

ORDINANCE NO. 1572

REVISION TO CHAPTER 13.28 OF THE LYNDEN MUNICIPAL CODE AMENDING ORDINANCE NO. 1172 TO ESTABLISH LATECOMER AGREEMENT METHODS AND PROCEDURES

WHEREAS, the City of Lynden ("City") desires to revise the uniform methodology and process for the administration of Latecomer Agreements for reimbursement of costs by benefited properties for privately initiated construction of public streets and utilities; and

WHEREAS, pursuant to RCW 35.72 et seq., the City is authorized to contract with owners of real estate for the reimbursement from benefited properties of costs associated with public street projects which the owners elect to install as a result of ordinances that require street improvements as a prerequisite to further property development; and

WHEREAS, pursuant to RCW 35.91 et seq., the City is authorized to contract with owners of real estate to enable the reimbursement from benefited properties of costs associated the improvement of water, sanitary sewer, storm sewer and/or street system;

WHEREAS, pursuant to RCWs 35.72 and 35.91 et seq., the City is also now authorized to assess benefited properties costs associated with public street projects and the improvement of water, sanitary sewer, storm sewer and/or street systems;

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Lynden that the Lynden Municipal Code shall be amended as described and set forth in Section 1 herein:

Section 1. The Lynden Municipal Code (LMC) Chapter 13.28 is hereby amended with deletions in strikethrough and additions underlined:

13.28.010 Purpose

To establish a uniform methodology and process for the administration of Latecomer Agreements for Developers in circumstances where a Developer constructs a water, sanitary sewer, storm sewer and/or street system improvement, and desires to be compensated by property owners benefited by the improvements. To also establish a uniform methodology and process for the City to create an assessment reimbursement area to finance the costs associated with construction or improvement of water, sanitary sewer, storm sewer facilities and/or street system improvement. The provisions of this chapter are in addition to and are intended to supplement other requirements contained elsewhere in the Lynden Municipal Code.

13.28.020 Definitions

A. "Adjacent." Abutting on public roads, streets, right-of-way or easements in which Street System Improvements are installed or directly connecting to Street System Improvements through an interest in real property such as an easement or license.

B. "Assessment." An equitable pro rata charge to be paid by an owner of property within the Assessment Reimbursement Area for the Cost of Construction of Street System Improvements and/or Utility System Improvements.

C. "Assessment Reimbursement Area." That area encompassing all parcels of real property which the City determines, in accordance with this Chapter, ~~will likely benefit from Street System Improvements or Utility System Improvements constructed by a Developer~~ are adjacent to the Street System Improvements which would require similar street improvements upon development or in the case of Utility System Improvements, likely to require connection to or service by said utility system improvement.

D. "Construction Interest" The sum of money to be added to the direct construction cost and reimbursed to the Developer for the use of the developer's monies during the construction term. The interest rate shall be 1% above the Federal Reserve Bank prime loan rate published most recently before the date of the ~~Public-Facilities~~ Latecomer Agreement. Interest accrual begins on the date of execution of the ~~Public-Facilities~~ Latecomer Agreement and will continue throughout the construction term.

Construction interest shall be computed utilizing the two-thirds rule; i.e., direct cost of construction multiplied by construction interest rate divided by 365 multiplied by the construction term expressed in days multiplied by 0.67 equals construction interest.

E. "Construction Term" That period of time between the date of execution of the Latecomer Agreement and the date of acceptance of the project by the City.

F. "Cost of Construction." The sum of the Direct Construction Costs incurred to construct the Street System Improvements and/or Utility System Improvements plus if applicable, Indirect Construction Costs. "Indirect Construction Costs" are limited to the City latecomer administrative fee (section .130) Construction Interest (subsection (D) above), and Developer Administrative Costs (subsection (H) below). "Direct Construction Costs" include but are not limited to all related design services, engineering, surveying, construction, legal services, bonding costs, environment mitigation, relocation and/or new construction of private utilities as required by the City, (i.e., power, telephone, cable and gas), relocation and/or installation of street lights, relocation and/or installation of signage, acquisition of right of way and/or easements, government agency fees, testing services, inspection, plan review and approval, labor, materials, equipment rental, and contractor and/or subcontractor fees or charges.

