

# DEVELOPMENT AGREEMENTS

*Analysis  
Colorado Case Studies  
Commentary*

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The Rocky Mountain Land Use Institute at the University of Denver College of Law engages in a variety of educational and research activities related to public interest aspects of land use and development. In addition to providing educational opportunities for students at the College of Law through internships and research projects, the Institute sponsors workshops and symposia for land use practitioners and citizen groups on specific land use topics. The Institute, working closely with both the public and private sector, also undertakes and supports research and service projects related to land use and development in the Rocky Mountain Region. The Institute operates in affiliation with both regional and national advisory boards, the members of which are among the leading practitioners and academics in the field. The Institute is entirely financially self-sustaining with funds generated by its activities and publications and by gifts from Institute sponsors.

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## *INTRODUCTION*

This book, the first in the Rocky Mountain Land Use Institute's research monograph series, addresses planning and legal issues related to the granting of vested rights and the utilization of development agreements in managing land use and development. The chapters in this book, and particularly the case studies, examine some of the more difficult issues and problems at the forefront of land-use planning today. Traditional Euclidean zoning's regulation of land use and development by fixed, self-administering, legislative rules has, in most jurisdictions, given way to flexible and discretionary site-specific development review procedures. Whatever the form of these new development review techniques, they nearly always involve negotiation, cooperation, and compromise on the part of all the parties involved.

The problems related to obtaining, or even ascertaining, vested development rights have long plagued both developers and local governments. Recent enabling legislation in Colorado and other states now provides for the granting of vested rights and for the use of development agreements that formalize the negotiated terms and conditions of development. These new land use management tools, when properly used to supplement existing planning and zoning review processes, can provide mechanisms for dealing with complex or unanticipated site-specific development issues. The case studies explain and illustrate their application in regard to a variety of types of development projects and development situations.

This research project represents the Institute's attempt to address land use topics in a manner that bridges the gap between planning theory and regulatory practice. Without the cooperation of the practicing planners and attorneys involved, this work would not have been possible. This spirit of cooperation will hopefully carry over and continue to be the hallmark of future Institute projects.

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# Chapter I

## ***DEVELOPMENT AGREEMENTS: PLANNING PERSPECTIVES***

Erin Johnson

### ***Concept and Function***

A development agreement is a statutorily authorized, voluntary, negotiated agreement between a local government and a private developer that establishes the respective rights and obligations of each party with respect to certain planning issues or problems related to a specific proposed development or redevelopment project. The agreement assures the developer that the project may be completed in accordance with the conditions of approval and other existing rules and regulations. A development agreement differs from traditional land use regulatory tools in that the agreement formalizes the results of arms-length negotiations between the public and private sectors with respect to issues or problems related to a specific development project. From the public perspective, a development agreement can be viewed as simply another form of exercise of the police power to deal with certain public interest aspects of a specific development proposal. From the private perspective, a development agreement provides for stability and predictability in both the development approval and construction processes.

A central concept of a development agreement is that the developer voluntarily consents to the negotiated terms of project approval in exchange for the right to proceed with the development project without further governmental interference. Because of longer project lead times and increased up front costs, developers typically make substantial investments in infrastructure and design before they have assurance that a project can be completed. Further, regulatory changes made after a project is started can be devastating to a project and the developer. In this respect, development agreements address the need to protect the investment and expectations of developers to a greater degree than would otherwise result in most states from court application of the often uncertain common law "equitable estoppel" and "vested rights" legal doctrines.

By determining a project's vested development rights before substantial construction costs are incurred, even if subject to conditions or stages of completion, a developer's risks can be reduced and made more predictable. This in turn can benefit the public sector, since it can be anticipated when and to what extent infrastructure and negotiated amenities will be provided during the course of the development project. Moreover, the negotiated decisionmaking and compromises inherent in the process leading to the final development agreement can enhance the public sector's ability to mitigate the possible adverse effects of a development project and to assure the provision and appropriate design of public amenities.

The potential benefits of development agreements have led Colorado, along with an increasing number of other states, to enact legislation authorizing local governments to enter into development agreements that determine the vesting of development rights. The legislative intent is generally to ensure reasonable certainty in regard to the right to complete a project, and to provide for enhanced public sector participation in the review and resolution of issues and problems related to development projects.

### ***Utilization of Development Agreements***

Traditional land use controls, such as zoning, often provide only a static and systematic approach to planning and managing development of the built environment and may therefore fail to address important and complex issues and problems related to specific development projects. A wide array of new planning and regulatory tools, such as floating zones, planned development review, and the utilization of approval processes that provide for the imposition of site-specific conditions, have developed over the years in an effort to build more flexibility and discretion into the development review process. State legislation authorizing the use of development agreements continues this reform by providing for the negotiated resolution of unanticipated or complex issues related to specific development projects.

Other trends have further influenced these regulatory reforms. As growth management, environmental protection, and fiscal concerns become driving forces in regulatory decisionmaking, land use regulation intensified and local governments increasingly shifted the financial costs of development to the private sector. In response to public sector demands for environmental and social element mitigation and for infrastructure contributions, developers have had to assume increasingly greater financial risks and front-end project costs. Flexible land use controls provide some ability to negotiate the allocation of such development responsibilities but, in many cases, this expanded exercise of public authority over development has led to excessive demands, unreasonable exactions, and costly and protracted litigation. Development agreements, resulting from a negotiated decisionmaking process, may provide a more appropriate mechanism for addressing and resolving difficult problems and issues related to a specific development project.

Development agreements offer several advantages over traditional zoning and subdivision regulation. The process of negotiation generally shifts the focus of decisionmaking to site-specific development plans, mitigation of the adverse effects of the specific development proposal, and related current community needs and social concerns. This shift requires the public sector decisionmakers to adopt a more active role in the development review process. The development agreement process may, in effect, force each party to more carefully consider, prioritize, and address relevant planning elements involved in a particular development project. A development agreement may therefore result in improved efficiency in the development review process and a better balancing of public and private sector interests in achieving quality development.

Development agreements may also involve other government agencies or third parties. Although local government decisions generally cannot bind other regulatory agencies, development agreements can establish contingencies or require compliance with other agency regulations. Agreements might also include the resolution of issues raised by neighborhood groups, extraterritorial issues, or intergovernmental agreements.

Development agreements are particularly valuable in situations involving large, multi-phase plans, in which the developer faces the greatest risks in terms of financial liability, changes in circumstances or political climate, and losses due to regulatory changes. In a large project the nature and scope of the development can be determined and approved, and financial burdens on the developer can be eased by providing trigger mechanisms for various obligations based on the percentage of project completion.

However, negotiated agreements are not limited to larger development projects.

A development agreement could be utilized to resolve a specific planning element, such as a sensitive aesthetic or environmental condition, or some unique or complex development problem that is not addressed under existing regulatory ordinances.

The variety of types of planning issues that might be addressed by development agreements is illustrated by the case studies discussed later in this book. For example, the Highlands Ranch development agreement deals with a large-scale development project that requires several years to complete. The agreement focuses on the detailed allocation of responsibilities for infrastructure, amenities, and other planning issues. The Cherry Creek Mall development agreement similarly involves allocation of responsibilities regarding maintenance of public improvements, in addition to resolving neighborhood conflicts.

The Denver Union Terminal is centered on the preservation of an historic building, and includes development and design standards for the area surrounding the structure. The Parkfield Development Project in the Denver Gateway represents the opposite - undeveloped land forming the entrance to the new Denver International Airport. This agreement addresses issues related to land uses along the entrance corridor.

The Twilight Golf Course development agreement allows for redevelopment of a golf course, while providing a much needed park for local citizens. The agreement made it possible for the park to be large enough to serve the neighborhood, as well as to be constructed to the City and County of Denver's existing standards, because they would assume maintenance for the park after construction. The Indian Tree Subdivision addresses a problem where the allowed zoning density was no longer compatible with the neighborhood that had built up around it. The Willow Park project resolved a stumbling block for developers and provided for road and parkway improvements.

The Moses Lot Split development agreement resolved problems for three parties. A condominium homeowners' association acquired open space and prohibited further development of the condominium parcel, a home owner was allowed to build a larger house within the existing view protection ordinance, and the City of Aspen benefitted through reduced densities in a sensitive area.

These development agreements, included as case studies in this book, represent only a few of the issues that could be resolved through the flexibility of a negotiated decisionmaking process. The case study commentaries, provided by representatives of both sides of the development agreement, portray different perspectives on each issue.

### ***Potential Application Problems***

There are valid criticisms of the use of development agreements, primarily based on the potential for unfair results. A few are mentioned here to provide an indication of the nature of some of the problems that may be encountered.

Any discretionary review process, because of the nature of the competing public and private interests, is vulnerable to abuses resulting from power imbalances and other external influences. However, through cooperative efforts and good faith bargaining, both procedural and design efficiencies can be realized by all involved parties.

Another criticism is that development agreements seemingly lack structure or a set methodology. This aspect of a development agreement is precisely what allows for flexibility and adaptability to differing situations, and the ability to resolve complex problems. The problem of the lack of ascertainable standards for development

agreement provisions is, to some extent ameliorated by the application of land use standards already in place in the underlying zoning codes and other ordinances.

There is a potential public sector risk regarding unforeseen circumstances that cannot be changed at a later date. However, major risks concerning the public are usually considered as exceptions to the commitments of the government agencies, in the development agreement enabling statutes. The intent of the exceptions is to insure that the public will not be harmed by strict adherence to the agreement.

Third parties, such as citizen groups, may contend that they were denied involvement in the negotiation process, because of concerns raised at a later date. Here again, development agreements are subject to the established rules, procedures, policies, comprehensive or master plans, and notice and hearing requirements of the local government entity involved. The review and approval process is intended to reach all affected and interested parties. Guidelines and standards, as some jurisdictions have adopted, ease some perceptions of development agreements as "back-room deals." Government entities should make every effort to reduce the possibility of such perceptions. Extra precaution should also be taken to minimize the possibility of future changes or amendments to a development agreement, because of the risk of invalidating the entire agreement.

It is also argued that existing or alternative regulatory tools may be better suited to deal with a particular situation. If a local government's current regulatory controls adequately address all relevant issues, there is no need for a more flexible mechanism to achieve the desired results. A development agreement can simply provide an alternative in the event that conventional methods and existing regulations fail to address a particular need or issue.

