



Legislation Text

File #: CB 119227, Version: 1

CITY OF SEATTLE

ORDINANCE _____

COUNCIL BILL _____

AN ORDINANCE granting Acorn Development LLC permission to construct, maintain, and operate below-grade utility lines for a site-specific heat conveyance system and other related utilities under and across Blanchard Street between 6th Avenue and 7th Avenue, Blanchard Street between 7th Avenue and 8th Avenue, and 7th Avenue between Bell Street and Blanchard Street; specifying the conditions under which this permit is granted; and providing for the acceptance of the permit and conditions.

WHEREAS, Acorn Development LLC (“Acorn”) has applied for permission to construct below-grade utilities

including utility lines for a site-specific heat conveyance system, including facilities for conveying non-potable water, a site-specific fire protection water conveyance system, and communications for new Acorn buildings; and

WHEREAS, the below-grade utility lines will be used for utilities that include a site-specific heat conveyance system that will capture heat energy from the Westin Building Exchange at 2001 6th Avenue and will transfer that heat energy to the Acorn buildings as a heating and cooling source; and

WHEREAS, the Seattle City Council conceptually approved utility tunnels containing the site-specific below-grade heat conveyance system for the Acorn buildings under Resolution 31545. Although Resolution 31545 refers to utility tunnels, only utility lines will be installed in the right-of-way; and

WHEREAS, this application is for the second phase of the utility lines that contain a site-specific below-grade heat conveyance system in the Denny Triangle neighborhood; and

WHEREAS, Acorn acknowledges that the utility lines and site-specific below-grade heat conveyance system will not be used to provide utility services to third-parties other than the Westin Building Exchange and Eco District LLC under the permissions granted by this ordinance; and

WHEREAS, adopting this ordinance is the culmination of the approval process for the utility lines that contain a site-specific below-grade heat conveyance system to legally occupy a portion of the public right-of-way; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. **Permission.** Subject to the terms and conditions of this ordinance, The City of Seattle (“City”) grants permission (also referred to in this ordinance as a permit) to Acorn Development LLC (“Acorn”), and its parents, affiliates, successors, and assigns as approved by the Director of the Seattle Department of Transportation (“Director”) according to Section 14 of this ordinance (Acorn and each such approved successor and assign is referred to as the “Permittee”), to construct, maintain, and operate below-grade utility lines that contain a site-specific heat conveyance system and other utilities limited to the Acorn development, including facilities for a site-specific fire protection water conveyance system, communications, and all related appurtenances (collectively the “Utility Lines”), in Blanchard Street between 6th Avenue and 7th Avenue, Blanchard Street between 7th Avenue and 8th Avenue, and 7th Avenue between Bell Street and Blanchard Street, adjacent in whole or in part to the property legally described as:

Lots 7, 8, 9, 10, 11 and 12 of Block 18, Second Addition to the Town of Seattle, as Laid off by the Heirs of Sarah A. Bell, Deceased (Commonly known as Heirs of Sarah A. Bell’s Addition to the City of Seattle), According to the Plat thereof, Recorded in Vol. 1 of Plats, page 121, in King County, Washington; and

All of Block 19, Second Addition to the Town of Seattle, as Laid off by the Heirs of Sarah A. Bell, Deceased (Commonly known as Heirs of Sarah A. Bell’s Addition to the City of Seattle), According to the Plat thereof, Recorded in Vol. 1 of Plats, page 121, in King County, Washington; and

All of Block 20, Second Addition to the Town of Seattle, as Laid off by the Heirs of Sarah A. Bell, Deceased (Commonly known as Heirs of Sarah A. Bell’s Addition to the City of Seattle), According to the Plat thereof, Recorded in Vol. 1 of Plats, page 121, in King County, Washington; and

All of Block 21, Second Addition to the Town of Seattle, as Laid off by the Heirs of Sarah A. Bell, Deceased (Commonly known as Heirs of Sarah A. Bell’s Addition to the City of Seattle), According to the Plat thereof, Recorded in Vol. 1 of Plats, page 121, in King County, Washington.

The Utility Lines are for providing distribution and connection for a heating and cooling system and other private utility systems limited to the buildings on Block 18, Block 19, Block 20 and Block 21 (the “Acorn campus”). If after adopting this ordinance, the Utility Lines authorized by this ordinance are proposed to be connected to properties other than the Acorn campus, or to buildings that have a different ownership than the buildings on the Acorn campus, by Acorn or a permit transferee subject to Section 14 of this ordinance, a new amended ordinance shall be required and subject to approval by the City Council.

