

RESOLUTION R-4899

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND AUTHORIZING THE CITY MANAGER TO EXECUTE A MEMORANDUM OF UNDERSTANDING REGARDING UTILITY TAXES BETWEEN THE CITIES OF BELLEVUE, MEDINA, ISSAQUAH AND KIRKLAND, AND THE TOWNS OF HUNTS POINT AND YARROW POINT.

WHEREAS, the City of Bellevue Utilities Department provides water utility services to residents and ratepayers of the cities of Issaquah, Kirkland and Medina, and to the towns of Hunts Point and Yarrow Point, including the provision of fire hydrants and fireflow water capacity for the purpose of fire suppression; and

WHEREAS, Bellevue has historically included the costs associated with fireflow capacity in water utility rates for customers throughout its water utility service area; and

WHEREAS, in October of 2008, the Washington Supreme Court issued a decision in *Lane v. Seattle Public Utilities*, 164 Wn.2d 875 (2008), holding that the provision of fireflow capacity is a governmental function separate from the proprietary functions of a water utility; and

WHEREAS, the Court further held that the costs of providing fireflow capacity must therefore be paid out of a local government's general fund and that such costs may not be charged directly to water utility ratepayers; and

WHEREAS, in compliance with the Court's ruling, Bellevue transferred the cost of providing fireflow capacity charges to its general fund as a general governmental expense; and

WHEREAS, to offset the impact to Bellevue's general fund from providing fireflow capacity to water utility customers outside of its city limits, Bellevue has agreed to amend its Utility Occupation Tax Code to tax the gross receipts from water service to ratepayers outside its city limits to cover Bellevue's costs of providing those customers with fireflow capacity;

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:


Section 1. The City Manager is hereby authorized and directed to execute on behalf of the City of Kirkland a Memorandum of Understanding substantially similar to that attached as Exhibit "A", which is entitled "Memorandum of Understanding Regarding Utility Taxes Between the Cities of Bellevue, Medina, Issaquah and Kirkland, and the Towns of Hunts Point and Yarrow Point."

Passed by majority vote of the Kirkland City Council in open meeting this 18th day of October, 2011.

Signed in authentication thereof this 18th day of October,  
2011.

  
MAYOR

Attest:

  
City Clerk

**MEMORANDUM OF UNDERSTANDING REGARDING UTILITY TAXES BETWEEN  
THE CITIES OF BELLEVUE, MEDINA, ISSAQUAH  
AND KIRKLAND, AND THE TOWNS OF HUNTS POINT AND YARROW POINT**

This Memorandum of Understanding is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 2011 Between the Cities of Bellevue, Medina, Issaquah and Kirkland all municipal corporations, which are located in and existing under the laws of the State of Washington and between the towns of Hunts Point and Yarrow Point, both municipal corporations located in and existing under the laws of the State of Washington (which governmental entities may be referred to collectively as "Parties").

**I. RECITALS**

WHEREAS, the City of Bellevue Utilities Department (referred to as the "Utility") provides water utility services to residents and ratepayers of the cities of Issaquah, Kirkland and Medina, and to the Towns of Hunts Point and Yarrow Point. Such utility services include the provision of fire hydrants and fireflow water capacity for the purpose of fire suppression (otherwise referred to as "fireflow capacity");

WHEREAS, the Utility has historically included the costs associated with fireflow capacity in water utility rates for customers throughout its water utility service area; and

WHEREAS, in October of 2008, the Washington State Supreme Court issued a decision in *Lane v. Seattle Public Utilities*, 164 Wn.2d 875, 194 P.3d 977 (2008) holding that the provision of fireflow capacity is a governmental function separate from the proprietary functions of a water utility. The Court further held that the costs of providing fireflow capacity must therefore be paid for out of a local government's general fund and that such costs may not be charged directly to water utility ratepayers; and

WHEREAS, in compliance with the Court's ruling, the City of Bellevue transferred the costs of providing fireflow capacity charges to its General Fund as a general governmental expense; and

WHEREAS, the City of Bellevue, to offset the impact to its General Fund from providing fireflow capacity to water utility customers outside the City limits, requested payment from the Parties for their respective proportionate share of the utility facility costs associated with the Utility's provision of fireflow capacity to each jurisdiction; and

WHEREAS, certain Parties to this Memorandum of Understanding have protested the City of Bellevue's request for such a payment for various reasons and have requested that Bellevue amend its Utility Occupation Tax Code to tax the gross receipts from water service ratepayers outside the City limits to cover Bellevue's costs of providing customers outside the Bellevue City limits with fireflow capacity; and

WHEREAS, the Parties agree that it is inequitable to require the taxpayers of the City of Bellevue to subsidize the provision of fireflow capacity to utility customers located outside of the city limits of Bellevue; and

