's service area within the City limits, the District will participate in a cooperative effort with the City to develop City's Comprehensive Plan Utilities Element that meets the requirements described in RCW 36.70A.070(4).

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

(c) 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 City within a reasonable time, not exceeding twenty (20) days from receipt of a written request for such information, provided that such information is in the District's possession, or can be reasonably developed from the information in the District's possession.

(d) 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 District's Comprehensive Sewer Comprehensive Plan(s), provided that such information is in the City's possession, or can be reasonably developed from the information in the City's possession.

(2) District and City shall each assign a representative whose responsibility shall be to coordinate planning for capital improvement plan projects including those that involve undergrounding. At a minimum, such coordination shall include:

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

(b) By February 1st of each year, District shall provide the City with a schedule of the District's planned capital improvements which may affect the rights-of-way for that year.

(c) By February 1st of each year, City shall provide the District with a schedule of City's planned capital improvements which may affect the rights-of-way for that year including but not limited to street overlays and repairs, storm drainage improvements and construction, and all other rights-of-way activities that could affect District capital improvements and infrastructure.

(d) The District shall meet with the City, and other franchisees and users of the right-of-way, as necessary, to schedule and coordinate construction activities.

(e) All construction locations, activities, and schedules shall be coordinated to minimize public inconvenience, disruption or damages.

(f) The City and the District agree to cooperate in the planning and implementation of emergency operations response procedures.

(g) Without charge to either Party, both Parties agree to provide each other with as-built plans, maps and records in electronic format as available that show the location of its facilities within rights-of-way.

Sec. 7. Indemnification.

(1) District shall indemnify, defend and hold the City, its agents, officers, employees, volunteers and assigns harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever, including all costs and attorney's fees, made against them on account of injury, sickness, death or damage to persons or property which is caused by or arises out of, in whole or in part, the willful, tortious or negligent acts, failures and/or omissions of District or its agents, servants, employees, contractors, subcontractors or assigns in the construction, operation or maintenance of its Facilities or in exercising the rights granted District in this

Franchise; provided, however, such indemnification shall not extend to injury or damage to the extent caused by the negligence or willful misconduct of the City, its agents, officers, employees, volunteers or assigns.

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

(3) In the event any such claim or demand be presented to or filed with the District or the City arising out of or relating to the acts or omissions in whole or in part of the other Party, the Party shall promptly notify the other Party thereof, and the notified Party shall have the right, at its election and at its sole cost and expense, to settle and compromise such claim or demand.

(4) Should a court of competent jurisdiction determine that this Franchise is subject to RCW 4.24.115, then, 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 City and District, their officers, employees and agents, District's liability hereunder shall be only to the extent of District's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the parties' waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification.

Sec. 8. Default. If the District fails to comply with any of the provisions of this Franchise, unless otherwise provided for herein, the City may serve upon the District a written

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

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

Sec. 9. Non-exclusive Franchise. This Franchise is not and shall not be deemed to be an exclusive Franchise. This Franchise shall not in any manner prohibit the City from granting other and further franchises over, upon, and along the Franchise Area, which do not interfere with District's rights under this Franchise. This Franchise shall not prohibit or prevent the City from constructing, altering, maintaining, or using the Franchise Area or affect the jurisdiction of the City over the same or any part thereof.

Sec. 10. Jurisdiction. This Franchise is intended to convey limited rights and interest only as to those roads and rights-of-way in which the City has an actual interest within the

Franchise Area. It is not a warranty of title or of interest in City road rights-of-way.

Sec. 11. Franchise term. This Franchise shall have a term of ten (10) years from its Effective Date as defined in section 36 herein, provided this Franchise shall be automatically extended for one additional five (5) year period unless either Party, at least one hundred eighty (180) days prior to the termination date of the Franchise provides written notice to the other Party of its intent to terminate the Franchise at the end of the then current Franchise term (collectively, the "Term").

Sec. 12. Franchise fee. As compensation to the City for its costs of creating and administering this Franchise, the District shall pay to the City a one-time franchise fee ("Franchise Fee") of Five Thousand Dollars ($5,000.00). The Franchise Fee shall be paid by the District to the City within thirty (30) days of the Effective Date of the Franchise.

