

Memorandum of Understanding
Between the City of Edmonds and City of Seattle
Relating to
Excess Capacity of High Speed Fiber Optic
Communication System

This Memorandum of Understanding (the "**Agreement**"), dated as of 22 July 2010, is entered into by The City of Seattle, acting by and through its Department of Information Technology ("**Seattle**"), and The City of Edmonds, acting by and through its Department of Information Services ("**Edmonds**"). Seattle and Edmonds are individually referred to as "**Party**" or collectively as "**Parties**".

WHEREAS, Edmonds filed the declaratory judgment action *In re Limited Tax General Obligation Bonds of the City of Edmonds*, Snohomish County Superior Court Cause No. 08-2-00023-9, seeking a decision declaring Edmonds had the authority to offer the use of excess capacity on its high speed fiber optic communication system to private individuals and non-governmental businesses and organizations; and

WHEREAS, on October 22, 2009, the Honorable Larry E. McKeeman granted Edmonds summary judgment order declaring that the use of excess capacity on Edmonds high speed fiber optic communication system by private individuals and non-governmental businesses and organizations is a lawful public purpose under Edmonds general home rule powers as a code city and under the express statutory authority to engage in economic development programs under Revised Code of Washington 35.21.703, and declaring valid in all respects the limited general obligation bonds intended to be used to enhance Edmonds high speed fiber optic communication system ("**Summary Judgment Order**"); and

WHEREAS, the Summary Judgment Order is a valuable judicial decision for other home rule and code cities in the State of Washington but is not binding judicial precedent; and

WHEREAS, an appeal of the Summary Judgment Order with a subsequent Washington Court of Appeals, Division I decision may create binding precedent for other home rule and code cities in the State of Washington; and

WHEREAS, Seattle would prefer a valid and binding judicial precedent declaring that home rule and code cities in the State of Washington have the necessary authority to offer excess capacity from their high speed fiber optic communication system for use by private individuals and non-governmental businesses and organizations; and

WHEREAS, Seattle and Edmonds have agreed that an appeal of the Summary Judgment Order is a cost efficient and convenient process for home rule and code cities in Washington to obtain a judicial opinion authorizing the same.

NOW THEREFORE, Seattle and Edmonds agree as follows:

SECTION 1. Appeal of the Summary Judgment Order

- A. Edmonds agrees to direct the designated public representative Rowena B. Rohrbach (“**Appellant**”) to appeal the Summary Judgment Order in a timely and diligent manner (“**Appeal**”). Edmonds shall support this action, including rigorously defending the Appeal, and taking all necessary and convenient steps toward obtaining a published decision from the Washington Court of Appeals that affirms the trial court’s ruling in the Summary Judgment Order.
- B. Edmonds agrees to provide Seattle with timely, routine updates, information and materials relating to the appeal, including advance notice of any key dates, including filing deadlines and hearing dates. Edmonds shall direct its counsel to provide the same to Seattle, if requested.
- C. Edmonds agrees to pursue a motion to publish in the event that the Washington Court of Appeals makes a favorable decision for home rule and code cities, but decides this case in an unpublished decision.

SECTION 2. Seattle’s limited reimbursement of certain Appeal costs.

- A. Seattle understands and agrees that Edmonds is under no obligation or need to appeal the Summary Judgment Order.
- B. As consideration for Edmonds pursuing the Appeal, Seattle agrees to pay for attorneys’ fees and costs relating to defending the Summary Judgment Order on appeal, up to a total amount of \$50,000.00. Seattle acknowledges that Edmonds has retained Will Patton of Foster Pepper PLLC as its counsel to defend to the Appeal. Edmonds shall send itemized invoices to Seattle no more often than monthly seeking payment for the relevant fees and costs to be paid by the Seattle. Seattle will make payment within 30 days of receipt of the invoice.

SECTION 3. Edmonds to pay for appellant’s Appeal costs.

Edmonds acknowledges that it bears the sole responsibility for all costs related to the Appeal, and Seattle’s commitment only applies to attorneys’ fees and costs relating to defending the Summary Judgment Order on Appeal. In no event shall Seattle be responsible for any costs relating to the Appellant’s arguments, costs and attorneys’ fees.

SECTION 4. MISCELLANEOUS

- A. Neither Party shall assign, encumber, dispose of or otherwise transfer this Agreement or any right, interest or benefit under this Agreement without the prior written consent of the other, which consent shall not be unreasonably denied, delayed or withheld.
- B. Unless otherwise provided elsewhere in this Agreement, any notice or other communication related to this Agreement, shall be in writing and shall be deemed to have been received if delivered in person, First Class United States Postal Service mail, by facsimile or sent by acknowledged delivery to the following addresses, as may be amended by the Parties by providing notice of such updated addresses in accordance with this paragraph B:

If to Edmonds:

Mr. Carl Nelson
Chief Information Officer
First Floor City Hall
121 Fifth Avenue North
Edmonds, WA 98020
Telephone: 425-771-0219
Facsimile: 425-771-0265
Email: carln@ci.edmonds.wa.us

If to Seattle:

Mr. William M. Schrier
Chief Technology Officer
Seattle Municipal Tower
PO Box 94709
Seattle, WA 98124-4709
Telephone: 206-684-0633
Facsimile: 206-684-0911
Email: bill.schrier@seattle.gov

and to:

Ms. Rebecca Keith
Assistant City Attorney
PO 94769
Seattle, WA 98124-4769
Telephone: 206-684-8239
Facsimile: 206-684-8284
Email: Rebecca.keith@seattle.gov

- C. This Agreement shall be governed by the laws of the state of Washington without reference to its choice of law principles to the contrary. Both parties agree to the exclusive venue for any dispute arising out of this Agreement to be the Superior Court of King County Washington.
- D. This Agreement may be amended or modified only by a writing signed by both Parties.
- E. Any failure or delay in the exercise of any right or remedy available to a Party hereunder shall not be construed as a waiver or relinquishment of such right or remedy.

- F. Any rule or principle of contractual construction that would otherwise require any aspect of this Agreement to be interpreted against the Party primarily responsible for its drafting will not be employed in the interpretation of this Agreement.
- G. Neither Party shall be liable for any indirect, incidental, special, exemplary, punitive, or consequential or pure financial damages arising in connection with this Agreement, including without limitation, lost profits, even if such Party has been advised of the possibility of such damages or such damages are otherwise foreseeable.
- H. This Agreement sets forth the entire agreement, and supersedes any and all prior and contemporaneous agreements and understandings, written or oral, of the Parties regarding the subject matter hereof.

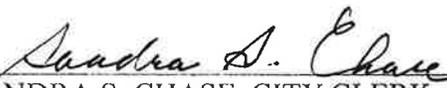
**THE CITY OF SEATTLE,
DEPARTMENT OF INFORMATION
TECHNOLOGY**

By: 
Its: Chief Technology Officer
Date: 32 July 2010

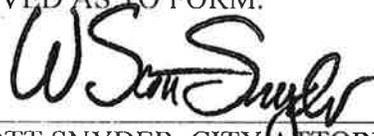
CITY OF EDMONDS


STEVE BERNHEIM, MAYOR PRO TEM
07-13-10
DATE

ATTEST/AUTHENTICATED:


SANDRA S. CHASE, CITY CLERK

APPROVED AS TO FORM:


W. SCOTT SNYDER, CITY ATTORNEY