TOWN OF TIMNATH, COLORADO
RESOLUTION NO. 55, SERIES 2016

A RESOLUTION APPROVING A GENERAL COUNSEL ENGAGEMENT LETTER
WITH WHITE BEAR ANKELE TANAKA & WALDRON PC

WHEREAS, the Town Council of the Town of Timnath ("Town") pursuant to C.R.S. § 31-15-103, has the power to pass resolutions; and

WHEREAS, attached hereto as Exhibit A is the Engagement Letter Between the Town and White Bear Ankele Tanaka & Waldron, PC, (the "Agreement"), which Agreement was initially entered into on March 8, 2013 for an initial term of 36 months (the "Initial Term"); and

WHEREAS, according to the terms of the Agreement, upon expiration of the Initial Term, the Agreement automatically extends for successive additional 36 month term(s), notwithstanding this automatic extension, the Timnath Town Council desires to memorialize its intent to renew this Agreement; and

WHEREAS, the Town Council is familiar with the Agreement and finds it to be in the best interest of the Town, its residents, and the general public.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF TIMNATH, COLORADO as follows:

Section 1. Approval
The Agreement is hereby approved in substantially the form as attached hereto, subject to independent legal counsel review and approval, and technical or otherwise non-substantive modifications, as deemed necessary by the Town Manager in consultation with the Town Planner, Engineer, Legal Counsel, and other applicable staff or consultants.


TOWN OF TIMNATH, COLORADO

[Signature]
Jill Grossman-Belisle, Mayor
ATTEST:

[Signature]

Milissa Peters, CMC
Town Clerk
PROFESSIONAL SERVICES AGREEMENT
BETWEEN
THE TOWN OF TIMNATH
AND WHITE BEAR AND ANKELE
PROFESSIONAL CORPORATION

This Professional Services Agreement (the “Agreement”), is made by and between the Town of Timnath (the “Town”) and the undersigned contractor (the “Contractor”). Town and Contractor shall be collectively referred to herein from time to time as the “Parties”.

WHEREAS, the Town desires to retain Contractor and Contractor desires to be retained to provide the professional Services defined in paragraph 1.C, below (the “Services”); and

WHEREAS, Contractor is presently serving as Town Attorney and has advised the Town on the form and content of this and similar agreements and has recommended to the Town that it obtain special legal counsel to review and comment on these agreements; and

WHEREAS, special counsel has completed its review and recommended certain changes which have been incorporated herein.

NOW, THEREFORE, in consideration of the agreements and covenants contained herein, the Parties hereto agree as follows:

1. BASIC TERMS:

A. Name, Address, and Phone Number of the Parties.

a. Town of Timnath
   i. Town of Timnath
      C/O Town Manager
      4800 Goodman Drive
      Timnath, Colorado 80547

b. Contractor
   i. White Bear Ankele Tanaka & Waldron Professional Corporation
      C/O Robert Rogers
      2154 E. Commons Ave., Ste. 2000
      Centennial Colorado, 80122

B. Exhibits and Attachments. All attachments specifically referred to herein shall be deemed incorporated herein by reference as if fully stated herein. Due to the day to day nature of the professional services relationship between Contractor and the Town, the parties acknowledge that informal amendments to exhibits or attachments may occur by custom and practice; however, the parties agree that no such amendment shall occur which is directly in conflict with a specific provision hereof without prior approval by the Town
Council as evidenced by written amendments hereto. This Agreement may also be amended by replacement of any Section herein in writing and initialed by the Mayor and Contractor.

C. Scope of Services. The "Scope of Services" attached hereto as Exhibit A defines generally the "Services" that Contractor will continue to provide to Town, subject to such direction as may be provided to Contractor by the Town.

D. Titles. Mr. Robert G. Rogers and Mr. Gary White shall be designated as the "Town Attorneys" and shall direct the provision of Services to Town on behalf of Contractor. Notwithstanding such reference, Contractor is solely liable to the Town for performance of this Agreement and Contractor, not Mr. Rogers or Mr. White individually, shall be responsible directly to the Town Council for Services provided by Contractor. No individual employee of Contractor shall be considered or deemed to have personally undertaken the obligations of this Agreement or to have personally guaranteed the performance hereof by Contractor. Mr. Rogers and Mr. White may hold themselves out as the Town Attorneys to persons doing business with, residing in, or otherwise dealing with Town, and may utilize business cards prepared by Town for such purposes.