Sec. 13. Non-assumption. In consideration of the District's payment of the Franchise Fee and Franchise payment to the City as provided in sections 12 and 14 herein, and the District's acceptance of the other terms and conditions of this Franchise, the City agrees not to exercise and to forbear its statutory authority pursuant to chapter 35.13A RCW or other statutes to attempt to assume jurisdiction over all or part of the District or any District responsibilities, property, facilities, equipment or utility customers located within or without the City's corporate limits during the term of this Franchise. The City's agreement and forbearance includes not facilitating or cooperating with any other city or town to attempt pursuant to RCW 35.13A.060 or as such statute may be amended or superseded to assume jurisdiction over the District or any District responsibilities, property, facilities, equipment or utility customers located within or without the City's corporate limits during the Term of this Franchise.

Sec. 14. Franchise payment.

(1) In consideration of the rights granted the District under this Franchise, the District shall pay to the City a Franchise payment ("Franchise payment") in the amount of six percent (6.0%) of the District's Revenue during the Term of this

Franchise, beginning the first day of the first month occurring at least thirty (30) days after the Effective Date of this Franchise, subject to the provisions of section 14(2) herein.

(2) Franchise payments shall be paid to the City in bi-monthly installments due and payable within thirty (30) days following the end of the bi-monthly period.

(3) Should the District be prevented by judicial or legislative action from paying any or all of the Franchise payments, the District shall be excused from paying that portion of the Franchise payment. Should a court of competent jurisdiction declare the Franchise payment invalid, in whole or in part, then the District's obligation to pay the Franchise payments to the City under this section shall be terminated in accordance with and to the degree required to comply with such court action, provided, the Parties agree to meet to discuss alternatives and amendments to this Franchise to retain the essential purposes of this section. If the Parties are unable to agree on appropriate amendments to this Franchise, the City shall have the right to void section 14(4) of this Agreement and may impose an Excise Tax on the District's Revenue; provided, if any such Excise Tax exceeds six percent (6%), the District shall have the right to terminate this Franchise and shall have the right to bring an action to challenge the legal validity of any such Excise Tax.

(4) In consideration of the District's payment of a Franchise payment to the City as provided in section 14 herein, and the District's acceptance of the other terms and conditions of this Franchise, the City agrees not to exercise and to forbear any legal authority it may have to impose a utility, business and occupation tax, public utility tax, privilege tax, excise tax or any other tax (collectively "Excise Tax") upon the District based on the District's revenues, gross receipts, or gross income during the term of this Franchise.

(5) If a court of competent jurisdiction determines the City may not agree to forbear its statutory authority to impose an Excise Tax upon the District based on the District's revenues, gross receipts, or gross income during the term of this Franchise, or may not agree to limit any such Excise Tax on the District's revenues, gross receipts, or gross income, and thereafter the City imposes an Excise Tax on the District, the District shall have the

cumulative rights and options, at its sole election, to (1) terminate this Franchise and the payment of Franchise payments to the City, or (2) elect not to terminate this Franchise and may elect to pay any such Excise Tax, provided the District's Franchise payments herein to the City shall be credited against any such Excise Tax the City may impose.

(6) The District shall have the right to recover the Franchise payments from the District's ratepayers residing within the City and may identify the Franchise payments as a separate billing item on utility customer billings.

(7) The District agrees while this Franchise is in effect that it will not pursue or support any legal challenge to the Franchise payment set forth herein.

(8) If the District fails to pay any fee required under this Franchise within ninety (90) days after the due date thereof, there shall be added to such fee a penalty of 1.5 percent (1.5%) of the amount of such fee.

Sec. 15. Compliance with codes and regulations.

