

ORDINANCE NO. 2021-25

AN ORDINANCE GRANTING TO MAXWELL SPECIAL UTILITY DISTRICT, FORMERLY MAXWELL WATER SUPPLY CORPORATION, THE RIGHT, PRIVILEGE AND FRANCHISE TO CONSTRUCT, INSTALL, EXTEND, REMOVE, REPLACE, ABANDON, OPERATE AND MAINTAIN ITS FACILITIES WITHIN THE PUBLIC RIGHTS-OF-WAY OF THE CITY OF SAN MARCOS, TEXAS FOR THE TRANSPORTATION, DELIVERY, SALE AND DISTRIBUTION OF POTABLE WATER; CONTAINING OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING FOR SEVERABILITY; INCLUDING PROCEDURAL PROVISIONS; PROVIDING FOR APPROVAL ON THREE READINGS OF THE ORDINANCE; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS:

SECTION 1. GRANT OF AUTHORITY. Subject to the terms, conditions and provisions of this ordinance, the right, privilege and franchise is hereby granted to Maxwell Special Utility District, to construct, install, extend, remove, replace, abandon, operate and maintain its facilities within the Public Rights-of-Way of the City of San Marcos, Texas for the transportation, delivery, sale and distribution of potable water within the corporate limits of the City of San Marcos, as the same are now and as the same may from time to time be extended. This ordinance may be referred to hereinafter as “this ordinance” or “this “Franchise.”

SECTION 2. DEFINITIONS.

2.1 “*City*” shall mean the City of San Marcos, Texas, a home-rule municipal corporation.

2.2 “*District*” shall mean Maxwell Special Utility District, formerly known as Maxwell Water Supply Corporation, a Texas special utility district established pursuant to applicable provisions of the Texas Water Code. District does not mean any other assignee, business organization, entity or person, any of which shall have no right, privilege or franchise granted hereunder.

2.3 “*Emergency Operations*” means operations or repairs of facilities to prevent imminent harm to the health, safety, or welfare of persons or property.

2.4 “*Facilities*” shall mean pipes, pipelines, water mains, laterals, feeders, regulators, meters, fixtures, connections and attachments and other associated equipment and appurtenances, used in or incident to providing transportation, distribution, supply and sales of potable water to serve retail customers of District.

2.5 “*Gross Receipts*” shall mean all amounts received by the District from the sale of

water to its customers within the corporate limits of City that correspond to the District's tariff charges for: (a) customer charge: (b) commodity charge: (c) tax adjustment; and (d) water cost adjustment.

2.6 “*Public Rights-of-Way*” shall mean the areas in, under, upon, over, across, and along any and all of the present and future Streets or streams now or hereafter owned or controlled by City.

2.7 “*Routine Maintenance*” shall mean, non-emergency repairs, not taking longer than 6 hours on City designated major thoroughfares and in public school zones between 9 a.m. and 3 p.m., and not taking longer than 10 hours on other Public Rights-of-Way between 8 a.m. and 6 p.m. where the paved surface of the rights-of-way, including the sidewalk and curbs, is not broken and there is no trenching in the unpaved surfaces of the Public Rights-of-Way beyond 24 inches.

2.8 “*Street*” shall mean the surface and the space above and below any public street, road, highway, alley, bridge, sidewalk, or other public place or way.

2.9 “*Transport Customer*” means any person or entity for whom District transports water through the distribution system of District within the corporate limits of the City for consumption within the corporate limits of the City.

SECTION 3. TERM OF FRANCHISE. This Franchise shall become effective on the Effective Date described in Section 22 and shall be in full force and effect for a term of five (5) years.

SECTION 4. CONSTRUCTION AND MAINTENANCE OF WATER DISTRIBUTION SYSTEM.

4.1 All Facilities installed by District in a Public Right-of-Way shall be of sound material and good quality, and shall be laid so that they will cause the least interference with traffic over the Public Rights-of-Way, the artificial drainage of the City or its underground or overhead fixtures and public utilities, or with navigation in or the natural drainage of any stream. All Facilities shall be installed, maintained, and repaired in accordance with applicable Federal, State and City laws, codes and regulations and in accordance with accepted industry standards in effect at the time the District performs construction, maintenance, and repair activities.

4.2 District shall conduct its maintenance, repair, construction and similar activity in a manner that will cause the least interference with the use of public or private property.

4.3 Within the Public Rights-of-Way, the location, relocation, and route of the Facilities by the District shall be subject to the reasonable and proper regulation, direction and control of the City or the City official to whom such duties have been delegated.

