

CITY OF SEATTLE
ORDINANCE 126346
COUNCIL BILL 120061

AN ORDINANCE granting permission to Northwest Kidney Center to continue to operate and maintain a pedestrian tunnel under and across Broadway, north of Cherry Street; repealing Section 8 of Ordinance 123367; and providing for acceptance of the permit and conditions.

WHEREAS, by Ordinance 123367, The City of Seattle granted Northwest Kidney Center permission to construct, maintain, and operate a pedestrian tunnel under and across Broadway, north of Cherry Street, for a ten-year term, renewable for two successive ten-year terms; and

WHEREAS, the permission authorized by Ordinance 123367, was due for renewal on December 1, 2018; and

WHEREAS, although the permission expired on December 1, 2018, Northwest Kidney Center has complied with all the conditions and obligations of Ordinance 123367; and

WHEREAS, Northwest Kidney Center submitted an application to the Director of Transportation to renew the permission granted by Ordinance 123367 for a new 15-year term; and

WHEREAS, the continuing obligations in Section 8 of Ordinance 123367 remain in effect after the ordinance term expires until the encroachment is removed, or Northwest Kidney Center is relieved of the obligations by the Seattle Department of Transportation Director, or the Seattle City Council passes a new ordinance to renew the permission granted; and

WHEREAS, Northwest Kidney Center satisfied all the terms of the original authorizing ordinance and the Director of Transportation recommends that the term permit be

1 renewed for 15 years, subject to the terms identified in this ordinance;

2 NOW, THEREFORE,

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

4 Section 1. **Permission.** Subject to the terms and conditions of this ordinance, the City of
5 Seattle (“City”) grants permission (also referred to in this ordinance as a permit) to Northwest
6 Kidney Center, and its successors and assigns as approved by the Director of the Seattle
7 Department of Transportation (“Director”) according to Section 14 of this ordinance (the party
8 named above and each such approved successor and assign are referred to as “Permittee”), to
9 continue maintaining and operating an existing pedestrian tunnel under and across Broadway,
10 north of Cherry Street. The pedestrian tunnel is adjacent in whole or in part to the properties
11 legally described as:

12 LOTS 8, 9 AND 12, IN BLOCK 144 PF A.A. DENNY’S BROADWAY ADDITION TO
13 THE CITY OF SEATTLE, AS PER PLAT RECORDED IN VOLUME 6 OF PLATS, PAGE 40,
14 RECORDS OF KING COUNTY, WASHINGTON. TOGETHER WITH THAT PORTION OF
15 VACATED ALLEY ADJOINING, WHICH, UPON VACATION, ATTACHED TO SAID
16 PROPERTY BY OPERATION OF LAW.

17
18 THE WEST 50 FEET OF LOTS, 7, 10 AND 11, IN BLOCK 144 OF A.A. DENNY’S
19 BROADWAY ADDITION TO THE CITY OF SEATTLE, AS PER PLAT RECORDED IN
20 VOLUME 6 OF PLATS, PAGE 40, RECORDS OF KING COUNTY, WASHINGTON.
21 EXCEPTING THEREFROM THAT PORTION COVEYED TO THE CITY OF SEATTLE
22 FOR STREET PURPOSES BY DEED RECORDED JULY 12, 1985 AS RECORDING NO.
23 8507120765.

24
25 Section 2. **Term.** The permission granted to the Permittee is for a renewed term of 15
26 years starting on the effective date of this ordinance, and ending at 11:59 p.m. on the last day of
27 the fifteenth year. Upon written application made by the Permittee at least one year before the
28 expiration of the first term, the Director or City Council may renew the permit once, for a
29 successive 15-year term, subject to the right of the City to require the removal of the pedestrian

1 tunnel or to revise by ordinance any of the terms and conditions of the permission granted by this
2 ordinance. The total term of the permission, including renewals, shall not exceed 30 years.

