

CITY OF SEATTLE
ORDINANCE 126415
COUNCIL BILL 120135

AN ORDINANCE granting ARE-SEATTLE NO. 33, LLC a permit to construct, maintain, and operate below-grade private utility lines under and across Roy Street, west of 8th Avenue North, and Dexter Avenue North, north of Mercer Street, for a 15-year term, renewable for one successive 15-year term; specifying the conditions under which this permit is granted; and providing for the acceptance of the permit and conditions.

WHEREAS, McKinstry Company LLC applied for permission to construct, operate, and maintain below-grade private utility lines under and across Roy Street, west of 8th Avenue North; Dexter Avenue North, north of Mercer Street; Roy Street, west of Dexter Avenue North; and under the alley north of Mercer Street, west of Dexter Avenue North, south of Roy Street, and east of Aurora Avenue North in the South Lake Union neighborhood (“ARE District Energy System”); and

WHEREAS, McKinstry Company LLC transferred all rights and ownership of the ARE District Energy System to ARE-SEATTLE NO. 33, LLC; and

WHEREAS, the ARE District Energy System has been modified to eliminate potential lines under and across Roy Street, west of Dexter Avenue North; and under the alley north of Mercer Street, west of Dexter Avenue North, south of Roy Street, and east of Aurora Avenue North; and

WHEREAS, the purpose of the ARE District Energy System is to extract waste heat from municipal wastewater and distribute it between the buildings located at 601 Dexter Avenue North, 701 Dexter Avenue North, and 800 Mercer Street, reducing energy usage and carbon emissions; and

1 WHEREAS, the obligations of the ordinance remain in effect after the ordinance term expires
2 until the encroachment is removed, or ARE-SEATTLE NO. 33, LLC is relieved of the
3 obligations by the Seattle Department of Transportation Director, or the Seattle City
4 Council passes a new ordinance to renew the permission granted; and

5 WHEREAS, the Seattle City Council adopted Resolution 31980 and conceptually approved the
6 ARE District Energy System, and ARE-SEATTLE NO. 33, LLC has met the obligations
7 described in Resolution 31980; and

8 WHEREAS, the adoption of this ordinance is the culmination of the approval process for the
9 ARE District Energy System to legally occupy a portion of the public right-of-way, and
10 the adopted ordinance is considered to be the permit; NOW, THEREFORE,

11 **BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

12 Section 1. **Permission.** Subject to the terms and conditions of this ordinance, The City of
13 Seattle (“City”) grants permission (also referred to in this ordinance as a “permit”) to ARE-
14 SEATTLE NO. 33, LLC, and its successors and assigns as approved by the Director of the
15 Seattle Department of Transportation (“Director”) according to Section 14 of this ordinance (the
16 party named above and each such approved successor and assign is referred to as the
17 “Permittee”), to construct, maintain, and operate below-grade private utility lines under and
18 across Roy Street, west of 8th Avenue North, and Dexter Avenue North, north of Mercer Street
19 (collectively referred to as “ARE District Energy System”), adjacent in whole or in part to the
20 property legally described as:

21 701 DEXTER AVENUE NORTH:
22 LOTS 1 AND 2, BLOCK 6, EDEN ADDITION TO THE CITY OF SEATTLE,
23 ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 1 OF PLATS,
24 PAGE(S) 61-1, IN KING COUNTY, WASHINGTON; EXCEPT THE EAST 7 FEET
25 THEREOF HERETOFORE CONDEMNED IN KING COUNTY SUPERIOR COURT
26 CAUSE NUMBER 61981 FOR THE WIDENING OF DEXTER AVENUE, AS

1 PROVIDED UNDER ORDINANCE NUMBER 17628 OF THE CITY OF SEATTLE;
2 AND LOTS 7 AND 9, BLOCK 6, EDEN ADDITION TO THE CITY OF SEATTLE,
3 ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 1 OF PLATS,
4 PAGE(S) 61-A, IN KING COUNTY, WASHINGTON; EXCEPT THAT PORTION
5 THEREOF CONDEMNED IN KING COUNTY SUPERIOR COURT CAUSE
6 NUMBER 236360 FOR THE WIDENING OF AURORA AVENUE, AS PROVIDED
7 UNDER ORDINANCE NUMBER 59719 OF THE CITY OF SEATTLE; SITUATE IN
8 THE CITY OF SEATTLE, COUNTY OF KING, STATE OF WASHINGTON.

