

Kelso City Council Agenda

Regular Meeting, 6:00 pm
May 19, 2015
City Hall, Council Chambers
203 South Pacific
Kelso, WA 98626



**Special accommodations for the handicapped and hearing impaired are available
by special arrangement through the City Clerk's Office at 360-423-0900**

Invocation:

Pastor Nick Stumbo from East Hills Alliance Church

Roll Call to Council Members:

1. Approve Minutes:

1.1. May 5, 2015 – Regular Meeting

2. Proclamation:

2.1. Public Works Week

3. Presentations:

3.1. Comcast

3.2. Finance/Utility Department Report

4. Consent Items:

4.1. Auditing of Accounts

5. Citizen Business:

6. Council Business:

6.1. Discussion – City Charter Amendment

6.2. Contract – 2015 Intersection Reconstruction Project

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7. Action/Motion Items:

7.1. Ordinance, 1st Reading

7.1.1. Wetlands Mitigation Conservation Easement

Other Items:

- City Manager Report
- Staff/Dept Head Reports
- Council Reports
- Other Business
- Executive Session

Pastor Vonda McFadden, Kelso First United Methodist Church, gave the invocation. Mayor David Futcher led the flag salute. The Regular Meeting of the Kelso City Council was called to order by Mayor Futcher. Councilmembers in attendance were Rick Roberson, Jared Franklin, Dan Myers, David Futcher, Gary Archer, Todd McDaniel, and Gary Schimmel.

Minutes: Upon motion by Councilmember Schimmel, seconded by Councilmember Archer, 'Approve the Minutes of the 4/21/15 Regular Meeting,' motion carried, all voting yes.

PROCLAMATIONS:

Mayor Futcher read a proclamation declaring May 11th – 17th, as “**National Salvation Army Week**” in the City of Kelso.

Mayor Futcher read a proclamation declaring May 10th – 16th, as “**National Transportation Week**” in the City of Kelso. Public Works Street/Drainage Lead Brian Hogue accepted the proclamation.

Mayor Futcher read a proclamation declaring May 10th – 16th, as “**National Police Week**” in the City of Kelso. Chaplain Mario Gambaro accepted the proclamation. He then awarded it to Police Chief Andrew Hamilton.

PRESENTATION:

Police Department: Chief Hamilton swore in Officer Jonathon M. Dahlke and Officer Roy W. Slaven to the Kelso Police Department. He provided a “National Police Week” presentation.

Allen Street Bridge Project: Manager Taylor recognized the Kelso Downtown Revitalization Association (KDRA) and their commitment on improving the appearance and vitality of our downtown area. He also acknowledged the other organizations that were involved in the landscaping project. KDRA President Mike Julian commented that KDRA looks forward to future projects.

CITIZEN BUSINESS:

The following citizens spoke about the local emergency shelter/urban rest stop, Love Overwhelming, being an ongoing negative impact on the community:

- **Chris Bornstedt**, 119 North Maple Street, Kelso, WA
- **Caren Teigen**, 8530 Barnes Drive, Castle Rock, WA
- **Adena Grigsby**, 1109 South 3rd Avenue, Kelso, WA

- **Don J. Skreen**, 150 Lenora Lane, Kelso, Kelso Housing Authority Maintenance Coordinator
- **Dennis McCarthy**, 2420 South Silver Lake Road, Castle Rock, WA
- **Lori Shelby**, 2420 South Silver Lake Road, Castle Rock, WA
- **Curtis Hart**, 115 Williams Avenue, Kelso, WA
- **Valerie Hart**, 202 North 6th Avenue, Kelso, WA
- **Anna Hooper**, 1408 Bowmont Avenue, Kelso, WA
- **Emily**, 2420 South Silver Lake Road, Castle Rock, WA

Chuck Hendrickson, Love Overwhelming Executive Director, provided an update on changes to their policies.

The Staff clarified the zoning definition of the land use at the time Love Overwhelming submitted their permit application. City Attorney Janean Parker provided options that the citizens and the Council may have to attempt to minimize the impact that Love Overwhelming is having on the community.

COUNCIL BUSINESS:

Anchor Point Property Feasibility/Economic Impact Study, Consultant Services

Contract: Upon motion by Councilmember Archer, seconded by Council Member Myers, ‘Authorize the Contract with David Evans & Associates, Inc.’ Discussion followed. Councilmembers Futcher, Schimmel, Myers, McDaniel, Roberson, and Archer voted yes. Councilmember Franklin voted no. Motion passed, 6 to 1.

Annual Water/Sewer Replacement Program, Consultant Design Services Contract:

Upon motion by Councilmember Myers, seconded by Councilmember Roberson, ‘Authorize the City Manager to enter into Agreement with Wallis Engineering, Inc.’ Motion passed, all voting yes.

2015 HOME Project Allocation: The Council requested that this item be revisited for further discussion from the April 21, 2015 Public Hearing. Upon motion by Councilmember McDaniel, seconded by Councilmember Schimmel, ‘Carry the 2015 HOME funding in the amount of \$39,041.28 to supplement the 2016 HOME funding.’ Lengthy discussion followed. Councilmembers Futcher, Archer, McDaniel, and Schimmel voted yes. Councilmembers Myers, Franklin, and Roberson voted no. Motion passed, 4 to 3.

MOTION ITEMS:

Ordinance No. 15-3845 – Amend KMC Chapter 17.45, Marijuana Land Use: The Deputy Clerk read the proposed ordinance by title only. Upon motion by Councilmember Myers, seconded by Councilmember Archer, ‘Adopt Ordinance No. 15-3845, ‘AN ORDINANCE OF THE CITY OF KELSO, WASHINGTON AMENDING

KELSO MUNICIPAL CODE CHAPTER 17.45, MARIJUANA RELATED LAND USES, TO REMOVE RESTRICTIONS TO ALLOW MARIJUANA PRODUCTION AND PROCESSING FACILITIES TO LOCATE WITHIN 250 FEET OF RESIDENTIAL USES,' motion passed, all voting yes.

Ordinance No. 15-3846 – Amend KMC Chapter 17.15, Wineries and Microbrewies

Land Use: The Deputy Clerk read the proposed ordinance by title only. Upon motion by Councilmember McDaniel, seconded by Councilmember Myers, 'Adopt Ordinance No. 15-3846, 'AN ORDINANCE OF THE CITY OF KELSO AMENDING THE KELSO MUNICIPAL CODE CHAPTER 17.15 RELATED TO MICROBREWRIES AND MICROWINERIES TO EXPAND THE ZONES WHERE SUCH USES ARE ALLOWED,' motion passed, all voting yes.

MANAGER’S REPORT:

Steve Taylor: 1) Provided an update on the West Main Streetscape Project. 2) Announced that the City of Kelso will be hosting a reception for delegation from Kelso’s Sister City, Makinohara, Japan. It will be held in the council chambers on May 28, 2015, at 4:00 p.m. 3) Provided an update on the Shoreline Master Program. Councilmember McDaniel spoke about taking action regarding the citizens’ concerns relating to Love Overwhelming.

STAFF REPORTS:

Finance Director Brian Butterfield: Provided an update on the state audit.

COUNCIL REPORTS:

Rick Roberson: 1) Spoke in favor of notifying the County Commission regarding the concerns relating to Love Overwhelming. 2) Commented that the next South Kelso Neighborhood Association meeting is on Thursday, at 6:00 p.m.

Jared Franklin: 1) Commented that it gives him a sense of security that the City of Kelso has Chief Hamilton and the police officers on staff. He read aloud some statistics of fallen officers and citizens during the duties of law enforcement.

Dan Myers: Spoke about the Council making an official stand by sending a letter to the County Commissioner’s Office regarding the concerns relating to Love Overwhelming. Manager Taylor commented that, with the Council’s direction, staff could gather information from the police department and Cowlitz 2 Fire & Rescue and draft a letter to bring back to Council for consideration.

David Futcher: 1) Commented that some of the councilmembers and the police department are currently in dialogue with the County Commissioners on the issues

relating to Love Overwhelming. He commented that he did not know if it would help if we took an official position over something that we have no control. 2) He commented that there are nine delegates coming to visit us from Japan. He encouraged people to attend the reception.

Gary Archer: 1) Spoke about the county flea market event. 2) He spoke in favor of taking an official position and sending a letter to the County Commissioner's Office.

Todd McDaniel: No report.

Gary Schimmel: Spoke in favor of encouraging the County Commissioners to do something with the funding for Love Overwhelming.

There being no further business, Mayor Futch adjourned the meeting at 7:45 p.m.

MAYOR

CITY CLERK

PROCLAMATION

National Public Works Week May 17-23, 2015

WHEREAS, public works services provided in our community are an integral part of our citizen's everyday lives; and

WHEREAS, the support of an understanding and informed citizenry is vital to the efficient operation of public works systems and programs such as water, sewers, streets and highways, public buildings, and solid waste collection; and

WHEREAS, the health, safety and comfort of this community greatly depends on these facilities and services; and

WHEREAS, the quality and effectiveness of these facilities, as well as their planning, design, and construction, is vitally dependent upon the efforts and skill of public works officials; and

WHEREAS, the efficiency of the qualified and dedicated personnel who staff public works departments is materially influenced by the people's attitude and understanding of the importance of the work they perform; and

WHEREAS, this year's theme "Community Begins Here", is to recognize that the future of our community is truly public works, not only through innovation, invention, and maintenance, but also with investment.

Now, THEREFORE, I, David Fatcher, Mayor of the City of Kelso, do hereby proclaim the week of May 17-23, 2015, as

"National Public Works Week"

in the City of Kelso, and call upon all citizens and civic organizations to acquaint themselves with the issues involved in providing our public works and to recognize the contributions which public works officials make every day to our health, safety, comfort and quality of life.

In witness whereof, I have hereunto set my hand and caused the seal of the City of Kelso to be affixed this 19th day of May, 2015

David Fatcher, Mayor

AGENDA SUMMARY SHEET

Business of the City Council City of Kelso, Washington

SUBJECT TITLE: Kelso City Charter
Discussion

Agenda Item: _____

Dept. of Origin: _____ City Manager _____

For Agenda of: _____ May 19, 2015 _____

Originator: _____ Steve Taylor _____

PRESENTED BY:

Steve Taylor
Janean Parker

City Attorney: Janean Parker

City Manager: Steve Taylor

Agenda Item Attachments:

[Kelso City Charter - 2006](#) (link to Code Publishing webpage)
City Attorney Memo, 11-14-2014 re: City Charter Questions

SUMMARY STATEMENT:

Kelso is Washington State's only municipality operating under both a city charter and the state's Optional Municipal Code (Title 35A Revised Code of Washington). The City uses the Council-Manager form of government. The Council's 2015 Budget Goals and Action Plan calls for the review of the city charter to evaluate potential amendments for voter consideration. City Attorney Parker and City Manager Taylor will review, in detail, a memo that was sent to the Council last December pertaining to questions of charter amendment or dissolution, when a public vote is required related to changes in the charter, and the legality of the City's existing council wards.

Concerns have been raised by Councilmembers in prior years of the charter's continued necessity given the City's adoption of the Optional Municipal Code. The charter contains several cumbersome administrative provisions including inflexible council meeting attendance requirements. Any change to the charter requires a public vote, so obsolete provisions or those with unintended consequences cannot be easily changed. On the other hand, nearly all of the content of the charter, in the case where the charter was repealed, could be separately adopted by ordinance and amended through Council action to provide a degree of flexibility, not presently allowed, in the administration of the City and its legislative processes.

Any action approved by the Council pertaining to a November 3rd ballot measure must be approved and submitted to the Cowlitz County Auditor no later than August 4th. Staff is seeking direction from the Council on:

1. whether to initiate a process to either amend or repeal the charter, and
2. whether to have staff draft amendments for Council's review prior to sending to the voters, or
3. whether to appoint a charter commission to prepare a new charter or repeal the existing one.

