



ORDINANCE NO. 3400-14

An Ordinance Concerning Sewage and Storm System Surcharge, Backup Prevention and Claims, Amending Ordinance No. 1506-88 (Chapter 14.08 Everett Municipal Code)

WHEREAS,

A. The City operates a sewer system to convey, treat, and discharge sanitary sewage and stormwater from properties throughout the City.

B. The City owned and operated its sewer and stormwater system since 1897. The City provides this basic governmental service pursuant to Chapter 35.92 RCW and other law. The City's system, not unlike over 700 other communities in the United States, includes a combined sewer system in the north end of the City, which serves about 6,500 acres and which was constructed between 1897 and 1963. The combined system conveys both sewage and stormwater together for treatment at the City's Wastewater Pollution Control Facility. This combined system is in contrast to the City's more recently built separated system, which serves the south 11,500 acres of the City and in which sanitary sewage is conveyed separately from stormwater.

C. The combined system contains about 2,785 manholes and 145 miles of 2 to 84 inch diameter pipelines. The size and grade of the pipes and other infrastructure in the combined system, among other things, determine its capacity for handling water. Events of heavy and intense rain can exceed the capacity of the combined system. Not unlike in other cities with combined systems, this means that excess water from various sources can backup or otherwise make its way onto private property, causing property damage.

D. The City inspects and maintains its sewers on a schedule intended to keep the system functioning properly, but sewers, whether in Everett or elsewhere, nonetheless occasionally back up and cause flooding onto properties or into structures. The area served by the separated system is less vulnerable to exceeding system capacity during heavy rains than the area served by the combined system. Nevertheless, extraordinary rain events can still overwhelm stormwater infrastructure in the separated area.

E. The question of the capacity of the combined system, and to a lesser extent the separated system, is a policy question that City Councils, Mayors, and Public Works Directors have grappled with for decades. In particular, increasing the capacity of the combined system is an expensive undertaking, in light of the age and extent of the system. This historical legacy has required the City from time to time to make fundamental policy decisions about capital improvements for the combined system, including balancing risks and advantages of authorizing expensive projects with the attendant increases in the rate burden on City citizens. These policy

decisions, including prioritization of capital projects and their costs, are reflected in part in recent decades in the City's Comprehensive Sewer Plan, adopted by City Council in 1999 and 2006. Accordingly, the City is upgrading combined sewers to address potential backups and overflows, but sewer improvements are expensive and take many years to complete; therefore, Everett, like more than 700 other communities nationwide, notwithstanding these efforts, will continue to have combined sewers in parts of the City for the foreseeable future.

F. On August 29, 2013, and September 6, 2013, heavy rain storms hit the City. According to some calculations, these storms approached or exceeded 200-year storms. Regardless of the characterization of the storms, the storms were in excess of the capacity of the combined system and, at least in some places, the separated system as well. Consequently, some houses and other buildings experienced backups and flooding, resulting in property damage.

G. The City has strong legal defenses against storm event claims, such as the claims from the storms of August 29, 2013, and September 6, 2013, for at least the following reasons:

1. Due to the nature of the storms, the storms constitute an "Act of God." Further, the policy decisions in connection with the capacity of the City's sewer and stormwater systems and whether to finance and build capital projects are discretionary decisions that cannot subject the City to liability, in accordance with the "discretionary immunity" doctrine.
2. Some claims concern damage to improvements that were not built with required building permits.
3. Some claims concern damage to improvements not allowed under the City's zoning code.
4. Some claims concern situations where the claimant was required to have a backwater valve pursuant to the Everett Municipal Code, but claimant did not install it.
5. Some claims concern property damage that arises at least in part because of acts or omissions of the claimant.

H. Recognizing the unpredictability and expense of litigating the claims from the storms of August 29, 2013, and September 6, 2013, the City Council determined by Resolution 6658 adopted September 18, 2013, upon the recommendation of the Mayor, to authorize the Mayor to direct City staff to compromise and settle the claims, in accordance with the terms of Resolution 6658. As with the settlements on claims paid after earlier storm events in past years, the City did not admit or otherwise acknowledge liability.

I. In conjunction with the storm events of August 29, 2013, and September 6, 2013, the City received claims totaling more than \$4,000,000.

J. The City has explored options to reduce the risk of sewer backups, including sewage backwater prevention devices, such as backwater valves, and have found that when properly installed and maintained, these can significantly reduce the risk of sewer backups.

