

VILLAGE OF LOS RANCHOS
de ALBUQUERQUE
ORDINANCE NO. 204

AN ORDINANCE GRANTING A WATER UTILITY FRANCHISE TO THE ALBUQUERQUE-BERNALILLO COUNTY WATER UTILITY AUTHORITY TO DEVELOP, LAY, RE-LAY, CONSTRUCT, MAINTAIN, OPERATE AND REMOVE PIPES, SYSTEMS AND OTHER STRUCTURES AND FACILITIES FOR THE PURPOSE OF DISTRIBUTING WATER AND WASTEWATER SERVICE IN RIGHTS-OF-WAY OF THE VILLAGE OF LOS RANCHOS DE ALBUQUERQUE; ESTABLISHING THE TERMS AND CONDITIONS OF THE FRANCHISE; ESTABLISHING CERTAIN REMEDIES FOR THE VIOLATION OF THE FRANCHISE.

BE IT ORDAINED BY THE TRUSTEES, THE GOVERNING BODY OF THE
Village of Los Ranchos de Albuquerque:

Section 1. SHORT TITLE. This ordinance may be cited as the Albuquerque-Bernalillo County Water Utility Authority Franchise Ordinance.

Section 2. LEGISLATIVE FINDINGS. The Trustees find it necessary to grant a Franchise to the Albuquerque-Bernalillo County Water Utility Authority (“Authority”) to develop, lay, re-lay, construct, maintain, operate and remove pipes, systems, works, lift stations, manholes, storage tanks, reservoirs, appliances, and other structures and facilities, on, over, under, along and across all Rights-of-way in or owned by the Village for the purpose of providing water and wastewater services all as more specifically set out below.

Section 3. DEFINITIONS. For the purpose of this ordinance, the following terms, phrases, words and their derivations shall have the meaning given in this section. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the

singular number, and words in the singular number include the plural number. The word "shall" is mandatory and "may" is permissive. Words not defined in this section shall be given their common and ordinary meaning.

AUTHORITY. The Albuquerque Bernalillo County Water Utility Authority as established by 72-1-10 NMSA 1978 (2003 Supp.) (as amended Laws 2005, Chapter 345) or successor statute.

TRUSTEES. The legislative body of the Village of Los Ranchos de Albuquerque.

FACILITIES. Are and include, but are not limited to, plant, works, systems, improvements and equipment of the Authority such as pipes, hydrants, wells, systems, lift stations, manholes, tanks, reservoirs, underground links, meters, pumping equipment and sewer mains.

FRANCHISE. The authorization granted herein to use Rights-of-way to construct, operate, and maintain water and wastewater systems in the Village or any portion or portions thereof.

GROSS REVENUE. Includes any and all revenue received by the Authority from the sale of Water or Wastewater to its customers within the limits of the Village, as those limits may be extended from time to time including the value of the Water and Wastewater served and consumed by the Authority in the Village. Gross Revenue shall not include amounts received by the Authority as a tax, fee or assessment of general applicability collected by the Authority for pass-through to another governmental agency, reimbursements from third parties for expenses, bad debt, revenue received by the Authority upon which the Village already collects a franchise fee from another utility, utility expansion charges or to refunds or credits. The Gross Revenue shall be measured and monitored periodically as set out below.

LINE EXTENSION. Any extension of distribution, transmission or collection facilities into areas within the boundaries of the Village not then served by the Authority.

MAYOR. The Mayor of the Village of Los Ranchos de Albuquerque or his/her designated representative.

PUBLIC PLACE. Any property that is owned or under the control of the Village that is not a Right-of-way but may be dedicated for public use including but not limited to, buildings and parks.

REASONABLE ATTORNEY FEES. Charges for legal representation as may be incurred by the Village or the Authority.