9 Construction and operation of the ARE District Energy System will connect 701 Dexter
10 Avenue North and 800 Mercer Street, under Roy Street; and 800 Mercer Street and 601 Dexter
11 Avenue North, under Dexter Avenue North.

12 Section 2. **Term.** The permission granted to the Permittee is for a term of 15 years
13 starting on the effective date of this ordinance and ending at 11:59 p.m. on the last day of the
14 fifteenth year. Upon written application made by the Permittee at least one year before expiration
15 of the term, the Director or the City Council may renew the permit once, for a successive 15-year
16 term, subject to the right of the City to require the removal of the ARE District Energy System or
17 to revise by ordinance any of the terms and conditions of the permission granted by this
18 ordinance. The total term of the permission, including renewals, shall not exceed 30 years. The
19 Permittee shall submit any application for a new permission no later than one year before the
20 then-existing term expires.

21 Section 3. **Protection of utilities.** The permission granted is subject to the Permittee
22 bearing the expense of any protection, support, or relocation of existing utilities deemed
23 necessary by the owners of the utilities, and the Permittee being responsible for any damage to
24 the utilities due to the construction, repair, reconstruction, maintenance, operation, or removal of
25 the ARE District Energy System and for any consequential damages that may result from any
26 damage to utilities or interruption in service caused by any of the foregoing.

1 Section 4. **Removal for public use or for cause.** The permission granted is subject to use
2 of the street right-of-way or other public place (collectively, “public place”) by the City and the
3 public for travel, utility purposes, and other public uses or benefits. The City expressly reserves
4 the right to deny renewal, or terminate the permission at any time before expiration of the initial
5 term or any renewal term, and require the Permittee to remove the ARE District Energy System
6 or any part thereof or installation on the public place, at the Permittee’s sole cost and expense, if:

7 A. The City Council determines by ordinance that the space occupied by the ARE
8 District Energy System is necessary for any public use or benefit or that the ARE District Energy
9 System interferes with any public use or benefit; or

10 B. The Director determines that use of the ARE District Energy System has been
11 abandoned; or

12 C. The Director determines that any term or condition of this ordinance has been
13 violated, and the violation has not been corrected by the Permittee by the compliance date after a
14 written request by the City to correct the violation (unless a notice to correct is not required due
15 to an immediate threat to the health or safety of the public).

16 A City Council determination that the space is needed for, or the ARE District Energy
17 System interferes with, a public use or benefit is conclusive and final without any right of the
18 Permittee to resort to the courts to adjudicate the matter.

19 Section 5. **Permittee’s obligation to remove and restore.** If the permission granted is
20 not renewed at the expiration of a term, or if the permission expires without an application for a
21 new permission being granted, or if the City terminates the permission, then within 90 days after
22 the expiration or termination of the permission, or prior to any earlier date stated in an ordinance
23 or order requiring removal of the ARE District Energy System, the Permittee shall, at its own

1 expense, remove the ARE District Energy System and all of the Permittee's equipment and
2 property from the public place and replace and restore all portions of the public place that may
3 have been disturbed for any part of the ARE District Energy System in as good condition for
4 public use as existed prior to constructing the ARE District Energy System and in at least as
5 good condition in all respects as the abutting portions of the public place as required by Seattle
6 Department of Transportation (SDOT) right-of-way restoration standards.

7 Failure to remove the ARE District Energy System as required by this section is a
8 violation of Chapter 15.90 of the Seattle Municipal Code (SMC) or successor provision;
9 however, applicability of Chapter 15.90 does not eliminate any remedies available to the City
10 under this ordinance or any other authority. If the Permittee does not timely fulfill its obligations
11 under this section, the City may in its sole discretion remove the ARE District Energy System
12 and restore the public place at the Permittee's expense and collect such expense in any manner
13 provided by law.

