

O-2023-38

AN ORDINANCE

ADOPTING TITLE 14, CHAPTER 28 OF THE MUNICIPAL CODE OF THE CITY OF LAKEWOOD, COLORADO, IN CONNECTION WITH ESTABLISHING A PUBLIC IMPROVEMENT REIMBURSEMENT PROGRAM TO ALLOW DEVELOPERS OF PRIVATELY FINANCED CONSTRUCTION THE ABILITY TO APPLY FOR AND OBTAIN PARTIAL COST RECOVERY FROM SUBSEQUENT USERS OF THE PUBLIC IMPROVEMENTS

WHEREAS, the City of Lakewood is a home rule municipality organized under Article XX of the Colorado Constitution and the authority of the Home Rule Charter for the City of Lakewood (Charter);

WHEREAS, Sections 1.2 and 2.1 of the Charter vests all municipal legislative powers in the City Council, and authorizes the City Council to establish those laws necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convince of such municipality and the inhabitants thereof;

WHEREAS, the City Council desires to create a developer reimbursement program that allows developers of privately financed construction of public infrastructure to obtain partial cost recovery from later users of the public improvement(s) who receive special benefit from those public improvement(s) but did not contribute to the initial capital costs;

WHEREAS, approval of this Ordinance on first reading is intended only to confirm that the City Council desires to comply with the Lakewood Municipal Code by setting a public hearing to provide City staff and the public an opportunity to present evidence and testimony regarding the proposal; and

WHEREAS, approval of this Ordinance on first reading does not constitute a representation that the City Council, or any member of the City Council, supports, approves, rejects or denies the proposal.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Lakewood, Colorado, that:

SECTION 1. Chapter 14.28 of the Lakewood Municipal Code shall be adopted as follows:

14.28.010 Purpose

The purpose of this Public Improvement Reimbursement Agreement program is to define the rules and regulations for the developers of privately financed construction of public water, sewer, storm sewer, and street system improvements to obtain partial cost recovery from later users of the Public Improvement(s) who receive special benefit from those Public Improvement(s) but did not contribute to the initial capital costs thereof.

14.28.020 Definitions

As used in this Chapter, the following terms are defined as follows:

City Engineer means the City Engineer for Development Services.

Connection means a physical connection of any kind to the City infrastructure, except that connection of an existing property entrance to new street infrastructure constructed by an Initial Developer that is eligible for reimbursement shall not be considered a connection for the purposes of reimbursement until such time as the property use changes or improvements to the entrance are required as a result of development of the property as determined by the Director or designee.

Connector means a party seeking to connect to the City infrastructure and who benefits from the infrastructure constructed by an Initial Developer that is eligible for the reimbursement procedure set forth in this section under criteria established by the City.

Construction Costs means all reasonable costs, as approved by the City Engineer, incurred directly and solely for the design and construction of Reimbursable Infrastructure and includes the total direct Construction Costs for the Reimbursable Infrastructure, all as detailed in a sworn affidavit of the Initial Developer.

Director means the Director of Public Works Department or designee.

Initial Developer means the party constructing or contracting for construction of Public Improvements required by the City to provide service to a development.

Initial Development means the development of the property for which the Reimbursable Infrastructure is constructed.

Public Improvements means those rights-of-way, easements, access rights, and physical improvements which, upon formal acceptance by the City, shall become the responsibility of the City for ownership and/or maintenance and repair, unless otherwise provided. which upon acceptance by the City, are intended to be for the use of and enjoyment of the public

Reimbursement Area means the geographical area approved by the City Engineer within the City that includes those properties identified as being specially benefitted by the Public Improvements completed by the Initial Developer.

Reimbursable Infrastructure means those Public Improvements identified by the City Engineer as eligible for reimbursement under this Chapter.

