



MEMORANDUM TRANSPORTATION & DEVELOPMENT DEPARTMENT MEMO NO. TDA13-013

DATE: SEPTEMBER 13, 2012
TO: MAYOR AND CITY COUNCIL
THRU: RICH DLUGAS, CITY MANAGER, PAT MCDERMOTT, ASSISTANT CITY MANAGER, R.J. ZEDER, TRANSPORTATION & DEVELOPMENT DIRECTOR
FROM: MARGARET COULTER, REGULATORY AFFAIRS MANAGER
SUBJECT: INTRODUCTION OF ORDINANCE NO. 4362, REPEALING ORDINANCE NOS. 2651 AND 2800, AND GRANTING TO AIR PRODUCTS AND CHEMICALS, INC., ITS SUCCESSORS AND ASSIGNS, A NONEXCLUSIVE LICENSE FOR TRANSPORTATION OF NITROGEN GAS THROUGH PIPELINES UNDER, ALONG AND ACROSS PUBLIC STREETS, ROADS AND ALLEYS IN CHANDLER, ARIZONA, AS THE SAME MAY NOW OR HEREAFTER EXIST, AND PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS AND CONDITIONS IN RESPECT TO SAID LICENSE.

RECOMMENDATION: Staff recommends introduction and tentative approval of Ordinance No. 4362, repealing Ordinance No. 2651 and Ordinance No. 2800 pertaining to the existing Air Products and Chemicals, Inc., its Successors and Assigns, a nonexclusive license for the transportation of nitrogen gas through pipelines under, along and across public streets, roads and alleys in Chandler, Arizona, as the same may now or hereafter exist, and prescribing certain rights, duties, terms and conditions in respect to said license.

BACKGROUND: Air Products and Chemicals, Inc. has operated a nitrogen gas pipeline in the City of Chandler since 1981, which was authorized by Ordinance No. 2651 and amended in 1998 by Ordinance No. 2800 in respect to its relocation costs when the Price Freeway (101) was constructed. There has been no new construction on this pipeline in the City in recent years, but construction is to resume related to a contract Air Products and Chemicals, Inc. has received to serve the new Intel Fab plant being built. Since Air Products and Chemicals, Inc. is now applying for encroachment permits from the City in relation to this project, it became

apparent that it would be beneficial to both Air Products and Chemicals, Inc. and the City to update and clarify the language in its License Agreement to reflect today's operational structure.

Specifically, an Arizona State Statute changed how the City is compensated for the use of right-of-way. This Ordinance deletes the old compensation language and retains only the applicable language. There have also been some operational changes related to financial reporting and easement recordings. Again, this Ordinance restates the original relevant language from the two adopted City ordinances while deleting non-applicable language and establishing new relevant language that reflects current operational practices, particularly those adopted in Chapter 46 of the Chandler City Code.

FINANCIAL IMPLICATIONS: Air Products and Chemicals, Inc. will continue to pay the City two percent (2%) of its gross annual sales of nitrogen gas. It is anticipated that the company's contract with Intel will result in higher revenues for the City.

PROPOSED MOTION: Move to introduce and tentatively approve Ordinance No. 4362, repealing Ordinance Nos. 2651 and 2800 and granting to Air Products and Chemicals, Inc., its Successors and Assigns, a nonexclusive license for the transportation of nitrogen gas through pipelines under, along and across public streets, roads and alleys in Chandler, Arizona, as the same may now or hereafter exist, and prescribing certain rights, duties, terms and conditions in respect to said license.

Attachment: Ordinance No. 4362

ORDINANCE NO. 4362

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CHANDLER, ARIZONA, REPEALING ORDINANCE NOS. 2651 AND 2800, AND GRANTING TO AIR PRODUCTS AND CHEMICALS, INC., ITS SUCCESSORS AND ASSIGNS, A NONEXCLUSIVE LICENSE FOR TRANSPORTATION OF NITROGEN GAS THROUGH PIPELINES UNDER, ALONG AND ACROSS PUBLIC STREETS, ROADS AND ALLEYS IN CHANDLER, ARIZONA, AS THE SAME MAY NOW OR HEREAFTER EXIST, AND PRESCRIBING CERTAIN RIGHTS, DUTIES, TERMS AND CONDITIONS IN RESPECT TO SAID LICENSE.