K. The City Council finds that public health, safety, and welfare are best protected by requiring (1) sewage backwater prevention devices for all connections with plumbing fixtures at an elevation below the elevation of the upstream sewer manhole; and (2) authorizing the public works department to establish programs for the installation of sewage backwater prevention devices.

L. The City Council finds that, in light of the City's strong defenses to storm event claims, including the fact that the capacity of the sewer and storm system is the result of discretionary policy decisions made by generations of City Councils and Mayors, the City Council should not authorize settlement of claims in excess of \$25,000 to the property owner and \$5,000 per tenant unit, as set forth in this ordinance.

NOW, THEREFORE, the City of Everett does ordain,

Section 1. Ordinance 1506-88 § 12 (EMC 14.08.180) which reads:

Backwater valve.

Whenever a situation exists involving an unusual danger of "backup" the city may require a minimum elevation at which the house drain may be discharged to the public sewer. Drains or sewers below such minimum elevation shall be lifted by artificial means. It shall be unlawful for any person to connect any basement with a city sewer without installing a backwater valve at the outlet. All backwater valves shall be installed in a vault to facilitate maintenance. The effective operation of the backwater valve shall be the responsibility of the owner of the sewer or drain.

Is amended to read:

System Surcharge, Backwater Prevention and Claims.

A. Definitions.

1. "Approved Sewage Backwater Prevention Device" means a backwater prevention device of a type that has been categorically approved by Director policy.
2. "ABWD" means an Approved Sewage Backwater Prevention Device.
3. "deadline date" is defined in section C.
4. "Designated Connection" means a (i) connection to the sewer system, usually a side sewer, that, because of the characteristics of the sewer system and topography, has been identified by the Department as a connection that requires an ABWD and (ii) the owner of record of the property served by connection has been mailed a written notice from the Department that the connection has been so designated. Upon mailing, the connection is a Designated Connection for the life of the connection,

regardless of whether the ownership of property changes, unless the Department later determines that the sewer system has been upgraded sufficiently so that the ABWD is no longer necessary.

5. “Department” means public works department.
6. “Director” means public works or utilities director.
7. “Properly installed” means installed by a licensed contractor or plumber or installed by the Department in accordance with section C.
8. “Served Property” is defined in section G.3.
9. “System Surcharge Event” is defined in section G.4.

B. Backwater Prevention Device Requirement.

1. New Connections. Unless otherwise permitted by the Director, it is unlawful for any person to connect to the City sewer system with plumbing fixtures at an elevation below the elevation of the upstream sewer manhole rim without properly installed ABWDs sufficient to prevent sewer backups, which usually will be backwater valves at outlets. ABWDs shall be installed to facilitate future access and maintenance. Unless the Director determines that the City will maintain an ABWD, the effective operation of ABWDs shall be the responsibility of the owner of the sewer or drain. This section B.1 applies regardless of whether the connection is a Designated Connection or not.
2. Designated Connections. All Designated Connections must have properly installed and maintained ABWDs sufficient to prevent sewer backups. This applies regardless of whether the Designated Connections are new or existing.

C. Installation of ABWDs for Designated Connections

1. Private Installation for Designated Connections. The Department is authorized to offer an ABWD program to owners of property served by Designated Connections to install an ABWD in their Designated Connection in accordance with this section. This program may include reasonable rebate, reimbursement or other mechanisms as established by the Department. Unless determined otherwise by the Director on a case-by-case basis, the maximum amount of the rebate per property will be the same for all Designated Connections and will be based on the cost of one ABWD installation for a single family residence. The ABWD shall be installed by a licensed contractor or plumber in accordance with standards, and following an inspection protocol, established by the Director. As established by the Director, the ABWD shall be installed either outside the structure being served by the ABWD in a location that is easily accessible

for inspection and maintenance, or installed within a building, whichever location in the opinion of the Department best prevents basement flooding.

