Gig Harbor City Council Meeting

September 24, 2012
5:30 p.m.

GIG HARBOR®

"THE MARITIME CITY"

AGENDA FOR
GIG HARBOR CITY COUNCIL MEETING
Monday, September 24, 2012 – 5:30 p.m.

CALL TO ORDER:

PLEDGE OF ALLEGIANCE:

CONSENT AGENDA:

1. Approval of City Council Minutes Sep. 10, 2012.
2. Liquor License Action: a) Renewals: Susanne's Bakery & Deli, Harvester Restaurant, Fred Meyer #601, Hot Iron, Quality Food Center #864, Bella Kitchen Essentials; b) Special Occasion – Boys & Girls Club; c) Added Privilege - Fred Meyer; d) Added Privilege - QFC;
3. Appointment to Gig Harbor Arts Commission.
4. Second Reading of Ordinance – Parking Penalties.
5. Second Reading of Ordinance - Extending Collective Garden Moratorium.
6. 2013 AC Water Main Replacements – Department of Health Grant Agreement Authorization.
7. Visitor Information Center/Woodworth Water Tank – Lead Paint Testing – Consultant Services Contract.
8. SR16/Burnham Drive Interchange Improvements – WSDOT Quit Claim Deed.
9. Donkey Creek Design Contract Amendment – Consultant Services Contract.
10. Donkey Creek Project Property Appraisal Contract.
11. Approval of Payment of Bills Sep 24, 2012: Checks #70591 through #70726 in the amount of $562,149.40.

OLD BUSINESS: None scheduled.

NEW BUSINESS:

1. First Reading of Ordinance - Comcast Franchise Agreement.
2. First Reading of Ordinance – Interim Special Flood Hazard Area Development Regulations.

STAFF REPORT:
Making Strides Breast Cancer Awareness Walk – Employee Team.

PUBLIC COMMENT:

MAYOR'S REPORT / COUNCIL COMMENTS:

ANNOUNCEMENT OF OTHER MEETINGS:

1. Downtown Planning / Visioning Committee: Wed. Sept. 26th at 4:00 p.m.
2. Chum Festival at Skansie Brothers' Park – Sat. Sept. 29th 10:00 a.m. – 5:00 p.m.
3. Planning / Building Committee: Mon. Oct 1st at 5:15 p.m.
4. Intergovernmental Affairs Committee: Mon. Oct. 8th at 4:30 p.m.
5. City Council Meeting: Mon. Oct. 8th at 5:30 p.m.

EXECUTIVE SESSION: For the purpose of discussing pending litigation per RCW 42.30.110(1)(i) and property acquisition per RCW 42.30.110(1)(b).

ADJOURN:

MINUTES OF GIG HARBOR CITY COUNCIL MEETING – September 10, 2012

PRESENT: Councilmembers Ekberg, Young, Perrow, Malich, Payne, Kadzik and Mayor Hunter. Councilmember Guernsey was absent.

CALL TO ORDER: 5:32 p.m.

Mayor Hunter announced that the Executive Session at the end of the meeting had been cancelled.

CONSENT AGENDA:

1. Approval of City Council Minutes Aug 6, 2012.
2. Receive and File: a) Second Quarter Finance Report; b) Planning and Building Committee Minutes June 4, 2012; c) Planning Commission Minutes May 3, 2012; May 17, 2012; and June 7, 2012; d) Downtown Planning and Vision Committee Minutes: April 25, 2012; June 12, 2012; and July 25, 2012; e) Operations & Public Projects Minutes: March 14 and July 19, 2012;
3. Liquor License Action: a) Assumption - Blue Cannon Pizza;
4. Resolution No. 909 - Sole Source Equipment Jerisich Pumpout.
5. Resolution No. 910 – Surplus Equipment.
6. Resolution No. 911 – Fee Schedule Update Adjustment for 2012.
7. Acceptance of Quit Claim Deed – Old Burnham Drive Properties.
8. East Tank Fencing / Tennis Count Fencing – Contract Authorization.
9. Cushman Trail Project Phase 3 and 4 – Direct-Appropriations Grant Contract.
10. Eddon Boat Park Beach Restoration Project – Escrow Agreement for Retainage.
11. Eddon Boat Park Project – Amendment to Design Contract.
12. Eddon Boat Park Project – Surveying Contract.
13. Wastewater Treatment Plant Expansion Phase 2 – Public Works Trust Fund Loan Agreement.
14. Approval of Payment of Bills Aug. 13, 2012: Checks #70260 through #70401 in the amount of $1,957,929.48.
15. Approval of Payment of Bills Aug. 27, 2012: Checks #70402 through #70506 in the amount of $2,073,367.47.
16. Approval of Payment of Bills Sep. 10, 2012: Checks #70507 through #70590 in the amount of $1,083,452.40.
17. Approval of Payroll for the month of July: Checks #6534 through #6737 and direct deposits in the amount of $334,086.15.
18. Approval of Payroll for the month of August: Checks #6738 through #6756 and direct deposits in the amount of $329,415.00.

MOTION: Move to adopt the Consent Agenda as presented.
Kadzik / Malich – unanimously approved.

OLD BUSINESS: None scheduled.

NEW BUSINESS:

1. First Reading of Ordinance – Parking Penalties Update. Court Administrator Stacy Colberg introduced this ordinance which is the second phase of housekeeping items to update the parking ordinance. This will return for adoption at the next council meeting.

2. First Reading of Ordinance – Extension of Interim Regulations for Collective Gardens. City Attorney Angela Belbeck presented his ordinance that would extend the interim regulations for medical cannabis collective gardens an additional six months. She explained that the Planning Commission has recommended the interim regulations be extended until voters consider Initiative 502 in November. If passed, Initiative 502 will decriminalize marijuana and licensing would be set up through the Washington State Liquor Board.

Mayor Hunter opened the public hearing at 5:38 p.m. No one came forward to speak and the hearing closed. This will return at the next meeting for adoption.

3. Public Hearing – Rush-Talmo, LLC Development Agreement Relating to Intersection Improvements at Wollochet Drive and Wagner Way. Engineering Tech William Hendrickson presented this resolution authorizing a development agreement for traffic mitigation as a part of the 72nd Street Plat. The agreement allows for a pro-rata contribution for intersection improvements and installation of a traffic signal at the intersection of Wagner Way and Wollochet Drive.

Mayor Hunter opened the public hearing at 5:40 p.m. No one came forward to speak and the hearing closed.

MOTION: Move to adopt Resolution No. 912 as presented.
Young / Malich – unanimously approved.

STAFF REPORT:

City Administrator Denny Richards reported on several subjects:

- Lita Dawn Stanton, Special Projects / Historic Preservation Coordinator, submitted three grant requests for the RCO 2012 cycle. Gig Harbor is in line for two of the three requests: acquisition of properties adjacent to Eddon Boat Park and the Maritime Playzone project.
- The city is on the final list for a grant through the Washington State Parks Clean Vessel Program for a year-round pump-out at the new Maritime Pier.
- The Department of Natural Resources has agreed to send out a crew to clean up the knotweed on the recently purchased Ancich Brothers' property and the Wheeler Street End property.
- Coastal Heritage Alliance is doing a first-class job of fulfilling their obligation to provide educational opportunities for the public at Skansie Netshed.

PUBLIC COMMENT: None.

MAYOR'S REPORT / COUNCIL COMMENTS:

Mayor Hunter reported on accepting an award of appreciation for city support of the YMCA. The city has been a partner with this very successful operation for five years.

Councilmember Ekberg added that the YMCA used this opportunity to recognize their community advocates.

Councilmember Young reported that Pierce Transit voted zero increases for employees in 2013; healthcare restructuring will result in $500,000 savings; and sales tax is lagging so the forecast is 0% for 2012 and slowly rising in 2013. He invited everyone to the Pierce Transit open house on Wednesday, Sept 19th at 6:00 p.m. to discuss their upcoming initiative.

Councilmember Malich said that he attended the Tacoma Narrows Airport Advisory Group meeting where he learned that the airport is on the list for the military to use for simulated fueling operations. He said that he voiced his concern due to the noise issues and requested further information.

ANNOUNCEMENT OF OTHER MEETINGS:

1. Inclusive Playground Site Tour City Park at Crescent Creek: Tue. Sep. 11th at 2:00 p.m.
2. Donkey Creek Groundbreaking and Appreciation: Mon. Sep 17th at 3:00 p.m.
3. Operations Committee: Thu. Sep 20th at 3:00 p.m.
4. Wilkinson Farm Greenhouse Ribbon Cutting: Fri. Sep. 21st at 3:00 p.m.
5. Maritime Pier Ribbon Cutting Ceremony: Mon. Sep. 24th at 3:30 p.m.
6. Boards and Candidate Review Committee: Mon. Sep. 24th at 4:30 p.m.

ADJOURN:

MOTION: Move to adjourn at 5:54 p.m.
Young / Payne – unanimously approved.

CD recorder utilized: Tracks 1002 – 1015

Charles L. Hunter, Mayor

Molly Towslee, City Clerk

C091080-2 WASHINGTON STATE LIQUOR CONTROL BOARD DATE: 09/07/2012

LICENSED ESTABLISHMENTS IN INCORPORATED AREAS CITY OF GIG HARBOR (BY ZIP CODE) FOR EXPIRATION DATE OF 20121231

	LICENSEE	BUSINESS NAME AND ADDRESS	LICENSE NUMBER	PRIVILEGES
1.	TUNNEY, MICHAEL S	SUSANNE'S BAKERY & DELI 3411 HARBORVIEW DR GIG HARBOR WA 98332 2127	408550	BEER/WINE REST - BEER/WINE
2.	HARVESTER GIG HARBOR, INC.	HARVESTER RESTAURANT 5601 SOUNDVIEW DR GIG HARBOR WA 98335 0000	366707	SPIRITS/BR/WN REST LOUNGE +
3.	FRED MEYER STORES, INC.	FRED MEYER #601 5500 OLYMPIC DR STE B GIG HARBOR WA 98335 1489	076448	GROCERY STORE - BEER/WINE
4.	HOT IRON GIG HARBOR LLC	HOT IRON 5500 OLYMPIC DR NW STE A-109 GIG HARBOR WA 98335 1489	400916	BEER/WINE REST - BEER/WINE
5.	FRED MEYER STORES, INC.	QUALITY FOOD CENTER / QFC #864 5010 PT FOSDICK DR NW GIG HARBOR WA 98335 1715	070236	GROCERY STORE - BEER/WINE BEER AND WINE TASTING
6.	GPS-GIG HARBOR, LLC	BELLA KITCHEN ESSENTIALS 4793 POINT FOSDICK DR NW GIG HARBOR WA 98335 2315	406253	BEER/WINE SPECIALTY SHOP

WASHINGTON STATE LIQUOR CONTROL BOARD-License Services
3000 Pacific Ave SE - P O Box 43075
Olympia WA 98504-3075

TO: MAYOR OF GIG HARBOR **September 7, 2012**

SPECIAL OCCASION # 093052

BOYS & GIRLS CLUB OF SOUTH PUGET SOUND
3875 S 66TH STREET, STE 101
TACOMA WA 98409

DATE: NOVEMBER 3, 2012 **TIME:** 5:30 PM TO 10 PM

PLACE: JIM & CAROLYN MILGARD FAMILY HOPE CENTER - 8502 SKANSIE AVE, SEATTLE

CONTACT: STACY DORE - 361-440-3735

SPECIAL OCCASION LICENSES

* __License to sell beer on a specified date for consumption at specific place.
* __License to sell wine on a specific date for consumption at a specific place.
* __Beer/Wine/Spirits in unopened bottle or package in limited quantity for **off** premises consumption.
* __Spirituous liquor by the individual glass for consumption at a specific place.

If return of this notice is not received in this office within 20 days from the above date, we will assume you have no objection to the issuance of the license. If additional time is required please advise.

1. Do you approve of applicant? YES__ NO__
2. Do you approve of location? YES__ NO__
3. If you disapprove and the Board contemplates issuing a license, do you want a hearing before final action is taken? YES__ NO__

OPTIONAL CHECK LIST	EXPLANATION	
LAW ENFORCEMENT	_____	YES__ NO__
HEALTH & SANITATION	_____	YES__ NO__
FIRE, BUILDING, ZONING	_____	YES__ NO__
OTHER:	_____	YES__ NO__

If you have indicated disapproval of the applicant, location or both, please submit a statement of all facts upon which such objections are based.

_____

DATE SIGNATURE OF MAYOR, CITY MANAGER, COUNTY COMMISSIONERS OR DESIGNEE

NOTICE OF LIQUOR LICENSE APPLICATION

MV6

RETURN TO: WASHINGTON STATE LIQUOR CONTROL BOARD
License Division - 3000 Pacific, P.O. Box 43075
Olympia, WA 98504-3075
Customer Service: (360) 664-1600
Fax: (360) 753-2710
Website: www.liq.wa.gov

TO: MOLLY TOWSLEE, CITY CLERK

DATE: 9/04/12

RE: APPLICATION FOR ADDED PRIVILEGE

UBI: 602-342-738-001-0048
License: 076448 - 1U County: 27
Tradename: FRED MEYER #601
Loc Addr: 5500 OLYMPIC DR STE B
GIG HARBOR WA 98335-1489

Mail Addr: PO BOX 305103
NASHVILLE TN 37230-5103

Phone No.: 253-858-4100

APPLICANTS:

FRED MEYER STORES, INC.

AALBERG, JAMES C
1949-11-21
DEATHERAGE, DAVID W
1959-08-10
ELLIS, MICHAEL L
1958-06-26
HELDMAN, PAUL W
1951-08-11

Privileges Upon Approval:
DIRECT SHIPMENT RECEIVER-IN/OUT WA
GROCERY STORE - BEER/WINE
SPIRITS RETAILER
BEER AND WINE TASTING
WINE RETAILER RESELLER

As required by RCW 66.24.010(8), the Liquor Control Board is notifying you that the above has applied for a liquor license. You have 20 days from the date of this notice to give your input on this application. If we do not receive this notice back within 20 days, we will assume you have no objection to the issuance of the license. If you need additional time to respond, you must submit a written request for an extension of up to 20 days, with the reason(s) you need more time. If you need information on SSN, contact our CHRI Desk at (360) 664–1724.

	YES	NO
1. Do you approve of applicant ?	☐	☐
2. Do you approve of location ?	☐	☐
3. If you disapprove and the Board contemplates issuing a license, do you wish to request an adjudicative hearing before final action is taken? (See WAC 314–09–010 for information about this process)	☐	☐

4. If you disapprove, per RCW 66.24.010(8) you MUST attach a letter to the Board detailing the reason(s) for the objection and a statement of all facts on which your objection(s) are based.

DATE

SIGNATURE OF MAYOR,CITY MANAGER,COUNTY COMMISSIONERS OR DESIGNEE

C091060/LIBRIMS

NOTICE OF LIQUOR LICENSE APPLICATION

MW6

RETURN TO: WASHINGTON STATE LIQUOR CONTROL BOARD
License Division - 3000 Pacific, P.O. Box 43075
Olympia, WA 98504-3075
Customer Service: (360) 664-1600
Fax: (360) 753-2710
Website: www.liq.wa.gov

TO: MOLLY TOWSLEE, CITY CLERK

DATE: 9/05/12

RE: APPLICATION FOR ADDED PRIVILEGE

UBI: 602-342-738-001-0106
License: 070236 - 1U County: 27
Tradename: QUALITY FOOD CENTER / QFC #864
Loc Addr: 5010 PT FOSDICK DR NW
GIG HARBOR WA 98335-1715

Mail Addr: PO BOX 305103
NASHVILLE TN 37230

Phone No.: 425-455-3761

APPLICANTS:

FRED MEYER STORES, INC.

AALBERG, JAMES C
1949-11-21
DEATHERAGE, DAVID W
1959-08-10
ELLIS, MICHAEL L
1958-06-26
HELDMAN, PAUL W
1951-08-11

Privileges Upon Approval:
GROCERY STORE - BEER/WINE
SPIRITS RETAILER
BEER AND WINE TASTING
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	YES	NO
1. Do you approve of applicant ?	☐	☐
2. Do you approve of location ?	☐	☐
3. If you disapprove and the Board contemplates issuing a license, do you wish to request an adjudicative hearing before final action is taken? (See WAC 314–09–010 for information about this process)	☐	☐

4. If you disapprove, per RCW 66.24.010(8) you MUST attach a letter to the Board detailing the reason(s) for the objection and a statement of all facts on which your objection(s) are based.

DATE

SIGNATURE OF MAYOR, CITY MANAGER, COUNTY COMMISSIONERS OR DESIGNEE

C091060/LIBRIMS

Business of the City Council
City of Gig Harbor, WA

Subject: Appointment to Gig Harbor Arts Commission

Proposed Council Action:
A motion to appoint Janine Miller-Fritz to serve a three year term ending March 31, 2014.

Dept. Origin: Administration

Prepared by: Boards/Commission Review Committee

For Agenda of: Sept. 24, 2012

Exhibits:

	Initial & Date
Concurred by Mayor:	CMH 9/18/12
Approved by City Administrator:	R 9/18/12
Approved as to form by City Atty:	
Approved by Finance Director:	
Approved by Department Head:	

Expenditure Required	$0	Amount Budgeted	$0	Appropriation Required	$0

INFORMATION / BACKGROUND

Summer Lane Landry resigned from the Arts Commission leaving her position ending March 31, 2014 vacant. After advertising for several months, we received one application from Janine Miller-Fritz.

FISCAL CONSIDERATION

N/A

BOARD OR COMMITTEE RECOMMENDATION

The Boards and Commissions Candidate Review Committee concur with the appointment of Janine Miller-Fritz.

RECOMMENDATION / MOTION

Move to: A motion to appoint Janine Miller-Fritz to serve the remainder of the three year term ending March 31, 2014.

GIG HARBOR
"THE MARITIME CITY"

Business of the City Council
City of Gig Harbor, WA

Subject: Second Reading – Ordinance Amending Chapter 10.06 GHMC to Incorporate State Law Parking Violations

Proposed Council Action: Adopt Ordinance No. 1246 at Second Reading.

Dept. Origin: Court

Prepared by: **Stacy Colberg**

For Agenda of: **September 24, 2012**

Exhibits: Ordinance 1246

Initial & Date

Concurred by Mayor: CLH 9/17/12

Approved by City Administrator: R-9/14/12

Approved as to form by City Atty: √ via email

Approved by Finance Director: ~~CLH~~ 9/9/17

Approved by Department Head: JC

Expenditure Required	$0	Amount Budgeted	$0	Appropriation Required	$0

INFORMATION / BACKGROUND

In 2011 the offenses in RCW 46.16.381 (disabled parking) were repealed and recodified under RCW 46.19.050, effective July 1, 2011. The penalties are unchanged and remain $450. The outdated reference to disabled parking is presently in the City's Traffic Code in Chapter 10.04 of the Gig Harbor Municipal Code. This Ordinance would remove the outdated reference from the Traffic Code and incorporate the new version into the City's Parking Regulations in Chapter 10.06.

Two additional state laws relating to other parking violations need to be incorporated into the City's Parking Regulations:

RCW 46.61.570 Stopping, standing, or parking prohibited (20' crosswalk, blocking driveway)
RCW 46.61.575 Additional parking regulations (wrong direction, 12" from curb)

These state laws, along with the provisions for disabled parking, would be incorporated in a new section 10.06.046.

Except for disabled parking, these parking violations would carry a $25 penalty, consistent with the current downtown time-restricted parking penalties.

FISCAL CONSIDERATION

None

BOARD OR COMMITTEE RECOMMENDATION

None

RECOMMENDATION / MOTION

Move to: Adopt Ordinance at Second Reading.

ORDINANCE NO. 1246

AN ORDINANCE OF THE CITY OF GIG HARBOR, WASHINGTON, RELATING TO PARKING REGULATIONS; DELETING AN OUTDATED REFERENCE TO RCW 46.16.381 FROM CHAPTER 10.04 OF THE GIG HARBOR MUNICIPAL CODE; AMENDING CHAPTER 10.06 OF THE GIG HARBOR MUNICIPAL CODE TO INCORPORATE BY REFERENCE PARKING REQUIREMENTS UNDER STATE LAW; PROVIDING FOR SEVERABILITY AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the City Council adopted traffic and parking regulations in chapters 10.04 and 10.06 of the Gig Harbor Municipal Code, respectively; and

WHEREAS, in 2011 the legislature amended and recodified the provisions relating to parking for persons with disabilities from RCW 46.16.381 to RCW 46.19.050, and the City Council desires to update the reference to state law and move it from the City's traffic code to the City's parking regulations; and

WHEREAS, the City Council further desires to incorporate by reference other state law regulations relating to parking in chapter 10.06 of the Gig Harbor Municipal Code; Now, therefore,

THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Section 10.04.010 - Amended. Section 10.04.010 of the Gig Harbor Municipal Code is amended to delete the reference to RCW 46.16.381.

Section 2. Section 10.06.046 - Added. A new section 10.06.046 is added to the Gig Harbor Municipal Code to read as follows:

10.06.046 Statutes adopted by reference.
The following state statutes, including all future amendments, repeals, or additions thereto, are hereby adopted by reference as if set forth in full:

RCW 46.19.050 Restrictions – Prohibitions – Violations – Penalties (Special parking privileges for persons with disabilities).
RCW 46.61.570 Stopping, standing, or parking prohibited in specified places – Reserving portion of highway prohibited.
RCW 46.61.575 Additional parking regulations.

Section 3. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance.

Section 4. Effective Date. This ordinance shall take effect and be in full force and effect five days after passage and publication of an approved summary consisting of the title.

PASSED by the Council and approved by the Mayor of the City of Gig Harbor, this _____ day of September, 2012.

CITY OF GIG HARBOR

_____
Mayor Charles L. Hunter

ATTEST/AUTHENTICATED:

_____
Molly M. Towslee, City Clerk

APPROVED AS TO FORM:
Office of the City Attorney

_____
Angela S. Belbeck

FILED WITH THE CITY CLERK:
PASSED BY THE CITY COUNCIL:
PUBLISHED:
EFFECTIVE DATE:
ORDINANCE NO: 1246

GIG HARBOR
"THE MARITIME CITY"

Business of the City Council
City of Gig Harbor, WA

Subject: Second Reading - Extension of Interim Regulations re: Medical Cannabis Collective Gardens

Proposed Council Action: Adopt at this second reading.

Dept. Origin: Planning/Legal

Prepared by: Jennifer Kester/Angela Belbeck JK

For Agenda of: September 24, 2012

Exhibits: Draft ordinance, ORD 1218 and ORD 1222, Planning Commission Recommendation

	Initial & Date
Concurred by Mayor:	CLH 9/20/12
Approved by City Administrator:	R 9/20/12
Approved as to form by City Atty:	email 9/11/12
Approved by Finance Director:	N/A
Approved by Department Head	JK 9/20/12

Expenditure Required	n/a	**Amount Budgeted**	n/a	**Appropriation Required**	$0

INFORMATION/BACKGROUND

Enclosed for your review is an ordinance that would extend the interim regulations for medical cannabis collective gardens an additional six months.

As authorized by state law, on July 11, 2011, the City Council approved Ordinance No. 1218 establishing interim regulations for medical cannabis collective gardens. On July 25, 2011, the City Council held a public hearing on the regulations and adopted Ordinance No. 1222, making additional findings of fact and amending Ordinance No. 1218.

On March 26, 2012, the City adopted Ordinance No. 1236 extending the interim regulations six months and directing the Planning Commission to review the regulations and provide a recommendation by the end of September 2012. The interim regulations will remain in effect until October 11, 2012 unless the interim regulations are extended or new regulations are adopted. No known gardens have been established since Ordinance No. 1218 became effective.

After adoption of Ordinance No. 1236, the intent was to adopt "permanent" medical cannabis collective garden regulations before the interim regulations expired. The Planning Commission held work-study sessions in April and May of 2012 and held a public hearing on May 3rd, 2012. On May 17, 2012, the Planning Commission recommended that the interim regulations be extended until after the November 2012 general election when Washington voters will consider Initiative 502. This initiative would decriminalize the licensed production, processing and possession of marijuana by Washington adults.

Furthermore, the Planning Commission was concerned that the Employment District along Bujacich Drive may not be the appropriate permanent location for medical cannabis collective gardens within the city given the intent of the zone to enhance the city's economic base by providing suitable areas to support the employment needs of the community. Medical cannabis collective gardens, by definition, are not businesses.

Legislative and Legal History:

In the 2011 legislative session, the Washington State legislature considered a bill (E2SSB 5073) relating to medical use of cannabis (marijuana). On April 29, 2011, Governor Gregoire vetoed the portions of the bill that would have provided the basis under state law for legalizing and licensing medical cannabis "dispensaries," processing facilities and production facilities. Governor Gregoire approved Section 403 of the bill, now codified at RCW 69.51A.085, which provides that qualifying patients may create and participate in "collective gardens" for the purpose of producing, processing, transporting, and delivering cannabis for medical use subject to the following conditions:

(1) No more than 10 qualifying patients may participate in a single collective garden at any time;
(2) A collective garden may contain no more than 15 plants per patient up to a total of 45 plants;
(3) A collective garden may contain no more than 24 ounces of useable cannabis per patient up to a total of 72 ounces;
(4) A copy of each qualifying patient's valid documentation, including a copy of the patient's proof of identity, must be available at all times on the premises of the collective garden; and
(5) No useable cannabis from the collective garden is delivered to anyone other than one of the qualifying patients participating in the collective garden.

Note that a collective garden is not the only means for qualifying patients to acquire medical cannabis under state law. Under Section 401 of the legislation, codified at RCW 69.51A.040, qualifying patients may grow up to 15 plants and: (i) possess no more than 24 ounces of usable cannabis; (ii) possess no more cannabis product than what could reasonably be produced with no more than 24 ounces of usable cannabis; or (iii) a combination of usable cannabis and cannabis product that does not exceed a combined total. Although Governor Gregoire vetoed the definition of "cannabis product," one can reasonably interpret this to include edible products (baked goods), tinctures and lotions.

The federal Controlled Substances Act prohibits possession and distribution of marijuana without an exception for medical marijuana. As such, provisions of Washington State medical cannabis laws which authorize possession and distribution of marijuana conflict with federal law. This conflict creates uncertainty regarding regulation of medical cannabis collective gardens. That uncertainty has been magnified by recent federal law enforcement actions against medical cannabis operations in the state and by a recent decision from the California Court of Appeal that a city cannot permit an activity that violates the federal Controlled Substances Act. (*Pack v. City of Long Beach*, 199 Cal.App.4th 1070 (October 4, 2011), petition for state supreme court review granted, 268 P.3d 1063). More locally, participants in medical cannabis collective gardens have sued the City of Seattle alleging, among other things, that the City's licensing requirement prohibits the plaintiffs from exercising their Fifth Amendment right against self-

incrimination, acknowledging that "*Since collective gardens are engaged in the purchase, transportation, possession, and distribution of marijuana, they are per se illegal under [the Washington Controlled Substances Act].... Medical marijuana remains illegal for any purposes under [the federal Controlled Substances Act].*" Additionally, the cities of Kent and Maple Valley are presently litigating issues relating to medical cannabis. Earlier this year the legislature considered a bill that could have impacted local regulations (SSB 6265), but that bill died February 16, 2012. There are potential impacts should Initiative 502 be approved by Washington voters.

FISCAL CONSIDERATION: None.

BOARD OR COMMITTEE RECOMMENDATION: On May 17, 2012, the Planning Commission recommended that the interim regulations be extended until after the November 2012 general election when Washington voters will consider Initiative 502.

RECOMMENDATION/MOTION: Adopt at this second reading.

ORDINANCE NO. 1247

AN ORDINANCE OF THE CITY OF GIG HARBOR, WASHINGTON, RELATING TO LAND USE AND ZONING; EXTENDING INTERIM ZONING CODE AMENDMENTS RELATING TO MEDICAL CANNABIS COLLECTIVE GARDENS; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, Initiative Measure No. 692, approved by the voters of Washington State on November 30, 1998 and now codified as chapter 69.51A RCW, created an affirmative defense for "qualifying patients" to the charge of possession of marijuana (cannabis); and

WHEREAS, in 2011 the Washington State Legislature considered a bill (E2SSB 5073) that would have authorized the licensing of medical cannabis dispensaries, production facilities, and processing facilities; and

WHEREAS, on April 29, 2011, Governor Gregoire vetoed the portions of E2SSB 5073 that would have provided the basis under state law for legalizing and licensing medical cannabis dispensaries, processing facilities and production facilities, thereby making these activities illegal; and

WHEREAS, in order to provide qualifying patients with access to an adequate, safe, consistent and secure source of medical quality cannabis, E2SSB 5073 also contained a provision, now codified as RCW 69.51A.085, authorizing "collective gardens" which would authorize qualifying patients the ability to produce, grow, process, transport and deliver cannabis for medical use, and that provision was approved by Governor Gregoire, effective on July 22, 2011; and

WHEREAS, E2SSB 5073, as approved and now codified at RCW 69.51A.140 authorized cities to adopt and enforce zoning requirements regarding production and processing of medical cannabis; and

WHEREAS, as authorized under RCW 35A.63.220 and RCW 36.70A.390, the Gig Harbor City Council approved Ordinance No. 1218 on July 11, 2011 adopting interim regulations for Medical Cannabis Collective Gardens that were effective and in full force immediately for a period of nine months, as amended by Ordinance No. 1222 approved after a public hearing on July 25, 2011; and

WHEREAS, the federal Controlled Substances Act and state laws regarding marijuana and cannabis are contradictory and those contradictions are unresolved so there are uncertainties in the area of local regulation of medical cannabis operations; and

WHEREAS, recent federal law enforcement actions against medical cannabis operations in the State of Washington and a recent decision from the California Court of Appeal (*Pack v. City of Long Beach*, 199 Cal.App.4th 1070 (October 4, 2011), petition for state supreme court review granted, 268 P.3d 1063) that a city's ordinance establishing a permit system for medical marijuana is preempted by the federal Controlled Substances Act further illustrate the uncertainty local governments must deal with; and

WHEREAS, as authorized under RCW 35A.63.220 and RCW 36.70A.390, after a public hearing, the Gig Harbor City Council approved Ordinance 1236 on March 26, 2012 extending the interim regulations for a period of six months and adopting findings justifying the same; and

WHEREAS, Ordinance 1236 called for the Planning Commission to review the interim regulations in the summer of 2012, to consider recommendations of the city attorney in response to changes in law, and to make a recommendation on whether the regulations, or some modification thereof, should be permanently adopted. The Commission is required to forward its recommendation to the Gig Harbor City Council by the end of September, 2012; and

WHEREAS, the Planning Commission held work-study sessions on the interim regulations on April 5th and May 3rd 2012 and considered recommendations from the City Attorney; and

WHEREAS, on May 3rd, 2012, the Planning Commission held a public hearing on the interim regulations. Public notice was provided in the city's official newspaper, the Gateway, on the City's webpage and was mailed to those parties which had signed up to receive notice of the Planning Commission's hearing. No persons testified at the hearing; and

WHEREAS, on May 17th, 2012, the Planning Commission recommended that the interim regulations be extended until after the November 2012 general election when Washington voters will consider Initiative 502. The initiative would decriminalize the licensed production, processing and possession of marijuana by Washington adults. The State Liquor Control Board would be authorized to administer the licensing program and develop rules and regulations; and

WHEREAS, it is premature to set permanent regulations for medical cannabis collective gardens given the potential changes in the law if Initiative 502 passes; and

WHEREAS, the City is concerned that the Employment District along Bujacich Drive may not be the appropriate permanent location for medical cannabis collective gardens within the city given the intent of the zone to to enhance the city's economic base by providing suitable areas to support the employment needs of the community. Medical cannabis collective gardens, by definition, are not businesses; and

WHEREAS, the City Council deems it to be in the public interest to extend the interim zoning regulations but to not codify permanent regulations due to the uncertainties; and

WHEREAS, RCW 35A.63.220 and RCW 36.70A.390 authorize the City to extend interim regulations for a period of six months after a public hearing and adoption of findings justifying the same; and

WHEREAS, the Gig Harbor City Council held a public hearing on September 10, 2012, to take public testimony relating to this ordinance; and

WHEREAS, at the public hearing on September 10, 2012, no members of the public testified on this ordinance; and

WHEREAS, nothing in this Ordinance is intended nor shall be construed to authorize or approve of any violation of federal or state law;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, HEREBY ORDAINS AS FOLLOWS:

Section 1. Purpose. The purpose of this ordinance is to extend the interim regulations set forth in Ordinance No. 1218 as further amended by Ordinance No. 1222 and extended under Ordinance No. 1236, for a period of six months.