3 Section 3. **Protection of utilities.** The permission granted is subject to the Permittee
4 bearing the expense of any protection, support, or relocation of existing utilities deemed
5 necessary by the owners of the utilities, and the Permittee being responsible for any damage to
6 the utilities due to the construction, repair, reconstruction, maintenance, operation, or removal of
7 the pedestrian tunnel and for any consequential damages that may result from any damage to
8 utilities or interruption in service caused by any of the foregoing.

9 Section 4. **Removal for public use or for cause.** The permission granted is subject to use
10 of the street right-of-way or other public place (collectively, “public place”) by the City and the
11 public for travel, utility purposes, and other public uses or benefits. The City expressly reserves
12 the right to deny renewal, or terminate the permission at any time prior to expiration of the initial
13 term or any renewal term, and require the Permittee to remove the pedestrian tunnel, or any part
14 thereof or installation on the public place, at the Permittee’s sole cost and expense in the event
15 that:

16 A. The City Council determines by ordinance that the space occupied by the pedestrian
17 tunnel is necessary for any public use or benefit or that the pedestrian tunnel interferes with any
18 public use or benefit; or

19 B. The Director determines that use of the pedestrian tunnel has been abandoned; or

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

1 A City Council determination that the space is needed for, or the pedestrian tunnel interferes
2 with, a public use or benefit is conclusive and final without any right of the Permittee to resort to
3 the courts to adjudicate the matter.

4 **Section 5. Permittee’s obligation to remove and restore.** If the permission granted is
5 not renewed at the expiration of a term, or if the permission expires without an application for a
6 new permission being granted, or if the City terminates the permission, then within 90 days after
7 the expiration or termination of the permission, or prior to any earlier date stated in an ordinance
8 or order requiring removal of the pedestrian tunnel, the Permittee shall, at its own expense,
9 remove the pedestrian tunnel and all of the Permittee’s equipment and property from the public
10 place and replace and restore all portions of the public place that may have been disturbed for
11 any part of the pedestrian tunnel in as good condition for public use as existed prior to
12 construction of the pedestrian tunnel and in at least as good condition in all respects as the
13 abutting portions of the public place as required by Seattle Department of Transportation
14 (SDOT) right-of-way restoration standards.

15 Failure to remove the pedestrian tunnel as required by this section is a violation of
16 Chapter 15.90 of the Seattle Municipal Code (SMC) or successor provision; however,
17 applicability of Chapter 15.90 does not eliminate any remedies available to the City under this
18 ordinance or any other authority. If the Permittee does not timely fulfill its obligations under this
19 section, the City may in its sole discretion remove the pedestrian tunnel and restore the public
20 place at the Permittee’s expense, and collect such expense in any manner provided by law.

21 Upon the Permittee’s completion of removal and restoration in accordance with this
22 section, or upon the City’s completion of the removal and restoration and the Permittee’s
23 payment to the City for the City’s removal and restoration costs, the Director shall then issue a

1 certification that the Permittee has fulfilled its removal and restoration obligations under this
2 ordinance. Upon prior notice to the Permittee and entry of written findings that it is in the public
3 interest, the Director may, in the Director's sole discretion, conditionally or absolutely excuse the
4 Permittee from compliance with all or any of the Permittee's obligations under this section.

5 **Section 6. Repair or reconstruction.** The pedestrian tunnel shall remain the exclusive
6 responsibility of the Permittee and the Permittee shall maintain the pedestrian tunnel in good and
7 safe condition for the protection of the public. The Permittee shall not reconstruct or repair the
8 pedestrian tunnel except in strict accordance with plans and specifications approved by the
9 Director. The Director may, in the Director's judgment, order the pedestrian tunnel reconstructed
10 or repaired at the Permittee's cost and expense because of: the deterioration of the pedestrian
11 tunnel; the installation, construction, reconstruction, maintenance, operation, or repair of any
12 municipally-owned public utilities; or for any other cause.

13 **Section 7. Failure to correct unsafe condition.** After written notice to the Permittee and
14 failure of the Permittee to correct an unsafe condition within the time stated in the notice, the
15 Director may order the pedestrian tunnel be removed at the Permittee's expense if the Director
16 deems that the pedestrian tunnel creates a risk of injury to the public. If there is an immediate
17 threat to the health or safety of the public, a notice to correct is not required.