14 Upon the Permittee's completion of removal and restoration in accordance with this
15 section, or upon the City's completion of the removal and restoration and the Permittee's
16 payment to the City for the City's removal and restoration costs, the Director shall issue a
17 certification that the Permittee has fulfilled its removal and restoration obligations under this
18 ordinance. Upon prior notice to the Permittee and entry of written findings that it is in the public
19 interest, the Director may, in the Director's sole discretion, conditionally or absolutely excuse the
20 Permittee from compliance with all or any of the Permittee's obligations under this section.

21 **Section 6. Repair or reconstruction.** The ARE District Energy System shall remain the
22 exclusive responsibility of the Permittee and the Permittee shall maintain the ARE District
23 Energy System in good and safe condition for the protection of the public. The Permittee shall

1 not reconstruct or repair the ARE District Energy System except in strict accordance with plans
2 and specifications approved by the Director. The Director may, in the Director’s judgment, order
3 the ARE District Energy System reconstructed or repaired at the Permittee’s cost and expense
4 because of the deterioration or unsafe condition of the ARE District Energy System; because of
5 the installation, construction, reconstruction, maintenance, operation, or repair of any
6 municipally owned public utilities; or for any other cause.

7 **Section 7. Failure to correct unsafe condition.** After written notice to the Permittee and
8 failure of the Permittee to correct an unsafe condition within the time stated in the notice, the
9 Director may order the ARE District Energy System be closed or removed at the Permittee’s
10 expense if the Director deems that the ARE District Energy System has become unsafe or creates
11 a risk of injury to the public. If there is an immediate threat to the health or safety of the public, a
12 notice to correct is not required.

13 **Section 8. Continuing obligations.** Notwithstanding the termination or expiration of the
14 permission granted, or removal of the ARE District Energy System, the Permittee shall remain
15 bound by all of its obligations under this ordinance until the Director has issued a certification
16 that the Permittee has fulfilled its removal and restoration obligations under Section 5 of this
17 ordinance, or the Seattle City Council passes a new ordinance to renew the permission granted
18 and/or establishes a new term. Notwithstanding the issuance of that certification, the Permittee
19 shall continue to be bound by the obligations in Section 9 of this ordinance and shall remain
20 liable for any unpaid fees assessed under Sections 15 and 17 of this ordinance.

21 **Section 9. Release, hold harmless, indemnification, and duty to defend.** The
22 Permittee, by accepting the terms of this ordinance, releases the City, its officials, officers,
23 employees, and agents from any and all claims, actions, suits, liability, loss, costs, expense,

1 attorneys' fees, or damages of every kind and description arising out of or by reason of the ARE
2 District Energy System or this ordinance, including but not limited to claims resulting from
3 injury, damage, or loss to the Permittee or the Permittee's property.

4 The Permittee agrees to at all times defend, indemnify, and hold harmless the City, its
5 officials, officers, employees, and agents from and against all claims, actions, suits, liability,
6 loss, costs, expense, attorneys' fees, or damages of every kind and description, excepting only
7 damages that may result from the sole negligence of the City, that may accrue to, be asserted by,
8 or be suffered by any person or property including, without limitation, damage, death or injury to
9 members of the public or to the Permittee's officers, agents, employees, contractors, invitees,
10 tenants, tenants' invitees, licensees, or successors and assigns, arising out of or by reason of:

11 A. The existence, condition, construction, reconstruction, modification, maintenance,
12 operation, use, or removal of the ARE District Energy System or any portion thereof, or the use,
13 occupation, or restoration of the public place or any portion thereof by the Permittee or any other
14 person or entity;

15 B. Anything that has been done or may at any time be done by the Permittee by
16 reason of this ordinance; or

17 C. The Permittee failing or refusing to strictly comply with every provision of this
18 ordinance; or arising out of or by reason of the ARE District Energy System, or this ordinance in
19 any other way.

20 If any suit, action, or claim of the nature described above is filed, instituted, or begun
21 against the City, the Permittee shall upon notice from the City defend the City, with counsel
22 acceptable to the City, at the sole cost and expense of the Permittee, and if a judgment is
23 rendered against the City in any suit or action, the Permittee shall fully satisfy the judgment

1 within 90 days after the action or suit has been finally determined, if determined adversely to the
2 City. If it is determined by a court of competent jurisdiction that Revised Code of Washington
3 (RCW) 4.24.115 applies to this ordinance, then in the event claims or damages are caused by or
4 result from the concurrent negligence of the City, its agents, contractors, or employees, and the
5 Permittee, its agents, contractors, or employees, this indemnity provision shall be valid and
6 enforceable only to the extent of the negligence of the Permittee or the Permittee's agents,
7 contractors, or employees.