Section 2. Findings in Support of Extending Interim Regulations. In addition to the findings previously made as set forth in Ordinance No. 1218, Ordinance No. 1222, and Ordinance No. 1236, the Gig Harbor City Council makes the following additional findings:

1. The City Council adopts the recitals set forth above in support of extending the interim regulations originally adopted under Ordinance No. 1218 and as amended by Ordinance No. 1222 and as extended under Ordinance No. 1236.

Section 3. Extension of Interim Zoning Regulations. The duration of the interim zoning regulations shall remain in effect for an additional period of six months, and shall automatically expire at that time unless the same are extended as provided in RCW 36.70A.390 and RCW 35A.63.220 prior to that date, or unless the same are repealed or superseded by permanent regulations prior to that date.

Section 4. Planning Commission Work Plan. The City of Gig Harbor Planning Commission is hereby directed to conduct another review the interim regulations in the fall of 2012 and winter of 2013, to consider the results of the initiative and any recommendations of the city attorney in response to changes in law, and to make a recommendation on whether the regulations, or some modification thereof, should be permanently adopted. The Gig Harbor Planning Commission is directed to complete its

review, to conduct such public hearings as may be necessary or desirable, and to forward its recommendation to the Gig Harbor City Council by February 21, 2013.

Section 5. Transmittal to Department. Pursuant to RCW 36.70A.106, this Ordinance shall be transmitted to the Washington State Department of Commerce.

Section 6. Severability. If any section, sentence, clause or phrase of this Ordinance should be held to be unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Ordinance.

Section 7. Publication. This Ordinance shall be published by an approved summary consisting of the title.

Section 8. Effective Date. This Ordinance shall be published and shall take effect and be in full force five (5) days after the date of publication.

PASSED by the Council and approved by the Mayor of the City of Gig Harbor, this 24th day of September, 2012.

CITY OF GIG HARBOR

_____
Mayor Charles L. Hunter

ATTEST/AUTHENTICATED:

_____
Molly M. Towslee, City Clerk

APPROVED AS TO FORM:
Office of the City Attorney

_____
Angela S. Belbeck

FILED WITH THE CITY CLERK: 09/05/12
PASSED BY THE CITY COUNCIL: 09/24/12
PUBLISHED: 10/0312
EFFECTIVE DATE: 10/08/12
ORDINANCE NO: 1247

Business of the City Council
City of Gig Harbor, WA

Subject: 2013 AC Water Main Replacements – Department of Health Grant Agreement Authorization

Proposed Council Action: Authorize the Mayor to execute a grant agreement in the amount of $2.0 million between the City of Gig Harbor and the Washington State Department of Health for replacement of asbestos cement water main.

Dept. Origin: Public Works/Engineering

Prepared by: Jeff Langhelm

For Agenda of: September 24, 2012

Exhibits: Grant Agreement

	Initial & Date
Concurred by Mayor:	CLH 9/18/12
Approved by City Administrator:	9/18/12
Approved as to form by City Atty:	VIA EMAIL 9/13/12
Approved by Finance Director:	9/18/12
Approved by Department Head:	9/14/12

Expenditure Required	$ 0	Amount Budgeted	$ 0	Appropriation Required	$0

INFORMATION/BACKGROUND

Each year, as funding allows, the City of Gig Harbor performs capital improvement projects on the City's water distribution system, include the replacement of various existing asbestos cement (AC) water mains. The replacement of AC water main is part of the Capital Improvement Program described in the City's Water System Plan. The goal is to replace approximately 4,500 LF per year of AC water main.

As of 2006, the City of Gig Harbor's Water System had approximately 35,000 LF of AC water main in operation. With the successful completion of multiple AC water main replacement projects the City will have approximately 24,000 LF of AC water main remaining at the end of 2012.

To assist the City with achieving the AC water main replacement goal the City applied for a $2.0 million state appropriation for replacement of a significant amount of the City's remaining AC water main. The proposed 2013 AC Water Main Replacement Project would assist the City by replacing approximately 8,500 LF of AC water main and related appurtenances. Where the water main is located under existing roadways, the project will repave the roadway above the new water main.

FISCAL CONSIDERATION

There is no City match required for this grant. Therefore no City funds beyond staff salaries are anticipated to be required to pay for work under this grant.

A budget item for work associated with the 2013 AC Water Main Replacement Project has been proposed in the draft 2013 Budget.

BOARD OR COMMITTEE RECOMMENDATION

None.

RECOMMENDATION/MOTION

Authorize the Mayor to execute a grant agreement in the amount of $2.0 million between the City of Gig Harbor and the Washington State Department of Health for replacement of asbestos cement water main.

Grant Agreement

between

Department of Health

and

City of Gig Harbor

For:

Project Name: Replace Failing Asbestos Concrete Water Main
Grant Number: N19724
Project Type: Repair/Upgrade System to Resolve a Public Health Concern

Start Date: Date of Execution

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GRANT FACE SHEET

Grant Number: N19724

Washington State Department of Health (DOH)

1. Grantee		**2. Grantee Doing Business As (optional)**	
City of Gig Harbor 3510 Grandview St Gig Harbor, Washington 98335		Not Applicable	
3. Grantee Representative		**4. Department of Health Representative**	
Jeff Langhelm Senior Engineer 3510 Grandview St Gig Harbor, Washington 98335	Phone number: 253.853.7630 Email address: langhelmj@cityofgigharbor.net	Leslie Hafford Program Contract Manager P.O. Box 47822 Olympia, Washington 98504	Phone number: 360.236.3083 Emaill address: leslie.hafford@doh.wa.gov

5. Grant Amount	**6. Funding Source**	**7. Start Date**	**8. End Date**
$2,000,000.00	**Federal:** ☐ **State:** ☒ **Other:** ☐ **N/A:** ☐	Date of Execution	24 months after Date of Execution

9. Federal Funds (as applicable)	**Federal Agency**	**CFDA Number**
N/A	N/A	N/A

10. Tax ID #	**11. SWV #**	**12. UBI #**	**13. DUNS #**
91-6001435	0000349-00	273-000-606	N/A

14. Grant Purpose

The outcome of this performance-based agreement is to replace failing asbestos contrete water main pipe at various locations throughout the City's water system, as referenced in Attachment I: Project Scope of Work.

DOH, defined as the Department of Health or its successor agency, and the Grantee, as defined above, acknowledge and accept the terms of this Grant and attachments and have executed this Grant on the date below to start as of the date and year referenced above. The rights and obligations of both parties to this Grant are governed by this Grant and the following other documents incorporated by reference: Grant Terms and Conditions, Attachment I – Project Scope of Work, Attachment II – Certification of Availability of Funds to Complete the Project, Attachment III – Estimated Project Costs, Attachment IV – Certification of the Payment and Reporting of Prevailing Wages, Attachment V – Certification of Intent to Enter the Leadership in Energy and Environmental Design (LEED) Certification Process.

FOR THE GRANTEE	**FOR THE DEPARTMENT OF HEALTH**
_____ **Authorized Signature**	_____ **Department of Health Contracting Officer Signature**
_____ **Print Name**	_____ **Print Name**
_____ **Title**	_____ **Date**
_____ **Date**	

SPECIAL TERMS AND CONDITIONS

THIS GRANT entered into by and between Washington State Department of Health (hereinafter referred to as DOH), and City of Gig Harbor (hereinafter referred to as the Grantee), and the WITNESSES THAT:

WHEREAS, under chapter 70.119A RCW, DOH and its Secretary are authorized to administer drinking water programs and, under RCW 70.119A, 070, to enter into contracts to carry out the chapter's purposes; and

WHEREAS, the Washington State Legislature has, in Laws of 2012, Second Special Session, Part IV, Section 402, made an appropriation to support the DOH "Safe Reliable Drinking Water Grants" program as part of the "2012 Jobs Now Act" and directed DOH to administer those funds; and

WHEREAS, the enabling legislation also stipulates that the Grantee is eligible to receive funding for acquisition, construction, or rehabilitation (a venture hereinafter referred to as the "Project").

NOW, THEREFORE, in consideration of covenants, conditions, performances, and promises hereinafter contained, the parties hereto agree as follows:

1. GRANT MANAGEMENT

The Representative for each of the parties shall be responsible for and shall be the contact person for all communications and billings regarding the performance of this Grant.

The Representative for DOH and their contact information are identified on the Face Sheet of this Grant.

The Representative for the Grantee and their contact information are identified on the Face Sheet of this Grant.

2. COMPENSATION

DOH shall pay an amount not to exceed **$2,000,000.00** for the capital costs necessary for or incidental to the performance of work as set forth in the Attachment I: Project Scope of Work.

3. COPYRIGHT PROVISIONS

General Terms and Conditions, Provision 12, Copyright Provisions, do not apply to this Grant.

4. PREVAILING WAGE LAW

The Project funded under this Grant may be subject to state prevailing wage law (Chapter 39.12 RCW). The Grantee is advised to consult the Industrial Statistician at the Washington Department of Labor and Industries to determine whether prevailing wages must be paid. DOH is not responsible for determining whether prevailing wage applies to this Project or for any prevailing wage payments that may be required by law.

5. BASIS FOR ESTABLISHING REAL PROPERTY VALUES FOR ACQUISITIONS OF REAL PROPERTY PERFORMANCE MEASURES

When the grant is used to fund the acquisition of real property, the value of the real property eligible for reimbursement under this grant shall be established as follows:

A. Grantee purchases of real property from an independent third-party seller shall be evidenced by a current appraisal prepared by a licensed Washington State commercial real estate appraiser, or a current property tax statement.

B. Grantee purchases of real property from a subsidiary organization, such as an affiliated LLC, shall be evidenced by a current appraisal prepared by a licensed Washington State commercial real estate appraiser or the prior purchase price of the property plus holding costs, whichever is less.

SPECIAL TERMS AND CONDITIONS

6. EXPENDITURES ELIGIBLE FOR REIMBURSEMENT INPUTS

The Grantee may be reimbursed, at the rate set forth elsewhere in this Grant, for the Project expenditures in the following cost categories:

A. Real property and costs directly associated with such purchase, when purchased or acquired solely for the purposes of the Project;
B. Design, engineering, architectural, and planning;
C. Construction management and observation;
D. Construction costs including, but not limited to, the following:

Site preparation and improvements;
Permits and fees;
Labor and materials;
Taxes on Project goods and services;
Capitalized equipment;
Information technology infrastructure; and
Landscaping.

7. BILLING PROCEDURES AND PAYMENT INPUT

DOH shall reimburse the Grantee for eligible project expenditures up to the maximum payable under this Grant. When requesting reimbursement for costs incurred or expenditures made, the Grantee shall submit a signed and completed Invoice Voucher, referencing the Attachment I: Project Scope of Work project activity performed, and any appropriate documentation. The Invoice Voucher must be certified by a representative of the Grantee with authority to bind the Grantee.

Each Invoice Voucher must be accompanied by a Project Status Report, which describes, in narrative form, the progress made on the project since the last invoice was submitted, as well as a report of project status to date. DOH will not release payment for any reimbursement request received unless and until the Project Status Report is received. After approving the Invoice Voucher and Project Status Report, DOH shall promptly remit a warrant to the Grantee.

In no case shall grant funds be disbursed to construction activities until the Grantee has met the following conditions:

Proof of completion with Governor's Executive Order 05-05 and/or, as applicable, Section 106 of the National Historic Preservation Act.

DOH has approved a Water System Plan, Amendment to a Water System Plan, or Small Water System Management Program that includes the project improvements described in Attachment I: Project Scope of Work.

DOH has approved a project report and related construction documents for all applicable activities described in Attachment I: Project Scope of Work.

The project includes installation of source meters, if applicable, per WAC 246-290.

The final Invoice Voucher payment shall not occur prior to the completion of all project activities as identified in Attachment I: Project Scope of Work. DOH will retain a sum not to exceed ten percent (10%) of the grant amount until all project activities are complete and a Certified Project Completion Report is completed and submitted by the Grantee, per Section 8.

The Grantee shall submit all Invoice Vouchers and any required documentation to:

Office of Drinking Water
Department of Health
PO Box 47822
Olympia, WA 98504-7822

SPECIAL TERMS AND CONDITIONS

DOH will pay the Grantee upon acceptance of reports documenting work on the Project and receipt of properly completed invoices, which shall be submitted to DOH not more often than monthly.

Payment shall be considered timely if made by DOH within thirty (30) calendar days after receipt of properly completed invoices. Payment shall be sent to the address designated by the Grantee.

No payments in advance or in anticipation of services or supplies to be provided under this Grant shall be made by DOH.

Duplication of Billed Costs. The Grantee shall not bill DOH for work performed under this Grant, and DOH shall not pay the Grantee, if the Grantee is entitled to payment or has been or will be paid by any other source, including other grants, for such work.

Disallowed Costs. The Grantee is responsible for any audit exceptions or disallowed costs incurred by its own organization or that of its subgrantees.

8. CERTIFIED PROJECT COMPLETION REPORT AND FINAL PAYMENT

The Grantee shall complete a Certified Project Completion Report when activities identified in Attachment I: Project Scope of Work are complete. DOH will supply the Grantee with the Certified Project Completion Report forms upon request.

The Grantee shall provide the following information to DOH:

A. A certified statement that the project, as described in Attachment I: Project Scope of Work, is complete and, if applicable, meets required standards.

B. A certified statement of the actual dollar amounts spent, from all funding sources, in completing the project as described in Attachment I: Project Scope of Work.

C. A certification that all costs associated with the project have been incurred and accounted for. Costs are incurred when goods and services are received and/or contract work is performed.

D. A final voucher for the remaining eligible funds.

E. A copy of the DOH Construction Completion Report as submitted to DOH.

The Grantee will submit the Certified Project Completion Report together with the last Invoice Voucher for a sum not to exceed the balance of the grant amount including the ten percent (10%) retainage, as described in Section 7. DOH shall not make the final Invoice Voucher payment prior to the Grantee's completion of all project activities identified in Attachment I: Project Scope of Work and DOH's receipt and acceptance of the Certified Project Completion Report.

9. REPORTS

The Grantee shall furnish DOH with Project Status Reports when submitting Invoice Vouchers (as described in Section 7), Quarterly Jobs Data Reports at the end of each quarter, a Certified Project Completion Report at project completion (as described in Section 8), and other reports as DOH may reasonably require. Grantee's failure to file required reports may result in termination of this Grant.

10. INSURANCE

The Grantee shall provide insurance coverage as set out in this section. The intent of the required insurance is to protect the state of Washington should there be any claims, suits, actions, costs, damages or expenses arising from any loss, or negligent or intentional act or omission of the Grantee, or Subgrantee, or agents of either, while performing under the terms of this Grant.

SPECIAL TERMS AND CONDITIONS

The insurance required shall be issued by an insurance company authorized to do business within the state of Washington. The insurance shall name the state of Washington, its agents, officers, and employees as additional insureds under the insurance policy. All policies shall be primary to any other valid and collectable insurance. The Grantee shall instruct the insurers to give DOH thirty (30) calendar days advance notice of any insurance cancellation or modification.

The Grantee shall submit to DOH within fifteen (15) calendar days of the Grant start date, a certificate of insurance which outlines the coverage and limits defined in this insurance section. During the term of the Grant, the Grantee shall submit renewal certificates not less than thirty (30) calendar days prior to expiration of each policy required under this section.

The Grantee shall provide insurance coverage that shall be maintained in full force and effect during the term of this Grant, as follows:

Commercial General Liability Insurance Policy. Provide a Commercial General Liability Insurance Policy, including contractual liability, written on an occurrence basis, in adequate quantity to protect against legal liability arising out of Grant activity but no less than $1,000,000 per occurrence. Additionally, the Grantee is responsible for ensuring that any Subgrantees provide adequate insurance coverage for the activities arising out of subgrants.

Fidelity Insurance. Every officer, director, employee, or agent who is authorized to act on behalf of the Grantee for the purpose of receiving or depositing funds into program accounts or issuing financial documents, checks, or other instruments of payment for program costs shall be insured to provide protection against loss:

A. The amount of fidelity coverage secured pursuant to this Grant shall be $2,000,000 or the highest of planned reimbursement for the Grant period, whichever is lowest. Fidelity insurance secured pursuant to this paragraph shall name the Grantor as beneficiary.

B. The Grantee shall provide, at DOH's request, copies of insurance instruments or certifications from the insurance issuing agency. The copies or certifications shall show the insurance coverage, the designated beneficiary, who is covered, the amounts, the period of coverage, and that DOH will be provided thirty (30) days advance written notice of cancellation.

Grantees and Local Governments that Participate in a Self-Insurance Program.

Self-Insured/Liability Pool or Self-Insured Risk Management Program – With prior approval from DOH, the Grantee may provide the coverage above under a self-insured/liability pool or self-insured risk management program. In order to obtain permission from DOH, the Grantee shall provide: (1) a description of its self-insurance program, and (2) a certificate and/or letter of coverage that outlines coverage limits and deductibles. All self-insured risk management programs or self-insured/liability pool financial reports must comply with Generally Accepted Accounting Principles (GAAP) and adhere to accounting standards promulgated by: 1) Governmental Accounting Standards Board (GASB), 2) Financial Accounting Standards Board (FASB), and 3) the Washington State Auditor's annual instructions for financial reporting. Grantee's participating in joint risk pools shall maintain sufficient documentation to support the aggregate claim liability information reported on the balance sheet. The state of Washington, its agents, and employees need not be named as additional insured under a self-insured property/liability pool, if the pool is prohibited from naming third parties as additional insured.

Grantee shall provide annually to DOH a summary of coverages and a letter of self insurance, evidencing continued coverage under Grantee's self-insured/liability pool or self-insured risk management program. Such annual summary of coverage and letter of self insurance will be provided on the anniversary of the start date of this Agreement.

SPECIAL TERMS AND CONDITIONS

11. ORDER OF PRECEDENCE

In the event of an inconsistency in this Grant, the inconsistency shall be resolved by giving precedence in the following order:

- Applicable federal and state of Washington statutes and regulations
- Special Terms and Conditions
- General Terms and Conditions
- Attachment I– Project Scope of Work
- Attachment II - Certification of the Availability of Funds to Complete this Project
- Attachment III – Estimated Project Costs
- Attachment IV – Certification of the Payment and Reporting of Prevailing Wages
- Attachment V– Certification of Intent to Enter the Leadership in Energy and Environmental Design (LEED) Certification Process

12. REDUCTION IN FUNDS

In the event state funds appropriated for the work contemplated under this Grant are withdrawn, reduced, or limited in any way by the Governor or the Washington State Legislature during the Grant period, the parties hereto shall be bound by any such revised funding limitations as implemented at the discretion of DOH, and shall meet and renegotiate the Grant accordingly.

13. OWNERSHIP OF PROJECT/CAPITAL FACILITIES

DOH makes no claim to any real property improved or constructed with funds awarded under this Grant and does not assert and will not acquire any ownership interest in or title to the capital facilities and/or equipment constructed or purchased with state funds under this Grant; provided, however, that DOH may be granted a security interest in real property, to secure funds awarded under this Grant. This provision does not extend to claims that DOH may bring against the Grantee in recapturing funds expended in violation of this Grant.

14. CHANGE OF OWNERSHIP OR USE FOR GRANTEE-OWNED PROPERTY PERFORMANCE MEASURE AND DISINCENTIVE

A. The Grantee agrees that any and all real property or facilities owned by the Grantee that are acquired, constructed, or otherwise improved by the Grantee using state funds under this Grant shall be held and used by the Grantee for the purpose or purposes stated elsewhere in this Grant for a period of at least ten (10) years from the date the final payment is made hereunder.

B. This provision shall not be construed to prohibit the Grantee from selling any property or properties described in this section; Provided, that any such sale shall be subject to prior review and approval by DOH, and that all proceeds from such sale shall be applied to the purchase price of a different facility or facilities of equal or greater value than the original facility and that any such new facility or facilities will be used for the purpose or purposes stated elsewhere in this Grant.

C. In the event the Grantee is found to be out of compliance with this section, the Grantee shall repay to the state general fund or to such other state fund as directed by DOH, the principal amount of the grant as stated in Section 1, hereof, plus interest calculated at the rate of interest on state of Washington general obligation bonds issued most closely to the effective date of the legislation in which the subject facility was authorized. Repayment shall be made pursuant to Section 27 of the General Terms and Conditions.

SPECIAL TERMS AND CONDITIONS

15. CHANGE OF USE FOR LEASED PROPERTY PERFORMANCE MEASURE AND DISINCENTIVE

A. The Grantee understands and agrees that any facility leased by the Grantee that is constructed, renovated, or otherwise improved using state funds under this Grant shall be used by the Grantee for the purpose or purposes stated elsewhere in this Grant for a period of at least ten (10) years from the date the final payment is made hereunder.

B. In the event the Grantee is found to be out of compliance with this section, the Grantee shall repay to the state general fund or to such other state fund as directed by DOH the principal amount of the grant as stated in Section 1, hereof, plus interest calculated at the rate of interest on state of Washington general obligation bonds issued most closely to the effective date of the legislation in which the subject facility was authorized. Repayment shall be made pursuant to Section 27 of the General Terms and Conditions.

16. MODIFICATION TO THE PROJECT BUDGET

A. Notwithstanding any other provision of this Grant, the Grantee may, at its discretion, make modifications to line items in the Estimated Project Costs(Attachment III), hereof, that will not increase the line item by more than fifteen percent (15%).

B. The Grantee shall notify DOH in writing (by email or regular mail) when proposing any budget modification or modifications to a line item in the Estimated Project Costs (Attachment III,) hereof, that would increase the line item by more than fifteen percent (15%). Conversely, DOH may initiate the budget modification approval process if presented with a request for payment under this Grant that would cause one or more budget line items to exceed the 15 percent (15%) threshold increase described above.

C. Any such budget modification or modifications as described above shall require the written approval of DOH (by email or regular mail), and such written approval shall amend the Project Budget. Each party to this Grant will retain and make any and all documents related to such budget modifications a part of their respective Grant file.

D. Nothing in this section shall be construed to permit an increase in the amount of funds available for the Project, as set forth in Section 2 of the Special Terms and Conditions.

17. SIGNAGE, MARKERS AND PUBLICATIONS

If, during the period covered by this Grant, the Grantee displays or circulates any communication, publication, or donor recognition identifying the financial participants in the Project, any such communication or publication must identify "The Taxpayers of Washington State" as a participant.

18. HISTORICAL AND CULTURAL ARTIFACTS

Prior to commencing construction, Grantee shall complete the requirements of Governor's Executive Order 05-05, and/or, as applicable, Grantee shall complete Section 106 of the National Historic Preservation Act. Grantee agrees that it is legally and financially responsible for compliance with all laws, regulations, and agreements related to the preservation of historical or cultural artifacts and agrees to hold harmless DOH and the State of Washington in relation to any claim related to such historical or cultural artifacts discovered, disturbed, or damaged as a result of the project funded by this Grant.

In addition to the requirements set forth in this Grant, Grantee shall, in accordance with Governor's Executive Order 05-05, coordinate with the Washington State Department of Archaeology and Historic Preservation (DAHP), including any recommended consultation with any affected tribe(s), during project design and prior to construction to determine the existence of any tribal cultural resources affected by the proposed project funded by this Grant. Grantee agrees to avoid, minimize, or mitigate impacts to the cultural resource as a continuing pre-requisite to receipt of funds under this Grant.

SPECIAL TERMS AND CONDITIONS

The Grantee agrees that, unless it is proceeding under an approved historical and cultural monitoring plan or other memorandum of agreement, if historical or cultural artifacts are discovered during construction, that it shall immediately stop construction and notify the local historical preservation officer and the state's historical preservation officer at DAHP. If human remains are uncovered, the Grantee shall report the presence and location of the remains to the coroner and local enforcement immediately, then contact DAHP and any concerned tribe's cultural staff or committee.

The Grantee shall require this provision to be contained in all subgrants or contracts for work related to Attachment I: Project Scope of Work.

In addition to the requirements set forth in this Grant, Grantee agrees to comply with RCW 27.44 regarding Indian Graves and Records; RCW 27.53 regarding Archaeological Sites and Resources; RCW 68.60 regarding Abandoned and Historic Cemeteries and Historic Graves; and, WAC 25-48 regarding Archaeological Excavation and Removal Permits.

In the event that the Grantee finds it necessary to amend Attachment I: Project Scope of Work, the Grantee may be required to re-comply with Governor's Executive Order 05-05 and/or, as applicable, Section 106 of the National Historic Preservation Act.

19. REAPPROPRIATION

A. The parties understand and agree that any state funds not expended by June 30, 2013, will lapse on that date unless specifically reappropriated by the Washington State Legislature. If funds are so reappropriated, DOH's obligation under the terms of this Grant shall be contingent upon the terms of such reappropriation.

B. In the event any funds awarded under this Grant are reappropriated for use in a future biennium, DOH reserves the right to assign a reasonable share of any such reappropriation for administrative costs.

20. TERMINATION FOR FRAUD OR MISREPRESENTATION DISINCENTIVE

In the event the Grantee commits fraud or makes any misrepresentation in connection with the Grant application or during the performance of this Grant, DOH reserves the right to terminate or amend this Grant accordingly, including the right to recapture all funds disbursed to the Grantee under the Grant.

GENERAL TERMS AND CONDITIONS

1. DEFINITIONS

As used throughout this Grant, the following terms shall have the meaning set forth below:

A. "Authorized Representative" shall mean the Director and/or the designee authorized in writing to act on the Director's behalf.

B. "DOH" shall mean the Department of Health or its successor agency.

C. "Grantee" shall mean the entity identified on the face sheet performing service(s) under this Grant, and shall include all employees and agents of the Grantee.

D. "Personal Information" shall mean information identifiable to any person, including, but not limited to, information that relates to a person's name, health, finances, education, business, use or receipt of governmental services or other activities, addresses, telephone numbers, social security numbers, driver license numbers, other identifying numbers, and any financial identifiers.

E. "Start Date" and "Date of Execution" shall mean the later date of signature by the authorized representative of both parties.

F. "State" shall mean the state of Washington.

G. "Subgrantee" shall mean one not an employee of the Grantee, who is performing all or part of the work under this Grant under a separate contract or grant with the Grantee. The terms "subgrantee" includes any contractor or subcontractor retained by the Grantee to perform work on the project in any tier. Unless an express agreement is entered into between DOH and a subgrantee, no contractual relationship is established between DOH and a subgrantee of the Grantee. The Grantee is required to ensure compliance by any subgrantee with those applicable terms and conditions stated herein.

2. ADVANCE PAYMENTS PROHIBITED

No payments in advance of or in anticipation of goods or services to be provided under this Grant shall be made by DOH.

3. ALL WRITINGS CONTAINED HEREIN

This Grant contains all the terms and conditions agreed upon by the parties. No other understandings, oral or otherwise, regarding the subject matter of this Grant shall be deemed to exist or to bind any of the parties hereto.

4. AMENDMENTS

This Grant may be amended by mutual agreement of the parties. Such amendments shall not be binding unless they are in writing and signed by personnel authorized to bind each of the parties.

5. AMERICANS WITH DISABILITIES ACT (ADA) OF 1990, PUBLIC LAW 101-336, also referred to as the "ADA' 28 CFR Part 35

The Grantee must comply with the ADA, which provides comprehensive civil rights protection to individuals with disabilities in the areas of employment, public accommodations, state and local government services, and telecommunications.

6. APPROVAL

This Grant shall be subject to the written approval of DOH's Authorized Representative and shall not be binding until so approved. The Grant may be altered, amended, or waived only by a written amendment executed by both parties.

GENERAL TERMS AND CONDITIONS

7. ASSIGNMENT

Neither this Grant, nor any claim arising under this Grant, shall be transferred or assigned by the Grantee without prior written consent of DOH.

8. ATTORNEYS' FEES

Unless expressly permitted under another provision of the Grant, in the event of litigation or other action brought to enforce Grant terms, each party agrees to bear its own attorneys fees and costs.

9. AUDIT

A. General Requirements

The Grantee will procure audit services based on the following guidelines.

The Grantee shall maintain its records and accounts so as to facilitate the audit requirement and shall ensure that any Subgrantees also maintain auditable records.

The Grantee is responsible for any audit exceptions incurred by its own organization or that of its Subgrantees.

DOH reserves the right to recover from the Grantee all disallowed costs resulting from an audit.

As applicable, Grantees required to have an audit must ensure the audits are performed in accordance with Generally Accepted Auditing Standards (GAAS); Government Auditing Standards (the Revised Yellow Book) developed by the Comptroller General.

Responses to any unresolved management findings and disallowed or questioned costs shall be included with the audit report. The Grantee must respond to DOH requests for information or corrective action concerning audit issues within thirty (30) days of the date of request.

B. State Funds Requirements

Grantees expending $100,000 or more in total state funds in a fiscal year must have a financial audit as defined by Government Auditing Standards (The Revised Yellow Book) and according to Generally Accepted Auditing Standards (GAAS). The Schedule of State Financial Assistance must be included. The schedule includes:

Grantor agency name
State program name
BARS account number
Grantor
DOH Grant number
Grant award amount including amendments (total grant award)
Beginning balance
Current year revenues
Current year expenditures
Ending balance
Program total

If the Grantee is a state or local government entity, the Office of the State Auditor shall conduct the audit. Audits of non-profit organizations are to be conducted by a certified public accountant selected by the Grantee.

The Grantee shall include the above audit requirements in any subgrants.

In any case, the Grantee's financial records must be available for review by DOH.