G. "Developer" An individual or entity (not including the City) that constructs Street System Improvements and/or Utility System Improvements in connection with the

development of real property, and seeks full or partial reimbursement under the provisions of this Chapter.

H. "Developer Administrative Costs." All indirect administrative costs incurred by the Developer in managing the project; such as office supplies, mailings, clerical services, telephone expenses, accounting expenses, project oversight, and the like. Developer Administrative Costs shall not exceed 3% of all direct construction costs.

I. "Latecomer Agreement" A written contract between the City and one or more Developers for the sole purpose of reimbursing such Developer for a pro rata portion of the ~~original costs~~ Cost of Construction Costs incurred by that Developer for the installation of a ~~facility-extension~~ Street System Improvement and/or Utility System Improvement to the extent such facilities benefit future connections or developments.

J. "Street System Improvements" Public street and alley improvements made in existing or subsequently dedicated or granted rights-of-way or easements and any improvements associated therewith including without limitation the acquisition of right-of-way and/or easements, design, engineering, surveying, inspection, grading, paving, installation of curbs, gutters, sidewalks, street lighting, bike lanes, and traffic control devices, relocation and/or construction of private utilities as required by the City, (i.e., power, telephone, cable and gas), relocation and/or construction of street lights, traffic control devices, signage, and other similar improvements.

K. "Utility System Improvements" Public water, sewer and storm drainage system improvements including, without limitation, the acquisition of right-of-way and/or easements, design, engineering, surveying, construction, inspection, testing, connection fees, and installation of improvements as required by the City. Utility System Improvements include:

1. Water system improvements such as treatment facilities, reservoirs, wells, mains, valves, fire hydrants, telemetry systems, pumping stations, and pressure reducing stations;
2. Sewer system improvements such as treatment plants, gravity mains, lift stations, force mains, and telemetry systems;
3. Storm sewer system improvements such as water quality structures and systems, detention and retention facilities, and storm water collection and conveyance facilities.

13.28.030 Eligibility

For Street System Improvements and/or Utility System Improvements ~~projects~~, a Developer shall be eligible to enter a Latecomer Agreement with the City only for those ~~projects~~ Street System Improvements and/or Utility System Improvements which are required by City ordinance as a prerequisite to further property development. Street System Improvements and/or Utility System Improvements constructed in order to

comply with any ordinance of the City of Lynden, including without limitation those ordinances pertaining to subdivision, zoning, or comprehensive plans, are hereby declared to be prerequisites to further property development for the purpose of RCW 35.72.010 and [RCW 35.91.020](#).

~~For Utility System Improvements, a Developer shall be eligible to enter into a Latecomer Agreement with the City regardless of whether such improvements are required as a prerequisite to further property development.~~

13.28.040 Application Process For Latecomer Agreement

Any Developer using private funds to construct Street System Improvements and/or Utility System Improvements in the City or within the City's utility service area, may apply to the City for a Latecomer Agreement in order to recover a pro rata share of the Cost of Construction from property owners subsequently benefiting from the Street System Improvements and/or Utility System Improvements made by Developer. The City will decide upon Developer's application in accordance with the provisions of this Chapter.

A. Pre-application. Prior to City acceptance of the Street System Improvements and/or Utility System Improvements, the Developer shall notify the City in writing of his/her intent to seek a Latecomer Agreement. This written notification shall include a map depicting the benefiting properties, along with the names of the owners of said properties, [including addresses and parcel numbers](#). Within a reasonable time after receipt of said written notice of Developer's intent, a pre-application meeting shall be held between the City and the Developer at which time the Developer's proposal shall be reviewed and commented upon.

B. Application. The application for a Latecomer Agreement shall be made following the pre-application meeting, but prior to the date Street and/or Utility System Improvements have been accepted by the City. The application shall be made on forms prepared by the Public Works Department and shall be accompanied by the city ~~administrative~~ application fee set forth in Section 13.28.130. The application shall contain the following information which shall be approved by a State of Washington licensed engineer:

1. A legal description of the Developer's [real](#) property [that is being developed](#).
2. ~~A legal description~~ [Parcel numbers](#) of the properties within the Developer's proposed Assessment Reimbursement Area, together with the names and addresses of the owners of each property, as shown in the records of the Assessor's Office of Whatcom County.
3. Vicinity maps of Developer's [real](#) property [that is being developed](#).
4. The Developer's proposed Assessment Reimbursement Area and ~~general~~ location of the Street System Improvements and/or Utility System

Improvements, in conformance with City of Lynden Design and Development Standards.

