

ORDINANCE 3492

AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING METRICOM, INC., A DELAWARE CORPORATION, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT, AND MAINTAIN, REPAIR, REPLACE, OPERATE UPON, OVER, UNDER, ALONG AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF ITS RICOCHET MICROCELLULAR DATA NETWORK BUSINESS.

Be it ordained by the City Council of the City of Kirkland as follows:

Section 1. Definitions. Where used in this franchise (the "Franchise") these terms have the following meanings:

(a) "METRICOM" means METRICOM, INC., a Delaware corporation, and its respective successors and assigns.

(b) "City" means the City of Kirkland, a municipal corporation of the State of Washington, and its respective successors and assigns.

(c) "Franchise Area" means: any, every and all of the roads, streets, avenues, alleys, highways and unrestricted utility easements of the City as now laid out, platted, dedicated or improved; and any, every and all roads, streets, avenues, alleys and highways that may hereafter be laid out, platted, dedicated or improved within the present limits of the City and as such limits may be hereafter extended.

(d) "Facilities" means wires, lines, conduits, cables, vaults, duct runs, radios, antennas and all necessary or convenient facilities and appurtenances thereto, whether the same be located over or under ground.

(e) "Ordinance" means this Ordinance No. 3492, which sets forth the terms and conditions of this Franchise.

Section 2.

A. Facilities within Franchise Area. The City does hereby grant to METRICOM the right, privilege, authority and franchise to:

(a) Construct, support, attach, connect and stretch Facilities between, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along and across the Franchise Area for purposes of its Ricochet Microcellular Data Network business.

B. Permission Required to Enter Onto Other City Property. Nothing contained in this Ordinance is to be construed as granting

permission to METRICOM to go upon any other public place other than those types of public places specifically designated as the Franchise Area in this Ordinance. Permission to go upon any other property owned or controlled by the City must be sought on a case by case basis from the City.

C. Compliance with WUTC Regulations. At all times during the term of this Franchise, METRICOM shall fully comply with all applicable regulations of the Washington Utilities and Transportation Commission

Section 3. Non-interference of Facilities.

A. METRICOM's Facilities shall be located, relocated and maintained within the Franchise Area so as not to unreasonably interfere with the free and safe passage of pedestrian and vehicular traffic and ingress or egress to or from the abutting property and in accordance with the laws of the State of Washington. Whenever it is necessary for METRICOM, in the exercise of its rights under this Franchise, to make any excavation in the Franchise Area, METRICOM shall, upon completion of such excavation, restore the surface of the Franchise Area, to the specifications established within the City of Kirkland Public Works Policies and Standards and in accordance with standards of general applicability imposed by the City by ordinance or administrative order. If METRICOM should fail to leave any portion of any Franchise Area so excavated in a condition that meets the City's specifications per the Public Works Policies and Standards, the City may after notice of not less than five days to METRICOM, which notice shall not be required in case of an emergency, order any and all work considered necessary to restore to a safe condition that portion of the Franchise area so excavated, and METRICOM shall pay to the City the reasonable cost of such work at City's standard rates; which shall include among other things, the overhead expense of the City in obtaining completion of said work.

B. Any surface or subsurface failure occurring during the term of this Agreement and caused by any excavation by METRICOM shall be repaired to the City's specifications, within 30 days or upon five (5) days written notice to METRICOM. If METRICOM shall fail to make such repairs within such time period, the City may order all work necessary to restore the damaged area to a safe and acceptable condition and METRICOM shall pay the reasonable costs of such work to the City.

Section 4. Relocation of Facilities.

A. Whenever the City causes the grading or widening of the Franchise Area or undertakes construction of any water, sewer or storm drainage line, lighting, signalization, sidewalk improvement, pedestrian amenities, or other public street improvement (for purposes other than those described in Section 4(B) below) and such project requires the relocation of METRICOM's then existing Facilities within the Franchise Area, the City shall:

- (a) Provide METRICOM, at least 90 days prior to the commencement of such project, written notice that a project is expected to require relocation; and
- (b) Provide METRICOM with reasonable plans and specifications for such grading or widening.