WHEREAS, the Washington Supreme Court ruled, in *Burba v. Vancouver*, 113 Wn.2d 800, 783 P.2d 1056 (1989), that a municipality may lawfully impose a tax on revenue generated by a utility from customers served outside the city limits provided a reasonable relationship exists between the event taxed and the benefit conferred; and

WHEREAS, the Parties agree that a reasonable relationship exists between the event taxed and the benefit conferred with respect to the Utility's provision of fireflow capacity; and

NOW, THEREFORE, the Parties agree as follows:

## II. PRINCIPLES OF UNDERSTANDING

1. Amendment to Bellevue City Code (BCC). Bellevue shall take all necessary steps, including any required public notice, to amend BCC 4.10.025 ("Utility Occupation Tax") to provide for application of its utility tax rate as measured against the gross proceeds of sales from customers of the utility throughout its entire water service area.

2. Adjustment of Rates or Charges. It is expressly understood and agreed to by the Parties that the Utility may adjust rates or charges for utility customers located throughout the service area in order to offset the increase in Utility Occupation Tax imposed on the Utility occasioned by an amendment to BCC 4.10.025 to allow for collection of utility taxes outside of the City of Bellevue's municipal boundaries, and further that nothing herein shall be deemed to prohibit Bellevue from adjusting rates and charges within its lawful authority to recoup costs incurred by the Utility associated with the Court's ruling in *Lane, supra*.

3. Agreement to Pay for Costs Associated with Provision of Fireflow Capacity. Should a successful legal challenge be made by any taxpayer, customer or ratepayer relating to Bellevue's authority to amend the scope of its Utility Occupation Tax or relating to the Utility's authority to tax customers located outside of the City of Bellevue's municipal boundaries, or related to any adjustment in rates or charges to offset the increase in the Utility Occupation Tax imposed on the Utility, each of the Parties shall remit payment to the City of Bellevue for its proportionate share of the cost associated with the Utility's provision of fireflow capacity within ninety (90) days of receipt of a request for payment from the City of Bellevue. PROVIDED, however, that the Parties retain the right to challenge the amount of the payment requested by Bellevue and the right of Bellevue to pass the costs of individual elements of fireflow capacity costs on to the Parties.

4. Term and Termination. This Memorandum of Understanding shall remain in effect so long as the provision of fireflow capacity is legally characterized as a governmental function of a

water utility or municipality and the costs of that service are required to be paid for out of a local government's general fund. PROVIDED, however, that any Party to this Memorandum of Understanding may choose to opt out by giving at least ninety (90) days written notice to the Utility that it has secured alternative fireflow capacity service. If the Utility chooses to cease provision of fireflow capacity service to any Party, it shall provide at least 365 days written notice to the affected Party. If any other binding Agreement or Contract between the Utility and one or more of the other Parties provides for greater notice of cessation of fireflow capacity service, that longer period shall apply.

5. Modification and Amendment. No modification or amendment of any of the terms or provisions of this Memorandum of Understanding shall be binding upon any Party unless made in writing and signed by all Parties or by a duly authorized representative or agent of such Parties.

6. Severability. In the event that any court shall find any portion of this Memorandum of Understanding unenforceable, the remaining portion shall remain in full force and effect.

7. Governing Law. This Agreement shall be governed in all respects by the law of the State of Washington.

8. Execution in Counterparts. This Memorandum of Understanding may be executed in several counterparts, each of which when so executed shall be deemed an original copy and shall become effective upon all signatures by all Parties upon one or more of such identical counterparts. It is further agreed that a signature page sent by facsimile or by electronic mail shall be deemed to be an original.

IN WITNESS WHEREOF, the PARTIES have executed this Memorandum of Understanding as of the day and year first written above.

CITY OF BELLEVUE

CITY OF KIRKLAND

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_  
\_\_\_\_\_

Title: \_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

CITY OF ISSAQUAH

CITY OF MEDINA

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_  
\_\_\_\_\_

Title: \_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

CITY OF YARROW POINT

TOWN OF HUNTS POINT

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_  
\_\_\_\_\_

Title: \_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**Approved as to form:**

\_\_\_\_\_  
Lori Riordan  
City Attorney  
City of Bellevue

\_\_\_\_\_  
Date

**Approved as to form:**

\_\_\_\_\_  
Robin Jenkinson  
City Attorney  
City of Kirkland

\_\_\_\_\_  
Date

**Approved as to form:**

\_\_\_\_\_  
Wayne Tanaka  
City Attorney  
City of Issaquah

\_\_\_\_\_  
Date

**Approved as to form:**

\_\_\_\_\_  
Bruce Disend  
City Attorney  
City of Medina

\_\_\_\_\_  
Date

**Approved as to form:**

\_\_\_\_\_  
Wayne Steward  
Town Attorney  
Town of Yarrow Point

\_\_\_\_\_  
Date

**Approved as to form:**

\_\_\_\_\_  
Mike Kenyon  
Town Attorney  
Town of Hunts Point

\_\_\_\_\_  
Date