4.4 At least annually, the District will provide current maps detailing the location of the District's Facilities in the corporate limits of the City. In addition, when the City is undertaking any installation or maintenance of public improvements that may involve excavation, upon written

request from the City, the District will promptly provide detailed maps of the District's Facilities, if any, within the limits of the City's undertaking.

4.5 Unless otherwise stated herein, the District shall comply with all applicable laws and provisions of ordinances of the City regarding construction within or on a Public Right-of-Way including but not limited to Chapter 74, Article 4 of the San Marcos City Code regarding Right-of-Way Construction, as amended.

SECTION 5. PERMITS.

5.1 Permit Applications. Except as indicated below, District and its contractors shall file an application for a permit indicating the dates, location, and nature of all work to be performed on its Facilities within the Public Rights-of-Way. Unless otherwise stated herein, the City shall approve or deny the permit application within ten (10) days of District's submission of its application or be deemed granted. District and contractors performing work for District shall not be required to pay any fee to perform work on District's Facilities, or park within the Streets and other Public Rights-of-Way, other than the fees set forth in Section 8 of this Franchise.

5.2 Major Construction. District shall not engage in the removal, retirement, abandonment, replacement, extension or installation of Facilities involving open trenching, excavating, boring, cutting, and the like in, under, upon, over, across, or along paved Streets, alleys, public way or place or any Public Rights-of-Way without first filing an application for a permit at least thirty (30) days prior to the start date of construction. Such permit shall include the scope and duration of the work, necessary maps, site and civil drawings, and traffic control plans, if applicable. The City shall approve or deny the permit application within thirty (30) days of District's submission of its application or be deemed granted.

5.3 Emergency Operations. In the event District determines there is a need to initiate Emergency Operations, District may act without any prior notice or permit, but shall provide notice on the first working day following District's completion of Emergency Operations. Such notice shall include the required permit information provided herein that corresponds to the type of work performed during the emergency. The notification of police or fire departments when initiating such Emergency Operations shall be at District's sole discretion and judgment.

5.4 Routine Maintenance. No permit shall be required to perform any Routine Maintenance.

5.5 City Requested Relocations. District and contractors performing work for District shall not be required to obtain any permits for relocations of Facilities requested by the City, provided that the relocated Facilities are placed in the location designated by the City and the relocation is otherwise in accordance with the City's request to relocate.

SECTION 6. STREETS TO BE RESTORED TO GOOD CONDITION.

6.1 Following completion of work in the Public Rights-of-Way, District shall repair the affected Public Rights-of-Way as soon as possible and shall comply with all City ordinances

governing time periods and standards relating to excavating in the Public Rights-of-Way. No Street, alley, highway or public place shall be encumbered for a longer period than shall be necessary to execute the work.

6.2 District shall ensure the quality of the restoration workmanship for one (1) year following the completion of the restoration. During the one-year maintenance period, the District shall remedy any area repaired by the District when directed to do so by City in the event of a pavement failure.

6.3 During the District's installation of its Facilities in a Public Right-of-Way, the City may, at its cost, place its facilities in the trenches in the Right of Way occupied by the District's Facilities, provided the City pays any incremental increase in cost incurred by the District for trenching necessary to accommodate such City facilities. Such activity must be technically, commercially, and economically feasible and not in violation of state or federal regulations or industry safety standards.

6.4 The City expressly reserves the right to change grades, construct, widen or relocate Streets and other public facilities as provided in Section 14.

6.5 District, in constructing, maintaining or repairing its Facilities, shall not interfere with any public utility facilities in any public property except with the consent and direction of the City Manager or his designee. The right of the District to use any area of public property shall in no way affect the right of the City or its agents to maintain, construct, repair, or operate any pavement, curbs, gutters, wires, cables, water or sewer pipes, or electric distribution facilities owned by the City and located within or near the public property.

SECTION 7. QUALITY OF SERVICE. The service furnished hereunder to the City and its inhabitants shall be in accordance with the quality of service rules of the Railroad Commission of Texas and all other applicable local, state and federal regulations. District shall furnish the grade of service to its customers as provided by its rate schedules and shall maintain its system in reasonable operating condition during the continuance of this Franchise. An exception to this requirement is automatically in effect, but only for so long as is necessary, when caused by a shortage in materials, supplies and equipment beyond the control of the District as a result of fires, strikes, riots, storms, floods and other casualties, governmental regulations, limitations and restrictions as to the use and availability of materials, supplies and equipment and as to the use of the services, and unforeseeable and unusual demands for service. In any of such events, the District shall do all things reasonably within its power to restore normal service as quickly as practicable.