E. Compensation. Fees for the Services shall be invoiced to the Town not later than the tenth (10th) day of each month in amounts subject to the following provisions:

(i) Compensation for the Services provided pursuant to this Agreement shall be subject to a Monthly Invoice Cap (defined below) for all Services performed for the Town and the Timnath Development Authority. Special work that can be charged to third party developers or work conducted in connection with unforeseen opportunities for the Town which is outside the normal routine shall be categorized as "Out of Scope Services", and shall fall outside the Monthly Invoice Cap and be paid hourly as approved by the Town.

(ii) The initial "Monthly Invoice Cap" for legal fees, exclusive of costs per the Special Provisions contained in Exhibit B as defined below, shall be in the amount of $22,545 per month. The Monthly Invoice Cap shall be applicable for Services provided from and after January 1 of the applicable year. The Monthly Invoice Cap amount shall be adjusted January 1 of each calendar year by increasing the Monthly Invoice Cap by 2.5%.

(iii) Each monthly invoice from Contractor shall contain a cover memorandum showing, at a minimum, how fees billed in excess of the Monthly Invoice Cap will be deferred and accounted for as part of the "Deferral Above Monthly Cap", and any additional information reasonably requested by the Town Council or Town Manager. Items discussed in paragraphs i and v of this subsection shall be due in addition to the Monthly Invoice Cap. The amount of the Deferral Above Monthly Cap shall accrue from month to month.
(the "Accrued Deferral Above Monthly Cap"), provided that it's accrual shall be limited to $100,000 per year (the "Annual Deferral Cap"). The Parties acknowledge that Accrued Deferral Above Monthly Cap from the previous term of this agreement, subject to the Annual Deferral Cap, shall continue to accrue from year to year throughout the Term and Additional Terms but shall never exceed a "Maximum Deferral" of $300,000. Amounts which exceed the Annual deferred Cap and the Maximum Deferral shall be forgiven annually.

(iv) The Deferral Above Monthly Cap and Accrued Deferral Above Monthly Cap shall be reflected on the Town's books as a contingent liability, due and payable to Contractor in the event the Professional Service Agreement is terminated for convenience. In no event shall any contingent liability exceed the Maximum Deferral and no payment shall be due which is greater than the lesser of the total contingent liability or the Maximum Deferral. The parties agree that the Deferral Above Monthly Cap and Accrued Deferral Above Monthly Cap represent fees for valid Services performed each month during the Term, properly due to Contractor as a portion of the Services for which the Monthly Invoice Cap is due, and that payment of such amounts by the Town in the event of termination for convenience of the Professional Services Agreement is not a penalty but is payment of earned fees constituting the Monthly Invoice Cap.

(v) The monthly invoice cap shall not apply to extraordinary Services, including but not limited to bond issues, litigation, major retail development project negotiations, or fees for services which are billed to the Town which are reimbursable to Town by third parties, whether actually reimbursed or not in the discretion of the Town. When such matters arise, Contractor will discuss with Town Manager additional budget amounts which may be necessary to pay fees for such work. In addition to amounts described above, Contractor may incur out of pocket costs in the handling of the Town's matters. These costs may include photocopying charges, handling charges, delivery charges, telephone, fax, filing and recording fees, and other costs which Contractor may advance payment on the Town’s behalf. These will also be billed on a monthly basis. These costs are subject to the same payment terms as fees. All bills are due upon receipt, and if any bill is not paid during the month of receipt of an invoice, interest will accrue at a rate of one percent per month.

F. Term and Termination. Notwithstanding the date of execution hereof or the date of ratification by the Town of the execution hereof, Contractor is engaged pursuant to this
Agreement for a term of 36 months commencing January 1, 2016, and continuing through December 31, 2018 (the "Initial Term"), subject to annual budget appropriation of revenues sufficient to pay the "Monthly Invoice Cap" as increased annually pursuant to paragraph E of this section. Fees for Services will be billed and itemized monthly per existing invoice formats. If fees in any month are less than the Monthly Invoice Cap, the lesser amount shall be paid. Upon the expiration of the Initial Term, this Agreement shall be deemed automatically extended for successive additional 36 month terms ("Additional Term(s)") until such time as this Agreement is terminated by formal Council action to terminate.

The parties acknowledge that the engagement created by this Agreement may be terminated for convenience at any time but only by formal resolution of the Town, as set forth below, adopted in a public meeting whereupon the Accrued Deferral Above Monthly Cap described above shall be due and payable in full within ten (10) days of adoption of such Resolution. Services shall terminate thirty (30) calendar days such Resolution is adopted. The compensation provisions set forth above shall be binding through the date Services are terminated. Subject only to the foregoing, the Town shall have the unfettered right to take formal action to terminate this Agreement.