8 Section 10. **Insurance.** For as long as the Permittee exercises any permission granted by
9 this ordinance and until the Director has issued a certification that the Permittee has fulfilled its
10 removal and restoration obligations under Section 5 of this ordinance, the Permittee shall obtain
11 and maintain in full force and effect, at its own expense, insurance and/or self-insurance that
12 protects the Permittee and the City from claims and risks of loss from perils that can be insured
13 against under commercial general liability (CGL) insurance policies in conjunction with:

14 A. Construction, reconstruction, modification, operation, maintenance, use,
15 existence, or removal of the ARE District Energy System or any portion thereof, as well as
16 restoration of any disturbed areas of the public place in connection with removal of the ARE
17 District Energy System;

18 B. The Permittee's activity upon or the use or occupation of the public place
19 described in Section 1 of this ordinance; and

20 C. Claims and risks in connection with activities performed by the Permittee by
21 virtue of the permission granted by this ordinance.

22 Minimum insurance requirements are CGL insurance written on an occurrence form at
23 least as broad as the Insurance Services Office (ISO) CG 00 01. The City requires insurance

1 coverage to be placed with an insurer admitted and licensed to conduct business in Washington
2 State or with a surplus lines carrier pursuant to chapter 48.15 RCW. If coverage is placed with
3 any other insurer or is partially or wholly self-insured, such insurer(s) or self-insurance is subject
4 to approval by the City’s Risk Manager.

5 Minimum limits of liability shall be \$5,000,000 per Occurrence; \$10,000,000 General
6 Aggregate; \$5,000,000 Products/Completed Operations Aggregate, including Premises
7 Operations; Personal/Advertising Injury; Contractual Liability. Coverage shall include “The City
8 of Seattle, its officers, officials, employees and agents” as additional insureds for primary and
9 non-contributory limits of liability subject to a Separation of Insureds clause.

10 Within 60 days after the effective date of this ordinance, the Permittee shall provide to
11 the City, or cause to be provided, certification of insurance coverage including an actual copy of
12 the blanket or designated additional insured policy provision per the ISO CG 20 12 endorsement
13 or equivalent. The insurance coverage certification shall be delivered or sent to the Director or to
14 SDOT at an address as the Director may specify in writing from time to time. The Permittee shall
15 provide a certified complete copy of the insurance policy to the City promptly upon request.

16 If the Permittee is self-insured, a letter of certification from the Corporate Risk Manager
17 may be submitted in lieu of the insurance coverage certification required by this ordinance, if
18 approved in writing by the City’s Risk Manager. The letter of certification must provide all
19 information required by the City’s Risk Manager and document, to the satisfaction of the City’s
20 Risk Manager, that self-insurance equivalent to the insurance requirements of this ordinance is in
21 force. After a self-insurance certification is approved, the City may from time to time
22 subsequently require updated or additional information. The approved self-insured Permittee
23 must provide 30 days’ prior notice of any cancellation or material adverse financial condition of

1 its self-insurance program. The City may at any time revoke approval of self-insurance and
2 require the Permittee to obtain and maintain insurance as specified in this ordinance.

3 In the event that the Permittee assigns or transfers the permission granted by this
4 ordinance, the Permittee shall maintain in effect the insurance required under this section until
5 the Director has approved the assignment or transfer pursuant to Section 14 of this ordinance.

6 Section 11. **Contractor insurance.** The Permittee shall contractually require that any and
7 all of its contractors performing work on any premises contemplated by this permit name “The
8 City of Seattle, its officers, officials, employees and agents” as additional insureds for primary
9 and non-contributory limits of liability on all CGL, Automobile and Pollution liability insurance
10 and/or self-insurance. The Permittee shall also include in all contract documents with its
11 contractors a third-party beneficiary provision extending to the City construction indemnities and
12 warranties granted to the Permittee.