After receipt of such notice and such plans and specifications, METRICOM shall relocate such Facilities within the Franchise Area at no charge to the City so as to accommodate such street improvement project. The City shall cooperate with METRICOM to designate a substitute location for its Facilities within the Franchise Area. City will establish a date by which Facilities will be relocated, which date will be not less than 60 days after written notice to METRICOM as to the facility to be relocated. METRICOM must finish relocation of each such Facility by the date so established.

B. Whenever any person or entity, other than the City, requires the relocation of METRICOM's Facilities to accommodate the work of such person or entity within the Franchise Area; or, whenever the City requires the relocation of METRICOM's Facilities within the Franchise Area for the benefit of any person or entity other than the City, then METRICOM shall have the right as a condition of such relocation to require such person or entity to:

- (a) make payment to METRICOM, at a time and upon terms acceptable to METRICOM, for any and all costs and expense incurred by METRICOM in the relocation of METRICOM's Facilities; and
- (b) indemnify, defend and hold METRICOM, its agents, officers, employees, and assigns harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever, including all costs and attorney's fees, made against them on account of injury, sickness, death or damage to persons or property which is caused by or arises out of, in whole or in part, the willful, tortuous or negligent acts, failures and/or omissions of the person or entity requesting the relocation of METRICOM's Facilities.

C. Any condition or requirement imposed by the City upon any person or entity (including, without limitation, any condition or

requirement imposed pursuant to any contract or in conjunction with approvals or permits for zoning, land use, construction or development) which necessitates the relocation of METRICOM's Facilities within the Franchise Area shall be subject to the provisions of subsection 4(B). However, in the event the City reasonably determines (and promptly notifies METRICOM in writing of such determination) that the primary purpose of imposing such condition or requirement upon such person or entity which necessitates such relocation is to cause the construction of an improvement on the City's behalf and in a manner consistent with City-approved improvement plans (as described in 4(A) above) within a segment of the Franchise Area then:

METRICOM shall require only those costs and expenses incurred by METRICOM in integrating and connecting such relocated Facilities with METRICOM's other Facilities to be paid to METRICOM by such person or entity, and METRICOM shall otherwise relocate its Facilities within such segment of the Franchise Area in accordance with the provisions of subsection 4(A) above.

D. This Section 4 shall govern all relocations of METRICOM's Facilities required in accordance with this Franchise. Nothing in this Section 4 shall require METRICOM to bear any cost or expense in connection with the location or relocation of any Facilities existing under benefit of easement or other rights not arising under this Franchise.

E. METRICOM recognizes the need for the City to maintain adequate width for installation and maintenance of City owned and/or Northshore Utility District owned utilities such as, but not limited to, sanitary sewer, water, and storm drainage. Thus, the City reserves the right to maintain clear zones within the public right-of-way for installation and maintenance of said utilities. The clear zones for each right-of-way segment shall be noted and conditioned with the issuance of each right-of-way permit. If adequate clear zones are unable to be achieved on a particular right-of-way, METRICOM shall locate in an alternate right-of-way, obtain easements from private property owners, or propose alternate construction methods which maintain and/or enhance the existing clear zones.

Section 5. Indemnification. METRICOM shall indemnify, defend and hold the City, its agents, officers, employees, volunteers and assigns harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever, including all costs and attorney's fees, made against them on account of injury, sickness, death or damage to persons or property which is caused by or arises out of, in whole or in part, the willful, tortuous or negligent acts, failures and/or omissions of METRICOM or its agents, servants, employees, contractors, subcontractors or assigns in the construction, operation or maintenance of its Facilities or in exercising

the rights granted METRICOM in this Franchise. Provided, however, such indemnification shall not extend to any claim, demand, liability, loss, cost, damage or expense caused by the willful, tortuous, or negligent acts, failures and/or omissions of the City, its agents, officers, employees, volunteers or assigns.

In the event any claim or demand for which City is entitled to be indemnified as provided above is presented to or filed with the City, the City shall promptly notify METRICOM thereof, and METRICOM shall have the right, at its election and at its sole cost and expense, to settle and compromise such claim or demand, provided further, that in the event any suit or action be begun against the City based upon any such claim or demand, the City shall likewise promptly notify METRICOM thereof, and METRICOM shall have the right, at its election and its sole cost and expense, to settle and compromise such suit or action, or defend the same at its sole cost and expense, by attorneys of its own election.