These issues are examples of areas that should be carefully considered in the process of negotiating a development agreement. A fair result is in the best interests of all parties, and it should be the foundation on which a development agreement is constructed. Chapter V, *Pointers for Negotiation*, and Chapter VI, *Checklist for Drafting Development Agreements*, offer valuable insights in this area. The case study commentaries also address some of these issues.

### ***Implementing Local Ordinances***

The Colorado statute allows each jurisdiction to define what constitutes a "site specific development plan." The intent was to accommodate the wide variety of terms, definitions and processes that constitute final development approvals. While some jurisdictions have interpreted the term broadly, others have used the determination of a "site specific development plan" as a limiting device for granting vested property rights.

The City of Arvada specifically lists the portions of their code that meet the definition of a site specific development plan. Vested property rights may be waived by a separate agreement. The City of Aspen's ordinance provides the procedures necessary to implement the provisions of the Colorado statute, regarding exceptions, notice and hearing, notice of final approval, requirements of the approving ordinance or resolution, and non-vested development.

The City of Boulder sought to minimize the risks and uncertainties related to the state statute, and have modified their land use regulations accordingly. Boulder now routinely requires an applicant to fill out a "Vested Rights Option Form and/or Waiver." The form requires the applicant to be responsible for notice provisions, request a public

hearing pursuant to the state statute, and acknowledge that certain delays may result as a result of pursuing a vested right. The second option on the form allows the applicant to waive the creation of a vested right, and if accepted, the application proceeds through the established review process for the City of Boulder.

In the Town of Breckenridge, a vested property right is created only upon the approval or affirmation of the Town Council. The City and County of Denver limits vested property rights to Planned Unit Developments. Douglas County does not vest property rights for single family residential property.

The City of Fort Collins lists the types of plans and the associated zoning districts that a site specific development plan is limited to. The City of Glenwood Springs broadly applies the term to approved development plans, subdivision plats, and special review use site plans. The City of Northglenn specifically excludes preliminary PUD approval from creating a vested right.

In the City of Steamboat Springs, written development permits are effective for a period of 24 months from the date of issue, and the City is authorized to enter into development agreements that vest property rights for a period of three years. The Town of Telluride limits site specific development plans to final subdivision plats, final PUDs, and as otherwise agreed between the Town Council or the Planning and Zoning Commission and the owner for a specific project or development phase. The City of Woodland Park requires the landowner to specifically request the approval of the site specific development plan.

The local implementing ordinances relative to vested property rights are included in this book as Appendix B. The Colorado statute is included as Appendix A. Although these ordinances are only a small portion of the various land use codes, they show some of the different ways in which local governments have interpreted the state statute. The local government planning offices should be contacted for the full interpretation of their ordinances. Appendix B, listing these ordinances in alphabetical order, is not a complete list of all jurisdictions in Colorado that have incorporated the state statute. The Appendix is meant only as a survey of some of the cities and counties that have recognized and incorporated the Colorado Vested Property Rights statute.



## Chapter II

# **VESTED PROPERTY RIGHTS IN COLORADO**

Thomas L. Strickland, Alan E. Schwartz and Carrie A. Mineart

### ***Vested Property Rights in Colorado Before and After SB 219***

The development of land has become an undertaking premised on government approval and compliance with zoning and other land use and building regulatory processes. The resulting uncertainty associated with investment and planning of development projects has been a deterrent to such investment. It further adds a substantial barrier to efficient and effective planning and construction of the extensive public and private facilities required for major and comprehensive development projects. In order to reasonably minimize the uncertainty associated with the development process, landowners have sought assurances that once certain government approvals have been obtained, that landowner may rely on the approvals and go forward with the plans as approved.

In proper circumstances, such assurances have become available in the form of "vested property rights." However, the common law doctrine of vested property rights has not developed in a manner that has provided sufficient certainty to landowners given the nature of the development process. As a result, in Colorado, as in other states, the statutory provision of such rights has been directed toward balancing local government interests in controlling the land use process, citizen interests in public notice and participation in that process, and landowners' need for increased certainty in regulation of development projects.

In recent years, the need for such a measure in Colorado became increasingly clear, when citizen initiatives seeking downzoning of particular sites threatened to stymie development projects notwithstanding pre-existing approvals that had been granted to developers by local governments. In 1987, after vigorous debate and one gubernatorial veto, members of the real estate community and representatives of local governments reached an acceptable compromise, and SB 219 was enacted.

### ***Common Law Vesting Rules***

At common law, the concept of vested rights in the context of land use development has been subject to a range of interpretations. Historically the majority rule has required the issuance of a building permit, and subsequent substantial reliance on that permit before a landowner could successfully assert a vested right to complete the project as planned.<sup>1</sup> The requirement of substantial reliance has been held by some courts to require the commencement of actual construction<sup>2</sup>, but by others to require

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<sup>1</sup> 4 Ziegler, *Rathkopf's The Law of Zoning and Planning*, §50.03.

<sup>2</sup> See e.g., *Tri-State Generation and Transmission Association, Inc. v. Board of County Commissioners*, 42 Colo. App. 479, 600 P.2d 103 (1979).

only the expenditure of significant funds.<sup>3</sup>

Another line of cases, allowing property rights to vest upon application for a permit, has also emerged in some states.<sup>4</sup> This rule assumes that a landowner is subject to only the land use and building regulations in effect at the time of an application, and thus prevents retroactive application of newly adopted regulatory changes to applications that have already been submitted.

An intermediate rule, granting vested rights to a landowner based on the inurrence of significant expense in reasonable reliance on the probability of the issuance of a permit, has also been adopted by courts in some states.<sup>5</sup>

In Colorado, the majority rule was adopted in the early case of *Pratt v. City and County of Denver*, 72 Colo. 51, 209 P. 508 (1922), and consistently applied thereafter.<sup>6</sup> Thus, "Colorado courts have been almost ritualistic in requiring both a building permit and reliance thereon before declaring rights to have vested."<sup>7</sup>

### **Common Law Problems and Statutory Correction**

Problems stemming from the majority common law rule, which limited vested rights to landowners with both a permit in hand and substantial reliance thereupon, became apparent during the 1970's and 80's. Substantial investment is often necessary prior to undertaking the actual construction of developments pursuant to a building permit. In addition, the increasing use of impact fees and other commitments and exactions in the development planning and approval process has led to circumstances in which developers of large-scale, phased projects must invest millions of dollars in the early phases of a project with no assurance that the project will be allowed to proceed to completion.<sup>8</sup>

Similar problems had arisen in Colorado, but these problems were further

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<sup>3</sup> See, e.g., *Santa Monica Pines, Ltd. v. Rent Control Bd. of Santa Monica*, 35 Cal.3d 858, 868, 679 P.2d 27, 33, 201 Cal. Rptr. 593, 599 (1984); *Life of the Land, Inc. v. City Council*, 61 Hawaii 390, 606 P.2d 866 (1980); *Kasperek v. Johnson County Bd. of Health*, 288 N.W. 2d 511 (Iowa 1980). The determination of how much expenditure is sufficient to constitute substantial reliance has also varied among courts. 4 Ziegler, *supra*, at §50.03(3)(b).

<sup>4</sup> See, *Valley View Indus. Park v. City of Redmond*, 107 Wash. 2d 621, 733 P.2d 182 (1987); *Smith v. Winhall Planning Comm'n*, 140 Vt. 178, 436 A.2d 760 (1981); *Clark v. International Horizons, Inc.*, 243 Ga. 63, 252 S.E. 2d 488 (1979); *Contracts Funding & Mortgage Exchange v. Maynes*, 527 P.2d 1073 (Utah 1974); *Ready to Pour, Inc. v. McCoy*, 95 Idaho 510, 511 P.2d 792 (1973); See also 4 Ziegler, *supra*, §50.03.

<sup>5</sup> See e.g., *Board of Supervisors v. Cities Serv. Oil Co.*, 213 Va. 359, 193 S.E. 2d 1 (1972).

<sup>6</sup> See, *Tri-State Generation*, 42 Colo. App. at 481, 600 P.2d at 105; *Crawford v. McLaughlin*, 172 Colo. 366, 473 P.2d 725 (1978); *Miller v. Board of Trustees of the Town of Palmer Lake*, 534 P.2d 1232 (Colo. App. 1975); *Witkin House, Inc v. City and County of Denver*, 31 Colo. App. 410, 414, 504 P.2d 1121, 1123 (1972). *Cline v. City of Boulder*, 168 Colo. 112, 119, 450 P.2d 335, 339 (1969); *City and County of Denver v. Stackhouse*, 135 Colo. 289, 310 P.2d 296 (1957).

<sup>7</sup> A. Schwartz, *Asserting Vested Rights in Colorado*, 12 Colo. Law 1199 (1983).

<sup>8</sup> For example, in a widely-cited California case, a developer submitted plans for a resort community in conformance with all applicable planning and zoning regulations, and had obtained approval of a site plan and subdivision plat. After grading the site, pursuant to a grading permit, and expending \$2.8 million for on-site improvements, stringent new legislation restricting development in coastal zones had a deleterious impact on the viability of the project. Nonetheless, the California Supreme Court refused to find that the developer's rights had vested, because no building permit had been issued. *Avco Community Developers, Inc. v. South Coast Regional Commission*, 132 Cal. Rptr. 386, 553 P.2d 546 (1976).



aggravated by added uncertainty associated with the initiative and referendum powers reserved to the people of Colorado under the terms of the state constitution and judicial interpretations of those powers. In particular, the Colorado Supreme Court found that zonings, rezonings and other land use approvals of a "permanent or general character" or which constitute a "declaration of public policy" are subject to the rights of referendum and initiative.<sup>9</sup> The potential for citizens to circumvent the decisions of local elected officials, and at any time in the development process change the regulatory landscape to, in effect, shut down an otherwise approved development project through downzoning, or similar measures, proved hardly inviting for developers face with the prospect of risking – and in some cases losing – millions of dollars in front-end investment in such projects.

In response to these issues raised by the common law rule regarding vested rights, several state legislatures acted to establish by statute the terms by which property rights in development may vest. These statutes provide for various vesting periods and terms,<sup>10</sup> and in some cases specifically authorize the use of development agreements to establish vested rights in development projects.<sup>11</sup> In 1988, Colorado joined the ranks of states that had addressed the vested rights issue when the Colorado General Assembly enacted SB 219, which provided for vesting of property rights for three or more years through the approval of a site specific development plan or the execution of a development agreement with a local government.