Section 2. **Term.** The permission granted to the Permittee is for a term of ten years starting on the effective date of this ordinance and ending at 11:59 p.m. on the last day of the tenth year. Upon written application made by the Permittee at least 180 days before the then-existing term expires, the Director or the City Council may renew the permit twice, each time for a successive ten-year term, subject to the right of the City to require the removal of the Utility Lines or to revise by ordinance any of the terms and conditions of the permission granted by this ordinance. The total term of this permission including renewals shall not exceed 30 years. The Permittee shall submit any application for a new permission no later than 180 days before the then-existing term expires.

Section 3. **Protection of utilities.** The permission granted is subject to the Permittee bearing the expense of protecting, supporting, or relocating any existing utilities deemed necessary by the utilities' owners, and the Permittee being responsible for any damage to the utilities due to constructing, repairing, reconstructing, maintaining, operating, or removing the Utility Lines and for any consequential damages that may result from any damage to utilities or interruption in service caused by constructing, repairing, reconstructing, maintaining, operating, or removing the Utility Lines.

Section 4. **Removal for public use or for cause.** The permission granted is subject to use of the street right-of-way or other public place (collectively the "public place") by the City and the public for travel, utility purposes, or other public uses or benefits. The City expressly reserves the right to deny a renewal or terminate the permission at any time before the initial term or any renewal term expiring, and require the Permittee to remove all or a part of the Utility Lines in the public place at the Permittee's sole cost and expense if:

(a) The City Council determines by ordinance that the space occupied by the Utility Lines is necessary

for any public use or benefit or that the Utility Lines interfere with any public use or benefit; or

(b) The Director determines that use of the Utility Lines have been abandoned; or

(c) The Director determines that any term or condition of this ordinance has been violated, and the

violation has not been corrected by the Permittee by the compliance date after a written request by the City to correct the violation, unless a notice to correct is not required due to an immediate threat to the health or safety of the public.

A City Council determination that the space is needed for or the Utility Lines interfere with a public use or benefit is conclusive and final without any right of the Permittee to resort to the courts to adjudicate the matter.

Section 5. **Permittee's obligation to remove and restore.** If the permission granted is not renewed at the term's expiration, or if the permission expires without an application for a new permission being granted, or if the City terminates the permission; then within 90 days or within a reasonable time period as determined by the Director, whichever is longer; after the expiration or termination of the permission, or prior to any earlier date stated in an ordinance or in an order requiring that the Utility Lines be removed; the Permittee shall at its own expense remove the Utility Lines from the public place. The Permittee shall replace and restore all portions of the public place that may have been disturbed by removing the Utility Lines, in as good condition for public use as existed before constructing the Utility Lines and in at least as good condition in all respects as the abutting portions of the public place as required by Seattle Department of Transportation (SDOT) right-of-way restoration standards.

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

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

Section 6. **Repair or reconstruction.** The Utility Lines shall remain the exclusive responsibility of the Permittee and the Permittee shall maintain the Utility Lines in good and safe condition for the protection of the public, including other below-grade facilities. The Permittee shall not reconstruct or repair the Utility Lines including, but not limited to, adding to or replacing the Utility Lines, except in strict accordance with plans and specifications approved by the Director, in consultation with other City departments. The Director may, in the Director's judgment, order the Utility Lines reconstructed or repaired at the Permittee's cost and expense because of: the deterioration or unsafe condition of the Utility Lines; the installation, construction, reconstruction, maintenance, operation, or repair of any municipally-owned public utilities; or for any other cause.

Section 7. **Failure to correct unsafe condition.** After written notice to the Permittee and failure of the Permittee to correct an unsafe condition within the time stated in the notice, the Director may order the Utility Lines to be closed or removed at the Permittee's expense if the Director deems that the Utility Lines have become unsafe or have created a risk of injury to the public. If there is an immediate threat to the health or safety of the public, a notice to correct is not required.

Section 8. **Continuing obligations.** Notwithstanding the permission granted terminating or expiring, or closing or removing the Utility Lines, the Permittee shall remain bound by all obligations under this ordinance until the Director has issued a certification that the Permittee has fulfilled its removal and restoration obligations under Section 5 of this ordinance. The Permittee shall continue to be bound by the obligations in Section 9 of this ordinance and shall remain liable for any unpaid fees assessed under Section 17 of this ordinance until the Permittee has fulfilled its obligations under Section 5 of this ordinance.

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

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

- (a) Continuing the existence, maintaining the condition, constructing, reconstructing, modifying, maintaining, operating, using, or removing the Utility Lines or any portion, or using, occupying, or restoring the public place or any portion by the Permittee or any other person or entity;
- (b) Anything that has been done or may at any time be done by the Permittee by reason of this ordinance; or
- (c) The Permittee failing or refusing to strictly comply with every provision of this ordinance.

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

Section 10. **Insurance.** For as long as the Permittee exercises any permission granted by this ordinance and until the Director has issued a certification that the Permittee has fulfilled its removal and restoration

obligations under Section 5 of this ordinance, the Permittee shall obtain and maintain in full force and effect, at its own expense, insurance or self-insurance that protects the Permittee and the City from claims and risks of loss from perils that can be insured against under commercial general liability (CGL) insurance policies in conjunction with:

(a) Constructing, reconstructing, modifying, operating, maintaining, using, continuing the existence, or removing the Utility Lines or any portion, and restoring any disturbed areas of the public place in connection with removing the Utility Lines;

(b) The Permittee's activity on or using or occupying the public place described in Section 1 of this ordinance; and

(c) Claims and risks in connection with activities performed by the Permittee by virtue of the permission granted by this ordinance.

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

Minimum limits of liability shall be \$2,000,000 per Occurrence; \$4,000,000 General Aggregate; \$2,000,000 Products/Completed Operations Aggregate, including Premises Operation; Personal/Advertising Injury; and Contractual Liability. Coverage shall include "The City of Seattle, its officers, officials, employees and agents" as additional insureds for primary and non-contributory limits of liability subject to a Separation of Insureds clause.

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

If the Permittee is self-insured, a letter of certification from the Corporate Risk Manager may be submitted in lieu of the insurance coverage certification required by this ordinance, if approved in writing by the City's Risk Manager. The letter of certification shall provide all information required by the City's Risk Manager and document, to the satisfaction of the City's Risk Manager, that self-insurance equivalent to the insurance requirements of this ordinance is in force. After a self-insurance certification is approved, the City may from time to time subsequently require updated or additional information. The approved self-insured Permittee shall provide 30 days' prior notice of any cancellation or material adverse financial condition of its self-insurance program. The City may at any time revoke approval of self-insurance and require the Permittee to obtain and maintain insurance as specified in this ordinance.

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

Section 11. **Contractor insurance.** The Permittee shall contractually require that any and all of its contractors performing work on any premises contemplated by this permit name “The City of Seattle, its officers, officials, employees and agents” as additional insureds for primary and non-contributory limits of liability on all CGL, Automobile and Pollution liability insurance, and self-insurance.

Section 12. **Performance bond.** Within 60 days after the effective date of this ordinance, the Permittee shall deliver to the Director for filing with the City Clerk a sufficient bond executed by a surety company authorized and qualified to do business in the State of Washington that is in the amount of \$70,000, and conditioned with a requirement that the Permittee shall comply with every provision of this ordinance and with every order the Director issues under this ordinance. The Permittee shall ensure that the bond remains in effect until the Director has issued a certification that the Permittee has fulfilled its removal and restoration obligations under Section 5 of this ordinance. An irrevocable letter of credit approved by the Director in consultation with the City Attorney’s Office may be substituted for the bond. If the Permittee assigns or transfers the permission granted by this ordinance, the Permittee shall maintain in effect the bond or letter of credit required under this section until the Director has approved the assignment or transfer pursuant to Section 14 of this ordinance.

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

Section 14. **Consent for and conditions of assignment or transfer.** When the Property is transferred, the permission granted by this ordinance shall be assignable and transferable by operation of law pursuant to Section 20 of this ordinance. Prior to transfer, the successor owner of the Property shall accept in writing all of the terms and conditions of the permission granted by this ordinance, and the new owner of the Property shall be conferred with the rights and obligations of Permittee by this ordinance. Other than a transfer to a new owner of the Property, Permittee shall not transfer, assign, mortgage, pledge, or encumber the same without the Director’s consent. The Director may approve assignment or transfer of the permission granted by this ordinance to a successor entity only if the successor or assignee has accepted in writing all of the terms and conditions of the permission granted by this ordinance; has provided, at the time of acceptance, the bond and certification of insurance coverage required under this ordinance; and has paid any fees due under Section 15 and Section 17 of this ordinance. Upon the Director’s approval of an assignment or transfer, the rights and obligations conferred on the Permittee by this ordinance shall be conferred on the successors and assigns from and after the effective date of the assignment or transfer. Upon assignment or transfer, the Permittee shall be released from all obligations conferred on the Permittee by this ordinance that arise after the assignment or transfer. The release shall have no effect on the Permittee’s obligations conferred by this ordinance during the period the Permittee was subject to this ordinance. Any person or entity seeking approval for an assignment or transfer of the permission granted by this ordinance shall provide the Director with a description of the current and anticipated use of the Utility Lines.

