
CITY OF KELOWNA

MEMORANDUM

Date: September 28, 2004
File No.: 2250-70-71

To: City Manager

From: Development Manager

Subject: LATECOMER CHARGES – MARKUI CONTRACTING LTD/JOHN & SARINA WEISBECK – HIGHWAY 33

RECOMMENDATION:

THAT the Municipal Council requires the owner of Lot 1, Sec 13, Tp 26 ODYD Plan 17448 and Lot 2, Sec 13, Tp 26 ODYD Plan 14039 which is to be subdivided or developed, to provide the excess or extended services shown in Appendix E of the Latecomer Agreement No. 2250-70-71, attached to the report of the Director of Works & Utilities, dated September 28, 2004;

AND THAT the Municipal Council consider the cost to provide the excess or extended services shown in Appendix E of the Latecomer Agreement No. 2250-70-71, in whole or in part, to be excessive;

AND THAT the Latecomer charges be imposed for excess or extended services, as shown in Appendix E of Latecomer Agreement No. 2250-70-71, which are required to be installed as part of the referenced Development Project;

AND THAT Latecomer charges be imposed on the benefiting lands listed in Appendix D of Latecomer Agreement No. 2250-70-71;

AND THAT the City enter into Latecomer Agreement No. 2250-70-71 with the owner to be effective upon Substantial Performance of the Excess or Extended Services, and the Mayor and City Clerk be authorized to execute and affix the corporate seal to this Latecomer Agreement;

AND FURTHER THAT the owners of the benefiting lands be advised in writing of the Latecomer charge to be imposed on their land.

BACKGROUND:

Pursuant to the Local Government Act, where an owner of land that is to be subdivided or developed is required to provide excess or extended services by Council, and where Council considers its cost to be provide these services are excessive; then Council can require the services to be paid for by the owner.

However, where the owner is required to pay for these costs, Council is required to:

- (a) determine the proportion of the cost of providing the highway or water, sewerage or drainage facilities that it considers constitutes the excess or extended service;

- (b) determine which part of the excess or extended service that it considers will benefit each of the parcels of land that will be served by the excess or extended service; and
- (c) impose, as a condition of an owner connecting to or using the excess or extended service, a charge related to the benefit determined under paragraph (b).

The purpose of this report is to establish these latecomer charges which will be collected from latecomers who connect to or use the designated services for a period fixed by the Latecomer Agreement which shall be no greater than 10 years commencing from the date of Substantial Performance as determined by the City Engineer.

In this particular development, the services which are the subject of a Latecomer charge are identified in Appendix E of the Latecomer Agreement.

All of the benefiting parcels have been identified as Appendix D of the Latecomer Agreement and the total Latecomer charge for each parcel is shown along with a breakdown by individual utility.

Where Development Cost Charge works are proposed to be constructed, a rebate will be made to the owner according to current Development Cost Charge rebate policy. Development Cost Charge works are not eligible for Latecomer Charges.

Steve Muenz, P.Eng.
Development Manager

John Vos
Director of Works & Utilities

Attach.

LATECOMER AGREEMENT NUMBER 2250-70-71

THIS AGREEMENT dated for reference the _____ day of _____,

BETWEEN:

CITY OF KELOWNA
1435 Water Street
Kelowna BC V1Y 1J4

("the City")

AND:

Markui Contracting Ltd. (50%)
228 Drysdale Boulevard
Kelowna, BC V1V 1X1

AND

John & Sarina Weisbeck (50%)
890 Wellington Court
Kelowna, BC V1Y 8J2

(the "Owner")

WHEREAS:

- A. The Owner has applied to the City to develop the Owner's Lands herein defined on Appendix A and is in accordance with the City's Subdivision and Development Bylaw providing water, sewage, drainage or Highway facilities, or a combination of such facilities, that will serve the Owner's Lands;
- B. A portion of the water, sewage, drainage, or Highway facilities (herein defined as "Excess or Extended Services") will serve the Benefiting Lands herein defined on Appendix B, which Benefiting Lands do not include the Owner's Lands;
- C. The City considers that its costs to provide the Excess or Extended Services in whole or in part are excessive, and requires the Owner of the Owner's Lands, and the owners of any other lands that, in the opinion of the City, will benefit from the Excess or Extended Services, to pay the cost of the Excess or Extended Services;
- D. The City is authorized to enter into this Agreement under Section 939 of the Local Government Act;
- E. The Council of the City has by way of Bylaw No. 6519, as amended or replaced from time to time, set the rate of interest referred to under Section 939(8) of the Local Government Act and in paragraph 3 of this agreement;