As previously noted, the threat of citizen-initiated downzoning of development sites for which related exactions, fees and investments had already been undertaken, precipitated the proposal of legislation to provide for vested rights. Along with state legislative leaders, the principal authors of this piece worked with members of the real estate development community and representatives of Colorado local governments, groups whose perspectives were distinctly different, to craft a compromise approach embodied by SB 60. However, once approved by the General Assembly, that legislation was vetoed by Governor Roy Romer. After further negotiations among the interested parties, modified legislation successfully melding their diverse interests was again approved by the General Assembly as SB 219. Having been modified to address the

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<sup>9</sup> *Margolis v. District Court*, 638 P.2d 297, 304 (Colo. 1981).

<sup>10</sup> For example, Massachusetts has enacted a statute that institutes a standard vesting period of seven years, applicable to local zoning ordinances or bylaws. Mass. Gen. Laws Ann. Ch. 40A, § 74 (West). Minnesota statute provides for a one year period following preliminary, and a two year period following final, plat approval, during which amendments to a comprehensive plan do not affect the project. Minn. Stat. § 462.358(3)(c). Pennsylvania statute prevents any zoning, subdivision or other ordinance from adversely affecting a proposed plat once an application has been filed, and provides a five year period of vested rights once a plat has been approved. 53 PA. § 10508(4).

<sup>11</sup> California adopted a statute in 1979 that protects a project from the imposition of density, design, improvement and construction standards other than those in place at the time a development agreement is executed, except in cases of bad faith by the developer. Cal. Govt. Code §§ 65864-65969.5. In addition, several other states have adopted statutes providing for the use of development agreements. See, e.g., Ariz. Rev. State. Ann. § 9-500.05; Fla. Stat. § 163; Haw. Rev. Stat. § 46; Minn. Stat. § 462.358(3)(c); Nev. Rev. Stat. Ann. § 278.0201-0207.

primary concern upon which the Governor had based his veto,<sup>12</sup> SB 219 was then subsequently signed into law.

### **Colorado's Vesting Statute**

The Colorado statute defines "vested property right" as the right to undertake and complete the development and use of property under the terms and conditions of a site specific development plan.<sup>13</sup> A site specific development plan is a "plan which has been submitted ... describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property."<sup>14</sup> What constitutes such a plan is to be defined by local governments throughout the state by "ordinance or regulation or upon an agreement entered into by the local government and the landowner."<sup>15</sup>

If notice and hearing provisions set forth in the statute are followed, the approval or conditional approval of a site specific development plan creates a vested property right for a three year period. If relevant circumstances warrant, a local government may by development agreement provide for a longer period of vesting.<sup>16</sup>

Although establishment of a vested property right does not preclude the application of ordinances or regulations that are general in nature and applicable to all property subject to land use regulation, it does preclude any local government action that would "alter, impair, prevent, diminish, or otherwise delay" the development or use of the property as provided in the approved plan.<sup>17</sup> Nonetheless, such government actions may be undertaken provided that 1) the landowner consents; 2) the actions are intended to address hazards that could not reasonably have been discovered at the time of vesting; or 3) the landowner receives just compensation for the affects of the action.<sup>18</sup>

Approval of a site specific development plan remains subject to all rights of referendum and judicial review, and the time period for seeking such subsequent review

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<sup>12</sup> In his veto message, the Governor signalled his support for the concept of vested property rights, and indicated that he would be willing to sign such a bill if it contained certain additional provisions. The first of the desired provisions, one authorizing local governments to define the point at which vesting occurs within their own approval process, was included in SB 219. The other requested change, a provision authorizing local governments to require the waiver of vested rights as a condition of development approval, was not included in SB 219 after extensive negotiation.

<sup>13</sup> Colo. Rev. Stat. § 24-68-102(5) (1987).

<sup>14</sup> Colo. Rev. Stat. § 24-68-102(4) (1987).

<sup>15</sup> Colo. Rev. Stat. § 24-68-102(4) (1987). However, the statute further provides that a document intended to trigger vesting must be identified as such at the time it is approved. *Id.*

<sup>16</sup> Colo. Rev. Stat. § 24-68-104 (1987). The circumstances to be considered include, among others, the size and phasing of the development, economic cycles, and market conditions. *Id.*

<sup>17</sup> Colo. Rev. Stat. § 24-68-105 (1987).

<sup>18</sup> Colo. Rev. Stat. § 24-68-105 (1987). "Just compensation" includes all costs incurred by the landowner after the date of approval, along with interest at the legal rate until repayment is made, but does not include diminution in the value of the property. Colo. Rev. Stat. § 24-68-105(1)(c) (1987).

does not begin to run until a notice of vesting of the rights is published.<sup>19</sup> In addition, the statute does not preclude a finding under common law that property rights in a development have vested.<sup>20</sup>

### **Conclusion**

Since the enactment of SB 219 in Colorado, several local governments have adopted ordinances or regulations establishing the proper procedures, terms and conditions in which property rights may vest in their jurisdiction. To date, most local governments experiencing significant development activity have adopted such measures. Notwithstanding the general opposition to SB 219 of local governments at the time of its consideration and passage, the consensus today regarding the legislation is that local government control of the land use and development processes has not been impaired by the provision for vested rights. The retention by local governments of such prerogatives as the authority to define the event triggering vesting, and the discretion whether to participate in development agreements, has enabled sufficient and suitable local control of development activities.

At the same time, the provisions of SB 219, and the implementation of those provisions by local governments, have offered an opportunity for landowners and developers to negotiate and plan comprehensive developments in cooperation with local governments and citizen interests with reduced risk of subsequent reversals and roadblocks. Thus subsequent development projects have been influenced, and likely facilitated and enhanced, by the vesting provisions. Examples of such projects, the New Town of Highlands Ranch, and Cherry Creek Shopping Center, follow.

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<sup>19</sup> Colo. Rev. Stat. § 24-68-103(1) (1987).

<sup>20</sup> Colo. Rev. Stat. § 24-68-106 (1987).



Chapter III  
**DEVELOPMENT AGREEMENTS AND VESTED RIGHTS:  
PROBLEMATIC LEGAL ISSUES**

Edward H. Ziegler

***Nature and Authority***

A number of states expressly authorize development agreements between a local government entity and a developer to establish the rights and obligations of both parties with respect to a specific development project. These statutes generally outline the development agreement process, including provisions for initial authorization by ordinance, public hearing requirements, periodic review, and subsequent modification and termination of such agreements. Statutorily authorized development agreements supplement a local government's land use regulations by providing for agreement as to the specific terms and conditions of a particular development project. Perhaps the most notable feature of development agreement enabling legislation are provisions that authorize local governments to make zoning and development regulations in effect at the time of the agreement a part of such an agreement. A developer is thereby protected from subsequent changes in development regulations except in certain specified situations.

Development agreements are authorized by state legislation in order to promote the general welfare by allowing a reasonable balancing of the public and the private interest in ascertaining with reasonable certainty the requirements that must be met for a specific development project. A development agreement benefits local government in that the agreement can provide for the fees, dedications, exactions, or improvements or other terms and conditions of development that the developer agrees to pay for or abide by in return either for the right to develop the property or for extended vested rights. The developer benefits since the agreement may "lock in" the land use regulations which are in effect at the time the agreement is adopted. This protection from future changes in regulation is important in states that have a vested rights doctrine that operates in favor of local government such that a developer does not obtain a vested right to build a project until later in the development process.<sup>1</sup>

In Colorado and other states, developers are placed in the position of incurring substantial "soft" costs, such as planning and surveys, and even many "hard" costs, such as grading and installation of improvements, before obtaining a vested right to build out the project. If the community's attitude towards the project changes during this time, the local legislative body, or citizens if an initiative right applies, may enact legislation which substantially reduces the size of the project or even prevents construction. The community may suffer the lost benefits of jobs, improvements, or fees otherwise payable by the developer. Development agreements can reduce this risk, especially when both

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<sup>1</sup> See generally, Curtin & Zischke, "Development Agreements: Securing Vested Rights and Project Completion Benefits," 11 Zoning & Plan. L. Rep. 25 (1988); Campanella, Elliott & Merriam, "New Vested Property Rights Legislation: States Seek to Protect A Shaky Judicial Doctrine," 11 Zoning & Plan. L. Rep. 81 (1988).

the developer and the local government agree that a project would benefit the community.

State statutes generally authorize subsequent adoption and application of new regulations to projects covered by such agreements under certain conditions. The Colorado statutory scheme, for example, allows local governments to take action which would "alter, impair, prevent, diminish, or otherwise delay the development or use of the property: (1) With the consent of the affected landowner; or (2) Upon the discovery of natural or manmade hazards on or in the immediate vicinity of the subject property, which hazards could not reasonably have been discovered at the time of site-specific development plan approval, and which hazards, if uncorrected, could pose a serious threat to the public health, safety, or welfare; or (3) To the extent such ordinances or regulations are enacted or provisions are contained in ordinances or regulations which are general in nature and are applicable to all property subject to land use regulation by a local government, including, but not limited to, building, fire, plumbing, electrical, and mechanical codes; or (4) To the extent that the affected landowner receives just compensation for all costs, expenses, and liabilities incurred by the landowner, including, but not limited to, all fees paid in consideration of financing, and all architectural, planning, marketing, legal, and other consultants' fees incurred after approval by the governmental entity, together with interest thereon at the legal rate until paid. Just compensation shall not include any diminution in the value of the property which is caused by such action.<sup>2</sup>

### ***Illegal Contract Zoning***

Courts traditionally have held that concomitant agreements between a developer and a municipality are void as "illegal contract zoning" when the police power is therein bargained away by a municipality's promise to rezone or not to subsequently repeal the rezoning. This is the case even in states where courts approve of "rezoning with site-specific conditions" or "conditional zoning."<sup>3</sup>

The extent to which a local government may validly restrict its future use of the police power under statutorily authorized development agreements is an issue that has not as yet been clearly resolved by the courts.<sup>4</sup> One state court has ruled that a statutorily authorized agreement between a landowner and local governmental body involving the use of land constitutes illegal contract zoning if the agreement is interpreted as a surrender by the government body of its future right to exercise the

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<sup>2</sup> Colo. Rev. Stat. § 24-68-105 (1987).

<sup>3</sup> See, *Chrismon v. Guilford County*, 370 S.E. 2d 579 (D.C. 1988) (discussing this point). And see *Ford Leasing Development Co. v. Board of County Commissioners*, 528 P.2d 237, 240 (Colo. 1974). See generally Ziegler, *Rathkopf's The Law of Zoning and Planning* § 29A.03 (1990).