WHEREAS, the City of Chandler (the "City") adopted Ordinance No. 2651 on June 13, 1996, and Ordinance No. 2800 on March 12, 1998, and thereby granted to Air Products and Chemicals, Inc., a Delaware corporation ("Air Products"), a nonexclusive license for the transportation of nitrogen gas through an industrial gas pipeline located within public streets, roads and alleys in Chandler, Arizona; and

WHEREAS, Air Products has proposed that the current license be replaced with a new license, which (i) extends the period of time that Air Products is able to construct, operate and maintain an industrial gas pipeline for transportation of nitrogen gas within the City's public streets, roads and alleys, and (ii) has terms and conditions compatible to Air Products continued provision of nitrogen gas service to Intel Corporation at the level of service needed by Intel to accommodate the expansion and improvement occurring at the Intel facilities in the South Chandler area; and

WHEREAS, the Chandler City Council (the "City Council") is authorized by state law (Article 4, Chapter 5, Title 9, Arizona Revised Statutes) to hold any public hearing for and to issue any license to use any of the City's public streets, roads, and alleys for construction, operation and maintenance of any industrial gas pipeline; and

WHEREAS, upon reasonable notice, a public hearing on this matter was held on September 13, 2012; and

WHEREAS, the City Council desires to repeal Ordinance Nos. 2651 and 2800; to otherwise terminate the existing license granted to Air Products; and to issue a new license in accordance with the terms and conditions and the time period set out in this Ordinance No 4362.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Chandler, Arizona as follows:

SECTION 1. DEFINITIONS. In this Ordinance, unless a different meaning clearly appears from the context:

1.1. "Industrial gas pipeline" means a pipeline or system of pipelines and all necessary appurtenances to the pipeline or system used to transport inert, nontoxic, nonflammable gas for industrial purposes to industrial users who pay for the service.

1.2. “Public streets, roads and alleys” includes public roadways of any type, whether held by the City in fee or as an easement, and any other form of public right-of-way held by the City.

SECTION 2. ORDINANCE REPEAL; NEW ORDINANCE EFFECTIVE DATE.

2.1. Repealer. Ordinance Nos. 2651 and 2800 are hereby repealed, and the license granted by said ordinances is terminated, as and from the effective date of this Ordinance No. 4362.

2.2. Effective Date of Ordinance No. 4362. Subject to subsection C below, the effective date of this Ordinance No. 4362, and the License granted herein, shall be thirty (30) days following the date that this Ordinance No. 4362 is passed and adopted by the City Council.

2.3. Additional Requirements for Effectiveness. Notwithstanding the above, this Ordinance No. 4362 shall be deemed null and void, and the License granted herein shall not be effective, and the license granted by Ordinance Nos. 2651 and 2800 shall not be deemed terminated, unless the Grantee (defined below) files with the Chandler City Clerk, on or before the thirtieth (30th) day following the date this Ordinance No. 4362 is passed and adopted, the following: (i) written acknowledgment that the license granted pursuant to Ordinance Nos. 2651 and 2800 has been mutually terminated by the parties thereto; and (ii) written acceptance of the License granted herein by this Ordinance No. 4362.

SECTION 3. GRANT AND ACCEPTANCE OF LICENSE.

3.1. License Granted. There is hereby granted to Air Products, its successors and assigns (the “Grantee”), a non-exclusive License to construct, operate and maintain an industrial gas pipeline under, along and across the present and future public streets, roads and alleys in Chandler, Arizona, solely for the purpose of transporting nitrogen gas to industrial users who pay for such service, and for no other purpose. The License shall be subject to all applicable provisions of the City Charter and the Chandler City Code, and any amendments thereto, together with all laws and regulations of any regulatory agency having jurisdiction, and to the terms and conditions set out in this Ordinance No. 4362.

3.2. Acceptance of License. By accepting the License granted herein, the Grantee does covenant and agree to perform, be bound by and strictly comply with all applicable terms and conditions imposed by the Charter and Code of the City of Chandler and with the terms and conditions of the License granted herein.