14.28.030 Agreement

- A. The owner of any property in the City who installs and dedicates qualified Public Improvements to be owned and maintained by the City may apply for the identification of a Reimbursement Area within which reimbursement of a portion of the costs of the Public Improvement(s) will be required from the owners of property specially benefited by the improvements. Construction cost or portions thereof may be recovered by the Initial Developer pursuant to the reimbursement procedure described in this section. This does not apply to fee in lieu of payment agreements.
- B. The total cost of design and construction of any required Public Improvement(s) shall be the responsibility of the Initial Developer whose development necessitates the initial installation of the Public Improvements as required by the City.
- C. The City Engineer is authorized to adopt administrative rules and regulations as needed to in order to carry out the intent of this Chapter.
- D. Applicants for the Public Improvement Reimbursement Agreements program must comply with all City ordinances and regulations to be eligible for reimbursement agreements. All Public Improvement(s) must be designed in accordance with the current editions of the City of Lakewood Engineering Regulations, Construction Specifications and Design Standards, the City of Lakewood Transportation Engineering Standards, and the City of Lakewood Storm Drainage Criteria Manual, as amended from time to time, the City's current infrastructure master plans, or based on other design requirements as otherwise determined by the City Engineer.
- E. The City Engineer may require the applicant to submit certified statements by a state of Colorado licensed professional engineers and/or contractors registered in the City of Lakewood containing information relevant to the application including, but not limited to, itemization of projected or actual cost of Public Improvement(s), property ownership records, plans, exhibits, or specifications.
- F. The City shall not be a connector or party subject to inclusion in a Reimbursement Area simply by receiving a public benefit from any improvement. However, if the City is the owner of a lot subject to development within the Reimbursement Area, and desires to connect to infrastructure that is the subject of a reimbursement agreement, the City may agree to be included as a connector subject to reimbursement payments.
- G. The applicant is solely responsible for the completeness and accuracy of all applications and required documents and must comply with the requirements of this agreement and all other applicable City ordinances.

14.28.040 Improvements Subject to Reimbursement

- A Public Improvement Reimbursement Agreement application shall be accepted for consideration for reimbursement if it contains the following Public Improvement(s):

- A. Public water system extensions and sanitary sewer where such extension provides new mains intended to be owned and operated by the City in locations where no mainlines are available at the time of the formal submittal;
- B. Public storm collectors and outfalls including manholes, inlets located beyond the property frontage, headwalls or end sections, culverts, and major channel improvements;
- C. Public streets or portions thereof including curb and gutter, asphalt pavement, concrete pavement, pavement striping, sidewalks, pedestrian/bike paths, traffic signals, streetlights, acceleration and deceleration lanes; or
- D. Other improvements, at the discretion of the City Engineer, which upon acceptance by the City, are intended to be for the use of and enjoyment of the public.

14.28.050 Excluded Improvement(s)

A Public Improvement Reimbursement Agreement application shall not be accepted for consideration if it contains the following Public Improvement(s):

- A. Asphalt required as part of street widening along the frontage of the initial property being developed including the asphalt transitions in front of abutting properties;
- B. Curb, gutter, and sidewalk along the frontages of initial property being developed;
- C. All improvements used to meet the City of Lakewood's Enhanced Development Menu criteria;
- D. Storm sewer inlets that are located along the frontage of the initial property being developed and are connected to an existing storm sewer collector pipe;
- E. Any improvements associated with a required detention or water quality facility; or
- F. Infrastructure systems that are included in any metropolitan or other special district that assesses fees to residents or collects any supplemental tax from residents.

14.28.060 Application for Establishment of Public Improvement Reimbursement Agreement

- A. At the time of the initial submittal of the Site Plan and Engineering Drawings, the developer may file an application with the City Engineer to form a reimbursable area in order to obtain partial cost recovery from later users of the Public Improvement(s) required by the City and included in the initial submittal of the engineering drawings.