Direction is also needed as to the level of public participation (workshops, committees, or public hearings) desired in the preparation and review of any amendments to the charter or decision to repeal the charter.

RECOMMENDED ACTION:

Consensus from Council on next steps for city charter review.

**MEMORANDUM
OFFICE OF THE CITY ATTORNEY**



To: Steve Taylor, City Manager
From: Janean Parker, City Attorney
Date: November 14, 2014
Re: Questions related to the City's Charter

You have posed several charter related legal questions in an effort to determine the best manner of proceeding in future elections. As the analysis below shows, there appears to be some inconsistency in the statutes that may warrant raising certain questions to the state attorney general in order to avoid any missteps in the event charter amendments are brought forward.

If the provisions of the charter are not constitutional, then what is the effect if the charter is not changed before the next election: do we follow charter or state law? Is the effect of the unconstitutionality, if any, to void that portion of the charter that is inconsistent?

After review of the charter and the state law governing elections and charter cities, it does not appear that the City's charter is unconstitutional or illegal. While the City's use of its districts, as stated within the charter, is not consistent with the statutory ward system, the City has broad powers to regulate itself under its charter and the charter as drafted is not illegal or unconstitutional.

Prior to 1993, the City of Kelso was a non-charter code city with a council manager form of government. In 1993 it appears that the City adopted its first charter and reorganized as a charter code city, and retaining its council-manager form of government. In 2006, the City went through an effort to amend the charter to create a ward system so that the community could have more direct access to council members. It did not amend its council-manager form of government. This is the classification and form of government currently in effect.

Under the City's charter, Section 2.02, it sets forth the eligibility for election of the Council.

2.02 Composition, Eligibility, Election and Terms.

(a) Composition. There shall be a city council composed of seven members to be **elected at large**. Four council members shall be **assigned** to certain geographic districts for liaison purposes to

improve communications between City government and Kelso citizens as follows: Position No. 1 shall be assigned to the "south district," which shall consist of that area within the city limits between the Cowlitz River east to Interstate 5 and Allen Street south to the city limits. Position No. 3 shall be assigned to the "west district," which shall consist of that area within the city limits between the Cowlitz River west to the City limits. Position No. 5 shall be assigned to the "east district," which shall consist of that area within the city limits between Interstate 5 east to the city limits to the east, north, and south. Position No. 6 shall be assigned to the "north district," which shall consist of that area within the city limits between the Cowlitz River east to Interstate 5 and Allen Street north to the city limits. The mayor shall be elected as provided in Section 2.03.

(b) Eligibility. Only those registered voters of the city who shall have resided in the city for one year prior to the election shall be eligible to hold the office of council member. For those council member **positions elected from districts**, only those registered voters who shall have **resided in the respective district for one year prior to the election shall be eligible to hold the office of council member.**

(c) Election. The registered electors of the city shall elect a council of seven members, **at large** in the following manner. At the election approving this Charter, the candidates receiving the highest number of votes for each position shall serve. In the event of a tie vote, the election shall be decided by lot. Such lot shall be conducted no later than the second Tuesday after certification of the election.

(d) Terms. Candidates for positions 1, 2 and 3 shall be elected for a four-year term. In order to stagger the terms of office, candidates for positions 4, 5, 6 and 7 shall be elected for a two-year term. After completion of this initial term, the term of office for positions 4, 5, 6 and 7 will be for four years.

Kelso Charter 2006 (emphasis added). The charter makes no distinction regarding the primary or general election.

As you can see, the charter sets out a method of assigning four of the Council members to four districts of the City; however, the section clearly describes the election of all seven council member positions as "at large" and not elected by any ward or district. It does, however, require that members elected to positions assigned to districts be residents of that district. Historically, at least since the amendment of the charter in 2006 to add the district system, all of the council positions have been elected at large and not from within the voters of a ward or district in either the primary or general

election.¹ Each of the candidates elected have been residents of the respective ward for over one year.

The process set out in the charter does not meet the requirements of state law for election by wards. The charter does not allow the voters of the district only to vote in a primary, and it does not base the boundaries of the district on population, to the extent practicable. RCW 35A.12.040 provides "... Election to positions on the council shall be by majority vote from the city at large, unless provision is made by charter or ordinance for election by wards." Here there is no charter provision for election by wards.

And see also 35A.18.020 (emphasis added):

"(2) Except for the initial staggering of terms, councilmembers shall serve for four-year terms of office. All councilmembers shall serve until their successors are elected and qualified and assume office in accordance with *RCW [29.04.170](#). Councilmembers may be elected on a citywide or town wide basis, or from wards or districts, or any combination of these alternatives. Candidates shall run for specific positions. Wards or districts shall be redrawn as provided in **chapter [29.70](#) RCW. **Wards or districts shall be used as follows: (a) Only a resident of the ward or district may be a candidate for, or hold office as, a councilmember of the ward or district; and (b) only voters of the ward or district may vote at a primary to nominate candidates for a councilmember of the ward or district. Voters of the entire city or town may vote at the general election to elect a councilmember of a ward or district, unless the city or town had prior to January 1, 1994, limited the voting in the general election for any or all council positions to only voters residing within the ward or district associated with the council positions.** If a city or town had so limited the voting in the general election to only voters residing within the ward or district, then the city or town shall be authorized to continue to do so."

RCW 35A.12.180 sets for the process for elections from wards:

Optional division of city into wards. At any time not within three months previous to a municipal general election the council of a non-charter code city organized under this chapter may divide the city into wards or change the boundaries of existing wards. No change in the boundaries of wards shall affect the term of any

¹ Washington, along with California and Alaska, had a blanket primary system that allowed every voter to choose a candidate of any party for each position. This kind of system was ruled unconstitutional in *California Democratic Party v. Jones* in 2000 because it forced political parties to endorse candidates against their will. Initiative 872 was passed in 2004 to create a nonpartisan blanket primary in that state. In 2008, the United States Supreme Court ruled in *Washington State Grange v. Washington State Republican Party* that Washington's Initiative 872 was constitutionally permissible. Since the 2008 decision Washington State implemented the top two primary, which applies to federal, state and local elections, but not to presidential elections. (Wikipedia - http://en.wikipedia.org/wiki/Nonpartisan_blanket_primary#Washington_open_primary)

councilmember, and councilmembers shall serve out their terms in the wards of their residences at the time of their elections: PROVIDED, That if this results in one ward being represented by more councilmembers than the number to which it is entitled those having the shortest unexpired terms shall be assigned by the council to wards where there is a vacancy, and the councilmembers so assigned shall be deemed to be residents of the wards to which they are assigned for purposes of those positions being vacant. The representation of each ward in the city council shall be in proportion to the population as nearly as is practicable.

Wards shall be redrawn as provided in *chapter [29.70](#) RCW. Wards shall be used as follows: (1) **Only a resident of the ward may be a candidate for, or hold office as, a councilmember of the ward; and (2) only voters of the ward may vote at a primary to nominate candidates for a councilmember of the ward. Voters of the entire city may vote at the general election to elect a councilmember of a ward**, unless the city had prior to January 1, 1994, limited the voting in the general election for any or all council positions to only voters residing within the ward associated with the council positions. If a city had so limited the voting in the general election to only voters residing within the ward, then the city shall be authorized to continue to do so.

RCW 35A.12.180.

The conclusion can be drawn, then, that since the charter specifically describes that members are elected at large, and does not describe any process for the voters of a district to choose the member, that the statutory ward process does not apply; instead the charter merely assigns a particular member to a particular district and requires the member to be a resident of the district. This is consistent with the language of the charter amendment resolution which stated a desire to give the community more direct access to council members. As a result, there is not conflict with state law related to wards.

This conclusion is also consistent with the interpretation of the City's charter by county officials in 2011, which held the charter to require election of all members at large in the primary and general election. See Exhibit A—email exchange with county.

If this is the case and a correct reading, the next step is to determine if the charter provision that requires that a candidate for a certain council member

position be a resident of a certain district within the City to be eligible for office is contrary to law. It does not appear to be unlawful to impose such a condition.

A city with an adopted charter has very broad legislative power akin to that of the state. The authority under the charter is restricted only by the constitution and enactments of the state. *AGO 1991#22* (holding that a charter can impose term limits on candidates because the provision is not contrary to the Constitution or state law and is akin to an additional qualification that must be met by the candidate). As in the AGO opinion, the residency requirement here is an additional qualification that must be met by the candidate.

In *State ExRel Griffith re Superior Court*, 177 Wash. 619 (1034) the Court held that the Seattle charter imposing conditions that prohibited any council member from holding other municipal office (as in this case a school board director) was not unconstitutional or contrary to state law, but was an additional requirement for candidates.

Based on this broad grant of authority and a reading of the charter that the candidates are not elected from the districts, but only assigned to the districts, the residency requirement would be a further requirement for candidates and would be permitted under the charter.

So a requirement of a candidate's residency in a particular ward is still lawful and within the authority granted to charter cities. A City is given great authority to regulate its affairs by charter and a city's interpretation of its charter is entitled to great weight. A charter can contain other restrictions or requirements on the candidates for office so long as not contrary to state law.

In the event the City wishes to amend the charter, can the City Council propose several amendments together to make the amendments at once or does each change need its own separate ballot measure?

Amendments to the charter of a charter code city are governed by RCW 35A.09. Under that chapter, three methods are set forth for changing a charter. First amendments may be initiated by the legislative body:

The charter of a charter code city may be amended by proposals therefor submitted by resolution of the legislative authority of such city to the electors thereof at any general election, after publication of such proposed charter amendment in the manner provided in chapter 35A.08 RCW for publication of a proposed charter, and upon notice of election

as provided by law. If such proposed charter amendment is ratified by a majority of the qualified electors voting thereon it shall become a part of the charter organic law governing such charter code city.

RCW 35A.09.010. Such amendments are submitted to the voters at the next general election. Furthermore, amendments can also be initiated by petition of the voters, and these amendments are also submitted to the voters at the next general election.

A third method, which may be initiated by resolution or petition, is for the formation by election of a "charter commission." The commission is formed to "prepare a new or revised charter for the city by altering, revising, adding to, or repealing" the existing charter. RCW 35A.09.030. The commission then prepares a new or revised charter for consideration by the voters at the next election.

There appears to be some overlap as to the type of changes that may be initiated by council resolution and by the charter commission. A commission may prepare a new charter or repeal a charter, but both the council and commission may change the charter. RCW 35A.09 (council can propose amendment and commission may propose to alter, revise, or add to). The statutes do not provide clarification and it appears that either method may be appropriate for alterations. *However, given the limitations of ballot titles and descriptions, it may be that significant unrelated amendments may be difficult to describe in a council resolution for amendment.* This could lead to the need for multiple ballot measures which would be very costly. Whereas this difficulty is avoided by the charter commission, which can repeal, replace, or change any or all of the charter with one ballot measure.

If City wishes to repeal the charter, what is the process to accomplish this and do all members have to run for election again?

Here again, it appears that the statutes may overlap and provide differing processes. It seems to depend on what classification of government that the city wishes to change to. As I understand it, the recommended reclassification would be to an optional non-charter code city classification and keeping the manager-council plan of government. Three methods appear to be described by the statutes that would accomplish this purpose.

At RCW 35A.10 there is a clear process for the abandonment of the classification of a charter code city classification of government. This process is the adoption of a resolution and the passage by the voters at the next election. Importantly, however, this process seems to contemplate that the charter will remain and that it is the "code city" part of the classification that

is abandoned and replaced by the classification that existed prior to becoming a code city. This would not accomplish the City's intent if this is the only manner that this statute can be applied.