<sup>4</sup> See, *Benton v. City of Chattanooga*, (unreported. 1988 Tenn. App., Lexis 454)(wherein the Tennessee court refused to rule on the validity of that state's statute authorizing contract zoning ruling that the case involved a valid conditional zoning since there was no bargaining away of the police power).

police power.<sup>5</sup> There is, however, significant support for the position that statutorily authorized development agreements are an exercise of the police power to *promote the general welfare* when they do not totally abdicate or surrender legislative authority.

Prior cases applying or stating the illegal contract zoning principle that the police power may not be bargained away generally have involved ad hoc agreements entered into without the benefit of express statutory authorization. These cases usually rely on the simplistic and overboard assumption that any contractual restriction on the future use of the police power is per se illegal and contrary to the general welfare.<sup>6</sup>

Clearly a municipality's police power is not totally insulated from the effect of prior municipal conduct.<sup>7</sup> Similarly, as U. S. Supreme Court cases under the contracts clause make clear, such an absolutistic "bargaining away" principle is not recognized in federal constitutional jurisprudence.<sup>8</sup> On the contrary, a number of court decisions have allowed restrictions on the exercise of a local government's police power when the restrictions are set out in a contract that is expressly authorized by statute.<sup>9</sup>

There is some support in existing case law for the view that bilateral agreements involving development rights are not per se void as illegal contracts when the agreement demonstrates that the local government has acted to promote the general welfare and has not totally abdicated its legislative authority in regard to the regulatory matter.<sup>10</sup>

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<sup>5</sup> See, *Delucchi v. County of Santa Cruz*, 179 Cal. App. 3d 814, 225 Cal. Rptr. 43 (1986)(wherein the court ruled that if agreement between landowner and county authorized by the Williamson Act to preserve agricultural land were interpreted to prevent application of future land use restrictions the agreement would be void as illegal contract zoning).

<sup>6</sup> See, *Stone v. Mississippi*, 101 U.S. 814, 25 L. Ed. 1079 (1880)(upholding subsequent legislative repeal of exclusive lottery franchise awarded by prior legislature).

<sup>7</sup> See, e.g., *City of Homer v. Campbell*, 719 P.2d 683 (Alaska 1986)(assuming in the case sub judice that contract zoning is not per se unconstitutional, the court herein ruled that a bilateral zoning agreement created a "property interest" protected by procedural due process that could not be arbitrarily terminated without notice and hearing); *Wa-Wa-Yanda, Inc. v. Dickerson*, 18 App. Div. 2d 251, 239 N.Y.S.2d 473 (1963)(after leasing island land for use as marina and yacht club, including gasoline facilities, town could not lawfully prohibit reconstruction of gasoline pumps destroyed by hurricane); *Palisades Properties, Inc. v. Brunetti*, 44 N.J. 117, 207 A.2d 522 (1965)(city may not accept grant of land in return for restrictive covenants and then authorize use inconsistent with covenants). And see *Amwest Invs., Ltd. v. City of Aurora*, 701 F. Supp. 1508 (D. Colo. 1988)(wherein the federal district court ruled that contracts of municipalities are within the ambit of the "contract clause," Article I, S 10, of the U. S. Constitution).

<sup>8</sup> See, *U. S. Trust Co. v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L.Ed. 2d 92 (1977)(holding that New York and New Jersey legislatures could not, under the contracts clause, repeal covenants contained in bond indentures).

<sup>9</sup> See, e.g., *Housing Auth. v. City of Los Angeles*, 38 Cal. 2d 853, 243 P.2d 515 (1952)(upholding intergovernmental agreement); *Meegan v. Village of Tinley*, 52 Ill. 2d 354, 288 N.E.2d 423 (1972)(upholding annexation agreement); *Chase v. Glen Cove*, 34 Misc. 2d 810, 227 N.Y.S.2d 131 (1962)(upholding intergovernmental agreement to rezone).

<sup>10</sup> See, e.g., *Bradley v. City of Trussville*, 527 So. 2d 1303 (Ala. Civ. App. 1988)(wherein the court held that city had not abdicated its legislative responsibility with regard to annexation and rezoning of developer's property by agreeing with developer that if Zoning and Planning Commission did not rezone property to classification sought by developer then city would agree to de-annex developer's property, where city was extensively involved in development of subdivision, there were many negotiations between city and developer as to subdivision, and public hearings were held on developer's petition to rezone).

And see *Geralnes v. City of Greenwood Village*, 583 F. Supp. 830 (D. Colo. 1984)(wherein the court found that a pre-annexation agreement was not ultra vires, distinguishing it from contract zoning, because the city had not completely surrendered its zoning power. The city had sought to renege on the agreement on the ground that it constituted an unlawful delegation of the police power. The city promised to share the private property's road improvement costs, obtain the owner's approval before including the land in a special assessment district, and remove certain development restrictions in exchange for the landowner's consent to annexation. The court stated that "the general prohibition against delegating legislative functions applies when a city completely surrenders its powers to rezone

Statutorily authorized development agreements may be viewed as an exercise of police power to promote the general welfare and not an improper abdication of legislative authority, particularly when the statutory scheme provides for periodic review, modification or termination, or application of subsequently adopted regulations in certain situations.<sup>11</sup>

For example, courts have upheld annexation agreements related to the rezoning of land that is the subject of annexation.<sup>12</sup> In *Geralnes v. City of Greenwood Village*,<sup>13</sup> a federal district court in Colorado upheld a pre-annexation agreement between a city and commercial landowners whereby the city promised to share road improvement costs, obtain the owner's approval before including the land in a special assessment district, and remove certain development restrictions in exchange for the landowner's consent to annexation. The city sought to repudiate the agreement on the ground that it constituted the illegal bargaining away of its police power. Finding that the agreement was not ultra vires, the court upheld the agreement stating that "the general prohibition against delegating legislative functions applies when a city completely surrenders its powers to rezone property for an indefinite period of time."

Courts have upheld agreements between a developer and a public agency (including a municipality) wherein the governmental body promised to recommend to the zoning authority that the developer's rezoning request be granted.<sup>14</sup> Also, courts have upheld rezonings pursuant to intergovernmental agreements whereby a municipality commits itself to rezone.<sup>15</sup>

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property for an indefinite period of time"); *Funger v. Somerset*, 249 Md. 311, 239 A.2d 748 (1968)(wherein the court held that a written agreement whereby a town promised to recommend to a county council the rezoning of about 18 acres to permit the construction of apartments, in consideration of a builder's promise to donate a prescribed scenic easement, to limit development for 20 years, and to donate certain park land, is not illegal contract zoning).

And see *Housing Auth. v. Richardson*, 196 So. 2d 489 (Fla. App. 1967)(upholding intergovernmental agreement to rezone); *Prassaic Junior Chamber of Commerce v. Housing Auth.*, 45 N.J. Super 381, 132 A.2d 813 (1957)(same); *St. Stephens Club v. Youngstown Metropolitan Hous. Auth.*, 164 Ohio St. 194, 115 N.E.2d 385 (1953)(same)

<sup>11</sup> On this point, see the statement of the Washington Supreme Court in *State ex rel. Myrhe v. City of Spokane*, 70 Wash. 207, 422 P.2d 790 (1967):

[The city must weigh the benefits which will flow to the public generally against the detriment, if any, to the adjacent property owners or to the public which may result therefrom. An amendment to a zoning ordinance and a concomitant agreement should be declared invalid only if it can be shown that there was no valid reason for a change and that they are clearly arbitrary and unreasonable, and have no substantial relation to the public health, safety morals, and general welfare, or if the city is using the concomitant agreement for bargaining and sale to the highest bidder or solely for the benefit of private speculators.

See generally, Rose, "Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy," 71 Calif. L. Rev. 837 (1983); Wegner, "Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals," 65 N.C.L. Rev. 957, 994-1027 (1987).

<sup>12</sup> See, Ziegler, *Rathkopf's The Law of Zoning & Planning* § 29A.03[5] (1990).

<sup>13</sup> 583 F. Supp. 830 (D. Colo. 1984).

<sup>14</sup> *City of Greenbelt v. Bresler*, 284 Md. 210, 236 A.2d, (1967).

<sup>15</sup> See, *Housing Auth. v. Richardson*, 106 So.2d 489 (Fla. App. 1967); *Prassaic Junior Chamber of Commerce v. Housing Auth.*, 45 N.J. Super. 381, 132 A.2d 813 (1957); *Chase v. Glen Cove*, 34 Misc. 2d 810, 227 N.Y.S.2d 131 (1962); *Housing Auth v. City of Los Angeles*, 38 Cal. 2d 853, 243 P.2d 515 (1952).



### ***Application of the Nollan "Substantial Nexus" Test to Site-Specific Conditions and Exactions***

The U. S. Supreme Court in *Nollan v. California Coastal Commission*<sup>16</sup> established the so called "substantial nexus" test for development conditions, exactions, and impact fees. In *Nollan*, the California Coastal Commission required the landowner to grant a public easement across private beach property in exchange for a permit to convert a beach bungalow into a two-story dwelling. The Supreme Court ruled this condition an unconstitutional "taking" of private property since there was no substantial relationship between the condition imposed and the asserted public purposes for the condition. In effect, *Nollan* may be said to require that a "substantial nexus" exist between a development condition or exaction and some particular problem or need generated by a specific development proposal. If such a nexus does not exist, the condition or exaction attached to a development proposal may be held unconstitutional under *Nollan* as an attempt at "simple extortion."<sup>17</sup> The *Nollan* substantial nexus test is now followed in Colorado and other states.<sup>18</sup>

Many planners and land use lawyers have assumed that the *Nollan* substantial nexus test is not applicable to development conditions or exactions voluntarily assumed by a developer in the context of seeking some additional development rights, as in the case of incentive zoning programs or development agreements. However, these issues have not as yet been clearly resolved by the courts. There is some logical and legal support for applying *Nollan's* nexus test to both incentive zoning programs and development agreements when they are utilized to *grant permission* to develop land. Is there a difference, for example, between a "condition on development permission" and "waiver of a development restriction"? In this regard, it should be noted that courts have applied this type of nexus test to conditions imposed on variances as well as rezonings and special permits.<sup>19</sup>

Similarly, is permission to develop land simply a "privilege" that may be sold by local government through some voluntary quid pro quo exchange or must there be some nexus between the conditions imposed by a development approval decision and some specific problem or need related to the particular development in question? In considering this question, one might wonder if the result in *Nollan* would have been different had the public agency turned down the development as proposed but offered to enter into a development agreement allowing the development subject to the dedication condition held unconstitutional by the Supreme Court. Also, one might consider on this point the language of Justice Scalia's opinion in *Nollan* with respect to the regulation of development rights. "[T]he evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation

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<sup>16</sup> 483 U. S. 825 (1987).