13 Section 12. **Performance bond.** Within 60 days after the effective date of this ordinance,
14 the Permittee shall deliver to the Director for filing with the City Clerk a sufficient bond
15 executed by a surety company authorized and qualified to do business in the State of Washington
16 in the amount of \$15,000 and conditioned with a requirement that the Permittee shall comply
17 with every provision of this ordinance and with every order the Director issues under this
18 ordinance. The Permittee shall ensure that the bond remains in effect until the Director has issued
19 a certification that the Permittee has fulfilled its removal and restoration obligations under
20 Section 5 of this ordinance. An irrevocable letter of credit approved by the Director in
21 consultation with the City Attorney’s Office may be substituted for the bond. If the Permittee
22 assigns or transfers the permission granted by this ordinance, the Permittee shall maintain in

1 effect the bond or letter of credit required under this section until the Director has approved the
2 assignment or transfer pursuant to Section 14 of this ordinance.

3 Section 13. **Adjustment of insurance and bond requirements.** The Director may adjust
4 minimum liability insurance levels and surety bond requirements during the term of this
5 permission. If the Director determines that an adjustment is necessary to fully protect the
6 interests of the City, the Director shall notify the Permittee of the new requirements in writing.
7 The Permittee shall, within 60 days of the date of the notice, provide proof of the adjusted
8 insurance and surety bond levels to the Director.

9 Section 14. **Consent for and conditions of assignment or transfer.** When the Property
10 is transferred, the permission granted by this ordinance shall be assignable and transferable by
11 operation of law pursuant to Section 20 of this ordinance. Continued occupation of the right-of-
12 way constitutes the Permittee's acceptance of the terms of this ordinance, and the new owner of
13 the Property shall be conferred with the rights and obligations of the Permittee by this ordinance.
14 Other than a transfer to a new owner of the Property, the Permittee shall not transfer, assign,
15 mortgage, pledge or encumber the same without the Director's consent, which the Director shall
16 not unreasonably refuse. The Director may approve assignment or transfer of the permission
17 granted by this ordinance to a successor entity only if the successor or assignee has provided, at
18 the time of the assignment or transfer, the bond and certification of insurance coverage required
19 under this ordinance; and has paid any fees due under Sections 15 and 17 of this ordinance. Upon
20 the Director's approval of an assignment or transfer, the rights and obligations conferred on the
21 Permittee by this ordinance shall be conferred on the successors and assigns. Any person or
22 entity seeking approval for an assignment or transfer of the permission granted by this ordinance

1 shall provide the Director with a description of the current and anticipated use of the ARE
2 District Energy System.

3 Section 15. **Inspection fees.** The Permittee shall, as provided by SMC Chapter 15.76 or
4 successor provision, pay the City the amounts charged by the City to inspect the ARE District
5 Energy System during construction, reconstruction, repair, annual safety inspections, and at other
6 times deemed necessary by the City. An inspection or approval of the ARE District Energy
7 System by the City shall not be construed as a representation, warranty, or assurance to the
8 Permittee or any other person as to the safety, soundness, or condition of the ARE District
9 Energy System. Any failure by the City to require correction of any defect or condition shall not
10 in any way limit the responsibility or liability of the Permittee.

11 Section 16. **Inspection reports.** The Permittee shall submit to the Director, or to SDOT
12 at an address specified by the Director, an inspection report that:

- 13 A. Describes the physical dimensions and condition of all load-bearing elements;
14 B. Describes any damages or possible repairs to any element of the ARE District
15 Energy System;
16 C. Prioritizes all repairs and establishes a timeframe for making repairs; and
17 D. Is stamped by a professional structural engineer licensed in the State of
18 Washington.

19 A report meeting the foregoing requirements shall be submitted within 60 days after the
20 effective date of this ordinance; subsequent reports shall be submitted every two years, provided
21 that, in the event of a natural disaster or other event that may have damaged the ARE District
22 Energy System, the Director may require that additional reports be submitted by a date
23 established by the Director. The Permittee has the duty of inspecting and maintaining the ARE

1 District Energy System. The responsibility to submit structural inspection reports periodically or
2 as required by the Director does not waive or alter any of the Permittee's other obligations under
3 this ordinance. The receipt of any reports by the Director shall not create any duties on the part
4 of the Director. Any failure by the Director to require a report, or to require action after receipt of
5 any report, shall not waive or limit the Permittee's obligations.