GENERAL TERMS AND CONDITIONS

C. **Federal Funds Documentation Requirements**

If, in addition to the State funds provided under the state appropriation, the Project receives federal funds, the Grantee must send a copy of any required audit Reporting Package related to the federal funding as described in OMB Circular A-133, Part C, Section 320(c) no later than nine (9) months after the end of the Grantee's fiscal year(s) to:

Department of Health
ATTN: Single Audit Review Coordinator
101 Israel Road SE
PO Box 47905
Olympia WA 98504-7905

In addition to sending a copy of the audit, when applicable, the Grantee must include:

- Corrective action plan for audit findings within three (3) months of the audit being received by DOH.
- Copy of the Management Letter.

10. CONFIDENTIALITY/SAFEGUARDING OF INFORMATION

A. "Confidential Information" as used in this section includes:

1. All material provided to the Grantee by DOH that is designated as "confidential" by DOH;
2. All material produced by the Grantee that is designated as "confidential" by DOH and
3. All personal information in the possession of the Grantee that may not be disclosed under state or federal law. "Personal information" may include but is not limited to information related to a person's name, health, finances, education, business, use of government services, addresses, telephone numbers, social security number, driver's license number and other identifying numbers, and "Protected Health Information" under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA).

B. The Grantee shall comply with all state and federal laws related to the use, sharing, transfer, sale, or disclosure of Confidential Information. The Grantee shall use Confidential Information solely for the purposes of this Grant and shall not use, share, transfer, sell or disclose any Confidential Information to any third party except with the prior written consent of DOH or as may be required by law. The Grantee shall take all necessary steps to assure that Confidential Information is safeguarded to prevent unauthorized use, sharing, transfer, sale or disclosure of Confidential Information or violation of any state or federal laws related thereto. Upon request, the Grantee shall provide DOH with its policies and procedures on confidentiality. DOH may require changes to such policies and procedures as they apply to this Grant whenever the Grantor reasonably determines that changes are necessary to prevent unauthorized disclosures. The Grantee shall make the changes within the time period specified by DOH. Upon request, the Grantee shall immediately return to DOH any Confidential Information that DOH reasonably determines has not been adequately protected by the Grantee against unauthorized disclosure.

C. Unauthorized Use or Disclosure. The Grantee shall notify DOH within five (5) working days of any unauthorized use or disclosure of any confidential information, and shall take necessary steps to mitigate the harmful effects of such use or disclosure.

11. CONFORMANCE

If any provision of this Grant violates any statute or rule of law of the state of Washington, it is considered modified to conform to that statute or rule of law.

GENERAL TERMS AND CONDITIONS

12. COPYRIGHT PROVISIONS

Unless otherwise provided, all Materials produced under this Grant shall be considered "works for hire" as defined by the U.S. Copyright Act and shall be owned by DOH. DOH shall be considered the author of such Materials. In the event the Materials are not considered "works for hire" under the U.S. Copyright laws, the Grantee hereby irrevocably assigns all right, title, and interest in all Materials, including all intellectual property rights, moral rights, and rights of publicity to DOH effective from the moment of creation of such Materials.

"Materials" means all items in any format and includes, but is not limited to, data, reports, documents, pamphlets, advertisements, books, magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions. "Ownership" includes the right to copyright, patent, register and the ability to transfer these rights.

For Materials that are delivered under the Grant, but that incorporate pre-existing materials not produced under the Grant, the Grantee hereby grants to DOH a nonexclusive, royalty-free, irrevocable license (with rights to sublicense to others) in such Materials to translate, reproduce, distribute, prepare derivative works, publicly perform, and publicly display. The Grantee warrants and represents that the Grantee has all rights and permissions, including intellectual property rights, moral rights and rights of publicity, necessary to grant such a license to DOH.

The Grantee shall exert all reasonable effort to advise DOH, at the time of delivery of Materials furnished under this Grant, of all known or potential invasions of privacy contained therein and of any portion of such document which was not produced in the performance of this Grant. The Grantee shall provide DOH with prompt written notice of each notice or claim of infringement received by the Grantee with respect to any Materials delivered under this Grant. DOH shall have the right to modify or remove any restrictive markings placed upon the Materials by the Grantee.

13. DISPUTES

Except as otherwise provided in this Grant, when a dispute arises between the parties and it cannot be resolved by direct negotiation, either party may request a dispute hearing with DOH's Office of Drinking Water Director, who may designate a neutral person to decide the dispute.

The request for a dispute hearing must:

- be in writing;
- state the disputed issues;
- state the relative positions of the parties;
- state the Grantee's name, address, and Grant number; and
- be mailed to the Director and the other party's (respondent's) Grant Representative within three (3) working days after the parties agree that they cannot resolve the dispute.

The respondent shall send a written answer to the requestor's statement to both the Director or the Director's designee and the requestor within five (5)] working days.

The Director or designee shall review the written statements and reply in writing to both parties within ten (10) working days. The Director or designee may extend this period if necessary by notifying the parties.

The decision shall not be admissible in any succeeding judicial or quasi-judicial proceeding.

The parties agree that this dispute process shall precede any action in a judicial or quasi-judicial tribunal.

Nothing in this Grant shall be construed to limit the parties' choice of a mutually acceptable alternate dispute resolution (ADR) method in addition to the dispute hearing procedure outlined above.

GENERAL TERMS AND CONDITIONS

14. DUPLICATE PAYMENT

The Grantee certifies that work to be performed under this Grant does not duplicate any work to be charged against any other Grant, subgrant, or other source.

15. ETHICS/CONFLICTS OF INTEREST

In performing under this Grant, the Grantee shall assure compliance with the Ethics in Public Service Act (Chapter 42.52 RCW) and any other applicable state or federal law related to ethics or conflicts of interest.

16. GOVERNING LAW AND VENUE

This Grant shall be construed and interpreted in accordance with the laws of the state of Washington, and the venue of any action brought hereunder shall be in the Superior Court for Thurston County.

17. INDEMNIFICATION

To the fullest extent permitted by law, the Grantee shall indemnify, defend, and hold harmless the state of Washington, DOH, all other agencies of the state and all officers, agents and employees of the state, from and against all claims or damages for injuries to persons or property or death arising out of or incident to the Grantee's performance or failure to perform the Grant. The Grantee's obligation to indemnify, defend, and hold harmless includes any claim by the Grantee's agents, employees, representatives, or any Subgrantee or its agents, employees, or representatives.

The Grantee's obligation to indemnify, defend, and hold harmless shall not be eliminated by any actual or alleged concurrent negligence of the state or its agents, agencies, employees and officers.

Subgrants shall include a comprehensive indemnification clause holding harmless the Grantee, DOH, the state of Washington, its officers, employees and authorized agents.

The Grantee waives its immunity under Title 51 RCW to the extent it is required to indemnify, defend and hold harmless the state and its agencies, officers, agents or employees. The Grantee shall require this same waiver of its immunity from any Subgrantee.

18. INDEPENDENT CAPACITY OF THE GRANTEE

The parties intend that an independent contractor relationship will be created by this Grant. The Grantee and its employees or agents performing under this Grant are not employees or agents of the state of Washington or DOH. The Grantee will not hold itself out as or claim to be an officer or employee of DOH or of the state of Washington by reason hereof, nor will the Grantee make any claim of right, privilege or benefit which would accrue to such officer or employee under law. Conduct and control of the work will be solely with the Grantee.

19. INDUSTRIAL INSURANCE COVERAGE

The Grantee shall comply with all applicable provisions of Title 51 RCW, Industrial Insurance. If the Grantee fails to provide industrial insurance coverage or fails to pay premiums or penalties on behalf of its employees as may be required by law, DOH may collect from the Grantee the full amount payable to the Industrial Insurance Accident Fund. DOH may deduct the amount owed by the Grantee to the accident fund from the amount payable to the Grantee by DOH under this Grant, and transmit the deducted amount to the Department of Labor and Industries, (L&I) Division of Insurance Services. This provision does not waive any of L&I's rights to collect from the Grantee.

GENERAL TERMS AND CONDITIONS

20. LAWS

The Grantee shall comply with all applicable laws, ordinances, codes, regulations and policies of local and state and federal governments, as now or hereafter amended including, but not limited to:

Washington State Laws and Regulations

A. Affirmative action, RCW 41.06.020 (11).

B. Boards of directors or officers of non-profit corporations – Liability - Limitations, RCW 4.24.264.

C. Disclosure-campaign finances-lobbying, Chapter 42.17 RCW.

D. Discrimination-human rights commission, Chapter 49.60 RCW.

E. Ethics in public service, Chapter 42.52 RCW.

F. Office of minority and women's business enterprises, Chapter 39.19 RCW and Chapter 326-02 WAC.

G. Open public meetings act, Chapter 42.30 RCW.

H. Public records act, Chapter 42.56 RCW.

I. State budgeting, accounting, and reporting system, Chapter 43.88 RCW.

21. LICENSING, ACCREDITATION AND REGISTRATION

The Grantee shall comply with all applicable local, state, and federal licensing, accreditation and registration requirements or standards necessary for the performance of this Grant.

22. LIMITATION OF AUTHORITY

Only the Authorized Representative or Authorized Representative's designee by writing (designation to be made prior to action) shall have the express, implied, or apparent authority to alter, amend, modify, or waive any clause or condition of this Grant.

23. NONCOMPLIANCE WITH NONDISCRIMINATION LAWS

During the performance of this Grant, the Grantee shall comply with all federal, state, and local nondiscrimination laws, regulations and policies. In the event of the Grantee's non-compliance or refusal to comply with any nondiscrimination law, regulation or policy, this Grant may be rescinded, canceled or terminated in whole or in part, and the Grantee may be declared ineligible for further Grants with the state. The Grantee shall, however, be given a reasonable time in which to cure this noncompliance. Any dispute may be resolved in accordance with the "Disputes" procedure set forth herein.

24. POLITICAL ACTIVITIES

Political activity of Grantee employees and officers are limited by the State Campaign Finances and Lobbying provisions of Chapter 42.17 RCW and the Federal Hatch Act, 5 USC 1501 - 1508.

No funds may be used under this Grant for working for or against ballot measures or for or against the candidacy of any person for public office.

25. PROHIBITION AGAINST PAYMENT OF BONUS OR COMMISSION

The funds provided under this Grant shall not be used in payment of any bonus or commission for the purpose of obtaining approval of the application for such funds or any other approval or concurrence under this Grant provided, however, that reasonable fees or bona fide technical consultant, managerial, or other such services, other than actual solicitation, are not hereby prohibited if otherwise eligible as project costs.

GENERAL TERMS AND CONDITIONS

26. PUBLICITY

The Grantee agrees not to publish or use any advertising or publicity materials in which the state of Washington or DOH's name is mentioned, or language used from which the connection with the state of Washington's or DOH's name may reasonably be inferred or implied, without the prior written consent of DOH.

27. RECAPTURE DISINCENTIVE

In the event that the Grantee fails to perform this Grant in accordance with state laws, federal laws, and/or the provisions of this Grant, DOH reserves the right to recapture funds in an amount to compensate DOH for the noncompliance in addition to any other remedies available at law or in equity.

Repayment by the Grantee of funds under this recapture provision shall occur within the time period specified by DOH. In the alternative, DOH may recapture such funds from payments due under this Grant.

28. RECORDS MAINTENANCE OUTPUT

The Grantee shall maintain all books, records, documents, data and other evidence relating to this Grant and performance of the services described herein, including but not limited to accounting procedures and practices which sufficiently and properly reflect all direct and indirect costs of any nature expended in the performance of this Grant. Grantee shall retain such records for a period of six years following the date of final payment.

If any litigation, claim or audit is started before the expiration of the six (6) year period, the records shall be retained until all litigation, claims, or audit findings involving the records have been finally resolved.

29. REGISTRATION WITH DEPARTMENT OF REVENUE

If required by law, the Grantee shall complete registration with the Washington State Department of Revenue.

30. RIGHT OF INSPECTION

At no additional cost all records relating to the Grantee's performance under this Grant shall be subject at all reasonable times to inspection, review, and audit by DOH, the Office of the State Auditor, and federal and state officials so authorized by law, in order to monitor and evaluate performance, compliance, and quality assurance under this Grant. The Grantee shall provide access to its facilities for this purpose.

31. SAVINGS

In the event funding from state, federal, or other sources is withdrawn, reduced, or limited in any way after the effective date of this Grant and prior to normal completion, DOH may terminate the Grant under the "Termination for Convenience" clause, without the ten business day notice requirement. In lieu of termination, the Grant may be amended to reflect the new funding limitations and conditions.

32. SEVERABILITY

If any provision of this Grant or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provisions of this Grant that can be given effect without the invalid provision, if such remainder conforms to the requirements of law and the fundamental purpose of this Grant and to this end the provisions of this Grant are declared to be severable.

GENERAL TERMS AND CONDITIONS

33. SUBGRANTING

The Grantee may only subgrant work contemplated under this Grant if it obtains the prior written approval of DOH.

If DOH approves subgranting, the Grantee shall maintain written procedures related to subgranting, as well as copies of all subgrants and records related to subgrants. For cause, DOH in writing may: (a) require the Grantee to amend its subgranting procedures as they relate to this Grant; (b) prohibit the Grantee from subgranting with a particular person or entity; or (c) require the Grantee to rescind or amend a subgrant.

Every subgrant shall bind the Subgrantee to follow all applicable terms of this Grant. The Grantee is responsible to DOH if the Subgrantee fails to comply with any applicable term or condition of this Grant. The Grantee shall appropriately monitor the activities of the Subgrantee to assure fiscal conditions of this Grant. In no event shall the existence of a subgrant operate to release or reduce the liability of the Grantee to DOH for any breach in the performance of the Grantee's duties.

Every subgrant shall include a term that DOH and the State of Washington are not liable for claims or damages arising from a Subgrantee's performance of the subgrant.

34. SURVIVAL

The terms, conditions, and warranties contained in this Grant that by their sense and context are intended to survive the completion of the performance, cancellation or termination of this Grant shall so survive.

35. TAXES

All payments accrued on account of payroll taxes, unemployment contributions, the Grantee's income or gross receipts, any other taxes, insurance or expenses for the Grantee or its staff shall be the sole responsibility of the Grantee.

36. TERMINATION FOR CAUSE / SUSPENSION DISINCENTIVE

In event DOH determines that the Grantee failed to comply with any term or condition of this Grant, DOH may terminate the Grant in whole or in part upon written notice to the Grantee. Such termination shall be deemed "for cause." Termination shall take effect on the date specified in the notice.

In the alternative, DOH upon written notice may allow the Grantee a specific period of time in which to correct the non-compliance. During the corrective-action time period, DOH may suspend further payment to the Grantee in whole or in part, or may restrict the Grantee's right to perform duties under this Grant. Failure by the Grantee to take timely corrective action shall allow DOH to terminate the Grant upon written notice to the Grantee.

"Termination for Cause" shall be deemed a "Termination for Convenience" when DOH determines that the Grantee did not fail to comply with the terms of the Grant or when DOH determines the failure was not caused by the Grantee's actions or negligence.

If the Grant is terminated for cause, the Grantee shall be liable for damages as authorized by law, including, but not limited to, any cost difference between the original Grant and the replacement Grant, as well as all costs associated with entering into the replacement Grant (i.e., competitive bidding, mailing, advertising, and staff time).

GENERAL TERMS AND CONDITIONS

37. TERMINATION FOR CONVENIENCE

Except as otherwise provided in this Grant DOH may, by ten (10) business days written notice, beginning on the second day after the mailing, terminate this Grant, in whole or in part. If this Grant is so terminated, DOH shall be liable only for payment required under the terms of this Grant for work satisfactorily performed and invoiced s prior to the effective date of termination.

38. TERMINATION PROCEDURES

After receipt of a notice of termination, except as otherwise directed by DOH, the Grantee shall:

A. Stop work under the Grant on the date, and to the extent specified, in the notice;

B. Place no further orders or subgrants for materials, work, or facilities related to the Grant;

C. Assign to DOH all of the rights, title, and interest of the Grantee under the orders and subgrants so terminated, in which case DOH has the right, at its discretion, to settle or pay any or all claims arising out of the termination of such orders and subgrants. Any attempt by the Grantee to settle such claims must have the prior written approval of DOH; and

D. Preserve and transfer any materials, Grant deliverables and/or DOH property in the Grantee's possession as directed by DOH.

Upon termination of the Grant, DOH shall pay the Grantee for any service provided by the Grantee under the Grant prior to the date of termination. DOH may withhold any amount due as DOH reasonably determines is necessary to protect DOH against potential loss or liability resulting from the termination. DOH shall pay any withheld amount to the Grantee if DOH later determines that loss or liability will not occur.

The rights and remedies of DOH under this section are in addition to any other rights and remedies provided under this Grant or otherwise provided under law.

39. WAIVER

Waiver of any default or breach shall not be deemed to be a waiver of any subsequent default or breach. Any waiver shall not be construed to be a modification of the terms of this Grant unless stated to be such in writing and signed by Authorized Representative of DOH.

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ATTACHMENT I:
PROJECT SCOPE OF WORK

2012 Jobs Now Act Grant - Direct Appropriation Project

Project Title: City of Gig Harbor – Replace Failing Asbestos Concrete Water Main

The project's scope of work is comprised of the following activities:

- Site clearing and grading
- Temporary traffic control
- Install approximately 6,000 linear feet of 12-inch water main
- Install approximately 2,500 linear feet of 8-inch water main
- Install fire hydrants along the new water main
- Install new control valves and pressure reducing valves along the new water main
- Install new services connections and service meters along the new water main
- Install new roadway surfacing above the new water main (where roadways exist)

If the above scope of work includes engineering, planning or design activities, the Grantee shall make all plans and documents funded in whole or in part by this Grant available for the DOH's review upon reasonable request.

The project will be considered complete when all the activities identified in the above scope of work are complete.

Project Performance Measures:

1. Create/or sustain 10 construction jobs for the period of project construction.
2. Upon project completion the City will eliminate water mains with recent history of two breaks and one leak, eliminate property damage broken or leaky water mains and further meet compliance with the Water System Plan by increasing fire flow and replacing A/C water mains.

ATTACHMENT II:
CERTIFICATION OF THE AVAILABILITY OF FUNDS
TO COMPLETE THIS PROJECT

2012 Jobs Now Act Grant - Direct Appropriation Project

Project Funding

TYPE OF FUNDING	SOURCE	CURRENT STATUS
Grants		
1. 2012 Jobs Bill Grant		$2,000,000
2. Other Grants		
	Total Grants	$2,000,000
Loans		
	Total Loans	$
Local Revenue		
	Total Local Revenue	$
Other Funds		
	Total Other Funds	$
TOTAL Project Funding		$2,000,000

ATTACHMENT III:
ESTIMATED PROJECT COSTS

2012 Jobs Now Act Grant - Direct Appropriation Project

Project Costs by Cost Category:

COST CATEGORY	CURRENT ESTIMATES
Engineering Report (Preliminary Engineering)	
Environmental Review	$35,000
Water System Plan	
Historical Review/Cultural Review	$5,000
Land/ROW Acquisition	
Permits	$15,000
Public Involvement/Information	$5,000
Bid Documents (Design Engineering)	$150,000
Construction	$1,400,000
Service Meters	$6,000
Other Fees: (Sales or Use Taxes)	$119,000
Contingency: (20 %)	$195,000
Other: Construction Management	$50,000
Other: Materials Testing	$20,000
TOTAL ESTIMATED PROJECT COSTS	$2,000,000

ATTACHMENT IV:
CERTIFICATION OF THE PAYMENT AND REPORTING OF PREVAILING WAGES

2012 Jobs Now Act Grant - Direct Appropriation Project

The Grantee certifies that all contractors and subgrantees performing work on the project as described in ATTACHMENT I: PROJECT SCOPE OF WORK shall comply with prevailing wage laws set forth in Chapter 39.12 RCW, as applicable to the project funded by this Grant, including but not limited to: the filing of the "Statement of Intent to Pay Prevailing Wages" and "Affidavit of Wages Paid" as required by RCW 39.12.040. The Grantee shall maintain records sufficient to evidence compliance with Chapter 39.12 RCW, and shall make such records available for DOH's review upon request.

If any state funds are used by the Grantee for the purpose of construction, applicable State Prevailing Wages must be paid.

ATTACHMENT V:
CERTIFICATION OF THE INTENT TO ENTER THE LEADERSHIP IN ENERGY AND ENVIRONMENTAL DESIGN (LEED) CERTIFICATION PROCESS

2012 Jobs Now Act Grant – Direct Appropriation Project

The Grantee certifies that if applicable, it will enter into the Leadership in Energy and Environmental Design (LEED) certification process, as stipulated in RCW 39.35D, as applicable to the project described in ATTACHMENT I: PROJECT SCOPE OF WORK funded by this Grant. The Grantee shall, upon receipt of LEED certification by the United States Green Building Council, provide documentation of such certification to DOH.

The Grantee, certifies that the declaration set forth above has been reviewed and approved by the Grantee's governing body.

NOT APPLICABLE
(LEED-exempt project)

Business of the City Council
City of Gig Harbor, WA

Subject: - Visitor Information Center/Woodworth Water Tank - Lead Paint Testing - Consultant Services Contract

Proposed Council Action:
Move to: Approve and authorize the Mayor to execute the contract with Parametrix, Inc. in the not-to-exceed amount of $1,768 for the preparation of a hazardous materials assessment.

Dept. Origin: Public Works/Operations

Prepared by: Marco Malich
Public Works Superintendent

For Agenda of: September 24, 2012

Exhibits: Consultant Services Contract

	Initial & Date
Concurred by Mayor:	CLH 9/17/12
Approved by City Administrator:	R 9/17/12
Approved as to form by City Atty:	via email 9-14-12
Approved by Finance Director:	9/17/12
Approved by Department Head:	

Expenditure Required	$1,768	**Amount Budgeted**	$19,500	**Appropriation Required**	$0

INFORMATION/BACKGROUND

This contract provides for sampling and analytical services in advance of contracting for the exterior painting of the Visitor Information Center and demolition of the Woodworth water tank. The purpose for the sampling is to determine whether the paint contains lead so that the City may inform contractors bidding on the projects since the structures were constructed prior to 1978, the consumer cutoff date for purchase of paints containing lead. This information is required for the contractor's health and safety planning.

FISCAL CONSIDERATION

The 2012 City Buildings budget, Objective #7 provides $3,500 to paint the exterior of the Visitor Information Center. The Water Operating budget, Objective #12 provides $16,000 for removal of the Woodworth water tank.

BOARD OR COMMITTEE RECOMMENDATION

N/A

RECOMMENDATION/MOTION

Move to: Approve and authorize the Mayor to execute the contract with Parametrix, Inc. in the not-to-exceed amount of $1,768 for the preparation of a hazardous materials assessment.

CONSULTANT SERVICES CONTRACT BETWEEN THE CITY OF GIG HARBOR AND PARAMETRIX, INC.

THIS AGREEMENT is made by and between the City of Gig Harbor, a Washington municipal corporation (the "City"), and Parametrix, Inc., a corporation organized under the laws of the State of Washington (the "Consultant").

RECITALS

WHEREAS, the City is presently engaged in Visitor Information Center Exterior Painting and Woodworth Water Tank Demolition and desires that the Consultant perform services necessary to provide the following consultation services; and

WHEREAS, the Consultant agrees to perform the services more specifically described in the Scope of Work including any addenda thereto as of the effective date of this Agreement, all of which are attached hereto as **Exhibit A – Scope of Work**, and are incorporated by this reference as if fully set forth herein;

NOW, THEREFORE, in consideration of the mutual promises set forth herein, it is agreed by and between the parties as follows:

TERMS

1. Retention of Consultant - Scope of Work. The City hereby retains the Consultant to provide professional services as defined in this Agreement and as necessary to accomplish the scope of work attached hereto as **Exhibit A** and incorporated herein by this reference as if set forth in full. The Consultant shall furnish all services, labor and related equipment necessary to conduct and complete the work, except as specifically noted otherwise in this Agreement.

2. Payment.

A. The City shall pay the Consultant an amount based on time and materials, not to exceed One Thousand Seven Hundred Sixty-Eight Dollars and Zero Cents ($1,768.00) for the services described in Section 1 herein. This is the maximum amount to be paid under this Agreement for the work described in **Exhibit A**, and shall not be exceeded without the prior written authorization of the City in the form of a negotiated and executed supplemental agreement. The Consultant's staff and billing rates shall be as described in **Exhibit A**. The Consultant shall not bill for Consultant's staff not identified or listed in **Exhibit A** or bill at rates in excess of the hourly rates shown in **Exhibit A**, unless the parties agree to a modification of this Contract, pursuant to Section 17 herein.

B. The Consultant shall submit monthly invoices to the City after such services have been performed, and a final bill upon completion of all the services described in this Agreement. The City shall pay the full amount of an invoice within forty-five (45) days of receipt. If the City

objects to all or any portion of any invoice, it shall so notify the Consultant of the same within fifteen (15) days from the date of receipt and shall pay that portion of the invoice not in dispute, and the parties shall immediately make every effort to settle the disputed portion.

3. Relationship of Parties. The parties intend that an independent contractor-client relationship will be created by this Agreement. As the Consultant is customarily engaged in an independently established trade which encompasses the specific service provided to the City hereunder, no agent, employee, representative or subconsultant of the Consultant shall be or shall be deemed to be the employee, agent, representative or subconsultant of the City. In the performance of the work, the Consultant is an independent contractor with the ability to control and direct the performance and details of the work, the City being interested only in the results obtained under this Agreement. None of the benefits provided by the City to its employees, including, but not limited to, compensation, insurance, and unemployment insurance are available from the City to the employees, agents, representatives, or subconsultants of the Consultant. The Consultant will be solely and entirely responsible for its acts and for the acts of its agents, employees, representatives and subconsultants during the performance of this Agreement. The City may, during the term of this Agreement, engage other independent contractors to perform the same or similar work that the Consultant performs hereunder.

4. Duration of Work. The City and the Consultant agree that work will begin on the tasks described in **Exhibit A** immediately upon execution of this Agreement. The parties agree that the work described in **Exhibit A** shall be completed by October 31, 2012; provided however, that additional time shall be granted by the City for excusable days or extra work.

5. Termination. The City reserves the right to terminate this Agreement at any time upon ten (10) days written notice to the Consultant. Any such notice shall be given to the address specified above. In the event that this Agreement is terminated by the City other than for fault on the part of the Consultant, a final payment shall be made to the Consultant for all services performed. No payment shall be made for any work completed after ten (10) days following receipt by the Consultant of the notice to terminate. In the event that services of the Consultant are terminated by the City for fault on part of the Consultant, the amount to be paid shall be determined by the City with consideration given to the actual cost incurred by the Consultant in performing the work to the date of termination, the amount of work originally required which would satisfactorily complete it to date of termination, whether that work is in a form or type which is usable to the City at the time of termination, the cost of the City of employing another firm to complete the work required, and the time which may be required to do so.

6. Non-Discrimination. The Consultant agrees not to discriminate against any customer, employee or applicant for employment, subcontractor, supplier or materialman, because of race, color, creed, religion, national origin, marital status, sex, sexual orientation, age or handicap, except for a bona fide occupational qualification. The Consultant understands that if it violates this provision, this Agreement may be terminated by the City and that the Consultant may be barred from performing any services for the City now or in the future.

7. Indemnification.

A. The Consultant agrees to hold harmless, indemnify and defend the City, its officers, agents, and employees, from and against any and all claims, losses, or liability, for injuries, sickness or death of persons, including employees of the Consultant, or damage to property, arising out of any willful misconduct or negligent act, error, or omission of the Consultant, its officers, agents, subconsultants or employees, in connection with the services required by this Agreement; provided, however, that:

1. The Consultant's obligations to indemnify, defend and hold harmless shall not extend to injuries, sickness, death or damage caused by or resulting from the sole willful misconduct or sole negligence of the City, its officers, agents or employees; and

2. The Consultant's obligations to indemnify, defend and hold harmless for injuries, sickness, death or damage caused by or resulting from the concurrent negligence or willful misconduct of the Consultant and the City, or of the Consultant and a third party other than an officer, agent, subconsultant or employee of the Consultant, shall apply only to the extent of the negligence or willful misconduct of the Consultant.

B. It is further specifically and expressly understood that the indemnification provided herein constitutes the consultant's waiver of immunity under industrial insurance, title 51 RCW, solely for the purposes of this indemnification. The parties further acknowledge that they have mutually negotiated this waiver. The consultant's waiver of immunity under the provisions of this section does not include, or extend to, any claims by the consultant's employees directly against the consultant.

C. The provisions of this section shall survive the expiration or termination of this Agreement.

8. Insurance.

A. The Consultant shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the Consultant's own work including the work of the Consultant's agents, representatives, employees, subconsultants or subcontractors.

B. Before beginning work on the project described in this Agreement, the Consultant shall provide evidence, in the form of a Certificate of Insurance, of the following insurance coverage and limits (at a minimum):

1. Business auto coverage for any auto no less than a $1,000,000 each accident limit, and
2. Commercial General Liability insurance no less than $1,000,000 per occurrence with a $2,000,000 aggregate. Coverage shall include, but is not limited to, contractual liability, products and completed operations, property damage, and employers liability, and

3. Professional Liability insurance with no less than $1,000,000 per occurrence. All policies and coverages shall be on an occurrence basis by an 'A' rated company licensed to conduct business in the State of Washington.

C. The Consultant is responsible for the payment of any deductible or self-insured retention that is required by any of the Consultant's insurance. If the City is required to contribute to the deductible under any of the Consultant's insurance policies, the Contractor shall reimburse the City the full amount of the deductible within 10 working days of the City's deductible payment.

D. The City of Gig Harbor shall be named as an additional insured on the Consultant's commercial general liability policy. This additional insured endorsement shall be included with evidence of insurance in the form of a Certificate of Insurance for coverage necessary in Section B. The City reserves the right to receive a certified and complete copy of all of the Consultant's insurance policies upon request.

E. Under this Agreement, the Consultant's insurance shall be considered primary in the event of a loss, damage or suit. The City's own comprehensive general liability policy will be considered excess coverage with respect to defense and indemnity of the City only and no other party. Additionally, the Consultant's commercial general liability policy must provide cross-liability coverage as could be achieved under a standard ISO separation of insured's clause.

F. The Consultant shall request from his insurer a modification of the ACORD certificate to include language that prior written notification will be given to the City of Gig Harbor at least 30 days in advance of any cancellation, suspension or material change in the Consultant's coverage.

9. Ownership and Use of Work Product. Any and all documents, drawings, reports, and other work product produced by the Consultant under this Agreement shall become the property of the City upon payment of the Consultant's fees and charges therefore. The City shall have the complete right to use and re-use such work product in any manner deemed appropriate by the City, provided, that use on any project other than that for which the work product is prepared shall be at the City's risk unless such use is agreed to by the Consultant.