<sup>17</sup> See, *William J. Jones Insurance Trust v. City of Fort Smith*, 731 F. Supp. 912, 914 (W. D. Ark. 1990).

<sup>18</sup> See, *Van Sickle v. Boyes*, 797 P.2d 1267 (Colo. 1990).

<sup>19</sup> See, Ziegler, *Rathkopf's The Law of Zoning & Planning* § 40.04 (1992).

becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensation to those willing to contribute \$100 to the state treasury.<sup>20</sup>

Where approval of a site-specific development plan or a development agreement makes *permission to develop* contingent on compliance with conditions, exactions, or impact fees then the *Nollan* nexus test might well be held to apply to those conditions or exactions. However, where a site-specific development plan or a development agreement simply exchanges the *granting of vested rights* for some public benefit or development condition the *Nollan* nexus test might well not apply. In this situation, the granting of greater vested rights in return for a negotiated benefit to the public may be seen as simply a voluntary exchange necessary to secure a valuable government benefit.<sup>21</sup>

### ***Remedies When A Court Invalidates a Site-Specific Condition***

A problem of appropriate remedies may arise when, in the context of litigation, a court holds invalid a site-specific condition imposed on a particular development project. There are basically two different lines of cases that a court might follow when invalidating a site-specific condition. In some cases, particularly in highly discretionary rezoning situations, reviewing courts have invalidated both the approval decision and the related concomitant development agreement.<sup>22</sup> In other cases, the development approval decision is allowed to stand, with only the site-specific condition in question held invalid.<sup>23</sup> This latter line of cases generally has involved administrative approval decisions under already established ordinance standards. Both lines of court decisions generally are based on consideration of the extent to which the condition held invalid may have formed an essential or integral part of the overall approval decision.<sup>24</sup>

It may be worth noting on this topic that some courts have estopped landowners from challenging the legal validity of site-specific conditions when they requested the approval decision and have benefitted therefrom.<sup>25</sup> Also, some courts have ruled that

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<sup>20</sup> 483 U.S. at 837.

<sup>21</sup> See, *Ruckelshaus v. Monsanto, Co.*, 467 U. S. 986, 1007 (1984) cited in *Nollan v. California Coastal Commission*, 483 U.S. at 832 (discussing this point).

And see, *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 698 (9th Cir. 1991) wherein the Ninth Circuit Court of Appeals ruled that provisions of a settlement agreement between a developer and the Tahoe Regional Planning Agency (TRPA), requiring the developer to perform off-site mitigation of adverse environmental effects, did not result in an unconstitutional taking under *Nollan* taking analysis. The court further held that the *Nollan* analysis is inapplicable where "parties choose to terminate or avoid litigation by executing a settlement agreement supported by consideration." Furthermore, the court found that even if *Nollan* were applicable, the off-site mitigation provisions would be upheld because they were directly related to the agency's purpose, which is to "minimize the adverse effects of urbanization on the Lake Tahoe Basin's ecological system."

<sup>22</sup> See, Ziegler, *Rathkopf's The Law of Zoning & Planning* § 29A.02 [6][9] (1990).

<sup>23</sup> See, Ziegler, *Rathkopf's The Law of Zoning & Planning* § 40.10 (1992).

<sup>24</sup> *Id.*

<sup>25</sup> See, *City of Cedar Rapids v. McConnell-Stevely-Anderson Architects and Planners*, 423 N.S. 2d 17 (Iowa 1988)(holding that, despite possible illegal contract zoning, owner was estopped from challenging validity of ordinance limiting use of property to specific business, since owner had requested same and had benefitted from that ordinance); *Psychogios v. Village of Skokie*, 4 Ill. App. 3d 186, 280 N.E.2d 552 (1992)(restaurant owner estopped from challenging prior zoning action and agreement thereunder relating to off-street

neighbors may not attack the validity of conditions imposed for their benefit and protection.<sup>26</sup>

The above discussion highlights the need for approval decisions and development agreements to include provisions addressing the rights of the parties in the event a specific condition is held invalid.

### ***Vested Rights, Administrative Approvals, and the Referendum Process***

Vested rights and development agreement legislation may in some states provide for the granting of extended vested rights through purely administrative approval processes. Colorado legislation, for example, authorizes local ordinances providing for administrative approval of a "site-specific development plan" which results in the granting of vested rights for a three year period.<sup>27</sup> The Colorado legislation also provides that: "[S]uch approval shall be subject to all rights of referendum and judicial review...."<sup>28</sup> However, as a matter of both case law and constitutional procedural due process, the referendum process is likely to be held not to apply to administrative approval of designated site-specific development plans granting vested rights.

Courts generally have held that the words "initiative" and "referendum" are themselves an implicit limitation on the type of matters that may properly be the subject of an initiative or referendum. Based on both historical intent and practical necessity, courts long have held that these powers extend only to truly "legislative matters" and may not be applied to administrative or quasi-judicial matters.<sup>29</sup>

In the context of zoning and land use decisionmaking, courts usually characterize either the original adoption or later amendment of a zoning code as legislative matters subject to voter initiative or referendum.<sup>30</sup> However, the administrative implementation of existing zoning ordinances, by the grant of a special permit, variance or site plan or planned development approval, etc. in accordance with already established ordinance standards, is generally considered to involve "administrative action" not properly subject to voter referendum.<sup>31</sup> This characterization basically mirrors and is based in part upon judicial interpretations of federal and state constitutional due process requirements that individual notice and a fair hearing are necessary for proceedings to determine

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parking since owner accepted benefits thereof for 3 years). And see, Ziegler, *Rathkopf's The Law of Zoning & Planning* § 40.09 (1992).

<sup>26</sup> See, Ziegler, *Rathkopf's The Law of Zoning & Planning* § 40.09 (1992).

<sup>27</sup> Colo. Rev. Stat. § 24-68-102(2), (4) (1987).

<sup>28</sup> Colo. Rev. Stat. § 24-68-103 [1] (1987).

<sup>29</sup> E.g., *In re Andrew Pfahler*, 150 Cal. 71, 88 P. 270 (1906); *Brazell v. Zeigler*, 26 Okla. 826, 110 P. 1052 (1910); *Kadderly v. Portland*, 44 Or. 118, 74 P. 710 (1903) See generally, 5 E McQuillin, *Municipal Corporations* § 16.55 at 194 (3d ed. 1981); O. Reynolds, *Handbook of Local Government Law* § 203, at 725, § 204 at 727 (1982)(both authorities declare that the powers of initiative and referendum are generally restricted to legislative matters).

<sup>30</sup> See, Ziegler, *Rathkopf's The Law of Zoning & Planning* § 29 C.03(1) (1990).

<sup>31</sup> *Id.*

"administrative" but not for "legislative" matters.<sup>32</sup> This reasoning is reflected in Colorado court decisions.<sup>33</sup>

Even with respect to action taken by a local legislative body, courts draw a distinction between matters that are truly legislative in character and matters that are administrative or quasi-judicial in nature. Limiting plebiscites to only legislative matters, courts generally look to the substance and nature of the actions taken rather than the form in which they are passed.<sup>34</sup> Action taken by a local legislative body in Colorado, or other states, with respect to a particular development application might well be considered "administrative" when such action merely implements existing ordinance standards for decision.<sup>35</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> See, *Margolis v. District Court*, 638 P. 2d 297 (Colo. 1981), wherein the supreme court of Colorado held that zoning and rezoning decisions affecting even small parcels are legislative acts and are therefore subject to the electorate's power of initiative and referendum as set forth in the state constitution. The court thus retreated somewhat from its earlier position taken in *Snyder v. City of Lakewood*, 189 Colo. 421, 542 P.2d 371 (1975), that a rezoning is quasi-judicial in nature. For the purposes of oral argument and opinion, *Margolis* was consolidated with two other cases: *Wright v. City of Lakewood* and *Yanz v. City of Arvada*. In *Yanz*, the city council enacted an ordinance rezoning a 3.34-acre parcel of land from single-family, residential to commercial. Petitions were filed seeking a referendum. In *Margolis*, a city annexed 90 acres of undeveloped land and then passed an ordinance zoning the property. Here, a petition for a referendum and another for an initiative to establish a different zoning scheme were filed. In both cases, the petitions were rejected by the city council. In *Wright*, the city council adopted an amendment to the city's master land-use plan and passed an ordinance rezoning certain parcels covered by the amendment. Petitions were filed for a referendum on the amendment and the rezoning, but the city council refused to repeal the ordinance or set a date for the referendum.

In holding in all three cases that zoning and rezoning decisions are legislative in nature, the court found no distinction between individual rezonings sought by a private landowner and large, generalized rezonings like the one in *Wright*. It stated that small-parcel rezonings reflect public policy "for future" and, like initial zonings, tend to become permanent. 638 P.2d at 304. However, the court also held that the master plan amendment in *Wright* was not a fit subject for initiative or referendum, thereby reversing the court of appeals, 43 Colo. App. 488, 608 P.2d 301 (1979). The supreme court stated that, under Colorado's statutory scheme, Colo Rev. Stat. § 31-23-201 et seq. (1977), a master plan is "advisory only," and "not of a permanent nature [but instead] subject to the control of the municipality's governing body." *Id.* at 305-306. Finally, the court stated that it continues to adhere to its ruling in *Snyder* that "for the purposes of judicial review, rezoning [is] quasi-judicial in character." *Id.* at 305.

<sup>34</sup> See, *Ziegler, Rathkopf's The Law of Zoning & Planning* § 29C.03 [1] (1990).

<sup>35</sup> A recent case discussing this point is *Citizens v. City of Steamboat Springs*, 807 P.2d 1197 (Colo. App. 1990), holding that, since a zoning ordinance required any specific developmental use to be approved by city council, such approval was analogous to planned development rezoning and thus a legislative act subject to referendum. The opinion does not mention whether there were existing ordinance standards applicable to the approval decision in question.