Upon the passage of a resolution of the legislative body of a charter code city, or upon the filing with the county auditor of a sufficient petition signed by registered voters of a charter code city in number equal to not less than ten percent of the votes cast at the last general municipal election therein, **proposing abandonment of the classification of charter code city** and that the city be **governed under its charter** and the general law relating to cities of the classification named in the petition or resolution, the legislative body thereof shall cause the propositions to be submitted to the voters at the next general municipal election if one is to be held within one hundred and eighty days or at a special election to be held for that purpose not less than ninety days nor more than one hundred and eighty days after the passage of the resolution or the filing of the certificate of sufficiency of the petition. Notice of election shall be given, the election conducted, and results declared generally as provided in chapter [35A.02](#) RCW, insofar as such provisions are applicable. If a majority of the votes cast upon such proposition are in favor of abandonment of the classification of charter code city, upon the certification of the record of election to the office of the secretary of state, such charter city shall be classified as a city of the class selected and shall be governed by the laws relating thereto.

RCW 35A.10.030. Unfortunately, however, the effect of this is only to go back to the earlier form of government and the charter appears to remain.

"Any charter code city, which has been so classified under the provisions of this title for more than six years **may abandon such classification** and elect to be governed **according to its charter** under the general law relating to charter cities of the classification held by such city immediately prior to becoming a charter code city, if any, or may elect to be governed by the general law relating to charter cities of the highest class, or other class, for which it is qualified by population."

RCW 35A.10.010. It does not appear to offer the ability to reclassify to a non-charter code city.

RCW 35A.09.030 also offers a process for the repeal of a city charter using the charter commission election procedure. As described above, this requires the formation of a commission and the commission makes recommendations that are submitted to the voters. While the statute does not indicate what classification of city that will replace the charter, it would be reasonable to assume that the classification of non-charter code city could be proposed and approved by the voters. If no classification were proposed the City would likely revert back to the classification that existed prior to the charter—in this case a non-charter code city.

Finally, RCW 35A.02 provides what could be the easiest process if the City wants to change to a non-charter code city. Importantly, however, this does not seem to contemplate the abandonment of a charter. Under this process the Council simply adopts a resolution, and if the resolution is not challenged by referendum of the people within 90 days, the council adopts an ordinance and the classification is changed.

When a majority of the legislative body of **an incorporated city or town** determines that it would serve the best interests and general welfare of such municipality to **change the classification** of such city or town **to that of non-charter code city**, such legislative body may, by resolution, declare its intention to adopt for the city or town the classification of non-charter code city. If the legislative body so determines, such resolution may also contain a declaration of intention to reorganize the municipal government under one of the plans of government authorized in this title, naming such plan; but it shall also be lawful for the legislative body of any incorporated city or town which is governed under a plan of government authorized prior to the time this title takes effect to adopt for the city or town the classification of non-charter code city while retaining the same general plan of government under which such city or town is then operating. Within ten days after the passage of the resolution, the legislative body shall cause it to be published at least once in a newspaper of general circulation within the city or town. Upon the expiration of the ninetieth day from, but excluding the date of first publication of the resolution, if no timely and sufficient referendum petition has been filed pursuant to RCW [35A.02.035](#), as determined by RCW [35A.29.170](#), the intent expressed in such resolution shall at the next regular meeting of the legislative body be effected by an ordinance adopting for the city or town the classification of non-charter code city; and, if the resolution includes a declaration of intention to reorganize, the legislative body shall provide at that time for such reorganization by ordinance.

RCW 35A.02.030 (emphasis added). Importantly, the provisions at 35A.02 seem to apply to any classification of city wishing to change to a non-charter code city and this would include the classification of a charter code city; this is the circumstance the City of Kelso would be in. However, this process does not address specifically whether the applicability would change if there was a charter in place. Because of the specific processes set out in other statutes for repealing or abandoning a charter, this seems a very simple process where the abandoning of the charter would not go to the voters unless there was a referendum passed.

Also, under 35A.02, a new election of officers is only required if there is a reorganization of the plan of government from the manager-council form, but not if there is only a reclassification to non-charter code city.

Conclusion.

Unfortunately, due to the overlapping nature of some of the governing statutes, there is not a clear answer to the questions you have raised. It is my opinion that the City's charter is not unlawful, but that it can be read in a manner that is consistent with state law and the authority under the constitution to be governed by a charter. I also believe that the City can, by legislative act, initiate changes to the charter, but if many and varied changes are to be proposed, such changes would likely be better accomplished by the commission process. Finally, I think that RCW 35A.02.030 describes a straightforward and simple process to change the classification of government to a non-charter code city, but seems suspect because it is contrary to the other statutory processes where a charter is involved. As we discussed, it may be beneficial for the City to submit all or a portion of these questions to the Washington Attorney General for further authority and clarification before taking action because of the long-lasting effects of any error.

Please let me know if you have any questions.

EXHIBIT A—Email Exchange:

Janeene,

I'm forwarding my questions...and the opinion given to me by Monty Cobb..on to you for your information.

As far as redistricting, our contact at the Secretary of State's Office is:

Dave Valiant

1-360-786-0046

David.valiant@redistricting.wa.gov

I'm certain they will be able to provide some answers. Feel free to contact me if you have any further questions.

Carolyn Myers

Cowlitz County Elections Supervisor

207 N 4th Ave, Rm 107

Kelso WA 98626

(360)577-3002 x:2765

myersc@co.cowlitz.wa.us

From: Cobb, Monty

Sent: Tuesday, May 24, 2011 11:18 AM

To: Hair, Amy; Swanson, Kris; Myers, Carolyn

Subject: FW: City of Kelso internal district primaries

RCW 35A.18.020: "Councilmembers may be elected on a citywide or townwide basis, or from wards or districts, or any combination of these alternatives"

The City has chosen all at-large representation (KMC 2.4.10) which is allowed under 35.18.020.

So, primaries are not bound to ward lines since the positions are all at-large.

Primaries would be restricted to wards if council positions were ward based and not at-large. The municipal code does conflict with state code as to the use of wards but is consistent with state code as to at-large, ward-based, or a combination of at-large and ward-based reps. This simply highlights an internal conflict in the state statutes as well.

For County Elections Department purposes, primaries run for City of Kelso council positions are district wide.

Monty Cobb

Chief Civil DPA

From: Baur, Sue
Sent: Monday, May 23, 2011 10:17 AM
To: Cobb, Monty
Subject: FW: City of Kelso internal district primaries

From: Myers, Carolyn
Sent: Friday, May 20, 2011 5:04 PM
To: Baur, Sue
Cc: Hair, Amy; Swanson, Kris
Subject: FW: City of Kelso internal district primaries

Sue,

After attending a redistricting training yesterday and hearing from the state that cities with internal wards must conduct internal district primaries, my office is in need of an official opinion from you.

I realize this string of emails is a bit long but could you look at the RCW's and the sections from the City of Kelso's Municipal Code and 2006 Resolution pasted below and let us know if we should be conducting their primaries by internal district or district wide? RCW seems pretty clear but the city code and resolution adopting the wards specifically state that all council members shall be elected at large. Which do we follow?

I appreciate you looking this over.

Carolyn Myers

Cowlitz County Elections Supervisor

207 N 4th Ave, Rm 107

Kelso WA 98626

(360)577-3002 x:2765

myersc@co.cowlitz.wa.us

From: Swanson, Kris
Sent: Friday, May 20, 2011 3:22 PM
To: Myers, Carolyn
Subject: RE: City of Kelso internal district primaries

This may say it all.

RCW 35A.12.180

Optional division of city into wards.

At any time not within three months previous to a municipal general election the council of a noncharter code city organized under this chapter may divide the city into wards or change the boundaries of existing wards. No change in the boundaries of wards shall affect the term of any councilmember, and councilmembers shall serve out their terms in the wards of their residences at the time of their elections: PROVIDED, That if this results in one ward being represented by more councilmembers than the number to which it is entitled those having the shortest unexpired terms shall be assigned by the council to wards where there is a vacancy, and the councilmembers so assigned shall be deemed to be residents of the wards to which they are assigned for purposes of those positions being vacant. The representation of each ward in the city council shall be in proportion to the population as nearly as is practicable.

Wards shall be redrawn as provided in *chapter [29.70](#) RCW. Wards shall be used as follows: (1) Only a resident of the ward may be a candidate for, or hold office as, a councilmember of the ward; and (2) only voters of the ward may vote at a primary to nominate candidates for a councilmember of the ward. Voters of the entire city may vote at the general election to elect a councilmember of a ward, unless the city had prior to January 1, 1994, limited the voting in the general election for any or all council positions to only voters residing within the ward associated with the council positions. If a city had so limited the voting in the general election to only voters residing within the ward, then the city shall be authorized to continue to do so.

[1994 c 223 § 34; 1967 ex.s. c 119 § [35A.12.180](#).]

Notes:

***Reviser's note:** Chapter [29.70](#) RCW was recodified as chapter [29A.76](#) RCW pursuant to 2003 c 111 § 2401, effective July 1, 2004

From: Myers, Carolyn
Sent: Friday, May 20, 2011 1:58 PM
To: Swanson, Kris
Cc: McLaughlin, Terry; Hair, Amy
Subject: City of Kelso internal district primaries

I overheard the State say that cities with internal wards conduct their Primaries by internal district. I tried blocking it from my mind, pretending that I didn't hear it but that hasn't worked so I looked up some RCW's and have pasted them below....not good news.

Looking at their municipal code and the resolution they adopted in 2006, it specifically states their council members will be elected at large (I've pasted both below). By writing this into their code and charter, can they exclude themselves from conducting internal district primaries? Are you comfortable with this Kris or should I send this to Sue for an official opinion?

Municipal Code

2.04.010 Election of councilmembers—Terms.

- A. In the election of city councilmembers, all seven shall be elected at large for four-year terms subject to the provisions of Kelso City Charter Section 2.01.
- B. The four-year terms shall commence and terminate as provided in RCW 29.04.170.
- C. The city council shall have the powers and authority granted to it in the Kelso City Charter. (Ord. 3279 § 2(g)–(i), 1995)

Resolution 06-926

2.02 Composition, Eligibility, Election and Terms.

(a) Composition. There shall be a city council composed of seven members to be elected at large. *Four council members shall be assigned to certain geographic districts for liaison purposes to improve communications between City government and Kelso citizens as follows: Position #1 shall be assigned to the "south district," which shall consist of that area within the city limits between the Cowlitz River east to Interstate 5 and Allen Street south to the city limits. Position #3 shall be assigned to the "west district," which shall consist of that area within the city limits between the Cowlitz River west to the City limits. Position #5 shall be assigned to the "east district," which shall consist of that area within the city limits between Interstate 5 east to the city*

limits to the east, north and south. Position #6 shall be assigned to the "north district" which shall consist of that area within the city limits between the Cowlitz River east to Interstate 5 and Allen Street North to the City Limits. The mayor shall be elected as provided in Section 2.03.

(b) Eligibility. Only those registered voters of the city who shall have resided in the city for one year prior to the election shall be eligible to hold the office of council member. *For those council member positions elected from districts, only those registered voters who shall have resided in the respective district for one year prior to the election shall be eligible to hold the office of council member.*

(c) Election. The registered electors of the city shall elect a council of seven members, at large in the following manner. At the election approving this Charter, the candidates receiving the highest number of votes for each position shall serve. In the event of a tie vote, the election shall be decided by lot. Such lot shall be conducted no later than the second Tuesday after certification of the election.

(d) Terms. Candidates for positions 1, 2 and 3 shall be elected for a four-year term. In order to stagger the terms of office, candidates for positions 4, 5, 6 and 7 shall be elected for a two- year term. After completion of this initial term, the term of office for positions 4, 5, 6 and 7 will be for four years.

RCW 35.18.020

Number of councilmembers -- Wards, districts -- Terms -- Vacancies.

(1) The number of councilmembers in a city or town operating with a council-manager plan of government shall be based upon the latest population of the city or town that is determined by the office of financial management as follows:

(a) A city or town having not more than two thousand inhabitants, five councilmembers; and

(b) A city or town having more than two thousand, seven councilmembers.