RIGHTS-OF-WAY. The surface of and the space above and below any street, road, avenue, highway, freeway, bridge, lane, path, alley, court, sidewalk, parkway, platted or other public utility easement, right-of-way or other easement, excluding railroad rights-of-way, parks and airport property, of the Village now or hereafter existing within or owned by the Village which may be properly used for water and wastewater systems. To the extent the Authority occupies an easement granted by the Village to the Authority on any Public Place that permits use and occupation of such Public Place, the terms and conditions of that easement shall govern and control the Authority's occupation thereof.

STORM DRAINAGE FACILITIES. Includes all Village owned channels (lined or unlined), pipe, manholes, inlets, and all other structures that handle storm run-off.

TREASURER. The Treasurer of the Village of Los Ranchos de Albuquerque.

WATER. Residential, multi-family, commercial, industrial and institutional water, systems and services.

WASTEWATER. Residential, multi-family, commercial, industrial, institutional and wholesale-special contracts water, systems and services.

Section 4. RIGHTS AND PRIVILEGES OF AUTHORITY.

(A) Permission to rent and use. There is hereby granted by the Village to the Authority nonexclusive permission to rent, use and occupy and the franchise right, privilege and authority to construct, purchase, acquire, locate, maintain, operate and extend into, within, and through the Village, Facilities for the purpose of distributing water and wastewater service, of any nature, with the right and privilege for the period and upon the terms and conditions hereinafter

specified, to sell, furnish and distribute any or all of said products to the Village and its inhabitants, by means of its Facilities, on, over, under, along and across all Rights-of-way.

(B) Indemnification. The Authority shall indemnify, defend and hold the Village harmless from and against claims, demands, liens and all liability or damage of whatsoever kind on account of or arising from the grant of this Franchise, the exercise by the Authority of the related rights, or from the operations of the Authority within the Village, and shall pay the costs of defense plus reasonable attorneys' fees. The Authority shall be responsible for damages to any property in the Rights-of-way as a result of Authority activities. The Village shall give prompt written notice to the Authority of any claim, demand or lien with respect to which the Village seeks indemnification hereunder and unless in the Village's judgment a conflict of interest may exist between the Village and the Authority with respect to such claim, demand or lien, permit the Authority to assume the defense of such claim, demand, or lien with counsel satisfactory to the Village. If such defense is not assumed by the Authority, and the Village agrees the defense is not assumed, the Authority shall not be subject to any liability for any settlement made without its consent. Notwithstanding any provision hereof to the contrary, the Authority shall not be obligated to indemnify, defend or hold the Village harmless to the extent any claim, demand or lien arises out of or in connection with any negligent act or failure to act of the Village or any of its officers or employees.

(C) Remedies. In the event the Authority or the Village fails to fulfill any of their respective obligations under this Franchise, the Village or the Authority, whichever the case may be, will have a breach of contract claim and remedy against the other in addition to any other remedy provided by law, provided that no remedy which would have the effect of amending the specific provisions of this Franchise shall become effective without such action which would be necessary to formally amend the Franchise.

Section 5. TERM, EFFECTIVE DATE.

(A) Term. This Franchise ordinance, and the rights, privileges and authority granted hereunder, shall continue for a period of ten (10) years from the effective date.

(B) Effective date. This ordinance shall become effective from and after its passage and publication as provided by NMSA 1978, § 3-42-1, or successor statute; provided that the Authority, either before or within 60 days shall have passed legislation also approving this Franchise.

Section 6. FRANCHISE NOT EXCLUSIVE. The right to use and occupy said Rights-of-way for the purposes herein set forth is not and shall not be deemed to be, an exclusive franchise, and the Village reserves the right to itself to make or grant a similar use of the said Rights-of-way to any other person, firm, or corporation.

Section 7. PERFORMANCE AND MODIFICATION.

The Authority and the Village agree to take all reasonable and necessary actions to assure that the terms of the Franchise are performed, and neither will take any action to secure modification of this Franchise before any court of competent jurisdiction before having attempted to negotiate in good faith any modifications either party may deem necessary.