5. Itemized cost data approved by a State of Washington licensed engineer for the Cost of Construction.
6. The Developer's proposed allocation of the Cost of Construction to the individual properties within the proposed Assessment Reimbursement Area and the method used for such allocation.

13.28.050 Preliminary Determinations.

For improvements made at the Developer's expense, the Developer ~~Public Works Director~~ shall formulate and provide to the ~~Developer~~ Public Works Director for approval, a preliminary Assessment Reimbursement Area and preliminary assessment for real property benefited by the Street System Improvements and/or Utility System Improvements based on the following factors:

- A. The likelihood that benefited property will be developed within 15 years for Street System Improvements or 20 years for Utility System Improvements, from the date of recording of the Latecomer Agreement.
- B. The likelihood that at the time of development of the benefited property such property will not be required to install similar Street and/or Utility System Improvements because they were already installed by the Developer.
- C. For Street System Improvements, the benefited parcels must be adjacent to such Street System Improvements.
- D. For Utility System Improvements, the likelihood (1) that such improvements will be tapped into or used (including not only direct connections but also connections to laterals or branches connecting thereto) by properties within the Assessment Reimbursement Area, and (2) that such properties will receive a ~~special~~ benefit from the Utility System Improvements.
- E. An equitable allocation of the Cost of Construction among the properties within the Assessment Reimbursement Area, so that each pays for benefits attributable to those improvements. The method or methods used to calculate the allocation of the assessment may be either front footage, number of units, square footage, or may be the zone and termini method or other recognized methods reasonably calculated to equitably allocate the assessment.
- F. For Utility System Improvements, the Developer must request a comprehensive plan approval for a water or sewer facility, if required.

13.28.060 Preliminary Determination Notice

- A. The preliminary Assessment Reimbursement Area and the preliminary assessment formulated by the [Developer and approved by the](#) Public Works Director, along with a notice of rights, shall be sent by certified mail to the Developer and the property owners of record within the preliminary Assessment Reimbursement Area, all in accordance with RCW 35.72 [and RCW 35.91](#) et seq., as from time to time amended. At minimum, the notice of rights shall advise notice recipients of their right, within twenty (20) days of the date of mailing said notice, to make written request for a [public](#) hearing before the City Council on the preliminary Assessment Reimbursement Area and the preliminary assessment. In the event no timely written request for public hearing is received as required, the determination of the Public Works Director on the Assessment Reimbursement Area and the assessment shall be final.
- B. If the Developer or any property owner within the preliminary Assessment Reimbursement Area requests a [public](#) hearing in writing within twenty (20) days of the mailing of the notice of rights described in subsection A, a [public](#) hearing shall be held before the City Council. Notice of such hearing shall be given to the Developer and all property owners within the preliminary Assessment Reimbursement Area. A public hearing before the City Council shall be conducted as soon as is reasonably practical. The Developer or a representative of the Developer shall attend the public hearing. After the public hearing, the City Council may approve, reject, or modify the preliminary Assessment Reimbursement Area and preliminary assessment for any or all property within the Assessment Reimbursement Area, applying the standards set forth in this Chapter. The City Council may also remand the matter back to the Public Works Director for further review. In the case of such a remand, a new public hearing shall be scheduled upon completion of review by the Public Works Director, with written notice to the Developer and property owners that may be included in the Assessment Reimbursement Area. The City Council's final decision on the Assessment Reimbursement Area and on the assessment for each property therein shall be [the final decision of the City](#).

13.28.070 Latecomer Agreement

Once the Assessment Reimbursement Area and the assessment for each property within the Assessment Reimbursement Area is final, the Public Works Director is authorized and directed to execute a Latecomer's Agreement for water, sewer, street or stormwater facility extensions [and/or street projects](#); and upon City Council approval the agreement shall be signed by the Developer and the City.