SECTION 4. TERM OF LICENSE. The License granted herein shall be in effect for a period of twenty-five (25) years commencing from the effective date of Ordinance No. 4362 as set out in paragraph 2.2 above.

SECTION 5. LICENSE FEE.

5.1. Annual Fee. The Grantee shall pay an annual License Fee in an amount equal to two percent (2%) of the Grantee’s gross annual sales of nitrogen gas delivered through use of any industrial gas pipeline constructed, operated and/or maintained by Grantee within any of the

public streets, roads and alleys situated within the corporate limits of Chandler, Arizona, during the period this License is in effect (the “gross annual sales”).

5.2. Verification Statement. On or before December 31 of each year that the License is in effect, the Grantee shall file with the City’s Management Services Director a verified statement of the Grantee’s gross annual sales for the twelve (12) month period ending on November 30 of the statement filing year, except that:

A. The verification statement filed in the first calendar year that the License is in effect (i.e., 2012) shall report the gross annual sales running from December 1, 2011, through November 30, 2012, in order to transition from the prior license established by Ordinance Nos. 2651 and 2800 (now repealed) and terminated by this Ordinance No. 4362; and

B. The verification statement to be filed in the last calendar year that the License is in effect (i) shall be filed on or before the 30th day following the expiration date of the License and (ii) shall report the gross annual sales running from the last date covered by the immediately preceding verification statement through the expiration date of the License.

5.3. Payment Due. The full amount of the annual License Fee shall be due and payable by the 10th of the month following the date by which the verification statement is required to be filed pursuant to paragraph 5.2 above.

SECTION 6. PIPELINE CONSTRUCTION.

6.1. Compliance with City Practices. All construction of an industrial gas pipeline done under the authority of this License shall be performed in accordance with the City’s customary and established practices with respect to public streets, roads and alleys in Chandler, Arizona.

6.2. Pre-construction Requirements. Prior to the start of construction of an industrial gas pipeline within a public street, road or alley, or within any other City-controlled land, construction plans showing the locations of such construction shall be submitted to the City’s Department of Transportation and Development for its review and prior approval. At the time of construction, the Grantee and/or the Grantee’s contractor shall have obtained an applicable encroachment permit pursuant to Chapter 46 of the Chandler City Code, and shall have satisfied all the conditions of the permit, including, without limitation, providing proof of insurance as required by the City. The fee for the encroachment permit shall be additional to the cost of any other permit, license, or other documents required by existing Federal, State or local laws, or to the License Fee provided for herein. During construction, the City will inspect all trenching, backfilling, and other related items of the pipeline construction.

6.3. Construction Guarantee. The Grantee shall provide a performance bond satisfactory to the City in an amount equal to the full cost of any construction of any industrial gas pipeline undertaken pursuant to this License, conditioned upon faithful performance of such construction in accordance with the plans, specifications and conditions approved by the City’s Director of the Department of Transportation and Development as provided hereinabove. Such bond shall be solely for the protection of the City.

6.4. Minimal Interference. The industrial gas pipeline to be constructed, installed, operated, and/or maintained hereunder shall be located (or relocated) so as to interfere as little as possible with traffic or other authorized uses of the City's public streets, roads, alleys, or other public rights of way (whether above, below or at the surface thereof). Those phases of construction, relating to traffic control, backfilling, compaction and paving, as well as the location or relocation of the industrial gas pipeline herein provided for, shall be subject to regulation by the City's Director of the Department of Transportation and Development.

6.5. Installation of Pipelines. All installations shall meet the standard specifications and requirements adopted by the City of Chandler.

6.6. Prompt Performance. Whenever the Grantee shall cause any opening or alteration whatever to be made for any purpose in any public streets or public places, the work shall be completed with due diligence within a reasonably prompt time, and the Grantee shall, upon the completion of such work, restore the property disturbed to as good condition as it was prior to such opening or alteration.

6.7. Hold Harmless. The Grantee shall save the City harmless from any expenses and losses incurred as a result of injury or damage to the person or property of third person occasioned by the exercise of this License by Grantee

SECTION 7. DISCONTINUANCE; ABANDONMENT.

