



Legislation Text

File #: CB 120585, Version: 1

CITY OF SEATTLE

ORDINANCE _____

COUNCIL BILL _____

AN ORDINANCE granting King County Department of Natural Resources and Parks, Wastewater Treatment Division permission to construct, maintain, and operate a transformer and retaining wall at 63rd Avenue Southwest, intersecting with Beach Drive Southwest and Southwest Spokane Street, for an unlimited term; specifying the conditions under which this permit is granted; and providing for the acceptance of the permit and conditions.

WHEREAS, King County Department of Natural Resources and Parks, Wastewater Treatment Division applied for permission to construct, operate, and maintain a transformer and retaining wall in 63rd Avenue Southwest, intersecting with Beach Drive Southwest and Southwest Spokane Street, in the West Seattle neighborhood (“Transformer”); and

WHEREAS, the purpose of the Transformer is to support the construction of a high-capacity generator to ensure consistent power for the Alki Wet Weather Treatment Facility and the 63rd Avenue Pump Station in the event of a power outage, preventing a cease in operations resulting in raw wastewater overflow; and

WHEREAS, the obligations of the ordinance remain in effect after the ordinance term expires until the encroachment is removed, or King County Department of Natural Resources and Parks, Wastewater Treatment Division 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, the Seattle City Council adopted Resolution 32079 on February 14, 2023, conceptually approving the Transformer, and the King County Department of Natural Resources and Parks, Wastewater Treatment Division has met the obligations described in this resolution; and

WHEREAS, the adoption of this ordinance is the culmination of the approval process for the Transformer to legally occupy a portion of the public right-of-way, and the adopted ordinance is considered to be the permit; 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 King County Department of Natural Resources and Parks, Wastewater Treatment Division, and its successors and assigns as approved by the Director of the Seattle Department of Transportation (“Director”) according to Section 14 of this ordinance (the party named above and each such approved successor and assign is referred to as the “Permittee”), to construct, maintain, and operate a transformer and retaining wall in 63rd Avenue Southwest, intersecting with Beach Drive Southwest and Southwest Spokane Street, (collectively referred to as “Transformer”), adjacent in whole or in part to the property legally described as:

Portion of Tracts 22, 23, and 24, Plat of Alki Point, as recorded in Volume 8 of Plats, page 19, in King County, Washington, and of vacated 65th Avenue Southwest and of the vacated alleys in said Tracts 22 and 23 described as follows

Beginning at the intersection of the northeasterly margin of Beach Drive Southwest and the east margin of Benton Place Southwest.
thence North 1°11’ 24” East along said east margin 202 40 feet to the property line of the Alki Sewage Treatment Plant, thence South 88°48’36” East along said sewage plant property line to a line 65 feet west of and parallel with the north and south center line of said Tract 23,
thence north along the last described parallel line to the south margin of Southwest Hanford Street,
thence east along said south margin to the west line of the east 8 feet of the west one-half of said Tract 24,
thence south along said west line to the north margin of Southwest Hinds Street,
thence west along said north margin to the north and south center line of said Tract 23,
thence south along said center line to the northeasterly margin of Beach Drive Southwest,
thence North 52°09’52” West along said northeasterly margin of the east margin of Benton Place Southwest and the beginning.

EXCEPT portion of said Tracts 22 and 23 described as follows

Beginning at the intersection of the northeasterly margin of Beach Drive Southwest and the east margin of Benton Place Southwest,
thence North 1°11’24” East along said east margin 202 40 feet to the property line of the Alki Sewage Treatment Plant,

thence South 88°48'36" East along said sewage treatment plant property line 135 22 feet to the True Point of Beginning,
thence South 37°50'09" West 39 62 feet,
thence South 52°09'51" East 59 93 feet,
thence North 37°50'09" East 46 92 feet,
thence North 52°09'51" West 50 13 feet to said sewage treatment plant property line,
thence North 88°48'36" West along said sewage treatment plant property line 12 21 feet to the True Point of Beginning,

AND EXCEPT portion of said Tracts 23 and 24, and vacated 65th Avenue Southwest and the vacated alley in said Tract 23 for playground, described as follows

Beginning at the intersection of the south margin of Southwest Hanford Street and the west line of the east 8 feet of the west one-half of said Tract 24,
thence south along said west line to the north margin of Southwest Hinds Street,
thence west along said north margin to a line 90 feet east of and parallel with the north and south center line of said Tract 23,
thence north along the last described parallel line to a line 280 feet northeasterly of and parallel with the northeasterly margin of Beach Drive Southwest,
thence northwesterly along the last described parallel line to a line 65 feet west of and parallel with the north and south center line of said Tract 23,
thence north along said parallel line to the south margin of Southwest Hanford Street,
thence east along said south margin to the west line of the east 8 feet of the west one-half of said Tract 24 and the beginning.