(1) The rights, privileges and authority herein granted are subject to and governed by this Ordinance and all other applicable City ordinances and codes, as they now exist or may hereafter be amended, provided the City shall not unreasonably affect or modify any portion of this Franchise without District's written approval. Nothing in this Ordinance limits the City's lawful power to exercise its police power to protect the safety and welfare of the general public or deprive the City of any powers, rights, or privileges it now has or may later acquire in the future to regulate the use of and to control the City road rights-of-way covered by this Franchise. Any location, relocation, erection or excavation by District shall be performed by District in accordance with applicable federal, state and City rules and regulations, including the City public works policies and pre-approved plans, and any required permits, licenses or regulatory fees, and applicable safety standards then in effect or any Memorandum of Understanding with District.

(2) If any territory served by District is annexed to the City after the Effective Date of this Franchise, this Franchise

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

Sec. 16. Location of facilities and equipment. With the exception of components that are traditionally installed above ground such as vault lids, risers, vacuum relief apparatus, pump stations, generators, electrical control panels, power meters, telephone connections, automated reading equipment and appurtenances, and utility markers, all Facilities and equipment to be installed within the Franchise Area shall be installed underground; provided, however, that such Facilities may be installed above ground if so authorized by the City, which authorization shall not be unreasonably withheld, conditioned or delayed, consistent with the provisions of the City's land use and zoning code and applicable development pre-approved plans.

Sec. 17. Record of installations and service. With respect to excavations by District and the City within the Franchise Area, District and the City shall each comply with its respective obligations pursuant to chapter 19.122 RCW, and as such statute may be modified and amended, and any other applicable state law.

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

Upon written request of District, the City shall provide District with the most recent update available of any plan of potential improvements to its improvements located within the Franchise

Area; provided, however, any such plan so submitted shall only be for informational purposes within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

As-built drawings of the location of any Facilities placed by District in the Franchise Area, shall be made available to the City within twenty (20) working days of request.

Sec. 18. Shared use of excavations.

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

(2) If at any time, or from time to time, either District, the City, or another franchisee, shall cause excavations to be made within the Franchise Area, the Party causing such excavation to be made shall afford the others, upon receipt of a written request to do so, an opportunity to use such excavation, provided that:

(a) No statutes, laws, regulations, ordinances or District policies prohibit or restrict the proximity of other utilities or facilities to District's Facilities installed or to be installed within the area to be excavated;

(b) Such joint use shall not unreasonably delay the work of the Party causing the excavation to be made;

(c) Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both Parties. The Parties shall each cooperate with other utilities in the Franchise Area to minimize hindrance or delay in construction.

Sec. 19. Insurance.

(1) The District shall keep a policy of insurance in force with a minimum limit of five million dollars ($5,000,000.00). Verification of insurance coverage is a condition precedent to the effectiveness of this Franchise.

(2) The insurance shall be maintained in full force and effect at the District's sole expense throughout the term of the Franchise, and, should such insurance be terminated, this Franchise shall terminate as of the date of the termination of insurance coverage. The District shall provide the City annually with original certificates evidencing insurance as required by this Agreement.

(3) The coverage provided by the District's insurance policies shall be primary to any insurance maintained by the City, except as to losses or damages attributable to the sole negligence of the City. Any insurance maintained by the City that might relate to this Franchise shall be in excess to the District's insurance and shall not contribute with or to it. The City has no obligation to report occurrences to the insurance companies unless a claim is filed with the City's City Council; and the City has no obligations to pay the District's premiums.

(4) The District shall be solely and completely responsible to perform all work related to this Franchise in compliance with all applicable federal, state, county and city statutes, rules, regulations, ordinances, orders and codes as presently constituted or as may be subsequently amended. The District's attention is directed to the requirements of the Washington Industrial Safety and Health Act, Chapter 49.17 RCW. The District shall be solely and completely responsible for safety and safety conditions on its job sites and for its work within the Franchise Area, including the safety of all persons and property during performance of any works therein. The services of the City or City's consultant personnel in conducting construction review of the District's work relating to the Franchise is not intended to include review of the adequacy of the District's work methods, equipment, scaffolding, or trenching, or safety measures in, on or near such Franchise Area or job site. The District shall provide reasonable and appropriate access for the City and its inspectors

to adequately inspect the work and its conformance with applicable statutes, ordinances, rules, regulations, and the Franchise.