6 Section 17. **Annual fee.** Beginning on the effective date of this ordinance the Permittee
7 shall pay an Issuance Fee, and annually thereafter, the Permittee shall promptly pay to the City,
8 upon statements or invoices issued by the Director, an Annual Renewal Fee, and an Annual Use
9 and Occupation Fee of \$4,482.60, or as adjusted annually thereafter, for the privileges granted by
10 this ordinance for the ARE District Energy System.

11 Adjustments to the Annual Use and Occupation Fee shall be made in accordance with a
12 term permit fee schedule adopted by the City Council and may be made every year. In the
13 absence of a schedule, the Director may only increase or decrease the previous year's fee to
14 reflect any inflationary changes so as to charge the fee in constant dollar terms. This adjustment
15 will be calculated by adjusting the previous year's fee by the percentage change between the two
16 most recent year-end values available for the Consumer Price Index for the Seattle-Tacoma-
17 Bellevue Area, All Urban Consumers, All Products, Not Seasonally Adjusted. Permittee shall
18 pay any other applicable fees, including fees for reviewing applications to renew the permit after
19 expiration of the first term. All payments shall be made to the City Finance Director for credit to
20 the Transportation Fund.

21 Section 18. **Compliance with other laws.** The Permittee shall construct, maintain, and
22 operate the ARE District Energy System in compliance with all applicable federal, state, County
23 and City laws and regulations. Without limitation, in all matters pertaining to the ARE District

1 Energy System, the Permittee shall comply with the City’s laws prohibiting discrimination in
2 employment and contracting including Seattle’s Fair Employment Practices Ordinance, Chapter
3 14.04, and Fair Contracting Practices Code, Chapter 14.10 (or successor provisions).

4 **Section 19. Acceptance of terms and conditions.** The Permittee shall not commence
5 construction of the ARE District Energy System before providing evidence of insurance
6 coverage required by Section 10 of this ordinance, the bond as required by Section 12 of this
7 ordinance, and the covenant agreement required by Section 20 of this ordinance. Obtaining
8 building permits from the Seattle Department of Construction and Inspections, or other
9 applicable City-issued permits, constitutes the Permittee’s acceptance of the terms of this
10 ordinance.

11 **Section 20. Obligations run with the Property.** The obligations and conditions imposed
12 on the Permittee by this ordinance are covenants that run with the land and bind subsequent
13 owners of the property adjacent to the ARE District Energy System and legally described in
14 Section 1 of this ordinance (the “Property”), regardless of whether the Director has approved
15 assignment or transfer of the permission granted herein to such subsequent owner(s). At the
16 request of the Director, the Permittee shall provide to the Director a current title report showing
17 the identity of all owner(s) of the Property and all encumbrances on the Property. The Permittee
18 shall, within 60 days of the effective date of this ordinance, and prior to conveying any interest in
19 the Property, deliver to the Director upon a form to be supplied by the Director, a covenant
20 agreement imposing the obligations and conditions set forth in this ordinance, signed and
21 acknowledged by the Permittee and any other owner(s) of the Property and recorded with the
22 King County Recorder’s Office. The Director shall file the recorded covenant agreement with the
23 City Clerk. The covenant agreement shall reference this ordinance by its ordinance number. At

1 the request of the Director, the Permittee shall cause encumbrances on the Property to be
2 subordinated to the covenant agreement.

3 Section 21. **Section titles.** Section titles are for convenient reference only and do not
4 modify or limit the text of a section.

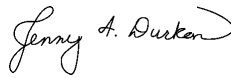
1 Section 22. This ordinance shall take effect and be in force 30 days after its approval by
2 the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it
3 shall take effect as provided by Seattle Municipal Code Section 1.04.020.

4 Passed by the City Council the 9th day of August, 2021,
5 and signed by me in open session in authentication of its passage this 9th day of
6 August, 2021.

7 

8 President Pro Tem of the City Council

9 Approved returned unsigned vetoed this 12th day of August, 2021.

10 

11 Jenny A. Durkan, Mayor

12 Filed by me this 12th day of August, 2021.

13 

14 Monica Martinez Simmons, City Clerk

15 (Seal)