Section 6. Moving Buildings Within the Franchise Area.

Before granting permission to any person or entity other than the City to use the Franchise Area for the moving or the removal of any building or other object, the City shall require such person or entity to make any necessary arrangements with METRICOM for the temporary adjustment of METRICOM's Facilities to accommodate the moving or removal of such building or other object. Such necessary arrangements with METRICOM shall be made, to METRICOM's satisfaction, not less than fourteen (14) days prior to the moving or removal of said building or other object. In such event, METRICOM shall, at the expense of the person or entity desiring to move or remove such building or other object, adjust any of its Facilities which may obstruct the moving or removal of such building or other object, provided that:

(a) The moving or removal of such building or other object which necessitates the adjustment of Facilities shall be done at a reasonable time and in a reasonable manner so as not to unreasonably interfere with METRICOM's business;

(b) Where more than one route is available for the moving or removal of such building or other object, such building or other object shall be moved or removed along the route which will minimize the interruption of utility service, interference with transportation and potential detriments to the public safety, as determined by the City.

(c) The person or entity other than the City obtaining such permission from the City to move or remove such building or other object shall be required to indemnify and save METRICOM and its agents, officers, employees and assigns harmless from any and all claims, demands, liabilities, losses, costs, damages, or expenses made against it or them on account of injury or damage to the person or property of another arising out of or in conjunction with the moving or removal of such building or other object, to the extent such injury or

damage is caused by, arises out of, in whole or in part, the willful, tortuous, or negligent acts, failures and/or omissions of the person or entity moving or removing such building or other object or the willful, tortuous, or negligent acts, failures and/or omissions of the agents, servants or employees of the person or entity moving such building or other object.

Section 7. Default. If METRICOM shall fail to comply with any of the provisions of this Franchise, unless otherwise provided for herein, the City may serve upon METRICOM a written order to so comply within thirty (30) days from the date such order is received by METRICOM. If METRICOM is not in compliance with this Franchise after expiration of said thirty (30) day period, the City may act to remedy the violation and may charge the costs and expenses of such action to METRICOM. The City may act without the thirty (30) day notice in case of an emergency. In addition, if the failure to comply with respect to which City notified METRICOM as provided above relates to a breach of a material term of this Franchise, then the City may in addition, by ordinance, declare an immediate forfeiture of this Franchise, provided, however, if any failure to comply with this Franchise by METRICOM cannot be corrected with due diligence within said thirty (30) day period (METRICOM's obligation to comply and to proceed with due diligence being subject to unavoidable delays and events beyond its control), then the time within which METRICOM may so comply shall be extended for such time as may be reasonably necessary and so long as METRICOM commences promptly and diligently to effect such compliance.

In addition to other remedies provided herein, if METRICOM is not in compliance with requirements of the Franchise, and if a good faith dispute does not exist concerning such compliance, the City may place a moratorium on issuance of pending METRICOM right-of-way use permits until compliance is achieved.

Section 8. Nonexclusive Franchise. This franchise is not and shall not be deemed to be an exclusive Franchise. This Franchise shall not in any manner prohibit the City from granting other and further franchises over, upon, and along the Franchise Area which do not interfere with METRICOM's rights under this Franchise provided further however, that any such subsequent franchisees shall be given notice that (i) such franchisee should not install equipment which interferes with METRICOM's operations; and (ii) that in the event such interference occurs, such franchisee would be required to work with METRICOM to eliminate such interference at such franchisee's sole expense. This Franchise immediately shall not prohibit or prevent the City from using the Franchise Area or affect the jurisdiction of the City over the same or any part thereof except as specifically set forth herein.

Section 9. Franchise Term. This Franchise is and shall remain in full force and effect for a period of ten (10) years from and after the effective date of the Ordinance. Thereafter, only with the mutual

consent of the parties, this Franchise may be extended on such terms as the parties shall find mutually agreeable. Provided, however, METRICOM shall have no rights under this Franchises nor shall METRICOM be bound by the terms and conditions of this Franchise unless METRICOM shall, within thirty (30) days after the effective date of the Ordinance, file with the City its written acceptance of this Franchise, in a form acceptable to the City Attorney.

