

TOWN OF TIMNATH
ORDINANCE NO. 9, SERIES 2012

**AN EMERGENCY ORDINANCE APPROVING THE FOURTH AMENDMENT TO THE
FEBRUARY 17, 2009 INTERGOVERNMENTAL AGREEMENT ENTERED INTO
BETWEEN THE TOWN OF TIMNATH AND THE CITY OF FORT COLLINS**

WHEREAS, the Town of Timnath ("Timnath") and the City of Fort Collins ("Fort Collins") entered into an intergovernmental agreement relating to annexation, growth management and related issues on February 17, 2009 ("IGA"); and

WHEREAS, the Timnath Town Council approved the IGA by motion at its regular Council meeting on February 11, 2009; and

WHEREAS, the Timnath Town Council approved the First Amendment to Intergovernmental Agreement by Ordinance on March 3, 2010; and

WHEREAS, the Timnath Town Council approved the Second Amendment to Intergovernmental Agreement by Ordinance on February 2, 2011; and

WHEREAS, the Timnath Town Council approved the Third Amendment to Intergovernmental Agreement by Ordinance on February 12, 2012; and

WHEREAS, Timnath and Fort Collins has determined the development of the Boxelder Overflow Project originally contemplated as described in the IGA is neither feasible nor desirable, and Timnath and Fort Collins have identified a mutually beneficial alternative approach to address flood impacts in the Boxelder Creek Basin as it impacts Timnath and Fort Collins, referred to as the Boxelder Creek Flood Mitigation Projects; and

WHEREAS, in order to move forward cooperatively to further investigate, conceptually plan and preliminarily design the Boxelder Creek Flood Mitigation Projects, the parties desire to amend the IGA and apply toward said Projects a portion of the funds previously paid into an escrow account by Fort Collins in accordance with the IGA.

WHEREAS, the Timnath Development Authority ("TDA") is simultaneously entering into a related agreement (the "TDA Agreement") with the Boxelder Stormwater Authority (the "Authority"), which is contingent on the award of a loan from the Colorado Water Conservation Board, and delay in the application of funds in accordance with the proposed Fourth Amendment to the IGA could jeopardize the ability of the Authority to secure the loan, which would in turn jeopardize the TDA Agreement.

NOW, THEREFORE, BE IT ORDAINED by the Town Council of the Town of Timnath, Colorado, that:

Section 1. Approval of the Fourth Amendment to the IGA. The Fourth Amendment to Intergovernmental Agreement Regarding Cooperation on Annexation, Growth Management and Related Issues ("Amendment"), a true copy of which shall be attached hereto and incorporated herein by reference, is hereby approved. The Mayor is hereby authorized to execute the Amendment, and the Town Clerk is directed to affix the seal of the Town thereto and attest same.

Section 2. Severability. If any article, section, paragraph, sentence, clause, or phrase of this Ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the validity or constitutionality of the remaining portions of this Ordinance. The Council hereby declares that it would have passed this Ordinance and each part or parts hereof irrespective of the fact that any one part or any parts be declared unconstitutional or invalid.

Section 3. Repealer. All ordinances or resolutions, or parts thereof, in conflict with this Ordinance are hereby repealed, provided that such repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

Section 4. Effective Date. This Ordinance shall take effect upon adoption at first reading, as provided by Section 3.5.5 of the Charter.

INTRODUCED, MOVED, SECONDED AND FINALLY ADOPTED ON FIRST READING FOLLOWING PUBLIC HEARING BY THE TIMNATH TOWN COUNCIL ON NOVEMBER 13, 2012.

TOWN OF TIMNATH



Jill Grossman-Belisle, Mayor

ATTEST:



Milissa Peters, Town Clerk

FOURTH AMENDMENT TO INTERGOVERNMENTAL AGREEMENT
(Regarding Cooperation on Annexation, Growth Management and Related Issues)

THIS FOURTH AMENDMENT TO INTERGOVERNMENTAL AGREEMENT (“Amendment”) is made and entered into this 13th day of November, 2012, by and between THE TOWN OF TIMNATH, COLORADO, a Colorado home rule town (hereinafter referred to as “Timnath”), and THE CITY OF FORT COLLINS, COLORADO, a Colorado home rule municipal corporation (hereinafter referred to as “Fort Collins”).