2. Department Installation of ABWDs in Designated Connections. The Department, on a schedule to be determined by the Department, is authorized to cause ABWDs to be installed in Designated Connections that have not had ABWDs privately installed pursuant to section C.1. ABWDs installed pursuant to this section typically will be installed at a point in the lateral sewer that is within public right-of-way, with the specific location to be determined solely at the Department's discretion. The Director has discretion to not install ABWDs at Designated Connections when such installation is deemed by the Director to not be in the best interests of the City.
3. Deadline Date Notice. On a schedule determined by the Department in connection with the progress of the installation programs under sections C.1 and C.2, the Department will mail notices to all property owners served by Designated Connections. This mailing may occur in phases. The notice will be deemed received three days after mailing. The notice shall contain a prominently displayed deadline date for installation of the ABWD at the property owner's Designated Connection. This deadline shall be no earlier than six months after the mailing of the notice. This date is defined as the "deadline date." The Director may extend the deadline date. A property owner may participate in the program after the deadline date. However, as set forth in section E, the City will not pay claims related to sewer backup from a System Surcharge Event after the deadline date for property served by Designated Connection that did not have properly installed and approved ABWDs at the time the backup occurred.
4. Designated Connection Owner Ultimately Responsible for ABWD Installation. Although the programs described in sections C.1 and C.2 are intended to help property owners to install ABWDs, the owner of the property served by the Designated Connection is ultimately responsible for ABWD installation. This responsibility remains regardless of whether the program described in section C.2 is made available at a Designated Connection.

D. ABWD Maintenance

Unless otherwise determined by Director on a case-by-case basis, the Department will only inspect and maintain ABWDs that are within City rights of way or within City property. Property owners shall maintain all backwater prevention devices located within their property.

E. Claims Related to Sewage Backup

1. Backup Claims Related to Designated Connections with ABWDs.

- a. The City will compromise and settle claims for damage arising from sewer backups from System Surcharge Events at properties that are served by Designated Connections with ABWDs, but only if the ABWD is maintained by the City and only to the extent that the ABWD fails because of improper City maintenance. This compromise and settlement will be in accordance with section G.
 - b. The City will not pay sewage backup claims for damage arising from sewer backups from System Surcharge Events at properties that are served by Designated Connections with ABWDs not maintained by the City.
2. Backup Claims Related to Designated Connections without ABWDs. The City will not pay sewage backup claims from System Surcharge Events related to properties served by Designated Connections that do not have properly maintained and installed ABWDs at the time of the sewer backup, except for the following limited circumstances:
 - a. Claims Prior to Deadline Date. The City will compromise and settle claims for damage arising from sewer backups that occur prior to a Designated Connection's deadline date. This compromise and settlement will be in accordance with section G.
 - b. City Negligence. The City will compromise and settle claims arising from sewer backups to the extent caused by the City's negligence.
3. Backup Claims Related to Properties That Are Not Served by Designated Connections. The City will compromise and settle claims for damage arising from sewer backups from System Surcharge Events at properties that are not served by Designated Connections. This compromise and settlement will be in accordance with section G.
4. Backup Water Not From City System.
 - a. The City will not pay backup claims for property damage caused by water not from the City's sewer system or from the City's stormwater system.
 - b. If there exist downspouts or other direct stormwater connections into a combined sewer, the City will not pay damage claims to the extent such damage could have prevented by disconnection of those downspouts or other direct stormwater connections from the combined sewer. This applies regardless of what the downspout

or other direct stormwater connection drains, and includes without limitation all new and old impervious surfaces.

- c. This section E.4 applies regardless of whether the property is served by a Designated Connection or not.

F. Claims Related to Overland Surcharge and Overflow

The City will compromise and settle claims for damage arising from overland surcharge and system overflow from a System Surcharge Event. This compromise and settlement will be in accordance with section G. This includes, for example, claims arising from overflow from manholes in the City's combined sewer system and claims arising from overland stormwater overflows in the City's separated sewer system. This does not include claims arising from sewer backups through a side sewer, which are determined under section E.

G. Settlement of Claims

To the extent authorized by section E and section F, the Mayor is authorized to settle claims in accordance with the following:

1. Settlement Only for Water from City System. The City will only settle claims to the extent that damage is caused by water from the City's sewer system or from the City's stormwater system.
2. Settlement Capped at \$25,000 Per Served Property. The City may pay up to \$25,000 per Served Property per System Surcharge Event to the Served Property's owner, for all damage to real and personal property on the Served Property.
3. Settlement Capped at \$5,000 per Tenant Unit. In addition to the \$25,000 per Served Property in section G.2, the City may pay up to \$5,000 for each tenant unit to tenants per System Surcharge Event, for the tenant's personal property on the Served Property. This limit also applies to storage units and condominium units.
4. Definition of System Surcharge Event. For the purposes of this section, a "System Surcharge Event" is a rain or snow storm or other weather event that causes the Everett sewer or stormwater system, in whole or in part, to surcharge or overflow, causing sewer backups and/or other related occurrences. If multiple storms cause surcharges and overflows within a reasonably concentrated number of days, all such storms are considered a single System Surcharge Event. Accordingly, storms a week apart that, for example, cause a Served Property to suffer damage by sewer backup and by overland overflows from a manhole all constitute a single Storm Surcharge Event, and the total damage is subject to the \$25,000 limit in section G.2 and the \$5,000 limit in G.3.