THIS AGREEMENT IS EVIDENCE THAT in consideration of the \$10.00 the mutual covenants and agreements made by each of the parties to the other as set out in this agreement, and for other valuable consideration (the receipt and sufficiency of which is hereby acknowledged) the City and the Owner covenant and agree as follows:

Interpretation

1. In this agreement

- (a) "Benefiting Lands" means the lands other than the Owner's Lands that:
 - (i) in the opinion of the City, will be served by the Excess or Extended Services, which Benefiting Lands are, subject to paragraph 1(a)(ii), legally described on Appendix B;
 - (ii) may be connected to the Excess or Extended Services after completion of those Excess or Extended Services;
- (b) "Excess or Extended Services" means any combination, as shown in Appendix E, of a portion of a:
 - (i) Highway system required to be constructed and installed by the owner that will provide access to land other than the land being subdivided or developed, or
 - (ii) Water, sewage, or drainage system constructed and installed by the owner that will service land other than the land being subdivided or developed;
- (c) "Latecomer" means an Owner of Benefiting Lands;
- (d) "Owner's Lands" means those certain lands equally described in Appendix A and owned by the Owner in respect of which the Owner is constructing works and services, a portion of which systems constitutes the Excess or Extended Services that will serve the Benefiting Lands;
- (e) "Owner" in respect of real property means the registered owner of an estate in fee simple, and includes:
 - (i) the tenant for life under a registered life estate,
 - (ii) the registered holder of the last registered agreement for sale,
 - (iii) the holder or occupier of land held in the manner mentioned in Sections 356 and 357 of the Local Government Act,
- (f) Substantial Performance is the stage of completion of all the Works and Services when:
 - (i) the Works and Services are ready to be used for their intended purpose, as certified by the Consulting Engineer; and
 - (ii) the total of the incomplete, defective and deficient Works and Services can be completed at a cost as estimated by the Consulting Engineer;

and verified by the City Engineer, of no more than 3% of the total cost of the Works and Services.

Payment of Latecomer Charges During Term

2. The City shall pay to the Owner charges imposed by the City under Section 939(5)(c) of the Local Government Act based upon the formula described on Appendix C, only if and to the extent the charges are paid by the Latecomers and collected by the City during the period commencing on the date of Substantial Performance and ending on the earlier of:
 - (i) the date on which the Owner's costs in connection with the Excess or Extended Services, determined in accordance with Section 11.1 of the Subdivision and Development Servicing Bylaw 7900, have been paid to the Owner; or
 - (ii) Ten Years from the date of Substantial Performance.

Interest

3. There shall be included in the charge payable to the Latecomer under Section 939(5)(c) interest calculated annually at a rate prescribed by a Bylaw of the City, payable for the period commencing on Substantial Performance, up to the date that the connection is made or the use commences, and if paid by the Latecomer and collected by the City during the period referred to in paragraph 2, the interest shall be paid to the Owner.

Assignment or Transfer of Owner's Rights

4. This Agreement may not be assigned by the Owner without the prior written consent of the City. In the event of a dispute as to the beneficiary of this Agreement, the City may, at its option, commence an action in interpleader joining any party claiming rights under this agreement, or other parties which the City believes to be necessary or proper, and the City shall be discharged from further liability on paying the person or persons whom the court having jurisdiction over such interpleader action shall determine, and in such action the City shall be entitled to recover its reasonable legal fees and costs, which fees and costs shall constitute a lien upon all funds accrued and accruing pursuant to this Agreement.

Indemnity

5. The Owner covenants not to sue the City, its administrators, successors, assigns, directors, officers, agents, employees, servants, tenants, solicitors, consultants, and anyone else whom the City is in law liable, by reason of or arising out of or in any way connected with any error, omission, or conduct of the City in relation to the Excess or Extended Services, including, without the generality of the foregoing, a failure of the City to pass a resolution, enact a bylaw, enter into an agreement, impose a charge, calculate a charge correctly, or collect a charge under Section 939 of the Local Government Act.

Termination

6. Upon the expiration of the Term, the City shall be forever released and wholly discharged from any and all liability and obligations hereunder this agreement, or howsoever arising pertaining to the Latecomer Charges, and whether arising before or after the expiry of this Agreement.
7. Paragraphs 5 to 16 shall survive the termination of this Agreement.