7.1. The line of any customer whose service is discontinued shall be suitably capped off by the Grantee.

7.2. If the Grantee abandons use of any industrial gas pipeline, or portion thereof, which the Grantee installed under or pursuant to the License, then title to the industrial gas pipeline, or portion thereof, shall vest in the City.

SECTION 8. RELOCATION COSTS.

8.1. Prior Rights. If the Grantee is required by the City to relocate any portion of an industrial gas pipeline, which is situated within the public streets, roads and alleys in Chandler, Arizona, but which was constructed within a private easement or rights of way obtained by the Grantee prior to the location becoming part of any public streets, roads and alleys, then the entire cost of the relocation shall be borne by the City. Such a prior right of the Grantee shall also be unaffected by any subsequent relocation required by the City.

8.2. Grantee acknowledges that certain easements acquired along Ellis Street from Willis Road south to Continuum and in particular those recorded with the Maricopa County Recorder as Instrument Nos. 2012-0163999 (Harold Kuiper Trust), 2012-0064177 (Phoenix Investors #19 LLC) and 2012-0189647 (Isagenix International LLC), along with that portion of the easement in Instrument No. 2012-0259797 (CCI-B Chandler II LLC) that is within Tract "A" of the Final Plat of Continuum in Book 1094 Page 13 (future Mockingbird Lane), records of Maricopa County Recorder, do not constitute a private easement or right of way for the purposes stated in paragraph 8.1 above.

8.3. City Governmental Functions. Except as provided in paragraphs 8.1 and 8.2 above, if the Grantee is required by the City to relocate any portion of an industrial gas pipeline, which is situated within the public streets, roads and alleys in Chandler, Arizona, Grantee shall bear the entire cost of such relocation where the requested relocation is made necessary by the construction of improvements done by or on behalf of the City in furtherance of any of the City's governmental functions. Governmental functions of the City include, but are not limited to, the following items:

- A. Any and all improvements to City streets, alleys, and avenues designed to improve the flow of vehicular and pedestrian traffic, including any subway or viaduct;
- B. Installation of sewers and storm drains and related facilities;
- C. Installation of pipe and other facilities to serve domestic and reclaimed municipal water to the extent that those facilities are used to serve municipal facilities utilized in furtherance of the City's governmental functions;
- D. Establishing and maintaining municipal parks;
- E. Providing fire protection.

8.4. Proprietary Function Off-set. The Grantee shall be allowed to off-set all costs incurred by the Grantee in relocating any industrial gas pipeline at the request, demand or other requirement of the City in the furtherance of a proprietary function; provided however, that in any License Fee period in which the costs were incurred, Grantee may not offset costs greater than ten percent (10%) of the License Fee payable for that License Fee period. Any costs not off-set in one License Fee period shall be accumulated and continued to be off-set at the same ten percent (10%) rate on the same basis in each subsequent License Fee period until fully exhausted or until expiration of the License, including any extension or renewal thereof, whichever occurs sooner.

8.5. Reasonability. The City will not exercise in an unreasonable or arbitrary manner the City's right to require any portion of Grantee's industrial gas pipeline to be relocated.

SECTION 9. CONFIDENTIAL NATURE OF REPORTS. Unless required by judicial order or state law, the City, or any of its departments, agents, employees, shall not divulge any sales information as shown by any statements, letters, or otherwise furnished by the Grantee to substantiate payments under this License.

SECTION 10. CITY AUDIT OF FISCAL RECORDS. The Grantee shall permit examinations of its records by the City as are necessary and material to the determination of the performance of the License obligations.

SECTION 11. PURCHASE OR CONDEMNATION BY THE CITY. There is hereby reserved to the City the right to acquire the property of the Grantee utilized in the performance of this License by purchase or through the exercise of the right of eminent domain in accordance with the conditions set forth in the Arizona Revised Statutes.