(2) Except for the initial staggering of terms, councilmembers shall serve for four-year terms of office. All councilmembers shall serve until their successors are elected and qualified and assume office in accordance with *RCW [29.04.170](#). Councilmembers may be elected on a citywide or townwide basis, or from wards or districts, or any combination of these alternatives. Candidates shall run for specific positions. Wards or districts shall be redrawn as provided in **chapter [29.70](#) RCW. Wards or districts shall be used as follows: (a) Only a resident of the ward or district may be a candidate for, or hold office as, a councilmember of the ward or district; and (b) only voters of the ward or district may vote at a primary to nominate candidates for a councilmember of the ward or district. Voters of the entire city or town may vote at the general election to elect a councilmember of a ward or district, unless the city or town had prior to January 1, 1994, limited the voting

in the general election for any or all council positions to only voters residing within the ward or district associated with the council positions. If a city or town had so limited the voting in the general election to only voters residing within the ward or district, then the city or town shall be authorized to continue to do so.

(3) When a city or town has qualified for an increase in the number of councilmembers from five to seven by virtue of the next succeeding population determination made by the office of financial management, two additional council positions shall be filled at the next municipal general election with the person elected to one of the new council positions receiving the greatest number of votes being elected for a four-year term of office and the person elected to the other additional council position being elected for a two-year term of office. The two additional councilmembers shall assume office immediately when qualified in accordance with *RCW [29.01.135](#), but the term of office shall be computed from the first day of January after the year in which they are elected. Their successors shall be elected to four-year terms of office.

Prior to the election of the two new councilmembers, the city or town council shall fill the additional positions by appointment not later than forty-five days following the release of the population determination, and each appointee shall hold office only until the new position is filled by election.

(4) When a city or town has qualified for a decrease in the number of councilmembers from seven to five by virtue of the next succeeding population determination made by the office of financial management, two council positions shall be eliminated at the next municipal general election if four council positions normally would be filled at that election, or one council position shall be eliminated at each of the next two succeeding municipal general elections if three council positions normally would be filled at the first municipal general election after the population determination. The council shall by ordinance indicate which, if any, of the remaining positions shall be elected at-large or from wards or districts.

(5) Vacancies on a council shall occur and shall be filled as provided in chapter [42.12](#) RCW.

[1994 c 223 § 12; 1981 c 260 § 7. Prior: 1979 ex.s. c 126 § 19; 1979 c 151 § 26; 1956 c 7 § [35.18.020](#) ; prior: 1959 c 76 § 1; 1955 c 337 § 3; prior: (i) 1943 c 271 § 6; Rem. Supp. 1943 § 9198-15. (ii) 1943 c 271 § 4, part; Rem. Supp. 1943 § 9198-13, part.]

NOTES:

Reviser's note: *(1) RCW [29.04.170](#) and [29.01.135](#) were recodified as RCW [29A.20.040](#) and [29A.04.133](#), respectively, pursuant to 2003 c 111 § 2401, effective July 1, 2004.

** (2) Chapter [29.70](#) RCW was recodified as chapter [29A.76](#) RCW pursuant to 2003 c 111 § 2401, effective July 1, 2004.

Purpose -- 1979 ex.s. c 126: See RCW [29A.20.040](#)(1).

Population determinations, office of financial management: Chapter [43.62](#) RCW.

Times for holding elections: RCW [29A.04.311](#) through [29A.04.330](#).

RCW 35A.12.180

Optional division of city into wards.

At any time not within three months previous to a municipal general election the council of a noncharter code city organized under this chapter may divide the city into wards or change the boundaries of existing wards. No change in the boundaries of wards shall affect the term of any councilmember, and councilmembers shall serve out their terms in the wards of their residences at the time of their elections: PROVIDED, That if this results in one ward being represented by more councilmembers than the number to which it is entitled those having the shortest unexpired terms shall be assigned by the council to wards where there is a vacancy, and the councilmembers so assigned shall be deemed to be residents of the wards to which they are assigned for purposes of those positions being vacant. The representation of each ward in the city council shall be in proportion to the population as nearly as is practicable.

Wards shall be redrawn as provided in *chapter [29.70](#) RCW. Wards shall be used as follows: (1) Only a resident of the ward may be a candidate for, or hold office as, a councilmember of the ward; and (2) only voters of the ward may vote at a primary to nominate candidates for a councilmember of the ward. Voters of the entire city may vote at the general election to elect a councilmember of a ward, unless the city had prior to January 1, 1994, limited the voting in the general election for any or all council positions to only voters residing within the ward associated with the council positions. If a city had so limited the voting in the general election to only voters residing within the ward, then the city shall be authorized to continue to do so.

[1994 c 223 § 34; 1967 ex.s. c 119 § [35A.12.180](#).]

NOTES:

***Reviser's note:** Chapter [29.70](#) RCW was recodified as chapter [29A.76](#) RCW pursuant to 2003 c 111 § 2401, effective July 1, 2004.

Carolyn Myers

Cowlitz County Elections Supervisor

207 N 4th Ave, Rm 107

Kelso WA 98626

(360)577-3002 x:2765

myersc@co.cowlitz.wa.us

AGENDA SUMMARY SHEET

Business of the City Council City of Kelso, Washington

SUBJECT TITLE:

Award Contract for:
2015 Intersection Reconstruction
Project #581504

Agenda Item: _____

Dept. of Origin: Community Development/Eng

For Agenda of: May 19, 2015

PRESENTED BY:

Michael Kardas, P.E.
Community Development Director / City Engineer

Cost of Item: \$164,897.00

City Manager: Steve Taylor

AGENDA ITEM ATTACHMENTS:

Bid Tabulation

SUMMARY STATEMENT:

The 2015 Intersection Reconstruction project, Schedule 'A', provides for the roadway intersection reconstruction at Minor Road & Brynion Street. The major work elements being 205 CY of road base repair and 155 tons of hot mix asphalt (HMA). Schedule 'B' provides for the roadway intersection reconstruction at Sunrise Street and Miller Drive with the major work elements being 145 CY of road base repair and 105 tons of hot mix asphalt (HMA).

One bid was submitted for this project at \$164,897.00. After reference checks, Advanced Excavating Specialists, LLC submitted the qualified low bid of \$164,897.00.

FINANCIAL SUMMARY:

This project is funded by monies from operation maintenance and repair fund.

The qualified low bid for this project is \$54,897.00 over the Engineer's Estimate of \$110,000.00.

RECOMMENDED ACTION:

Staff recommends that the City Council make a motion to award the above-referenced project to the lowest qualified bidder, Advanced Excavating Specialists, LLC, in the amount of \$164,897.00 and authorize the city manager to enter into an agreement. Immediately following award, an agreed change order removing schedule 'B' from the total project and adjusting the quantities of schedule 'A' will be executed in order to keep the project within budget constraints. The final contract amount will be \$87,895.00 once that change order is entered.

2015 Intersection Reconstruction
 Project # 581504
 May 12, 2015
Bid Tabulation

Item No.	Description	Engineer's Estimate				Advanced Excavating Specialists, LLC			
		Quan	Unit	Price	Amount	Quan	Unit	Price	Amount
SCHEDULE 'A'									
1	Mobilization	LS	1	\$6,000.00	\$6,000.00	1		\$ 8,800.00	\$ 8,800.00
2	Project Temporary Traffic Control	LS	1	\$2,500.00	\$2,500.00	1		\$ 2,700.00	\$ 2,700.00
3	Flaggers & Spotters	HR	200	\$53.00	\$10,600.00	200		\$ 50.00	\$ 10,000.00
4	Adjust Manhole Ring & Cover	EA	1	\$320.00	\$320.00	1		\$ 950.00	\$ 950.00
5	Remove Valve Box & Cover	EA	6	\$25.00	\$150.00	6		\$ 350.00	\$ 2,100.00
6	Install Valve Box & Cover	EA	5	\$300.00	\$1,500.00	5		\$ 480.00	\$ 2,400.00
7	RP & Reset Existing Surface Monument	EA	1	\$300.00	\$300.00	1		\$ 1,400.00	\$ 1,400.00
8	Planning Bituminous Pavement Incl. Haul	SY	670	\$3.00	\$2,010.00	670		\$ 6.75	\$ 4,522.50
9	Roadway Excavation Incl. Haul	CY	220	\$30.00	\$6,600.00	220		\$ 30.00	\$ 6,600.00
10	Crushed Surfacing Top Course	TON	100	\$40.00	\$4,000.00	100		\$ 37.00	\$ 3,700.00
11	Crushed Surfacing Base Course	TON	275	\$26.00	\$7,150.00	670		\$ 35.00	\$ 23,450.00
12	Construction Geotextile for Soil Stabilization	SY	670	\$2.00	\$1,340.00	670		\$ 2.25	\$ 1,507.50
13	Cement Conc. Curb Ramp	EA	2	\$1,800.00	\$3,600.00	2		\$ 2,800.00	\$ 5,600.00
14	HMA for Pavement Repair Cl.,PG	TON	155	\$90.00	\$13,950.00	155		\$ 150.00	\$ 23,250.00
15	Install Painted Cross Walk Striping	LF	110	\$6.50	\$715.00	110		\$ 27.00	\$ 2,970.00
16	Install Painted Stop Line	LF	20	\$17.00	\$340.00	20		\$ 27.00	\$ 540.00
17	Install Centerline Stripe	LF	20	\$1.50	\$30.00	20		\$ 27.00	\$ 540.00
18	Temporary Pavement Marking	LF	80	\$0.75	\$60.00	80		\$ 3.00	\$ 240.00
19	Trimming and Cleanup	LS	1	\$1,000.00	\$1,000.00	1		\$ 1,600.00	\$ 1,600.00
20	Erosion Control	LS	1	\$500.00	\$500.00	1		\$ 1,800.00	\$ 1,800.00
TOTAL ESTIMATE SCHEDULE 'A'					\$62,665.00				\$ 104,670.00
CONTINGENCY					\$5,000.00				
SCHEDULE TOTAL					\$65,000.00				
SCHEDULE 'B'									
1	Mobilization	LS	1	\$4,000.00	\$4,000.00	1		\$ 8,800.00	\$ 8,800.00
2	Project Temporary Traffic Control	LS	1	\$2,500.00	\$2,500.00	1		\$ 2,700.00	\$ 2,700.00
3	Flaggers & Spotters	HR	150	\$53.00	\$7,950.00	150		\$ 50.00	\$ 7,500.00
4	Adjust Manhole Ring & Cover	EA	1	\$320.00	\$320.00	1		\$ 950.00	\$ 950.00
5	Planing Bituminous Pavement Incl. Haul	SY	444	\$3.00	\$1,332.00	444		\$7.25	\$ 3,219.00
6	Roadway Excavation Incl. Haul	CY	145	\$30.00	\$4,350.00	145		\$40.00	\$ 5,800.00
7	Crushed Surfacing Top Course	TON	70	\$40.00	\$2,800.00	70		\$45.00	\$ 3,150.00
8	Crushed Surfacing Base Course	TON	185	\$26.00	\$4,810.00	185		\$39.00	\$ 7,215.00
9	Construction Geotextile for Soil Stabilization	SY	444	\$2.00	\$888.00	444		\$2.25	\$ 999.00
10	HMA for Pavement Repair Cl.,PG	TON	105	\$90.00	\$9,450.00	105		\$ 150.00	\$ 15,750.00
11	Install Painted Stop Line	LF	12	\$17.00	\$204.00	12		\$ 27.00	\$ 324.00
12	Install Centerline Stripe	LF	30	\$1.50	\$45.00	0		\$ 27.00	\$ -
13	Temporary Pavement Marking	LF	140	\$0.75	\$105.00	140		\$ 3.00	\$ 420.00
14	Trimming and Cleanup	LS	1	\$1,000.00	\$1,000.00	1		\$ 1,600.00	\$ 1,600.00
15	Erosion Control	LS	1	\$500.00	\$500.00	1		1800	\$ 1,800.00
TOTAL ESTIMATE SCHEDULE 'B'					\$40,254.00				\$ 60,227.00
CONTINGENCY					\$5,000.00				
SCHEDULE TOTAL					\$45,000.00				
Sub Total					\$110,000.00				
Contract Amount					\$110,000.00				

**Total Schedule A and B
 \$ 164,897.00**

AGENDA SUMMARY SHEET

Business of the City Council City of Kelso, Washington

SUBJECT TITLE: Ordinance (1st Reading)

Granting a conservation and access easement over the Hart's Lake property (parcels WI36-01-001 and 24125) to Forterra NW

Agenda Item: _____

Dept. of Origin: _____ City Council _____

For Agenda of: _____ May 19, 2015 _____

Originator: _____ Steve Taylor _____

PRESENTED BY:

Steve Taylor, City Manager

City Attorney: **Janean Parker**

City Manager: **Steve Taylor**

Agenda Item Attachments:

Conservation and Access Easement to Forterra NW

SUMMARY STATEMENT:

The City Council previously authorized a wetland mitigation lease agreement with Habitat Bank, LLC allowing the use of 240 acres of real property extending south from the Coweeman River into the hills east of Aldercrest as a wetland and fish/wildlife habitat mitigation bank. Prior to obtaining regulatory approval of the mitigation bank, Habitat Bank must secure a conservation easement over the property to preserve, in perpetuity, the wetland and conservation enhancement measures that are to be constructed as part of the project. Forterra NW is the organization that was chosen by Habitat Bank to ensure the preservation of the enhancements over time.