Section 10. Compliance with codes and regulations.

A. The rights, privileges and authority herein granted are subject to and governed by this ordinance and all other applicable ordinances and codes of the City of Kirkland, as they now exist or may hereafter be amended. Nothing in this ordinance limits the City's lawful power to exercise its police power to protect the safety and welfare of the general public. Any location, relocation, erection or excavation by METRICOM shall be performed by METRICOM in accordance with applicable federal, state and city rules and regulations, including the City Public Works Policies and Standard Plans, and any required permits, licenses or fees, and applicable safety standards then in effect.

B. Upon written inquiry, METRICOM shall provide a specific reference to either the federal, state, or local law or the W.U.T.C. order or action establishing a basis for METRICOM's actions related to a specific franchise issue.

C. In the event that any territory served by METRICOM is annexed to the City after the effective date of this Franchise, such territory shall be governed by the terms and conditions contained herein upon the effective date of such annexation.

Section 11. Undergrounding. METRICOM hereby represents and warrants that METRICOM shall perform no excavation, trenching, coring, boring, or digging into the ground or installation of any equipment or other material into the ground, or any other underground work in connection with the work to be performed METRICOM under this AGREEMENT, without City's prior written consent, and shall not otherwise disturb or disrupt the operation or maintenance of any sanitary sewers, storm drains, gas or water mains, or other underground conduits, cables or mains.

Section 12 Record of Installations and Service. With respect to excavations by METRICOM and the City within the Franchise Area, METRICOM and the City shall each comply with its respective obligations pursuant to Chapter 19.122 RCW and any other applicable state law.

Upon written request of the City, METRICOM shall provide the City with the most recent update available of any plan of potential

improvements to its Facilities within the Franchise Area; provided, however, any such plan so submitted shall be for informational purposes within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

As built drawings of the precise location of any Facilities placed by METRICOM in any street, alley, avenue, highway, easement, etc., shall be made available to the City within 10 (ten) working days of request.

### Section 13.

A. City Use of Facilities. With respect to trenches which are facilities and which are (1) wholly owned by METRICOM and (2) within the Franchise Area, the City, subject to METRICOM's prior written consent, which may not be unreasonably withheld, may install and maintain City owned wires and underground conduits in such trenches, for police, fire and other noncommercial communications purposes, subject to the following:

(a) Such installation and maintenance shall be done by the City and any additional costs shall be at the City's expense;

(b) METRICOM shall have no obligation under the indemnification provisions of the Franchise for the installation or maintenance of such City owned wires or conduits.

(c) METRICOM shall not charge the City a fee for the use of such trenches in accordance with this Section 14 as a means of deriving revenue therefrom; provided, however, nothing herein shall require METRICOM to bear any cost or expense in connection with such installation and maintenance by the City.

B. City Access. If the City requests telecommunication services from METRICOM, METRICOM shall allow the service at METRICOM's most favorable rate charged for a similar service within the state of Washington. Other terms and conditions of the provision of such services may be determined between METRICOM and the City in a separate agreement.

Section 14. Other Use of Facilities. With respect to trenches or other facilities developed or placed in the Franchise Area by METRICOM, City may approve installation or addition of devices to such places or use of such facilities by another franchisee or user, so long as such action will not unreasonably interfere with METRICOM's rights under this Franchise subject to the terms of Section 8 above and provided further however that such other Franchisee or user shall bear all costs in connection therewith. METRICOM may not charge City any fee or costs based on such City approval, but METRICOM may seek from others compensation as necessary to recover its costs and



expenses arising from actions taken pursuant to approvals given as per this Section.

**Section 15. Shared Use of Excavations.** METRICOM and the City shall exercise best efforts to coordinate construction work either may undertake within the Franchise Area so as to promote the orderly and expeditious performance and completion of such work as a whole. Such efforts shall include, at a minimum, reasonable and diligent efforts to keep the other party and other utilities within the Franchise Areas informed of its intent to undertake such construction work. METRICOM and the City shall further exercise best efforts to minimize any delay or hindrance to any construction work undertaken by themselves or other utilities within the Franchise Area.