RECITALS

WHEREAS, on February 17, 2009, Timnath and Fort Collins entered into an intergovernmental agreement relating to annexation, growth management and related issues, which agreement resolved certain differences that had arisen between the parties regarding a variety of planning and growth management issues (the “Intergovernmental Agreement”); and

WHEREAS, on March 3, 2010, the parties executed a First Amendment to Intergovernmental Agreement which extended the periods of time within which Fort Collins was to amend the Fort Collins Growth Management Area (“FCGMA”) and Timnath was to provide written notice to Fort Collins of its intent to exercise its option to purchase the Vangbo Property, as those terms are defined in the Intergovernmental Agreement; and

WHEREAS, on February 2, 2011, the parties executed a Second Amendment to Intergovernmental Agreement, which extended the period of time within which Fort Collins was to amend the FCGMA; and

WHEREAS, on February 21, 2012, the parties executed a Third Amendment to Intergovernmental Agreement, which extended until February 12, 2013, the period of time within which both parties will amend the boundaries of their growth management areas; and

WHEREAS, the parties have determined that development of the Boxelder Overflow Project originally contemplated by Timnath as described in the Intergovernmental Agreement is not feasible nor desirable, and have further identified a mutually beneficial alternative approach to address flood impacts in the Boxelder Creek Basin as it impacts Timnath and Fort Collins, referred to as the Boxelder Creek Flood Mitigation Projects; and

WHEREAS, in order to move forward cooperatively to further investigate, conceptually plan and preliminarily design the Boxelder Creek Flood Mitigation Projects, the parties desire to apply toward those Projects a portion of the funds previously paid into an escrow account by Fort Collins in accordance with Article 7 of the Intergovernmental Agreement; and

WHEREAS, accordingly, the parties are entering into this Fourth Amendment to Intergovernmental Agreement so as to clarify and document their intentions and mutual rights

and responsibilities with respect to the Boxelder Overflow Project and Boxelder Creek Flood Mitigation Projects.

NOW, THEREFORE, in consideration of the mutual promises of the parties and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties agree as follows:

1. Definitions Added. Article 1 of the Intergovernmental Agreement is hereby amended to add the following new definitions:

“Boxelder Basin Regional Stormwater Authority” or “BBRSA” shall mean the regional stormwater authority formed by agreement of the Board of Commissioners of Larimer County, Colorado, Fort Collins and the Town of Wellington, Colorado entitled Intergovernmental Agreement for Stormwater Cooperation and Management by and between them and dated August 20, 2008.

“Boxelder Basin Regional Stormwater Authority Master Plan” shall mean the master plan for improvements in the Boxelder Creek Stormwater Basin adopted by and incorporated by reference as part of the intergovernmental agreement that established the BBRSA.

“Boxelder Creek Flood Mitigation Projects” shall mean the general plan for storm drainage improvements to significantly reduce the 100-Year stormwater runoff within both the BoxelderCreek Drainage Basin and the Cooper Slough Drainage Basin that contribute to the flooding potential in Boxelder Creek, which is expected to include the conceptual elements identified in Section 7.1.

“East Side Detention Facility” shall mean that particular stormwater detention facility described in Subsection 7.2(a), and work required to design, engineer and construct the same.