**CONTRACTOR NOT EMPLOYEE.** Contractor is an independent contractor and not an employee, partner or agent of the Town and, as such, is not entitled to workers’ compensation benefits and is obligated to pay federal and state income tax on any moneys earned pursuant to this Agreement. Contractor shall, at all times, have exclusive domain and control over the activities of its employees, if any, and under no circumstances shall Contractor or Contractor’s employees be considered employees or agents of the Town. The Services set forth in this Agreement shall be provided by Contractor using its own office space, employees, supplies, and resources sufficient to meet the needs of the Town as directed by Council.

2. **SPECIAL PROVISIONS.** Exhibit B contains special provisions which are deemed a part of this Agreement. The application of certain provisions of Exhibit B may be limited to specific Services set forth in Exhibit A. Unless such limitations are set forth, all provisions of Exhibit B are intended to apply to all provisions of this Agreement and all Services set forth in Exhibit A.

3. **COLORADO CONSTITUTION, ARTICLE X, SECTION 20.** Notwithstanding other provisions in this Agreement to the contrary, if any, the Parties understand and acknowledge that the Town is subject to Article X, § 20 of the Colorado Constitution ("TABOR"). Consistent with Article X, Section 20 of the Colorado Constitution, the Town’s payment obligations to Contractor in any year following the year of the execution hereof are not intended to and do not constitute a multi-year fiscal obligation to the Town. All financial obligations of the Town under this Agreement are subject to the annual appropriation of sufficient funds for the same by the Timnath Town Council, acting in its sole and exclusive discretion. In the event of non-appropriation which occurs as set forth herein, this Agreement shall automatically terminate upon the first day of the fiscal year for which funds are not appropriated and neither Party shall have any continuing obligation to the other under this Agreement except as explicitly provided herein with respect to the obligation to pay the Accrued Deferral Above Monthly Cap amount which obligation shall survive any termination and non-appropriation.
4. **CONFIDENTIALITY.** The Parties agree that Contractor will, in the course of its duties hereunder, receive information concerning the Town, its employees, elected and appointed officials, property, equipment and functions. Contractor agrees to hold all such information confidential and to not disclose the same other than to the extent required to perform its duties, or upon a proper request from an authorized Town official, or pursuant to a proper request under the Colorado Open Records Act, C.R.S. § 24-72-101, et. Seq., to which the authorized Town official has confirmed it is appropriate for Contractor to respond or pursuant to a lawful court order. The requirements of this Section shall survive the termination of this Agreement.

5. **ILLEGAL ALIENS – PUBLIC CONTRACTS FOR SERVICES.** “E-verify Program” as used herein means the electronic employment verification program created in Public Law 104-208, as amended, and explained in Public Law 108-156, as amended, and jointly administered by the United States Department of Homeland Security and the Social Security Administration, or its successor program. “Department” as used herein means the Department of Labor and Employment. “Department Program” as used herein means the employment verification program established by the Department pursuant to C.R.S. § 8-17-102(5)(c). The undersigned on behalf of the Contractor certifies that, at the time of this certification and the execution of this Agreement, the Contractor does not knowingly employ or contractor with an illegal alien who will perform work under this Agreement and that the Contractor will participate in the E-verify Program, pursuant to C.R.S. § 8-175.191 or Department Program in order to confirm the employment eligibility of all employees who are newly hired for employment to perform work under this Agreement and will otherwise seek and obtain its own legal counsel for advice on how to comply with such laws.

6. **MISCELLANEOUS PROVISIONS.**

   a. **Severability/Governing Law.** This Agreement is to be governed and construed according to the laws of the State of Colorado with venue of any litigation to be in Larimer County. If any provisions of this Agreement shall be determined to be void by any court of competent jurisdiction, then such determination shall not affect any other provision of this Agreement, and all such other provisions shall remain in full force and effect. It is the intention of the Parties hereto that if any provision of this Agreement is capable of two constructions, one of which would render the provision valid, then the provision shall have the meaning which renders it valid.