10. City's Right of Inspection. Even though the Consultant is an independent contractor with the authority to control and direct the performance and details of the work authorized under this Agreement, the work must meet the approval of the City and shall be subject to the City's general right of inspection to secure the satisfactory completion thereof. The Consultant agrees to comply with all federal, state, and municipal laws, rules, and regulations that are now effective or become applicable within the terms of this Agreement to the Consultant's business, equipment, and personnel engaged in operations covered by this Agreement or accruing out of the performance of such operations.

11. Records. The Consultant shall keep all records related to this Agreement for a period of three years following completion of the work for which the Consultant is retained. The Consultant shall permit any authorized representative of the City, and any person authorized by the City for audit purposes, to inspect such records at all reasonable times during regular business hours of the Consultant. Upon request, the Consultant will provide the City with reproducible copies of any such records. The copies will be provided without cost if required to substantiate any billing of the Consultant, but the Consultant may charge the City for copies requested for any other purpose.

12. Work Performed at the Consultant's Risk. The Consultant shall take all precautions necessary and shall be responsible for the safety of its employees, agents, and subconsultants in the performance of the work hereunder and shall utilize all protection necessary for that purpose. All work shall be done at the Consultant's own risk, and the Consultant shall be responsible for any loss of or damage to materials, tools, or other articles used or held by the Consultant for use in connection with the work.

13. Non-Waiver of Breach. The failure of the City to insist upon strict performance of any of the covenants and agreements contained herein, or to exercise any option herein conferred in one or more instances shall not be construed to be a waiver or relinquishment of said covenants, agreements, or options, and the same shall be and remain in full force and effect.

14. Resolution of Disputes and Governing Law.

A. Should any dispute, misunderstanding, or conflict arise as to the terms and conditions contained in this Agreement, the matter shall first be referred to the City Engineer or Director of Operations and the City shall determine the term or provision's true intent or meaning. The City Engineer or Director of Operations shall also decide all questions which may arise between the parties relative to the actual services provided or to the sufficiency of the performance hereunder.

B. If any dispute arises between the City and the Consultant under any of the provisions of this Agreement which cannot be resolved by the City Engineer or Director of Operations determination in a reasonable time, or if the Consultant does not agree with the City's decision on the disputed matter, jurisdiction of any resulting litigation shall be filed in Pierce County Superior Court, Pierce County, Washington. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. The prevailing party in any such litigation shall be entitled to recover its costs, including reasonable attorney's fees, in addition to any other award.

15. Written Notice. All notices required to be given by either party to the other under this Agreement shall be in writing and shall be given in person or by mail to the addresses set forth below. Notice by mail shall be deemed given as of the date the same is deposited in the United States mail, postage prepaid, addressed as provided in this paragraph.

CONSULTANT:
Parametrix, Inc.
ATTN: Lara Linde, LG
WA State Lead Risk Assessor
4000 Kitsap Way, Suite A
Bremerton, WA 98132

City of Gig Harbor
ATTN: Marco Malich
Public Work Superintendent
3510 Grandview Street
Gig Harbor, WA 98335
(253) 851-6170

16. Subcontracting or Assignment. The Consultant may not assign or subcontract any portion of the services to be provided under this Agreement without the express written consent of the City. If applicable, any subconsultants approved by the City at the outset of this Agreement are named on **Exhibit C** attached hereto and incorporated herein by this reference as if set forth in full.

17. Entire Agreement. This Agreement represents the entire integrated agreement between the City and the Consultant, superseding all prior negotiations, representations or agreements, written or oral. This Agreement may be modified, amended, or added to, only by written instrument properly signed by both parties hereto.

IN WITNESS WHEREOF, the parties have executed this Agreement this _____ day of _____, 20____.

CONSULTANT

By:_____
Its:_____

CITY OF GIG HARBOR

By:_____
Mayor Charles L. Hunter

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

EXHIBIT A

Parametrix
ENGINEERING . PLANNING . ENVIRONMENTAL SCIENCES
4660 KITSAP WAY, SUITE A
BREMERTON, WA 98312-2357
T. 360.377.0014 F. 360.479.5961
www.parametrix.com

SENT VIA EMAIL

September 4, 2012

Marco Malich
City of Gig Harbor
3510 Grandview Street
Gig Harbor, WA 98335

Re: Chamber of Commerce Building and Water Tower Paint Sampling

Dear Marco:

Per our telephone discussion this morning, the City of Gig Harbor (City) is requesting Parametrix provide sampling and analytical services in advance of contracting an exterior painting project at the Chamber of Commerce building located at 3125 Judson Street in downtown Gig Harbor and demolition of an abandoned water tower located at the intersection of Woodworth Avenue and Ringold Street also in Gig Harbor.

The purpose for the sampling is to determine whether the paint contains lead so that the City may inform contractors bidding on the projects since the structures were constructed prior to 1978, the consumer cutoff date for purchase of paints containing lead. This information is required for the contractor's health and safety planning.

Parametrix will provide and perform the following:

- A State of Washington certified lead-based paint professional to collect samples.
- Collection of up to 13 paint chip samples.
- Analysis of up to 13 paint chip samples by an appropriately accredited laboratory on standard 10 working day turnaround time.
- One to two page technical memorandum for each structure (two structures total) presenting the analytical results and recommendations within one week of receiving laboratory results.

The cost associated with completing the Chamber of Commerce work described includes $843 (8 hours) for labor and $150 for analytical and supplies. This task is estimated at $993 time and materials.

The cost associated with completing the abandoned water tower work described includes $700 (6.5 hours) for labor and $75 for analytical and supplies. This task is estimated at $775 time and materials.

Please review this proposal and contact me at (360) 850-5332 or llinde@parametrix.com with any questions you may have.

Sincerely,

EXHIBIT A

PARAMETRIX

Lara Linde

Lara Linde, LG
AHERA Building Inspector
WA State Lead Risk Assessor

SENT VIA EMAIL

GIG HARBOR
"THE MARITIME CITY"

Business of the City Council
City of Gig Harbor, WA

Subject: SR16/Burnham Drive Interchange Improvements – WSDOT Quit Claim Deed

Proposed Council Action: Approve and authorize the Mayor to execute the Quit Claim Deed with the Washington State Department of Transportation

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Dept. Origin: Public Works/Engineering

Prepared by: Stephen Misiurak, P.E.
City Engineer

For Agenda of: September 24, 2012

Exhibits: WSDOT Quit Claim Deed, Right-of-Way Exhibit A – WSDOT Turnback Agreement No. TB3-0138 dated 7-2-10

Initial & Date

Concurred by Mayor: CLH 9/19/12
Approved by City Administrator: R. 9/19/12
Approved as to form by City Atty: by email 9/19/12
Approved by Finance Director: n/a
Approved by Department Head: _____

Expenditure Required	$0	Amount Budgeted	$0	Appropriation Required	$0

INFORMATION / BACKGROUND

This Agreement is a transfer of a portion of WSDOT right-of-way property to the City of Gig Harbor and encompasses a portion of the area associated with the recently completed Bremerton-bound on ramp. Routine maintenance of this on ramp including roadway striping and storm cleaning will be the responsibility of the City.

FISCAL CONSIDERATION

None.

BOARD OR COMMITTEE RECOMMENDATION

RECOMMENDATION / MOTION

Approve and authorize the Mayor to execute the Quit Claim Deed with the Washington State Department of Transportation.

AFTER RECORDING RETURN TO:

ATTN: REAL ESTATE SERVICES
DEPARTMENT OF TRANSPORTATION
P. O. BOX 47338
OLYMPIA, WA 98504-7338

Document Title: Quitclaim Deed
Grantor: State of Washington
Grantee: City of Gig Harbor
Legal Description: SE-NE. Section 36, T22N, R1E, WM
Additional Legal Description is on page 1 of deed
Assessor's Tax Parcel Number: None Assigned-Public Road

QUITCLAIM DEED

IN THE MATTER OF SR 16, Narrows Bridge to Olympic Drive;

The STATE OF WASHINGTON, Grantor, for and in accordance with that agreement of the parties entitled Turnback Agreement No. TB 3-0138, dated July 2, 2010, hereby conveys and quitclaims to the CITY OF GIG HARBOR, a Municipal Corporation of the State of Washington, Grantee, all right, title, and interest under the jurisdiction of the Department of Transportation, in and to the following described real property situated in Pierce County, State of Washington:

Those areas designated as for Relinquishment to City as shown on Sheet 14 of 26 sheets, SR 16, Narrows Bridge to Olympic Drive, Right of Way and Limited Access Plan, approved March 19, 1970, revised June 17, 2010 and shown as Exhibit A to Turnback Agreement No. TB 3-0138, dated July 2, 2010, on file in the office of the Secretary of Transportation at Olympia, Washington being a portion of:

The Southeast quarter of the Northeast quarter of Section 36, Township 22 North, Range 1 East, W. M.

It is understood and agreed that the above-referenced property is transferred for road/street purposes only, and no other use shall be made of said property without the prior written approval of the Grantor. It is also understood and agreed that the Grantee, its successors or assigns, shall not revise either the right-of-way lines or the access control without prior written approval from the Grantor, its successors, or assigns. Revenues resulting from any vacation, sale, or rental of this property or any portion thereof, shall (1) if the property is disposed of to a governmental entity for public use, be placed in the Grantee's road/street fund and used exclusively for road/street purposes; or (2) if the property is disposed of other than as provided in (1) above, be shared by the Grantee and Grantor, their successors or assigns, in the same proportion as acquisition costs were shared; except that the Grantee may deduct the documented direct costs of any such vacation, sale, or rental.

The Grantee, as part consideration herein, does hereby agree to comply with, and require its successors or assigns to comply with, all civil rights and anti-discrimination requirements of chapter 49.60 RCW, as to the right of way and Roadway Facilities herein described.

The Grantee accepts said deed subject to all matters of record.

The lands herein described are not required for State highway purposes and are conveyed pursuant to the provisions of RCW 36.75.090.

Dated at Olympia, Washington, this _____ day of _____, 2012.

STATE OF WASHINGTON

_____
Paula J. Hammond, P.E.
Secretary of Transportation

APPROVED AS TO FORM:

By: _____
Assistant Attorney General

REVIEWED AS TO FORM:

By: _____

STATE OF WASHINGTON)
): ss
County of Thurston)

On this _____ day of _____, 2012, before me personally appeared Paula J. Hammond, P.E., known to me as the Secretary of Transportation, Washington State Department of Transportation, and executed the foregoing instrument, acknowledging said instrument to be the free and voluntary act and deed of the State of Washington, for the uses and purposes therein mentioned, and on oath stated that she was authorized to execute said instrument.

Given under my hand and official seal the day and year last above written.

_____
Notary Public in and for the State of
Washington, residing at _____

My Commission Expires _____

Washington State Department of Transportation

EXHIBIT A

Turnback Agreement			Organization and Address City of Gig Harbor Public Works Department 3105 Judson Street Gig Harbor, WA 98335
Agreement Number TB3-0138			Section / Location Narrows Bridge to Olympic Drive
State Route 16	Control Section 270600	Region Olympic	SR 16 Burnham Dr I/C City Improvements

THIS AGREEMENT is between the STATE OF WASHINGTON, Department of Transportation, hereinafter the "STATE," and City of Gig Harbor, hereinafter the "LOCAL AGENCY," collectively hereinafter the "PARTIES."

WHEREAS, the STATE is planning the construction or improvement of a section of the state route as identified above, hereinafter referred to as the "PROJECT," and

WHEREAS, the STATE has acquired and/or is in the process of acquiring right of way needed to construct, reconstruct, or rearrange the state route and/or certain streets or roads, frontage roads, access roads, intersections, ramps, crossings, and /or other roadway features, hereinafter referred to as "Roadway Facilities," and

WHEREAS, upon completion of the PROJECT, certain right of way and Roadway Facilities, as shown on Exhibit A, attached hereto and made a part hereof, will require maintenance, operation, and ownership transfer from the STATE to the LOCAL AGENCY, and

WHEREAS, the STATE and LOCAL AGENCY enter into this Agreement to identify the process of Roadway Facilities and right of way maintenance, operation, and ownership transfer,

NOW, THEREFORE, pursuant to

☒ (City or Town) RCW 36.75.090 and/or RCW 47.52.210,

☐ (County) RCW 36.75.090 and WAC 468-18-040, "Design standards for rearranged county roads, frontage roads, access roads, intersections, ramps and crossings,"

IT IS MUTUALLY AGREED AS FOLLOWS:

1. COMPLETION, ACCEPTANCE, AND TRANSFER OF OPERATION AND MAINTENANCE

1.1 Once the PROJECT is completed and reviewed by the PARTIES, the STATE will in writing transfer to the LOCAL AGENCY and the LOCAL AGENCY agrees to accept the responsibility for the maintenance and operation of the Roadway Facilities and right of way until such time as the full ownership of the right of way and Roadway Facilities are conveyed by deed pursuant to Section 2.

1.2 The LOCAL AGENCY agrees to accept ownership of the right of way and Roadway Facilities as shaded, where applicable, on Exhibit A, as follows:

Red	Indicates access control and access rights to be retained by the STATE
Blue (light)	Indicates Roadway Facilities and right of way to be conveyed in fee to the LOCAL AGENCY
Yellow	Indicates easements to be conveyed to the LOCAL AGENCY

2. RECORDED CONVEYANCE

2.1 Within one year following the STATE's written transfer to the LOCAL AGENCY of the responsibility for maintenance and operations as provided in Section 1, the STATE will furnish the LOCAL AGENCY a recordable conveyance of right of way, including the Roadway Facilities constructed thereon, as shown on the plans marked Exhibit A. The conveyance will be recorded pursuant to RCW 65.08.095.

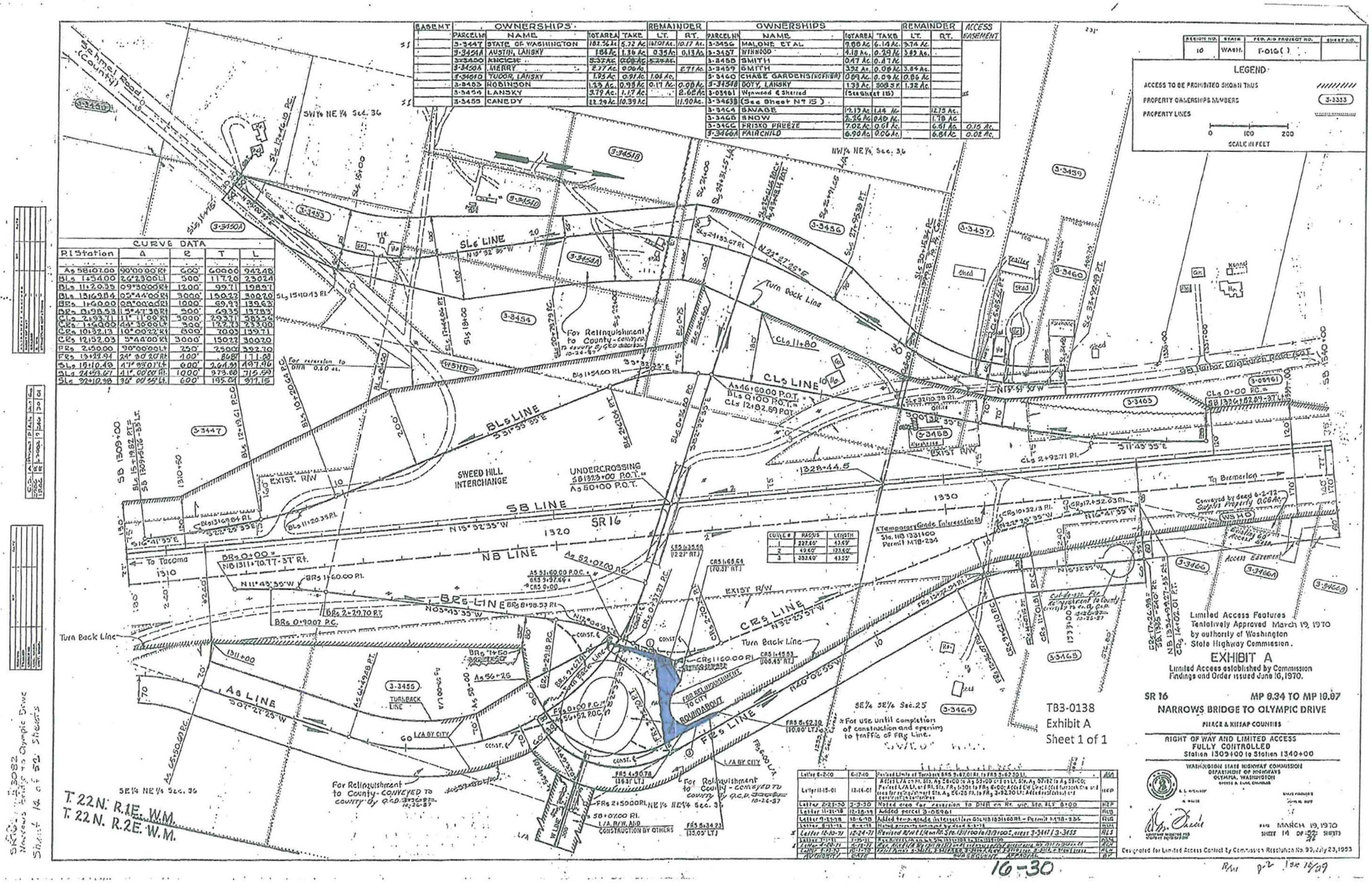
2.2 It is understood and agreed that the above-referenced property is transferred for road/street purposes only, and no other use shall be made of said property without the prior written approval of the STATE. It is also understood and agreed that the LOCAL AGENCY, its successors or assigns, shall not revise either the right of way lines or the access control without prior written approval from the STATE, its successors, or assigns. Revenues resulting from any vacation, sale, or rental of this property or any portion thereof, shall (1) if the property is disposed of to a governmental entity for public use, be placed in the LOCAL AGENCY road/street fund and used exclusively for road/street purposes; or (2) if the property is disposed of other than as provided in (1) above, be shared by the LOCAL AGENCY and STATE, their successors or assigns, in the same proportion as acquisition costs were shared; except that the LOCAL AGENCY may deduct the documented direct costs of any such vacation, sale, or rental.

2.3 The LOCAL AGENCY agrees to comply with, and require its successors or assigns to comply with, all civil rights and anti-discrimination requirements of chapter 49.60 RCW, as to the right of way and Roadway Facilities to be conveyed.

2.4 The LOCAL AGENCY understands and agrees that the STATE is retaining ownership of all rights of ingress and egress, to, from and between the above referenced state highway route and/or Roadway Facilities and the properties abutting said state highway route and/or Roadway Facilities, including all rights of access, light, view and air, and access control as shown by the access prohibition symbol and as shaded in section 1.2 above along the above referenced state route and/or Roadway Facilities right of way and along abutting properties on the right of way access plans marked as Exhibit A. The LOCAL AGENCY, its successors or assigns, shall have no right of ingress or egress between the above referenced state route and abutting properties, or the state route and the lands herein conveyed that show the access prohibition symbol and as shaded in section 1.2 above. The LOCAL AGENCY, its successors or assigns, shall not be entitled to compensation for any loss of access, light, view, or air occasioned by the location, construction, reconstruction, maintenance, or operation of the above referenced state route and/or Roadway Facilities.

IN WITNESS WHEREOF, the PARTIES hereto have executed this Agreement on the date last written below.

LOCAL AGENCY	STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION
By Charles L Hunter	By
Print Name Charles L. Hunter	Print Name Neal Campbell
Date June 28, 2010	Date July 2, 2010


LEGEND
ACCESS TO BE PROHIBITED SHOWN THUS
PROPERTY OWNERSHIPS NUMBERS
PROPERTY LINES
SCALE IN FEET
CURVE DATA
SWEED HILL INTERCHANGE
UNDERCROSSING
SB LINE
NB LINE
SR 16
To Tacoma
To Bremerton
ROUNDABOUT
For Relinquishment to County
TB3-0138
Exhibit A
Sheet 1 of 1
Limited Access Features Tentatively Approved March 19, 1970 by authority of Washington State Highway Commission.
EXHIBIT A
Limited Access established by Commission Findings and Order issued June 16, 1970.
SR 16
MP 8.34 TO MP 10.07
NARROWS BRIDGE TO OLYMPIC DRIVE
PIERCE & KITSAP COUNTIES
RIGHT OF WAY AND LIMITED ACCESS
FULLY CONTROLLED
Station 1309+00 to Station 1340+00
WASHINGTON STATE HIGHWAY COMMISSION
DEPARTMENT OF HIGHWAYS
OLYMPIA, WASHINGTON
MARCH 19, 1970
T. 22 N. R.1E. W.M.
T. 22 N. R.2E. W.M.
16-30

GIG HARBOR
"THE MARITIME CITY"

Business of the City Council
City of Gig Harbor, WA

Subject: Donkey Creek Design Contract Amendment – Consultant Services Contract

Proposed Council Action: Approve and authorize the Mayor to execute a Consultant Services Contract Amendment No. 1 with Parametrix, Inc. in the not-to-exceed amount of $5,743.00.

Dept. Origin: Public Works/Engineering

Prepared by: Stephen Misiurak, P.E.
City Engineer

For Agenda of: September 24, 2012

Exhibits: Consultant Services Contract Amendment No. 1

	Initial & Date
Concurred by Mayor:	CMH 9/20/12
Approved by City Administrator:	R - 9/20/12
Approved as to form by City Atty:	by email 9/20/12
Approved by Finance Director:	9/20/12
Approved by Department Head:	

Expenditure Required	$5,743.00	Amount Budgeted	$1,961,000.00	Appropriation Required	0

INFORMATION / BACKGROUND

This contract amendment will provide surveying services associated with the necessary procurement of both temporary and permanent construction easements associated with this project.

FISCAL CONSIDERATION

The 2012 Storm Water Capital Division Objective Fund has allocated funds for the Donkey Creek Estuary and Road Improvements project. This expense has been considered in the total project budget as a "Miscellaneous Cost".

BOARD OR COMMITTEE RECOMMENDATION

N/A.

RECOMMENDATION/MOTION

Move to: Approve and authorize the Mayor to execute the Consultant Services Contract Amendment No. 1 with Parametrix, Inc. in the not-to-exceed amount of $4,000.00, for a revised total contract not to exceed $5,743.00

FIRST AMENDMENT
TO
CONSULTANT SERVICES CONTRACT
BETWEEN THE CITY OF GIG HARBOR AND

THIS FIRST AMENDMENT is made to that certain Consultant Services Contract dated July 24, 2012 (the "Agreement"), by and between the City of Gig Harbor, a Washington municipal corporation (hereinafter the "City"), and Parametrix, Inc., a corporation organized under the laws of the State of Washington (hereinafter the "Consultant").

RECITALS

WHEREAS, the City is presently engaged in completing the design of the Donkey Creek Restoration and Transportation Improvements Project and desires to extend consultation services in connection with the project; and

WHEREAS, section 18 of the Agreement requires the parties to execute an amendment to the Agreement in order to modify the scope of work to be performed by the Consultant and to amend the amount of compensation paid by the City;

NOW, THEREFORE, in consideration of the mutual promises set forth herein, it is agreed by and between the parties in this Amendment as follows:

Section 1. Scope of Work. Section 1 of the Agreement is amended to add the work as shown in **Exhibit A – Scope of Work**, attached to this Amendment and incorporated herein.

Section 2. Compensation. Section 2(A) of the Agreement is amended to increase compensation to the Consultant for the work to be performed as described in **Exhibit A** in an amount not to exceed Five Thousand Seven Hundred Forty-three Dollars ($5,743.00), as shown in **Exhibit B,** attached to this Amendment and incorporated herein.

Section 3. Duration of Work. Section 4 of the Agreement is amended to extend the duration of this Agreement to October 31, 2012.

EXCEPT AS EXPRESSLY MODIFIED BY THIS FIRST AMENDMENT, ALL TERMS AND CONDITIONS OF THE AGREEMENT SHALL REMAIN IN FULL FORCE AND EFFECT.

IN WITNESS WHEREOF, the parties have executed this First Amendment on this _____ day of _____, 20__.

CONSULTANT

By:_____
Its Principal

CITY OF GIG HARBOR

By:_____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

EXHIBIT A

SCOPE OF WORK

City of Gig Harbor
Encroachment Survey for the Remy Property

Objective

Parametrix surveyors will map encroachments associated with the Remy parcel, located at 8715 N. Harborview Drive. These encroachments include sidewalk and roadway improvements along N. Harborview Drive, the Remy's house and deck along N. Harborview Drive and portions of the Remy's deck into the Harbor History Museum parcel. The mapping information will be processed and an exhibit map prepared identifying any encroachments or intrusions on or off the aforementioned parcels. Surveyors will also map the Remy's driveway for purpose of preparing a temporary construction easement and exhibit map. Legal descriptions and exhibit maps will be prepared to support the conveyance of property to resolve encroachment issues.

Task 1

Parametrix surveyors will recover controlling monuments or lot corners in order to define the right-of-way limits and boundary lines of the above referenced parcels. Measurements will be made and referenced onto an exhibit map with dimensional ties to all intrusions. Legal descriptions and exhibit maps will be prepared to support the transfer of property to eliminate existing encroachments on and off the Remy property.

Task 2

Based upon existing base map information and supplemental mapping as described above, Parametrix will prepare a legal description for Temporary Construction Easements and Exhibit maps for the Remy's driveway and for Tax Parcel 4002990020, located at 4021 Harborview Drive.

Based upon design features as shown on Donkey Creek improvements for property located at 4021 Harborview Drive; legal description and exhibit map will be prepared for use in acquiring a Temporary Construction Easement. The description and map will be limited to only those areas of the subject property set for improvements under the proposed construction activities.

Assumptions

- City of Gig Harbor will acquire right of entry for all private parcels.
- Parametrix will provide legal descriptions and exhibit maps for Temporary Construction Easements. However, the conveyance documents with conditions and time frames will be the responsibility of the City.
- Parametrix will prepare a legal description for Temporary Construction Easements and Exhibit maps for the Remy's driveway and for Tax Parcel 4002990020, located at 4021 Harborview Drive.

EXHIBIT A

Fee – Time and material not to exceed

Task 1, Labor, material and expenses.....$2,006.00

Task 2, Labor, material and expenses.....$3,737.00

Project Total ***$5,743.00***

Client: City of Gig Harbor
Project: Austin Street Utilities
Project No: 2372750025

EXHIBIT B

						Scott D. Spees	Eric L. Freeberg	David A. Ironmonger	Adam W. Beauprez	Shannon D. Thompson	April D. Whittaker	Shari Morgan	Dennis L. Harmon	Scean Ripley
						Surveyor III	Sr Surveyor	Survey Supervisor	Surveyor II	Sr Construction Mgr	Project Controls Specialist	Sr Project Accountant	Surveyor II	Surveyor III
Burdened Rates:						$95.00	$99.20	$141.00	$68.91	$185.60	$83.58	$92.97	$80.60	$93.00
Phase	**Task**	**Description**	**Labor Dollars**	**Labor Hours**	**Multiplier**									
02		Encroachments and Easements	$5,375.99	55	3.03	10		8	10	2	4	1	4	16
02	01	Field work	$1,639.10	20	3.03	10			10					
02	02	Processing and Exhibits	$3,736.89	35	3.03			8		2	4	1	4	16
		Labor Totals:	**$5,375.99**	**98**		**10**	**0**	**8**	**10**	**2**	**4**	**1**	**4**	**16**
						$950.00	**$0.00**	**$1,128.00**	**$689.10**	**$371.20**	**$334.32**	**$92.97**	**$322.40**	**$1,488.00**

DIRECT EXPENSES:

Description	Amount
Mileage	$66.600
WA Survey Equipment	$198.000
Wa Survey Vehicle	$102.000
Expense Total:	**$366.600**

Project Total: **$5,742.590**

GIG HARBOR
"THE MARITIME CITY"

Business of the City Council
City of Gig Harbor, WA

Subject: Donkey Creek Project property appraisal – Consultant Services Contract

Proposed Council Action: Approve and authorize the Mayor to execute a Consultant Services Contract with Percival and Associates LLC for the amount of $750.00.

Dept. Origin: Public Works/Engineering

Prepared by: Emily Appleton, P.E.
Senior Engineer
E/A 9.20.12

For Agenda of: September 24, 2012

Exhibits: Consultant Services Contract Between the City of Gig Harbor and Percival & Associates LLC

	Initial & Date
Concurred by Mayor:	CAH 9/20/12
Approved by City Administrator:	R- 9/20/12
Approved as to form by City Atty:	via email
Approved by Finance Director:	9/20/12

Expenditure Required	$750.00	Amount Budgeted	$ 1,961,000	Appropriation Required	$ 0

INFORMATION / BACKGROUND

This contract will provide appraisal services associated with the necessary procurement of easements and right-of-way associated with this project.

FISCAL CONSIDERATION

The 2012 Storm Water Capital Division Objective Fund has allocated funds for the Donkey Creek Estuary and Road Improvements project. This expense has been considered in the total project budget as a "Miscellaneous Cost".

BOARD OR COMMITTEE RECOMMENDATION

N/A.

RECOMMENDATION/MOTION

Move to: Approve and authorize the Mayor to execute a Consultant Services Contract with Percival and Associates LLC for the amount of $750.00.

CONSULTANT SERVICES CONTRACT
BETWEEN THE CITY OF GIG HARBOR AND
PERCIVAL & ASSOCIATES, LLC

THIS AGREEMENT is made by and between the City of Gig Harbor, a Washington municipal corporation (the "City"), and Percival & Associates, a corporation organized under the laws of the State of Washington (the "Consultant").

RECITALS

WHEREAS, the City is presently engaged in the property appraisal of 8715 N. Harborview Drive, Gig Harbor, WA 98332 (parcel number 4102000013) and desires that the Consultant perform services necessary to provide the following consultation services; and

WHEREAS, the Consultant agrees to perform the services more specifically described in the Scope of Work including any addenda thereto as of the effective date of this Agreement, all of which are attached hereto as **Exhibit A – Scope of Work**, and are incorporated by this reference as if fully set forth herein;

NOW, THEREFORE, in consideration of the mutual promises set forth herein, it is agreed by and between the parties as follows:

TERMS

1. Retention of Consultant - Scope of Work. The City hereby retains the Consultant to provide professional services as defined in this Agreement and as necessary to accomplish the scope of work attached hereto as **Exhibit A** and incorporated herein by this reference as if set forth in full. The Consultant shall furnish all services, labor and related equipment necessary to conduct and complete the work, except as specifically noted otherwise in this Agreement.

2. Payment.

A. The City shall pay the Consultant an amount based on time and materials, not to exceed Seven Hundred and Fifty dollars ($750.00) for the services described in Section 1 herein. This is the maximum amount to be paid under this Agreement for the work described in **Exhibit A**, and shall not be exceeded without the prior written authorization of the City in the form of a negotiated and executed supplemental agreement. The Consultant's staff and billing rates shall be as described in **Exhibit B – Schedule of Rates and Estimated Hours**. The Consultant shall not bill for Consultant's staff not identified or listed in **Exhibit B** or bill at rates in excess of the hourly rates shown in **Exhibit B**, unless the parties agree to a modification of this Contract, pursuant to Section 17 herein.