The attached easement document outlines the requirements, rights, and expectations of the City (as landowner and grantor), Forterra, and Habitat Bank in maintaining, preserving, and using the property over time. The City has preserved the right of public access to the property for low-impact, passive recreational activities.

OPTIONS:

- 1) Move to approve the ordinance on first reading granting a conservation and access easement to Forterra NW on the Harts Lake (Jacobsen Land Trust) property;
- 2) Do not approve the ordinance.
- 3) Direct staff to negotiate amended provisions within the easement document.

RECOMMENDED ACTION:

Approve the ordinance on first reading granting the conservation easement to Forterra NW.

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF KELSO GRANTING A CONSERVATION AND ACCESS EASEMENT OVER THE HART'S LAKE PROPERTY, PARCELS WI36-01-001 and 24125, TO FORTERRA NW

WHEREAS, the City owns approximately 240 acres of real property along the Coweeman River that was transferred in 2002 from the Department of Natural Resources; and

WHEREAS, the City acquired the property for open space preservation; and

WHEREAS, the City has entered into an agreement with Habitat Bank, LLC for the development of a wetland mitigation project at this property that would improve the wetland and wildlife habitat conservation values at that site and would allow that credits for such work be purchased for wetland mitigation purposes elsewhere throughout the City;

WHEREAS, as a part of this development, the City must reserve an easement over the property to preserve the wetland and conservation enhancement measures that are to be constructed; and

WHEREAS, this Easement with Forterra NW will preserve the land in perpetuity for wetland and conservation purposes while allowing passive recreational uses;

NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF KELSO DO ORDAIN AS FOLLOWS:

SECTION 1. Easement Approved. The City hereby approves the grant of a Conservation and Access Easement, substantially as set forth in Exhibit A attached hereto, over the Property known as Hart's Lake, Tax Parcel Nos WI-01-001 and 24125, and more particularly described the legal description attached to Exhibit A to Forterra NW a Washington non-profit corporation.

SECTION 2. City Manager Authorization. The City Manager is authorized to execute a Conservation and Access Easement, substantially in the form attached hereto as Exhibit A, and to execute such other documents and to take such other action as may be necessary to accomplish the conveyance of the Easement to Forterra NW.

SECTION 3. The provisions of this Ordinance are declared to be severable. If any

provision, clause, sentence, or paragraph of this Ordinance or the application thereof to any person, establishment, or circumstances shall be held invalid, such invalidity shall not affect the other provisions or application of this Ordinance.

SECTION 4. This Ordinance shall be in full force and effect 5 days after its passage and publication of summary as required by law.

ADOPTED by the City Council and **SIGNED** by the Mayor this ____ day of _____, 2015.

ATTEST/AUTHENTICATION:

MAYOR

CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY

PUBLISHED: _____

When recorded return to:

Forterra NW
901 Fifth Ave., Suite 2200
Seattle, WA 98164

CONSERVATION EASEMENT AND ACCESS EASEMENT

Grantor: City of Kelso

Grantee: Forterra NW

Abbr. legal description: E ½ of E ½, SW ¼ of NE ¼, NW ¼ of SE ¼, Sec. 36, T 8 N, R 2 W

Legal Description: Exhibit A, p.18

Assessor's Tax Parcel Number: WI36-01-001; 24125

Auditor File No. of Documents Assigned, Released, or Amended: n/a

THIS CONSERVATION EASEMENT ("Easement") and Access Easement are made by the City of Kelso, a Washington municipality, having an address at _____ ("Grantor"), in favor of Forterra NW, a Washington non-profit corporation, having an address of 901 Fifth Ave., Suite 2200, Seattle, WA 98164 ("Grantee") (collectively "Parties").

1. RECITALS

1.1. Grantor is the sole owner in fee simple of that certain real property (the "Protected Property") in Cowlitz County, Washington, more particularly described in Exhibit A (legal description) and shown on Exhibit B (site map), which are attached and incorporated into this Easement by this reference.

1.2. The Protected Property possesses wetlands and other fish and wildlife habitat ("Conservation Values"). Wetlands and other fish and wildlife habitat on the Protected Property that are restored, enhanced, or otherwise created after the effective date of this Easement shall also be considered Conservation Values.

1.3. The Conservation Values are a result of the Protected Property's inherent ecological potential and of the existing and/or anticipated restoration and enhancement of wetlands and other habitats on the Protected Property by Habitat Bank, LLC ("Mitigation Sponsor"). The foregoing restoration and enhancement is intended to qualify the Protected Property for use as mitigation for development elsewhere in Washington State ("Mitigation").

1.4. This Easement is a condition of the Mitigation.

1.5. Grantor and Grantee intend that the Conservation Values be preserved and maintained in perpetuity by permitting only those land uses on the Protected Property that do not impair or interfere with the Conservation Values, which include, but are not limited to, such restoration, enhancement, agricultural and recreational uses as further provided in this Easement.

1.6. Grantee is a publicly supported, tax-exempt nonprofit organization, qualified under Sections 501(c)(3) and 170(h) of the Internal Revenue Code of 1986, as amended, and also qualified as a nonprofit nature conservancy corporation under RCW 64.04.130 and RCW 84.34.250, whose primary purpose is to promote the preservation of open space and critically important ecological systems in Cowlitz County in Washington State.

1.7. Grantee agrees, by accepting this Easement, to preserve and protect in perpetuity the Conservation Values and enforce the provisions hereof, unless this Easement is sooner terminated as expressly provided for herein.

1.8. The Parties acknowledge that this Easement does not provide standards or criteria regarding the effectiveness of Habitat Bank, LLC's restoration or enhancement of the Protected Property and that this Easement is not intended to provide a basis for ensuring the effectiveness of such restoration and enhancement or to obligate Grantee to ensure such effectiveness. The Parties further acknowledge that such standards and criteria and the ability to ensure the effectiveness thereof are provided for elsewhere.

2. CONVEYANCE AND CONSIDERATION

2.1. For the reasons stated above, and in consideration of the mutual covenants, terms, conditions, and restrictions contained in this Easement, and other good and valuable consideration provided by the Parties, the receipt and sufficiency of which is hereby acknowledged, Grantor hereby voluntarily grants, conveys, and warrants to Grantee a conservation easement in perpetuity over the Protected Property, consisting of certain rights in the Protected Property, as set forth in this Easement, subject only to the restrictions contained in this Easement.

2.2. This conveyance is a conveyance of an interest in real property under the provisions of RCW 64.04.130 and RCW 84.34.210.

2.3. This grant shall be subject to only those easements, restrictions, interests, and water rights that are set forth in Exhibit C, which is attached and incorporated into this Easement by this reference ("Permitted Exceptions"). The Permitted Exceptions include, but are not limited to, that certain Agreement for Use of Property executed on August 20, 2013 and recorded February 20, 2015 at AFN 3517294, as amended by instrument executed February 19, 2015 and recorded February 20, 2015 at AFN 3517293.

2.4. Grantor expressly intends that this Easement run with the land and that this Easement shall be binding upon Grantor's successors and assigns.

2.5. This Easement does not transfer any water or water rights. This Easement also does not transfer, or create any entitlement in, any credit from, or rights in, the Mitigation.

3. PURPOSE

The purpose of this Easement is to assure that the Protected Property will be retained forever predominantly in its condition as old growth forest, upland, streams, wetland and other aquatic and riparian habitat of fish, wildlife, and plants, providing the old growth forest, wetland, aquatic and riparian functions and values described in the Baseline Documentation, and to prevent any use of, or activity on, the Protected Property that will impair or interfere with the Conservation Values (the "Purpose"). Grantor intends that this Easement will confine the use of, or activity on, the Protected Property to such uses and activities that are consistent with this Purpose.

4. RIGHTS CONVEYED TO GRANTEE

To accomplish the Purpose of this Easement, the following rights are conveyed to Grantee by this Easement:

4.1. Identification and Protection. To preserve and protect in perpetuity, unless sooner terminated as expressly provided under this Easement, and to enhance by mutual agreement, the Conservation Values.

4.2. Access.

4.2.1. To enter the Protected Property annually, at a mutually agreeable time and upon prior written notice to Grantor, for the purpose of making a general inspection to monitor compliance with this Easement.

4.2.2. To enter the Protected Property at such other times as are necessary if Grantee reasonably believes that a violation of the Easement is occurring or has occurred, for the purpose of mitigating or terminating the violation and otherwise enforcing the provisions of this Easement. Such entry shall be upon prior reasonable notice to Grantor, and Grantee shall not in any case unreasonably interfere with Grantor's use and enjoyment of the Projected Property.

4.2.3. Solely in furtherance of the purposes described in this Section 4, Grantor hereby grants and conveys to Grantee a non-exclusive easement for ingress and egress to the Protected Property, of a duration commensurate with the duration of this Easement, on, over and across all other easements, rights-of-way, or other property of the Grantor whereby Grantor has access to the Protected Property as of and/or after the effective date of the Easement.

4.2.4. To enter the Protected Property, at mutually agreeable times and upon prior written notice to Grantor, to exercise any other affirmative rights as expressly provided for herein.

4.3. Injunction and Restoration. To enjoin any use of, or activity on, the Protected Property that is inconsistent with the Purpose of this Easement, and to undertake the restoration of such areas or features of the Protected Property as may be damaged by uses or activities inconsistent with the provisions of this Easement, all in accordance with Section 9.

4.4. Enforcement. To enforce the terms of this Easement, consistent with Section 9.

4.5. Assignment. To assign, convey, or otherwise transfer Grantee's interest in the Protected Property in accordance with Section 13 and subject to Section 11.4.

4.6. Baseline Documentation.

4.6.1. As further provided in Section 4.6.2 below, Grantee shall document specifically the Conservation Values in an inventory of relevant features of the Protected Property, which Grantee shall maintain on file at its offices and which shall be incorporated into this Easement by this reference ("Baseline Documentation"). The Baseline Documentation shall consist of reports, maps, photographs, and other documentation that provide, collectively, an accurate representation of the Protected Property. The Baseline Documentation is intended to serve as an objective, although nonexclusive, information baseline for monitoring compliance with the terms and conditions of this Easement. Grantee shall timely provide Grantor with a copy of the Baseline Documentation.

4.6.2. The Parties acknowledge and agree that through the process of developing the Mitigation there may be prepared by the Mitigation Sponsor from time to time such annual reports, "as-built" plans, and other documentation of the condition of the Protected Property ("Mitigation Plans & Reports") sufficient to constitute the Baseline Documentation. Promptly after Grantor's receipt thereof from the Mitigation Sponsor, Grantor agrees to provide Grantee with a copy of each such document constituting a Mitigation Plan or Report. The Parties further agree that Grantee may, but shall have no obligation to, independently obtain any other information for the purpose of establishing or updating the Baseline Documentation.