Section 8. FRANCHISE FEE.

(A) Fee and rental. As consideration for this Franchise, which provides for the rental and use by the Authority of the Rights-of-way, which are valuable public properties acquired and maintained by the Village at great expense to its taxpayers and citizens, the Authority shall pay to the Village a franchise fee in the amount of four percent of the annual Gross Revenue within the Village limits, as defined in Section 3 of this Franchise ordinance. As additional consideration for this Franchise, the Authority and Village agree to the following:

1. The Authority shall maintain all current fire protection waterline connections at the main waterline and allow for all required new fire protection connections at the main waterline for Village facilities;
2. The Authority shall provide water for fire suppression at no cost to the Village. The parties further agree to establish a methodology or process for estimating water usage for fire suppression;
3. The Authority shall maintain all fire hydrants to operable condition, including periodic painting, for use by the Village and the Village will inspect, lubricate and flow the hydrants annually. The Village will notify the Authority of any defects observed at the time of the inspection. The Authority will notify the Village when they receive the documentation of observed defects and when those defects have been corrected. At least quarterly, the Authority will notify the Village of the location of all new or relocated hydrants. The Authority will maintain an adequate supply of meters in the event public or private contractors desire to use fire hydrants for construction purposes; any such use shall be measured accordingly.

The franchise fee and services provided for herein shall constitute the only consideration by the Authority to the Village for the Authority's use and occupancy of the Rights-of-way. Said payments shall be in lieu of any and all other fee, license, privilege, occupation, excise or revenue taxes imposed generally by the Village on any business, revenue, property, service, facilities or other appurtenances or any part thereof within the Village during the term of this Franchise ordinance.

(B) Payment terms. Commencing the month following the month this Franchise ordinance becomes effective, the franchise fee shall be paid monthly on the 25th day of each month; such fee shall be for Gross Revenues received by the Authority for the preceding month. Nothing herein shall preclude the Authority and the Village from agreeing to a revised payment schedule.

(C) Reconciliation. Commencing on or before the first day of the thirteenth month following the effective date of this Franchise, the Authority shall submit to the Treasurer, a statement of the franchise fee actually due to the Village based upon the actual Gross Revenue for the year, together with a check for any amount due from the Authority or a statement for any amount due from the Village. In the event any sums are owed by the Village or Authority, such amount shall include interest from the last day of the franchise year computed at the rate being paid for customer security deposits being held by the Authority. Within 30 days from the submission of the statement of franchise fee owing, or within such reasonable additional time as he or she may request, the Treasurer shall investigate the statement and determine the accuracy of the amounts reported. However, neither payment of the franchise fee nor failure to make such investigation shall estop the Village in any way or prevent subsequent investigation or return of any amount properly due.

(D) Claims. In the event it is claimed by the Village that the amount of the franchise fee paid hereunder is insufficient or in the event the Authority claims that the amount is excessive, and the parties cannot agree, the Village and the Authority shall attempt to informally negotiate a resolution. In the event that negotiations fail, the dispute shall be submitted to non-binding mediation. The party making the demand shall submit the dispute to the American Arbitration Association (“AAA”) pursuant to the Commercial Mediation Rules of the AAA in effect at the time or as otherwise agreed to by the parties.

(E) Contract payment. In the event that the franchise fee set forth in this Franchise ordinance is declared illegal, unconstitutional or void for any reason by any court, the Authority shall be contractually bound to pay the Village, at the same times and in the same manner as provided for herein, an aggregate amount equal to the amount which would have been paid as a franchise fee.

Section 9. INSPECTION AND RETENTION OF RECORDS.