SECTION 8. PAYMENT TO THE CITY.

8.1 In consideration of the rights and privileges herein granted, the administration of the Franchise by the City, the temporary interference with the use of Public Rights-of-Way and cost and obligations undertaken by the city in relation thereto and in lieu of any license, charge, fee, street or alley rental or other character of charge for use and occupancy of the streets, alleys, and public places of the City, and in lieu of any inspection fee, the District agrees to pay to the

City franchise fees in the amount and manner described herein.

8.2 District agrees to pay to the City quarterly during the continuance of this Franchise a sum of money equal to two percent (2%) of the District's gross receipts for the preceding calendar quarter received by the District from the sale of water within the corporate limits of the City. The franchise fees hereunder shall be calculated for the calendar quarters ending March 31, June 30, September 30, and December 31 and shall be payable on or before the fifteenth day of May, August, November, and February following the quarter for which payment is made, beginning with the first such date following the Effective Date of this Franchise and each August 15th, November 15th, February 15th, and May 15th thereafter; provided, however, the first such payment shall be prorated as necessary to reflect only those gross receipts received and transportation volumes delivered by District after the Effective Date of this Franchise. In no event shall the District be required to remit to the City franchise fee amounts that for any reason whatsoever are not fully recoverable from its customers. Upon receipt of the above amount of money, the City Clerk shall deliver to the District a receipt for such amount. If any payment due date required herein falls on a weekend or bank holiday, payment shall be made on or before the close of business of the first working day after the payment due date.

SECTION 9. ANNEXATIONS BY CITY. This Franchise shall extend to and include any and all territory that is annexed by the City during the term of this Franchise. Within sixty (60) days from the receipt of notice from the City of any such annexation, the District shall assure that any and all customers within such annexed territory are included and shown on its accounting system as being within the corporate limits of the City of San Marcos. After such sixty (60) day period the payment provisions specified in Section 8 of this Franchise shall apply to gross receipts and transport fees received by the District from customers located within such annexed territory. District shall true-up its map of City boundaries to the City's map on an annual basis.

SECTION 10. NON-EXCLUSIVE FRANCHISE. Nothing contained in this Franchise shall ever be construed as conferring upon the District any exclusive rights or privileges of any nature whatsoever.

SECTION 11. COMPLIANCE AND REMEDIES.

11.1 In the event the District by act or omission violates any material term, condition or provision of this Franchise, the City shall notify the District in writing of such violation. Should the District fail or refuse to correct any such violation within thirty days from the date of City's notice, the City shall, upon written notification to the District, have the right to terminate this agreement. Any such termination and cancellation shall be by ordinance adopted by City Council; provided, however, before any such ordinance is adopted, the District must be given at least sixty (60) days' advance written notice. Such notice shall set forth the causes and reasons for the proposed termination and cancellation, shall advise the District that it will be provided an opportunity to be heard by City Council regarding such proposed action before any such action is taken and shall set forth the time, date and place of the hearing.

11.2 Other than its failure, refusal or inability to pay its debts and obligations, including, specifically, the payments to the City required by this Franchise, the District shall not be declared

in default or be subject to any sanction under any provision of this Franchise in those cases in which performance of such provision is prevented by reasons beyond its control.

11.3 The rights and remedies of the City and the District set forth herein shall be in addition to, and not in limitation of, any other rights and remedies provided at law or in equity. The City's or District's exercise of any particular remedy shall not constitute a waiver of their rights to exercise any other remedy.

SECTION 12. RESERVATION OF POWERS. Except as otherwise provided in this Franchise, the City by the granting of this Franchise does not surrender or to any extent lose, waive, impair or lessen the lawful powers, claims and rights, now or hereafter vested in the City under the Constitution and statutes of the State of Texas and under the Charter and Ordinances of the City of San Marcos or other applicable law, to regulate public utilities within the City and to regulate the use of the Streets by the District; and the District by its acceptance of this Franchise agrees that, except as otherwise provided in this Franchise, all lawful powers and rights, whether regulatory or otherwise, as are or as may be from time to time vested in or reserved to the City, shall be in full force and effect and subject to the exercise thereof by the City at any time and from time to time.