5. GRANTOR'S RESERVED RIGHTS AND OBLIGATIONS

5.1. General. Grantor reserves for itself and its successors and assigns all rights accruing from ownership of the Protected Property, including, but not limited to, the right to sell, lease, and devise the Protected Property and the right to engage in, or permit or invite others to engage in, any use of, or activity on, the Protected Property that is not inconsistent with the Purpose of the Easement and that is not prohibited by this Easement. Without limiting the generality of this Section 5.1, Grantor specifically reserves for itself and its successors and assigns, the following uses and activities:

5.2. Agricultural Use. The following agricultural activities are permitted: grazing, grass cutting, and baling hay; *provided* that such activities are carried out in compliance with federal, state, and local regulations, and *further provided that* portions of the Protected Property once restored pursuant to the Mitigation (up to the entirety of the Protected Property), shall not be used for such agricultural activities unless specifically authorized by the Mitigation Sponsor.

5.3. Recreation. The undertaking of recreational activities that is non-motorized, non-commercial, low-impact, and dispersed (*i.e.*, not occurring in a confined area), including by members of the general public, such as hiking, bird watching, horseback riding, fishing, and hunting; *provided* that such activities are conducted in a manner and intensity that does not cause more than a *de minimis* adverse impact on the Conservation Values. Notwithstanding the foregoing, Grantor shall not construct improvements in furtherance of the foregoing uses and activities, including, but not limited to new trails, *except* that Grantor may install temporary, seasonal devices, such as removable hunting blinds provided that they do not adversely impact the Conservation Values. For purposes of this Easement, the term “more than a *de minimis* adverse impact” means more than an insubstantial or slight adverse or detrimental impact.

5.4. Road and Trail Maintenance. The use, maintenance, or replacement of existing roads and trails necessary to maintain, restore, or enhance the Conservation Values or to facilitate access within the Protected Property necessary for uses and activities expressly allowed in this Section 5 unless such maintenance or replacement would cause more than a *de minimis* adverse impact on the Conservation Values, *except* as may otherwise be approved by Grantee.

5.5. Fences. The construction and maintenance of fences within or around the Protected Property provided that the design and location shall not adversely affect the Conservation Values.

5.6. Habitat Stewardship, Restoration, and Enhancement. Constructing, installing, planting, maintaining, and engaging in other activities to maintain or further restore or enhance the Conservation Values in accordance with the requirements of the Mitigation and any final construction or management plans and bid specifications subsequently developed in conformance with said requirements, which may include, but are not limited to: planting and irrigating plants; removing and controlling weeds; installing and maintaining ditches, berms, dikes, wells, log weirs and other water control and production structures (“Water Control Structures”); diking wetland areas; altering or manipulating ponds and water courses; and creating new wetlands, water impoundments, or water courses. Motorized and mechanized vehicles may be used in furtherance of, and to facilitate, the foregoing activities, provided that any off-road use thereof does not cause more than a *de minimis* adverse impact on the Conservation Values. If Grantor has conveyed or assigned its rights to engage in the activities described in this Section 5.6 to Grantee or third parties, Grantor covenants to not interfere with such restoration and/or enhancement, including, but not limited to, by the exercise of any rights reserved to Grantor under this Easement.

5.7. Maintenance. Taking various actions necessary to protect the Conservation Values, Water Control Structures, ditches, canals, agricultural improvements, and other features of the Protected Property, to insure that neighboring properties are not adversely impacted by any activities or conditions on or caused by the Protected Property, provided that the conduct of such maintenance activities itself does not cause more than a *de minimis* adverse impact on the Conservation Values.

5.8. Signs. The installation and maintenance of signs, *provided* that such installation does not cause more than a *de minimis* adverse impact on the Conservation Values, and *further provided* that signs in excess of twenty-five (25) square feet in area shall not be permitted.

5.9. Protection of Health or Safety. The undertaking of other activities necessary to protect human health or safety, or that are actively required by and subject to compulsion of any governmental agency with authority to require such activity; *provided* that any such activity shall be conducted so that significant adverse impacts on the Conservation Values are avoided, or, if avoidance is not possible, minimized to the greatest extent possible under the circumstances.

5.10 Grantor's Obligations Access & Non-Interference. Grantor shall provide access for the purpose of implementing the long-term management and maintenance plan of the Mitigation ("Plan"). Grantor, furthermore, shall refrain from impeding or otherwise interfering with implementation of the Plan. Activities in furtherance of the Plan are to be carried out by Habitat Bank, LLC, or its assignee. Such activities may include, but are not limited to, maintenance and repair of Water Control Structures; maintenance, repair, removal, or abandonment of structural elements of the Mitigation; and removal of invasive plant species.

6. USES AND ACTIVITIES INCONSISTENT WITH THE PURPOSE OF THE EASEMENT

6.1. General. Any use of, or activity on, the Protected Property inconsistent with the Purpose of this Easement is prohibited, and Grantor acknowledges and agrees that it will not conduct, engage in, or permit any such use or activity. Without limiting the generality of the foregoing, the following uses of, or activities on, the Protected Property, although not an exhaustive list of inconsistent uses or activities, are inconsistent with the Purpose of this Easement and shall be prohibited:

6.2. Subdivision. The legal or "de facto" division or subdivision of the Protected Property, which shall include, but not be limited to, any subdivision, short subdivision, platting, binding site plan, testamentary division, or other process by which the Protected Property is divided into lots or in which title to different portions of the Protected Property are held by different owners, *except* in any such circumstance that such division or subdivision is exclusively in furtherance of the Mitigation or the Purpose of this Easement or is approved by the Grantee. This prohibition shall not be interpreted to preclude any lot line adjustment that does not create a number of lots that is greater than the number of lots in existence on the effective date of this Easement.

6.3. Construction. The placement, installation, or construction of any buildings, structures, or other improvements of any kind, including, but not limited to, roads, railroads, utilities, cellular phone towers, septic systems, wells, recreational facilities, and parking lots, *except* as expressly provided in Section 5 above.

6.4. Alteration of Land. The alteration of the surface of the land, including, without limitation, the excavation or removal of soil, sand, gravel, rock, peat, or sod, *except* in

conjunction with a use or activity expressly allowed in Section 5 above.

6.5. Erosion or Water Pollution. Any use or activity that causes or is likely to cause significant soil degradation or erosion or significant pollution of any surface or subsurface waters. For the purposes of this Easement, the uses and activities expressly allowed under Section 5 above shall be deemed to not violate this prohibition.

6.6. Removal of Trees and Other Vegetation. The pruning, topping, cutting down, uprooting, girdling, or other destruction or removal of live and dead trees and other vegetation, *except* as expressly provided in Section 5 above or in conjunction with a use or activity expressly allowed in Section 5 above.

6.7. Waste Disposal. The disposal, storage, or Release of Hazardous Substances, rubbish, garbage, debris, unregistered vehicles, abandoned equipment, parts thereof, or other offensive waste or material. The term “Release” shall mean release, generation, treatment, disposal, storage, dumping, burying, or abandonment. The term “Hazardous Substances” shall mean any substances, materials, or wastes that are hazardous, toxic, dangerous, or harmful, or are designated as, or contain components that are, or are designated as, hazardous, toxic, dangerous, or harmful, and/or that are subject to regulation as hazardous, toxic, dangerous, or harmful or as a pollutant by any federal, state, or local law, regulation, statute, or ordinance, including, but not limited to, petroleum or any petroleum product.

6.8. Mining. The exploration for, or development and extraction of, oil, gas, coal, limestone, fossils, metals, geothermal resources, sand, gravel, or rock of any type on or below the surface of the Protected Property.

6.9. Recreational Activities. The undertaking of recreational activities and the installation or construction of improvements in furtherance of the same, *except* as expressly provided in Section 5 above.

7. NOTICE AND APPROVAL

7.1. Notice.

7.1.1. Grantor. Certain provisions of this Easement may require Grantor to notify Grantee and/or to receive Grantee’s written approval prior to undertaking certain permitted uses and activities. The purpose of requiring Grantor to notify Grantee prior to undertaking these permitted uses and activities is to afford Grantee an adequate opportunity to ensure that the use or activity in question is designed and carried out in a manner consistent with the Purpose of this Easement. Whenever such notice is required, Grantor shall notify Grantee in writing not less than thirty (30) days prior to the date Grantor intends to undertake the use or activity in question. The notice shall describe the nature, scope, design, location, timetable, and any other material aspect of the proposed use or activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the terms of this Easement and the Purpose thereof.

7.1.2. **Grantee.** Certain provisions of this Easement may require Grantee to give notice to Grantor prior to undertaking certain activities. Whenever such notice is required, Grantee shall notify Grantor in writing not less than thirty (30) days prior to the date Grantee intends to undertake the use or activity in question, unless otherwise provided for by this Easement.

7.2. **Approval.** Where approval by one of the Parties is required under this Easement, such approval shall be granted or denied in writing within thirty (30) days of receipt of a written request for approval, and such approval shall not be unreasonably withheld. Such approval may include reasonable conditions consistent with the Mitigation requirements that must be satisfied in undertaking the proposed use or activity. When approval is required under this Easement, and when such approval is not granted or denied within the time period and manner set forth in this Section 7.2, the non-approving party may conclusively assume the other party's approval of the use or activity in question.

7.3. **Optional Consultation.** If Grantor is unsure whether a proposed use or activity is prohibited by this Easement, Grantor may consult Grantee by providing Grantee a written notice describing the nature, scope, design, location, timetable, and any other material aspect of the proposed use or activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the Purpose of this Easement and to provide comments thereon to Grantor. This Section 7.3 does not itself impose a requirement of prior approval of the activity described in any such notice; however, if Grantee does not provide written objections within thirty (30) days after receipt of Grantor's notice, Grantee shall be deemed to have approved of the proposed use or activity.

7.4. **Addresses.** Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by first class certified mail, postage prepaid, or by facsimile (if available) with original dispatched by certified mail, addressed as follows, or to such other address as either party from time to time shall designate by written notice to the other:

To Grantor: City of Kelso

To Grantee: Forterra NW
901 Fifth Ave., Suite 2200
Seattle, WA 98164

8. ALTERNATIVE DISPUTE RESOLUTION

8.1. **Mediation/Arbitration.** If a dispute arises between the Parties concerning the consistency of any present or proposed use or activity with the Purpose of this Easement, and if the Party intending such use or activity agrees not to continue or proceed with the use or activity pending resolution of the dispute, the Parties shall meet together to discuss the dispute and attempt resolution. If the dispute is not resolved through preventive discussions, either party may

thereafter refer the dispute to mediation by request made in writing to the other. Within thirty (30) days of the receipt of such a request, the Parties shall select a single mediator to hear the matter. The mediation shall be pursuant to the Washington State mediation statute then in effect. The foregoing provisions of this Section 8 shall not be applicable to Grantee's exercise of its rights pursuant to Section 4 hereof.

8.2. Preventive Discussions. Grantor and Grantee will promptly give the other notice of problems or concerns arising in connection with the other's actions under the Easement or the use of or activities or conditions on the Protected Property, and will meet as needed, but no later than fifteen (15) days after receipt of a written request for a meeting, to minimize the same.

9. JUDICIAL RESOLUTION

9.1. Notice of Violation, Corrective Action. If either party determines that the other is in violation of the terms of this Easement or that a violation is threatened, they shall give written notice to the other of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Protected Property resulting from any use or activity inconsistent with the Purpose of this Easement, to restore the portion of the Protected Property so injured to its prior condition in accordance with a plan approved by Grantee.

9.2. Failure to Respond. Either party may bring an action as provided in Section 9.3 below if the other party:

9.2.1. Fails to cure the violation within thirty (30) days after receipt of a notice of violation; or

9.2.2. Under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fails to begin curing the violation within the thirty (30) day period and fails to continue diligently to cure such violation until finally cured.