5. Definition of Served Property. For the purposes of this section, “Served Property” is real property served by the City sewer or stormwater system, subject to the following provisions: (a) all buildings on a single lot or tax parcel constitute a single Served Property; (b) all buildings on adjoining lots or tax parcels under common ownership collectively constitute a single Served Property; and (c) a condominium complex is a single Served Property. For example, a duplex, triplex, multifamily building, apartment building, office building or similar building on a single lot is a single Served Property. For example, a group of apartment buildings under common ownership on adjoining lots together constitute a single Served Property.
6. No Admission of Liability. The settlement authority granted in this section G is not an admission of any liability. This authority is granted in recognition of the costs of litigation. This settlement authority does not preclude the Mayor from determining to not settle with any or all claimants.
7. Adjustment of Settlement Caps. The City Attorney and the Department will periodically review the settlement caps in section G.2 and G.3 and will recommend to City Council adjustments to the settlement caps, either upward or downward.
8. Insurance. Unless otherwise determined by the City Attorney, (a) the City will not settle claims unless the owner of the property has tendered the damage claim to the owner’s insurance and (b) the City will not settle subrogation claims.
9. Additional Authority. If the City Attorney and the Department determine that it is in the best interests of the City to settle a claim in excess of the settlement caps in section G.2 and G.3, then the City Attorney shall submit such settlement to City Council for approval or disapproval.
10. Standard Claims Adjustment Procedures. Except as otherwise provided in this section, the City will apply its normal claims adjusting processes in the resolution of claims against the City.

H. Downspout and Other Connections

Stormwater from new impervious surfaces shall not be discharged, through downspouts or other direct pipe connections, into a combined sewer, including a lateral line or side sewer connected to the City’s combined sewer system. The Director may grant exceptions to this requirement on a case by case basis, at the sole discretion of the Director, where there are no practicable alternatives to discharging stormwater to the sewer system. Owners who have been granted an exception under this section shall ensure that their stormwater discharge and ABWD are properly located and installed to prevent stormwater from flooding the

structure. Under no circumstances will the City assume financial responsibility for damage that results from the failure to comply with this section.

I. Other Backup Prevention Programs

The Department is authorized to take steps to help its sewer customers prevent and minimize damage from sewage backups, including providing customers with information on side sewer maintenance, downspout disconnection, sewage backwater prevention and mitigation. The Department is authorized to establish a disconnection program to help property owners disconnect downspouts and other connections to the sewer system.

Section 2. Severability. Should any section, paragraph, clause or phrase of this Ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this Ordinance be pre-empted by state or federal law or regulations, this shall not affect the validity of the remaining portions of this Ordinance or its application to other persons or circumstances.

Section 3. Conflict. In the event there is a conflict between the provisions of this Ordinance and any other City ordinance, the provisions of this Ordinance shall control.

Section 4. Corrections. The City Clerk and the codifiers of this Ordinance are authorized to make necessary corrections to this Ordinance including, but not limited to, the correction of scrivener's/clerical errors, references, ordinance numbering, section/subsection number and any references thereto.

Section 5. General Duty. It is expressly the purpose of this Ordinance to provide for and promote the health, safety and welfare of the general public and not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by the terms of this Ordinance. It is the specific intent of this Ordinance that no provision or any term used in this Ordinance is intended to impose any duty whatsoever upon the City or any of its officers or employees. Nothing contained in this Ordinance is intended nor shall be construed to create or form the basis of any liability on the part of the City, or its officers, employees or agents, for any injury or damage resulting from any action or inaction on the part of the City related in any manner to the enforcement of this Ordinance by its officers, employees or agents.

ATTEST: Sharon Fuller
CITY CLERK

Ray Stephanson
Ray Stephanson, Mayor

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