And see, *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1255 (Colo. 1987)(initiative which would repeal any measure of city council that authorized moving schoolhouse or acquiring land on which to place schoolhouse and which would prohibit use of any funds for purposes of relocating schoolhouse or acquiring the land to relocate the schoolhouse, which was to be remodeled as a city hall, related to administrative matters and were invalid attempts to exercise the constitutional right of initiative and referendum. The decision to build a new city hall in the first instance, and to raise tax revenues therefor, had previously been made and approved by the voters); *Citizens Lobby v. Port Huron City Clerk*, 132 Mich. App. 412, 347 N.W.2d 473 (1984)(proposal for development of waterfront property acquired by city, which ordinance constituted an attempt to implement existing city charter policy on land development, was administrative in nature and was not subject to voter initiative or referendum).

## Chapter IV **CASE STUDIES**

### Foreword to the Case Studies

Edward H. Ziegler

The case studies which follow are the result of a survey by the Institute regarding the utilization of development agreements by Colorado cities and counties. Development agreements obtained through this survey were reviewed for inclusion herein based on obtaining a view of their use both in regard to a variety of types of development projects and to a variety of types of development situations and issues. The Institute then contacted the public and private sector planners and attorneys who were directly involved in the negotiation of the agreements to obtain their narrative contributions, which appear herein, describing the development background, process, and provisions of each agreement.

The development agreements examined herein involve a variety of types of development projects. The *Highlands Ranch* agreement involves, in effect, the creation of a satellite city to Denver in northern Douglas County, a 22,000 acre mixed-use development that is expected at build out to have a residential population of 90,000 people. The *Denver Union Terminal* agreement focuses on preservation of Denver's historic Union Terminal railroad station and the future development of two 250 foot commercial towers on its 18 acre site. The *Cherry Creek Mall* agreement involves a 47 acre infill commercial and mixed use redevelopment project in an established upscale neighborhood, and is viewed by one author herein, as an example of "how neighborhood groups, existing commercial development, local government and a new developer can work together to integrate a major new facility into the fabric of an existing neighborhood."

The *Twilight Development* agreement involves infill commercial redevelopment of a golf course in an existing residential area. The *Indian Tree Subdivision* agreement involves a residential infill project in a developed residential area. Both of the above projects initially faced significant neighborhood opposition and the resulting agreements reflect the compromises necessary for the respective projects to be undertaken.

The *Willow Park* agreement addresses issues related to obtaining planned development and resubdivision approvals for the construction of 474 single family homes on a 138 acre tract in the face of local government demands that the developer finance the construction of a major parkway on the property, an 11 acre park, water taps for the park, and substantial off-site drainage improvements.

The *Denver Gateway-Parkfield* agreement involves amendment of an existing PUD district and a companion annexation agreement for a 647 acre site near Denver's new international airport to reflect the land use, infrastructure and dedication requirements of that city's new Gateway Area Concept Plan and to address a number of issues and disputes associated with the property, including school district litigation and the release of public improvement guaranties.

The *Moses Lot Split* agreement involves application by an owner in Aspen to increase the size of a building lot so that the existing floor area ratio would permit

construction of a 5,000 square foot house on the lot. The resulting development agreement, involving this lot line adjustment, benefitted the city by eliminating townhouse development rights on a sensitive parcel of land near the central core of Aspen.

The development agreements address a variety of planning and development issues. The *Highlands Ranch* agreement focuses on the conveyance of land for open space, wildlife habitat, and park and recreational uses. The *Denver Union Terminal* agreement contains provisions for preservation of the existing structure and design review of new development. The *Cherry Creek Mall* agreement addresses financing responsibilities for park, street, storm drainage, and utility improvements, landscaping, parking, the phasing of improvements, number of anchor stores, maximum and minimum square footage for different types of uses, easements and vacations, and further incorporated therein the provisions for the redevelopment of the property set out in the city's neighborhood plan for the area. The *Willow Park* agreement focuses on city reimbursement of the developer for street improvement costs. The *Twilight Development* agreement addresses the city's commitment to reimburse the developer for park acquisition and improvement costs, with the annual repayment based on a tax increment formula. The *Indian Tree* and *Moses Lot Split* agreements imposed specific and detailed conditions, such as off-street parking, landscaping, fencing, etc., on the development approved.

Many of the agreements contain provisions with respect to termination, modification, breach, and remedies. As might be expected, most of the agreements grant the developer extended vested rights. With respect to the granting of vested rights, the agreements range from 3 years (*Indian Tree Subdivision*) to 30 years (*Highlands Ranch*), to 50 years (*Denver Union Terminal*), to the granting of vested rights in perpetuity (*Moses Lot Split*). It should be noted, however, that three of the agreements (*Cherry Creek Mall*, *Twilight Development*, and *Willow Park*) do not involve the granting of vested rights. The *Cherry Creek* agreement is secured only by the mutual consideration and conditions set out therein. The *Twilight Development* and *Willow Park* agreements largely embody simply the good faith commitment of the local government to reimburse the developer over a period of time for park acquisition or street development costs.

Interestingly, the development agreements herein generally were not utilized in an entirely ad hoc fashion in responding to specific development proposals. Often the agreements reflect and crystalize planning issues with respect to application of an adopted city neighborhood or subarea plan to a specific development project or tract of land (the *Cherry Creek Mall*, *Denver Union Terminal*, and *Denver Gateway-Parkfield* agreements) or else address unanticipated or complex planning issues in a way thought to further some specific element or goal of the local government's comprehensive land use plan (the *Highlands Ranch*, *Willow Park*, and *Moses Lot Split* agreements). Two of the agreements (the *Indian Tree* and *Twilight Development* agreements) generally reflect the ad hoc negotiation and resolution of planning and compatibility issues raised by neighborhood opposition to infill development projects.

The narratives herein contributed by both public and private sector planners and attorneys generally speak quite favorably in regard to the utility of development agreements in supplementing the planning and zoning process. Often, the agreements are seen as instrumental in accommodating desired development consistent with community concerns and planning goals. Hopefully, the case studies herein provide

some insight with respect to the appropriateness and utility of development agreements in negotiating the management of land use and development.





**Case Study 1**  
**Highlands Ranch - Douglas County**

**Private Sector Representatives: Thomas L. Strickland and Carrie A. Mineart**  
**Public Sector Representatives: John W. Johnson and Betty Allen**

**Background:** *Highlands Ranch is an example of a large-scale, mixed use development that has dominated growth in Douglas County since the mid-1980's. The vesting agreement between Mission Viejo, the developer, and Douglas County guarantees residential, commercial and industrial development rights for a period of 30 years. The developer, in addition to complying with the complex terms of the agreement, conveyed 8200 acres of the 22,000 acre project to the Community Association as a Committed Area, for open space and recreational purposes. Highlands Ranch, one of the nation's largest single developments, is a prime example of the value of development agreements in large-scale projects.*



HIGHLANDS RANCH DEVELOPMENT AGREEMENT - DOUGLAS COUNTY  
**Private Sector Commentary - Thomas L. Strickland and Carrie A. Mineart**

***The New Town of Highlands Ranch***

The New Town of Highlands Ranch ("Highlands Ranch") is a large-scale, mixed use planned development consisting of 21,806 acres located in the unincorporated northern portion of Douglas County, the southern part of the Denver metropolitan area. Viewed as a success story among Denver area development projects and "new town" developments nationally, Highlands Ranch is currently occupied by an estimated 20,000 residents living in approximately 8,000 residential dwelling units, of which about 1,000 were sold last year. The success, scope and nature of the Highlands Ranch project make it a particularly good illustration of the benefits and operation of Colorado's property rights vesting statute.

***Description of Highlands Ranch***

Mission Viejo Company ("MVC") began the process of developing Highlands Ranch in 1979, and on September 17, 1979, Douglas County adopted the Planned Community District Development Guide and Development Plan for the New Town of Highlands Ranch (the "Development Guide").<sup>1</sup> Zoning for MVC's project was approved in 1980, and several thousand residential units were completed during the course of the 1980's.

The plans for development of Highlands Ranch provide for residential development areas with densities ranging from 2 to 15 dwelling units per residential acre, and for development of a total of 36,700 units. The building of these units is expected to take thirty to forty years, and to result in an overall residential density of 5.6 units per acre and an estimated ultimate population of approximately 90,000.

To complement the planned residential uses, construction for retail, commercial, and industrial uses is envisioned for 1,182 acres. In addition, a 79-acre partially developed community activities center, and three substantial town centers of 170, 172, and 286 acres, are also included as part of the Highlands Ranch community.

A primary feature of Highlands Ranch, as planned, is the reservation of approximately 60% of the planned land area for non-urban uses. The Development Guide calls for the creation of approximately 13,360 acres for non-urban uses, including 8,200 acres permanently set aside for an open space conservation area. Examples of other non-urban uses planned for the remaining 5,160 acres include churches, parks, public facilities, schools, open space, and trails.

In order to implement the Development Guide and establish the Highlands Ranch community as envisioned, major investment in both private and public facilities over many years have been, and will continue to be, required. Successful completion of the planned development of Highlands Ranch will depend on the willingness of not only

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<sup>1</sup> The Development Guide included the Planned Community District Development Plan - Statistical Summary, and the Planned Community District Development Plan - Zoning Map. On May 24, 1988, Douglas County approved amendment of the Development Guide to expand the Ranch area to include and rezone 369 acres of property for industrial park, and to increase the allowable number of residential units to be developed, along with certain other changes made in connection with the proposed development agreement under negotiation at the time. The references to the Development Guide hereinafter are intended to refer to the Development Guide as amended. The development agreement is discussed in detail *infra*.

MVC, but Douglas County and many others as well, to invest in the necessary fees, exactions, and costs associated with infrastructure, and facilities. Vested rights for MVC through an appropriately tailored development agreement have been critical in achieving the elimination of costly uncertainty regarding zoning and land use restrictions, and have facilitated the efficient planning and provision of high quality infrastructure to meet the needs of the present and future Highlands Ranch community.