18 **Section 8. Continuing obligations.** Notwithstanding termination or expiration of the
19 permission granted, or removal of the pedestrian tunnel, the Permittee shall remain bound by all
20 of its obligations under this ordinance until the Director has issued a certification that the
21 Permittee has fulfilled its removal and restoration obligations under Section 5 of this ordinance,
22 or the Seattle City Council passes a new ordinance to renew the permission granted and/or
23 establish a new term. Notwithstanding the issuance of that certification, the Permittee shall

1 continue to be bound by the obligations in Section 9 of this ordinance and shall remain liable for
2 any unpaid fees assessed under Section 15 and Section 17 of this ordinance.

3 Section 9. **Release, hold harmless, indemnification, and duty to defend.** The
4 Permittee, by accepting the terms of this ordinance, releases the City, its officials, officers,
5 employees, and agents from any and all claims, actions, suits, liability, loss, costs, expense,
6 attorneys' fees, or damages of every kind and description arising out of or by reason of the
7 pedestrian tunnel or this ordinance, including but not limited to claims resulting from injury,
8 damage, or loss to the Permittee or the Permittee's property.

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

16 A. The existence, condition, construction, reconstruction, modification, maintenance,
17 operation, use, or removal of the pedestrian tunnel;

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

20 C. The Permittee failing or refusing to strictly comply with every provision of this
21 ordinance; or arising out of or by reason of the pedestrian tunnel or this ordinance in any other
22 way.

1 If any suit, action, or claim of the nature described above is filed, instituted, or begun
2 against the City, the Permittee shall upon notice from the City defend the City, with counsel
3 acceptable to the City, at the sole cost and expense of the Permittee, and if a judgment is
4 rendered against the City in any suit or action, the Permittee shall fully satisfy the judgment
5 within 90 days after the action or suit has been finally determined, if determined adversely to the
6 City. If it is determined by a court of competent jurisdiction that Revised Code of Washington
7 (RCW) 4.24.115 applies to this ordinance, then in the event claims or damages are caused by or
8 result from the concurrent negligence of the City, its agents, contractors, or employees, and the
9 Permittee, its agents, contractors, or employees, this indemnity provision shall be valid and
10 enforceable only to the extent of the negligence of the Permittee or the Permittee's agents,
11 contractors, or employees.

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

18 A. Construction, reconstruction, modification, operation, maintenance, use, existence, or
19 removal of the pedestrian tunnel, as well as restoration of any disturbed areas of the public place
20 in connection with removal of the pedestrian tunnel;

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

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

3 Minimum insurance requirements are CGL insurance written on an occurrence form at least as
4 broad as the Insurance Services Office (ISO) CG 00 01. The City requires insurance coverage to
5 be placed with an insurer admitted and licensed to conduct business in Washington State or with
6 a surplus lines carrier pursuant to chapter 48.15 RCW. If coverage is placed with any other
7 insurer or is partially or wholly self-insured, such insurer(s) or self-insurance is subject to
8 approval by the City’s Risk Manager.

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

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

20 If the Permittee is self-insured, a letter of certification from the Corporate Risk Manager
21 may be submitted in lieu of the insurance coverage certification required by this ordinance, if
22 approved in writing by the City’s Risk Manager. The letter of certification must provide all
23 information required by the City’s Risk Manager and document, to the satisfaction of the City’s

1 Risk Manager, that self-insurance equivalent to the insurance requirements of this ordinance is in
2 force. After a self-insurance certification is approved, the City may from time to time
3 subsequently require updated or additional information. The approved self-insured Permittee
4 must provide 30 days' prior notice of any cancellation or material adverse financial condition of
5 its self-insurance program. The City may at any time revoke approval of self-insurance and
6 require the Permittee to obtain and maintain insurance as specified in this ordinance.