B. The Consultant shall submit monthly invoices to the City after such services have been performed, and a final bill upon completion of all the services described in this Agreement. The City shall pay the full amount of an invoice within forty-five (45) days of receipt. If the City objects to all or any portion of any invoice, it shall so notify the Consultant of the same within fifteen (15) days from the date of receipt and shall pay that portion of the invoice not in dispute, and the parties shall immediately make every effort to settle the disputed portion.

3. Relationship of Parties. The parties intend that an independent contractor-client relationship will be created by this Agreement. As the Consultant is customarily engaged in an independently established trade which encompasses the specific service provided to the City hereunder, no agent, employee, representative or subconsultant of the Consultant shall be or shall be deemed to be the employee, agent, representative or subconsultant of the City. In the performance of the work, the Consultant is an independent contractor with the ability to control and direct the performance and details of the work, the City being interested only in the results obtained under this Agreement. None of the benefits provided by the City to its employees, including, but not limited to, compensation, insurance, and unemployment insurance are available from the City to the employees, agents, representatives, or subconsultants of the Consultant. The Consultant will be solely and entirely responsible for its acts and for the acts of its agents, employees, representatives and subconsultants during the performance of this Agreement. The City may, during the term of this Agreement, engage other independent contractors to perform the same or similar work that the Consultant performs hereunder.

4. Duration of Work. The City and the Consultant agree that work will begin on the tasks described in **Exhibit A** immediately upon execution of this Agreement. The parties agree that the work described in **Exhibit A** shall be completed by October 8, 2012; provided however, that additional time shall be granted by the City for excusable days or extra work.

5. Termination. The City reserves the right to terminate this Agreement at any time upon ten (10) days written notice to the Consultant. Any such notice shall be given to the address specified above. In the event that this Agreement is terminated by the City other than for fault on the part of the Consultant, a final payment shall be made to the Consultant for all services performed. No payment shall be made for any work completed after ten (10) days following receipt by the Consultant of the notice to terminate. In the event that services of the Consultant are terminated by the City for fault on part of the Consultant, the amount to be paid shall be determined by the City with consideration given to the actual cost incurred by the Consultant in performing the work to the date of termination, the amount of work originally required which would satisfactorily complete it to date of termination, whether that work is in a form or type which is usable to the City at the time of termination, the cost of the City of employing another firm to complete the work required, and the time which may be required to do so.

6. Non-Discrimination. The Consultant agrees not to discriminate against any customer, employee or applicant for employment, subcontractor, supplier or materialman,

because of race, color, creed, religion, national origin, marital status, sex, sexual orientation, age or handicap, except for a bona fide occupational qualification. The Consultant understands that if it violates this provision, this Agreement may be terminated by the City and that the Consultant may be barred from performing any services for the City now or in the future.

7. Indemnification.

A. The Consultant agrees to hold harmless, indemnify and defend the City, its officers, agents, and employees, from and against any and all claims, losses, or liability, for injuries, sickness or death of persons, including employees of the Consultant, or damage to property, arising out of any willful misconduct or negligent act, error, or omission of the Consultant, its officers, agents, subconsultants or employees, in connection with the services required by this Agreement; provided, however, that:

1. The Consultant's obligations to indemnify, defend and hold harmless shall not extend to injuries, sickness, death or damage caused by or resulting from the sole willful misconduct or sole negligence of the City, its officers, agents or employees; and

2. The Consultant's obligations to indemnify, defend and hold harmless for injuries, sickness, death or damage caused by or resulting from the concurrent negligence or willful misconduct of the Consultant and the City, or of the Consultant and a third party other than an officer, agent, subconsultant or employee of the Consultant, shall apply only to the extent of the negligence or willful misconduct of the Consultant.

B. It is further specifically and expressly understood that the indemnification provided herein constitutes the consultant's waiver of immunity under industrial insurance, title 51 RCW, solely for the purposes of this indemnification. The parties further acknowledge that they have mutually negotiated this waiver. The consultant's waiver of immunity under the provisions of this section does not include, or extend to, any claims by the consultant's employees directly against the consultant.

C. The provisions of this section shall survive the expiration or termination of this Agreement.

8. Insurance.

A. The Consultant shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the Consultant's own work including the work of the Consultant's agents, representatives, employees, subconsultants or subcontractors.

B. Before beginning work on the project described in this Agreement, the Consultant shall provide evidence, in the form of a Certificate of Insurance, of the following insurance coverage and limits (at a minimum):

1. Business auto coverage for any auto no less than a $1,000,000 each accident limit, and
2. Commercial General Liability insurance no less than $1,000,000 per occurrence with a $2,000,000 aggregate. Coverage shall include, but is not limited to, contractual liability, products and completed operations, property damage, and employers liability, and
3. Professional Liability insurance with no less than $1,000,000 per occurrence. All policies and coverages shall be on an occurrence basis by an 'A' rated company licensed to conduct business in the State of Washington.

C. The Consultant is responsible for the payment of any deductible or self-insured retention that is required by any of the Consultant's insurance. If the City is required to contribute to the deductible under any of the Consultant's insurance policies, the Contractor shall reimburse the City the full amount of the deductible within 10 working days of the City's deductible payment.

D. The City of Gig Harbor shall be named as an additional insured on the Consultant's commercial general liability policy. This additional insured endorsement shall be included with evidence of insurance in the form of a Certificate of Insurance for coverage necessary in Section B. The City reserves the right to receive a certified and complete copy of all of the Consultant's insurance policies upon request.

E. Under this Agreement, the Consultant's insurance shall be considered primary in the event of a loss, damage or suit. The City's own comprehensive general liability policy will be considered excess coverage with respect to defense and indemnity of the City only and no other party. Additionally, the Consultant's commercial general liability policy must provide cross-liability coverage as could be achieved under a standard ISO separation of insured's clause.

F. The Consultant shall request from his insurer a modification of the ACORD certificate to include language that prior written notification will be given to the City of Gig Harbor at least 30 days in advance of any cancellation, suspension or material change in the Consultant's coverage.

9. Ownership and Use of Work Product. Any and all documents, drawings, reports, and other work product produced by the Consultant under this Agreement shall become the property of the City upon payment of the Consultant's fees and charges therefore. The City shall have the complete right to use and re-use such work product in any manner deemed appropriate by the City, provided, that use on any project other than that for which the work product is prepared shall be at the City's risk unless such use is agreed to by the Consultant.

10. City's Right of Inspection. Even though the Consultant is an independent contractor with the authority to control and direct the performance and details of the work authorized under this Agreement, the work must meet the approval of the City and shall be

subject to the City's general right of inspection to secure the satisfactory completion thereof. The Consultant agrees to comply with all federal, state, and municipal laws, rules, and regulations that are now effective or become applicable within the terms of this Agreement to the Consultant's business, equipment, and personnel engaged in operations covered by this Agreement or accruing out of the performance of such operations.

11. Records. The Consultant shall keep all records related to this Agreement for a period of three years following completion of the work for which the Consultant is retained. The Consultant shall permit any authorized representative of the City, and any person authorized by the City for audit purposes, to inspect such records at all reasonable times during regular business hours of the Consultant. Upon request, the Consultant will provide the City with reproducible copies of any such records. The copies will be provided without cost if required to substantiate any billing of the Consultant, but the Consultant may charge the City for copies requested for any other purpose.

12. Work Performed at the Consultant's Risk. The Consultant shall take all precautions necessary and shall be responsible for the safety of its employees, agents, and subconsultants in the performance of the work hereunder and shall utilize all protection necessary for that purpose. All work shall be done at the Consultant's own risk, and the Consultant shall be responsible for any loss of or damage to materials, tools, or other articles used or held by the Consultant for use in connection with the work.

13. Non-Waiver of Breach. The failure of the City to insist upon strict performance of any of the covenants and agreements contained herein, or to exercise any option herein conferred in one or more instances shall not be construed to be a waiver or relinquishment of said covenants, agreements, or options, and the same shall be and remain in full force and effect.

14. Resolution of Disputes and Governing Law.

A. Should any dispute, misunderstanding, or conflict arise as to the terms and conditions contained in this Agreement, the matter shall first be referred to the City Engineer or Director of Operations and the City shall determine the term or provision's true intent or meaning. The City Engineer or Director of Operations shall also decide all questions which may arise between the parties relative to the actual services provided or to the sufficiency of the performance hereunder.

B. If any dispute arises between the City and the Consultant under any of the provisions of this Agreement which cannot be resolved by the City Engineer or Director of Operations determination in a reasonable time, or if the Consultant does not agree with the City's decision on the disputed matter, jurisdiction of any resulting litigation shall be filed in Pierce County Superior Court, Pierce County, Washington. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. The prevailing party in any such litigation shall be entitled to recover its costs, including reasonable attorney's fees, in addition to any other award.

15. Written Notice. All notices required to be given by either party to the other under this Agreement shall be in writing and shall be given in person or by mail to the addresses set forth below. Notice by mail shall be deemed given as of the date the same is deposited in the United States mail, postage prepaid, addressed as provided in this paragraph.

CONSULTANT:
Percival & Associates, LLC
ATTN:
Mark Percival
P.O. Box 2272
Tacoma, WA 98401

City of Gig Harbor
ATTN: Steve Misiurak
City Engineer
3510 Grandview Street
Gig Harbor, WA 98335
(253) 851-6170

16. Subcontracting or Assignment. The Consultant may not assign or subcontract any portion of the services to be provided under this Agreement without the express written consent of the City. If applicable, any subconsultants approved by the City at the outset of this Agreement are named on **Exhibit C** attached hereto and incorporated herein by this reference as if set forth in full.

17. Entire Agreement. This Agreement represents the entire integrated agreement between the City and the Consultant, superseding all prior negotiations, representations or agreements, written or oral. This Agreement may be modified, amended, or added to, only by written instrument properly signed by both parties hereto.

IN WITNESS WHEREOF, the parties have executed this Agreement this _____ day of _____, 20____.

CONSULTANT

By:_____
Its:_____

CITY OF GIG HARBOR

By:_____
Mayor Charles L. Hunter

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

EXHIBIT A

ANTICIPATED SCOPE OF WORK

Site visit

Exterior observation only, on-site, from curb.

The Appraiser shall have the Property Owner present during the site visit and appraisal.

Valuation approaches

Sales comparison approach

Note: Appraiser shall use all approaches necessary to develop a credible opinion of value.

APPRAISAL REPORT

Report option

Summary Appraisal Report

Form or format:

GP Land Form.

CONTACT FOR PROPERTY ACCESS, IF APPLICABLE

[name, phone number] Claude Reme - (253) 988-5754

DELIVERY DATE

No later than 9/8/2012.

DELIVERY METHOD

U.S. mail / Hand delivery / E-mail

NUMBER OF COPIES

03.

EXHIBIT B

SCHEDULE OF RATES AND ESTIMATED HOURS

Lump sum appraisal fee of $750.00.

GIG HARBOR
"THE MARITIME CITY"

Business of the City Council
City of Gig Harbor, WA

Subject: Comcast Franchise Renewal Ordinance – First Reading

Proposed Council Action: Consider Ordinance Renewing Comcast Franchise for Cable Television Services in the City

Dept. Origin:

Prepared by:

For Agenda of:
Exhibits: Draft ordinance

Initial & Date

Concurred by Mayor: CLH 9/19/12
Approved by City Administrator: 12 - 9/19/12
Approved as to form by City Atty: ELANA ZANA
Approved by Finance Director: 9/18/12
Approved by Department Head: _____

Expenditure Required	$0	Amount Budgeted	$0	Appropriation Required	$0

INFORMATION / BACKGROUND

Ordinance No. 1054 granted a five year franchise to Comcast of Puget Sound Inc., effective July 31, 2006. Comcast has continued to provide cable television services to the residents of the City of Gig Harbor following the expiration of the franchise in accordance with the franchise provisions. Comcast and the City have negotiated a renewal franchise for Comcast to continue to provide cable television services to the residents of the City.

The following is a list of the substantial changes in the renewal franchise as compared to the franchise approved by the City Council in July 2006:

- Expanded definition of Gross Revenues (to be consistent with other Washington franchises)
- Competitive Equity language required by Comcast in all of its newly renewed franchises
- Extended term of 7 years
- Additional public works provisions regarding general construction and maintenance requirements
- Enhanced indemnification provisions for the City
- Increased insurance limits
- Reduction in performance bond because Comcast does not plan on a significant build-out during the term of this franchise
- Deletion of I-Net provisions

- Addition of a commitment by Comcast to offer a discount to low income residents
- Revised provision regarding release of information pursuant to a public records request
- Updated provisions related to a change in control or transfer of the franchise from Comcast to another provider
- Provision of Performance Reports (upon request)

This list is a non-exclusive list of the changes. A complete detail of all of the modifications can be provided upon request.

As part of the renewal process the City discovered an underpayment in Franchise Fees which has since been corrected by Comcast (and the City has received a check from Comcast for those fees in the amount of $105,868.86).

FISCAL CONSIDERATION

None

BOARD OR COMMITTEE RECOMMENDATION

None

RECOMMENDATION / MOTION

Move to: Consider ordinance at First Reading and bring back for adoption at Second Reading.

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF GIG HARBOR, WASHINGTON, GRANTING TO COMCAST OF PUGET SOUND, INC., ITS SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AND FRANCHISE FOR THE TERM OF SEVEN YEARS, TO ERECT, MAINTAIN, AND OPERATE A CABLE SYSTEM IN THE CITY OF GIG HARBOR, WASHINGTON; TO ERECT, MAINTAIN, AND OPERATE ITS POLES, TOWERS, ANCHORS, WIRES, CABLES, ELECTRONIC CONDUCTORS, CONDUITS, MANHOLES, AND OTHER STRUCTURES AND APPURTENANCES IN, OVER, UNDER, ALONG, AND ACROSS THE PRESENT AND FUTURE PUBLIC RIGHTS-OF-WAY IN THE CITY; PRESCRIBING COMPENSATION FOR THE RIGHTS, PRIVILEGES, AND FRANCHISE CONFERRED HEREUNDER; PRESCRIBING THE CONDITIONS GOVERNING THE OPERATION OF THE BUSINESS INSOFAR AS IT AFFECTS THE USE OF PUBLIC PROPERTY FOR THE PURPOSE OF SUCH BUSINESS; INSTALLATION, UPGRADE, MAINTENANCE, AND OPERATION OF SAID CABLE SYSTEM AND BUSINESS; CONTAINING OTHER PROVISIONS RELATING TO THE SUBJECT; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, by Ordinance No. 1054, the City of Gig Harbor granted a five year franchise to Comcast of Puget Sound Inc., effective July 31, 2006; and

WHEREAS, Grantee has provided cable services within the City under such franchise; and

WHEREAS, Grantee has requested renewal of its franchise in accordance with Section 626 of the Cable Act to allow continued operation of its cable system in the City; and

WHEREAS, the City Council finds from all the evidence that Grantee meets the legal, financial, and technical qualifications, as well as other qualifications, necessary to assure that the residents of the City of Gig Harbor will receive the best available cable service provided in accordance with this franchise; and

WHEREAS facts and circumstances developed or discovered through independent study and investigation, the City Council now deems it appropriate and in the best interest of the City and its inhabitants that the franchise be renewed with Grantee; now, therefore

THE CITY COUNCIL OF THE CITY OF GIG HARBOR DO ORDAIN AS FOLLOWS:

SECTION 1
ENACTMENT

§1.01. Recitals. The facts and recitations set forth in the preamble of this Ordinance are hereby adopted, ratified, and confirmed.

§1.02. Short Title. This Ordinance shall be known and may be cited as "The City of Gig Harbor Cable Service Franchise Ordinance." Within this document, it shall be referred to as the "Franchise."

SECTION 2
DEFINITIONS

§2.01. Terms. Terms, phrases, words, and abbreviations not defined herein shall be construed in accordance with the Cable Act, and if not therein defined, then in accordance with the ordinances of the City or their customary usage and meaning. When not inconsistent with the context, words used in the singular shall include the plural, words in the plural shall include the singular, and words used or defined in one tense or form shall include other tenses or derivative forms. The headings contained in this Franchise are to facilitate reference only, do not form a part of this Franchise, and shall not in any way affect the construction or interpretation hereof. The words "shall," "will," and "must" are mandatory, and the word "may" is permissive or directory.

A. Affiliate. When used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.

B. Basic Cable Service. The Cable Service tier, which includes the retransmission of local television broadcast signals, as well as the PEG Channels required by this Franchise.

C. Cable Act. The Cable Communications Policy Act of 1984 as amended and as may be amended from time to time during the term of this Franchise (47 U.S.C. § 521 et seq., as amended).

D. Cable Operator. Any Person or group of Persons (i) who provides Cable Service over a Cable System and directly or through one or more affiliates owns a significant interest in the Cable System, or (ii) who otherwise Controls or is responsible for, through any arrangement, the management and operation of such a Cable System.

E. Cable Service. The transmission to Subscribers of Video Programming, or Other Programming Service and Subscriber interaction, if any, which is required for the selection or use of such Video Programming or Other Programming Service.

F. Cable System. A facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide Cable Service which includes, but is not limited to, Video Programming and which is provided to multiple Subscribers within a community, but such term does not include facilities that qualify under the exceptions put forth in 47 U.S.C. §522(7). Unless otherwise specified, "Cable System" is used in this Franchise to refer to the particular cable system authorized under the Franchise and operated by the Grantee or any Affiliate who is a Cable Operator within the Franchise Area.

G. Channels. A portion of the frequency band capable of carrying a video programming service or a combination of video programming services, whether by analog or digital signal.

H. City Engineer. The Gig Harbor City Engineer or his/her designee.

I. Control. The actual working control of Grantee in whatever manner exercised. Without limiting the generality of the foregoing, for the purposes hereof, a change in Control shall be deemed to have occurred at any point in time when there is: (i) a change in working or effective voting control, in whatever manner effectuated, of the Grantee; or (ii) an agreement of the holders of voting stock or rights of the Grantee which effectively vests or assigns policy decision-making in any Person other than the Grantee.

J. Days. Calendar days unless otherwise specified.

K. Drop. An aerial or underground portion of the Cable System which extends from the tap to the ground block of the Subscriber's residence or business.

L. Educational Access Channel. The non-commercial Channel(s) on the Cable System which are reserved for educational users and used in accordance with the rules and procedures established by the City or its designee.

M. Expanded Basic Cable Service. The tier of cable programming services which is offered for an additional monthly charge over and above the charge for Basic Cable Service.

N. Federal Communications Commission or FCC. The agency as presently constituted by the United States Congress or any successor agency with jurisdiction over Cable Service matters.

O. Franchise Area. The incorporated area of the City and such additional areas as may be included in the corporate limits of the City during the term of this Franchise.

P. Government Access Channel. The non-commercial Channel(s) on the Cable System which are reserved for government users and used in accordance with the rules and procedures established by the City or its designee.

Q. Grantee. Comcast of Puget Sound, Inc., also known as Comcast, or its lawful successor.

R. Gross Revenue. Any and all revenue as determined in accordance with generally accepted accounting principles (GAAP) derived by the Grantee or any Cable Operators of the Cable System, including an Affiliate of Grantee, from the operation of the Cable System to provide Cable Services within the Franchise Area.

By way of illustration and not limitation, Gross Revenue includes all fees charged Subscribers for any and all Cable Services provided by Grantee over the Cable System such as Basic Cable Service revenues, Expanded Basic Cable Service revenues, Premium Cable Service revenues, revenues derived from any other Cable Service tier, revenues resulting from fees charged to Subscribers for any optional, per-Channel, or per-program services, revenues from leased Access Channels, revenues received from any music services that are deemed to be a Cable Service over the Cable System, revenues from the sale of program guides; revenues resulting from connection, modification or reconnection to the Cable System in order to receive Cable Services, revenues from service calls, revenues resulting from the lease, rental, or use of Cable System equipment used to provide Cable Service, revenues from late, delinquent, or other administrative fees applied to Cable Services, and Franchise fees assessed on Cable Services which are collected from Subscribers.

Gross Revenues shall also include advertising sales, minus commissions due to advertising agencies that arrange for the advertising buy as calculated under GAAP and home shopping revenues to the extent consistent with GAAP.

Gross Revenues shall not include (i) any tax, fee or assessment of general applicability collected by the Grantee from Subscribers for pass-through to a government agency; (ii) unrecovered bad debt, and (iii) those payments described in subsection 14.06 of this Franchise.

S. Other Programming Service. Information that a Cable Operator makes available to all Subscribers generally.

T. Master Use Permit Ordinance. Chapter 12.18 of the Gig Harbor Municipal Code.

U. Normal Operating Conditions. Those service conditions that are within the control of the Grantee. Those conditions which are not within the control of the Grantee include, but are not limited to, natural disasters, labor strikes or slowdowns, civil disturbances, telephone network outages which are not caused by Grantee or its Affiliate, commercial power outages, and severe or unusual weather conditions. Those conditions which are within the control of Grantee include, but are not limited to, special promotions, pay-per-view events, changes in rates, regular or seasonal demand periods, changes in the billing cycles, changes in channel lineups that are within the Grantee's control, backup power during power outages, and maintenance or upgrade of the Cable System.

V. Premium Cable Services. The delivery over the Cable System of programming to Subscribers for a fee or charge over and above the charge for Basic Cable Service or Expanded Basic Cable Programming Service on a per program, per Channel, per connection or per time period of connection basis.

W. PEG Channels. All Public Access Channels, Educational Access Channels and Government Access Channels, collectively.

X. PEG Programming. Non-commercial programming produced for cable casting over the PEG Channels.

Y. Person. Any natural person, firm, partnership, association, corporation, company, joint stock company, trust corporation, governmental entity, or organization of any kind.

Z. Public Access Channel. The non-commercial Channel(s) on the Cable System which are reserved for public users and used in accordance with the rules and procedures established by the City, or its designee.

AA. Public Rights-of-Way. The surface, the air space above the surface, and the area below the surface of any public street, highway, freeway, land path, parkway, circle, lane, alley, sidewalk, boulevard, drive, bridge, tunnel, easement or similar property in which the City holds any property interest or exercises any rights of management or control and which, consistent with the purposes for which it was acquired or dedicated, may be used for the installation, repair, and maintenance of a Cable System. No reference in this Franchise to a Public Right-of-Way shall be deemed to be a representation or guarantee by the City that its interests or other rights in such property are sufficient to permit its use for the installation, repair, and maintenance of a Cable System, and the Grantee shall be deemed to gain only those rights which the City has the undisputed right and power to give.

AB. Subscriber. Any Person lawfully receiving Cable Service delivered by means of the Grantee's Cable System.

A.C. Video Programming. Programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

SECTION 3
GRANT OF AUTHORITY

§3.01. Use of Public Rights-of-Way. There is hereby granted to Grantee the right, privilege, and Franchise to have, acquire, construct, reconstruct, upgrade, repair, maintain, use, and operate in the City a Cable System, and to have, acquire, construct, reconstruct, repair, maintain, use, and operate in, over, under, and along the present and future Public Rights-of-Way of the City all necessary or desirable poles, towers, anchors, wires, cables, electronic conductors, underground conduits, manholes, and other structures and appurtenances necessary for the construction, maintenance, and operation of a Cable System in the Franchise Area. Grantee or Affiliates shall not install or construct facilities within the City's Public Rights-of-Way which are not authorized by this Franchise or lawfully allowed by applicable local, state, or federal law.

§3.02. Additional Services/Compensation. By granting this Franchise, the City does not waive and specifically retains any right to regulate and receive compensation as allowed by law for services offered over the Cable System which are not Cable Services. Upon request, Grantee shall inform City of any non-Cable and/or Cable Services offered over the Cable System of which Grantee or its Affiliates are aware. By accepting this Franchise, Grantee does not waive any right it has under law to challenge the City's requirement for authorization to provide non-Cable Services.

§3.03. Responsibility for Costs. Except as expressly provided otherwise, any act that Grantee is required to perform under this Franchise shall be performed at its cost. If Grantee fails to perform work that it is required to perform within the time provided for performance or a cure period, the City may perform the work and bill the Grantee for documented costs. The Grantee shall pay the amounts billed within forty-five (45) days. The parties agree that any amounts paid pursuant to this Section are not Franchise fees and fall within one or more of the exceptions to the definition of Franchise fee under federal law. Nothing in this section is intended to affect in any way (by expansion or contraction) Grantee's rights under applicable law governing rates.

§3.04. Publication Costs. Any and all costs of publication related to this Franchise which may be required by law or action of City Council shall be borne by Grantee, subject to the five percent (5%) limit established by Section 622 of the Cable Act. Any payments made by the City under this provision are to be reimbursed to the City within thirty (30) days of Grantee's receipt of the invoice.

§3.05. Franchise Non-Exclusive. The rights, privileges, and Franchise granted hereby are not exclusive. This Franchise shall not be construed as any limitation upon the right of the City, through its proper officers, to grant to other persons or corporations, including itself, rights, privileges or authority the same as, similar to or different from the rights, privileges or authority herein set forth, in the same or other streets and public ways by Franchise, permit or otherwise. The City shall not authorize or permit any Person providing Video Programming and/or Cable Services to enter into the Public Rights-of-Way in any part of the City on terms or conditions more favorable or less burdensome to such Person than those applied to the Grantee pursuant to this Franchise, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

§3.06. Grant of Other Franchises; Competitive Equity.

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

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

C. In the event that a wireline multichannel video programming distributor provides video service to the residents of the City under the authority granted by federal, State legislation, or other regulatory entity, Grantee shall have a right to request Franchise amendments that relieve Grantee of regulatory burdens that create a competitive disadvantage to Grantee. In requesting amendments, Grantee shall file a petition seeking to amend the Franchise. Such

petition shall: (1) indicate the presence of such wireline competitor; (2) identify the basis for Grantee's belief that certain provisions of the Franchise place Grantee at a competitive disadvantage; and (3) identify the regulatory burdens to be amended or repealed in order to eliminate the competitive disadvantage. The City shall not unreasonably withhold consent to Grantee's petition.

SECTION 4
SERVICE AVAILABILITY

§4.01. Service Availability. The Grantee shall provide Cable Service throughout the entire Franchise Area, subject to the provision below.

§4.02. Annexations. If the City annexes any contiguous area which is being provided Cable Service by the Grantee or its Affiliates, the annexed area will be subject to the provisions of this Franchise upon the effective date of the annexation; provided, however, that Grantee shall be allowed a reasonable time under the circumstances to make any required modifications to the Cable System, Cable Services, billing system, etc., as may be required to accommodate such change, and provided that if the area is serviced by an Affiliate, a transfer of ownership of the Cable System in that area to the Grantee shall not be required by the City. If the annexed area is being provided Cable Service by another provider, Grantee shall have the right, but not the requirement, to extend its Cable System to the annexed area. If the annexed area is not being provided Cable Services, the Grantee shall be required to provide service within one (1) year of the annexation.

§4.03. Installation and Extension Policy

A. In general, except as otherwise provided herein, Grantee shall provide a standard installation of Cable Service within seven (7) days of a request by any Person within its Franchise Area. For purposes of this Section a request shall be deemed made on the date of signing a service agreement, receipt of funds by Grantee, receipt of a written request by Grantee or receipt by Grantee of a verified verbal request. Grantee shall provide such service:

(1) With no line extension charge except as specifically authorized elsewhere in this Franchise.

(2) At a non-discriminatory installation charge for a standard installation, consisting of a one hundred twenty-five (125) foot aerial or sixty (60) foot Underground drop connecting to the exterior demarcation point for Subscribers, with additional charges for non-standard installations computed according to subsection B below.

B. No Customer shall be refused service arbitrarily. However, for unusual circumstances, such as the existence of more than one hundred twenty-five

(125) aerial feet or sixty (60) underground feet of distance from distribution cable to connection of service to Customers, or a density of less than twenty-five (25) residences per cable-bearing mile of aerial trunk or distribution cable or sixty (60) residences per cable-bearing mile of underground trunk or distribution cable, service shall be made available on the basis of a capital contribution in aid of construction, including cost of material, labor and easements. For the purpose of determining the amount of capital contribution in aid of construction to be borne by the Grantee and Customers in the area in which service shall be expanded, the Grantee will contribute an amount equal to the construction and other costs per mile, multiplied by a fraction whose numerator equals the actual number of residences per cable-bearing mile of its trunk or distribution cable and whose denominator equals twenty-five (25) for an aerial extension or sixty (60) for an underground extension. Customers who request service hereunder will bear the remainder of the construction and other costs on a pro rata basis. The Grantee may require that the payment of the capital contribution in aid of construction borne by such potential Customers be paid in advance.

SECTION 5
TERM, EVALUATION, AND RENEWAL

§5.01. Term of Franchise. This Franchise shall be in full force and effect for a term of seven (7) years commencing on the effective date of Ordinance No. ____.

§5.02. Performance Evaluations. In order to assure that the Grantee is complying with the terms of this Franchise and with the character, quality, and efficiency of service to be rendered, given, performed, and furnished under this Franchise, and in order to promote a sharing of information between the City Council and the Grantee, the City may schedule a performance evaluation once during any seven (7) year term of the Franchise, subject to §5.03 below, in accordance with the following process:

A. At least one hundred twenty (120) days prior to each performance evaluation, the City shall notify the Grantee of the date, time and location of the evaluation. Such notice shall include specification of any additional information to be provided by the Grantee pursuant to paragraph B below. Unless specifically waived by the City Council, attendance of Grantee's duly authorized representative at these meetings shall be mandatory.

B. Within sixty (60) days from receipt of such notification, the Grantee shall file a report with the City that is certified by a representative of the Grantee knowledgeable of the operations of Grantee within the City, in reasonable detail, specifically addressing, at a minimum, the following areas:

(1) compliance with the requirements regarding technical performance and testing, as provided in §12.02 of this Franchise;

(2) compliance with the PEG Channel requirements, as provided in §14.01 and §14.02;

(3) compliance with the FCC customer service standards;

(4) a comparison of rates to any benchmarks or standards set by federal, state, or local agencies having jurisdiction; and

(5) any other topic deemed material or relevant by the City for its enforcement of this Franchise, subject to the confidentiality provisions in §18.03.

C. All reports to be prepared under this subsection and submitted by Grantee shall be based on information since the previous performance evaluation up to and inclusive of the most current quarter available and not data that ends more than twelve (12) months before the time of the performance evaluation.

D. Following receipt of the report, but not less than thirty (30) days prior to the performance evaluation, the City may request additional information, clarification or detailed documentation concerning those topics identified for inclusion in the performance evaluation. Grantee shall make reasonable effort to provide such additional information to the City prior to the meeting. In the event that the information cannot be made available prior to the performance evaluation, Grantee shall notify the City, in writing, explaining the reasons for such delay.

E. The City Council shall hear any interested Persons during such performance evaluation. The Grantee shall be entitled to all the rights of due process consistent with the City proceedings including, but not limited to, the right to present evidence and the right to be represented by counsel.

§5.03. Renewal. Grantee and City agree that the Cable Act shall govern Franchise renewal proceedings at the time of renewal.