If at any time, or from time to time, either METRICOM, the City, or another franchisee, shall cause excavations to be made within the Franchise Area, the party causing such excavation to be made shall afford the other, upon receipt of a written request to do so, an opportunity to use such excavation, provided that:

- (a) Such joint use shall not unreasonably delay the work of the party causing the excavation to be made;
- (b) Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties. The parties shall each cooperate with other utilities in the Franchise Area to minimize hindrance or delay in construction.

The City reserves the right to not allow open trenching for five years following a street overlay or improvement project. METRICOM shall be given written notice at least 90 days prior to the commencement of the project. Required trenching due to an emergency will not be subject to five year street trenching moratoriums.

The City reserves the right to require METRICOM to joint trench with other franchisees if both parties are anticipating trenching within the same franchise area and provided that the terms of (a) and (b) above are met.

**Section 16. Insurance.** METRICOM shall maintain in full force and effect throughout the term of this Franchise, a minimum of One Million Dollars (\$1,000,000.00) liability insurance for property damage and bodily injury.

The City shall be named as an additional insured on any policy of liability insurance obtained by METRICOM for the purpose of complying with the requirements of this section if and to the extent that:

(a) METRICOM's insurance carrier is willing to name the City as an additional insured without prejudice, in any way, to the rights and coverages afforded METRICOM by such policy of insurance;

(b) Naming the City as an additional insured on such policy of insurance does not cause the cost to METRICOM of maintaining such insurance to be increased.

In satisfying the insurance requirements set forth in this section, METRICOM may self-insure against such risks in such amounts as are consistent with good utility practice. METRICOM shall provide the City with sufficient written evidence, upon request, that such insurance (or self-insurance) is being so maintained by METRICOM. Such written evidence shall include, to the extent available from METRICOM's insurance carrier, a written certificate of insurance with respect to any insurance maintained by METRICOM in compliance with this Section.

Section 17. Tariff Changes. If METRICOM shall file, pursuant to Chapter 80.28 RCW, with the Washington Utilities and Transportation Commission (or its successor) any tariff affecting the City's rights arising under this Franchise, METRICOM shall give the City Clerk written notice thereof within five (5) days of the date of such filing.

Section 18. Assignment. All of the provisions, conditions, and requirements herein contained shall be binding upon METRICOM, and no right, privilege, license or authorization granted to METRICOM hereunder may be assigned or otherwise transferred without the prior written authorization and approval of the City, which the City may not unreasonably withhold. Notwithstanding the foregoing, METRICOM may assign this agreement to an affiliate, successor in interest or entity acquiring fifty-one percent (51%) or more of METRICOM's stock or assets, or to a parent or subsidiary of METRICOM, without the consent of, but upon notice to the City.

Section 19. Miscellaneous. If any term, provision, condition or portion of this Franchise shall be held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Franchise which shall continue in full force and effect. The headings of sections and paragraphs of this Franchise are for convenience of reference only and are not intended to restrict, affect or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs.

METRICOM shall pay the City a one-time administrative fee of two thousand dollars (\$2,000) relating to the issuance and administration of this Franchise. METRICOM shall further be subject to all permit fees associated with activities undertaken through the authority granted in this franchise ordinance or under the laws of the City.

In addition, METRICOM shall pay franchise fee of four percent (4%) of METRICOM's Gross Revenues per year (the "Franchise Fee"). For the purposes of this subsection, "Gross Revenues" shall mean the gross dollar amount accrued on METRICOM's books from its Ricochet Microcellular Data Network business for subscribers located in the City, less the administrative fee mandated by the previous paragraph and the Franchise Fee. "Gross Revenues" do not include (a) taxes, fees, or assessments of any kind or description imposed on or levied against METRICOM which are not applicable to all other persons or entities doing business within the City, (b) revenues uncollectible from customers (bad debts), and (c) discounts. Where the City will need to incur costs and expenses for review, inspection, or supervision of activities undertaken through the authority granted in this franchise or any ordinances relating to the subject for which a permit fee is not established, prior to commencing any such work, City shall first advise METRICOM of the total costs and expenses to be incurred, and METRICOM shall pay such costs and expenses directly to the City. In addition to the above, METRICOM shall promptly reimburse the City at its standard rates for any and all costs it reasonably incurs in response to any emergency involving METRICOM's facilities.