Sec. 20. Abandonment and/or removal of District Facilities. The Parties agree that the standard practice will be to abandon underground District Facilities in-place whenever practical, subject to the following conditions:

(1) The District shall continue to own and be responsible for any such facilities abandoned within the Franchise Area.

(2) The City shall have the right to require the District to remove any Facilities abandoned within the Franchise Area if the City reasonably determines the removal of the abandoned Facility is required to facilitate the construction or installation of a City project within the Franchise Area and the City determines there is no other reasonable or feasible alternative to the removal of the Facility. The City will make reasonable efforts to avoid conflicts with abandoned Facilities whenever possible, however, whenever a conflict cannot be resolved except by removal from the right-of-way of previously abandoned District Facilities, then the District shall, at the District's expense, remove such abandoned Facilities by their own forces or by participating in the City's public works project. When necessary, removal of abandoned Facilities shall be limited to the area of direct conflict. In removing such material, the District shall conform to all local, state, and federal regulations applicable to asbestos abatement, when applicable.

(3) Within one hundred and eighty days (180) of the District's permanent cessation of use of its Facilities as determined by the District, or any portion thereof, the District shall provide the City with record drawings showing the location of the Facilities to be abandoned.

(4) District Facilities that are abandoned in-place shall be abandoned pursuant to City Standards, to the satisfaction of the Planning, Building and Public Works Director.

(5) The Parties expressly agree that this section shall survive the expiration, revocation or termination of this Franchise, unless modified by separate agreement.

Sec. 21. Vacation of Franchise Area. If the City processes an application and/or determines to vacate any right-of-way which is part of the Franchise Area, the City may, after giving thirty (30) days written notice to the District, terminate this Franchise with respect to any City road or rights-of-way vacated. However, should the District notify the City that an easement is required for existing Facilities within the proposed vacation area, the City shall require the applicant for a vacation to prepare and provide to the District the necessary easement documentation, at no cost to the District. The City shall withhold approval of such vacation until the District has notified the City that the necessary easement documentation has been secured, or provisions otherwise made acceptable to the District to maintain the viability and use of existing Facilities.

Sec. 22. Assignment. All of the provisions, conditions, and requirements herein contained shall be binding upon the District, and no right, privilege, license or authorization granted to the District hereunder may be assigned or otherwise transferred without the prior written authorization and approval of the City, which the City may not unreasonably withhold, condition or delay, provided that a merger or consolidation of District with or into another Title 57 water-sewer district shall not be considered an assignment for the purposes of this provision and shall not be subject to the City's approval.

Sec. 23. Reservation of rights. The City reserves the right, upon thirty (30) days written notice to the District, to amend or modify the provisions or conditions of this Franchise to conform to any state, county, or federal statute, ordinance, rule or regulation. Unless mandated by state or federal law, if any term or condition of this Franchise and any term or condition of any City code, ordinance, resolution, or regulation are in conflict, the terms of this Franchise shall control.

Sec. 24. Notice. Unless applicable law requires a different method of giving notice, any and all notices, demands or other communications required or desired to be given hereunder by any Party (collectively, "notices") shall be in writing and shall be validly given or made to another Party if delivered either personally or by Federal Express or other overnight delivery service of recognized standing, or if deposited in the United

States Mail, certified, registered, or express mail with postage prepaid, or if sent by e-mail with electronic confirmation. If such notice is personally delivered, it shall be conclusively deemed given at the time of such delivery. If such notice is delivered by Federal Express or other overnight delivery service of recognized standing, it shall be deemed given one (1) business day after the deposit thereof with such delivery service. If such notice is mailed as provided herein, such shall be deemed given three (3) business days after the deposit thereof in the United States Mail. If such notice is sent by email, it shall be deemed given at the time of the sender's receipt of electronic confirmation. Each such notice shall be deemed given only if properly addressed to the Party to whom such notice is to be given as follows:

To City: City Clerk
City of Des Moines
21630 11th Ave. S.
Des Moines, WA 98198
Phone: (206) 878-4595
Fax: (206) 870-6540

To District : General Manager
Midway Sewer District
PO Box 3487
Kent, WA 98089
Phone: (206) 824-0375
Fax: (206) 824-0806

Any Party may change its address for the purpose of receiving notices as herein provided by a written notice given in the manner required by this section to the other Party.