### ***Colorado and Douglas County Provisions for Vesting***

In 1988, the Colorado legislature enacted SB 219,<sup>2</sup> which provided that the right to undertake and complete the development and use of property under the terms and conditions of a site specific development plan, a "vested property right," may be obtained through the approval of a site specific development plan, as defined by the applicable local government.<sup>3</sup>

Once a vested property right is established, pursuant to the statute, a local government is prohibited from taking any action that would "alter, impair, prevent, diminish, or otherwise delay" the development or use of property as set forth in the approved plan, except (1) with the consent of the landowner, (2) upon discovery of hazards which could not reasonably have been discovered at the time of approval, or (3) to the extent the landowner receives "just compensation."<sup>4</sup>

Development agreements are included in the statutory definition of "site specific development plan,"<sup>5</sup> and the statute further authorizes local governments to enter into development agreements that provide for vested property rights to endure beyond the statutory period of three years if circumstances so warrant.<sup>6</sup>

In response to the enactment of Colorado's vested property rights statute, Douglas County amended its zoning resolution to include the procedures required to obtain such rights.<sup>7</sup> In addition to establishing a process through which a site plan may trigger vested property rights, the Douglas County Zoning Resolution also authorized the use of development agreements for that purpose. However, the Resolution requires that:

- (1) the development must be located within the most northern Primary Planned Urbanization Area as identified on the 1986 Douglas County Master Plan;
- (2) 30% or more of the total infrastructure needs of the development must be constructed;

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<sup>2</sup> See, Colo. Rev. Stat. § 24-68-101 et seq. (1988).

<sup>3</sup> Prior to enactment of the statute, vesting of property rights had been an issue addressed, and variously resolved, by courts throughout the country. Increasingly, states such as Colorado have enacted statutory provisions to establish a more settled basis for determining whether rights have vested and when such vesting is appropriate or desired. Nonetheless, the Colorado statute does not preclude a judicial determination, based on common law, that a vested property right exists or a compensable taking has occurred. Colo. Rev. Stat. § 24-68-106 (1988).

<sup>4</sup> Colo. Rev. Stat. §24-68-105 (1988).

<sup>5</sup> Colo. Rev. Stat. § 24-68-105 (1988).

<sup>6</sup> Colo. Rev. Stat. § 24-68-104 (1988).

<sup>7</sup> See, Douglas County Zoning Resolution, Secs. 10-11.

- (3) \$50 million (in 1984 dollars) must be invested in infrastructure;
- (4) occupied residential commercial or office structures must exist on-site; and
- (5) the development site must have expressway access or be directly adjacent to it, or must have completed and adequate arterial access to an expressway interchange of adequate capacity.<sup>8</sup>

Moreover, the Resolution sets out the following list of benefits that may be granted to a landowner through development agreement:

- (1) a covenant by the Douglas County Board of County Commissioners providing that the Board will not initiate downzoning of the site;
- (2) the right to develop substantially the number of residential dwelling units and total gross acres for residential use provided in the site development plan;
- (3) the right to develop substantially the total gross acres for commercial and industrial use provided in the site development plan; and
- (4) the right to develop the project in order, rate and time dictated by the market, within the structure of the site development plan.<sup>9</sup>

It was in this legal context that Douglas County, MVC, Sand Creek Cattle Company,<sup>10</sup> and Highlands Ranch Community Association (the "Community Association")<sup>11</sup> entered into a development agreement regarding Highlands Ranch on November 15, 1988 (the "Highlands Ranch Agreement" or the "Agreement").<sup>12</sup>

### ***Development Agreement and Vesting For Highlands Ranch***

The Highlands Ranch Agreement confers substantial benefits to MVC, Douglas County, and the Community Association, most notably conferring on the developer vested rights with respect to the uncompleted balance of the development in exchange for the developer's commitment to convey a certain substantial property to the Community Association for open space, recreational and public use and wildlife habitat. The Agreement further contains provisions establishing its compliance with applicable state and county requirements.<sup>13</sup>

Through the Highlands Ranch Agreement, MVC is obligated to convey 8,200 acres to the Community Association for use as open space and for community use and

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<sup>8</sup> Douglas County Zoning Resolution, Sec. 11(C)(3).

<sup>9</sup> Douglas County Zoning Resolution, Sec. 11(F)(14).

<sup>10</sup> Sand Creek Cattle Company is a wholly owned subsidiary of MVC, and joined in the subject agreement as present owner of some of the property to be conveyed pursuant to the agreement.

<sup>11</sup> The Community Association is a Colorado non-profit corporation established to represent the interests of owners of privately-owned sites at Highlands Ranch. The Community Association joined in the subject agreement to accept the property conveyed under the agreement for the purpose of owning and administering the property for the uses as set forth.

<sup>12</sup> That agreement, entitled "Open Space Conservation Agreement (Highlands Ranch)," is reprinted herein.

<sup>13</sup> For example, the Agreement identifies itself as a "site specific development plan" intended to vest property rights in the developer. Highlands Ranch Agreement, at Sec. IV.4.1. In addition, it states that the Agreement meets each of the criteria required by Douglas County for development agreements intended to confer vested rights; for example, the Agreement states that substantially more than 30% of the infrastructure needs for the development had been constructed, and substantially more than \$50 million (in 1984 dollars) had been invested in addressing infrastructure needs. Highlands Ranch Agreement, at Sec. I.1.2(c).

facilities. The Agreement requires the developer to convey the committed acres no later than two years after substantial completion of either residential or nonresidential buildout of the development, but in no event later than 75 years from the date of the Agreement.<sup>14</sup> The Agreement further provides for interim conveyances and use, use restrictions, limited permitted uses incidental uses and a required Open Space Conservation Area Plan in relation to the property to be conveyed.<sup>15</sup>

Another benefit expressly conferred to Douglas County is agreement by the developer not to initiate annexation of Highlands Ranch in a manner that would remove it from Douglas County jurisdiction without the County's express consent.<sup>16</sup> In addition under the Agreement, the developer's recourse, should the County breach the Agreement or cause a default, is limited to injunction or specific performance, rather than monetary relief as allowed by the vesting statute.<sup>17</sup> In addition, the County reserves the right to disapprove development in the vicinity of any hazards, notwithstanding the statutory provision limiting such regulation to hazards that could not reasonably have been discovered as of the date of the vesting agreement.<sup>18</sup>

In exchange, the Agreement grants to MVC vested rights for a thirty year period, justified by the size of Highlands Ranch, the time required to complete development, the phased nature of the project and the potential for economic and market trends to impact on the progress of the development.<sup>19</sup> The particular rights granted to the developer<sup>20</sup> include the full list of benefits authorized under Douglas County requirements, discussed *supra*. In addition, the Agreement acknowledges the developer's right to seek equitable remedies in the event of breach or default.<sup>21</sup>

### **Conclusion**

In sum, development agreements have increasingly provided a means to enhance long-term and comprehensive planning of land use developments, and to provide the level of certainty, in the form of explicitly vested property rights, necessary to allow major developments to proceed to the mutual benefit of the community and the

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<sup>14</sup> Highlands Ranch Agreement, at Sec. 3.2. The Agreement deems substantial completion to have occurred when building permits for 90% of the dwelling units allowed under the approved Development Guide; when final plats and building permits have been approved for each residential lot or parcel on 90% of the acreage of all planned areas designated for residential use; or when final plats or site plans have been approved for 90% of the acreage of developable land within the Planning Areas designated in the Development Guide for nonresidential use. *Id.*

<sup>15</sup> Highlands Ranch Agreement, at Secs. II.3.5-9.

<sup>16</sup> Highlands Ranch Agreement, at Sec. IV.4.10.

<sup>17</sup> Highlands Ranch Agreement, at Sec. IV.4.6.

<sup>18</sup> Highlands Ranch Agreement, at Sec. IV.4.4.

<sup>19</sup> Highlands Ranch Agreement, at Sec. IV.4.3.

<sup>20</sup> Highlands Ranch Agreement, at Sec. IV.4.2.

<sup>21</sup> Highlands Ranch Agreement, at Sec. IV.4.6.

developer. As a review of the terms of the Highlands Ranch Agreement reflects, that Agreement is a balanced one epitomizing the spirit underlying that trend.

The Agreement provides substantial benefits to the County and community, in the form of open space, extensive land and resources dedicated to public facilities and other community uses, and likewise provides benefits to the developer in the form of increased certainty that development efforts will be allowed to proceed as planned. This promotion of all the parties' complementary interests, supported and furthered by the Highlands Ranch Agreement, will help to ensure the longterm success of the Highlands Ranch community, and provide a useful example for other developing communities.





HIGHLANDS RANCH DEVELOPMENT AGREEMENT - DOUGLAS COUNTY  
**Public Sector Commentary - John W. Johnson and Betty Allen**

Mission Viejo Company is a familiar name in developing communities in California and Colorado. Their Colorado development - Highlands Ranch- is one of the nation's largest single developments. The population at buildout is expected to reach 90,000 people. The 35 square mile Ranch is a mixed-use planned development, comprised of approximately 22,000 acres, 36,700 residential units and 1,000 acres of commercial and industrial uses. As of October of 1992, approximately 7,258 dwellings had been constructed resulting in a current population of approximately 20,000 residents. In a typical year, Highlands Ranch accounts for 52% of the building permits in the County.

In 1988 Douglas County entered into a vesting agreement with Mission Viejo Company concerning Highlands Ranch. The *vesting* of development rights is an important land use and planning issue throughout the United States. Generally, a vested development right refers to the right of a developer to proceed with development free from the effects of certain land-use regulations, adopted subsequent to the time the development right vests.

***Key Features of the Agreement***

Vital to all vesting agreements is that the agreement be mutually beneficial to the developer and the public. The key features of the vesting agreement for Highlands Ranch are as follows:

- The landowners covered by the Highlands Ranch Development Guide shall have the right to undertake and complete development and use of such land as provided in the agreement.
- The County shall not initiate any zoning action to reduce the maximum number of residential units or acres or to reduce the total gross acres for commercial, business, or industrial development.
- The landowners shall have the right to develop substantially the total number of residential units set forth on the Development Plan and use substantially the total gross acres for residential use as set forth on the Development Plan.
- The landowners shall have the right to use substantially the total gross acres of commercial, and industrial use as set forth on the Development Plan and the right to develop substantially the gross floor area of commercial and industrial use as is permitted under the provisions, limitations, and constraints of the Development Guide.
- The landowners have the right to develop in such order and at such rate and at such time as the market dictates in recognition of the size of development, the time required to complete development, the need for development to be phased, and the possible impact of economic conditions during the course of development.

- The landowners have the right to continue and complete the development of Highlands Ranch with conditions, standards, dedications, exactions, and requirements which are no more onerous than those set forth in the Development Guide or than those being imposed by the County on other developers in Douglas County on a reasonably uniform and consistent basis.
- The vested rights provided in this agreement have a duration of 30 years and may be extended by the County upon the landowner's request.
- The discovery of natural or man-made hazards may be allowed as a reason for the County to deny development when such hazards are not or cannot be corrected and that such hazard if uncorrected would pose a serious threat to the public health, safety, and welfare.
- The County may apply regulations of general applicability including:
  - impact fees
  - local improvement district fees
  - building, fire, plumbing, engineering, electrical, and mechanical codes
  - subdivision and zoning regulations
  - regional, state or federal regulations
 as all of the foregoing exist on the date of the vesting agreement or may be enacted or amended subsequent to the date of the vesting agreement when applied uniformly.