SECTION 12. NO TRANSFER; NON-EXCLUSIVITY. The License hereby granted, and any rights or privileges arising therefrom, may not be transferred in whole or in part by the Grantee, its successors and assigns, unless a resolution consenting to such assignment has been adopted by the City Council; provided, however, that the foregoing shall not be deemed to require consent in the case of an assignment made to an affiliate of the Grantee or an assignment made as security pursuant to a mortgage and deed of trust, or any transfer made in enforcement of rights there under or by action of law, or in the case of a transfer pursuant to a merger or consolidation with or into another corporation which assumes the obligation of the Grantee hereunder. This License is not exclusive, and nothing contained herein shall be construed to prevent the City from granting other like or similar grants or privileges to any other person, firm, or corporation, or to deny to or lessen the powers and privileges granted the City by Article 4, Chapter 5, Title 9, Arizona Revised Statutes.

SECTION 13. GENERAL PROVISIONS.

13.1. Conflict. If there is any conflict or inconsistency between any provision of this Ordinance No. 4362 and any other ordinance of the City, the provisions of this Ordinance No. 4362 shall be deemed to prevail.

13.2. Severability. If any section, paragraph, subdivision, clause, phrase or provision of this Ordinance shall be adjudged invalid or unconstitutional, the same shall not affect the validity of this Ordinance as a whole or any part of the provisions hereof other than the part so adjudged to be invalid or unconstitutional.

13.3. Removal on Expiration. Upon the expiration of this License, if the Grantee shall not have acquired an extension or renewal thereof and accepted same, it may remove its industrial gas pipeline within Chandler, Arizona, or, at its option, may continue for a reasonable period of time, not to exceed ninety (90) days, to operate its industrial gas pipeline within Chandler, Arizona, until a new license can be effected with the City.

SECTION 14. TERMINATION OF LICENSE.

14.1. Mutual Termination. The City and the Grantee may mutually agree, in a writing approved by the City Council, to terminate the License granted herein. In such event, the City Council may also proceed to have this Ordinance No. 4362 repealed.

14.2. Early Termination by the City. The License granted herein may be terminated by the City prior to the date of expiration in the event the City Council shall have found that, after notice from the City pursuant to paragraph 14.3 below:

A. The Grantee has failed to comply with any material provisions of this Ordinance or has, by act or omission, violated any term or condition of the License granted herein; or

B. The Grantee has failed to comply with any rule or regulation validly adopted by the City Council that is applicable to the License granted herein.

14.3. Notice of Noncompliance. The Chandler City Manager may make written demand that the Grantee do or comply with any requirement, limitation, term, condition, rule or regulation applicable to the License granted herein. If the Grantee fails to cure the noncompliance within thirty (30) days following such written demand, or, if the noncompliance is non-monetary in nature and is not capable of being cured within thirty (30) days, and the cure has not been commenced within such thirty (30) day period and diligently pursued to completion, then the City Manager may place a request for termination of the License upon the next regular City Council meeting agenda. The City Manager shall cause to be served upon the Grantee, at least ten (10) days prior to the date of such City Council meeting, a written notice of the City Manager's intent to request such termination, and the time and the place of the meeting, notice of which shall be published by the City Clerk at least once ten (10) days before such meeting in a newspaper of general circulation within the City.

14.4. Council Hearing and Determination. The City Council shall consider the request of the City Manager and shall hear any persons interested therein, and shall determine, in its discretion, whether or not any failure of the Grantee was with just cause.

A. Cause for Failure. If such failure by the Grantee was with just cause, the City Council shall direct the Grantee to comply within such time and manner and upon such terms and conditions are reasonable.

B. No Cause for Failure. If the City Council shall determine such failure was without just cause, then the City Council may, by resolution, declare that the License of the Grantee shall be terminated and forfeited unless there be compliance by the Grantee within such period as the City Council may fix.

INTRODUCED AND TENTATIVELY APPROVED by the City Council for the City of Chandler, Arizona this _____ day of _____ 2012.

ATTEST:

CITY CLERK

MAYOR

PASSED AND ADOPTED by the City Council of the City of Chandler, Arizona this _____ day of _____ 2012.

ATTEST:

CITY CLERK

MAYOR

APPROVED AS TO FORM:

CITY ATTORNEY GAB

CERTIFICATION

I HEREBY CERTIFY that the above and foregoing Ordinance No. 4362 was duly passed and adopted by the Mayor and City Council of the City of Chandler, Arizona at a regular meeting held on the _____ day of _____ 2012, and that a quorum was present thereat.

CITY CLERK

PUBLISHED: