

RESOLUTION NO. 04-19

BEFORE THE COMMON COUNCIL OF THE CITY OF WEST LAFAYETTE, INDIANA

**A Resolution Approving Sewer Service Area Agreement
Between The City Of West Lafayette And American Suburban Utilities**

WHEREAS, the City of West Lafayette, Indiana (the “City”), owns and operates a sewer utility inside and outside the municipal corporate limits of the City; and

WHEREAS, American Suburban Utilities, Inc. (“ASU”) owns and operates a sewer utility in certain rural areas pursuant to certain certificates of territorial authority issued by the Indiana Utility Regulatory Commission (“IURC”); and

WHEREAS, the City and ASU, from time to time, have had disputes over sewer service territories; and

WHEREAS, the City and ASU engaged in negotiations to settle those disputes over sewer service territory; and

WHEREAS, the City and ASU have reached a sewer service territory agreement in that certain Service Territory Agreement attached hereto and incorporated herein as “Exhibit A” (the “Agreement”); and

WHEREAS, the Common Council of the City (the “Common Council”) finds that the Agreement will resolve the disputes with ASU for the next 25 years, will allow for orderly development and extension of sewer utility infrastructure, will avoid the installation of patchwork sewer utility infrastructure, will offer stability and reasonable assurances to recover the cost of necessary sewer utility infrastructure investments, and will avoid expensive litigation over sewer utility territories; and

WHEREAS, the Common Council believes the Agreement presents a reasonable resolution of the sewer utility disputes that the Common Council believes is in the public interest.

NOW THEREFORE, BE IT RESOLVED, by the Common Council of the City of West Lafayette that:


- Section 1. Agreement Approved. The Agreement is hereby approved.
- Section 2. Submission to IURC. The City shall work with ASU to seek approval of the Agreement from IURC in accordance with the terms of the Agreement.
- Section 3. Incorporation of Recitals. The recitals preceding this Resolution are incorporated herein by this reference.
- Section 4. Effectiveness. This Resolution shall become effective upon final passage.


INTRODUCED ON THE FIRST READING ON THE 10 DAY OF May, 2019.

MOTION TO ADOPT MADE BY COUNCILOR Keen, AND SECONDED BY COUNCILOR DeBoer.

DULY RESOLVED, PASSED, AND ADOPTED BY THE COMMON COUNCIL OF THE CITY OF WEST LAFAYETTE, INDIANA, ON THE 10 DAY OF May, 2019, HAVING BEEN PASSED BY A VOTE OF 9 IN FAVOR AND 0, OPPOSED, THE ROLL CALL VOTE BEING:

	AYE	NAY	ABSENT	ABSTAIN
Bunder	✓			
DeBoer	✓			
Dietrich	✓			
Jones	✓			
Keen	✓			
Leverenz	✓			
Sanders	✓			
Thomas			✓	
Wang	✓			



Peter Bunder, Presiding Officer

Attest:

Sana G. Booker, Clerk

PRESENTED BY ME TO THE MAYOR OF THE CITY OF WEST LAFAYETTE, INDIANA ON THE 7 DAY OF May, 2019.

Sana G. Booker, Clerk

THIS RESOLUTION APPROVED AND SIGNED BY ME ON THE 13 DAY OF May, 2019.


John R. Dennis, Mayor

Attest:

Sana G. Booker, Clerk

"EXHIBIT A"

SERVICE TERRITORY AGREEMENT

This Service Territory Agreement (this "Agreement") is entered into by and between the City of West Lafayette, Indiana (the "City" or "West Lafayette") and American Suburban Utilities, Inc. ("ASU") (the City and ASU, together, the "Parties" and individually, a "Party") effective as of the latest date of execution set forth below (the "Effective Date").

RECITALS:

A. The City is a second class city which provides sewer utility service in an around its corporate limits in Tippecanoe County, Indiana, and such sewer utility service area covers "regulated territory" within the meaning of Ind. Code 8-1.5-6-2 of the City (the "Regulated Territory").

B. ASU is a "public utility" within the meaning of Ind. Code 8-1-2-1 and a "sewage disposal company" within the meaning of Ind. Code 8-1-2-89 that is subject to the jurisdiction of the Indiana Utility Regulatory Commission ("IURC").

C. Pursuant to certificates of territorial authority issued by the IURC under Ind. Code 8-1-2-89 (collectively, the "CTA"), ASU provides sewer utility service to rural areas in Tippecanoe County, Indiana, and in certain instances to areas that the City has annexed since issuance of the CTA that are now within the municipal corporate limits of the City.

D. The IURC granted ASU's most recent CTA in Cause No. 42889 by order issued on January 18, 2006.

E. The sewer service area covered by ASU's CTA is within the City's Regulated Territory.

F. The Parties have often competed against one another for sewer utility customers,

which has created problems for infrastructure planning and development and has created disputes over which Party should render sewer utility service in certain areas.

G. The Parties have conducted negotiations concerning such disputes and have reached an agreement on the terms and conditions they deem acceptable to resolve such disputes, which are set forth in this Agreement.

H. The Parties each believe that this Agreement is in the best interest of the Parties and the public because this Agreement, if approved by the IURC, will provide better and more efficient infrastructure planning and deployment, avoid constant conflict over the rendering of sewer service between ASU and the City, avoid duplication of facilities, and provide greater service territory certainty, which will foster economic development.

I. For purposes of this Agreement, the term "sewer utility service" shall mean the collection, treatment, purification and/or disposal in a sanitary manner of liquid and solid waste, sewage, night soil, or industrial waste and shall be deemed to include "sewage disposal service" as that term is defined in Ind. Code 8-1-2-89.

J. For purposes of this Agreement, the term "Approval Date" shall mean date upon which this Agreement is approved by the IURC.

TERMS AND CONDITIONS:

NOW, THEREFORE, in consideration of the terms, covenants and promises contained in this Agreement, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Division of Sewer Utility Service Areas. Subject to approval by the IURC, the Parties agree to divide their existing sewer utility service areas as set forth in the map attached hereto and incorporated herein as **Exhibit A**.

2. Term. This Agreement shall commence on the Effective Date (subject to the conditions set forth herein) and be in effect for twenty-five (25) years from the Approval Date.

3. American Suburban Sewer Service Area. ASU shall have the exclusive right as to the City to provide sewer utility service to all areas within the area labeled "American Suburban Sewer Service Area" on **Exhibit A** for twenty-five (25) years following the Approval Date.

4. West Lafayette Sewer Service Area. The City shall have the exclusive right as to ASU to provide sewer utility service to all areas within the areas labeled "West Lafayette Sewer Service Area" and "PRF Area" on **Exhibit A** for twenty-five (25) years following the Approval Date, and the City shall also have the exclusive right to provide sewer utility service to all other areas within its corporate limits that are not otherwise contained in the area labeled "American Suburban Sewer Service Area" on **Exhibit A**.

5. Legal Descriptions. In conjunction with efforts to obtain IURC approval pursuant to Paragraph 11 of this Agreement, the City agrees to pay T-Bird Engineering to prepare legal descriptions of the agreed service territories described above, including the PRF Area, and set forth in **Exhibit A**. The Parties agree to incorporate those legal descriptions in this Agreement as **Exhibit B** and into their IURC filing and to adhere to it following IURC approval.

6. Payment. After the Approval Date, the City shall pay ASU \$1.00 per EDU annually for the rendering of sewer utility service within the hatched area depicted on and labeled as the "PRF Area" on **Exhibit A** for the period extending from November 1, 2009 through the date five (5) years after the Approval Date. The initial payment shall be made no later than ten (10) days after the first anniversary of the Approval Date and shall include payment for the period of November 1, 2009 to first anniversary of the Approval Date. Subsequent payments shall be made no later than ten (10) days after each additional anniversary of the Approval Date through the end

of the five (5) year period.

7. Reporting. For a period of five (5) years from the Approval Date, the City shall annually provide a list of all new connections and the equivalent dwelling units associated therewith, within the PRF Area within ten (10) days of each anniversary of the Approval Date.

8. Service in Other Party's Territory. If either Party commences service after the Approval Date in the other Party's service territory (as depicted on **Exhibit A** and described on **Exhibit B**) without the consent of the other Party, the customer served would be deemed to be the customer of the Party in whose service territory it is located, with the service provided by the breaching Party. The breaching Party shall pay to the non-breaching Party 50% of the breaching Party's then-existing rate for such customer as a wholesale rate for treatment expenses on an annual basis for twenty-five (25) years from the date of connection. The annual payment shall be made within ten (10) days of each anniversary of the Approval Date. A breaching Party shall annually provide a list of all connections in the other Party's service area when making its annual payment. The rights and obligations set forth in this Paragraph 8 shall survive the termination of this Agreement.

9. Enforcement; Costs. In any action relating to the enforcement or breach of this Agreement (except as described below in Paragraph 11), the Prevailing Party shall be entitled to recover reasonable attorneys' fees and other costs incurred, in addition to the relief described above in Paragraph 8 and any other appropriate relief. "Prevailing Party" shall include, but not be limited to, a Party who dismisses an action for recovery under this Agreement in exchange for payment of the sums allegedly due, performance of covenants allegedly breached, or consideration substantially equal to the relief sought in the action.

10. City Council Approval. This Agreement is conditional upon its approval by the

Common Council of the City of West Lafayette (the "City Council"). The City shall seek such approval as soon as is reasonably practical after receipt of a copy of this Agreement executed by ASU.

11. IURC Approval. This Agreement is also conditional upon approval by the IURC under Ind. Code § 8-1.5-6-10. The Parties agree to cooperate in seeking such approval, including the initiation of an IURC proceeding seeking approval of this Agreement within 90 days after the City Council approves this Agreement, with each Party to bear its own costs and attorneys' fees in so doing. As of the Effective Date, ASU relinquishes whatever rights it has to serve the 64-lot Three Meadows development, which is located in what is shown as the West Lafayette Sewer Service Area on **Exhibit A**. After the Effective Date and prior to IURC approval, the Parties shall take no action that would frustrate the purposes and intent of this Agreement. In the event that IURC approval is not obtained, the Agreement will be null and void, and the Parties will return to their respective positions prior to the execution of the Agreement.

12. Incorporation of Recitals. The recitals immediately preceding this Agreement are incorporated herein by this reference.

13. Notice. All notices and other communications under this Agreement shall be in writing and shall be deemed given (a) when delivered personally by hand with written confirmation of receipt by other than automatic means, (b) when sent by facsimile or email; or (c) one (1) business day following the day sent by an recognized overnight courier with written confirmation of receipt, in each case at the following addresses, facsimile numbers and email addresses (or to such other address, facsimile number or email address as a Party may specify by notice given pursuant to this Paragraph 13):

If to ASU:

American Suburban Utilities, Inc.
Attn: President
3350 W 250 N
West Lafayette, IN 47906
inbox@asucorp.com

With copy to:

Nicholas K. Kile
Barnes & Thornburg
11 S. Meridian St.
Indianapolis, IN 46204
nkile@btlaw.com

If to the City:

City of West Lafayette
Attn: Utility Director
500 S. River Rd.
West Lafayette, IN 47906
dhenderson@westlafayette.in.gov

With copy to:

David T. McGimpsey
Bingham Greenebaum Doll LLP
212 W. 6th Street
Jasper, IN 47546
dmcgimpsey@bgdlegal.com

14. Assignment; Successors and Assigns. This Agreement may be assigned by either Party upon the consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed. If either Party seeks to transfer its sewer utility assets, this Agreement must be included as an integral part of the transfer of sewer utility assets. This Agreement shall inure to the benefit of and be binding upon the heirs, administrators, successors, and assigns of each of the Parties.

15. Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, and all such counterparts together shall constitute one

Agreement. A facsimile signature shall be equivalent to and as binding as an original signature.

16. Authorization. Each person signing this Agreement on behalf of a Party or Parties represents and warrants to the other Parties that he is duly and fully authorized to enter into and execute this Agreement and that all of its terms are binding commitments on behalf of himself and the Party for which he purports to act.

17. Understanding Terms; Drafting. Each of the Parties has read this Agreement, has consulted with an attorney concerning this Agreement, and knows and understands its terms and contents. In view of such reading, counseling and understanding, and because each Party also has had the opportunity to negotiate fully the terms of this Agreement, its terms shall be interpreted and construed without any presumption or inferences against a party causing this Agreement or any part of it to be drafted.

18. Entire Agreement; Amendment and Waiver. This Agreement contains the entire agreement between the Parties hereto, and fully supersedes any and all prior agreements or understandings between the Parties hereto pertaining to the subject matter hereof. No statements, promises or inducements made by or on behalf of a party or counsel for a party that are not contained herein shall be binding. No amendment or modification to this Agreement shall be effective unless and until agreed to in writing and signed by both the Party hereto against whom the amendment or modification is sought to be enforced and approval of such modification is received from the IURC. No waiver of a provision of this Agreement will be deemed to be or will constitute a waiver of any other provision of this Agreement. A waiver will be effective only in the specific instance and for the purpose for which it was given, and will not constitute a continuing waiver.

19. Choice of Law; Venue. This Agreement shall be governed by and construed in

accordance with the laws of the State of Indiana, without reference to its choice of law principles. Any action for breach of or to enforce or rescind this Agreement shall be brought only in the Tippecanoe County Superior Court or before the IURC, as appropriate.

20. Resolution. This Agreement is entered into in order to resolve all claims and potential claims related to the subject matter hereof between the Parties. Nothing in this Agreement or in the conduct of the Parties arising from this Agreement shall be considered an admission of liability of any kind, and the Parties expressly deny any such liability.

SERVICE TERRITORY AGREEMENT

SIGNATURE PAGE – AMERICAN SUBURBAN UTILITIES, INC.

AMERICAN SUBURBAN UTILITIES, INC.

Date: 2 APR 19

By: 
Scott L. Lods, President

SERVICE TERRITORY AGREEMENT

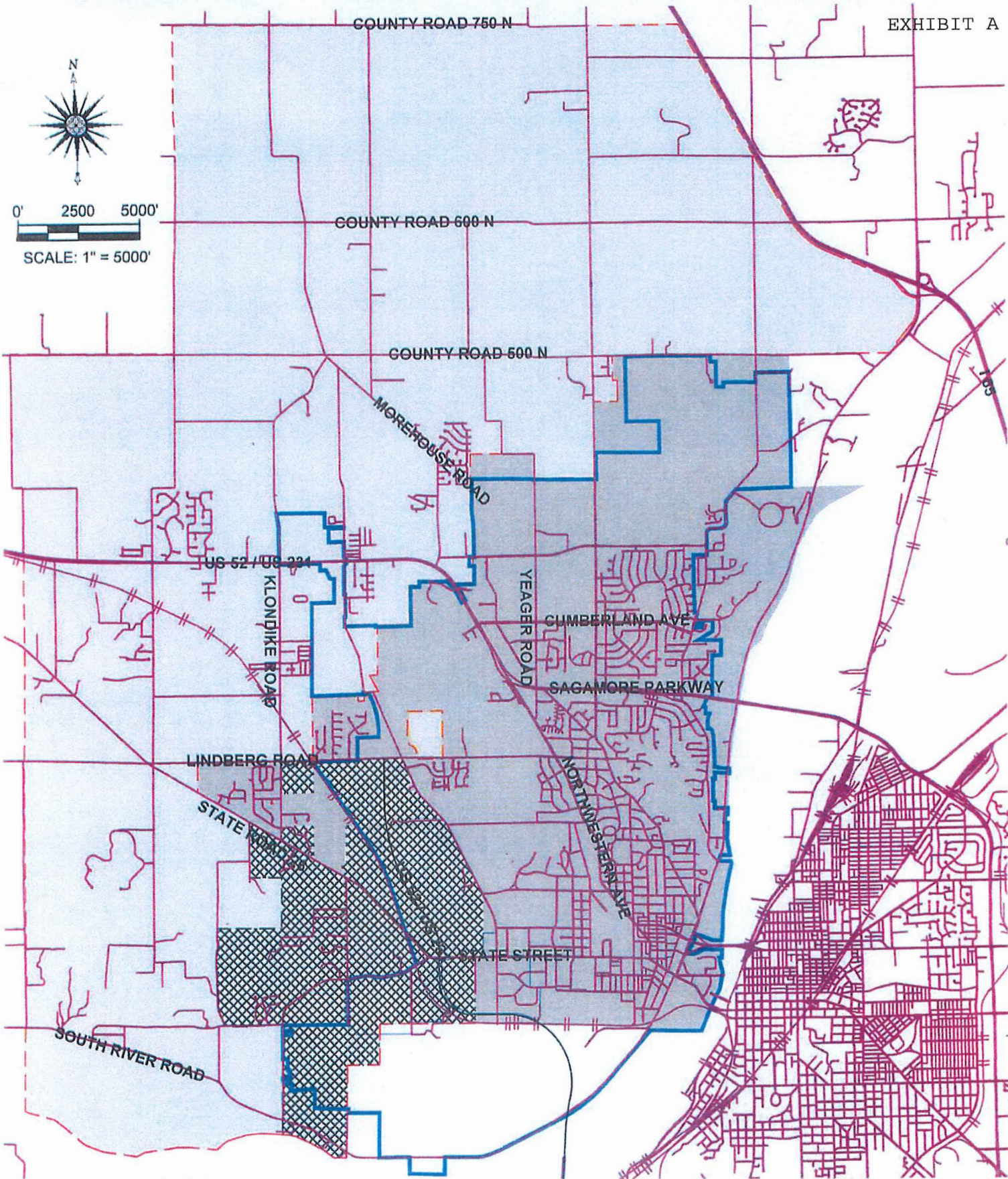
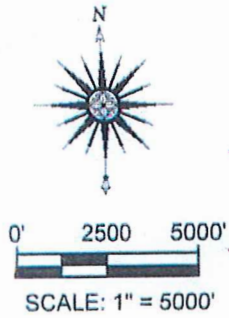
SIGNATURE PAGE – CITY OF WEST LAFAYETTE, INDIANA

CITY OF WEST LAFAYETTE, INDIANA





Date: 4/9/2019

By:  _____

John R. Dennis, Mayor



LEGEND

-  AMERICAN SUBURBAN SEWER SERVICE AREA
-  WEST LAFAYETTE CORPORATE LIMITS
-  WEST LAFAYETTE SEWER SERVICE AREA
-  PRF AREA (WEST LAFAYETTE SEWER SERVICE AREA)