SECTION 13. INDEMNITY. TO THE EXTENT PERMITTED BY LAW, THE DISTRICT, ITS SUCCESSORS AND ASSIGNS, SHALL PROTECT AND HOLD THE CITY AND ITS OFFICERS, AGENTS, AND EMPLOYEES (COLLECTIVELY REFERRED TO IN THIS SECTION AS "THE CITY") HARMLESS AGAINST ANY AND ALL CLAIMS OR DEMANDS FOR DAMAGES TO ANY PERSON OR PROPERTY BY REASON OF THE CONSTRUCTION AND MAINTENANCE OF THE DISTRICT'S WATER DISTRIBUTION SYSTEM, OR IN ANY WAY GROWING OUT OF THE RIGHTS GRANTED BY THIS FRANCHISE, EITHER DIRECTLY OR INDIRECTLY, OR BY REASON OF ANY ACT, NEGLIGENCE OR NONFEASANCE OF THE DISTRICT OR THE CONTRACTORS, AGENTS OR EMPLOYEES OF THE DISTRICT OR ITS SUCCESSORS AND ASSIGNS, AND SHALL REFUND TO THE CITY ALL SUMS WHICH THE CITY MAY BE ADJUDGED TO PAY ON ANY SUCH CLAIM, OR WHICH MAY ARISE OR GROW OUT OF THE EXERCISE OF THE RIGHTS AND PRIVILEGES HEREBY GRANTED OR BY THE ABUSE THEREOF, AND THE DISTRICT OR ITS SUCCESSORS AND ASSIGNS SHALL INDEMNIFY AND HOLD THE CITY HARMLESS FROM AND ON ACCOUNT OF ALL DAMAGES, COSTS, EXPENSES, ACTIONS, AND CAUSES OF ACTION THAT MAY ACCRUE TO OR BE BROUGHT BY, A PERSON, PERSONS, DISTRICT OR COMPANIES AT ANY TIME HEREAFTER BY REASON OF THE EXERCISE OF THE RIGHTS AND PRIVILEGES HEREBY GRANTED, OR OF THE ABUSE THEREOF.

SECTION 14. RELOCATION OF FACILITIES. The District shall, upon written request of the City, relocate its Facilities within Public Rights-of-Way at the District's own expense, exclusive of Facilities installed for service directly to the City, whenever such shall be reasonably necessary on account of the widening, change of grade, or relocation by the City of Streets or Public Rights-of-Way, or construction or relocation by the City of City utility infrastructure or drainage facilities. The City shall bear the costs of all relocations of Facilities

installed for service directly to the City and of any relocation of other Facilities requested by the City for reasons other than the widening, change of grade, or relocation by the City of Streets or Public Rights-of-Way, or construction or relocation by the City of City utility lines or drainage facilities.

SECTION 15. GOVERNMENTAL FUNCTION. All of the regulations and activities required by this Franchise are hereby declared to be governmental and for the health, safety and welfare of the general public.

SECTION 16. RECORDS AND REPORTS.

16.1 Books of Account. The District shall keep complete and accurate books of accounts and records of its business and operations under and in connection with this Franchise. All such books of accounts and records shall be kept at the District's principal office in Houston, Texas.

16.2 Access by City. The City may conduct an audit or other inquiry or may pursue a cause of action in relation to the payment of the franchise fee. Each party shall bear its own costs of any such audit or inquiry. Upon receipt of a written request from the City, all books and records related to District's operations under this Franchise shall be made available for inspection and copying no later than thirty (30) days from receipt of such request.

16.3 Interest on Underpayments and Overpayments.

16.3.1 Amounts due to City for late payments shall include interest, compounded daily equal to the return on equity plus three percent (3%) granted to the District in its most recent proceeding fixing rates applicable to customers within the corporate limits of the City, provided such interest will not exceed the maximum interest rate allowed under applicable law.

16.3.2 If the City identifies, as a result of a franchise fee compliance review, amounts owed by the District from prior periods or prior underpayments, then the District shall pay simple interest on such amounts equal to the return on equity granted to the District in its most recent proceeding fixing rates applicable to customers within the corporate limits of the City. Said interest shall be payable on such sums from the date the initial payment was due until it is paid and shall not be billed to customers.

16.3.3 Amounts due District for past overpayments shall include simple interest equal to the return on equity granted to the District in its most recent proceeding fixing rates applicable to customers within the corporate limits of the City; provided, however, if there is a change in the approved return on equity during the time period subject to the City's audit or inquiry, then for each time period during which there was an overpayment, the approved return on equity in effect during such time period shall be used in calculating interest under this subparagraph (c). Interest payable on such sums shall be credited to customers.