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

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

17 Section 12. **Performance bond.** Within 60 days after the effective date of this ordinance,
18 the Permittee shall deliver to the Director for filing with the City Clerk a sufficient bond
19 executed by a surety company authorized and qualified to do business in the State of Washington
20 that is: in the amount of \$75,000, and conditioned with a requirement that the Permittee shall
21 comply with every provision of this ordinance and with every order the Director issues under this
22 ordinance. The Permittee shall ensure that the bond remains in effect until the Director has issued
23 a certification that the Permittee has fulfilled its removal and restoration obligations under

1 Section 5 of this ordinance. An irrevocable letter of credit approved by the Director in
2 consultation with the City Attorney's Office may be substituted for the bond. In the event that
3 the Permittee assigns or transfers the permission granted by this ordinance, the Permittee shall
4 maintain in effect the bond or letter of credit required under this section until the Director has
5 approved the assignment or transfer pursuant to Section 14 of this ordinance.

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

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

1 Permitee by this ordinance shall be conferred on the successors and assigns. Any person or
2 entity seeking approval for an assignment or transfer of the permission granted by this ordinance
3 shall provide the Director with a description of the current and anticipated use of the pedestrian
4 tunnel.

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

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

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

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

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

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 \$8,720, or as adjusted annually thereafter, for the privileges granted by
10 this ordinance.

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.** Permittee shall construct, maintain, and
22 operate the pedestrian tunnel in compliance with all applicable federal, state, County, and City
23 laws and regulations. Without limitation, in all matters pertaining to the pedestrian tunnel, the

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

4 **Section 19. Acceptance of terms and conditions. Acceptance of terms and conditions.**

5 The Permittee shall provide evidence of insurance coverage required by Section 10 of this
6 ordinance, the bond as required by Section 12 of this ordinance, and the covenant agreement
7 required by Section 20 of this ordinance within 60 days after the effective date of this ordinance.
8 Continued occupation of the right-of-way constitutes the Permittee’s acceptance of the terms of
9 this ordinance.

10 **Section 20. Obligations run with the Property.** The obligations and conditions

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

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

3 Section 21. **Repealing Section 8 of Ordinance 123367.** Section 8 of Ordinance 123367
4 is repealed:

5 ~~((Section 8. Continuing obligation to remove and restore. Notwithstanding~~
6 ~~termination or expiration of the permission granted, or closure or removal of the tunnel,~~
7 ~~the Permittee shall remain bound by its obligation under this ordinance until:~~

8 ~~(a) the pedestrian tunnel and all its equipment and property are removed~~
9 ~~from the street right-of-way;~~

10 ~~(b) the area is cleared and restored in a manner and to a condition~~
11 ~~satisfactory to the Director; and~~

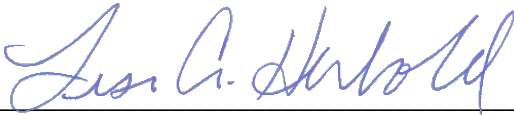
12 ~~(c) the Director certifies that the Permittee has discharged its obligations~~
13 ~~under this ordinance.~~

14 ~~Upon prior notice to the Permittee and entry of written findings that it is in the~~
15 ~~public interest, the Director may, in the Director's sole discretion, conditionally or~~
16 ~~absolutely excuse the Permittee from compliance with all or any of the Permittee's~~
17 ~~obligations to remove the tunnel and its property and to restore any disturbed areas.))~~

18 Section 22. **Section titles.** Section titles are for convenient reference only and do not
19 modify or limit the text of a section.

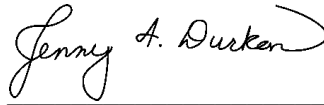
1 Section 23. This ordinance shall take effect and be in force 30 days after its approval by
2 the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it
3 shall take effect as provided by Seattle Municipal Code Section 1.04.020.

4 Passed by the City Council the 24th day of May, 2021,
5 and signed by me in open session in authentication of its passage this 24th day of
6 May, 2021.

7 

8 President Pro Tem of the City Council

9 Approved / returned unsigned / vetoed this 28th day of May, 2021.

10 

11 Jenny A. Durkan, Mayor

12 Filed by me this 28th day of May, 2021.

13 

14 Monica Martinez Simmons, City Clerk

15 (Seal)