13.28.080 Recording; Effective Date; Payment of Assessment; Lien for Non-Payment

- A. Following final signatures, the Latecomer Agreement shall be promptly recorded by the City with the Whatcom County Auditor.
- B. The City shall not issue a building permit or similar development permit or approval nor grant permission to use water or sewer service for any property with

obligations under a Latecomer Agreement, unless the City has received full payment of the assessment required by the Latecomer Agreement, including interest.

- C. If improvements are made to any property with obligations under a Latecomer Agreement without payment as required thereby, the amount owed under said Latecomer Agreement shall be a binding obligation upon the owner of record (and successors) of the affected property.

~~D. Failure by a property owner to pay the assessment due within 180 days of notice to this effect shall entitle the Developer to foreclose against the property in the same manner as a mortgage, and shall entitle the Developer to recover reasonable costs and attorney fees.~~

13.28.090 Segregation

The Public Works Director shall, upon the request of any property owner within the assessment reimbursement area, segregate the assessment ~~only if no additional lots are created~~. The segregation shall be based upon the same factors applied when the assessments were originally established. The property owner seeking segregation of the assessment shall pay a an administrative segregation fee to the City of Lynden, as set by City Resolution. ~~based upon a segregation fee schedule to be established by the City.~~

13.28.100 Term of Latecomer Agreements

Each Latecomer Agreement shall be entered for a term not to exceed 15 years for Street System Improvements and 20 years for Utility System Improvements from the date of its recording.

13.28.110 Removal of Unauthorized Connections or Taps

Whenever any tap or connection is made into any water, sewer, and/or storm sewer system(s) without payment of the assessment required by this ordinance, the Public Works Director shall cause it to be removed and disconnected from the City system.

13.28.120 Interest on Assessment

Each assessment established in the Latecomer Agreement shall bear interest from the date of recording of the Latecomer Agreement at an interest rate fixed at the Federal Reserve for one-year treasury bills on the secondary market.

13.28.130 City Administrative Fees

- A. An application fee, set by City Resolution, is due at the time the application for the Latecomer Agreement is submitted to the City.

- B. For processing Latecomer Agreements the City shall charge a base fee for Utility System Improvements and Street System Improvements as established by the City Resolution ~~Fee Schedule~~.

To the base fee shall be added a percentage of the total project Cost of Construction, established by Resolution, having been based on a front foot or area assessment basis, or other equitable method, as determined by the City, or any combination of these methods at the reasonable discretion of the Public Works Director. The project costs may include all applicable design and construction charges of the project submitted by the developer and approved by the City.

- C. In addition to the fees described in subsection A above, a fee established by City Resolution ~~Fee~~ shall be added for every separate parcel of property within the Developer's proposed assessment reimbursement area.
- D. The City Latecomer administrative fees described in subsections A, B and C above shall be paid ~~upon application~~ prior to recording of the Latecomer Agreement and are non-refundable.

13.28.140 Payment of Latecomer Charge

Each assessment shall be due in its entirety ~~upon~~ prior to connection to or use of a ~~Street System Improvement and/or~~ Utility System Improvement by a property subject to an assessment and for Street System Improvements, prior to the development or redevelopment of property if at the time of development or redevelopment the property owner is not required to construct similar Street System Improvements because they were already constructed by the Developer, and shall be paid to the City in one lump sum including interest until date of payment. The City will pay over to Developer the amounts due within 30 days of receipt.

When the assessment for any property has been paid in full, the Public Works Director or designee shall record with the Whatcom County Auditor a certification of payment that will release such property from obligations under the Latecomer Agreement.

13.28.150 Appeal

Developer may file an appeal to the City Council challenging the written interpretations and/or decisions of the Public Works Director made pursuant to this Chapter. The appeal must be filed within ten (10) days of the date of mailing the interpretation or decision of the Public Works Director.

13.28.160 Enforcement of Latecomer Obligations

In processing and imposing obligations in this Chapter, the City does not guarantee payment of assessments by latecomers or enforceability of assessments or the amount(s) thereof against such persons or property. The offices or finances of the City shall not be used for enforcement or collection of latecomer obligations beyond those duties specifically set forth in this Chapter. It shall be the obligation of a Developer to

take whatever authorized means are available to enforce payment of latecomer assessments and Developers are hereby authorized to take such actions.