Owner Representation and Warranty

8. The Owner represents and warrants to the City that the Owner has not received, claimed, demanded or collected money or any other consideration from the Latecomers for the provision, or expectation of the provision of the Excess or Extended Services, other than as contemplated and as provided for under this Agreement; and further represents and warrants that the Owner has not entered into any agreement the Latecomers for consideration in any way related to or connected directly or indirectly with the provision of the Excess or Extended Services.

Miscellaneous

9. Time is of the essence.
10. Any notice required by this Agreement will be sufficiently given if delivered by mail to the parties at the addresses first above written.
11. This Agreement will enure to the benefit of and be binding on the parties hereto and their respective successors and assigns.
12. This Agreement shall be governed by the laws of the Province of British Columbia.
13. This Agreement constitutes the entire agreement between the City and the Owner with regard to the subject matter hereof and supersedes all prior agreements, understandings, negotiations, and discussions, whether oral or written of the City with the Owner.
14. No amendment or waiver of any portion of this agreement shall be valid unless in writing and executed by the parties of this agreement. Waiver of any default by a party shall not be deemed to be a waiver of any subsequent default by that party.
15. A reference, in this Agreement to the City or the Owner includes their permitted assigns, heirs, successors, officers, employees, and agents.
16. The Owner represents and warrants to the City that:
 - (a) all necessary corporate actions and proceedings have been taken by the Owner to authorize its entry into and performance of this Agreement;
 - (b) upon execution and delivery on behalf of the Owner, this Agreement constitutes a valid and binding contractual obligation of the Owner;
 - (c) neither the execution and delivery, nor the performance, of this agreement shall breach any other agreement or obligation, or cause the Owner to be in default of any other agreement or obligation, respecting the Owner's Lands; and
 - (d) the Owner has the corporate capacity and authority to enter into and perform this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the year and date first above written.

Markui Contracting Ltd.
by its authorized signatories:

CITY OF KELOWNA
by its authorized signatories:

Mark Fruson, President

Authorized Signatory (Print Name) Mayor

J & S Weisbeck
by its authorized signatories:

John Weisbeck, Property Owner

Authorized Signatory (Print Name) City Clerk

Sarina Weisbeck, Property Owner

Appendix A to Latecomer Agreement 2250-70-71

<u>Legal Description of Owner's Land</u>	<u>Roll No.</u>	<u>KID No.</u>
Lot 2, Sec 13, Tp 26 ODYD Plan 14039	4299.000	611512
Lot 1, Sec 13, Tp 26 ODYD Plan 17448	4309.000	606738

* NOTE: Each receiving 50% of Cost Recovery.

Appendix B to Latecomer Agreement 2250-70-71

<u>Legal Description of Benefiting Lands</u>	<u>Roll No.</u>	<u>KID No.</u>
1. Lot 3, Sec 13, Tp 26 ODYD Plan 14039	4300.000	328930
2. Lot 1, Sec 13, Tp 26, ODYD Plan 13388	4296.000	125171
3.		
4.		
5.		
6.		

Appendix C to Latecomer Agreement 2250-70-71

The charges imposed by the City for the purposes of paragraph 2 will, in respect of the particular **Parcel** of the **Benefiting Lands**, be based on one of the following formula. The selection of appropriate formula will be at the sole discretion of the City.

$$\frac{\text{(Benefiting Parcel Frontage)}}{\text{(Total Benefiting Lands Frontage) + (Owner's Lands Frontage)}} \times \text{(Excess or Extended Services Cost)}$$

OR

$$\frac{\text{(Benefiting Parcel EDU's)}}{\text{(Total Benefiting Lands EDU's) + (Owner's Lands EDU's)}} \times \text{(Excess or Extended Services Cost)}$$

ROMESHA VENTURES INC.
LOT 3, SEC 13 TP 26 ODYD PLAN 14039

$$\frac{71 \text{ LOTS}}{87 \text{ LOTS} + 78 \text{ LOTS}} \times \$173,766.98 = \$74,719.80$$

TONY BALISKY
LOT 1, SEC 13, TP 26 ODYD PLAN 13388

$$\frac{16 \text{ LOTS}}{87 \text{ LOTS} + 78 \text{ LOTS}} \times \$173,766.98 = \$15,639.02$$



OVERALL DEVELOPMENT PLAN	
LOTS CONTRIBUTING TO THE GARNER ROAD SANITARY SEWER	
FRUSON	39 LOTS
WEISBERG	39 LOTS
BALISKY	16 LOTS
TOTAL	165 LOTS



APPENDIX E