   b. **Entire Agreement.** It is understood that there are no oral agreements between the Parties hereto effecting this Agreement and this Agreement supersedes and cancels any and all previous negotiations, arrangements, brochures, agreements and understandings, if any, between the Parties hereto or displayed by Town to Contractor with respect to the subject matter thereof, and none thereof shall be used to interpret or construe this Agreement. This Agreement is and shall be considered to be the only agreement between the Parties hereto and their representatives and agents. All negotiations and oral agreements acceptable to both Parties have been merged into and are included herein. No provision of this Agreement may be amended or added
to except by an agreement in writing signed by the Parties hereto or their respective successors in interest.

c. Waiver and Modification. The waiver by Town of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition on any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of Services hereunder by Town shall not be deemed to be a waiver of any previous breach by Contractor of any term, covenant or condition of this Agreement. No modification of the terms of this Agreement shall be valid unless in writing and executed with the same formality as this Agreement, and no waiver of any breach of any provision of this Agreement shall be construed as a waiver of any subsequent breach of the same or any other provision hereof. If this Agreement is contingent upon approval by the Town Council, it is expressly agreed that, except as may otherwise be provided by applicable statute or ordinance, no official of the Town has the authority to waive or modify any provision of this Agreement without formal approval of the Town Council.

d. Headings. The headings and titles in this Agreement are not a part of this Agreement and shall have no effect upon the construction or interpretation of any part hereof.

e. Time. Time is of the essence of this Agreement, and each and all of its provisions in which performance is a factor.

f. Corporate Authority. If Contractor is a corporation, an LLC, an LLP, a limited partnership, a general partnership, an LLPI, or other non-natural entity, each individual executing this Agreement on behalf of said entity represents and warrants that they are duly authorized to execute and deliver this Agreement on behalf of said entity, in accordance with a duly adopted resolution of the board of directors, partners, or members of said entity or in accordance with the governing documents of said entity, and that this Agreement is binding upon said entity in accordance with its terms.

g. Notices. Any notice or other communication given by any of the Parties hereto to another relating to this Agreement shall be in writing and shall be deemed to have been duly given:

i. On the date and at the time of delivery if delivered personally to the party to whom notices is given at the address specified in Section 1, above;

ii. On the date of delivery or attempted delivery shown on the return receipt if mailed to the party to whom notices is to be given by first class mail, sent by registered or certified mail, return receipt requested, postage prepaid and properly addressed as specified in Section 1, above; or

iii. Within twenty-four (24) hours after deposit with a nationally recognized overnight courier or messenger service, properly addressed as specified in
Section 1, above.

Either Party may change such address by fifteen (15) days written notice to the other provided, however, the Parties may not designate more than one place and address to received notices as provided in this Agreement.

h. Non-Assignment. This Agreement is an agreement for Services by which Contractor was selected for Contractor's special expertise. This Agreement may not be assigned by either party.
IN WITNESS WHEREOF, the Parties hereto have made and executed this Agreement as of the 28th day of June, 2016.

TOWN OF TIMNATH
By: ______________________________
Title: ______________________________
Mayor

ATTEST:
______________________________
Town Clerk

CONTRACTOR:

______________________________
By: ______________________________
Title: ______________________________

APPROVED AS TO FORM:

______________________________
General Counsel
STATE OF COLORADO
COUNTY OF __________

The foregoing Professional Services Agreement was acknowledged before me this ____ day of _______________, 2016 by __________________ as ___________________.

Witness my hand and official seal.

My commission expires:__________________

_____________________________________
Notary Public

_____________________________________
Address

EXHIBIT A
(Scope of Service)

General Counsel Scope of Work

The following items are expected to be addressed based on priorities established in consultation with the Town Council. Specific details, strategies, and objectives of each task will be developed with, and reported to the Council on an as-needed basis, typically in Executive Sessions and/or in attorney/client privileged memoranda or electronic mail communications.

1. General Counsel. General Counsel will serve as general legal counsel to the Town and the Timnath Development Authority ("TDA"). This work will include:

   - Attending meetings of the Town Council and TDA Board and providing legal advice as necessary.
   - Reviewing and assisting with the negotiation of contracts between the Town, TDA, and their vendors.
   - Reviewing and assisting with the negotiation of contracts, such as annexation agreements, subdivision improvement agreements, service plans, etc. between the Town, TDA, and developers or other parties as needed, and which shall be invoiced to the Town pursuant to the provisions of Paragraph (1)(E)(i) of the Agreement.
   - Reviewing and assisting with the negotiation of contracts between the Town, TDA and their employees and consultants.
   - Advising the Town and TDA with regard to conducting their meetings in a manner that complies with best practices and state law.
   - Advising the Town Council concerning proposed ordinances and resolutions and
drafting such on request.
- Assisting the Town and TDA in responding to CORA requests and developing policies concerning CORA, records retention, etc.
- Assisting the Town and TDA with the development of updated policies in a variety of areas including public works bidding, IT security, special district controls, etc.
- Providing the Town and TDA with all other required legal services with the exception of condemnation, water law issues, litigation, and employment law matters as to which the Contractor will advise the Council on the retention of special counsel for these services.
- Advise Town Council and assist to engage special counsel when outside of the area of expertise of the Contractor.