- B. The application shall be made using the form created by the City of Lakewood and shall include the following supplemental information:
1. Payment of the non-refundable application fee set in accordance with 14.01.060.
 2. An exhibit depicting the infrastructure suitable for inclusion in the reimbursement agreement as determined by the City Engineer. The exhibit shall be presented on 11x17 sized paper and shall clearly show all proposed reimbursable Public Improvements included in the request to scale.
 3. An itemized list of the improvements for inclusion in the reimbursement agreement with descriptions and quantities.
 4. An ownership map acceptable to the City, showing all the properties specially benefited by the proposed reimbursement agreement. This exhibit on 11 x 17 sized paper shall clearly show the proposed Reimbursement Area to be established to scale with streets and addresses.
 5. A list of the names, mailing addresses of the property owners, and the tax ownership identification numbers for the properties within the boundaries of the proposed reimbursement agreement area, accompanied by a written ownership and encumbrance report from a title company or similar document acceptable to the City Engineer evidencing proof of ownership of all property subject to the reimbursement agreement.
- C. Concurrent with the Site Plan and Engineering Drawing review, the City Engineer shall conduct a review of the complete application. Incomplete applications will not be reviewed. The Initial Developer will be notified in writing if the Public Improvement qualifies as Reimbursable Infrastructure and whether the application is approved. In the event the City Engineer does not approve the application, the City Engineer shall notify the Initial Developer thereof in writing explaining the bases for such determination. The Initial Developer may thereafter submit modified application materials for further review or file an appeal in accordance with this Chapter.
- D. Applications will be reviewed based on the criteria set forth in the administrative rules and regulations adopted by the City Engineer. Acceptance or denial of the application by the City Engineer must be determined prior to approval of the Site Plan and Engineering Drawings.
- E. The applicant may appeal the decision of the City Engineer prior to acceptance of the Site Plan and Engineering Drawings. An appeal of the City Engineer's decision must be made in writing to the Director of Public Works and include the reason for the appeal and all relevant documentation that the applicant wishes to be considered by

the Director. The Director shall have fourteen (14) days to provide a written decision regarding the application. The Director's decision shall be final and subject to judicial review by a court of competent jurisdiction.

14.28.070 Estimated Construction Cost

- A. Upon approval of the Site Plan and Engineering Drawings the Initial Developer must provide the following construction cost information:
1. A report acceptable to the City Engineer detailing the estimated construction cost and the resulting reimbursement amount proposed to be assessed to each property within the approved Reimbursement Area. The report shall include all calculations substantiating the initial costs based on the approved Engineering Drawings and the approved reimbursable Public Improvements and Reimbursable Area.
 2. The report must include a minimum of three independent construction bids for the reimbursable Public Improvement(s). The bids shall be submitted in similar format and include an itemized unit price, quantities, and the total estimated cost for the improvements. Regardless of which contractor is selected by the Initial Developer, the lowest responsible bidder's itemized unit price schedule of values will be used to calculate the reimbursable amounts for each property.
 3. Notwithstanding the above, if the Initial Developer is unable to obtain three independent construction bids as required, the Initial Developer may request a waiver of this requirement from the City Engineer. In this event, the Initial Developer shall provide documentation to the City Engineer of the extenuating circumstances that preclude obtaining three independent bids. The City Engineer shall have the sole discretion to determine if the documentation of the extenuating circumstances is sufficient to waive the requirement for three independent bids.
 4. A notarized affidavit from the Initial Developer attesting to the estimated construction cost and to the fact that the work was bid to at least three independent contractors. The affidavit shall be supported with complete documentation, including copies of all vendor, consultant, and contractor bids, proposals, invoices and other relevant documents to support the validity of the construction cost. In the event the requirement for three independent bids was waived by the City Engineer, the affidavit will describe the bidding process that was used. The Initial Developer shall attest that all information contained in the application is true and correct.

5. The report must include calculations that clearly identify how the estimated construction cost is to be allocated to the properties within the Reimbursement Area. A separate sheet(s) shall be included for each property showing the location of the property relative to the initial property to be developed, the approved reimbursable Public Improvement(s), the limits of the Reimbursement Area, the total estimated cost, and the estimated cost for that property.
 6. Draft copies of the notice required in Section 14.28.080(A) to be sent to each property owner.
- B. The City Engineer shall complete a review of the estimated construction cost report and provide a written approval or rejection of the estimated Construction Costs. If the City Engineer needs additional information, written comments shall be provided to the Initial Developer. The Initial Developer may thereafter submit modifications until accepted by the City Engineer.
 - C. If the Initial Developer disputes the City Engineer's determination regarding the estimated reimbursable Construction Costs, or chooses not to submit modifications, they may appeal such determination as set forth in Section 14.28.140 of this section.

14.28.080 Determination of Pro Rata Shares

- A. Properties within a Reimbursement Area shall be assessed in such a manner as to equitably apportion the cost among all properties specially benefitted by the improvement, but no property shall be assessed an amount greater than the special benefit received by it. In the absence of unusual circumstances requiring a different method, Public Improvements shall be subject to reimbursement on the basis of front footage for streets, sidewalks and trails and on the basis of acres served in the case of water main, sewer main and storm drainage improvements.
- B. The cost to be apportioned within a Reimbursement Area shall be the reasonable cost of installing the improvement, but not including the cost of any part or portion which solely benefits the Initial Developer, such as curb cuts or main connections to serve its property. Engineering costs, not to exceed five percent (5%) of Construction Costs, may be included with the cost allocations. Reimbursable Construction Costs shall be based on the lowest responsible bid of three bids obtained by the Initial Developer.
- C. Except as hereinafter limited, the phrase "special benefit" shall mean only the benefit conferred upon a property, which is greater or different in kind, from that conferred upon properties in the City as a whole by a Public Improvement. Among the factors to be considered in determining the existence of a special benefit are:

1. Improvement in safety or convenience of access;
2. Improved drainage;
3. Alleviation of health or sanitation hazards;
4. Adaptability of the property to a superior or more profitable use;
5. Improved availability of public water or sewer service to the property; and
6. In the case of undeveloped property, the installation of an improvement which would otherwise be required upon development of the property. When a party must extend an improvement, such as a water or sewer main, in order to make lateral connection to its property, the pre-existing portion of the improvement shall not be deemed to specially benefit that portion of its property served by the extension.

14.28.090 Reimbursement Area Hearing

- A. Upon approval by the City Engineer of the estimated construction cost report, the City shall set a hearing date no less than thirty-five (35) days from the approval and notify the Initial Developer. The Initial Developer shall send by first class U.S. mail, at least twenty-one (21) days before the hearing date, a notice to each of the owners of each property that is situated within the proposed Reimbursement Area boundary, together with a copy of the proposed reimbursement agreement, the individual property summary sheet, letter of explanation and a copy of this code section. The notice shall advise the property owners of the hearing date, time and location and their right to appear at the hearing to contest the Reimbursement Area, the reimbursement agreement, or both.
- B. Hearing Process. The Director shall conduct the hearing on the matter. The burden of proof to establish that the request for reimbursement for construction cost is reasonable and necessary shall be on the Initial Developer. If the Initial Developer establishes that the request for reimbursement is reasonable and necessary, the burden of proof to establish disqualification for reimbursement shall shift to the owner(s) of property identified as being within the Reimbursement Area. Following the hearing, the Director shall render, within thirty (30) days, a written decision and provide copies of the decision to all parties. The Director's decision is final and subject to judicial review by a court of competent jurisdiction.

14.28.100 Establishing the Final Construction Cost

- A. Prior to acceptance of Public Improvements, the Initial Developer must provide the following final construction cost information:

1. A report acceptable to the City Engineer detailing the final construction cost and the resulting reimbursement amount to be assessed to each property within the approved Reimbursement Area. The report shall include all calculations substantiating the final costs based on the actual construction cost incurred for construction of the approved reimbursable Public Improvements. For purposes of calculating the assessed reimbursement amount, the total reimbursable amount shall not exceed one hundred fifteen percent (115%) of the estimated Construction Costs determined in Section 14.28.070.
 2. A notarized affidavit from the Initial Developer attesting to the final construction cost. The affidavit shall be supported with complete documentation, including copies of all vendor, consultant, and contactor invoices, change orders, pay applications and other relevant documents to support the validity of the final construction cost. The complete cost of all Public Improvement(s) subject to reimbursement must be tracked separately from other costs associated with the project.
 3. The report must include calculations that clearly identify how the final construction cost is to be allocated amongst the initial property, and all properties within the approved Reimbursement Area. A separate sheet(s) shall be included for each property showing the location of the property relative to the initial property to be developed, the approved reimbursable improvement(s), the limits of the Reimbursement Area, the total final cost, and the final cost for that property.
 4. The report must also include a draft letter notifying the property owners within the Reimbursement Area of the completion of the Public Improvements and the final cost to be recorded as required in 14.28.90(C).
- B. The City Engineer shall complete a review of the final construction cost report and provide a written notice of approval or rejection. If the City Engineer needs additional information, written comments shall be provided to the Initial Developer. The Initial Developer may thereafter submit modifications until accepted by the City Engineer.
- C. When the final construction cost is approved, a notice of the existence of the Reimbursement Area shall be recorded by the Initial Developer against the properties in the Reimbursement Area in the office of the County Clerk and Recorder in the county in which the properties are located. The Initial Developer shall send by first class U.S. mail a maximum of twenty-one (21) days after the approval of the final cost and allocation, a notice to each of the owners of each property that is situated within the proposed Reimbursement Area boundary, a copy of the recorded reimbursement agreement, the individual property summary sheet, and a copy of this code section.