9.3. Action.

9.3.1. **Injunctive Relief.** Either party may bring an action at law or in equity in a court having jurisdiction to enforce the terms of this Easement:

9.3.1.1. To enjoin the violation, *ex parte* as necessary and as allowed under the applicable civil rules, by temporary or permanent injunction; and

9.3.1.2. To require the restoration of the Protected Property to the condition that existed prior to any such injury.

9.3.2. **Damages.** The prevailing party shall be entitled to recover damages for violation of the terms of this Easement or injury to any Conservation Values protected by this Easement. Without limiting Grantor's liability in any way, Grantee shall first apply any damages recovered to the cost of undertaking corrective or restoration action on the Protected Property.

9.4. Emergency Enforcement. If Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values, Grantee may pursue its remedies under this Section 9 without prior notice to Grantor or without waiting for the period provided for cure to expire.

9.5. Scope of Relief. Grantee's rights under this Section 9 apply equally in the event of either actual or threatened violations of the terms of this Easement. Grantor agrees that Grantee's remedies at law for any violation of the terms of this Easement are inadequate and that Grantee shall be entitled to the injunctive relief described in this Section 9, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's remedies described in this Section 9 shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

9.6. Costs of Enforcement. In the event a Party finds it necessary to bring an action at law or other proceeding against the other Party to enforce any of the provisions of this Easement, the reasonable enforcement expenses, including attorneys' and consultants' fees (whether incurred at the trial, appellate, or administrative level) incurred by the prevailing party, shall be paid by the other Party.

Grantor [initials]

Grantee [initials]

9.7. Discretion in Enforcement. Enforcement of the terms of this Easement shall be at the discretion of each Party, and any forbearance by a Party (for purposes of this Section 9.7, the "Injured Party") to exercise its rights under this Easement in the event of any breach of any terms of this Easement by the other Party, or the other Party's agents, employees, contractors, invitees or licensees, shall not be deemed or construed to be a waiver by the Injured Party of such term of any of the Injured Party's rights under this Easement. No delay or omission by the Injured Party in the exercise of any right or remedy upon any breach by the other Party shall impair such right or remedy or be construed as a waiver. Notwithstanding the foregoing, nothing in this Easement shall be interpreted to waive or toll any applicable statutes of limitation.

9.8. Acts Beyond Party's Control. Neither Grantor nor Grantee shall be in default or violation as to any obligation created hereby and no condition precedent or subsequent shall be deemed to fail to occur if such party is prevented from fulfilling such obligation by, or such condition fails to occur due to:

9.8.1. Actions by trespasser upon the Protected Property (the category of trespassers would not include members of the public engaging in uses and activities that are expressly permitted under Section 5 above);

9.8.2. Forces beyond such party's reasonable control, including without limitation, destruction or impairment of facilities resulting from breakdown not resulting from lack of ordinary care and maintenance, flood, earthquake, slide, storm, lightning, fire, epidemic, war, riot, civil disturbance, sabotage, proceeding by court or public authority, or act or failure to act by court, public authority, or third party, which forces by exercise of due diligence and foresight such party could not reasonably have expected to avoid; or

9.8.3. Any action deemed reasonable by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Protected Property resulting from such causes.

In the event the terms of this Easement are violated by acts of trespassers, Grantor agrees, at Grantee's option and expense, to join in any suit, to assign its right of action to Grantee, or to appoint Grantee its attorney in fact, for the purpose of pursuing enforcement action against the responsible parties if Grantor, in its discretion, elects not to pursue such action.

9.9. Compliance Certificates. Upon request by Grantor, Grantee shall within thirty (30) days execute and deliver to Grantor, or to any party designated by Grantor, any document, including a compliance certificate, that certifies, to the best of Grantee's knowledge, the status of Grantor's compliance with any obligation of Grantor contained in this Easement and otherwise evidences the status of this Easement

10. COSTS, LIABILITIES, TAXES, ENVIRONMENTAL COMPLIANCE, AND INDEMNIFICATION

10.1. Costs, Legal Requirements, Liabilities and Insurance. Grantee shall bear no costs or liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Protected Property.

10.2. Taxes and Other Costs. Grantor shall pay all taxes, fees and charges assessed against the Protected Property by governmental authority as they become due, including taxes imposed upon, or incurred as a result of, this Easement, and shall furnish Grantee with satisfactory evidence of payment upon request. To preserve its rights under this Easement, Grantee may, but is in no event obligated to, make payment of any taxes upon five (5) days prior written notice to Grantor, in accordance with any bill, statement, or estimate procured from the appropriate authority, without inquiry into the validity of the taxes or the accuracy of the bill, statement or estimate, and the obligation to Grantee created by such payment will bear interest until paid by Grantor at the same rate imposed by the relevant governmental authority for the late payment of the tax so paid by Grantee.

10.3. Control. Nothing in this Easement shall be construed as giving rise, in the absence of a judicial decree, to any right or ability in Grantee to exercise physical or managerial control over the day-to-day operations of the Protected Property, or any of Grantor's activities on the Protected Property, or otherwise to become an operator with respect to the Protected Property within the meaning of the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended ("CERCLA"), and the Model Toxics Control Act, as amended ("MTCA").

10.4. Grantor's Indemnification. Grantor shall hold harmless, indemnify, and defend Grantee and its members, directors, officers, employees, agents, and contractors (collectively "Grantee Indemnified Parties") from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, reasonable attorneys' and consultants' fees, arising from or in any way connected with breach of its representations and warranties or injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, hazardous material, or other matter related to or occurring on or about the Protected Property that is not a consequence of any action or omission of any of the Grantee Indemnified Parties on or about the Protected Property.

10.5. Grantee's Indemnification. Grantee shall hold harmless, indemnify, and defend Grantor and Grantor's members, directors, officers, employees, agents, and contractors (collectively "Grantor Indemnified Parties") from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, reasonable attorneys' and consultants' fees, arising from or in any way connected with injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Protected Property that is a consequence of Grantee's actions or omissions or the actions or omissions of Grantee's members, directors, officers, employees, agents, or contractors on or about the Protected Property.

11. EXTINGUISHMENT, CONDEMNATION, AND SUBSEQUENT TRANSFER

11.1. Extinguishment. If circumstances arise in the future that render the Purpose of this Easement impossible to accomplish, this Easement can only be terminated or extinguished, whether in whole or in part, by the Parties' mutual agreement and with the written approval of the Mitigation Sponsor, or by judicial proceedings of a court having jurisdiction. Unless otherwise agreed to by the Parties, Grantee shall have no compensable interest in this Easement under such circumstances and Grantee acknowledges that its compensation relating to its obligations under this Easement is provided for under separate agreement with Habitat Bank, LLC. The immediately foregoing provision shall be limited solely to the circumstances described in this Section 11.1, and shall not be interpreted to have any application or inference to any other provision of, or circumstance under, this Easement, including, but not limited to, those provisions pertaining to Grantee's rights to enforce the terms of this Easement and Grantee's rights to damages to, or the cost of restoring, the Conservation Values.

11.2. Condemnation. If the Easement is taken, in the whole or in the part, by the exercise of the power of eminent domain, Grantee shall be entitled to compensation based upon the appraised value of this Easement. The immediately foregoing provision shall be limited solely to the circumstances described in this Section 11.2, and shall not be interpreted to have any application or inference to any other provision of, or circumstance under, this Easement, including, but not limited to, those provisions pertaining to Grantee's rights to enforce the terms of this Easement and Grantee's rights to damages to, or the cost of restoring, the Conservation Values.

11.3. Subsequent Transfers. Grantor agrees to:

11.3.1. Incorporate the terms of this Easement by reference in any deed or other legal instrument by which it divests itself of any interest in all or a portion of the Protected Property, including, without limitation, a leasehold interest;

11.3.2. Describe this Easement in and append it to any executory contract for the transfer of any interest in the Protected Property; and

11.3.3. Give written notice to Grantee of the transfer of any interest in all or a portion of the Protected Property prior to the date of such transfer. Such notice to Grantee shall include the name, address, and telephone number of the transferee or the transferee's representative.

The failure of Grantor to perform any act required by this Section 11.3 shall not impair the validity of this Easement or limit its enforceability in any way.

11.4. No Merger. In the event that Grantee acquires the fee title to the Protected Property, it is the Parties' intention that no merger of title shall take place that would merge the restrictions of this Easement with fee title to the Protected Property and thereby eliminate them, and that the restrictions on the use of the Protected Property, as embodied in this Easement, shall, in the event title becomes vested in Grantee, become and remain permanent and perpetual restrictions on the use of the Protected Property.

12. AMENDMENT

If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantor and Grantee are free to jointly amend this Easement upon approval of such amendment or modification by the Mitigation Sponsor. Any such amendment shall be recorded in the official records of Cowlitz County, Washington, and any other jurisdiction in which such recording is required.

13. ASSIGNMENT AND SUCCESSION

13.1. Assignment. With Grantor's written approval, which shall not be unreasonably withheld, and the Mitigation Sponsor's written approval, this Easement is transferable, but Grantee may assign its rights and obligations under this Easement only to an organization that is authorized to acquire and hold conservation easements under RCW 64.04.130 or RCW 84.34.210 (or any successor provision(s) then applicable). As a condition of such transfer, Grantee shall require that the transferee exercise its rights under the assignment consistent with the Purpose of this Easement. Grantee shall notify Grantor in writing forty-five (45) days prior to such assignment at Grantor's last known address.

13.2. Succession. If at any time (a) it becomes impossible for Grantee to ensure compliance with the covenants, terms, conditions and restrictions contained in this Easement, (b) the Grantor and the Mitigation Sponsor, or the Mitigation Sponsor alone, determine that this

Easement should be assigned due to any reasons of actual non-performance by the Grantee, including, but not limited to, circumstances under which actual non-performance occurs because Grantee is the holder of both the fee title to the Protected Property and this Easement, (c) Grantee ceases to exist or to be authorized to acquire and hold conservation easements under RCW 64.04.130 and 84.34.210 (or any successor provision(s) then applicable), or (d) Grantee is otherwise released from its liabilities and obligations under the Easement, then, if Grantee has been provided forty five (45) days prior notice and opportunity to cure any non-performance or otherwise remedy any other circumstance forming the basis of any transfer under this Section 13.2, and subject to the Preventative Discussion provisions under Section 8.2 above if applicable, Grantee's rights and obligations under this Easement shall become vested and fall upon such other entity as may be designated by the Mitigation Sponsor and approved by the Grantor, which has purposes similar to Grantee's and is authorized to acquire and hold conservation easements under RCW 64.04.130 or RCW 84.34.210 (or the successor statutes then applicable), to the extent that such entity accepts and assumes the obligations of the Grantee under this Easement; *provided* that if such vesting is deemed to be void under the Rule Against Perpetuities, the rights and obligations under this Easement shall vest in such organization as a court having jurisdiction shall direct, pursuant to the applicable Washington law and with due regard to the Purpose of this Easement. Grantee shall cause any approved assignment under this provision to be recorded in the Official Records of Cowlitz County, Washington, and shall notify the Mitigation Sponsor and the Grantor of such assignment.

14. RECORDATION

Grantee shall record this Easement in a timely fashion in the official records of Cowlitz County, Washington, and in any other appropriate jurisdictions, and may re-record it at any time as may be required to preserve its rights in this Easement.

15. GENERAL PROVISIONS

15.1. Controlling Law. The interpretation and performance of this Easement shall be governed by the laws of the State of Washington.

15.2. Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the Purpose of this Easement. If any provision in this Easement is found to be ambiguous, an interpretation consistent with the Purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

15.3. Severability. If any provision of this Easement, or its application to any person or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected.

15.4. Entire Agreement. Except as to any other written agreement between the Parties, all prior discussions, negotiations, understandings, communications, or oral agreements regarding this Easement have been superseded by, and are merged into, this Easement.