13.28.170 City Participation in Assessment Reimbursement

- A. As an alternative to financing Street System Improvement projects under this Chapter solely by owners of real estate, the City may join in the financing of improvement projects and may be reimbursed in the same manner as the owners of real estate who participate in the projects, provided that (a) as to Street System Improvements, the conditions of the city's participation shall be specified by ordinance ~~and (b) as to Utility System Improvements, the 15 year limitation in 13.28.100 shall not apply.~~ The City may be reimbursed only for the costs of Street System Improvements that benefit that portion of the public who will use the developments within a given Assessment Reimbursement Area. No costs of improvement that benefit the general public may be reimbursed.
- B. If authorized by ordinance or contract, the City may participate in financing Utility System Improvements authorized and improved or constructed in accordance with this Chapter. Unless otherwise provided by ordinance or contract, the City:
1. Has the same rights to reimbursement as Developers as authorized under this Chapter; and
 2. Is entitled to a pro rata share of the reimbursement based on the respective contribution of the Developer and City.

13.28.180 City Creation of Assessment Reimbursement Area

As an alternative to financing Utility or Street System Improvements in whole or in part by a Developer, the City may create an assessment reimbursement area on its own initiative, without the participation of a Developer, finance all of the costs associated with a Utility or Street System Improvement, and become the sole beneficiary of reimbursements in accordance with RCW 35.91 and RCW 35.72 respectively. The process shall be as follows:

- A. The Public Works Director shall formulate the boundaries of a preliminary assessment reimbursement area and determine the amount of the preliminary assessment applicable to each property located within the preliminary assessment reimbursement area in accordance with LMC 13.28.050, subject to the following limitations:
1. No City costs for any portion of the Utility System Improvements that only benefit property outside of the assessment reimbursement area may be reimbursed. For Utility System Improvements, City administrative and legal costs may not be reimbursed.
 2. The City may be reimbursed only for the costs of Street System Improvements that benefit that portion of the public who will use the developments within the assessment reimbursement area. No City costs for improvements that benefit the general public may be reimbursed.

3. The public works department shall provide notice of its preliminary determination to all owners of record of property located within the preliminary assessment reimbursement area in accordance with 13.28.060 LMC.
 4. Owners of record of property located within the preliminary assessment reimbursement area may contest the public works department's preliminary determinations in accordance with 13.28.060 LMC.
- B. Based upon staff's preliminary determination, if no hearing is requested, or based upon City Council's determination, if a hearing is requested, the public works department shall prepare and record a notice of assessment against each property in the county auditor's office. Upon recording of the notice, the assessment shall be binding upon the property and shall run with the land in perpetuity until paid. The term limits contained in 13.28.100 LMC shall not apply to latecomer assessments established under this subsection.
- C. Assessments shall be paid to the City as follows:
1. Assessments for Street System Improvements shall be paid prior to the development or redevelopment of property if at the time of development or redevelopment the owner is not required to install similar street improvements because they were already installed by the City. For example, for subdivisions, assessments shall be paid prior to the final plat approval; for building permit applications, assessments shall be paid prior to building permit issuance.
 2. Assessments for Utility System Improvements shall be paid prior to connection to or use of the Utility System Improvements.
 3. Upon receipt of payment in full, the City shall record a notice of release of assessments in the county auditor's office. Recording costs shall be paid in advance by the property owner assessed.
 4. Assessments may be determined and recorded at any time prior to or after completion of construction of the improvements.
 5. If the recorded assessment amounts were determined prior to completion of construction based upon estimated costs, the City shall subsequently prepare revised notices of assessment based upon actual costs following completion of construction; provided, that assessments shall not be increased by more than 10 percent. The revised notices shall be sent by certified mail to each owner of record of property within the Assessment Reimbursement Area and recorded in the County Auditor's office.

Section 2. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance. The Council hereby declares that it would have passed this code and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases has been declared invalid or unconstitutional, and if, for

any reason, this ordinance should be declared invalid or unconstitutional, then the original ordinance or ordinances shall be in full force and effect.

Section 3. Any ordinance or parts of ordinances in conflict herewith are hereby repealed.

Section 4. This ordinance shall be in full force and effect five (5) days after its passage, approval and publication as provided by law.

PASSED by the City Council this _____ day of _____, 2019 and signed by the Mayor on the _____ day of _____, 2019.

MAYOR

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney