

Latecomer Agreements

What Are They?

Latecomer agreements, also referred to as recovery contracts or reimbursement agreements, allow a property owner who has installed street or utility improvements to recover a portion of the costs of those improvements from other property owners who later develop property in the vicinity and use the improvements. Two different statutes, chapter 35.72 RCW for streets, and chapter 35.91 RCW for utilities, govern these agreements. Chapter 35.72 RCW allows a municipality to be considered as a property owner that can be reimbursed under a street latecomer agreement, but chapter 35.91 RCW does not afford that same opportunity.

What They are Not

Latecomer agreement charges are not to be confused with local improvement district (LID) assessments. While the computation of charges to be recovered under a latecomer agreement can be very similar to that of an LID assessment, the procedures are very different, and under an LID the money goes to the municipality rather than to the property owner. In addition, LID assessments apply to all properties within the reimbursement area, whether or not the property is developed. Latecomer assessments, however, are triggered only if a property owner submits an application for a development that would have required similar improvements.

Latecomer agreement charges are also not to be confused with connection fees, also known as facilities charges or system development charges, for utilities under chapter 35.92 RCW. These fees or charges are a property owner's equitable share of the cost of the entire utility system and not just for improvements that serve his/her property.

Street Latecomer Agreements (Chapter 35.72 RCW)

Who can contract? Any city or county.

With who? Owners of real estate.

For what? Construction or improvement of street projects that the owners elect to install as a result of ordinances that require the projects as a prerequisite to further property development.

What's included? Street projects subject to reimbursement may include design, grading, paving, installation of curbs, gutters, storm drainage, sidewalks, street lighting, traffic controls, and other similar improvements, as required by the street standards of a city or county.

Where? Inside the municipal corporate boundaries.

Why? To provide for reimbursement, for a period not to exceed 15 years, of a portion of the costs of the project by other property owners who: 1) are determined to be within an assessment reimbursement area; 2) are determined to have a reimbursement share; 3) did not contribute to the original cost of the street project; and 4) subsequently develop their property within the 15-year period and at the time of development are not required to install similar street projects because they were already provided by the original developer.

Reimbursement amount? The reimbursement is to be a pro rata share of construction and contract administration costs of the street project, determined by a method of cost apportionment based on the benefit to the property owner from the project.

What are the required procedures? In addition to the procedures set out in RCW 35.72.040, summarized below, the courts have held that a prerequisite to the latecomer agreement process is having in place an ordinance that requires the particular street improvements as a condition of property development. *Woodcreek Partnerships v. City of Puyallup*, 69 Wn. App. 1, 847 P.2d 501 (1993). With such an ordinance in place, the following statutory procedures must be followed:

(1) the city or county formulates an assessment reimbursement area based upon a determination of which parcels adjacent to the improvements would require similar street improvements upon development.

(2) the city or county sends, by certified mail, a preliminary determination of area boundaries and assessments, along with a description of the property owners' rights and options, to property owners within the proposed assessment area. If any property owner requests a hearing in writing within 20 days of the mailing of the preliminary determination, the city or county legislative body must hold a hearing, with notice to all affected property owners. The legislative body's ruling is final.

(3) the contract must be recorded in the appropriate county auditor's office within 30 days of its final execution.

(4) the filed contract is binding on property owners within the assessment area who are not party to the contract.

Can a city or county participate in or create a street latecomer agreement, and can it be the sole beneficiary of the reimbursements? Yes. RCW 35.72.050 authorizes a city or county to join in the financing of street improvement projects and

to be reimbursed in the same manner as the property owners of real estate who participate in the projects, if the city or county has specified the conditions of its participation in an ordinance. Or, a city or county may create an assessment reimbursement area on its own initiative, without the participation of a private property owner, finance the costs of the street improvements, and become the sole beneficiary of the reimbursements that are contributed. A city or county may be reimbursed only for the costs that benefit that portion of the public who will use the improvements within the assessment reimbursement area. A city or county may not be reimbursed for improvements that benefit the general public.

Can Washington State Department of Transportation (WSDOT) participate in or create a street latecomer agreement, and can it be the sole beneficiary of the reimbursements? Yes. RCW 35.72.050 authorizes WSDOT participation in the same manner and subject to the same restrictions as cities or counties. However, the appropriate city or county is to act as a WSDOT's agent through an interlocal agreement.

Utility Latecomer Agreements (Chapter 35.91 RCW)

Who can contract? Any city, town, county, water-sewer district, or drainage district.

With who? Owners of real estate.

For what? Construction of water and sewer facilities (storm, sanitary, or combination sewers, pumping stations, and disposal plants, water mains, hydrants, reservoirs, or appurtenances).

Where? Both inside and, except for counties, within 10 miles of the corporate boundaries.

Why? To provide for a period not to exceed 15 years for reimbursement of a fair pro rata share of the cost of water or sewer facility construction to property owners by other property owners who did not contribute to the original cost of the facilities and who subsequently tap into or use them.

Subject to? To reasonable rules and regulations established by the municipality.

What's the catch? A latecomers agreement is not binding on any property owner not included in the contract unless the contract has been recorded with the county advisor prior to the time that owner connects to the water or sewer facilities.

What about the boundary review board? Extension of water or sewer facilities outside of the boundaries of a city or town are subject to potential review by a boundary review board under chapter 36.93 RCW.

How about approval and acceptance? Upon completion of the facilities, the governing body must approve their construction and accept them as facilities of the municipality.

What about operation and maintenance costs? If the water or sewer facilities are approved and accepted, the governing body is responsible for all further maintenance and operation costs.

Can a municipality participate in or create a utility latecomer agreement? No.

How is the original property owner reimbursed? RCW 35.91.040 states that nobody may connect to water or sewer facilities under a latecomer agreement during the life of the agreement without first paying to the city or county the amount required by the agreement. Moneys received under a latecomers agreement are to be paid out under the terms of the agreement within 60 days. If connection is made into a contracted water or sewer facility without payment having been made, the city or county may remove the unauthorized connection and all connecting tile or pipe located in the facility right-of-way and dispose of unauthorized material without any liability.

How are the costs due under a utility latercomer agreement determined? This is to be determined by an engineer's estimate, which must include the fair pro rata share due from property owners. RCW 35.91.050.

Does a latecomers agreement need to be recorded? Yes. The agreement must be recorded with the county auditor. RCW 35.91.020. In addition, a "notice of additional tap or connection charges," that includes a legal description or a map of the affected property, must also be filed with the county auditor. RCW 65.08.170.

Combined Street and Utility Latecomers Agreement Codes and Ordinances

Several cities have combined street and utility latecomer agreements into a single ordinance or set of master code sections. Since there are differences in required procedures between each set of statutes, any master code must meet the specific requirements of both sets of statutes. For example, the street latecomer statutes require a public hearing at the request of an aggrieved property owner, while the utility statutes do not have a specific requirement. Similarly, the recording require-

ment for a street latecomer agreement is more explicitly stated than for utility agreements.

A combined set of code sections should contain uniform application and processing procedures, uniform (but flexible) requirements for establishing the pro rata share to be reimbursed, uniform hearing requirements, and uniform recording requirements. All these should be based on the more restrictive language in either set of statutes.

Frequently Asked Questions

Does the legislative body of a city or county have to approve a latecomer agreement? Yes. RCW 35.91.020 says “ The governing body of any city, town, county, water-sewer district, or drainage district, hereinafter referred to as a “municipality” may contract...”

May the legislative body delegate to a department head the authority to approve and accept water or sewer facilities built by a private contractor using the latecomer agreement process (chapter 35.91 RCW)? Though the relevant statute specifically grants to the governing body the power to approve and accept the facilities, the statutory language does not necessarily preclude delegation, by ordinance, of approval and acceptance authority. We recommend that any ordinance delegating approval authority to a department head provide a process that includes certification from the city or county engineer that the facilities were constructed as planned and meet the city or county standards.

May a school district contract with the city or county in a latecomer agreement and be the “reimbursee”? Yes. RCW 35.91.020 authorizes a city or county to “contract with owners of real estate for the construction of storm, sanitary, or combination sewers, pumping stations, and disposal plants, water mains, hydrants, reservoirs, or appurtenances” An owner of real estate can be another governmental entity.

May a city or county enter into a street latecomer agreement with a developer for reimbursement of part of the cost of a traffic signal if the developer is in the process of installing or has already installed the signal? Yes. As long as the contract is recorded and provides notice to property owners within the reimbursement area before they undertake development that triggers reimbursement, reimbursement is required for the subsequent developer.

May a city or county include interest as a part of the construction costs that can be reimbursed under the latecomer’s agreement pursuant to chapter 35.91 RCW? RCW 35.91.020 allows the developer to recover the costs of construction.

However, this provision does not specifically define what may be included in the costs of construction, and there is no specific mention of interest.

There is a split in the practice of local governments in the state regarding including interest. Some cities take the position that interest may not be included, while others allow it.

Is a local enabling ordinance required before a county or city can approve late-comer agreements for water and sewer facilities under RCW 35.91.020 and for streets under chapter 35.72 RCW? Although neither statutory scheme expressly requires an enabling ordinance, MRSC recommends that one be adopted for each. For the street latecomer agreement process, a jurisdiction is first required to have in place an ordinance that requires the particular street improvements. *Woodcreek Partnerships. v. City of Puyallup*, 69 Wn. App. 1, 847 P.2d 501 (1993)

For utility latecomer agreements, must a city or county use only the front footage assessment method or may it use any equitable method of assessment? According to RCW 35.91.020, the charge must be a fair pro rata share of the cost of the construction. While most cities and counties use a front footage method of allocation, a number of cities provide for alternate methodologies. See, for example:

- SeaTac Municipal Code 12.35.050
- Puyallup Municipal Code 21.10.110(3)(b)
- Marysville Municipal Code 14.07.090

What costs are reimbursable to a city or county under chapter 35.72 RCW? A city or county may be reimbursed only for the cost of improvements that benefit that portion of the public who will use the developments within the assessment reimbursement area established pursuant to RCW 35.72.040(1). Improvements that benefit the general public may not be reimbursed. This principle must be followed when establishing the assessment reimbursement.

How do developer utility extension agreements relate to latecomer agreements? Utility extension agreements can simply state that the developer will construct an improvement and deed it to the city upon completion of construction and acceptance by the city. Extension agreements can also allow the developer to recover costs from other properties served by the improvement via a latecomer agreement.

May a city or county enter into an agreement with property owners who are required to install sidewalks whereby the sidewalks will be installed by the city or county and the property owners will be charged under the terms of a latecomer agreement? Under RCW 35.72.050, a city or county may establish a reimbursement

area on its own initiative, without the participation of a private property owner, and may finance the costs and become the sole beneficiary of the reimbursements. The improvements must, however, be required by the agency's development standards. The city or county would be reimbursed as the properties served by the sidewalks are developed, triggering application of applicable development standards.

May a municipality charge an administrative fee to process latecomer agreement payments? Yes. Of a dozen cities surveyed in 1998, over half charged such a fee. See, for example:

- SeaTac Municipal Code 12.35.110
- Skagit County Code 12.64.060(i)
- King County Code 13.04.250

Resources

Available online at www.mrsc.org/Subjects/PubWorks/latecomers.aspx#resources or contact the MRSC library at (206) 625-1300.

Articles and Checklists

- Municipal Research News, "Utilities and Developer Contributions," by John Carpita, Public Works Consultant, March 1998
- "Special Connection Fees, Latecomer Charges and LID Waivers; Some Comments on RCW 35.91.020 and 35.92.025 and Pending Spokane Litigation," by Robert G. Baumier, Jr., Assistant City Attorney of Spokane. Information Bulletin No. 446 (1988), Legal Notes, , pp. 133-150.
- Checklist for Reimbursement Agreement – Port Angeles
- Clark County General Process

Combined Street and Utility Latecomer Agreement Code Excerpts

- Port Angeles Municipal Code, chapter 13.68
- Bellingham Municipal Code, chapter 14.02
- Renton Municipal Code, Title 9, chapter 5
- Lynnwood Municipal Code, chapter 3.30
- Everett Municipal Code, chapter 14.36

Sample or Model Combined Street and Utility Latecomer Agreements

- Port Angeles Public Works Policy PW-208: System Development Charges and Developer Reimbursement Agreements
- Bellingham Information Pamphlet
- Bellingham Application Packet
- Omak sample agreement

Street Latecomer Agreement Code Excerpts

- Vancouver Municipal Code, chapter 11.97
- Puyallup Municipal Code, chapter 11.24
- Cheney Municipal Code, chapter 12.22
- Clark County Code, chapter 12.36
- Des Moines Municipal Code, chapter 12.44

Sample or Model Street Latecomer Agreements

- Bellingham Racine Street LST 57-00
- Clark County /Anderson Investors Application and Process Package
- Puyallup Ordinance No. 2483 (storm sewer)
- Vancouver West Corbett Area – Ordinance No. M-3533
- Vancouver Sample Agreement Set

Utility Latecomer Agreement Code Excerpts

- Port Townsend Municipal Code, chapter 13.04
- Lake Stevens Municipal Code, chapter 6.24
- Marysville Municipal Code § 14.07.090
- Oak Harbor Municipal Code, chapter 13.44
- Redmond Municipal Code, chapter 13.12

Sample or Model Utility Latecomer Agreements

- Yelm Ordinances No. 649 and No. 650 and corresponding latecomer agreements
- Monroe sample agreement
- Camas sample agreement
- Colville sample agreement
- Friday Harbor sample agreement
- Raymond sample service extension agreement
- Gig Harbor sample agreements (two)

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