SECTION 6
COMPLIANCE WITH CITY, STATE, AND FEDERAL LAWS

§6.01. Compliance with Applicable Laws. Grantee shall at all times comply with all laws, rules, and regulations of the City, state and federal governments and any administrative agencies thereof which are applicable to all businesses in the City and/or all users of the Public Rights-of-Way. The express provisions of this Franchise constitute a valid and enforceable contract between the parties.

§6.02. Subject to Police Power of the City. Construction, maintenance, and operation of Grantee's Cable System and all property of Grantee subject to the provisions of this Franchise shall be subject to all lawful police powers, rules, and regulations of the City. The City shall have the power at any time to order and require Grantee to remove or abate any pole, line, tower, wire, cable, guy, conduit, electric conductor, or any other structure or facility that is dangerous to life or property. In the event Grantee, after written notice, fails or refuses to act within fifteen (15) days of such written notice, City shall have the power to remove or abate the same at the expense of Grantee, all without compensation or liability for damages to Grantee except in instances when the damage is caused by negligence or willful misconduct of the City or its agents.

§6.03. Notification in the Event of Preemptive Law. Grantee shall use its best efforts to notify the City of any change in law that materially affects Grantee's rights or obligations under this Franchise.

SECTION 7
CONDITIONS OF PUBLIC RIGHTS-OF-WAY OCCUPANCY

§7.01. Use. All structures, wires, cables, equipment, and facilities erected or maintained by Grantee within the City shall be located as to cause minimum interference with the proper and intended use of the Public Rights-of-Way and with the rights or reasonable convenience of the owners or occupants of property which adjoins any of such Public Rights-of-Way. The location of all poles, towers, anchors, wires, cables, electronic conductors, conduits, manholes and other structures and appurtenances in, over, under, along, and across the present and future Public Rights-of-Way in the City shall be fixed under the supervision of the City or an authorized agent appointed by the City. Grantee agrees to comply with all other City laws, rules, or ordinances that govern the use of Public Rights-of-Way that may be lawfully promulgated by the City during the franchise term. In the event that there is substantial conflict between the requirements of this Franchise and any enacted Public Rights-of-Way standards, the franchise shall govern.

§7.02. Excavation. Grantee may excavate only for the construction, installation, expansion, repair, removal, and maintenance of all or a portion of its facilities used to provide Cable Service under this Franchise. In the event a permit may ordinarily be required

for any excavation, a permit shall not be required for the installation of facilities to initiate service to a customer's property, or repair or maintenance of existing facilities unless such installation, repair or maintenance requires the breaking of pavement, excavation or boring. Grantee shall provide the City written notice within fifteen (15) days of any proposed breaking of pavement, excavation, or boring on any Public Rights-of-Way other than for the purposes of installation of facilities to initiate service to a customer's property, or repair or maintenance of existing facilities, prior to the commencement thereof.

Grantee shall provide the City with notice following any emergency maintenance that required the breaking of pavement, excavation, or boring on the Public Right-of-Way. Property owners or occupants of adjoining property shall be given reasonable notice. No Public Rights-of-Way shall be encumbered by construction, maintenance, removal, restoration, or repair work by Grantee for a longer period than shall be necessary to execute such work. When the Grantee shall make or cause to be made excavations or shall place obstructions in any Public Rights-of-Way, the public shall be protected by barriers and lights placed, erected, and maintained by the Grantee in accordance with any existing or future City, state, or federal requirements.

§7.03. Restoration. Grantee shall warrant any restoration work performed by or for Grantee in the Public Rights-of-Way or on other public property for one (1) year. If restoration is not satisfactorily performed by the Grantee within a reasonable time, the City may, after a 48-hour notice to the Grantee, or without notice where the disturbance or damage may create a risk to public health or safety, cause the repairs to be made and recover the cost of those repairs from the Grantee. Within forty-five (45) days of receipt of an itemized list of those costs, including the costs of labor, materials and equipment, the Grantee shall reimburse the City in a manner agreeable to both parties.

§7.04. Relocation. Whenever by reason of the construction, repair, maintenance, relocation, widening, raising, or lowering of the grade of any Public Rights-of-Way by the City or by the location or manner of construction, reconstruction, maintenance, or repair of any public property, structure, or facility by the City, it shall be deemed necessary by the City for Grantee to move, relocate, change, alter, or modify any of its facilities or structures, such change, relocation, alteration, or modification shall be promptly made by Grantee upon thirty 30 days' written notice by the City. If the City requires Grantee to relocate its facilities located within the Public Rights-of-Way, the City shall make a reasonable effort to provide Grantee with an alternate location within the Public Rights-of-Way. Reasonable effort shall mean a review by the City Engineer of the available construction space in or under the Public Rights-of-Way. After making provision for the foreseeable future capacity requirements for City owned utilities and other public infrastructure of the City, the City Engineer shall allot any available excess among the City's franchisees on a first come, first serve basis with Grantee being given preference along with any other franchisee with similar right to relocation consideration. In the event that limited space is available for multiple relocated

franchised facilities, and all franchisees have an equal right to be considered for relocation, all available space shall be allotted in the same proportion as space was allotted in the Public Rights-of-Way from which the facilities are to be removed. Grantee shall pay the cost of relocating its facilities unless there are funds generally available to affected users of the Public Rights-of-Way for reimbursement of such costs, in which case Grantee shall be entitled to its share of such funding. If the funds are controlled by another governmental entity, the City shall make application for such funds on behalf of the Grantee, if Grantee cannot make such application itself. In the event Grantee, after such notice, fails or refuses to commence, pursue, or complete such relocation work within a reasonable time, the City shall have the authority, but not the obligation, to remove or abate such structures or facilities and to require Grantee to pay to the City the reasonable cost of such removal or abatement, all without compensation or liability for damages to Grantee unless such damage was caused by the willful misconduct of the City or its agents. For the purposes of this Section 7.04, "reasonable time" means twenty-one (21) days unless Grantee provides notice to the City of its inability to commence, pursue or complete such relocation within twenty-one (21) days due to extenuating circumstances beyond Grantee's control. The parties should then meet and discuss a timeframe in which such relocation shall occur.

§7.05. Temporary Removal of Wire for Building Moving. Upon written request of any Person holding a building moving permit issued by the City, Grantee shall remove, raise, or lower its wires and cables temporarily to permit the moving of houses, buildings, or other bulky structures. The reasonable expense of such temporary removal, raising, or lowering shall be paid by the benefited Person, and Grantee may require such payment in advance, Grantee being without obligation to remove, raise, or lower its wires and cables until such payment shall have been made. Grantee shall be given written notice, at least five (5) business days in advance, to arrange for such temporary wire and cable adjustments.

§7.06. Tree Trimming. The Grantee shall have the authority to trim trees or other natural growth overhanging any of the Cable System in the Franchise Area to prevent branches from coming into contact with the Grantee's wires, cables or other equipment that may be damaged due to continued contact. The Grantee shall reasonably compensate the City or property owner for any damages caused by such trimming, or shall, at its own expense, replace all trees or shrubs damaged as a result of such trimming in a mutually agreed manner with the property owner. From time to time, the City may pass ordinances regulating tree trimming or removal on or along City property, and Grantee shall comply with these ordinances.

§7.07. Approval of Plans and Specifications. In accordance with the City's right-of-way use regulations, Grantee shall provide complete plans and specifications for all construction (with the exception of individual drops) within Public Rights-of-Way. Approval of plans and specifications shall not be unreasonably delayed or denied. In the event of rejection, Grantee shall submit revised plans and specifications for

approval. This provision shall apply to each construction sequence if the construction is accomplished in phases.

§7.08. Underground Installation.

A. In those portions of the City where telephone lines and electric utility lines are both located underground, Grantee's lines, cables, and wires shall also be placed underground. Grantee's lines, cables, wires, and similar facilities located above ground prior to the effective date of this Franchise shall be relocated underground by Grantee at the same time that all other above-ground utility lines (e.g., electric and telecommunications lines) located on the poles with Grantee's facilities are required to be placed underground. Grantee shall pay the cost of relocating its facilities unless there are funds generally available to affected users of the Public Rights-of-Way. It shall be the policy of the City that existing poles for electric and communications purposes be utilized by Grantee whenever possible.

B. Whenever feasible and when a pathway is needed by Grantee, and at Grantee's sole discretion, City shall allow Grantee to place conduit and conduit appurtenances in trenches provided by City for City projects. The costs of providing and installing conduits and associated appurtenances shall be the sole responsibility of Grantee. With respect to City projects, the costs of City trenching, including side trenching and excavation for vault and equipment placement, backfill, and restoration, shall be the sole responsibility of the City.

§7.09. Facilities Location.

A. From time to time, the City, or its representatives, may request identification of the specific location of certain Grantee Cable System facilities. The Grantee agrees to respond, if possible, to such request within forty-eight (48) hours of the receipt of the request. In the event that Grantee cannot locate such information within forty-eight (48) hours, Grantee shall notify the City to alert them. If Grantee fails to notify the City of its facilities locations within forty-eight (48) hours, and damage is caused to Grantee's facilities as a direct result, the Grantee shall hold the City harmless from all liability, damage, cost or expense resulting from the City's actions in this regard unless such damage was caused by the willful misconduct of the City or its agents.

B. Within sixty (60) days of the effective date of this Franchise, Grantee shall provide the City with a current route map of the Cable System located within the City. Upon City request, but no more often than once each year during the term of this Franchise, the Grantee shall provide the City with an updated route map showing the changes that have occurred in the Cable System.

C. Grantee agrees to obtain facilities location information from other users of the Public Rights-of-Way prior to Grantee's construction, reconstruction, maintenance, operations and repair of the Cable System facilities.

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

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

A. Grantee shall ensure that all cable drops are properly bonded and grounded at the home, consistent with applicable code requirements in effect at the time of the work being performed. All non-conforming or non-performing cable drops shall be replaced by Grantee as necessary to conform to applicable code.

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

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

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

§7.12 Emergency Relocation. The City may require relocation of facilities at the Grantee's expense in the event of an unforeseen emergency that creates an immediate threat to the public safety or welfare. The City shall request that

Grantee perform the relocation, if however, the Grantee fails to perform the relocation within the time necessary to avert the emergency, the City may perform the relocation itself, and recover the reasonable and necessary costs of the relocation. Within forty-five (45) days of receipt of an itemized list of those costs, including the costs of labor, materials and equipment, the Grantee shall reimburse the City in a manner agreeable to both parties.

SECTION 8
INDEMNIFICATION AND LIABILITY

§8.01. Indemnification.

A. It is the intent of this Section and by its acceptance of this Franchise, Grantee specifically agrees, that Grantee for itself and its agents, employees, subcontractors, and the agents and employees of said subcontractors, shall indemnify and hold the City, its officers, agents, employees, and elected officials harmless from all liability actions, causes of action, lawsuits, judgments, claims, damages, penalties, costs or fees, including attorney's fees and costs of defense, for any injury to or the death of any Person or damage to or destruction of any property arising out of, resulting from or based upon, in whole or in part, any negligent act or omission of Grantee under this Franchise related to the construction, reconstruction, upgrade, operation, or maintenance of its Cable System. In the event that any action, suit or proceeding is brought or claim is made against the City based upon or arising out of any such negligent act or omission of the Grantee under this Franchise, the City shall give timely notice in writing of such action, suit, proceeding and tender such claim to the Grantee. However, the failure of the City to provide such notice in writing to Grantee shall not relieve Grantee of its duties and obligations under this Section, provided that Grantee is given sufficient advance notice to perform its duties under this Section.

B. The City shall not and does not by reason of granting this Franchise, assume any liability of Grantee whatsoever for injury or death to Persons, damage to property, or penalties of any kind whatsoever. The provisions of this Section shall survive the expiration or early termination of this Franchise.

C. Subject to applicable law, Grantee shall indemnify the City, its elected officials, officers, authorized agents, boards, and employees for any damages, claims, additional costs, or expenses assessed against, or payable by, the City related to, arising out of, or resulting from Grantee's failure to remove, adjust or relocate any of its facilities in the Rights-of-Way in a timely manner in accordance with any relocation required by the City. As part of its indemnity obligations pursuant to Section 8.01(A) the provisions of this Section 8.01(C) shall specifically include, but are not limited to, claims for delay, damages, costs, assessed against or payable by the City, by a contractor performing public work for or on behalf of the City.

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

§8.02. Damages and Penalties. By acceptance of this Franchise, Grantee specifically agrees that it will pay all damages or penalties which the City, its officers, agents, employees, or contractors may legally be required to pay as a result of damages arising out of copyright infringements and all other damages arising out of Grantee's or Grantee's agents' installation, maintenance, or operation of the Cable System, except as referenced in Section14 of this Franchise, whether or not any act or omission complained of is authorized, allowed, or prohibited by this Franchise, subject to Section 635A of the Cable Act and applicable law.

§8.03. Expenses. If any action or proceeding is brought against the City or any of its officers, agents, or employees for claims for damages or penalties described in this Section, the Grantee, upon written notice from the City, shall assume the investigation of defense and fully control any resolution or compromise thereof, including the employment of counsel and the payment of all expenses including the reasonable value of any services rendered by any officers, agents, employees or contractors of the City which are not unreasonably duplicative of services provided by Grantee and its representatives. The City shall fully cooperate with the Grantee.

§8.04. Separate Counsel. If separate representation to fully protect the interests of both parties is necessary, such as a conflict of interest between the City and the counsel selected by Grantee to represent the City, then upon the approval and consent of Grantee, which shall not be unreasonably withheld, the City shall have the right to employ separate counsel in any action or proceeding and to participate in the investigation and defense thereof, and the Grantee shall pay the reasonable fees and expenses of such separate counsel. The City's fees and expenses shall include all out-of-pocket expenses, such as consultants and expert witness fees, and shall also include the reasonable value of any services rendered by the counsel retained by the City but shall not include outside attorneys' fees for services that are unnecessarily duplicative of services provided the City by Grantee.

SECTION 9
INSURANCE REQUIREMENTS

§9.01. Minimum Coverage. Grantee shall maintain throughout the term of this Franchise:

A. A commercial general liability insurance policy issued by a company duly authorized to do business in the State of Washington insuring the Grantee with respect to the installation, maintenance, and operation of Grantee's Cable System in the minimum amount of Two Million Dollars ($2,000,000.00) per incident and Five Million Dollars ($5,000,000.00) aggregate.

B. An automobile liability insurance policy and, if necessary, a commercial umbrella liability insurance policy with a limit of not less than One Million Dollars ($1,000,000) per accident. Such insurance shall cover liability arising out of any Grantee motor vehicle (including owned, hired, and non-owned vehicles).

§9.02. Increased Coverage. The City Council reserves the right to require Grantee to increase the minimum amounts of liability insurance coverage up to a maximum of Four Million Dollars ($4,000,000) per incident if such increased coverage is deemed by City Council to be reasonably based on changes in statutory law, court decisions, or the claims history of the industry or the Grantee. Such requirement shall be expressed by resolution or ordinance.

§9.03. Endorsements. Grantee agrees that with respect to the insurance requirements contained in §9.01, all insurance certificates will contain the following required provisions:

A. Name the City of Gig Harbor and its officers, employees, and elected representatives as additional insureds.

B. Provide for thirty (30) days' notice to the City for cancellation, non-renewal or material change, or ten (10) days notice to the City in the event of non-payment of the premium.

C. Shall be on an occurrence basis and shall be primary coverage of all losses resulting from Grantee's operations covered by the policies.

§9.04. Workers' Compensation. The Grantee shall maintain throughout the term of this Franchise workers' compensation and employers liability insurance in the amount required by all applicable federal and state laws.

§9.05. Certificate of Insurance. Upon acceptance of the Franchise, Grantee shall provide to the City and maintain on file throughout the term of the Franchise a certificate of insurance evidencing coverage as required in this Section.

§9.06. Insurance Term. The insurance required by §9.01 shall be kept in full force and effect by Grantee during this Franchise and thereafter until after the removal of all poles, wires, cables, underground conduits, manholes, and other conductors and fixtures incident to the maintenance and operation of Grantee's Cable System, should such removal be required by City Council or undertaken by Grantee.

§9.07. Issuing Companies. Companies issuing the insurance policies shall have no recourse against the City for payment of any premiums or assessments which all are set at the sole risk of the Grantee.

SECTION 10
PERFORMANCE BONDING

§10.01. Amount. Upon acceptance of the Franchise, Grantee shall furnish and file with the City a performance bond in the amount of Twenty-Five Thousand Dollars ($25,000.00). The bond shall be conditioned upon the faithful performance of the Grantee of all terms and conditions of the Franchise. If there is an uncured breach by Grantee of a material provision of this Franchise or pattern of repeated violations of any provision(s) of this Franchise, then the City may require and Grantee shall thereupon establish and provide within thirty (30) days from receiving notice from the City, to the City as security for faithful performance by Grantee of all of the provisions of this Franchise, an additional performance bond in the amount of Twenty-Five Thousand Dollars ($25,000).

§10.02. Reservation of Rights. The rights reserved by the City with respect to the bond are in addition to all other rights the City may have under the Franchise or any other law.

§10.03. Endorsement. The bond shall contain the following endorsement:

> "It is hereby understood and agreed that this bond may not be canceled without notice to the City and issuance of a replacement bond. The City must be given thirty (30) days written notice by certified mail, return receipt requested, of intent to cancel or not to renew."

SECTION 11
CABLE SYSTEM CHARACTERISTICS

§11.01. Channel Capacity. Grantee's Cable System shall have the potential of providing no fewer than one hundred (100) Channels throughout the term of this Franchise. All Channels being offered to Subscribers within the Franchise Area will adhere to the technical standards set forth in paragraph 12.02 (A).

§11.02. New Construction. Any areas of the City where Grantee constructs new Cable System facilities, such facilities shall be built, at a minimum, to the same technical specifications as the Cable System existing in the City as of the effective date of this Franchise.

§11.03. Cable System Capabilities. Prior to the effective date of this Franchise, Grantee completed an upgrade of its Cable System. Concurrently, the Grantee modified

its Cable System from a traditional "Christmas tree architecture" to a hybrid fiber coaxial, fiber-to-the-node system architecture, with fiber-optic cable deployed from the headend to the node and coaxial cable deployed from the node to Subscriber's homes. Active and passive devices are capable of passing a minimum of 550MHz and capable of delivering more than 100 Channels of high quality analog or digital video signals, meeting or exceeding FCC technical quality standards. Emergency standby power is rated at a minimum of twelve (12) hours at the headend, two (2) hours at each fiber optic node located throughout the Cable System. During this Franchise, the Grantee agrees to maintain the Cable System in a manner consistent with, or in excess of these specifications.

§11.04. Equal and Uniform Service. The Franchisee shall provide access to equal and uniform Cable Service offerings throughout the Franchise Area.

SECTION 12
OPERATIONAL STANDARDS

§12.01. Compliance with Applicable FCC Rules. Grantee shall comply with present and future applicable rules and regulations of the FCC including, but not limited to, technical standards, testing requirements, consumer protection standards and consumer electronics compatibility regulations and all other present and future rules and regulations of the FCC in connection with and relating to the operation of Grantee's Cable System.

§12.02. Technical Performance.

A. Grantee's Cable System within the City shall meet or exceed all FCC and other applicable technical and signal quality standards for cable systems, including any such standards or regulations as hereinafter may be amended or adopted to the extent that compliance with such amended standards is mandated by law or regulation.

B. Antennas, supporting structures, headend and associated equipment, outside plant used in the Cable System shall comply with any applicable federal, state or generally applicable City law.

C. Grantee shall not design, install or operate its facilities in a manner that will interfere with the signals of any broadcast station, the electrical or telephone system located in any building, the cable system of another franchisee, or individual or master antennas used for receiving television or other broadcast signals.

D. If the City contacts Grantee prior to the next FCC required test period (e.g., those generally conducted in February and August of each year), a City

representative may be present during the testing. Upon request, Grantee shall provide written summary reports of the results of such tests to the City.

E. Grantee shall maintain all of its facilities and outside plant in a safe condition. Copies of the plant maintenance procedure manuals will be available for inspection at Grantee's office in Bremerton, Washington on written request, within thirty (30) days.

F. Grantee shall keep and maintain a proper and adequate inventory of maintenance and repair parts for the Cable System. Grantee shall maintain or otherwise have available a work force of skilled technicians for Cable System repair and maintenance.

G. Upon request, Grantee shall provide the City copies of all correspondence with the FCC related to technical performance of the Cable System in the Franchise Area. In the event that any complaints are filed with the FCC related to the Cable System operations, Grantee shall provide copies of such complaints as well as the resolution thereof to the City upon request.

§12.03. Parental Guidance Control. Upon request of a Subscriber, Grantee shall provide by sale and/or lease a device by which the Subscriber can prohibit viewing or use of a particular Cable Service(s) during periods selected by that Subscriber. Subscribers shall be notified in writing, by the Grantee of the availability of the device at least once per year.

§12.04. Customer Service. The Grantee shall provide customer service in accordance with the FCC standards set forth in 47 CFR 76.309(a-c). If the City enters into a subsequent franchise with any other competing cable operator and affords them more favorable terms relating to customer service standards Grantee shall be entitled to the benefit of the more favorable terms as well. Additionally, if the City subsequently adopts a Customer Service Standards ordinance the terms of that subsequent ordinance shall govern.

SECTION 13
SIGNALS TO BE CARRIED

§13.01. Required Programming Categories. To the extent they are reasonably available, Grantee shall carry the following general programming categories:

A. News, Information and Government
B. Movies
C. Sports
D. General Entertainment, Music and the Arts
E. Children, Family
F. Educational, Science, Foreign language

§13.02. Service for the Hearing Impaired. Grantee shall comply with any FCC requirements regarding altering or adapting programming for the hearing impaired. Grantee shall not take any action to remove or alter closed captioning provided for the hearing impaired as a part of any programming. Grantee shall deliver intact such closed captioning in the manner in which it arrives at the headend or from another origination source to the Cable System.

SECTION 14
PUBLIC, EDUCATIONAL AND GOVERNMENT ACCESS

§14.01. Initial Channels. Within forty-five (45) days of written request, Grantee shall dedicate one (1) Channel for the carriage of PEG Programming. The Grantee shall ensure that such PEG Channel is of a technical quality comparable to any other Channel offered over the Cable System. To the extent allowed by law, the City agrees to indemnify, save and hold harmless the Grantee from and against any and all liability resulting from the City's use of the PEG Channels required herein.

§14.02. Additional Channels.

A. Grantee shall make available up to two (2) additional PEG Channels (for a total of 3 PEG Channels) based on demonstrated community need and subscriber support for additional channels.

B. If all the Video Programming Services offered by Grantee on the Cable System are in a digital format, Grantee shall likewise make the PEG Channels available in a digital format.

§14.03. Delivery of PEG Programming. PEG Programming may be in analog or digital format, so long as it is compatible with the technology utilized by the Cable System for delivery to Subscribers on the lowest tier of service in accordance with applicable law.

§14.04. Management and Control of PEG Channels. The City may, at its discretion, allocate and reallocate the PEG Channels amongst Public, Educational and Government Access Programming. The City may authorize a third party(ies) to control and manage the use of any or all PEG Channels dedicated for City use, and their related facilities. The City, or its designee, may formulate rules for the operation of PEG Channels consistent with this Franchise and federal law.

§14.05. Relocation of Access Channels. Grantee will use reasonable efforts to minimize the movement of PEG Channel assignments. Grantee shall provide the City with at least forty-five (45) days' notice, prior to the time any PEG Channel designation is changed, unless the change is required by federal law, in which case Grantee shall give the City the maximum notice possible. Grantee shall notify customers of the Access Channel's relocation in the form of a bill message. Any new Channel designations for the PEG Channels provided

pursuant to this Franchise shall be in full compliance with FCC signal quality and proof-of-performance standards.

§14.06. PEG Capital Support. Effective sixty (60) days after written request and continuing during the term of this Franchise, Grantee shall pay to City a Capital Contribution for PEG Access capital expenditures in the amount of fifteen cents ($.15) per Subscriber per month. Grantee shall make Capital Contribution payments quarterly, no later than thirty (30) days following the end of the quarter. Grantee shall pay interest in accordance with IRS specified interest amounts for corporate underpayments for the applicable period, on PEG Capital Support payments, or portions thereof, that are paid subsequent to the specified payment dates. The City agrees that 47 C.F.R. §76.922 permits Grantee to add the cost of the Capital Contribution to the price of Cable Services and to collect the Capital Contribution from Subscribers. In addition, as permitted in 47 C.F.R. §76.985, all amounts paid as the Capital Contribution may be separately stated on Subscriber's bills as a Government Access capital equipment fee.

§14.07. Technical Assistance. Within four (4) hours of receipt of a request from the City regarding a problem with a PEG Channel, Grantee shall commence research to determine whether or not the problem with the PEG Channel is the result of matters for which Grantee is responsible and, if so, Grantee will take prompt corrective action. Such assistance will be at no charge to the City. Grantee is responsible for all maintenance, repair and replacement of any return lines and associated equipment from Grantee's side of the fiber termination panel at the PEG origination sites to the headend. The City is responsible for all maintenance, repair and replacement of facilities and equipment on the City-side of the fiber termination panel at the PEG origination sites. Grantee agrees to install equipment provided by the City at the PEG origination sites and provide technical support for the installation for six months after the date of installation.

SECTION 15
EMERGENCY USE OF THE CABLE SYSTEM

§15.01. Emergency Alert Capability.

A. Grantee shall provide an operating Emergency Alert System ("EAS") in accordance with and at the time required by the provisions of federal laws, including FCC regulations.

B. The City shall only permit appropriately trained and authorized persons to operate the EAS equipment and shall take reasonable precautions to prevent any use of the Grantee's Cable System that in any manner results in an inappropriate use thereof. To the extent allowed by law, the City shall hold the Grantee, its employees and officers harmless from any claims arising out of the emergency use of the EAS facilities by the City, including, but not limited to, reasonable attorneys' fees and costs.

C. Grantee shall ensure that the EAS is functioning properly at all times. It will test the EAS periodically, in a manner consistent with sound operational practices for emergency systems. Grantee will advise the City of the testing schedule and the City and/or its authorized representative may be present for the tests.

SECTION 16
FREE DROPS AND SERVICE

§16.01. Free Drops and Service. Free drops and service provided pursuant to this section are a voluntary initiative of Grantee and Grantee agrees to continue the service throughout the term of the Franchise to existing City owned and occupied buildings, schools and public libraries. Complimentary service is defined as standard installation, one outlet per building per campus and basic service. For purposes of this section, "school" means all State-accredited public and private K-12 schools. In addition, Grantee shall provide, at no cost to the City or other entity, throughout the term of this Franchise, one outlet of Basic Cable Service to new buildings that are owned or leased and occupied by the City, schools and public libraries where service is not being provided as of the effective date of this Franchise. If additional outlets of Basic Cable Service are provided to such buildings, the building owner/occupant shall pay the usual installation and service fees associated therewith.

The complimentary Cable Service described herein shall be limited to those locations where the drop line from the feeder cable to such building does not exceed one hundred twenty-five aerial feet (125') or sixty feet (60') underground unless the City or other entity agrees to pay the actual incremental cost of such drop line in excess of one hundred twenty-five aerial feet (125') or sixty feet (60') underground.

This complimentary service is provided for the benefit of the Community and shall only be accessible to the employees of the receiving institutions. This complimentary service shall not be made available to the general public such as on a commercial basis. The City shall guarantee that its use will not conflict with Grantee's general policies regarding commercial contracts. The City shall hold the Grantee harmless from any and all liability or claims arising out of the provision and use of Cable Service provided under this section.

§16.02 Low Income Discount. Grantee has historically granted a thirty percent (30%) discount to Subscribers who are low income and are aged 65 years or older or disabled to its Basic Cable Service Subscribers (provided they are not already receiving a package discount and provided further they are the legal owner or lessee/tenant of the dwelling unit). Grantee, as a voluntary initiative, is encouraged to continue to offer a discount to these individuals. For purposes of this discount, Subscribers are considered low income if their combined disposable income from all sources does not exceed the Housing and Urban

Development Standards for the Seattle/Everett Area for the current and preceding calendar year. As of the Effective Date of this Franchise Grantee is offering this low income discount as described herein.

SECTION 17
PAYMENT TO CITY

§17.01. Amount and Time. As compensation for the right, privilege, and Franchise herein conferred, Grantee shall pay to City each year during the term of this Franchise a sum equal to five percent (5%) of the Grantee's Gross Revenues. Such payments shall be made quarterly within forty-five (45) days after the expiration of each calendar quarter. Accompanying the payment, Grantee shall submit a written report verified by an authorized representative of Grantee, containing an accurate statement of Grantee's Gross Revenues by category, and the computation thereof.

§17.02. Annual Financial Report. Grantee shall file with the City within ninety (90) days following the end of each calendar year, or portion thereof during which the Franchise is in effect, a certified statement of Gross Revenues, prepared according to generally accepted accounting principles, showing Gross Revenues by significant category used in the computation of Franchise fee payments for the previous year.

§17.03. Right of Inspection of Records. The City shall have the right to inspect Grantee's records showing the Gross Revenues from which payments to the City are computed and to recompute any and all amounts paid under this Franchise. The City's right to audit and the Grantee's obligation to retain records related to a Franchise fee audit shall expire six (6) years after each Franchise fee payment has been made to the City. The City shall have the right to hire, at its own expense, an independent certified public accountant, or other business or financial expert, to review the books and records of the Grantee. If after a financial audit it is agreed that the Grantee has under paid amounts owed to the City in excess of ten percent (10%) then the City may require the Grantee to reimburse the City for the actual cost of the audit, such cost not to exceed Five Thousand Dollars ($5,000) for each year of the audit period.

§17.04. Late Payment Interest Charge. In the event any payment due quarterly is not received within forty-five (45) days from the end of the preceding quarter, Grantee shall pay interest on the amount due in accordance with IRS specified interest amounts for corporate under-payments for the applicable period.

§17.05. Acceptance. Payments received from the Grantee under this Section shall not in any way limit or impair any of the privileges or rights of the City, whether under this Franchise or otherwise. No acceptance of any payment shall be construed as an accord that the amount paid is the correct amount, nor shall acceptance be construed as a release of any claim the City may have for additional amounts payable under the provisions of this Section, subject to the limitations in §17.03.

§17.06. Acts of Non-Collection. Any transaction or arrangement made for the purpose of evading Franchise fees payable under this Franchise is prohibited.

§17.07. Additional Commitments Not Franchise Fees. The Franchise fee payable hereunder shall be exclusive of and in addition to all taxes, fees for municipal improvements, the PEG Capital Fee and other lawful obligations of Grantee to City, subject to applicable law.

Although the total sum of Franchise fee payments and additional commitments set forth elsewhere in this Franchise may total more than five percent (5%) of Grantee's Gross Revenues in any annual period, Grantee agrees that the additional commitments herein are neither Franchise fees as defined under any federal law in effect as of the effective date of this Franchise, nor are the additional payments to be offset or credited against any Franchise fee payments due to the City.