2. **Templates.** Maintain and make model agreements for “templates” for future agreements such as annexation agreements, subdivision improvement agreements, and service plans so future agreements are consistent in style and general content. Policy recommendations will be made as to vesting, acceptance of facilities, security for improvement obligations, self-help remedies and other enforcement and collection provisions, etc.

3. **Policy Development.** Policy recommendations will be made on an ongoing basis with regard to business practices for processing development applications. These will include systems for processing annexation petitions, and assuring compliance with the Town’s comprehensive plan. Policies will be recommended for vesting, sales tax sharing, and other business items of common negotiation with the business and development community. Finally, a policy will be recommended with respect to the contract negotiation process to assure uniform distribution of information among council members.

4. **Reimbursement Agreements.** A review will be made of all reimbursables due to the Town to develop negotiation and collection strategies, and to monitor ongoing enforcement of contracts. This may include development of accounts receivable management protocols, as well as standard collection, lien and enforcement practices.

5. **Comprehensive Plan and Land Use Codes.** This matter will also be reviewed with the Town’s general counsel to ensure that the comprehensive plan is updated regularly as required by statute consistent with development of a Town annexation boundary, and that land use codes are updated, codified, and reviewed regularly to deal with zoning applications made in conjunction with annexation petitions.

6. **Statewide Legal and Policy Issues Affecting Town and TDA.** Monitor the development of, and advise Council as to its opportunities to develop, policies regarding oil industry fracking within the Town, Amendment 64 marijuana regulations, and other matters that arise from time to time at a statewide level that have policy implications for the Town.

7. **Future Development Opportunities.** This work will focus on developing strategies, term sheets, and contracts for potential new retail, manufacturing, or industrial businesses in the Town.
EXHIBIT B
SPECIAL PROVISIONS

We have performed an internal review for potential conflicts of interest with other clients and find none at this time. If any are discovered in the future, we will discuss the scope of our continued engagement with you. These special provisions constitute our standard engagement letter for legal services which are deemed amended by the Agreement to which this Exhibit is attached. Additional information about the Firm can be found at www.whitebearankele.com. “We” or “Firm” as used herein means White Bear and Ankele Professional Corporation. “You” or “your” as used herein means the Town of Timnath, Colorado.

The Firm’s legal services are billed on an hourly basis and are not contingent on any outcome. Such fees are subject to caps and other terms set forth in the Agreement to which this Exhibit is attached. All rates are subject to change without advance notice. You will be billed on a monthly basis primarily for the work that Mr. White and others in the Firm perform in increments of one-tenth of an hour. Some services of the Firm are allocated on an equitable basis to clients who benefit from general legal work by the Firm’s personnel. In addition to legal fees, the Firm may incur costs in the handling of your legal matters. These costs may include photocopying charges, handling charges, delivery charges, telephone, fax, filing and recording fees, and other costs which the Firm may advance payment for on your behalf. Notwithstanding, these costs are your responsibility and will be billed to you on a monthly basis. These costs are subject to the same payment terms as legal fees.

Town agrees to pay all fees, costs and expenses billed by the Firm for the legal services. In the event that the Firm is compelled to resort to collection of your account, which may or may not include litigation, you agree that your obligations to the Firm shall include payment of all costs such as collection efforts, including court fees and costs, attorneys’ fees and expenses. After you begin to receive invoices from the Firm, billing questions should be directed to the Finance Manager.

You will have the right to terminate our representation at any time and we will have the same right of termination (including termination for non-payment of fees and expenses) subject to reasonable notice. All fees incurred for services rendered through the date of termination, as well as all costs and expenses incurred by us on your behalf must be paid within ten days of receipt of our final statement. We will also be entitled to payment at our standard billing rates for any work required in connection with the turnover of files to the client or new counsel and the orderly transition of pending matters to new counsel. Upon conclusion of our services, whether due to termination or completion of the work, we will not thereafter be responsible for legal matters as to which our services have not been specifically requested and confirmed in writing.