(A) Audit. The Village shall have the right to review or audit all books and records of the Authority in accordance with generally accepted accounting

and auditing principles regarding any amounts which may be paid under this Franchise ordinance but shall not have the right to change or otherwise redetermine the revenue components comprising the franchise fee base. This right includes the right to review and audit all books and records of revenue not included in the calculation of the fee paid, but which may be considered by the Village to be subject to a franchise fee. The Village shall give written notice to the Authority of any additional amount claimed to be due to the Village as a result of any review. The additional amount due, if any, shall be paid within 30 days following determination that such amount is due and payable,

(B) Record Keeping. The Authority agrees that it shall keep complete and accurate books and records of its business and operations pursuant to this Franchise in accordance with generally accepted accounting principles. The Authority and Village agree that Authority records shall be kept on a Village-specific basis for purposes of calculating franchise fees. All such books, records and accounts shall be retained for a period of six years in accordance with NMSA 1978, § 37-1-3. The Authority shall make such records as are necessary to complete an audit available for inspection by the Village at its principle place of business upon thirty days notice.

Section 10. VILLAGE REGULATION. The Village expressly reserves, and the Authority expressly recognizes, the Village's right and duty to adopt, from time to time, in addition to the provisions herein contained, such Charter provisions, ordinances and rules and regulations as the Village may deem necessary in the lawful exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties.

Section 11. VILLAGE RIGHTS.

(A) Enforcement. The Mayor, or his or her designee, is the official of the Village having full power and authority to take appropriate action for and on behalf of the Village and its inhabitants to enforce the provisions of this Franchise and to investigate any alleged violations or failures of the Authority to comply with

the provisions hereof or to adequately and fully discharge its responsibilities and obligations hereunder. The failure or omission of the Mayor or the Village to so act shall not constitute any waiver or estoppel.

(B) The Authority and Village agree to meet at regular intervals to share and coordinate information relative to the operation and repair of the facilities of the Village or of the Authority located in Rights-of-way.

Section 12. PLAN, DESIGN, CONSTRUCTION COORDINATION AND INSTALLATION OF AUTHORITY FACILITIES.

(A) Before the Authority may conduct underground work involving excavation, renovation, new construction or major relocation work in any Rights-of-way the Authority shall first notify the Village not less than five working days prior to commencement of the work and shall comply with any special conditions relating to location, scheduling, coordination and public safety. The Authority shall file maps and drawings with the Village showing the location of any proposed construction or extension of its facilities and services in any Rights-of-way of the Village. Such proposed construction work to be done by the Authority shall be performed and coordinated in a safe manner subject to the approval of the Mayor and in accordance with applicable federal and state laws and Village ordinances, regulations and permit requirements now or hereafter existing.

(B) Construction forecast. On or before the first day of the 6th month of each Franchise year, the Village and the Authority agree to meet and exchange three year construction forecasts, together with such additional information as the Village and the Authority deem appropriate relating to projects planned within the Village. The Village and Authority shall hold such meetings as they deem necessary to exchange additional information with a view toward coordinating their respective activities in these areas where such coordination will prove mutually beneficial to the public by minimizing disruption and costs to the public. The Authority will comply with all building and zoning codes and assure that aesthetic and other relevant planning principles have been given due consideration. It is recognized that, notwithstanding the foregoing, the Village

retains absolute discretion over the timing and all other aspects of its proposed projects. The Village will make reasonable efforts to allow Authority work to be incorporated in its projects.

(C) Interference; permits. All facilities constructed by the Authority within Rights-of-way of the Village shall be located so as to cause minimum interference with public use of streets, alleys and other public ways and shall be maintained in good repair and condition. Facilities located on, upon, over and under Rights-of-way shall be constructed, installed, maintained, cleared of vegetation, renovated or replaced in accordance with resolutions, ordinances, rules and regulations of general application as may be adopted by the Village to control and monitor such activities. The Village may inspect the manner of such work and require remedies as may be necessary to assure compliance.

(D) Compliance with laws. The Authority shall take measures which will result in its facilities meeting the standards required by applicable federal and state water pollution laws. Upon the Village's request, the Authority will provide the Village with copies of any reports submitted to these agencies in compliance with such laws.

(E) Joint use. Upon reasonable request by the Village or the Authority and to the extent the Village or Authority can do so, each will grant joint use of its property which it now, or in the future, owns or has an interest in to each other for purposes including, but not limited to, parks, drainage facilities, bikeways, traffic conduits, mass transit corridors, storm sewerlines, pedestrian area parking, open spaces and water, waste water, electric, cable, and natural gas distribution, provided that neither the Village nor the Authority shall be required to make such an offer in any circumstance where such offer would interfere with the current use of the property. Compensation for such joint use shall be as negotiated by the Village and the Authority. If joint use is accepted by the Village or Authority, then any improvements deemed appropriate shall be made by the at the requesting party's sole expense.

(F) Maintenance. The Authority shall be responsible for the maintenance of the property within reasonable proximity of and upon which the

Authority maintains above-ground facilities, including the removal of weed and litter.

(G) ADA. The Authority shall insure its facilities in Rights-of-way are located and constructed in a manner such that access is not impaired in compliance with the Americans with Disabilities Act (ADA). Following notice by the Village of an ADA construction problem, the Authority shall have 60 days or other reasonable time to remedy the problem. In the event the Village and the Authority cannot agree that a problem exists, any dispute shall be submitted to mediation pursuant to Section 8.(D) herein.

(H) Public Places. The Village and Authority agree that no Authority facilities will be placed in Public Places without the express written consent of the Village. The Village and Authority further agree that in the event the Village requests service or the placement of new or added Authority facilities in any Public Place, the Village shall bear all costs necessary for such placement. And, the Village and Authority further agree that in the event the Village requests service or the placement of new or added Authority Facilities in any Public Place, such facilities will require the grant of a permanent easement to the Authority.

Section 13. AUTHORITY EXCAVATIONS AND RELOCATIONS.

(A) Placement of facilities. The Authority shall have the right to excavate in, occupy and use any and all Rights-of-way. The Authority shall not, pursuant to this Franchise, place any of its facilities, on, over, under or within any Village park, duly designated as such by the Village, but nothing herein contained shall preclude the Village from granting a permanent easement therefore in accordance with Section 12(H) above. The Authority shall not place any of its facilities, on, over, under or within the median portion of any boulevard or parkway without first having obtained the written permission of the Village.

(B) Location and relocation expense. Any location or relocation of the Authority's facilities in the Rights-of-way reasonably required, caused or occasioned by any Village project necessitated by the health and safety of the public, including the installation of storm drainage, landscaping, or traffic signal

facilities, and road reconstruction shall be at the cost of the Authority. The Village and the Authority agree to meet and coordinate with respect to any project such that, when timing allows, the Authority may include the costs of any location or relocation in the next budget and/or bond cycle. The Authority shall reconstruct, replace or restore any street, alley, or public way or place, in a timely fashion, and any sewer, storm drainage, traffic signalization facilities, or other facility of the Village disturbed by the Authority, without cost to the Village, to a condition acceptable to the Village consistent with reasonable standards of safety and appearance. Any facility so disturbed by the Authority shall be reconstructed, replaced, or restored only under the supervision of Village personnel. Any such relocation shall be accomplished as expeditiously as possible.

(C) The Authority shall comply with all Village ordinances and resolutions regarding lane closures and traffic control.

(D) Abandoned facilities. From and after the effective date of this Franchise, the Authority is required to remove any and all abandoned facilities located in Rights-of-way at Authority expense as soon as practicable, but not later than 90 days following request by the Village.

Section 14. WATER AND WASTEWATER SERVICE.

In accordance with the terms hereof, the Authority shall furnish water and wastewater service within the corporate limits of the Village or any additions thereto, to the Village and to the inhabitants thereof, and to any person or persons or corporation doing business in the Village or any additions thereto.

Section 15. CONSERVATION.