SECTION 18
RECORDS AND REPORTS

§18.01. Notice. Unless expressly otherwise agreed between the parties, every notice or response required by the Franchise to be served upon the City or the Grantee shall be in writing, and shall be deemed to have been duly given to the required party when hand delivered, or five (5) business days after having been posted in a properly sealed and correctly addressed envelope and sent by certified or registered mail, postage prepaid.

The notices or responses to the City shall be addressed as follows:

Office of the Mayor
City of Gig Harbor
3510 Grandview Street
Gig Harbor, Washington 98335

With a copy to:
City Clerk
City of Gig Harbor
3510 Grandview Street
Gig Harbor, Washington 98335

The notices or responses to the Grantee shall be addressed as follows:

Comcast of Puget Sound, Inc.
Attention: General Manager
1225 Sylvan Way
Bremerton, WA 98310

With a copy to:
Comcast of Puget Sound, Inc.
Attention: Franchising and Local Government Relations
15815 25th Avenue West
Lynnwood, Washington 98087

The City and the Grantee may designate such other address or addresses from time to time by giving notice to the other.

§18.02. Books of Account. Grantee shall keep complete and accurate books of accounts and records of its business and operations under and in connection with this Franchise and its exhibits. All such books of accounts and records related to enforcement of the Franchise shall be made available for inspection by the City at Grantee's office in Lynnwood, Washington, during normal business hours upon thirty (30) days' advance notice. If Grantee elects to move the books of accounts and records relating to the enforcement of this Franchise elsewhere, Grantee must make said books and records available and pay the travel costs, lodging, meals and any copying expenses or a City representative to visit the site where the books and records may be found, if such a review is requested by the City. Grantee shall maintain the books and records for Franchise compliance purposes for a period of five (5) years. If Grantee maintains books and records related to enforcement of the Franchise for a period greater than five (5) years, City shall have access to those records.

§18.03. Confidentiality. Notwithstanding anything to the contrary set forth in this Section, Grantee shall not be required to disclose information that it reasonably deems to be proprietary or confidential in nature. The City agrees to keep confidential any proprietary or confidential books or records to the extent permitted by law. Grantee shall be responsible for clearly and conspicuously indentifying the work as confidential or proprietary, and shall provide a brief written explanation as to why such information is confidential and how it may be treated as such under State and federal law. Grantee shall not be required to provide Subscriber information in violation of Section 631 of the Cable Act or any other applicable federal or State privacy law. In the event that the City receives a public records request for the disclosure of information Grantee has designated as confidential, trade secret or proprietary, the City shall promptly provide notice of such disclosure and a copy of any written request so that Grantee can take appropriate steps to protect its interests within ten (10) days of receiving notification of the City's intended disclosure. Nothing in the Section 18.03 prohibits the City from complying with RCW 42.56, or any other applicable law or court order requiring the release of public records, and the City shall not be liable to Grantee for compliance with any law or court order requiring the release of public records. The City shall comply with any injunction or court order requested by Grantee which prohibits the disclosure of any such confidential records; however, in the event a higher court overturns such injunction or court

order, Grantee shall reimburse the City for any fines or penalties imposed for failure to disclose such records.

§18.04. Quarterly Reports. A report shall be filed by Grantee with the City within forty-five (45) days following the end of each calendar quarter, or portion thereof during which the Franchise is in effect. At the Grantee's option, the measurements and reporting above may be changed from calendar quarters to billing or accounting quarters. Grantee shall notify the City of such a change thirty (30) days in advance. The material substance of the report shall be in a form reasonably acceptable to the City. The information contained within the quarterly report shall include, but not be limited to:

A. The Gross Revenue report required by subsection 17.01.

§18.05. Annual Report. A report shall be filed by Grantee with the City within ninety (90) days following the end of each calendar year, or portion thereof during which the Franchise is in effect. At the Grantee's option, the measurements and reporting above may be changed from calendar years to billing or accounting years. Grantee shall notify the City of such a change thirty (30) days in advance. The information contained within the annual report shall include, but not be limited to:

A. Total number of Subscribers and Basic Service only Subscribers, subject to subsection 18.03.

B. The Gross Revenue report required by subsection 17.02.

C. A summary of any new services being offered.

D. A PEG capital support recovery report.

Such report shall be certified by a representative of the Grantee knowledgeable of the operations of the Grantee within the City. Grantee shall also provide the City a copy of the publicly-available annual report of the Grantee's parent company, when available.

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

A. Records of all written complaints received by Grantee for the previous year. The term "complaint" as used herein refers to escalated concerns about any aspect of the Cable System or Grantee's cable operations.

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

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

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

SECTION 19
REGULATION OF RATES

§19.01. City Regulation of Grantee's Rates. All of Grantee's rates and charges related to or regarding Cable Services shall be subject to regulation by the City to the full extent authorized by applicable federal, State and local laws.

§19.02. Notice of Rates. Upon request, Grantee shall provide a copy of its rates and charges for any and all of its Cable Services in the City and shall notify the City of any changes to such rates and charges in compliance with any timing requirements prescribed in FCC regulations.

§19.03. Customer Billing. Customer billing shall be itemized by service(s) per FCC regulation 76 CFR 309 (B)(ii)(A).

SECTION 20
EMPLOYMENT REQUIREMENTS

§20.01. Equal Opportunity in Employment. Grantee shall afford equal opportunity in employment to all qualified Persons. No Person shall be discriminated against in employment because of race, color, religion, national origin, or gender.

SECTION 21
PROHIBITION OF DISCRIMINATORY OR PREFERENTIAL PRACTICES

§21.01. No Rate Discrimination. All Grantee rates and charges shall be published in the form of a publicly-available rate card, made available to the public, and shall be non-discriminatory as to all Persons of similar classes, under similar circumstances and conditions. Grantee shall apply its rates in accordance with governing law. Grantee shall permit Subscribers to make any in- residence connections the Subscriber chooses without additional charge and without penalizing the Subscriber therefore. If any in-home connection requires service from Grantee due to signal quality, signal leakage or other factors, caused by improper installation of such in-home wiring or faulty materials of such in-home wiring, the Subscriber may be charged appropriate service charges by Grantee. Nothing herein shall be construed to prohibit:

A. The temporary reduction or waiving of rates or charges in conjunction with promotional campaigns;

B. The offering of rate discounts for Cable Service to governmental agencies or educational institutions; or

C. Offering of bulk discounts for Multiple Dwelling Units.

SECTION 22
ASSIGNMENT OF FRANCHISE

§22.01. City Approval of Assignment Required. This Franchise shall not be assigned, sold or transferred, or otherwise encumbered, to any third party that does not possess the legal, technical or financial qualifications to operate the Cable System without the prior consent of the City expressed by resolution or ordinance, and then only under such conditions as may be lawfully prescribed therein. Within thirty (30) days of receiving the request for transfer, the City shall notify the Grantee, in writing, of the information it requires to determine whether the FCC Form 394 (the transfer application) is complete so that the City can ascertain the legal, financial, and technical qualifications of the transferee. If the City has not taken action on the Grantee's request for transfer within one hundred twenty (120) days after receiving a complete FCC Form 394, consent by the City shall be deemed given. No assignment to any Person shall be deemed effective until the transferee has filed with the City an instrument in writing, duly executed, reciting the fact of such assignment, accepting the terms of this Franchise, and agreeing to comply with all lawful provisions hereof, subject to applicable law.

§22.02. City Approval of Change of Control Required. The Grantee shall promptly notify the City of any proposed change of Control of the Grantee. For the purpose of determining whether the City shall consent to such change of Control, the City may inquire into the legal, financial, and technical qualifications of the prospective controlling party, but shall do so within thirty (30) days of receipt of the requested change of Control from the Grantee. Grantee shall assist the City in such inquiry and will respond within ten (10) days unless a longer time is reasonably necessary to respond or allowed by law. No change of Control to any Person shall be deemed effective until the transferee has filed with the City an instrument in writing, duly executed, reciting the fact of such change in Control, accepting the terms of this Franchise, and agreeing to comply with all lawful provisions hereof, subject to applicable law.

§22.03 Change in Control Terms. In reviewing a request for assignment or change of Control, the City may inquire into the legal, technical, and financial qualifications of the prospective controlling party or transferee, and Grantee shall assist the City in so inquiring. The City may condition said assignment or change of Control upon such terms and conditions which are consistent with federal law;

provided, however, that any such terms and conditions so attached shall be related to the legal, technical, and financial qualifications of the prospective controlling party or transferee.

§22.04 No Waiver. The consent or approval of the City to any assignment of the Franchise or change in Control pursuant to this Section 22 shall not constitute a waiver or release of any rights of the City either pursuant to law or the Franchise itself.

SECTION 23
FRANCHISE VIOLATIONS, NOTICE AND LIQUIDATED DAMAGES

§23.01. Notice of Default; Opportunity to Cure; Public Hearing.

A. Notice of Default. The City shall notify the Grantee, in writing, of any alleged failure to comply with a provision of this Franchise, which notice shall specify the alleged failure with reasonable particularity. The Grantee shall have thirty (30) days subsequent to receipt of the notice in which to:

1. respond to the City, contesting the City's assertion that a default has occurred, and requesting a meeting in accordance with subsection (B), below; or

2. cure the default; or

3. notify the City that Grantee cannot cure the default within the thirty (30) days, because of the nature of the default. In the event the default cannot be cured within thirty (30) days, Grantee shall promptly take all reasonable steps to cure the default and notify the City, in writing and in detail, as to the exact steps that will be taken and the projected completion date. In such case, the City may set a meeting in accordance with subsection (B) below to determine whether additional time beyond the thirty (30) days specified above is indeed needed, and whether Grantee's proposed completion schedule and steps are reasonable.

B. If Grantee does not cure the alleged default within the cure period stated above, or by the projected completion date under subsection (A)(3), or denies the default and requests a meeting in accordance with subsection (A)(2), or the City orders a meeting in accordance with subsection (A)(3), the City shall set a meeting to investigate said issues and the existence of the alleged default. The City shall notify Grantee of the meeting, in writing, and such meeting shall take place no less than thirty (30) days after Grantee's receipt of notice of the meeting. At the

meeting, Grantee shall be provided an opportunity to be heard and to present evidence in its defense.

C. If, after the meeting, the City determines that a default exists, Grantee and the City may agree on a plan and schedule to cure the default. Absent such agreement, the City shall order Grantee to correct or remedy the default or violation within fifteen (15) days or within such other reasonable timeframe as the City shall determine.

D. The determination as to whether a violation of this Franchise has occurred shall be within the discretion of the City, provided that any such determination may be subject to appeal to the City Council or review by a court of competent jurisdiction under applicable law.

§23.02. City Action in Event of Violation. Subject to the City's compliance with the cure notice and procedures given in §23.01 and in the event Grantee does not cure within such time to the City's reasonable satisfaction, the City may:

A. Seek liquidated damages pursuant to §23.03;

B. In the case of violation of a material provision of the Franchise or other material violation as set forth in §24.01 and §24.02, seek to revoke the Franchise pursuant to §24.03;

C. Recommend any other legal or equitable remedy available under this Franchise or any applicable law.

Notwithstanding the foregoing, the City may not pursue monetary damages or liquidated damages in addition to the interest specified in §17.04 for late payment of Franchise fees; or monetary damages or liquidated damages in addition to the interest specified in §14.06 for late payment of the PEG Capital Fee.

§23.03. Liquidated Damages.

A. If Grantee remains in violation following this cure period, the City may charge to and collect from Grantee the liquidated damages set forth in subsection (E) below, with liquidated damages beginning to accrue no earlier than the day following the end of the cure period set forth in §23.01 above. If the City pursues liquidated damages, the Grantee may elect, in response, to request to enter into arbitration pursuant to §23.04 below. If the Grantee enters into arbitration, liquidated damages shall be tolled from the date of Grantee's election for the full duration of the arbitration proceeding, before accruing again. If Grantee prevails at arbitration liquidated damages shall be waived, if the City prevails in

arbitration liquidated damages shall accrue until Grantee corrects the violation.

B. The parties agree that actual damages that might be sustained by the City by reason of Grantee's violation of the Franchise provisions below, are uncertain and difficult to ascertain, and that the sums set forth below are reasonable compensation for such violation, and Grantee promises to pay, and the City agrees to accept, such sums as liquidated damages, and not as a penalty, in the event of such violation.

C. Additionally such sums of money shall be considered liquidated damages due the City by Grantee by reason of inconvenience to the public and because of public works supervision and maintenance and other City administrative time and involvement which resulted in the expenditure of public funds due to Grantee's failure to comply with certain provisions in this Franchise.

D. Grantee covenants that any such sums paid to the City under this Franchise provision shall not be included in the development of any rate, change, or price for services charged to Subscribers.

E. The specific amounts of liquidated damages are as follows:

(1) For failure of Grantee to provide any report, certificate or map to the City as required by this Franchise, Fifty Dollars ($50) per day.

(2) For failure to comply with the service availability requirements set forth in Section 4, the greater of Fifty Dollars ($50) per day or One Dollar ($1.00) per day per impacted Subscriber.

(3) For failure of Grantee to respond, restore or repair the Public Rights-of-Way within forty-eight (48) hours of notice by City under §7.03, Two Hundred Fifty Dollars ($250) per day for every day following forty-eight (48) hours after Grantee's receipt of the notice.

(4) Should the City adopt any lawful and generally applicable ordinance governing the Public Rights-of-Way which includes administrative fees for City-performed relocation of Grantee facilities, such fees in the ordinance shall apply to the Grantee and supersede the ability of the City to collect liquidated damages under the Franchise for relocation violations.

(5) For failure of Grantee to provide a cable system in accordance with Section 11, One Thousand Dollars ($1000) per day.

(6) For failure of Grantee to provide the PEG Channels as required by Section 14, Two Hundred Fifty Dollars ($250) per day.

(7) For failure of Grantee to provide the notice of rates as required by §19.02, Twenty-Five Dollars ($25) per day.

(8) For departure of fifteen percent (15%) measured over a quarterly period from FCC Customer Service Standards, Fifty Dollars ($50) per day.

(9) For failure to comply with any other material breaches of the Franchise, Two Hundred Fifty ($250) per day.

§23.04 Arbitration.

A. All disputes relating to the interpretation, application or enforcement of liquidated damages under § 23.03 may be arbitrated as provided below.

B. Either party may initiate arbitration by sending written notice to the other.

C. In the event an arbitration is initiated, each party has fifteen (15) days from the date of receipt of written notice, to provide to the other party in writing, a list of six persons qualified to serve as arbitrators with no affiliation or relationship with either party that would tend to affect the person's ability to act as a neutral arbitrator, and acceptable to that party.

D. The City and Grantee shall mutually select an arbitrator from the list within five (5) days after the exchange of proposed arbitrators information. If the City and Grantee are unable to agree upon an arbitrator within the time specified herein, then an arbitrator shall be appointed by the Chief Judge of the Federal District Court for the Western District of Washington or, if said judge declines to act, by the Presiding Judge of the Pierce County Superior Court.

E. After an arbitrator has been selected, he or she shall take an oath to serve neutrally and impartially. The arbitrator shall then schedule such discovery or other exchange of documents and information as is appropriate to the issue and a date, time and place for hearing the presentations of the City and the Grantee. The hearing shall occur not less than sixty (60) days and not more than one hundred (100) days after the appointment of the arbitrator unless the parties mutually agree to a different schedule or an extension is granted by the arbitrator for good cause shown. The arbitrator shall make a written report to the City and the Grantee on their final determination within thirty (30) days after

completion of the hearing. The determination of the arbitrator shall constitute a final arbitration determination, appealable to a court of competent jurisdiction by either party.

F. The arbitration shall be conducted in Seattle, Washington, in accordance with the existing rules of the American Arbitration Association, but not under the auspices or control of the AAA unless the parties so agree. Judgment upon any award by the arbitrator may be entered by the state or federal court having jurisdiction.

G. Each party shall be responsible for its own costs of arbitration.

H. Statutes of limitation applicable under Washington law shall apply to proceedings in arbitration.

§23.05. Force Majeure. Other than its failure, refusal, or inability to pay its debts and obligations, including, specifically, the payments to the City required by this Franchise, Grantee shall not be declared in default or be subject to any sanction under any provision of this Franchise in those cases in which performance of such provision is prevented by reasons beyond its control.

§23.06. Reservation of Rights. The rights reserved to the City under this Section are in addition to all other rights of the City whether reserved by this Franchise or authorized by law, and no action, proceeding or exercise of a right shall affect any other right the City may have.

§23.07. Venue and Jurisdiction. Venue and jurisdiction for any action for breach or default of this agreement will lie in Pierce County, Washington.

§23.08 No Third-Party Beneficiaries. Nothing in this Franchise is or was intended to confer third-party beneficiary status on any Person or any member of the public to enforce the terms of this Franchise.

§23.09 Captions. The captions and headings of Sections throughout this Franchise are intended solely to facilitate reading and reference to the sections and provisions of this Franchise. Such captions shall not affect the meaning or interpretation of this Franchise.

SECTION 24
REVOCATION OF FRANCHISE

§24.01. General. In addition to all rights and powers of the City by virtue of this Franchise or otherwise, the City reserves, as an additional and as a separate and distinct power, the right to revoke the Franchise in accordance with the procedures specified herein if any of the following events occur or for any of the following reasons:

A. Grantee by act or omission violates any material term, condition, or provision of this Franchise and fails or refuses to effect material compliance following the notice and opportunity to cure specified under §23.01.

B. Grantee knowingly or willingly attempts to evade any material provision of this Franchise.

C. Grantee knowingly makes a false entry or statement regarding any material provision under this Franchise in any reports or records provided to the City.

D. Repeated and substantial violation or willful disregard of:

(1) the City's lawful ordinances and regulations related to the Public Rights-of-Way; or

(2) the FCC Customer Service Standards; or

(3) the Cable System technical performance requirements in Section 12.

E. The occurrence of any event which may reasonably lead to the foreclosure or other similar judicial or non-judicial sale of all or any material part of the Cable System.

F. Grantee becomes insolvent or is adjudged bankrupt or all or any part of Grantee's facilities are sold under an instrument to secure a debt and are not redeemed by Grantee within thirty (30) days from the date of such sale; provided, however, this shall not be an event of termination or cancellation in the event of bankruptcy proceeding and the trustee, receiver, or debtor in possession agrees in writing to be bound by the terms of this Franchise.

G. Grantee has been found by a court of law to have practiced any fraud or deceit in its conduct or relations under this Franchise with the City, Subscribers or potential Subscribers.

§24.02. Method of Revocation. Should the City Council determine, following the process set forth in §23.01 (to the extent applicable,) that its selected course of action shall be to seek revocation of the Franchise, the City shall give Grantee written notice of such intent. The notice shall set forth the causes and reasons for the proposed revocation, shall advise Grantee that it will be provided an opportunity to be heard by City regarding such proposed action before any such action is taken, and shall set forth the time, date, and place of the hearing. In no event

shall such hearing be held less than thirty (30) days following delivery of such notice to Grantee. At the hearing, the Grantee shall be entitled to all rights of due process consistent with the City procedures including, but not limited to, the right to present evidence, examine witnesses and the right to be represented by counsel. Any such revocation of this Franchise shall be by ordinance.

§24.03. Grantee May Appeal City's Decision. The Grantee may appeal the City's decision to revoke the Franchise to an appropriate court, which shall have the power to review the City's decision de novo and to modify or reverse such decision as justice may require. Such appeal to the appropriate court must be taken within sixty (60) days of the issuance of the determination of the City.

SECTION 25
VALUATION

§25.01. Purchase Price of Cable System. If the Franchise is revoked for cause and the parties agree that the City may purchase the Cable System, the City may purchase the Cable System at an equitable price. If renewal of the Franchise is lawfully denied and the parties agree that the City may purchase the Cable System, the City may purchase the Cable System at fair market value, determined on the basis of the Cable System valued as a going concern but with no value allocated to the Franchise itself. Should the parties fail to agree upon the equitable price or the fair market value of the Cable System, the same shall be determined in an appropriate proceeding filed in any court having jurisdiction.

SECTION 26
FAILURE OF CITY TO ENFORCE FRANCHISE

§26.01. No Waiver of Terms. The Grantee shall not be excused from complying with each and all of the terms, conditions, and provisions of this Franchise even though the City should upon one or more occasions fail to insist upon, to require, or to seek compliance with any such term, condition, or provision.

SECTION 27
RECOURSE, UNDERSTANDING, CONSTRUCTION, AND SEVERABILITY

§27.01. Requirements and Enforcement. Except as expressly provided herein, Grantee shall have no monetary recourse whatsoever against City of any loss, cost, expense, or damage arising out of the provisions or requirements of this Franchise or because of the enforcement thereof by City or because of the lack of City's authority to grant all or any part of this Franchise.

§27.02. Grantee's Understanding. Grantee expressly acknowledges that in accepting this Franchise, it relied solely upon its own investigation and understanding of the power and authority of City to grant this Franchise and that Grantee was not induced to accept this Franchise by any understanding, promise, or other

statement, verbal or written, by or on behalf of the City or by any third Person concerning any term or condition not expressed herein.

This Franchise, including all Exhibits, embodies the entire understanding and agreement of the City and the Grantee with respect to the subject matter hereof and supersedes all prior understandings, agreements and communications, whether written or oral.

§27.03. Construction of Franchise. By acceptance of this Franchise, Grantee acknowledges that it has carefully read the provisions hereof and is willing to and does accept all of the risks of the meanings of such provisions.

§27.04. Provisions Severable. If any provision, section, subsection, paragraph, sentence, clause, or phrase of this Franchise is for any reason held to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity of the remaining portions of this Franchise. It is the intent of the City in adopting this Franchise that no portion or provision thereof shall become inoperative or fail by reason of any invalidity or unconstitutionality of any other portion or provision, and to this end all provisions of this Franchise are declared to be severable.

SECTION 28
ACCEPTANCE OF FRANCHISE

§28.01. Method of Acceptance. Within sixty (60) days from the publication date of this Franchise, Grantee shall file with the City Clerk a written instrument, executed and sworn to by a corporate officer of the Grantee before a Notary Public, in the following form signed in its name and behalf:

"To the Honorable Mayor and City Council of the City of Gig Harbor, Washington: For itself, its successors, and assigns, Comcast of Puget Sound, Inc., duly authorized to do business in the State of Washington, hereby accepts the attached Franchise and agrees to be bound by all of its terms, conditions, and provisions, subject to applicable law.

COMCAST OF PUGET SOUND, INC.

By:_____

Its:_____

Dated this _____day of _____, 2012."

§28.02. Acceptance of Franchise Not a Waiver. Acceptance of this Franchise by Grantee shall not constitute a waiver by it of any of its rights.

§28.03. Effective Date. Subject to the acceptance by Grantee, this Franchise shall be effective five (5) days after its publication and passage as required by law.

BY THE CITY COUNCIL AND APPROVED BY ITS MAYOR ON THIS ___th day of _____, 2012.

THE CITY OF GIG HARBOR

_____
Mayor Charles L. Hunter

ATTEST:

_____
Molly M. Towslee, City Clerk

APPROVED AS TO FORM:

_____
Angela S. Belbeck, Attorney for the City of Gig Harbor

Filed with the City Clerk:
Adopted by the City Council:
Publication Date:
Effective Date:

Business of the City Council
City of Gig Harbor, WA

Subject: Interim Ordinance Implementing FEMA Option #3 - Permit-by-Permit Demonstration of Compliance under the Endangered Species Act

Proposed Council Action: Adopt Ordinance No. 1248, declaring an emergency and adopting interim development regulations relating to development in the special flood hazard and riparian buffer areas to take effect immediately.

Dept. Origin: **Planning Department/Legal**

Prepared by: PLL Peter Katich, Sr. Planner
Angela Belbeck, City Attorney

For Agenda of: September 24, 2012

Exhibits: Draft Ordinance
Ordinance No. 1223 & 1234
September 21, 2011 Graves letter

	Initial & Date
Concurred by Mayor:	CLH 9/20/12
Approved by City Administrator:	R - 9/20/12
Approved as to form by City Atty:	per e-mail dated 9.19.12
Approved by Finance Director:	N/A
Approved by Department Head:	JK 9/20/12

Expenditure Required	$ n/a	**Amount Budgeted**	$ n/a	**Appropriation Required**	$0

INFORMATION/BACKGROUND

In *National Wildlife Federation and Public Employees for Environmental Responsibility v. FEMA, et al.*, 345 F. Supp. 2d 1151 (2004), the U.S. District Court for the Western District of Washington ruled that FEMA must undergo formal consultation under Section 7 of the Endangered Species Act ("ESA") because the implementation of the National Flood Insurance Program ("NFIP") may affect listed species found in the Puget Sound Region. As a result of the consultation, National Marine Fisheries Service ("NMFS") issued a Biological Opinion on September 22, 2008, documenting the adverse effects of FEMA's NFIP on listed species found in the Puget Sound Region, which includes Puget Sound Chinook Salmon, Puget Sound Steelhead and Southern Resident Killer Whales. The Biological Opinion can be viewed at: https://pcts.nmfs.noaa.gov/pls/pcts-pub/pcts_upload.summary_list_biop?p_id=29082.

The Biological Opinion has generated numerous questions in implementing its requirements, and staff has attended workshops heavily attended by many of the 122 jurisdictions affected in the State of Washington. John Graves from FEMA's Mitigation Division sent the attached letter dated September 21, 2011 (received September 23, 2011) acknowledging receipt of the City's Option 2 submittal package, acknowledging that the City is defaulting to Option 3, and included a "Frequently Asked Question" memo regarding Option 3 implementation.

In order to maintain eligibility in the NFIP, participants must demonstrate compliance with the Biological Opinion by choosing one of three options provided by FEMA: Option 1 - adopt the FEMA-developed ESA compliant model ordinance; Option 2 - meet FEMA checklist for ESA

compliance with current regulations; or Option 3 - permit by permit demonstration of ESA compliance. The model ordinance under Option 1 is drafted for communities with rivers and does not work with the City's developed shoreline. The City originally requested review by FEMA for Option 2 but that option would not become effective until the City completes the update of its Shoreline Master Program in 2013. If a jurisdiction does not implement Options 1 or 2, the default is to Option 3. This requires the City to maintain documentation from the applicant obtained from a habitat assessment or Section 7 consultation with NMFS that demonstrates compliance with the ESA.

Interim Ordinances No's. 1223 and 1234 adopted by the city on September 26, 2011 and March 12, 2012, respectively, implemented FEMA's Option 3 to address the requirements of the NMFS Biological Opinion over the past year as the city has continued to move forward on the update of the master program. Interim Ordinance No. 1234 expires on September 26, 2012 and the subject ordinance would replace it. The regulations under the proposed ordinance are substantively the same as those regulations originally adopted under Ordinance No. 1223.

Staff is currently reviewing comments submitted at the Council's June 11, 2012 public hearing on the draft Shoreline Master Program in preparation for bringing the draft document back to Council for review and consideration during the fall of 2012 and submittal to the Department of Ecology (Ecology) by the end of the year. Ecology's review process is approximately 180 days in length followed by a 60-day appeal process with any appeal of the master program decided by the State Growth Management Hearings Board.

Due to this lengthy and somewhat uncertain time period, and the success of the Option 3 approach over the past year, staff will, by separate ordinance to be considered by Council in the future, propose the adoption of the FEMA Option 3 approach on a permanent basis. That ordinance is tentatively scheduled for Council consideration at its November 12, 2012 meeting.

FISCAL CONSIDERATION

None.

BOARD OR COMMITTEE RECOMMENDATION

n/a

RECOMMENDATION/MOTION

Adopt on first reading Ordinance No. 1248, extending the interim regulations adopted under Ordinance No. 1234 relating to development in the flood hazard and buffer areas. (Adoption on first reading requires a vote of the majority plus one in favor and is requested due to the approaching expiration date.)

ORDINANCE NO. 1248

AN ORDINANCE OF THE CITY OF GIG HARBOR, WASHINGTON, ADOPTING INTERIM DEVELOPMENT REGULATIONS RELATING TO DEVELOPMENT IN SPECIAL FLOOD HAZARD AREAS AND WITHIN 200 FEET LANDWARD OF SPECIAL FLOOD HAZARD AREAS; MAKING FINDINGS OF FACT; REQUIRING A HABITAT ASSESSMENT OR LETTER FROM NMFS OR FEMA ESTABLISHING COMPLIANCE WITH THE ENDANGERED SPECIES ACT; SETTING A PUBLIC HEARING FOR NOVEMBER 13, 2012, IN ORDER TO TAKE PUBLIC TESTIMONY REGARDING THE INTERIM DEVELOPMENT REGULATIONS; PROVIDING FOR SEVERABILITY; DECLARING AN EMERGENCY AND ESTABLISHING AN IMMEDIATE EFFECTIVE DATE.

WHEREAS, in *National Wildlife Federation and Public Employees for Environmental Responsibility v. Federal Emergency Management Agency, et al.*, 345 F. Supp. 2d 1151 (2004), the United States District Court for the Western District of Washington ruled that the Federal Emergency Management Agency ("FEMA") must undergo formal consultation under Section 7 of the Endangered Species Act ("ESA") because the implementation of the National Flood Insurance Program ("NFIP") may affect listed species found in the Puget Sound Region; and

WHEREAS, as a result of the consultation, National Marine Fisheries Service ("NMFS") issued a Biological Opinion on September 22, 2008, that documented the adverse effects of FEMA's NFIP on listed species found in the Puget Sound Region, which includes Puget Sound Chinook Salmon, Puget Sound Steelhead and Southern Resident Killer Whales; and

WHEREAS, cities that participate in the NFIP must demonstrate compliance with the Biological Opinion by choosing one of three options provided by FEMA: Option #1 - adopt the FEMA-developed ESA compliant model ordinance; Option #2 - meet FEMA checklist for ESA compliance with current regulations; or Option #3 - permit by permit demonstration of ESA compliance; and

WHEREAS, the City is currently undergoing review by FEMA for Option #2 but that option cannot become effective until the City completes the update of its Shoreline Master Program; and

WHEREAS, in anticipation of the requirements for Option #2 being met, on September 26, 2011, the City Council adopted Ordinance No. 1223 which adopted interim regulations for a period of six months implementing Option #3 while the City awaited meeting the requirements for Option #2. Ordinance No. 1223 was extended another six months under Ordinance No. 1234; and

WHEREAS, the interim regulations adopted under Ordinance No. 1223 as extended under Ordinance No. 1234 expire on September 26, 2012; and

WHEREAS, because the provisions of the interim regulations expire on September 26, 2012 and the City is unable to hold a public hearing prior to the expiration, the Gig Harbor City Council has determined that an emergency exists which necessitates that this ordinance be

enacted as a new interim development regulation on an emergency basis in order to preserve the public health, safety, and welfare and to avoid vesting of development applications that are contrary to the provisions of this ordinance;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Findings. The recitals set forth above are hereby adopted as the Gig Harbor City Council's findings in support of the interim development regulations imposed by this ordinance. The Gig Harbor City Council may, in its discretion, adopt additional findings after conclusion of the public hearing referenced in Section 3 below.

Section 2. Interim Development Regulations.

A. Definitions.

1. "Biological Opinion" means that certain opinion issued by the National Marine Fisheries Service on September 22, 2008, recommending changes to the implementation of the National Flood Insurance Program in order to meet the requirements of the Endangered Species Act in the Puget Sound watershed.

2. "Biologist, qualified" means a person who possesses a bachelor's degree from an accredited college in biology, a branch of biology, limnology, biometrics, oceanography, forestry or natural resource management, with experience preparing reports for the relevant type of habitat.

3. "Endangered Species Act" or "ESA" means 16 U.S.C. 1531 *et seq*., as amended.

4. "Habitat Assessment report" means a report prepared by a qualified biologist that assesses the proposed development and identifies potential impacts, required mitigation, and whether or not the development adversely affects water quality, water quantity, flood volumes, flood velocities, spawning substrate and/or floodplain refugia for listed salmonids under the requirements of the Endangered Species Act.

5. "Likely to Adversely Affect" or "LAA" means the effects of the development will result in short- or long-term adverse effects on listed species or designated habitat area.

6. "May Affect, Not Likely to Adversely Affect" or "NLAA" means the effects to the listed species or designated critical habitat are insignificant and/or discountable.

7. "No Effect" or "NE" means the development has no effect whatsoever to the listed species or designated critical habitat.

8. "Riparian Buffer Zone" includes all parcels located within 200 feet landward from the +9 elevation (NGVD 1929 datum).

9. "Special Flood Hazard Area" or ""Area of Special Flood Hazard" has the same meaning as set forth in GHMC 18.10.040(C) and as determined under GHMC 18.10.050(B).

B. Habitat Assessment Required. In addition to the requirements set forth in chapter 18.10 GHMC, if applicable, and other applicable development regulations in the Gig Harbor Municipal Code, no development permits may be issued on any parcel partially or fully within the Special Flood Hazard Area or Riparian Buffer Zone unless the Planning Director or designee, after review of a Habitat Assessment report provided by applicant, has determined the development meets the standards of NE or NLAA, or the applicant submits a letter from the National Marine Fisheries Service ("NMFS") or the Federal Emergency Management Agency ("FEMA") stating that the development complies with the requirements under the Biological Opinion and the ESA.

C. Process. The Planning Director or designee shall review the Habitat Assessment Report to determine whether the development meets the standard of NE, NLAA or LAA. If the Planning Director or designee determines that the development is LAA, then the City may not issue the development permit unless the development is redesigned to a point where the assessment is NLAA or NE. If a development cannot be redesigned to meet the standard of NLAA or NE, the development may only be permitted if the applicant submits a letter from NMFS or FEMA demonstrating concurrence through a consultation under Section 7 or 4(d) of the ESA or issuance of an incidental take permit under Section 10 of the ESA. The Habitat Assessment and/or concurrence letter from NMFS or FEMA shall be retained in the permit file.

D. Exemptions. The following development is exempt from the requirements set forth in Section B above:

1. Repair or remodel of an existing building in its existing footprint, including buildings damaged by fire or other casualties;
2. Removal of noxious weeds;
3. Replacement of non-native vegetation with native vegetation;
4. Lawn and garden maintenance;
5. Removal of hazard trees;
6. Normal maintenance of public utilities and facilities; and
7. Restoration or enhancement of floodplains, riparian areas and streams that meet federal and state standards.

Section 3. Public Hearing. Pursuant to RCW 36.70A.390 and RCW 35A.63.220, the City Council hereby sets a public hearing for November 13, 2012 at 5:30 p.m. or as soon thereafter as the matter may be heard in order to take public testimony on the amendments adopted by this ordinance. The City Council may, in its discretion, adopt additional findings justifying the interim development regulations after the close of the hearing.

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

Section 5. Copy to Commerce Department. Pursuant to RCW 36.70A.106(3), the City Clerk is directed to send a copy of this ordinance to the State Department of Commerce for its files within ten (10) days after adoption of this ordinance.

Section 6. Effective Period for Interim Regulations. The interim development regulations adopted by this ordinance shall remain in effect for a period of six months, and shall automatically expire unless the same are extended as provided in RCW 36.70A.390 and

RCW 35A.63.220 prior to expiration, or unless the same are repealed or superseded by permanent regulations prior to expiration. The provisions of this ordinance supersede the provisions of Ordinance No. 1223 as extended by Ordinance No. 1234.

Section 7. Declaration of Emergency. The Gig Harbor City Council hereby finds and declares that an emergency exists which necessitates that this ordinance become effective immediately in order to preserve the public health, safety and welfare.

Section 8. Publication. The City Clerk is directed to publish a summary of this ordinance at the earliest possible publication date.

Section 9. Effective Date. This ordinance shall take effect immediately upon passage by a majority vote plus one of the entire membership of the Council, as required by RCW 35A.12.130.

PASSED by the Council and approved by the Mayor of the City of Gig Harbor, this 24th day of September, 2012.

CITY OF GIG HARBOR

_____
Mayor Charles L. Hunter

ATTEST/AUTHENTICATED:

_____
Molly M. Towslee, City Clerk

APPROVED AS TO FORM:
Office of the City Attorney

_____
Angela S. Belbeck

FILED WITH THE CITY CLERK: 09/19/12
PASSED BY THE CITY COUNCIL: 09/24/12
PUBLISHED: 10/03/12
EFFECTIVE DATE: 09/24/12
ORDINANCE NO: 1248

ORDINANCE NO. 1223

AN ORDINANCE OF THE CITY OF GIG HARBOR, WASHINGTON, ADOPTING INTERIM DEVELOPMENT REGULATIONS RELATING TO DEVELOPMENT IN SPECIAL FLOOD HAZARD AREAS AND WITHIN 200 FEET LANDWARD OF SPECIAL FLOOD HAZARD AREAS; MAKING FINDINGS OF FACT; REQUIRING A HABITAT ASSESSMENT OR LETTER FROM NMFS OR FEMA ESTABLISHING COMPLIANCE WITH THE ENDANGERED SPECIES ACT; SETTING A PUBLIC HEARING FOR NOVEMBER 14, 2011, IN ORDER TO TAKE PUBLIC TESTIMONY REGARDING THE INTERIM DEVELOPMENT REGULATIONS; PROVIDING FOR SEVERABILITY; DECLARING AN EMERGENCY AND ESTABLISHING AN IMMEDIATE EFFECTIVE DATE.

WHEREAS, in *National Wildlife Federation and Public Employees for Environmental Responsibility v. Federal Emergency Management Agency, et al.*, 345 F. Supp. 2d 1151 (2004), the United States District Court for the Western District of Washington ruled that the Federal Emergency Management Agency ("FEMA") must undergo formal consultation under Section 7 of the Endangered Species Act ("ESA") because the implementation of the National Flood Insurance Program ("NFIP") may affect listed species found in the Puget Sound Region; and

WHEREAS, the as a result of the consultation, National Marine Fisheries Service ("NMFS") issued a Biological Opinion on September 22, 2008, that documented the adverse effects of FEMA's NFIP on listed species found in the Puget Sound Region, which includes Puget Sound Chinook Salmon, Puget Sound Steelhead and Southern Resident Killer Whales; and

WHEREAS, cities that participate in the NFIP must demonstrate compliance with the Biological Opinion by choosing one of three options provided by FEMA: Option #1 - adopt the FEMA-developed ESA compliant model ordinance; Option #2 - meet FEMA checklist for ESA compliance with current regulations; or Option #3 - permit by permit demonstration of ESA compliance; and

WHEREAS, the City is currently undergoing review by FEMA for Option #2 but that option cannot become effective until the City completes the update of its Shoreline Master Program; and

WHEREAS, until the requirements for Option #2 are met, the City believes that Option #3 best meets the needs of the environment and community. This requires the City to maintain documentation from the applicant obtained from a habitat assessment or Section 7 consultation with NMFS, that demonstrates compliance with the ESA. This documentation is to be maintained by the City with the applicable permit file and available for FEMA review upon request; and

WHEREAS, because the federal requirement took effect September 22, 2011, the Gig Harbor City Council has therefore determined that an emergency exists which necessitates that this ordinance be enacted as an interim development regulation on an emergency basis in order

to preserve the public health, safety, and welfare and to avoid vesting of development applications that are contrary to the provisions of this ordinance;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Findings. The recitals set forth above are hereby adopted as the Gig Harbor City Council's findings in support of the interim development regulations imposed by this ordinance. The Gig Harbor City Council may, in its discretion, adopt additional findings after conclusion of the public hearing referenced in Section 3 below.

Section 2. Interim Development Regulations.

A. Definitions.

1. "Biological Opinion" means that certain opinion issued by the National Marine Fisheries Service on September 22, 2008, recommending changes to the implementation of the National Flood Insurance Program in order to meet the requirements of the Endangered Species Act in the Puget Sound watershed.

2. "Biologist, qualified" means a person who possesses a bachelor's degree from an accredited college in biology, a branch of biology, limnology, biometrics, oceanography, forestry or natural resource management, with experience preparing reports for the relevant type of habitat.

3. "Endangered Species Act" or "ESA" means 16 U.S.C. 1531 *et seq.*, as amended.

4. "Habitat Assessment report" means a report prepared by a qualified biologist that assesses the proposed development and identifies potential impacts, required mitigation, and whether or not the development adversely affects water quality, water quantity, flood volumes, flood velocities, spawning substrate and/or floodplain refugia for listed salmonids under the requirements of the Endangered Species Act.

5. "Likely to Adversely Affect" or "LAA" means the effects of the development will result in short- or long-term adverse effects on listed species or designated habitat area.

6. "May Affect, Not Likely to Adversely Affect" or "NLAA" means the effects to the listed species or designated critical habitat are insignificant and/or discountable.

7. "No Effect" or "NE" means the development has no effect whatsoever to the listed species or designated critical habitat.

8. "Riparian Buffer Zone" includes all parcels located within 200 feet landward from the +9 elevation (NGVD 1929 datum).

9. "Special Flood Hazard Area" or ""Area of Special Flood Hazard" has the same meaning as set forth in GHMC 18.10.040(C) and as determined under GHMC 18.10.050(B).

B. Habitat Assessment Required. In addition to the requirements set forth in chapter 18.10 GHMC, if applicable, and other applicable development regulations in the Gig Harbor Municipal Code, no development permits may be issued on any parcel partially or fully within the Special Flood Hazard Area or Riparian Buffer Zone unless the Planning Director or designee, after review of a Habitat Assessment report provided by applicant, has determined the development meets the standards of NE or NLAA, or the applicant submits a letter from the National Marine Fisheries Service ("NMFS") or the Federal Emergency Management Agency ("FEMA") stating that the development complies with the requirements under the Biological Opinion and the ESA.

C. Process. The Planning Director or designee shall review the Habitat Assessment Report to determine whether the development meets the standard of NE, NLAA or LAA. If the Planning Director or designee determines that the development is LAA, then the City may not issue the development permit unless the development is redesigned to a point where the assessment is NLAA or NE. If a development cannot be redesigned to meet the standard of NLAA or NE, the development may only be permitted if the applicant submits a letter from NMFS or FEMA demonstrating concurrence through a consultation under Section 7 or 4(d) of the ESA or issuance of an incidental take permit under Section 10 of the ESA. The Habitat Assessment and/or concurrence letter from NMFS or FEMA shall be retained in the permit file.

D. Exemptions. The following development is exempt from the requirements set forth in Section B above:

1. Repair or remodel of an existing building in its existing footprint, including buildings damaged by fire or other casualties;
2. Removal of noxious weeds;
3. Replacement of non-native vegetation with native vegetation;
4. Lawn and garden maintenance;
5. Removal of hazard trees;
6. Normal maintenance of public utilities and facilities; and
7. Restoration or enhancement of floodplains, riparian areas and streams that meet federal and state standards.

Section 3. Public Hearing. Pursuant to RCW 36.70A.390 and RCW 35A.63.220, the City Council hereby sets a public hearing for November 14, 2011 at 5:30 p.m. or as soon thereafter as the matter may be heard in order to take public testimony on the amendments adopted by this ordinance. The City Council may, in its discretion, adopt additional findings justifying the interim development regulations after the close of the hearing.

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

Section 5. Copy to Commerce Department. Pursuant to RCW 36.70A.106(3), the City Clerk is directed to send a copy of this ordinance to the State Department of Commerce for its files within ten (10) days after adoption of this ordinance.

Section 6. Effective Period for Interim Regulations. The interim development regulations adopted by this ordinance shall remain in effect through March 25, 2012, and shall automatically expire unless the same are extended as provided in RCW 36.70A.390 and

RCW 35A.63.220 prior to expiration, or unless the same are repealed or superseded by permanent regulations prior to expiration.

Section 7. Declaration of Emergency. The Gig Harbor City Council hereby finds and declares that an emergency exists which necessitates that this ordinance become effective immediately in order to preserve the public health, safety and welfare.

Section 8. Publication. The City Clerk is directed to publish a summary of this ordinance at the earliest possible publication date.

Section 9. Effective Date. This ordinance shall take effect immediately upon passage by a majority vote plus one of the entire membership of the Council, as required by RCW 35A.12.130.

PASSED by the Council and approved by the Mayor of the City of Gig Harbor, this 26th day of September, 2011.

CITY OF GIG HARBOR

Mayor Pro Tem Jim Franich

ATTEST/AUTHENTICATED:

Molly M. Towslee, City Clerk

APPROVED AS TO FORM:
Office of the City Attorney

Angela S. Belbeck

FILED WITH THE CITY CLERK: 09/23/11
PASSED BY THE CITY COUNCIL: 09/26/11
PUBLISHED: 10/05/11
EFFECTIVE DATE: 09/26/11
ORDINANCE NO: 1223

ORDINANCE NO. 1234

AN ORDINANCE OF THE CITY OF GIG HARBOR, WASHINGTON, RELATING TO DEVELOPMENT IN SPECIAL FLOOD HAZARD AREAS AND WITHIN 200 FEET LANDWARD OF SPECIAL FLOOD HAZARD AREAS; EXTENDING INTERIM REGULATIONS REQUIRING A HABITAT ASSESSMENT OR LETTER FROM NMFS OR FEMA ESTABLISHING COMPLIANCE WITH THE ENDANGERED SPECIES ACT; ESTABLISHING A WORK PLAN; PROVIDING FOR SEVERABILITY AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, in *National Wildlife Federation and Public Employees for Environmental Responsibility v. Federal Emergency Management Agency, et al.*, 345 F. Supp. 2d 1151 (2004), the United States District Court for the Western District of Washington ruled that the Federal Emergency Management Agency ("FEMA") must undergo formal consultation under Section 7 of the Endangered Species Act ("ESA") because the implementation of the National Flood Insurance Program ("NFIP") may affect listed species found in the Puget Sound Region; and

WHEREAS, the as a result of the consultation, National Marine Fisheries Service ("NMFS") issued a Biological Opinion on September 22, 2008, that documented the adverse effects of FEMA's NFIP on listed species found in the Puget Sound Region, which includes Puget Sound Chinook Salmon, Puget Sound Steelhead and Southern Resident Killer Whales; and

WHEREAS, cities that participate in the NFIP must demonstrate compliance with the Biological Opinion by choosing one of three options provided by FEMA: Option #1 - adopt the FEMA-developed ESA compliant model ordinance; Option #2 - meet FEMA checklist for ESA compliance with current regulations; or Option #3 - permit by permit demonstration of ESA compliance; and

WHEREAS, the City is currently undergoing review by FEMA for Option #2 but that option cannot become effective until the City completes the update of its Shoreline Master Program; and

WHEREAS, until the requirements for Option #2 are met, the City believes that Option #3 best meets the needs of the environment and community. This requires the City to maintain documentation from the applicant obtained from a habitat assessment or Section 7 consultation with NMFS, that demonstrates compliance with the ESA. This documentation is to be maintained by the City with the applicable permit file and available for FEMA review upon request; and

WHEREAS, the City Council deems it to be in the public interest to extend the interim regulations but not to codify permanent regulations until either Option #2 is approved or the City otherwise determines to adopt Option #3 on a permanent basis; and

WHEREAS, the City Council held a public hearing on March 12, 2012 to take public testimony relating to this ordinance;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Purpose. The purpose of this ordinance is to extend the interim regulations set forth in Ordinance No. 1223 for a period of six months.

Section 2. Findings in Support of Extending Interim Regulations. In addition to the findings previously made as set forth in Ordinance No. 1223, the Gig Harbor City Council makes the following additional findings:

1. The City Council adopts the recitals set forth above in support of extending the interim regulations originally adopted under Ordinance No. 1223.

2. [Other, if any.] _____

_____

Section 3. Extension of Interim Regulations. The interim regulations adopted under Ordinance No. 1223 shall remain in effect for an additional period of six months, and shall automatically expire at that time unless the same are extended as provided in RCW 36.70A.390 and RCW 35A.63.220 prior to expiration, or unless the same are repealed or superseded by permanent regulations prior to expiration.

Section 4. Work Plan. The present schedule for adoption of the Shoreline Master Program (SMP) and anticipated adoption of FEMA Option #2 is as follows:

1. **February 29, 2012**-Issued SEPA Determination of Nonsignificance for SMP update. 60-day Department of Commerce Integrated SEPA/GMA review and public review and comment period initiated;
2. **April 30, 2012**-60-day SEPA comment period ends;
3. **May 7, 2012**-7 day SEPA appeal period ends;
4. **May 14, 2012**-City Council Public Hearing on February 29, 2012 draft SMP;
5. **May 29, 2012**-City Council First Reading of Ordinance
6. **June 11, 2012**-City Council 2nd Reading of Ordinance-Revised draft SMP and city response to FEMA's 12.8.11 letter provided to FEMA for review and consideration;
7. **July 2, 2012**-City Council adopted SMP provided to the Washington State Department of Ecology for review pursuant to RCW 90.58.090. Per the RCW, Ecology shall strive to complete its review in a maximum of 180-days. Per

RCW 90.58.090(2)(b), Ecology, at its discretion, may conduct a public hearing on the request within its designated 30-day comment period.

8. **February, 2013**-Ecology takes final action of city approved SMP and the master program becomes effective.
9. **February, 2013**-submit Ecology-approved SMP to FEMA for review and consideration as part of City's Option #2 approach for complying with the NMFS Biological Opinion.
10. FEMA approval of Option #2 approach to follow.

The Planning Director shall review the progress of the City's Shoreline Master Program update and consider whether permanent adoption of FEMA Option #3 should be recommended. The Planning Director shall make a recommendation to the Gig Harbor City Council by the end of August, 2012, as to whether to extend the interim regulations in anticipation of adoption of the Shoreline Master Program or whether to adopt Option #3 on a permanent basis.

Section 5. Copy to Commerce Department. Pursuant to RCW 36.70A.106(3), the City Clerk is directed to send a copy of this ordinance to the State Department of Commerce for its files within ten (10) days after adoption of this ordinance.

Section 6. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance.

Section 7. Effective Date. This Ordinance shall take effect and be in full force five (5) days after passage and publication of an approved summary consisting of the title.

PASSED by the Council and approved by the Mayor *Pro Tem* of the City of Gig Harbor, this 12th day of March, 2012.

CITY OF GIG HARBOR

Mayor Pro Tem Ekberg

ATTEST/AUTHENTICATED:

Molly M. Towslee, City Clerk

APPROVED AS TO FORM:
Office of the City Attorney

Angela S. Belbeck

FILED WITH THE CITY CLERK: 03/07/12
PASSED BY THE CITY COUNCIL: 03/12/12
PUBLISHED: 03/26/12
EFFECTIVE DATE: 03/26/12
ORDINANCE NO: 1234

U.S. Department of Homeland Security
Region X
130 228th Street, SW
Bothell, WA 98021-9796

FEMA

September 21, 2011

Mr. Tom Dolan
Director, Planning Department
City of Gig Harbor
3510 Grandview Street
Gig Harbor, Washington 98335

Dear Mr. Tom Dolan:

The City of Gig Harbor has chosen to demonstrate compliance with the National Flood Insurance Program (NFIP) Biological Opinion by choosing to provide a copy of any ordinances, procedures, and policies that equal or exceed the performance standards in the Programmatic Checklist for the NFIP Biological Opinion (Option 2). On June 24, 2011 FEMA Region X received a submittal package for our review.

FEMA Region X is currently reviewing your submittal and anticipates providing comments in the near future. This letter is to inform you that on September 22, 2011, your community will default to demonstrating permit by permit compliance (Option 3) until such time as FEMA can approve the submittal. The enclosed guidance memorandum entitled "What does it mean to be in Door 3?" provides additional information on how communities can implement a permit by permit approach to demonstrating compliance with the ESA when issuing a floodplain development permit.

For more information, please visit the FEMA Region X ESA/NFIP website at https://www.fema.gov/about/regions/regionx/nfipesa.shtm or feel free to contact me at john.graves1@dhs.gov or 425-487-4737.

Sincerely,

John Graves, CFM

Senior NFIP Specialist

Frequently Asked Question:

What does it mean to be in "Door 3"?

Federal regulations and local community ordinances mandate that communities that participate in the National Flood Insurance Program (NFIP) must require project proponents to obtain a floodplain development permit from the local community for any ground disturbing project proposed to occur within the Special Flood Hazard Area (SFHA). Communities must also ensure that all other federal, state, and local permits have been received prior to issuing a floodplain development permit. Communities may choose to provide a programmatic guarantee that floodplain development is compliant with the Endangered Species Act (ESA) by either adopting the Model Ordinance issued by FEMA Region X ("Door 1"), or by providing a copy of their ordinances, policies, and regulations that meet the performance standards of the Biological Opinion. Region X has developed a checklist communities can use for this option ("Door 2") to demonstrate that resources will be protected. There may be instances when a habitat assessment may be required for projects that are proposed in the SFHA that do not meet the performance standards of the Biological Opinion. These projects may still be permitted provided a habitat assessment is completed and the project is determined that it does not have an adverse effect. Section 7 of the FEMA Region X ESA Compliant Model Ordinance provides clarification on when a habitat assessment is required.

Absent a programmatic approach through Door 1 or Door 2, communities must ensure that development in the SFHA will not cause harm to threatened or endangered species, or that any harm from floodplain development is exempt from the take prohibition contained in Section 9 of the ESA. Any project that may have an adverse impact on threatened and endangered species must receive an incidental take permit under Section 10 of the ESA. Applicants for development projects in the SFHA must assess the impact of the proposed development on salmon habitat on a permit by permit basis ("Door3"). In order to avoid allowing incremental, systemic loss of essential ecosystem features to occur, the compliance standard for Door 3 must be a high showing that individual projects seeking to develop in the floodplain will retain the full level of existing baseline function. The impact of a project on habitat may be difficult to evaluate because there is often little or no information on the baseline conditions of the site's natural features and habitat functions. The scope, magnitude, and risks associated with possible impacts to populations or their habitats vary greatly by project. A habitat assessment is needed to identify those natural processes and habitat functions that currently exist (i.e. the environmental baseline) and determine how the proposed project will affect them. Communities should consult their legal counsel to determine if their current regulations include the authority to require the completion of habitat assessments for projects located within the SFHA. Communities may want to consider requiring a habitat assessment for projects that are required to undergo a Washington State Environmental Policy Act (SEPA) review. Although SEPA thresholds are often limited to larger projects, a community may choose to lower the thresholds for which a project is required to submit for a SEPA review. Additionally, many communities require critical areas reports for projects occurring within designated critical areas and may request additional data for projects that are in a frequently flooded area. Communities that implement this approach may need to require additional data in order ensure the standards for conducting habitat assessments are met.

The FEMA Region X Guidance for conducting Habitat Assessments is available at: https://www.fema.gov/about/regions/regionx/nfipesa.shtm.

If a permit applicant has prepared a Biological Evaluation or a Biological Assessment that includes an effects analysis of the proposed actions of the current project, and has received concurrence from United States Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) (the services), the project is deemed to comply with the ESA. As an example, projects requiring a federal permit under Section 404 of the Clean Water Act would likely follow a consultation process through the U.S. Army Corps of Engineers Regulatory Branch. The Section 404 permit process includes consultation with the U.S. Fish and Wildlife Service (USFWS), and/or the National Marine Fisheries Service (NMFS). Such consultations are required under Section 7 of the ESA. Applicants may also consult with NMFS through Section 10 of the ESA by providing a Habitat Conservation Plan (HCP) for their project; for example the Storedahl Gravel project, or by providing evidence that the project falls under an existing consultation conducted under Section 4(d) of the ESA. Many section 4(d) projects fall under the Regional Road Maintenance Program. A new habitat assessment will not be required for the . project if it has already received concurrence from the services.

Once it is determined that a habitat assessment is needed in order to describe baseline habitat conditions and have a basis to estimate possible impacts from proposed project actions, a step by step assessment process is recommended in the FEMA Region X guidance for conducting Habitat Assessments. Communities should use or direct applicants to sources of information that are readily available in order to provide detailed information that may be necessary to include in the habitat assessment. Some potential sources of information are the Shoreline Characterization Reports use for a community's Shoreline Master Program, Watershed Resource Inventory Area (WIRA) reports, and critical areas inventories.

NMFS, USFWS, and the Corps use the following effects determination criteria and this language needs to be used for habitat assessments:

- No Effect (NE): the project has no effect whatsoever to the listed species or designated critical habitat.
- May Affect, Not Likely to Adversely Affect (NLAA): the effects to the listed species or designated critical habitat are insignificant and/or discountable. A determination of NLAA would be made for those activities that have only a beneficial effect with no short or long-term adverse effects.
- Likely to Adversely Affect (LAA): the effects of the project will result in short -or long-term adverse effects on the identified species or designated habitat area.

If the effects determination is NLAA, the report should indicate what minimization and conservation measures would help eliminate or minimize the impact. For example, the permit applicant could time certain construction work to occur when the species are not present in the project area. If the assessment finds a project is LAA, then the floodplain development permit cannot be issued unless the project is redesigned to a point where the assessment is NLAA. If a project cannot be redesigned to meet the standard of NLAA, the project may only be permitted if the project has received concurrence from NMFS through a consultation under Section 7, 4(d), or

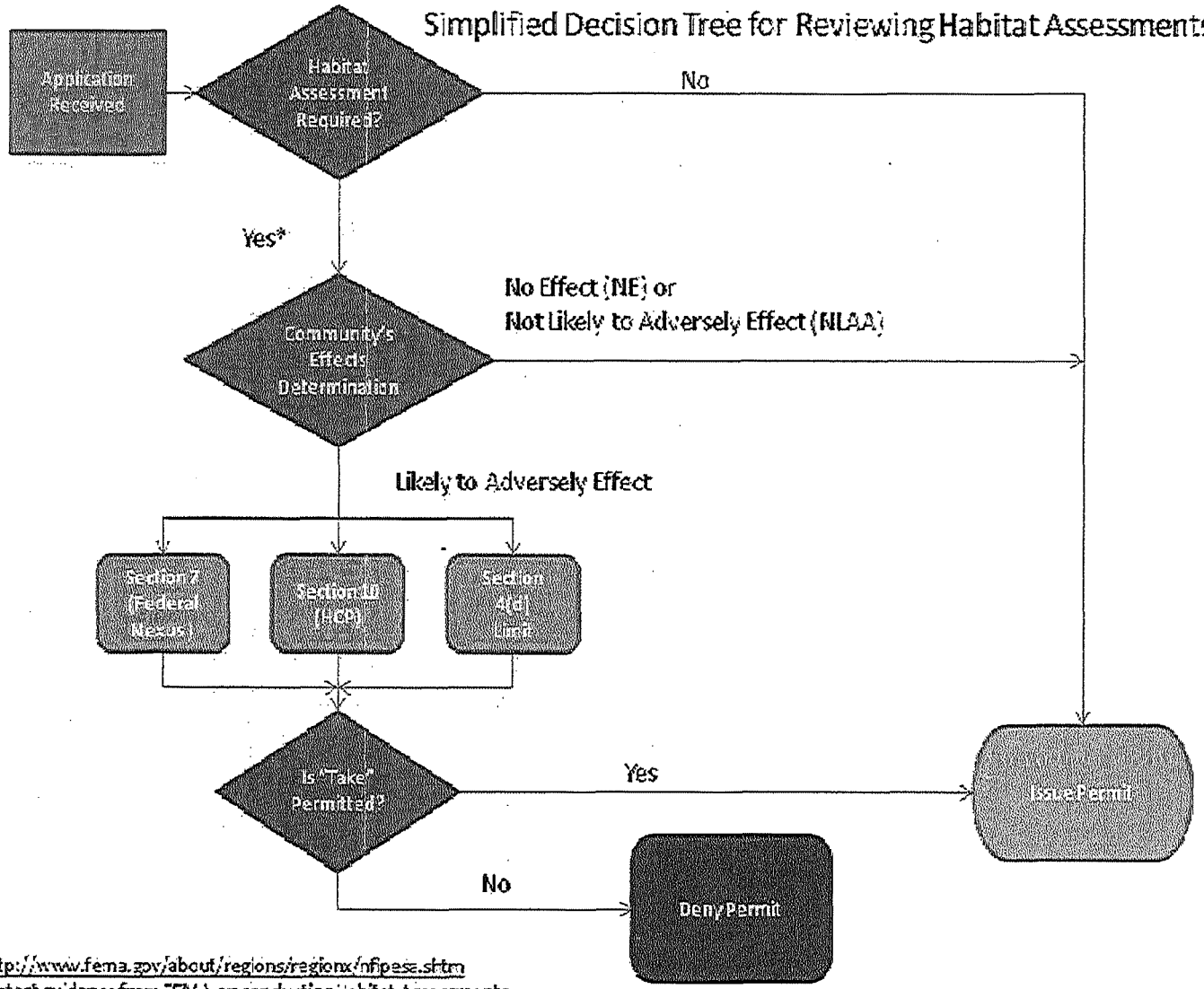
10 of the ESA. The attached simplified permitting process flowchart will help communities understand the steps required to permit a development project in the SFHA.

It is recommended that applicants start with conceptual development plans and conduct a preliminary impact assessment before they invest in detailed project plans and specifications. Continued communication with community staff will also help identify problems and solutions before too much time and/or money is spent on a project that may require additional mitigation measures, if allowed.

It may be necessary for some communities with limited staff to require assistance to evaluate the adequacy of habitat assessments. The FEMA Region X Habitat Assessment Guide does allow for flexibility in many aspects of the assessment. Review of assessments will require some familiarity with the information needed to adequately portray and interpret fisheries population and habitat survey data. FEMA Region X can provide assistance to communities preparing habitat assessments. Communities with low levels of floodplain development may receive one on one assistance for their occasional permit. Communities with moderate to high levels of development may receive training on how to conduct a habitat assessment.

A permit applicant should weigh the cost of preparing the assessment and the mitigation plan, should one be needed, against the cost of locating the project outside the SFHA. It may cost less in time and money to simply avoid the SFHA.

For additional information please view the FEMA website at:
www.fema.gov/about/regions/regionx/nfipesa.shtm or contact John Graves at
john.graves1@dhs.gov or 425-487-4737.



*See http://www.fema.gov/about/regions/regionx/nfipesa.shtm for the latest guidance from FEMA on conducting Habitat Assessments