15.5. No Forfeiture. Nothing contained in this Easement will result in a forfeiture of Grantor's title in any respect.

15.6. "Grantor" - "Grantee". The terms "Grantor" and "Grantee," wherever used in this Easement, and any pronouns used in their place, shall be held to mean and include, respectively the above-named Grantor, and its successors and assigns, and the above-named Grantee, and its successors and assigns.

15.7. Successors and Assigns. The covenants, terms, conditions, and restrictions of this Easement shall be binding upon, and inure to the benefit of, the Parties to this Easement and their respective successors and assigns, and shall continue as a servitude running in perpetuity with the Protected Property, unless sooner terminated as expressly provided for herein. No term or provision of this Easement is intended to be, or shall be, for the benefit of any person, firm, organization, or corporation not a party to this Easement, and no such other person, firm, organization, or corporation shall have any right or cause of action hereunder, *except* as expressly provided in Section 13 above.

15.8. Termination of Rights and Obligations. A party's rights and obligations under this Easement terminate upon transfer of the party's interest in the Easement or Protected Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

15.9. Counterparts. The Parties may execute this Easement in two or more counterparts, which shall be signed by both Parties. Each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

15.10. Recitals. Each recital set forth above is fully incorporated into this Easement.

15.11. Effective Date. The effective date of this Easement is the date of recording of this Easement.

15.12. Authority. The individuals signing below, if signing on behalf of any entity, represent and warrant that they have the requisite authority to bind the entity on whose behalf they are signing.

15.13. Captions. The captions in this instrument have been inserted solely for convenience and ease of reference and are not a part of this Easement and shall have no effect upon construction or interpretation.

16. SCHEDULE OF EXHIBITS

16.1. Exhibit A -- Legal Description of Property Subject to Easement.

16.2. Exhibit B -- Site Map(s).

16.3. Exhibit C – Permitted Exceptions.

TO HAVE AND TO HOLD unto Grantee, its successors and assigns forever.

IN WITNESS WHEREOF, the undersigned Grantor has executed this Easement this ____ day of _____, 2015.

City of Kelso, Grantor

By _____

[print name/title]

Forterra NW does hereby accept the above Conservation Easement and Access Easement.

Dated: _____

Forterra NW, Grantee

By _____

[print name/title]

STATE OF WASHINGTON)
) ss.
COUNTY OF COWLITZ)

On this ____ day of _____ 2015, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared _____ to me known to be the _____ of the City of Kelso, the Washington municipality that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said municipality for the uses and purposes therein mentioned, and on oath stated that he/she is authorized to execute the said instrument.

WITNESS my hand and official seal hereto affixed the deal and year in this certificate above written.

NOTARY PUBLIC in and for the State of
Washington, residing at _____
Print Name: _____
My commission expires _____

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

On this ____ day of _____ 2015, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared _____ to me known to be the _____ of Forterra NW, the Washington non-profit corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he/she is authorized to execute the said instrument.

WITNESS my hand and official seal hereto affixed the deal and year in this certificate above written.

NOTARY PUBLIC in and for the State of
Washington, residing at _____
Print Name: _____
My commission expires _____

EXHIBIT A OF CONSERVATION EASEMENT
Legal Description of Property Subject to Conservation Easement

The E ½ of the E ½, the SW ¼ of the NE ¼, and the NW ¼ of the SE ¼ of Section 36, Township 8 North, Range 2 West, Willamette Meridian, Cowlitz County, Washington, according to U.S. Government subdivision procedures.

EXHIBIT B OF CONSERVATION EASEMENT
Site Map

[see attached following this cover page]

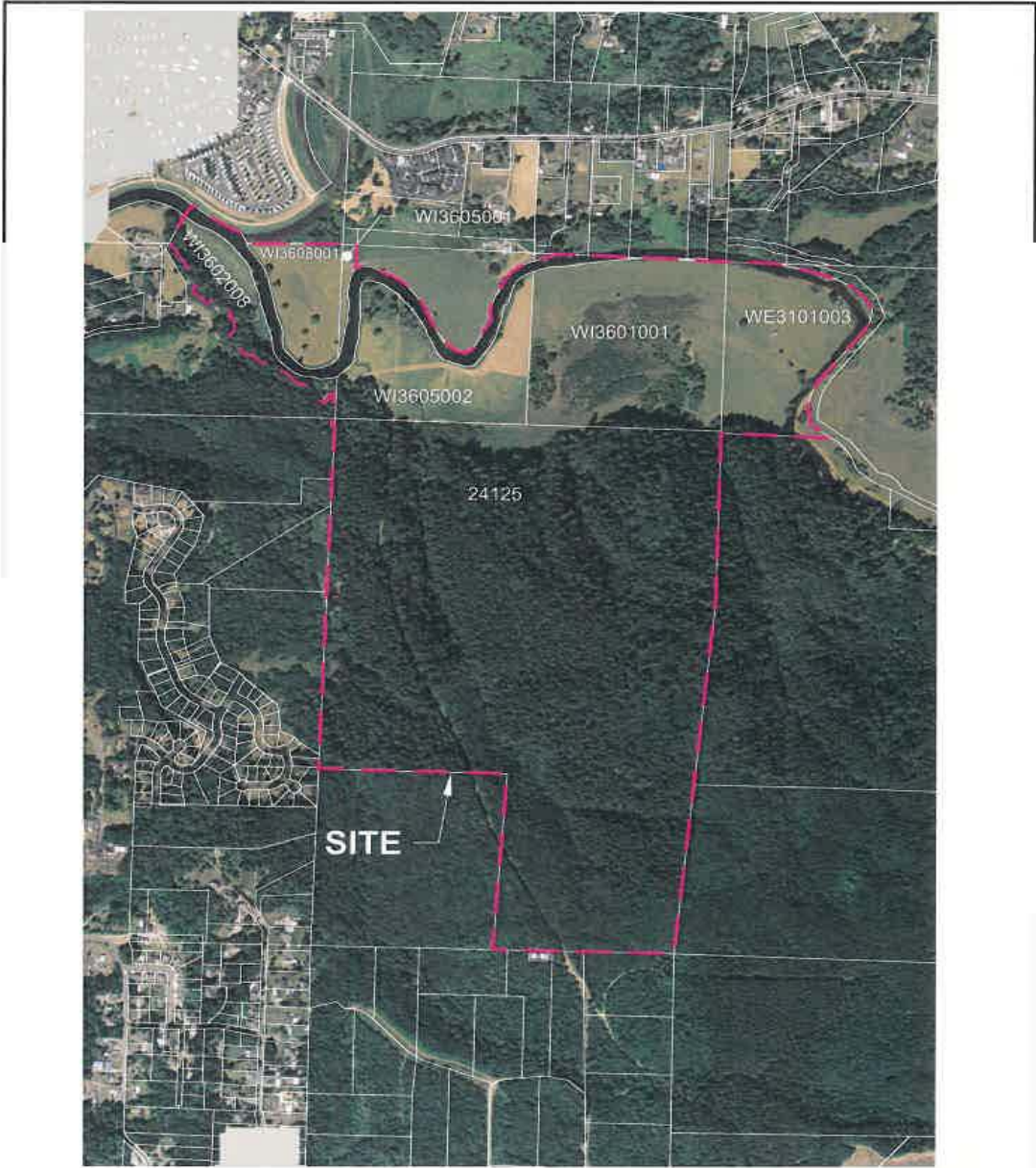


EXHIBIT C OF CONSERVATION EASEMENT
Permitted Exceptions

3. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:
IN FAVOR OF: UNITED STATES OF AMERICA
BY DECLARATION OF TAKING IN CAUSE NO. 257 IN UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION
CERTIFIED COPY RECORDED AUGUST 12, 1941 UNDER AUDITOR'S FILE NO. 216066 IN VOL.
272, PAGE 313
PURPOSE: PERPETUAL EASEMENT AND RIGHT OF WAY AND THE RIGHT IN PERPETUITY TO
CONSTRUCT, OPERATE AND MAINTAIN ONE OR MORE ELECTRIC TRANSMISSION LINES AND
NECESSARY COMMUNICATION LINES.

4. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:
GRANTEE: OLYMPIC PIPE LINE COMPANY
PURPOSE: RIGHT OF WAY FOR PIPE LINE CONSTRUCTION, OPERATION AND
MAINTENANCE PURPOSES
DATED: AUGUST 9, 1965
RECORDED: AUGUST 25, 1965
AUDITOR'S NO.: 613065 VOLUME: 720 PAGE: 1429
AREA AFFECTED: SAID PROPERTY

5. UNDERGROUND UTILITY EASEMENT AND THE TERMS AND CONDITIONS THEREOF:
GRANTEE: PUBLIC UTILITY DISTRICT NO.1 OF COWLITZ COUNTY,
WASHINGTON
PURPOSE: RIGHT OF WAY EASEMENT FOR POWER UNDERGROUND
DATED: JANUARY 22, 2003
RECORDED: JANUARY 23, 2003
AUDITOR'S NO.: 3172215
AREA AFFECTED: SAID PROPERTY

CONTAINS COVENANT PROHIBITING STRUCTURES OVER SAID EASEMENT OR OTHER
ACTIVITY WHICH MIGHT ENDANGER THE UNDERGROUND SYSTEM.

6. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:
GRANTEE: MITCH WHARTON
PURPOSE: CONSTRUCT AND MAINTAIN AN ACCESS ROADWAY SUITABLE
FOR A SINGLE-FAMILY RESIDENCE
DATED: JANUARY 21, 2003
RECORDED: JANUARY 23, 2003
AUDITOR'S NO.: 3172216
AREA AFFECTED: SAID PROPERTY

7. RESERVATION CONTAINED IN DEED FROM THE STATE OF WASHINGTON RECORDED
UNDER AUDITOR'S FILE NO. 3144623 RESERVING TO THE GRANTOR ALL OIL, GASES,
COAL, ORES, MINERALS, FOSSILS, ETC., AND THE RIGHT OF ENTRY FOR OPENING,
DEVELOPING AND WORKING THE SAME, AND PROVIDING THAT SUCH RIGHTS SHALL NOT
BE EXERCISED UNTIL PROVISION HAS BEEN MADE FOR FULL PAYMENT OF ALL DAMAGES
SUSTAINED BY REASON OF SUCH ENTRY.

RIGHT OF THE STATE OF WASHINGTON OR ITS SUCCESSORS, SUBJECT TO PAYMENT OF
COMPENSATION THEREFORE, TO ACQUIRE RIGHTS-OF-WAY FOR PRIVATE RAILROADS,
SKID ROADS, FLUMES, CANALS, WATER COURSES OR OTHER EASEMENTS FOR
TRANSPORTING AND MOVING TIMBER, STONE, MINERALS AND OTHER PRODUCTS FROM
THIS AND OTHER PROPERTY, AS RESERVED IN DEED REFERRED TO ABOVE.

8. RESTRICTIONS IMPOSED BY INSTRUMENT RECORDED ON APRIL 4, 2002, UNDER AUDITOR'S FILE NO. 3144623, AS FOLLOWS:

THIS PROPERTY IS CONVEYED PURSUANT TO CHAPTER 8, SECTION 415, WASHINGTON LAWS OF 2001, SECOND SPECIAL SESSION, TO BE USED EXCLUSIVELY FOR OPEN SPACE OR RECREATION PURPOSES FOR A MINIMUM OF THIRTY YEARS FROM THE DATE OF THIS DEED.

9. AGREEMENT FOR USE OF PROPERTY AND THE TERMS AND CONDITIONS THEREOF:

**BETWEEN: CITY OF KELSO
AND: HABITAT BANK, LLC
DATED: AUGUST 20, 2013
RECORDED: FEBRUARY 20, 2015
AUDITOR'S NO.: 3517294**

10. AMENDMENT NO. 1 TO AGREEMENT FOR USE OF PROPERTY AND THE TERMS AND CONDITIONS THEREOF:

**BETWEEN: CITY OF KELSO
AND: HABITAT BANK, LLC
DATED: FEBRUARY 19, 2015
RECORDED: FEBRUARY, 20, 2015
AUDITOR'S NO.: 3517293**