Sec. 25. Severability. If any term, provision, condition or portion of this Franchise shall be held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Franchise, which shall continue in full force and effect.

Sec. 26. Non-Waiver. The failure of either Party to enforce any breach or violation by the other Party or 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.

Sec. 27. Non-Discrimination clause. In all hiring or employment made possible or resulting from this Franchise, the Parties agree there shall be no discrimination against any employee or applicant for employment because of sex, sexual orientation, age, race, color, creed, national origin, marital status, families with children, honorably discharged veteran or military status or the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability unless based upon a bona fide occupation qualification. No person shall be denied or subjected to discrimination in receipt of the benefit of any services or activities made possible by or resulting from this Franchise on the grounds of sex, sexual orientation, age, race, color, creed, national origin, marital status, families with children, honorably discharged veteran or military status or the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability unless based upon a bona fide occupation qualification.

Sec. 28. 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 may submit the dispute to mediation or other non-binding alternate dispute resolution process agreed to by the Parties. Unless otherwise agreed upon between the Parties or determined herein, the cost of that process shall be shared equally by the Parties.

Sec. 29. Attorney fees. All fees and expenses for mediation or arbitration shall be borne by the parties equally. However, each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of evidence. In any claim or lawsuit for damages arising from the parties' performance of this Agreement, each party shall pay all its legal costs and attorney's fees incurred in defending or bringing such claim or lawsuit, in addition to any other recovery or award provided by law; provided, however, nothing in this paragraph shall be construed to limit the City's or the District’s right to indemnification under section 7 of this Agreement.

Sec. 30. Governing Law/Venue. This Franchise shall be governed by the laws of the State of Washington. Any suit to enforce or relating to this Agreement shall only be filed in King County Superior Court, King County, Washington.

Sec. 31. 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.

Sec. 32. Amendment. This Franchise may be amended only by written instrument, signed by both Parties, which specifically states that it is an amendment to this Franchise, and is approved and executed in accordance with the laws of the State of Washington. Without limiting the generality of the foregoing, this Franchise (including, without limitation, section 7 "Indemnity" above) shall govern and supersede and shall not be changed, modified, deleted, added to, supplemented or otherwise amended by any permit, approval, license, agreement or other document required by or obtained from the City in conjunction with the exercise (or failure to exercise) by District of any and all rights, benefits, privileges, obligations, or duties in and under this Franchise, unless such permit, approval, license, agreement or document specifically:

(1) References this Franchise; and

(2) States that it supersedes this Franchise to the extent it contains terms and conditions which change, modify, delete, add to, supplement or otherwise amend the terms and conditions of this Franchise.

In the event of any conflict or inconsistency between the provisions of this Franchise and the provisions of any such permit, approval, license, agreement or other document that does not comply with subsections (1) and (2) referenced immediately above, the provisions of this Franchise shall control.

Sec. 33. Directions to City Clerk. The City Clerk is hereby authorized and directed to forward certified copies of this Ordinance to the District as set forth in this Ordinance. District shall have thirty (30) days from the receipt of the certified copy

of this Ordinance to accept in writing the terms of the Franchise granted to the District by this Ordinance and file with the City Clerk the Statement of Acceptance, attached hereto as Exhibit "A," and incorporated by reference.

Sec. 34. District acceptance of Franchise. District shall have no rights under this Franchise nor shall District be bound by the terms and conditions of this Franchise unless District shall, within thirty (30) days after the effective date of the Ordinance, file with the City its written acceptance of this Franchise.

Sec. 35. Effective 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.

Sec. 36. Effective date of Franchise. The terms and conditions of this Ordinance shall not be binding on the City and the District unless the District Board of Commissioners within thirty (30) days of the effective date of this Ordinance adopts a resolution accepting this Franchise, and the date of the adoption of such resolution by the District Board of Commissioners shall be the effective date ("Effective Date") of the Franchise.