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

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

- (a) Describes any damages or possible repairs, beyond routine maintenance, to any element of the Utility Lines; and
- (b) Prioritizes all repairs and establishes a timeframe for making repairs.

A report meeting the above requirements shall be submitted within 10 days after the Permittee becomes aware of any failure or operating problem in the Utility Lines. If, however, there is indication that a failure in the Utility Lines poses a threat to the public place, the Permittee shall notify the Director promptly after the threat is known to the Permittee. All reconstructions or repairs shall be reviewed by the Director as provided for in Section 6 of this ordinance. If a natural disaster or other event may have damaged the Utility Lines, the Director may require that additional reports be submitted by a date established by the Director. The Permittee has the duty of monitoring the condition of and maintaining the Utility Lines. The responsibility to submit reports periodically or as required by the Director does not waive or alter any of the Permittee's other obligations under this ordinance. The receipt of any reports by the Director shall not create any duties on the part of the Director. Any failure by the Director to require a report or to require action after receiving any report shall not waive or limit the obligations of the Permittee under this ordinance.

Section 17. Annual fee. Beginning on the effective date of this ordinance and annually thereafter, the Permittee shall promptly pay to the City, upon statements or invoices issued by the Director, an annual fee of \$18,360, or as adjusted annually thereafter, for the privileges granted by this ordinance.

Adjustments to the annual fee shall be made in accordance with a term permit fee schedule adopted by the City Council, and an adjustment may be made every year. In the absence of a schedule, the Director may only increase or decrease the previous year's fee to reflect any inflationary changes so as to charge the fee in constant dollar terms. This adjustment shall be calculated by adjusting the previous year's fee by the percentage change between the two most recent year-end values available for the Consumer Price Index for the Seattle-Tacoma-Bremerton Area, All Urban Consumers, All Products, Not Seasonally Adjusted. All payments shall be made to the City Finance Director for credit to the Transportation Fund.

Section 18. Compliance with other laws. The Permittee shall construct, maintain and operate the Utility Lines in compliance with all applicable federal, state, County, and City laws and regulations. Without limitation, in all matters pertaining to the Utility Lines, the Permittee shall comply with the City's laws prohibiting discrimination in employment and contracting including Seattle's Fair Employment Practices Ordinance, SMC Chapter 14.04, and Fair Contracting Practices Code, SMC Chapter 14.10, or successor provisions.

Section 19. Acceptance of terms and conditions. The Permittee shall deliver to the Director its written signed acceptance of the terms of this ordinance within 60 days after the ordinance's effective date. The Director shall file the written acceptance with the City Clerk. If no acceptance is received within that 60-day period, the privileges conferred by this ordinance shall be deemed declined or abandoned and the permission granted deemed lapsed and forfeited. The Permittee shall not start constructing the Utility Lines before the Permittee delivers its written signed acceptance of the terms of this ordinance and provides the bond and certification of insurance coverage required by this ordinance and the covenant agreement required by Section 20 of this ordinance.

Section 20. Obligations run with the Property. The obligations and conditions imposed on the Permittee by this ordinance are covenants that run with the land and bind the subsequent owners of the property adjacent to the Utility Lines and legally described in Section 1 of this ordinance (the "Property"), regardless of if the Director has approved an assignment or transfer of the permission granted by this ordinance to subsequent owners. At the Director's request, the Permittee shall provide to the Director a current title report showing the identity of all owners of the Property and all encumbrances on the Property. The Permittee shall, within 60 days of the effective date of this ordinance and before conveying any interest in the Property, deliver to the Director upon a form supplied by the Director, a covenant agreement imposing the obligations and conditions in this ordinance, signed and acknowledged by the Permittee and any other owners of the Property, that has been recorded with the King County Recorder's Office. The Director shall file the recorded covenant agreement with the City Clerk. The covenant agreement shall reference this ordinance by its ordinance or Council Bill number.

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

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

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

Passed by the City Council the _____ day of _____, 2018, and signed by me in open session in authentication of its passage this _____ day of _____, 2018.

President _____ of the City Council

Approved by me this _____ day of _____, 2018.

Jenny A. Durkan, Mayor

Filed by me this _____ day of _____, 2018.

Monica Martinez Simmons, City Clerk

(Seal)