Section 2. **Term.** The permission granted to the Permittee to construct, maintain, and operate the Transformer under this ordinance shall continue for so long as King County Department of Natural Resources and Parks, Wastewater Treatment Division operates the Alki Wet Weather Treatment Facility and the 63rd Avenue Pump Station. The permission is subject to the right of the City to require the removal of the Transformer for city transportation purposes or to revise by ordinance any of the terms and conditions of the permission granted by this ordinance.

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

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 referred to as “public place”) by the City and the public for travel, utility purposes, and other public uses or benefits. The City expressly reserves the right to deny renewal, or terminate the permission at any time before expiration of the initial term or any renewal term, and require the Permittee to remove the Transformer or any part thereof or installation on 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 Transformer is necessary for any public use or benefit or that the Transformer interferes with any public use or benefit; or

B. The Director determines that use of the Transformer has 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 Transformer interferes 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 City terminates the permission, then within 90 days after the expiration or termination of the permission, or prior to any earlier date stated in an ordinance or order requiring removal of the Transformer, the Permittee shall, at its own expense, remove the Transformer and all of the Permittee’s equipment and property from the public place and replace and restore all portions of the public place that may have been disturbed for any part of the Transformer in as good condition for public use as existed prior to constructing the Transformer, 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 Transformer 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 eliminate 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 Transformer and restore the public place at the Permittee's expense and collect such expense in any manner provided by law.

Upon the Permittee's completion of removal and restoration in accordance with this section, or upon the City's completion of 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 Transformer shall remain the exclusive responsibility of the Permittee and the Permittee shall maintain the Transformer in good and safe condition for the protection of the public. The Permittee shall not reconstruct or repair the Transformer except in strict accordance with plans and specifications approved by the Director. The Director may, in the Director's judgment, order the Transformer reconstructed or repaired at the Permittee's cost and expense because of the deterioration or unsafe condition of the Transformer; because of the installation, construction, reconstruction, maintenance, operation, or repair of any municipally-owned public utilities; or for any other cause that gives rise to public health or safety concerns.

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 Transformer be closed or removed at the Permittee's expense if the Director deems that the Transformer has become unsafe or creates 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 termination or expiration of the permission

granted, or removal of the Transformer, the Permittee shall remain bound by all of its obligations under this ordinance until the Director has issued a certification that the Permittee has fulfilled any removal and restoration obligations established by the City. Notwithstanding the issuance of that certification, the Permittee shall continue to be bound by the obligations in Section 9 and Section 20 of this ordinance and shall remain liable for any unpaid fees assessed under Sections 15 and 17 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 Transformer, 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. The existence, condition, construction, reconstruction, modification, maintenance, operation, use, or removal of the Transformer or any portion thereof, or the use, occupation, or restoration of the public place or any portion thereof 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; or arising out of or by reason of the Transformer, or this ordinance in any other way.

If any suit, action, or claim of the nature described above is filed, instituted, or begun against the City, the Permittee shall upon notice from the City defend the City, with counsel 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, then in the event 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 and/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. Construction, reconstruction, modification, operation, maintenance, use, existence, or removal of the Transformer or any portion thereof, as well as restoration of any disturbed areas of the public place in connection with removal of the Transformer;

B. The Permittee's activity upon or the use or occupation of 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 chapter 48.15 RCW. If coverage is placed with any other insurer or is partially or wholly self-insured, such insurer(s) or self-insurance is subject to approval by the City's Risk Manager.

Minimum limits of liability shall be \$5,000,000 per Occurrence; \$10,000,000 General Aggregate; \$5,000,000 Products/Completed Operations Aggregate, including Premises Operations; Personal/Advertising Injury; 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 must 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 must 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.

In the event that 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/or self-insurance. The Permittee shall also include in all contract documents with its contractors a third-party beneficiary provision extending to the City construction indemnities and warranties granted to the Permittee.

