

**TOWN OF TIMNATH
ORDINANCE NO. 6, SERIES 2014,**

**AN ORDINANCE APPROVING SIXTH AMENDMENT TO
INTERGOVERNMENTAL AGREEMENT
(Regarding Cooperation on Annexation, Growth Management and Related Issues)**

THIS SIXTH AMENDMENT TO INTERGOVERNMENTAL AGREEMENT (“Amendment”) is made and entered into this 25th day of April, 2014, 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 determined that development of the Boxelder Overflow Project originally contemplated by Timnath as described in the Intergovernmental Agreement would be neither feasible nor desirable, and 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, on November 13, 2012, the parties executed a Fourth Amendment to Intergovernmental Agreement to move forward cooperatively to further investigate, conceptually plan and preliminarily design the Boxelder Creek Flood Mitigation Projects in coordination with the Boxelder Basin Regional Stormwater Authority (BBRSA), and the parties agreed to the use of a portion of the funds previously paid into an escrow account by Fort Collins in accordance with Article 7 of the Intergovernmental Agreement to match \$250,000 in funding from Timnath for related planning and design; and

WHEREAS, on February 5, 2013, the parties executed a Fifth Amendment to Intergovernmental Agreement, which extended the period of time within which both parties will amend the boundaries of their growth management areas; and

WHEREAS, since the time of the Fourth Amendment, the parties have provided a total of \$500,000 in funds for design and engineering work for identified project components to be carried out under the direction of BBRSA, in accordance with the terms of the Fourth Amendment; and

WHEREAS, in light of the design and engineering work so completed, and the ongoing discussion and consideration of options for mutually beneficial stormwater management approaches related to the mutual purposes of the parties, the parties have now identified updated projects of mutual benefit and developed an agreed upon approach to the completion of additional improvements; and

WHEREAS, accordingly, the parties are entering into this Sixth Amendment to Intergovernmental Agreement so as to clarify and document their intentions and mutual rights and responsibilities with respect to the 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. Article 7 Superseded and Replaced. Article 7 of the Intergovernmental Agreement, as adopted in the Fourth Amendment, is hereby deleted and replaced in its entirety with the following:

ARTICLE 7
BOXELDER CREEK FLOOD MITIGATION PROJECTS

7.1 Escrowed Funds. As originally agreed by the parties, Fort Collins paid the total amount of Two Million Dollars (\$2,000,000) into escrow in specified installments, originally intended 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. Funds in the amount of Two Hundred and Fifty Thousand Dollars (\$250,000) have been

withdrawn from escrow and applied by the parties to certain purposes consistent with and as described in the Fourth Amendment. Remaining funds in the amount of One Million Seven Hundred and Fifty Dollars (\$1,750,000) (the "Escrowed Funds") shall be available to the parties for use in accordance with and as set forth in this Article.

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 and in coordination with the BBRSA 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 Boxelder Creek Drainage Basin and the Cooper Slough Drainage Basin that contribute to the flooding potential in Boxelder Creek. The plan consists of one set of projects to be designed and constructed by the BBRSA and a second set of projects to be funded, designed and constructed by Fort Collins and Timnath. The two sets of projects are together referred to as the Boxelder Creek Flood Mitigation Projects, the individual components of which are more fully described below:

(a) BBRSA Projects. The BBRSA Projects shall include the following:

(1) East Side Detention Facility ("ESDF"): A stormwater detention facility to be constructed on the east side of Interstate 25 adjacent to the Gray Lakes Reservoirs that includes an earthen embankment between County Road 50 and County Road 52, an un-gated 12' x 8' box culvert outfall, a reinforced spillway, and related appurtenances;

(2) Larimer Weld Canal Crossing Structure ("LWCCS"): A defined weir on the south side of the Larimer Weld Canal at its crossing with Boxelder Creek crossing located approximately one mile south of ESDF that includes a lowered canal embankment fortified with grouted rip rap and related appurtenances; and

(3) County Road 52 Improvements: The installation of four 4' x 20' concrete box culverts under County Road 52, tree removal along the north side of the roadway, grading an area within the adjacent golf course north of County Road 52 and related appurtenances.

(b) Fort Collins/Timnath Projects. The Fort Collins/Timnath Projects shall include the following:

(1) Lake Canal Crossing of Boxelder Creek: A siphon and associated appurtenances to transport flows in the Lake Canal beneath Boxelder Creek just west of Interstate Highway 25;

(2) Boxelder Creek Outfall and Prospect Road Improvements: A side spill weir (split flow channel) and flood conveyance channel on Boxelder Creek upstream of Prospect Road along with six 12' x 4' concrete box culverts beneath Prospect Road west of Interstate Highway 25, associated utility relocations (i.e. electric, water, wastewater, gas and telecommunications), roadway restoration, and a flood conveyance channel south of Prospect Road to the Poudre River and associated appurtenances; and

(3) Boxelder Creek at Interstate Highway 25: Drainageway and channel improvements and grading adjacent to and upstream (east) of Interstate Highway 25 and the opening of two existing blocked culverts beneath Interstate Highway 25.

7.3 Cost Sharing. 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 the Escrowed Funds to match expenditures by Timnath for the design, engineering, and permitting of the Fort Collins/Timnath Projects, as specified in this Section and consistent with this Article.

(a) The parties agree that Fort Collins shall be entitled to use a portion of the Escrowed Funds not to exceed Two Hundred Thousand and 00/100th Dollars (\$200,000.00) to match a payment by Timnath, or the TDA on behalf of Timnath for costs that have been or will be incurred by Fort Collins to proceed with the design, engineering and right-of-way acquisition for the Fort Collins/Timnath Projects described in Section 7.2(b), as more specifically described in Section 7.5. Escrowed Funds in the amount of Two Hundred Thousand and 00/100th Dollars (\$200,000.00) shall be released to Fort Collins by the escrow agent upon request for the purposes described in this Section 7.3(a). Timnath, or the TDA on behalf of Timnath, shall provide funding in the amount of Two Hundred Thousand and 00/100th Dollars (\$200,000.00) to Fort Collins within ten (10) business days of the release of escrow funds to Fort Collins. 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 provided by Timnath are intended to pay fifty percent (50%) of the invoices and payments made by Fort Collins to carry out the design, engineering and right-of-way acquisition for the Fort Collins/Timnath Projects. Timnath or the TDA on behalf of Timnath shall be entitled to review all invoices and other documentation related to said payments in order to verify the use of funds in accordance with this Article. 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) The parties agree that Fort Collins shall be entitled to use a portion of the Escrowed Funds not to exceed Two Hundred Fifty Thousand and 00/100th Dollars (\$250,000.00) to match a payment by Timnath, or the TDA on behalf of Timnath for

costs to be incurred by Fort Collins to proceed with the work necessary to complete the Lake Canal Crossing of Boxelder Creek described in Section 7.2(b)(1). Escrowed Funds in the amount of Two Hundred Fifty Thousand and 00/100th Dollars (\$250,000.00) shall be released to Fort Collins by the escrow agent upon request for the purposes described in this Section 7.3(b). Timnath, or the TDA on behalf of Timnath, shall provide funding in the amount of Two Hundred Fifty Thousand and 00/100th Dollars (\$250,000.00) to Fort Collins within ten (10) business days of the release of escrow funds to Fort Collins. 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 provided by Timnath are intended to pay fifty percent (50%) of the invoices and payments made by Fort Collins to carry out the work necessary to complete the Lake Canal Crossing of Boxelder Creek described in Section 7.2(b)(1). Timnath or the TDA on behalf of Timnath shall be entitled to review all invoices and other documentation related to said payments in order to verify the use of funds in accordance with this Article. 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.

(c) The parties agree that Fort Collins shall be entitled to use all remaining Escrowed Funds, which are expected to total One Million Three Hundred Thousand and 00/100th Dollars (\$1,300,000), along with any previously released funds under Sections 7.3(b) and 7.3(c) that are remaining and available after completion of the projects described in Sections 7.3(b) and 7.3(c), to match payments by Timnath, or the TDA on behalf of Timnath, for costs to be incurred by Fort Collins in connection with contracts for work to complete the Fort Collins/Timnath Projects, including any design, engineering, right-of-way acquisition, or permitting not fully funded through the payments identified in Section 7.3(a) and 7.3(b), and construction of the Fort Collins/Timnath Projects. All remaining Escrowed Funds shall be released to Fort Collins by the escrow agent upon request from Fort Collins at any time after January 1, 2015, to be used for the purposes described in this Section 7.3(c). 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 Fort Collins may be required to pay from its own funds an additional amount of up to Two Hundred and Fifty Thousand and 00/100th Dollars (\$250,000) to fully fund fifty percent (50%) of the total cost of the Fort Collins/Timnath Projects (which total cost is referred to herein as the "Total Project Cost", and is currently estimated to be Four Million Dollars (\$4,000,000.00)), and further that the Escrowed Funds, together with such additional Fort Collins funds, are intended as a match to payments by Timnath, or the TDA on behalf of Timnath on invoices for the work described in this Section 7.3(c). Timnath, or the TDA on behalf of Timnath, shall provide funding in the amount of fifty percent (50%) of the Total Project Cost to Fort Collins within ten (10) business days of the release of escrow funds to Fort Collins under this Section 7.3(c). Timnath or the TDA on behalf of Timnath 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.

(d) If the BBRSA Projects described in Section 7.2 (a) are completed prior to full completion of the Fort Collins/Timnath Projects described in Section 7.2(b), Timnath, or the TDA on behalf of Timnath, shall place into escrow any unpaid balance of the total amount of funds needed to pay fifty percent (50%) of the Total Project Cost, or of the most current estimated total cost to complete the construction of the Fort Collins/Timnath Projects, pursuant to Section 7.3(e), if higher than the Total Project Cost, and Fort Collins shall commence the work described in Section 7.2(b)(3). The work described in Section 7.2(b)(3) shall not be performed until these funds have been placed in escrow. To the extent not already released pursuant to Section 7.3(a), (b) or (c), these funds shall be released to Fort Collins by the escrow agent upon request in order to allow Fort Collins to proceed with the work described in Section 7.2(b). 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 to be used for the purposes and in the manner described in the foregoing Section 7.3(c), and are subject to the same conditions and procedures as provided therein.

(e) In the event that the Total Project Cost exceeds the estimate stated in Section 7.3(c), Fort Collins agrees to provide Timnath, or the TDA on behalf of Timnath documentation confirming the need to increase the estimated amount deemed to constitute the Total Project Cost. However, the parties agree that any increase in Total Project Cost in excess of Five Hundred Thousand Dollars (\$500,000) shall be subject to mutual approval and agreement by the parties. Notwithstanding any provision in this Agreement to the contrary, Fort Collins and Timnath, or the TDA on behalf of Timnath agree that each party shall pay its own costs in the negotiation and preparation of this Agreement.

7.4 Fort Collins to Provide or Contract for Services. Fort Collins agrees to provide or contract for the services required to carry out the Fort Collins/Timnath Projects identified in Section 7.2(b), subject to the conditions and requirements of this Article. Fort Collins shall maintain appropriate documentation and make any reports, data or design deliverables produced available to the parties for review and use in connection with the completion of the Fort Collins/Timnath Projects. Fort Collins shall upon request provide to Timnath work scope and specifications and pricing documents and contracts for work to be completed by Fort Collins hereunder.

7.5 Design and Engineering of the Projects. Fort Collins is responsible for the initiation and completion of design engineering as necessary in order to determine actual design

and related costs and to allow said Projects to proceed. This work is intended to allow for the efficient design and expedited construction schedule. Fort Collins has provided or contracted for, or will provide or contract for, the following:

(a) Preparation and completion of the conceptual design of the projects to include hydraulic modeling and collaboration with upstream BBRSA projects, adjacent potential property development and other current and planned projects near the project site;

(b) Initiation of Final Design (including appropriate geotechnical investigations, structural design, flood conveyance and stream design, stability analysis, stream restoration, utility relocation, and associated items) in order to prepare estimated costs for final design, real estate acquisition, permitting, engineering and construction; and,

(c) Project management and coordination to include meetings with representatives of Fort Collins, Timnath, the BBRSA, United States Army Corps of Engineers (USACE), the Colorado Water Conservation Board (CWCB), irrigation companies and adjacent property owners.

7.6 Milestones for the Boxelder Creek Flood Mitigation Projects. The following are milestones for the completion of the Boxelder Creek Flood Mitigation Projects:

(a) The targeted construction start date for the Lake Canal Crossing of Boxelder Creek Improvements described in Section 7.2(b)(1) is January 15, 2015.

(b) The targeted construction start date for water main utility relocations associated with the Boxelder Creek Outfall and Prospect Road Improvements described in Section 7.2 (b)(2) is March 1, 2015.

(c) The targeted construction start date for the remainder of work associated with the Boxelder Creek Outfall and Prospect Road Improvements described in Section 7.2(b)(2) is June 1, 2015,

(d) The targeted construction start date for the Boxelder Creek at Interstate Highway 25 -- Drainageway and channel improvements and grading adjacent to and upstream (east) of Interstate Highway 25 and the opening of two existing blocked culverts beneath Interstate Highway 25 is the later of either October 1, 2015, or completion of the BBRSA Projects described in Section 7.2(a) and payment by Timnath of funds as required in Section 7.3(d).

7.7 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.

7.8 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 for 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.

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

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

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

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

6. 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.


7. 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: 
Mayor

ATTEST:


Town Clerk



APPROVED AS TO FORM:

Town Attorney

THE CITY OF FORT COLLINS, COLORADO

By: 
Mayor

ATTEST:

APPROVED AS TO FORM:

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THE TOWN OF TIMNATH, COLORADO

By: 
Mayor

ATTEST:


Town Clerk



APPROVED AS TO FORM:


Town Attorney

THE CITY OF FORT COLLINS, COLORADO

By: 
Mayor

ATTEST:

APPROVED AS TO FORM:

Wanda Nelson
City Clerk



Carrie J. D...
Deputy City Attorney