14.28.110 Reimbursement Payments

- A. A Connector included within a Reimbursement Area may in such Connector's discretion pay the reimbursement at any time after it has been allocated but shall not be required to do so until the first of the following to occur: execution of a Public Improvement agreement or similar document; subdivision of the property; issuance of a building permit for the property; or at the time of connection to the Public Improvement.
1. In the event that a Connector included within a Reimbursement Area initiates an action, other than a direct connection to the Public Improvement, that would otherwise trigger a requirement for payment, but the Connector does not immediately benefit from the initial improvement, the Connector may request deferral of the payment in writing from the Director prior to applying for any permits. A decision by the Director to defer payment shall not void the Connectors' obligation triggered by additional actions or change the original term of the obligation.
 2. Deferral of payment for an individual Connector shall not change the reimbursement amount for any other Connector included within the Reimbursement Area.
- B. A Connector included within a Reimbursement Area shall make reimbursement payments directly to the Initial Developer, in good and verifiable funds. Upon making the reimbursement payment, the Connector making the payment and the Initial Developer shall both sign and provide to the City Engineer an acknowledgement of payment showing that the Connector and Initial Developer agree that reimbursement has been made.
- C. No property will be permitted to connect to infrastructure constructed pursuant to this section or to any other part of the City's infrastructure until the obligations associated with such property under any reimbursement agreements have been paid in full or have been deferred.
- D. In no event shall the actual amount reimbursed to the Initial Developer exceed the reimbursable Construction Costs.

14.28.120 Responsibilities of Initial Developer

After the recordation of the reimbursement agreement, it shall be the responsibility of the Initial Developer (and the party's successor(s)-in-interest) to keep the City informed of its current address. Failure to comply with the Initial Developer's responsibilities shall

constitute abandonment of all rights of reimbursement and shall be grounds for termination of the reimbursement agreement.

14.28.130 Termination of Reimbursement Areas

- A. The reimbursement agreement shall terminate upon the earlier to occur of the following: payment of the full amount of reimbursable Construction Costs, or ten (10) years from the date of execution.
- B. Upon full payment of reimbursement or expiration of the reimbursement term, whichever occurs first, the City will, upon request, issue a written release to the owner of property included within a Reimbursement Area.

14.28.140 Dispute, Administrative Appeal

- A. In the event the Initial Developer disputes the City Engineer's determination of estimated or actual reimbursable Construction Costs or the qualification of the improvement as Reimbursable Infrastructure, the Initial Developer may submit a written appeal to the Director detailing why the Initial Developer disputes the City Engineer's determination.
- B. Upon receipt of a written appeal hereunder, the Director shall review the written appeal to determine whether the written appeal contains reasonably sufficient information to overturn the City Engineer's determination regarding estimated or actual reimbursable Construction Costs, as applicable. If the Director concludes there is not reasonably sufficient information, the Director shall notify the Initial Developer within twenty-one (21) calendar days after receipt of the written appeal, including identifying the nature of the required additional information to the extent reasonably possible. The Initial Developer shall provide the required additional information within fifteen (15) calendar days after the date of the notice. Failure to provide the required additional information within such time period shall render the appeal abandoned, and the Initial Developer shall be deemed to have accepted the City Engineer's determination of estimated or actual reimbursable Construction Costs.
- C. If the Director concludes that the written appeal is sufficient, with or without required additional information, as applicable, the Director shall investigate and provide to the Initial Developer a written decision within thirty (30) calendar days after receipt of the written application or, if the written application required additional information, within thirty (30) calendar days after receipt of such additional information.
- D. The Director's decision shall be final for the purposes of further appeals, which shall be to a court of competent jurisdiction.