Section 12. **Performance bond.** In the event that the Permittee seeks to assign or transfer the permission granted by this ordinance, the Director, in consultation with the City Attorney’s Office, may determine that a performance bond is necessary to adequately protect the City’s interests, in which case the successor entity shall deliver to the Director for filing with the City Clerk, as a condition of approval of the assignment or transfer within 60 days of notification of such determination, a sufficient bond executed by a surety company authorized and qualified to do business in the State of Washington that is in the amount determined by the Director in consultation with the City Attorney’s Office, and conditioned with a requirement that the successor entity shall comply with every provision of this ordinance and with every order the Director issues under this ordinance. The successor entity shall ensure that the bond remains in effect until the Director has issued a certification that the successor entity has fulfilled its removal and restoration obligations under Section 5 of this ordinance. An irrevocable letter of credit approved by the SDOT Director in consultation with the City Attorney’s Office may be substituted for the bond.

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. Continued occupation of the right-of-way constitutes the Permittee's acceptance of the terms of this ordinance, and the new owner of the Property shall be conferred with the rights and obligations of the Permittee by this ordinance. Other than a transfer to a new owner of the Property, the Permittee shall not transfer, assign, mortgage, pledge or encumber the same without the Director's consent, which the Director shall not unreasonably refuse or condition. 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 provided, at the time of the assignment or transfer, the bond and certification of insurance coverage required under this ordinance; and has paid any fees due under Sections 15 and 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. 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 Transformer.

The obligations and conditions imposed on the Permittee by and through this ordinance are also imposed on the Permittee's successors and assigns regardless of whether the Director has approved assignment or transfer of the permission granted by this ordinance to the successors or assigns. All references in this ordinance to obligations or conditions imposed on the "Permittee" shall also be deemed to refer to the Permittee's successors and assigns.

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 Transformer during construction, reconstruction, repair, annual safety inspections, and at other times deemed necessary by the City. An inspection or approval of the Transformer 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 Transformer. Any failure by the City to require correction of any defect or condition shall not in any way limit the responsibility or liability of the Permittee.

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

A report meeting the foregoing requirements shall be submitted at the request of the Director. In the event of a natural disaster or other event that may have damaged the Transformer, the Director may require that additional reports be submitted by a date established by the Director. The Permittee has the duty of inspecting and maintaining the Transformer. The responsibility to submit structural inspection 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 receipt of any report, shall not waive or limit the Permittee's obligations.

Section 17. **Annual fee.** Beginning on the effective date of this ordinance the Permittee shall pay an Issuance Fee, and annually thereafter, the Permittee shall promptly pay to the City, upon statements or invoices issued by the Director, an Annual Renewal Fee, and an Annual Use and Occupation fee of \$1,686, or as adjusted annually thereafter, for the privileges granted by this ordinance for the Transformer.

Adjustments to the Annual Use and Occupation Fee shall be made in accordance with a term permit fee schedule adopted by the City Council and 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 will 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-Bellevue Area, All Urban Consumers, All Products, Not Seasonally Adjusted. Permittee shall pay any other applicable fees, including fees for reviewing applications to renew the permit after expiration of the first term. 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 Transformer in compliance with all applicable federal, state, County and City laws and regulations. Without limitation, in all matters pertaining to the Transformer, the Permittee shall comply with the City's laws prohibiting discrimination in employment and contracting including Seattle's Fair Employment Practices Ordinance, Chapter 14.04, and Fair Contracting Practices code, Chapter 14.10 (or successor provisions).

Section 19. Acceptance of terms and conditions. The Permittee shall not commence construction of the Transformer before providing evidence of insurance coverage required by Section 10 of this ordinance and the covenant agreement required by Section 20 of this ordinance. Obtaining building permits from the Seattle Department of Construction and Inspections, or other applicable City-issued permits, constitutes the Permittee's acceptance of the terms 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 subsequent owners of the property adjacent to the Transformer and legally described in Section 1 of this ordinance (the "Property"), regardless of whether the Director has approved assignment or transfer of the permission granted herein to such subsequent owner(s). The Permittee shall, within 60 days of the effective date of this ordinance, and prior to conveying any interest in the Property, deliver to the Director upon a form to be supplied by the Director, a covenant agreement imposing the obligations and conditions set forth in this ordinance, signed and acknowledged by the Permittee and 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 number.

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 _____, 2023, and signed by me in open session in authentication of its passage this _____ day of _____, 2023.

President _____ of the City Council

Approved / returned unsigned / vetoed this _____ day of _____, 2023.

Bruce A. Harrell, Mayor

Filed by me this _____ day of _____, 2023.

_____, City Clerk

(Seal)