PASSED BY the City Council of the City of Des Moines this 23rd day of June, 2016 and signed in authentication thereof this 23rd day of June, 2016.

MAYOR

APPROVED AS TO FORM:

Interim Assistant City Attorney

ATTEST:

City Clerk

Published: June 28, 2016

EXHIBIT A

DES MOINES ORDINANCE NO. 1653

ACCEPTANCE OF FRANCHISE

The undersigned authorized representative of Midway Sewer District hereby declares on behalf of Midway Sewer District the acceptance of the nonexclusive franchise to Midway Sewer District approved by the Des Moines City Council on June 23, 2016, by the adoption of Des Moines City Ordinance No. 1653.

DATED this 13 day of July, 2016.

MIDWAY SEWER DISTRICT:

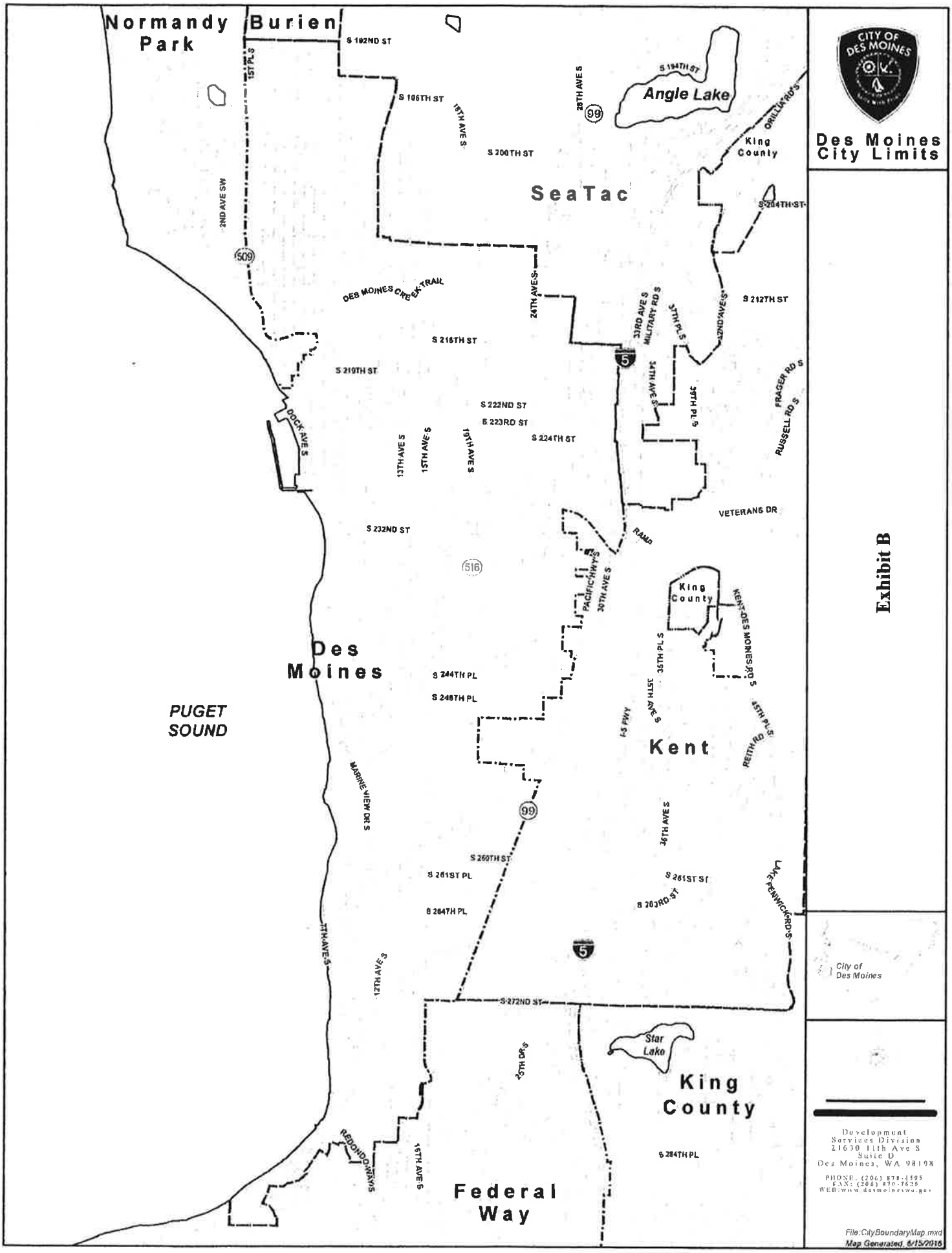
By: Scott S

Its: Pres

EXHIBIT B

DES MOINES ORDINANCE NO. 1653

DEPICTION OF CITY CORPORATE BOUNDARIES



CITY OF DES MOINES

Des Moines City Limits

Exhibit B

City of Des Moines

Development Services Division
21630 11th Ave S
Suite D
Des Moines, WA 98198
PHONE: (206) 878-4595
FAX: (206) 870-7626
WEB: www.desmoineswa.gov

File:CityBoundaryMap.mxd
Map Generated: 6/15/2016

LEGAL NOTICE

SUMMARY OF ADOPTED ORDINANCE

CITY OF DES MOINES

ORDINANCE NO. 1653, Adopted June 23, 2016.

DESCRIPTION OF MAIN POINTS OF THE ORDINANCE:

This Ordinance grants Midway Sewer District a non-exclusive franchise to construct, maintain, operate, replace and repair a sewer system within public rights-of-way of the City of Des Moines, Washington, and fixes a time when the same shall become effective.

The full text of the Ordinance will be mailed without cost upon request.