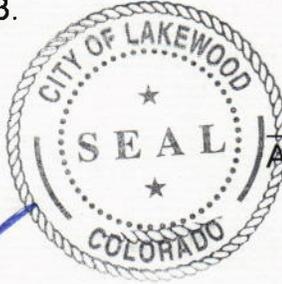
14.28.150 Limitation of City's Duty and Liability

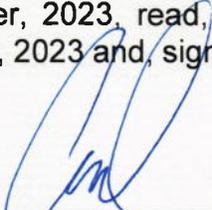
- A. The Initial Developer shall defend and indemnify the City for, and hold the City harmless from, any suit, claim, or action that is or may be brought by any person against the City as a result of the reimbursement agreement entered into pursuant to this Chapter. In the event the City incurs costs as the result of any litigation or dispute in administering this Chapter, the Initial Developer shall reimburse the City for these costs within ten (10) days of the City sending notification. In the event the Initial Developer fails to reimburse these costs upon written request by the City Attorney or designee, the City will have no further obligations to the Initial Developer and any reimbursement agreements with the Initial Developer will be considered terminated. Notwithstanding the foregoing, the City is not limited to these remedies.
- B. In the event a court invalidates the reimbursement agreement, the City will have no further obligations to the Initial Developer and the reimbursement agreement with the Initial Developer will be considered terminated unless the court order provides otherwise. If the Initial Developer has received reimbursement payments under a reimbursement agreement that a court invalidates, then the Initial Developer shall return the reimbursement funds, plus the applicable collection fee paid by the Connector, to the Connector unless the court order provides otherwise. If a court invalidates the reimbursement agreement, the City will not be obligated to refund the application fee to the Initial Developer.
- C. The Initial Developer shall cooperate with the City in the implementation of the agreement including, but not limited to, providing such information as the City may deem necessary to perform its functions under the agreement.
- D. Failure of the Initial Developer to comply with any of the material provisions of the reimbursement agreement shall constitute abandonment of all rights to reimbursement.
- E. Nothing in this section shall prevent the Initial Developer from pursuing any other legal action against a property owner for failure to pay.

SECTION 2. This Ordinance shall take effect thirty (30) days after final publication. Upon its effective date, there will be a grace period of an additional thirty (30) days for active or in progress developments or redevelopments to apply for partial reimbursement of any public improvement(s) in accordance with the provisions of this Ordinance.

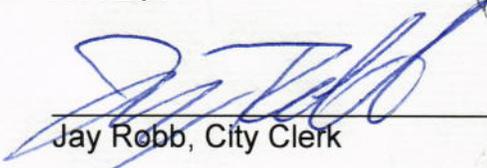
SECTION 3. If any provision of this Ordinance should be found by a court of competent jurisdiction to be invalid, such invalidity shall not affect the remaining portions or applications of this Ordinance that can be given effect without the invalid portion, provided that such remaining portions or application of this Ordinance are not determined by the court to be inoperable.

I hereby attest and certify that the within and foregoing ordinance was introduced and read on first reading at a hybrid regular meeting of the Lakewood City Council on the 25th day of September 2023; published by title in the Denver Post and in full on the City of Lakewood's website, www.lakewood.org, on the 28th day of September, 2023; set for public hearing to be held on the 9th day of October, 2023, read, finally passed and adopted by the City Council on the 9th day of October, 2023 and, signed by the Mayor on the 10th day of October, 2023.

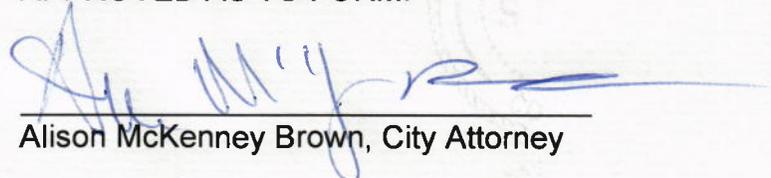



Adam Paul, Mayor

ATTEST:


Jay Robb, City Clerk

APPROVED AS TO FORM:


Alison McKenney Brown, City Attorney