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Attachment B

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Ms. Malisa Files
Finance Director
City of Redmond
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Re: Applicability of RCW 35.94.040 to Microsoft's Requested Release of Utility Easements

Dear Malisa:

As you requested, I am providing you with an opinion as to whether RCW 35.94.040 requires the City to surplus the utility easements and pipes providing service to Microsoft's property before releasing/conveying the same to Microsoft to facilitate the Microsoft Refresh Project. For the reasons set forth below, the surplus process in RCW 35.94.040 is required.

As an optional municipal code city (*see* RMC 1.02.010), Redmond may "operate utility services as authorized by chapters 35.88, 35.91, 35.92, and 35.94 RCW." RCW 35A.80.010. Chapter 35.94 RCW governs the process by which the sale, lease, or other conveyance of "any public utility works, plant, or system owned by [a city] or any part thereof, together with all or any equipment and appurtenances thereof" may be accomplished. RCW 35.94.010. Chapter 35.94 RCW sets up two separate procedures for conveying utility assets: (1) a formal bidding process described in RCW 35.94.020 and .030, under which a city council passes a resolution authorizing the solicitation of bids and then passes an ordinance accepting the winning bid and calling for a public vote on the conveyance; and (2) a less formal process described in RCW 35.94.040, under which a city council holds a public hearing and then passes a resolution declaring the assets surplus and establishes the terms under which the assets will be conveyed. Most jurisdictions conveying utility assets use the less formal process set forth in RCW 35.94.040 for obvious reasons. Redmond has

used this process in the past, most recently when declaring properties purchased for the Tosh Creek project surplus.

While Microsoft has questioned the applicability of RCW 35.94.040 to the release or conveyance of City of Redmond utility easements for the Microsoft Refresh, the language of RCW 35.94.040 is clear. RCW 35.94.040 provides that

> (1) Whenever a city shall determine, by resolution of its legislative authority, that any lands, property, or equipment originally acquired for public utility purposes is surplus to the city's needs and is not required for providing continued public utility service, then such legislative authority by resolution and after a public hearing may cause such lands, property, or equipment to be leased, sold, or conveyed. Such resolution shall state the fair market value or the rent or consideration to be paid and such other terms and conditions for such disposition as the legislative authority deems to be in the best public interest.
>
> (2) The provisions of RCW 35.94.020 and 35.94.030 shall not apply to dispositions authorized by this section.
>
> (3) This section does not apply to property transferred, leased, or otherwise disposed in accordance with RCW 39.33.015 [related to intergovernmental transfers of property and not applicable here].

Underlined emphasis added.

As you can see from the underlined language, the statute requires that "any lands, property, or equipment originally acquired for utility purposes" must be declared surplus to the City's needs before it can be leased, sold, or conveyed. A utility easement is clearly an interest in land. *Berg v. Ting,* 125 Wn.2d 544, 551, 886 P.2d 564 (1995); *Perrin v. Derbyshire Scenic Acres Water Corp.*, 63 Wn.2d 716, 719, 385 P.2d 949 (1964); *Wilhelm v. Beyersdorf,* 100 Wn. App. 836, 842, 999 P.2d 54 (2000). A utility easement is also an incorporeal "property right," separate and apart from ownership, that allows the use of another's land. *Admasu v. Port of Seattle,* 185 Wn. App. 23, 35, 340 P.3d 873 (2014); *810 Props. v. Jump,* 141 Wn. App. 688, 699, 170 P.3d 1209 (2007); *M.K.K.I., Inc. v. Krueger,* 135 Wn. App. 647, 654, 145 P.3d 411 (2006). Finally, utility pipelines are not fixtures owned by the abutting landowner, but such pipelines are the personal property of the utility company using them to provide service. *Dunsmuir v. Port Angeles Gas, Water, Elec. & Power Co.,* 24 Wash. 104, 112-13, 63 Pac. 1095 (1901); *Liberty Lake Sewer District v. Liberty Lake Utilities Co., Inc.,* 37 Wn. App. 809, 815, 683 P.2d 1117 (1984). The utility easements and utility pipelines serving the Microsoft Campus thus fall squarely within the "lands, property, or equipment" language and must be declared surplus as the statute requires.

I understand Microsoft has made three arguments against application of the statute. First, Microsoft argues that the terms "land" and "property" should be interpreted as including only the fee interest in land and as not applying to easements and pipelines. I see nothing in the statute that

supports such an interpretation. An easement is clearly an interest in land and it is clearly a property right. Pipelines are clearly personal property. Nothing in the statute suggests that only fee interests in land and only real property is subject to the statute. I therefore respectfully disagree with Microsoft's suggested interpretation.

Microsoft's second argument is that the statute should not apply because Microsoft conveyed the easements and pipelines to the City in the first place and the easements and pipelines have no value except as they serve Microsoft's property. Again, I see nothing in the statute that supports Microsoft's interpretation. As pointed out above, the statute governs all "land, property, and equipment" and the easements and pipelines fall squarely within those terms. Also, the statute refers to land, property, and equipment that was "originally acquired for utility purposes," while making no distinction between land, property, or equipment that was acquired at the utility's expense and land, property, or equipment that was conveyed to the utility as the result of development. If the legislature had intended to exempt land, property, or equipment acquired from a private developer as a condition of development from the requirement to surplus, it could have written that into the statute. The legislature did not do that, so the statute applies. And while the value of the easements and pipelines may be lessened by their inability to serve other properties, that only goes to fair market value required to be stated in the resolution and not to whether the statute applies at all.

Finally, Microsoft argues that the City has not always followed the statute with respect to every utility easement released or conveyed and that doing so now would "set a bad precedent." While it is true that the City may not have followed the process in every past instance, the only situations I am aware where that may have happened involved the mere relocation of a single easement from one place to another on a single parcel, such as when a single easement may be moved a few feet to accommodate a new structure. This is a far cry from what Microsoft is proposing, which is the wholesale release and conveyance of a significant number of City easements and pipelines, the conveyance of a fewer number of easements and pipelines to the City, and the privatization of a substantial amount of sewer infrastructure. In any event, any failure by the City to surplus easements and pipelines in the past is not binding on the City in the present situation, the sheer scale of which could raise audit issues if the statute is not complied with.

For all of the reasons set forth in this letter, RCW 35.94.040 applies to the release and conveyance of utility easements and pipelines in connection with the Microsoft Refresh Project. If you have any questions, I would be happy to answer them.

Very truly yours,

OGDEN MURPHY WALLACE, P.L.L.C.

James E. Haney

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