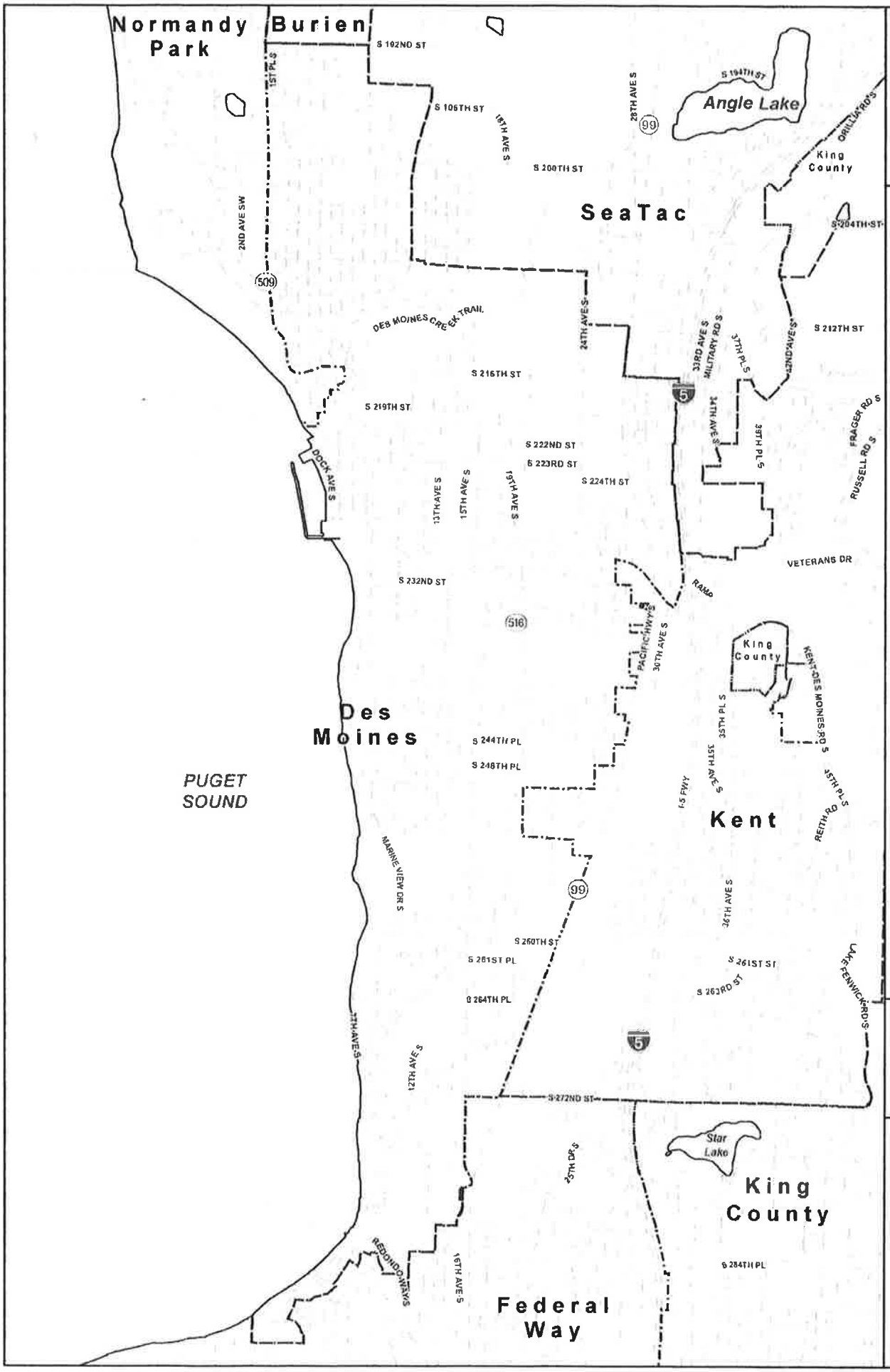
Bonnie Wilkins, CMC
City Clerk

Published: June 28, 2016

EXHIBIT B

DES MOINES ORDINANCE NO. 1653

DEPICTION OF CITY CORPORATE BOUNDARIES



CITY OF DES MOINES

Des Moines City Limits

Exhibit B

City of Des Moines

Development Services Division
21630 11th Ave S
Suite D
Des Moines, WA 98198
PHONE: (206) 878-4595
FAX: (206) 870-7626
WEB: www.desmoineswa.gov

File: CityBoundaryMap.mxd
Map Generated: 6/15/2015

LEGAL NOTICE

SUMMARY OF ADOPTED ORDINANCE

CITY OF DES MOINES

ORDINANCE NO. 1653, Adopted June 23, 2016.

DESCRIPTION OF MAIN POINTS OF THE ORDINANCE:

This Ordinance grants Midway Sewer District a non-exclusive franchise to construct, maintain, operate, replace and repair a sewer system within public rights-of-way of the City of Des Moines, Washington, and fixes a time when the same shall become effective.

The full text of the Ordinance will be mailed without cost upon request.

Bonnie Wilkins, CMC
City Clerk

Published: June 28, 2016

Certification

I, Ken Kase, as General Manager for Midway Sewer District do hereby certify that the attached is a true and correct copy of the original Resolution 2016-08, adopted and approved by the Board of Commissioners of Midway Sewer District on the 13th day of July, 2016.

Ken Kase
General Manager
Midway Sewer District
P.O. Box 3487
Kent, WA 98089

Dated: July 13, 2016

MIDWAY SEWER DISTRICT
RESOLUTION NO. 2016-08

RESOLUTION APPROVING CITY OF DES MOINES FRANCHISE AGREEMENT

Background:

1. Midway Sewer District owns and operates portions of its sewer system in City of Des Moines Right of Ways; and

2. Midway Sewer District Staff have worked with City of Des Moines staff to negotiate a mutually beneficial franchise agreement that establishes the terms and conditions that apply to both the City and District when the District has facilities located in City right of ways.; and

3. The City of Des Moines City Council has adopted Ordinance No. 1653 approving the Franchise term;

Resolution: NOW THEREFORE, BE IT RESOLVED, that the Board of Commissioners of Midway Sewer District hereby approve the terms of the Franchise Agreement set forth in City of Des Moines Ordinance No. 1653 and authorize the Chair of the Board to execute the Acceptance of Franchise document..

Adoption: ADOPTED at a regular meeting of the Board of Commissioners of Midway Sewer District on July 13, 2016 the following Commissioners being present and voting:

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner