



To: Norman City Council

Thru: Jeff Bryant, City Attorney

From: Beth Muckala, Assistant City Attorney

Date: July 17, 2018

Subject: Relationship between the Development and Recoupment Processes;
Application of Recoupment to Parcels of Various Uses

BACKGROUND:

During the June 12, 2018 City Council meeting, questions were raised regarding the relationship between the City of Norman's development process and how it relates to the its recoupment ordinance, codified in Sections 16-601 through 16-603 in the City Code ("Recoupment Ordinance"). Further, there was inquiry regarding the application of the Recoupment Ordinance to unplatted parcels upon which residences (as opposed to commercial development) have already been constructed.

The purpose of this memorandum is to:

- (A) Explain the Recoupment Ordinance's origin, purpose, scope and application;
- (B) Describe the relationship between the Recoupment Ordinance and the City of Norman's development process, and the particular role that platting plays in those processes; and
- (C) Discuss questions that have arisen regarding the City's exercise of its recoupment rights, including an evaluation of any need to amend the Recoupment Ordinance, as codified at Sections 16-601 through 16-603 of the City Code.

DISCUSSION:

I. Scope and History of the Recoupment Ordinance

Sections 16-601 through 16-603 were adopted February 11, 1997 through the approval of Ordinance O-9697-31 ("Recoupment Ordinance"). At this time, the City's observation was that current regulations requiring that a developing parcel owner to improve half of an arterial street abutting only the developing property was resulting in substantial "gaps," in street development, necessitating the City's completion of "gap" paving projects to correct the inconsistencies. This process of street improvement was observed to be costly and inefficient, and responsible for unsatisfactory street conditions giving rise to concerns for public safety and welfare. The Recoupment Ordinance created a process whereby a party funding the improvements was provided a mechanism to recoup that cost as "development fees" when other parcels abutting the same arterial street were later developed.

office memorandum

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Section 16-601 of the Norman City Code declares that, “[a] property owner(s) is responsible for all costs of improvements to all arterial streets abutting his property in compliance with the City of Norman Street Standards and Subdivision Regulations, as amended.” This statement is unequivocal in its application to all property owners, as it makes no distinction in terms of the use of any particular parcel. Thus, this responsibility relates to all types of parcels, whether a commercial enterprise, industrial use, or residence exists upon it. Modeled in conformity with state legislation found at Okla.Stat. tit. 11 § 45-104(C), the City’s requirement that developing landowners be responsible for street improvements as a precondition of platting is a valid exercise of the City’s police power.¹

Section 16-602 provides that an abutting parcel owner, the City, or both may improve arterial streets beyond the boundary of their property voluntarily, and that where funds other than City funds are used, an agreement must be entered into delineating the boundaries and scope of the project, and creating a “map and a list” of “all abutting properties subject to recoupment.”

Section 16-603 set forth the manner in which recoupment is to proceed and type and amount of recoupable costs. This section has been amended multiple times since its 1997 passage. The current version identifies the following recoupable costs:

- (1) all right-of-way costs (including temporary and permanent easements);
- (2) engineering and surveying costs;
- (3) utility adjustments or relocation (unless previously constructed by the property owner in accordance with City guidelines);
- (4) excavation and subgrade preparation
- (5) storm sewer installation or relocation (including culverts and bridges);
- (6) four-lane pavement construction and turn lanes (in accordance with the City Transportation Plan);
- (7) signalization;
- (8) curbs and gutters;
- (9) sidewalks;
- (10) lighting;
- (11) signage and other traffic control devices;
- (12) “other amenities, as might be required”.

A City administrative fee of two percent (2%) is also added to total of these costs.

¹ In *Atkinson, et al. v. City of Norman, Oklahoma*, CJ-2005-748W, the Oklahoma District Court of Cleveland County, Oklahoma, through Judge Lori Walkley, found as a matter of law:

Based upon a reading of the City’s Charter, the ordinance at issue was enacted with the proper legal authority under the City’s general police powers. The ordinance is not at odds with State Statutes, particularly those codified at Title 11 of the Oklahoma Statutes. . . . [I]n the present case, the ordinance is, on its face reasonably related to the objective being sought and

See February 2, 2017 Order Granting City of Norman’s Motion for Summary Judgment. This ruling was not appealed (“Atkinson Order”).

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The Recoupment Ordinance has been amended four times since its passage. The most recent amendment to 16-603, adopted in September of 2010, struck an important balance in distributing certain funding benefits to both the City and its residents by giving relief to abutting property owners where the City was successful in obtaining bond or federal funding sources for the project. With this amendment, 16-603 now states:

It is the intent of this section to assess against an abutting property owner those costs that would normally be borne by the land developer² at the time the recoupment project is declared. However, it is recognized that multiple funding sources are often utilized to complete arterial street projects and that the City does not intend to collect as a recoupable cost any funds in excess of those needed to complete the designated recoupment project. To that end, a recoupable cost shall not include those costs that are funded by general obligation bonds or funds from any other governmental entity which are not subject to repayment by the City. Further, proceeds from general obligation bonds that are to be applied to a voter approved project shall be applied pro-rata on a linear foot basis to all property owners abutting the project when calculating recoupable project costs. (emphasis added).

Thus, where a recoupment project utilizes bond or federal funds, such amounts are deducted from the eligible recoupment costs and the benefit of the City's efforts in securing the alternative funding is passed directly on to the parcel owner, who is then responsible for only a portion of the cost, rather than the entire cost, associated with their responsibility for street improvements.

Section 16-603 also sets forth the calculation to determine each tract's "total arterial street improvement cost participation expense", which is demonstrated in sub-part (d) as follows:

$$(1) \quad \text{Pro-Rata Share} = \frac{a-b}{c} \times d$$

Where a = Total Improvement Costs, as identified in Section 16-603(a)

b = Total Permanent Right-of-Way Costs

c = Total Front Footage of the Project

And d = Front Footage of Subject Tract

(2) Right-of-Way Cost = Actual price paid for acquisition of permanent right-of-way from subject tract.

(3) Adjustment of (1) and (2) by The Engineering News Record Construction Cost Index since date of certification by City Engineer.

The total payments calculated in (1), (2), and (3) above, shall become a liability against property subsequent to the contracting for street improvements. All such obligations shall be paid in full before the filing of a plat.

² The term "developer" or "development" is not defined within Article VI, Chapter 16 of the City Code, where the Recoupment Ordinance was codified, though it is defined within other portions of the Code.

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“Unless earlier paid, each defined tract’s share of the participation cost shall continue as an obligation of the property for its determined share of the total street improvement costs” plus an “appropriate inflation/deflation increase” that is provided for by the Recoupment Ordinance, at sub-part (d)(3) shown above. One hundred percent of this participation cost may be recovered if the parcel is developed within the fifteen years following completion of the road improvements. The pro rata share set forth in (1) above is reduced by twenty percent (20%) every year thereafter, and those costs are entirely waived after twenty years.

II. Relationship to the City’s Development Process

Just as 16-601 makes it clear that *all* parcel owners are responsible for street improvement costs, 16-601 clearly states that this responsibility is further governed by “City of Norman Street Standards and Subdivision Regulations, as amended.” The City’s Subdivision Regulations are codified in Chapter 19 of the City Code.

Because Chapter 19 has defined “development” and Chapter 19 was specifically incorporated into the Recoupment Ordinance, Chapter 19’s definition, set forth in Section 19-210(K), should be applied to the Recoupment Ordinance:

Development: The erection, construction, or change of use of buildings; or the erection or construction of any additions to existing buildings³ where outer walls are added or altered as to location, but not including alterations or remodeling of buildings where said outer walls are not added or altered as to location. As it relates to water quality protection, any man-made change to improved or unimproved real estate, including, but not limited to, buildings or other structures, mining, dredging, filling, grading, paving, excavation, drilling, or storage of equipment or materials.⁴

Further, Section 19-101 declares the purpose of the City’s development regulations as follows:

The subdivision of land is the first step in the process of development. The regulation of land subdividing within a formalized procedure provides for the evolution of a contract between the land owner (developer) and governmental entity acting in behalf of the public and for the benefit of subsequent individual owners and/or tenants. Precise commitments concerning a described geographic area of proposed development are specifically set forth in relation to and in accord with graphic and written documentation as filed of record. . . .

³ Notably, the definition of “development” does *not* presume application to only vacant lots, but also applies where certain alteration to existing construction occurs.

⁴ Additionally, though the definitions in Section 16-902 of the City Code apply only to Article IX, which addresses Wastewater Plan Investment Fees, as they are located within Chapter 16 with the Recoupment Ordinance, they may also be instructive here in that its definition of “[d]evelopment” necessarily includes both “[r]esidential development and [n]onresidential development.”

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This chapter intends to require that all land located in the City of Norman be platted in conformance with these provisions prior to the actual accomplishment of development and that an approved final plat shall be filed of record prior to the issuance of a required building permit for the development of any and all institutional, industrial, commercial, and residential uses (emphasis added).

Therefore, “development” pursuant to Chapter 19 only occurs following the filing of a final plat.