The Village and the Authority recognize and agree that conservation programs offer opportunities for the efficient use of water and reduction of customers' costs. The Authority recognizes and shares the Village's strong desire to advance the implementation of cost-effective conservation programs that provide direct opportunities to the Authority's customers to manage more

efficiently their use of water and thereby create the opportunity to reduce their costs.

Section 16. EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION.

The Village and Authority are committed to stimulating and strengthening the participation of minorities and women and are also committed to the principle that the success and economic well-being of the Village and Authority are related closely to the economic strength and vigor of the communities and people it serves.

Section 17. SYSTEM TO REMAIN IN PLACE. In the event this Franchise is not renewed at the expiration of its term or the Authority terminates any service provided herein for any reason whatsoever, the Authority shall have no right to remove the systems, pending resolution of the disposition of the system. The Authority agrees it will not withhold any temporary services necessary to protect the public, and in such event shall be entitled only to monetary compensation in no greater amount than it would have been entitled to were such services provided during the term of this Franchise. Only upon receipt of written notice from the Village stating that the Village has adequate alternative sources to provide for the people of the Village shall the Authority be entitled to remove any or all of said systems in use under the terms of this Franchise.

Section 18. AMENDMENT.

At any time during the term of this Franchise, the Village through its Trustees, or the Authority, may propose amendments to the franchise by giving 30 days written notice to the other of the proposed amendment(s) desired, and both parties thereafter, through their designated representatives, will, within a reasonable time, negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s). No amendment or amendments to this franchise shall be effective until mutually agreed upon by the Village and the Authority and thereafter submitted to and approved by the Trustees.

Section 19. PUBLIC PURPOSE. All of the regulations provided in this ordinance are hereby declared to be for a public purpose and the health, safety, and welfare of the general public. Any member of the governing body or Village official or employee charged with the enforcement of this ordinance, acting for the Village in the discharge of his duties, shall not thereby render himself personally liable; and he is hereby relieved from all personal liability for any damage that might accrue to persons or property as a result of any act required or permitted in the discharge of his or her said duties. Neither the Village nor the Authority by accepting this Franchise waives its right to seek all appropriate legal and equitable remedies as allowed by law upon violation of the terms of this Franchise, including seeking injunctive relief in a court of competent jurisdiction. Such right to injunctive relief is expressly reserved and all terms and provisions hereof shall be enforceable through injunctive relief.

Section 20. NOTICES. For the purpose of this ordinance, notice to the Village will be to:

Mayor
Village of Los Ranchos de Albuquerque
6718 Rio Grande Blvd. N.W.
Los Ranchos de Albuquerque, New Mexico 87107

Notice to the Authority will be to:
Albuquerque Bernalillo Water Utility Authority
Executive Director
Albuquerque, New Mexico 87114

Notice will be effective upon delivery at the above addresses until the Village or Authority notifies the other, in writing, of a change in the address.

Section 21. VENUE. This ordinance shall be construed under and in accordance with the laws of the State of New Mexico, and all obligations of the parties hereunder are performable in Bernalillo County, New Mexico. In the event that any legal proceeding is brought to enforce the terms of this Franchise, the same shall be brought in Bernalillo County, New Mexico.

Section 22. NO WAIVER. Neither the Village nor the Authority shall be excused from complying with any of the terms and conditions of this Franchise by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions to insist upon or to seek compliance with any such terms and conditions.

Section 23. EFFECTIVE DATE. This ordinance shall become effective from and after its passage and publication as provided by NMSA 1978, § 3-42-1, or successor statute; provided that the Authority, either before or within 60 days shall have passed legislation also approving this franchise.

COMPILING CLAUSE

This ordinance shall be incorporated and compiled as part of the Codified Municipal Code of the Village of Los Ranchos.

APPROVED AND ADOPTED by the Governing Body of the Village of Los Ranchos de Albuquerque this _____ day of _____, 2006.

Larry P. Abraham,
Mayor

ATTEST:

Annabelle Silvas, Clerk

