

ORDINANCE NO. 70

PROVIDING FOR A RECAPTURE AGREEMENT IN CONNECTION WITH THE
REPLAT OF JOHANSEN'S BEACH

The City Council of the City of Underwood does hereby ordain as follows:

- Section 1. The Mayor and Clerk of the City of Underwood are authorized to enter into a Recapture Agreement on behalf of the City of Underwood with Vernon D. Johansen, individually and as Trustee under the Vernon D. Johansen Revocable Living Trust dated November 14, 2001.
- Section 2. The Recapture Agreement shall be in substantial conformance with the criteria as set forth in Exhibit A attached hereto.
- Section 3. The Recapture Agreement shall be drafted by and/or reviewed by the Underwood City Attorney before it is executed on behalf of the City of Underwood.

Dated: December 4, 2006

/s/ Bert Kinzler

Mayor

Attest:

/s/ Anna Kiser

City Clerk

EXHIBIT A

RECAPTURING CONSTRUCTION COSTS

Section 1. Findings of Fact and Purpose

The development of new residential, commercial and industrial areas within the city is frequently hampered by a diversity of ownership within the areas to be developed. This diversity of ownership requires any developer who wishes to provide public sewer and water access to his or her property to construct such sewer and water facilities adjacent to property owned by other competing owners. The owners of such adjacent property not only receive free sewer and water access but obtain an unfair competitive advantage in that the free access gives them a windfall increase in their property values. The developer, on the other hand, must pay not only the proportional costs of the sewer and water access to his or her property but must also pay the costs of providing the access to his or her competitors. While the city could assess for the costs of these improvements, this process would pass on to the public some costs which the developer would otherwise pay, especially in situations where the improved properties become tax delinquent. The purpose of this document is to alleviate the problems set forth above and to promote the orderly development of the city, the equitable distribution of development costs and the minimization of public costs for development.

Section 2. Definitions.

For the purposes of this document, the following terms will have the meanings set forth hereinafter:

Developer – shall mean any owner of land who builds a sewer or water extension to service that land.

Recapture – shall mean the repayment of a developer's costs for engineering and constructing that part of a sewer or water extension which is installed at the developer's cost, which is dedicated to and accepted by the city and to which a user, other than the city, the developer or the developer's grantees, successors or assigns, may later connect.

Recapture agreement – shall mean an agreement between a developer and the city, which provides for recapture and which contains all the terms and provisions required by this document.

Recapture fee – shall be that fee which is established by a recapture agreement and which is computed so that the ratio of the recapture fee to the total costs of the engineering and construction of a sewer or water extension shall be no greater than the ratio of the user's lot abutting the sewer or water extension to the total number of lots abutting the sewer or water extension.

Sewer extension – shall mean any extension of the city’s sanitary sewer system, which extension is capable of serving more than one commercial, residential or industrial unit of service.

Water extension – shall mean any extension of the city’s water system which is capable of serving more than one commercial, residential or industrial user.

Termination of a sewer or water extension – shall mean that end of a sewer or water extension which the developer does not connect to a city sanitary sewer.

User – shall mean any person who connects a commercial, industrial or residential unit of service to a sewer or water extension.

Section 3. Procedures.

A. Developers seeking recapture. Any developer seeking recapture shall apply to the Director of Public Works for the city and shall supply to him or her the following information.

- (1) A description of the location of the proposed sewer extension or water extension;
- (2) A legal description of the land abutting the proposed sewer extension or water extension;
- (3) A legal description of the land owned by the developer and served by the proposed sewer extension or water extension;
- (4) A legal description of the land from which the developer hopes to obtain recapture and a list of the owners of that land;
- (5) A detailed estimate of the engineering, legal, other costs and construction for the proposed sewer extension or street extension;
- (6) The developer’s name, address and telephone number; and
- (7) Any and all other information requested by the Director of Public Works.

B. Review of requested recapture. Upon receiving all requested information, the Director of Public Works shall review the requested recapture and shall make a recommendation on the proposed recapture to the city council. The director shall attempt to notify owners of the affected property. If approved by the city council, the developer and the city shall enter into a recapture agreement which shall provide, in addition to the terms and conditions of this document:

- (1) During the term of the recapture agreement, the city will require any user of the proposed sewer or water extension, except for the city, the developer or his or her grantees, successors and assigns, to pay all applicable recapture fees, which will then be paid over by the city to the developer;

- (2) Payment of applicable recapture fees will be required prior to the issuance of a building permit for any improvements requiring a connection to the proposed sewer or water extension;
- (3) The developer will provide a complete and final statement of all costs for the engineering, legal, construction and other costs of the sewer or water extension within 30 days from the completion of construction;
- (4) The developer will unconditionally dedicate the sewer or water extension to the city within 30 days from the completion of construction;
- (5) The developer will construct the sewer or water extension to the specifications of the City Public Works Department and the State Department of Natural Resources after having the sewer or water extension plans approved by both agencies, if necessary;
- (6) Construction shall be completed within a time limit set by said public works department;
- (7) The developer will indemnify and hold the city, its officers, agents and employees harmless from any negligence or error, whether such negligence is that of the city, its agents and employees or of other, and whether such negligence or error concerns the collection of recapture fees, the issuance of building permits, the construction or use of the sewer extension or water extension or connection thereto, the interpretation of this document or the enforcement or failure to enforce this document;
- (8) The developer will provide, within 30 days from completion of the sewer extension or water extension the computation of recapture fees for each potential user, which computation shall, when approved by the Public Works Department, be established as recapture fees under this division. The Public Works Department's decision as to the amount and computation of recapture fees shall be final;
- (9) The developer will pay all costs, damages and attorney's fees incurred by the city, its officers, agents or employees as a result of the recapture agreement or as a result of any legal actions brought by a user against the city challenging this division. The developer will indemnify and hold the city, its agents, officers and employees harmless in the event that this division or any recaptures and recapture agreements, or any parts thereof, are deemed unconstitutional, void, illegal or otherwise invalid by any court of competent jurisdiction;
- (10) The recapture agreement shall terminate along with any potential user's obligation to pay recapture fees not later than ten (10) years from the date the recapture agreement is signed;
- (11) The dedication of the sewer extension or water extension may not be conditioned upon the validity of the recapture agreement or the payment of recapture fees;
- (12) The recapture agreement shall not be interpreted as a contract between the city and the developer, and the developer shall have no

- cause of action against the city, its agents or employees for breach of contract or for other cause of action based on a contract;
- (13) Such other terms and conditions as may be required by the Public Works Department and by this document shall apply.

Section 4. Limitations to recapture agreement.

- A. Recapture fees shall not apply to any portion of a sewer or water extension which extends from beyond the furthest end of the developer's frontage on the sewer or water extension to the extension's termination.
- B. A developer who connects a new sewer or water extension to an existing extension shall not pay a recapture fee to the developer of the existing sewer or water extension.
- C. No recapture agreement shall apply, and no recapture fees shall be due from any user who connects to a sewer or water extension from land which was acquired from the developer by the user or his or her predecessors after the date the recapture agreement was signed.
- D. When the developer purchases land subject to a recapture fee under a recapture agreement signed by that developer, any right to collect a recapture fee from that land shall be forever terminated.
- E. No developer shall have a claim, cause of action or recovery against the city, its agents, employees or departments as a result of the failure of the city, its agents, employees or departments to collect a recapture fee and no developer shall have any claim, cause of action or other recovery against the city, its agents, employees or departments under any recapture agreement or under this document.
- F. All sewer or water extensions subject to recapture agreements must serve the entire contiguous parcel of land owned by the developer in such a manner that no further sewer or water extensions are necessary for full development of his or her land.

Section 5. Enforcement and Interpretation.

- A. No person, other than a developer, his or her grantees, successors, assigns or the city, shall become a user of a sewer or water extension, which is subject to a recapture agreement, without first paying to the city all applicable recapture fees.

- B. No building permit will be issued for any use of land, which use will require a connection to a sewer or water extension constructed by a developer under a recapture agreement, until all applicable recapture fees are paid to the city.
- C. No recapture fees shall be paid over by the city for any connection made by a user before the proposed sewer or water extension is completed to the satisfaction of the City's Public Works Department. In the event that the extension is not completed to the satisfaction of the City Public Works Department, the recapture fees collected shall be returned to the user or, if already paid to the developer, shall be refunded by the developer.
- D. In any case where a user's land is abutted by two or more sewer or water extensions which are subject to recapture agreements, or where a user's land is abutted by one sewer or water line which is subject to a recapture agreement and another sewer or water line which is not subject to a recapture agreement, the Department of Public Works shall determine to which sewer or water line extension the user shall connect; and recapture fees shall be paid, or not paid, accordingly. Where any user's land abuts the same sewer or water line extension on two or more sides, the Department of Public Works shall determine to which side the user shall connect, and recapture fees shall be determined only on the basis of the lots abutting that side. The Department's determination shall be based upon its opinion as to which connection is most beneficial to the entire sewer or water system. In the event that there is no greater benefit to the system derived from connection to either side, sewer or water extension, the user shall be allowed to connect to either.
- E. Recapture fees shall be in addition to all other connection, service or use fees, taxes or assessments which may be charged by the city.
- F. Recapture fees collected by the city shall be mailed to the developer at the address shown in the recapture agreement, unless the developer has specifically informed the Department of Public Works to send recapture fees to another address. Recapture fees returned to the Department of Public Works or not claimed by the developer shall be forfeited to the city.