The City’s “Plat Preparation and Approval Procedure” is set forth in Article III of Chapter 19, which requires the approval and filing of preliminary and final plats. Unlike the preliminary plat (discussed in Sections 19-301 through 19-307), Section 19-309(B) provides that a final plat may not be submitted for consideration unless it includes “specifications in final form for all required public improvements” and states that “[n]o installation or construction of any public utility or required public improvement” may occur without the approval of the City’s Public Works department. Specifically, Section 19-310 requires⁵ that the final plat show the dedicated public rights of way and planned public improvements as follows:

15. The accurate outline of any property which is offered for dedication for public use, and of all property that may be reserved by covenant, in the deeds for the common use of the property owners in the subdivisions, with the purpose indicated thereon. All lands dedicated to the public other than streets or roads shall be marked ‘dedicated to the public’;

16. The location of all building lines, setback lines, easements of record, and easements being dedicated for public services or utilities with dimensions to the nearest foot showing their location;

Sections 19-314 and 19-315 provide that the required public improvements may be accomplished either by the developing parcel owner’s construction of the improvements or by the provision of a “corporate surety bond, cash, certificate of deposition, or irrevocable letter of credit . . . for all required improvements.” As set forth in Sections 19-316 through 19-319, the City’s acceptance of these public improvements is accomplished by approval and acceptance of the final plat, which is thereafter recorded at the parcel owners’ expense upon receipt of the City Council’s approval of the plat (and deferral, bond or surety, as applicable).

III. Platting and Recoupment Obligations

As it relates to the recoupment process, platting is significant in two ways:

(1) Previously platted parcels are generally exempt from the Recoupment Ordinance. Parcels that have already platted in accordance with Chapter 19 have already submitted to the

⁵ Again, this requirement has already been found to track the state’s preconditions to platting set forth in state statute, at Okla. Stat. tit. 11 § 45-104(C). See Atkinson Order.

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process whereby they dedicated, i.e. donated, necessary public rights of way and either constructed the public improvements associated with their parcel's development or otherwise paid a deferral of those costs to the City. The Recoupment Ordinance provides:

The only exceptions shall be those properties which have previously constructed arterial streets adjacent to such properties according to City of Norman requirements or those which have made payments for deferred construction prior to the City entering an agreement or commencing design of a designated street.

Thus, to avoid a parcel owner paying for improvements to the same platted parcel more than once, the Recoupment Ordinance provides that the "corresponding pro-rata share" of developed parcels "shall [instead] be the responsibility of the City."

(2) Platting by the parcel owner is the trigger for their responsibility to pay the recoupment participation costs associated with their parcel. Platting's ability to "trigger" the recoupment process is directly referenced in the Recoupment Ordinance in two places: 16-603(f) and 16-603(g). Sub-part (f) explains that any owner of a recoupment parcel may cause the "tract's total obligation" to be paid upon the City's determination of that amount. Otherwise, such costs are due (either inflated or deflated based upon application of the factor specified in 16-603(d)(3)) "**prior to the filing of a final plat** for any portion of the subject tract"⁶ Further, 16-603(g) empowers the Director of Public Works to establish "platting procedures" when a final plat is submitted after the declaration of a recoupment district but before the recoupment project is completed. The purpose of these particular procedures is meant to assure "property owners and developers that plat approval may proceed so as not to retard the progress of private development plans, while, at the same time, to provide financial security to the City that the property's recoupment share will be paid upon final ascertainment of the amount owed." These provisions are entirely consistent with Chapter 19's development procedure (which is, again, referenced and adopted, as amended, in Section 16-601 of the Recoupment Ordinance), and provides that street improvements, including the dedication of all public rights-of-way and easements, be either constructed or funded by the developing parcel owner, prior to the filing of a final plat pursuant to Chapter 19.

Though platting triggers recoupment obligations, it is important to note that the City Code does not require platting for all types of development or subdivision. In fact, Section 19-103 specifically defines the reach of Chapter 19 by stating that it "shall apply to the following forms of subdividing and/or developing of land within the corporate limits of the City":

- A. The dividing of land into two (2) or more tracts, lots, sites, or parcels, any part of which, when subdivided, shall contain less than forty (40) acres in area.
- B. The redividing of previously platted land into tracts, lots, sites, or parcels.
- C. The development of land in a manner not in strict conformance with the plat and plans filed of record.

⁶ Section 16-603(d) specifies that the filing of a rural certificate of survey ("COS") for "agriculturally zoned land . . . will not require repayment of the pro-rata share of the recoupment[]" but does "require repayment of the right-of-way cost for each tract."

- D. The dedicating, vacating, or reserving of any public or private easement through any tract of land regardless of the area involved, including those for use of public and private utility companies.
- E. The dedicating or reserving of any street or alley or any part thereof through any tract of land regardless of the area involved.
- F. Planned unit development as defined in this Code.
- G. The development of any parcel of land classified by zoning district as single family residential, multifamily residential, commercial, industrial, recreational, or institutional.
- H. Any tract, lot, site or parcel of land, regardless of size, which is to be developed and on which exists or will exist, because of such contemplated development, any topographic feature or improvement requiring the dedication or reservation of any easement, public or private, under the provisions of this chapter.

Excepted from these general categories are parcels in excess of 40 acres and agricultural parcels. Further exceptions to responsibility for making street improvements may also be found in further portions of Chapter 19, within Article VI (“Variations and Exceptions”). For example, Section 19-604 allows that “whenever there is a tract of land of less than three (3) acres comprising the total area of a single ownership which is to be re-subdivided into three (3) or fewer lots where all required public improvements are in place and accepted by the City, the proposed subdivision may be exempt from the procedural provisions of this chapter and a preliminary and final plat may not be required” Additionally, pursuant to Section 19-607, RE and Rural Cluster Planned Unit Development zoned lands are excluded from responsibility to improve abutting section line roads when certain conditions are met.

IV. Development Options of a Parcel Owner

The City Council has recently requested guidance regarding the applicability of the Recoupment Ordinance to unplatted parcels upon which residences have already been constructed. As Chapter 19 and the Recoupment Ordinance are currently drafted, and have been drafted since passage of the Recoupment Ordinance in 1997, these parcels are firmly within the purview of the Recoupment Ordinance, and historically the City has exercised its recoupment power in accordance with this fact. Section 16-601 determines the applicability of the Recoupment Ordinance and broadly declares that all parcel owners are responsible for the improvement of abutting arterial streets. However, the universal application of the Recoupment Ordinance, and triggering of its obligations, was carefully and purposefully restricted by the exceptions and jurisdictional boundaries referenced above.

Addressing these, and first, parcels that “have previously constructed [abutting] arterial streets” will not have to pay to do so again. Second, parcels that do not opt to develop their property for twenty years following completion of the road improvements have their recoupment participation costs entirely waived, even if they develop in the future. Third, Chapter 19 does not require platting for agricultural parcels or parcels over 40 acres in size, and even if it is generally required by the Chapter, a specific variation or exception to responsibility for costs

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may still be applicable to a particular parcel pursuant to exceptions otherwise set forth in the City Code.

Thus, where a residence has already been constructed upon a parcel that remains unplatted, application of a recoupment obligation would not affect that parcel owner, except where that parcel owner elects to develop the property in a manner invoking Chapter 19's jurisdiction within twenty years following completion of the applicable recoupment project. Thus, where an owner remains in that home for twenty years without further "developing" that parcel as defined in Section 19-210(K), and even where that parcel is sold to one or more third parties, that parcel's recoupment obligation will never come due. However, where an unplatted parcel is zoned residential and the parcel owner wishes to rezone the parcel so that it may either develop that parcel or sell it to a developer for a more intense use, the necessary improvements or construction upon that parcel to accomplish that more intense development would very likely trigger an existing recoupment obligation.

V. Options for Alterations or Application of the Recoupment Ordinance

Importantly, application of the Recoupment Ordinance is not automatic, but occurs through a process where the City Council first identifies and declares a project, and later assesses eligible costs as to each parcel within the recoupment project. There is a strong public interest in maintaining the consistent and equitable application of the City's recoupment power. In general, the Recoupment Ordinance seeks to set a level playing field for all parcel owners so that those owners that develop in advance of others are not penalized by being forced to pay for improvements that benefit later developers. Decisions regarding its application should take into account historical practice and consistency as well as the equitable considerations raised by particular circumstances.

Should the City wish to categorically exclude any particular type of development from the Recoupment Ordinance's reach, an amendment would be required and could be implemented in any number of ways, including an amendment to 16-601's universal application. Any such amendment, however, would constitute a large alteration of the City's historical approach to determining responsibility for arterial street improvements and could implicate several portions of the City Code. If the City wishes to proceed with such an amendment, it is recommended that a comprehensive analysis of Chapters 16 and 19, and possibly Chapter 22, be performed to determine the additional provisions that may be affected by such an amendment.

CONCLUSION:

The Recoupment Ordinance has been carefully crafted and refined through several previous amendments to achieve distribution of the cost burden for the improvement of arterial streets between the City and certain developing parcel owners in an equitable and efficient manner. All unplatted parcels may be subject to recoupment obligations; however, certain exceptions and jurisdiction limits are placed in the City Code to limit the reach and application of recoupment obligations. Further, the City may exercise its discretion in its application of the Recoupment Ordinance on a project-by-project or parcel-by-parcel basis; thus, while the City may consider an

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amendment to effectuate a change in its application, such is not necessary where the City opts instead to evaluate situations where it may exercise the discretion the Recoupment Ordinance already allows.

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