City has the right, but not the obligation, to take over control and ownership of METRICOM's Facilities in the ROW, without compensation, after expiration of a thirty (30) day notice period if: (1) such Facilities are abandoned; or (2) in the event this Franchise is terminated and METRICOM does not remove such METRICOM Facilities at its own expense.

This Franchise may be amended only by written instrument, signed by both parties, which specifically states that it is an amendment to this Franchise, and is approved and executed in accordance with the laws of the State of Washington. Without limiting the generality of the foregoing, this Franchise (including, without limitation, Section 5 above) shall govern and supersede and shall not be changed, modified, deleted, added to, supplemented or otherwise amended by any permit, approval, license, agreement or other document required by or obtained from the City in conjunction with the exercise (or failure to exercise) by METRICOM of any and all rights, benefits, privileges, obligations, or duties in and under this Franchise, unless such permit, approval, license, agreement or document specifically:

- (a) references this Franchise; and
- (b) states that it supersedes this Franchise to the extent it contains terms and conditions which change, modify, delete, add to, supplement or otherwise amend the terms and conditions of this Franchise.

In the event of any conflict or inconsistency between the provisions of this Franchise and the provisions of any such permit,


approval, license, agreement of other document, the provisions of this Franchise shall control.

This Franchise is subject to the provisions of any applicable tariff now or hereafter on file with the Washington Utilities and Transportation Commission or its successor. In the event of any conflict of inconsistency between the provisions of this Franchise and such tariff, the provisions of such tariff shall control.

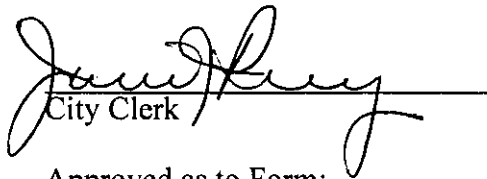
Section 20. Effective date. This Ordinance, being in compliance with RCW 35A.47.040, shall be in force and effect five days from and after its passage by the Kirkland City Council and publication pursuant to Section 1.08.017 Kirkland Municipal Code in the summary form attached to the original of this ordinance and by this reference approved by the City Council.

Passed by majority vote of the Kirkland City Council in regular, open meeting this 3rd day of October, 1995.

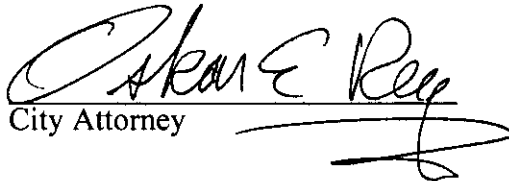
Signed in authentication thereof this 3rd day of October, 1995.

  
MAYOR

Attest:

  
City Clerk

Approved as to Form:

  
City Attorney

PUBLICATION SUMMARY  
OF ORDINANCE NO. 3492

AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING METRICOM, INC., A DELAWARE CORPORATION, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT, AND MAINTAIN, REPAIR, REPLACE, OPERATE UPON, OVER, UNDER, ALONG AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF ITS RICOCHET MICROCELLULAR DATA NETWORK BUSINESS.

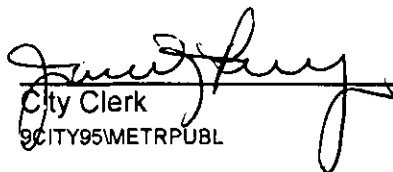
SECTIONS 1-15. Provide for the grant to Metricom, Inc. of a franchise for a data network business for ten years on specified terms and conditions.

SECTIONS 16-19. Set forth administrative provisions for the franchise and concerning its legal effect.

SECTION 20. Authorizes publication of the ordinance by summary, which summary is approved by the City Council pursuant to Section 1.08.017 Kirkland Municipal Code and establishes the effective date as five days after publication of summary.

The full text of this Ordinance will be mailed without charge to any person upon request made to the City Clerk for the City of Kirkland. The Ordinance was passed by the Kirkland City Council at its regular meeting on the 3rd day of October, 1995.

I certify that the foregoing is a summary of Ordinance 3492 approved by the Kirkland City Council for summary publication.

  
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City Clerk  
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