SECTION 17. EASEMENT. In consideration for the compensation set forth in Section

8, City agrees that if City sells, conveys, or surrenders possession of any portion of the Public Right-of-Way that is being used by District pursuant to this Franchise, City, except where relocation is required under Section 14, to the extent of its right to do so, shall first grant District an easement for such use and the sale, conveyance, or surrender of possession of the Public Right-of-Way shall be subject to the right and continued use of District.

SECTION 18. ACCEPTANCE. The District shall, within thirty (30) days following the final passage and approval of this Franchise, file with the City Clerk of the City of San Marcos a written statement signed in its name and behalf in substantially the following form:

"To the Honorable Mayor: and City Council of the City of San Marcos:

Maxwell Special Utility District, hereby accepts the attached franchise ordinance and agrees to be bound by all of its terms and provisions."

_____,
DBA _____

By: _____
[Name and Title]

Dated this _____ day of _____, 20____.

SECTION 19. SEVERABILITY. If any provision, section, subsection, sentence, clause or phrase of this Franchise is for any reason held to be unconstitutional, void, or invalid or for any reason unenforceable, the validity of the remaining portions of this Franchise shall not be affected thereby, it being the intent the City of San Marcos in adopting this Franchise that no portion hereof or provision hereof shall become inoperative or fail by reason of any unconstitutionality or invalidity of any other portion, provision or regulation and, to this end, all provisions of this ordinance are declared to be severable.

SECTION 20. NOTICES. Every notice, order, petition, documents or other direction or communication to be served upon the City or the District shall be deemed sufficiently given if sent by registered or certified mail, return receipt requested.

Every such communication to the District shall be sent to:

Maxwell Special Utility District
Attn: General Manager
P.O. Box 158
Maxwell, Texas 787656

With copy to:

McGinnis Lochridge, LLP
Attn: Zachariah T. Evans, Esq.

600 Congress Ave., Ste. 2100
Austin, Texas 78701

Every such communication to the City or the City Council shall be sent to:

City of San Marcos, Texas
Attn: Mayor
630 East Hopkins Street
San Marcos, Texas 78666

With a Copy to:

City of San Marcos, Texas
Attn: City Manager
630 East Hopkins Street
San Marcos, Texas 78666

SECTION 21. PUBLICATION, PASSAGE AND EFFECTIVE DATE. This Franchise, having been published once before first reading, shall take effect and be in force thirty (30) days after final passage and timely receipt of the District's acceptance under Section 18 ("Effective Date"). In accordance with Section 11.04 of the City's Charter, the District shall pay the cost of publication of this ordinance.

SECTION 22. PRIOR AGREEMENTS. This Franchise supersedes any agreements, oral or written, between the City and the District.

SECTION 23. APPLICABLE LAW AND VENUE. This Franchise shall be construed and interpreted under the laws of the state of Texas. Venue for any legal proceedings arising under this Franchise shall lie in the state courts located in Hays County, Texas having appropriate jurisdiction or, if in federal court, the United States District Court for the Western District of Texas, Austin Division.

SECTION 24. COMPLIANCE WITH CHARTER AND ORDINANCES. This Franchise, the rights granted hereby and the operations and activities performed by the District pursuant hereto shall be subject to applicable provisions of the City's Charter. Except to the extent otherwise expressly provided herein, the franchise and rights granted hereby and the operations and activities performed by the District pursuant hereto, shall be subject to all valid ordinances and regulations of the City insofar as such ordinances and regulations: (a) do not shorten the term hereof or terminate, abrogate, or materially and adversely affect the Franchise and right granted to the District hereby; (b) do not conflict with or are not inconsistent with the terms and provisions contained in this ordinance; or (c) prevent or interfere with the District's federal and state regulatory obligations. All such conflicting or inconsistent ordinances are hereby repealed to the extent of such conflict or inconsistency.

PASSED AND APPROVED on first reading on April 6, 2021.

PASSED AND APPROVED on second reading on April 20, 2021.

PASSED, APPROVED AND ADOPTED on May 18, 2021.

The Effective Date of this ordinance is _____.

Jane Hughson, Mayor

ATTEST:

Tammy K. Cook, Interim City Clerk

APPROVED:

Michael J. Cosentino, City Attorney

Published before first reading in the San Marcos Daily Record on _____, 2021.

[ATTACH DISTRICT'S WRITTEN ACCEPTANCE AND INCLUDE
STATEMENT FROM CITY CLERK REGARDING DATE RECEIVED]