2. Article 7 Superseded and Replaced. Article 7 of the Intergovernmental Agreement is hereby deleted and replaced in its entirety with the following:

ARTICLE 7
BOXELDER CREEK FLOOD MITIGATION PROJECTS

7.1 Boxelder Overflow Project not Feasible nor Desirable. At the time of execution of the Intergovernmental Agreement, Timnath intended to construct the Boxelder Overflow Project, as defined in the Intergovernmental Agreement. The parties agree and hereby acknowledge that the Boxelder Overflow Project is not feasible or desirable, based on additional review by the parties, and further agree that Timnath will not proceed with said Project. Article 7 of the Intergovernmental Agreement provided for execution of a mutually agreeable easement on Fort Collins property (the “Boxelder Easement”) if required for the Boxelder Overflow Project,

and further required Fort Collins to pay the total amount Two Million Dollars (\$2,000,000) into escrow in specified installments, for use for reimbursement of Timnath for up to fifty percent of Timnath's incurred costs in the design, engineering, right-of-way acquisition and construction of the Boxelder Overflow Project. Fort Collins has placed funds in the total amount of One Million Eight Hundred Thousand Dollars (\$1,800,000) into escrow in accordance with said provisions of Article 7. Fort Collins will place the remaining Two Hundred Thousand Dollars (\$200,000) into escrow in February 2013 in accordance with the provisions and schedule outlined in the original Intergovernmental Agreement.

7.2 Boxelder Creek Flood Mitigation Projects. The parties agree and hereby acknowledge that it is in the best interest of both Fort Collins and Timnath to work cooperatively to design and construct projects along Boxelder Creek and its associated flow paths to mitigate the impacts of flooding for the mutual benefit of the parties as well as the region. Accordingly, the parties have developed a general plan for storm drainage improvements to significantly reduce the 100-Year stormwater runoff within both the BoxelderCreek Drainage Basin and the Cooper Slough Drainage Basin that contribute to the flooding potential in Boxelder Creek, which is expected to include the following conceptual elements, which are together referred to as the Boxelder Creek Flood Mitigation Projects and are to be constructed concurrently:

- (a) East Side Detention Facility/Gray Lakes Reservoirs:
 - 1. Construction of an earthen embankment (dam) and un-gated outlet to create detention storage upstream of County Road 50.
- (b) Boxelder Creek and Boxelder Creek / Larimer and Weld Canal Crossing:
 - 1. Construction of a side spill weir crossing of the Larimer and Weld canal to allow Boxelder Creek storm runoff to continue downstream (south).
 - 2. Boxelder Creek drainageway improvements adjacent to and upstream (east) of Interstate Highway 25
- (c) Boxelder Creek and Prospect Road West of I-25:
 - 1. Flood conveyance, bed and bank stabilization, stream restoration and associated improvements on Boxelder Creek from I-25 to just downstream of Prospect Road; and
 - 2. Culvert/bridge crossing(s) of Prospect Road.
- (d) Cache la Poudre Overflow:
 - 1. Construction of a side-flow spillway structure on Boxelder Creek, just downstream of Prospect Road; and
 - 2. Construction of an outfall channel and swale to convey flows to an existing oxbow of the Poudre River.

7.3 Cost Sharing.

(a) The parties agree and hereby acknowledge that it is in the best interests of both Fort Collins and Timnath to cooperate in making use of a portion of the funds deposited by Fort Collins under Article 7 of the Intergovernmental Agreement to match expenditures by

Timnath for the design, engineering, and permitting of the Boxelder Creek Flood Mitigation Projects, as specified in this Section and in Section 7.4.

Accordingly, Fort Collins and Timnath agree that Timnath or the Timnath Development Authority (“TDA”) on behalf of Timnath, shall be entitled to a portion of said escrowed funds not to exceed Two Hundred Fifty Thousand and 00/100th Dollars (\$250,000.00) to match payments by Timnath, or the TDA on behalf of Timnath, for up to fifty percent (50%) of the costs actually incurred by Timnath or the TDA to proceed with the work described in Section 7.4. Disbursement in the amount of Two Hundred Fifty Thousand and 00/100th Dollars (\$250,000.00) shall be available upon execution of this amendment by both Fort Collins and Timnath and shall be released to Timnath, or the TDA on behalf of Timnath, upon request from the escrow agent in order to allow Timnath or the TDA to proceed with the work described in Section 7.4. The parties agree to direct the escrow agent managing said funds to disburse said funds in a manner consistent with this provision. The parties acknowledge that said funds are intended as a match only to Timnath or TDA payments on invoices for the work described in Section 7.4, and any amounts not applied by Timnath or the TDA for up to fifty percent (50%) of costs for the same shall be returned to Fort Collins upon final completion of the work and final payment under the related contract for services with BBRSA. Fort Collins shall be entitled to review all invoices and other documentation related to said contract in order to verify the use of funds in accordance with this Amendment. Timnath acknowledges and agrees that, should Timnath arrange for performance by the TDA of any Timnath’s obligations hereunder, Timnath shall continue to be responsible to Fort Collins for full and satisfactory completion of any of such obligations.

(b) It is the intent of the parties that the remaining escrowed Fort Collins funds in the amount of One Million Seven Hundred Fifty Thousand and 00/100th Dollars (\$1,750,000.00), together with such remaining amounts as are not disbursed under Section 7.3(a), shall be applied toward the remaining design, engineering, right-of-way acquisition, permitting and construction of the components of the Boxelder Creek Flood Mitigation Projects, but only in the form of equal match to funds contributed by Timnath, or the TDA on behalf of Timnath, for said purposes.

(c) The total cost for construction of the Boxelder Creek Flood Mitigation Projects has not yet been determined but it is understood that it may exceed the total amount of funds in escrow plus the matching funds provided by Timnath or the TDA on behalf of Timnath.

(d) Final determination of the design of the Boxelder Creek Flood Mitigation Projects, and the costs, and cost-sharing, associated with the completion of said Projects, shall be agreed upon under a future Amendment to this Agreement.

7.4 Timnath to Contract for Services. The Boxelder Creek Flood Mitigation Projects are included in the Boxelder Basin Regional Stormwater Authority Master Plan. BBRSA has initiated preliminary design engineering for said Projects, but continuation of this design

engineering is necessary in order to determine actual design and related costs and to allow said Projects to proceed.

(a) Timnath, or the TDA on behalf of Timnath, shall contract with the BBRSA for the following services:

1. Preparation of the Feasibility Study and Final Application for a Colorado Water Conservation Board loan to BBRSA for the East Side Detention Facility which consists of the Gray Lakes Stormwater Detention Facility and accompanying improvements;
2. Complete the conceptual design of the Middle Basin (Boxelder Creek / Larimer and Weld Crossing), including modeling and collaboration with the Lake Canal Ditch Company to determine the acceptable crossing structure to accomplish the goals of the BBRSA Master Plan;
3. Initiate Final Design efforts (including Phase II of the geotechnical investigation - seismic site, seepage and stability analysis) for the East Side Detention Facility in order to prepare estimated costs for use in a loan application to the Colorado Water Conservation Board to be submitted no later than December 1, 2012; and
4. Initial coordination, meetings and preparation for United States Army Corps of Engineers permitting and coordination with the Colorado Office of the State Engineer.

(b) The work described in Subsection 7.4(a) is intended to allow BBRSA to maintain an efficient design, submittal and construction schedule focused on an expedited completion of the East Side Detention Facility in a timely manner with a targeted completion by the end of 2014.

(c) Timnath, or the TDA on behalf of Timnath, shall work with BBRSA and Fort Collins to develop an appropriate plan for payment to BBRSA of amounts required to complete the foregoing work.

(d) As part of its contractual arrangements with BBRSA, Timnath or the TDA on behalf of Timnath, shall require that BBRSA maintain appropriate documentation and make any reports, data or design deliverables produced for BBRSA available to the parties for review and use in connection with the Boxelder Creek Mitigation Projects and this Fourth Amendment to Intergovernmental Agreement.

7.5 Satisfaction of Obligations. It is the intent of the parties that the performance of the requirements of this Article 7 fully satisfies any obligation that Fort Collins may have to Timnath to contribute to the management of storm drainage waters flowing from Boxelder Creek insofar as such waters or the floodplain related thereto, may affect property within Timnath's municipal boundaries or within the TGMA. Accordingly, Timnath has released Fort Collins and its officers, employees, agents and assigns, from any and all claims or causes of action of any

kind whatsoever for any monetary damages or for any other remedy at law or in equity arising from, connected with or in any way related to the flow, blockage or diversion of storm waters from Boxelder Creek, the installation, operation and maintenance of culverts and other storm water facilities related to that portion of I-25 that is adjacent to the TGMA, or the determination of rainfall standards for areas within Timnath's municipal boundaries or the TGMA, insofar as such claim or cause of action is based upon any acts or omission of Fort Collins or any of its officers, employees, agents or assigns, on or before the Effective Date.

The parties acknowledge and agree that, in the 1980's, at Fort Collins' request, the Colorado Department of Highways (CDOT) installed two additional box culverts under I-25 at a location that would, if the culverts were opened, allow a substantially greater volume of storm runoff to flow from Boxelder Creek under I-25 and into portions of the Fort Collins GMA and municipal limits and that such increased flows could do considerable damage to property within such area and that, in order to properly manage and contain such flows, extensive new storm water facilities must be constructed. Accordingly, both parties agree that no officer, employee, agent or assign, shall attempt, directly or indirectly, at any time after the execution of this Agreement, to persuade CDOT to take any action that would reasonably be expected to result in the opening of said culverts, until such time as the Boxelder Creek Flood Mitigation Projects, or other stormwater improvements satisfactory to the parties, are complete. In addition, if a third party takes, or attempts to take, any such action prior to the completion of said projects, Timnath agrees to support Fort Collins' opposition to such action by providing a letter to CDOT to that effect upon the request of Fort Collins.

7.6 No Admission of Liability. Nothing in this Article or elsewhere in this Agreement shall in any way or manner be construed as an admission of liability by Fort Collins or its officers or employees for any claim or damages arising from or in any way related to the lack of construction of the Boxelder Overflow Project, construction of the Boxelder Flood Mitigation Projects, the overflow of waters from Boxelder Creek, FEMA's designation of certain areas within the TGMA as being within a floodplain, or any related matters, nor shall anything herein be construed as a waiver of any defenses, limitations and immunities established pursuant to the Colorado Government Immunity Act (SS24-10-101, et seq. C.R.S.), the United States and Colorado Constitutions, or under the common law or laws of the State of Colorado or of the United States, including but not limited to Section 42 U.S.C. 1983.

3. No Further Modification. Except as expressly amended by this Amendment, the Intergovernmental Agreement is unmodified and shall continue in full force and effect.

4. Binding Agreement. Both Timnath and Fort Collins intend that this Amendment shall be binding upon them.

5. Amendments. This Amendment may only be amended, changed, modified or altered in writing, signed by both parties hereto.

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6. Governing Law. This Amendment shall be governed by and construed in accordance with the laws of the State of Colorado.

7. Jointly Drafted; Rules of Construction. The parties hereto agree that this Amendment was jointly drafted, and, therefore, waive the application of any law, regulation, holding or rule of construction providing that ambiguities in an agreement or other document will be construed against the party drafting such agreement or document.

8. Defined Terms. Capitalized terms used in this Agreement but not otherwise defined herein shall have the meanings set forth in the Intergovernmental Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

THE TOWN OF TIMNATH, COLORADO

By: [Signature]
Mayor

ATTEST:

[Signature]
Town Clerk



APPROVED AS TO FORM:

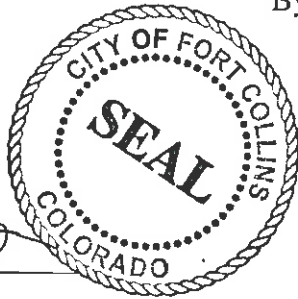
[Signature]
Town Attorney

THE CITY OF FORT COLLINS, COLORADO

By: [Signature]
Mayor

ATTEST:

[Signature]
City Clerk



APPROVED AS TO FORM:

[Signature]
Deputy City Attorney