***Special Concessions***

- Mission Viejo Company agreed to convey the *Committed Area* - approximately 8200 acres - to the Community Association, or a community/public body, as defined in a related Open Space Agreement, no later than 2 years after substantial completion of either residential or nonresidential buildout of the area covered by the Development Guide or 75 years after the date of the vesting agreement (the year 2063), whichever occurs first.

The *Committed Area* is to be preserved by such community/public body for open space and recreational purposes and permitted incidental uses, i.e., roads, utilities, drainage and flood control devices.

- Mission Viejo Company waived rights to money damages provided by the Constitution and laws of the United States or State of Colorado for any breach or default.
- The landowners must provide the County with a written notice of any breach or default and shall provide the County 60 days to cure any such breach or default.
- The landowners may not hold the County liable for normal administrative delays in its land-use and development process or for delays for reasons beyond the

County's control.

- Vested rights are declared to apply to any other local government which may subsequently obtain or assert jurisdiction, unless otherwise agreed to by the County and the landowner.
- Mission Viejo Company will not initiate annexation of Highlands Ranch to a municipality whose main body of population or center of government is located outside the County, except with the express consent of the County.
- The landowners shall provide proof of adequate services, as defined by the Douglas County Board of Commissioners and uniformly applied county-wide, within the control of the developer, as a prerequisite to County approval of a final plat or site plan.

### ***Approval Requirements***

Vesting of development rights is generally provided for upon the approval of a Site Specific Development Plan, rather than at the time of zoning approval. The final plat is considered to be the site specific development plan in the case of residential development, and the site improvement plan is considered to be the site specific development plan in the case of commercial, business, industrial, or nonresidential development.

The Highlands Ranch vesting agreement was approved in accordance with Part I, Section 10 of the Douglas County Zoning Resolution, which was enabled by Section 24-68-101, et. seq., C.R.S. Key requirements for approval of a vesting agreement at zoning are:

- The development must be located in the Northern Primary Planned Urbanization Area, identified in the County Master Plan, in close proximity to the metro area, where multiple freeways and other infrastructure exist and service delivery costs are minimized.
- A substantial investment in the infrastructure for the development must have occurred such that:
  - 30% or more of the total infrastructure has been constructed
  - \$50 million or more has been invested in infrastructure
  - Residential, commercial, or office structures are occupied
  - Expressway access, on site or directly adjacent to the site, or adequate arterial access to an expressway interchange of adequate capacity must be available

### ***Summary***

Development agreements are important to developments, especially the residents, when they are financed by special district debt. Steady, healthy growth is essential to the retirement of this debt. The development industry has sought vesting agreements to provide certainty for those engaged in the development process, including lending institutions. In contrast, most local governments view vesting with caution due to changing circumstances and the need for flexibility for planning and proper growth

impact mitigation, including the provision of adequate public facilities and services and future revenue sources.

Development agreements can be mutually beneficial to both private and public interests. The public sector should take care that public benefit is assured. First, care needs to be directed toward examining project viability, particularly the size, location, and timing of development. Developments should be in accordance with the local government's 'Master Plan'. Secondly, if a project has demonstrated adequate project viability and special district debt is utilized, then vesting can help protect existing and future residents with timely debt retirement.

Finally, the provision of supplemental facilities or benefits which cannot be acquired through existing regulations, standards, or policies may be an added benefit in the negotiation of development agreements.

# OPEN SPACE CONSERVATION AGREEMENT

(Highlands Ranch)

This Agreement is made this 15<sup>th</sup> day of November, 1988, among COUNTY OF DOUGLAS, STATE OF COLORADO ("County"), acting by and through its Board of County Commissioners, HIGHLANDS RANCH COMMUNITY ASSOCIATION, INC., a Colorado nonprofit corporation ("Community Association"), MISSION VIEJO COMPANY, a California corporation ("Mission"), and SAND CREEK CATTLE COMPANY, a Colorado corporation ("Sand Creek").

## I. GENERAL.

1.1 Recitals. This Agreement is entered into on the basis of the following facts, understandings and intentions of the parties:

(a) Pursuant to Colorado Revised Statutes, 30-28-106 (1), the Douglas County Planning Commission adopted a Douglas County Master Plan on November 18, 1986. The General Goal Statement for the Douglas County Master Plan contains several central themes and highlights certain Plan objectives, including: Encouraging the efficient investment and use of limited public and private resources in developing and maintaining quality community facilities and services; maximizing the benefits of growth and development and minimizing the impacts; accommodating major growth and development while seeking to preserve and maintain significant open space areas and the natural environment; and encouraging and supporting the economic development in providing a tax base and a range of employment and housing opportunities.

(b) The referenced Douglas County Master Plan established a number of planning goals to ensure, through the Plan's implementation, orderly development of Douglas County, the provision of adequate infrastructure and quality development compatible with the surrounding land uses and the natural environment. Various land use goals were established for residential, commercial and industrial development to direct new urban development toward Planned Urbanization Areas and municipalities.

(c) Since 1979, Mission has been in the process of developing Highlands Ranch, a large scale, mixed use development, in accordance with the Planned Community District Development Guide and Development Plan for the New Town of Highlands Ranch. These development and investment activities by Mission have been consistent with, and supportive of, the goals established in the current Douglas County Master Plan.

(d) The Highlands Ranch project has required and will continue to require major investments in public facilities over a span of time to serve the needs of the community and the

County. There is a need for predictability and assurance of ability to complete these facilities to serve the Highlands Ranch Development, including streets, drainage facilities, water lines and mains, wastewater lines and mains, water and wastewater treatment plants, parks and recreation facilities, and fire protection facilities.

(e) County recognizes that completion of these facilities will help to achieve the objectives of the Douglas County Master Plan. The County also acknowledges that these facilities must be planned in an effective, efficient and economic manner and must be constructed with sizing and capacity which anticipates the ultimate size and scope of the planned development. The County further recognizes that this, in turn, requires public and private investment by the County, by the water and sanitation districts, by metropolitan districts and by developers which can be supported only if there is assurance that development, once approved by the County, will be allowed to proceed to ultimate completion as provided in this Agreement.

(f) County has expressed an interest in open space conservation in Douglas County. Mission and Sand Creek as a part of this Agreement are committing to convey a major portion of Highlands Ranch ("Committed Area") to the Community Association for the purpose of owning and administering these lands for use in perpetuity as open space, recreation purposes, public facilities and wildlife habitat enhancement. County recognizes this as a significant contribution toward Open Space Conservation in Douglas County. Mission and Sand Creek recognize that their commitment to convey the Committed Area as aforesaid is a material consideration for the agreements of the County contained herein.

(g) The County has approved an Amendment to the Development Guide to, among other things, expand the boundaries of Highlands Ranch to include and rezone 369 acres of property for industrial park owned by third parties and increase the maximum number of residential dwelling units which may be developed within Highlands Ranch. The amendment will provide economic benefits in the form of: (1) increased assessed valuation of those properties, (2) readily developable land due to proximity to C-470, and (3) additional tax benefits to the County and Highlands Ranch Special Districts.

(h) County has determined that entry into this Agreement will further the goals and objectives of the County's land use planning policies by: (1) eliminating uncertainty in planning for and securing orderly development of Highlands Ranch so that adequate long-term plans regarding the provision of necessary infrastructure can be developed and implemented, and ensuring the maximum effective utilization of resources within the County at the least economic cost to its citizens, and (2) providing for the preservation of open space and wildlife habitat enhancement. In exchange for these benefits to the

County, Mission desires to receive the assurance that it may proceed with development of Highlands Ranch as provided in this Agreement.

(i) The purpose of the Agreement is: (1) to reflect the vesting of certain rights to undertake and complete development and use of Highlands Ranch under the Development Guide, and (2) to reflect the commitment of Mission to convey major portions of Highlands Ranch to the Community Association or a community body or a public body as permitted herein for the purpose of owning and administering these lands for use in perpetuity as open space, recreational purposes, public facilities and wildlife habitat enhancement. Sand Creek, a wholly owned subsidiary of Mission, joins in this Agreement as present owner of some of the Committed Area, as hereinafter defined. The Community Association joins in this Agreement to evidence its approval and acceptance of the terms hereof and its agreement to accept conveyance of the Committed Area as provided herein.

1.2 County Development Agreement Provisions. The County has adopted an amendment to Part I of its Zoning Resolution, as Section 11, Development Agreements ("County Development Agreement Provisions") establishing criteria, procedures, submittal requirements and development agreement requirements and the rights which may be vested for the vesting of property rights by development agreement at a stage earlier than site plan or final plat approval. The County has determined that Mission and the Highlands Ranch project have satisfied the criteria; that Mission has, except as waived by County in accordance with the County Development Agreement provisions, followed the procedures and the submittal requirements; and that this Agreement satisfies the Development Agreement requirements of the County Development Agreement Provisions, all as hereinafter indicated.

(a) The Development Guide for Highlands Ranch, as amended, and the vesting of property rights thereunder, is consistent with the goals and policies of the Douglas County Master Plan.

(b) The commitment contained herein of Mission to convey the Committed Area for open space, recreational purposes and wildlife habitat enhancement enables the County to obtain supplemental facilities and benefits which cannot be obtained through existing regulations, standards or policies.

(c) The Highlands Ranch project is located within the most Northern Primary Planned Urbanization Area as identified on the 1986 Douglas County Master Plan.

(d) A substantial investment in the infrastructure needs of the development has been accomplished in that substantially more than 30% of the infrastructure needs of

the development, as defined in the County Development Agreement Provisions, has been constructed and substantially more than \$50 million in 1984 dollars has been invested in infrastructure needs.

(e) Highlands Ranch contains occupied residential, commercial and office structures.

(f) Highlands Ranch has direct freeway access to C-470.

(g) The application for approval of this Agreement as a development agreement was submitted many months prior to adoption of the County Development Agreement Provisions and, accordingly, as permitted under the County Development Agreement Provisions, procedural and submittal requirements contained in the County Development Agreement Provisions have been waived; however, the County finds that, notwithstanding the submittal of this Agreement for approval prior to adoption of County Development Agreement Provisions, the procedural and submittal requirements of the County Development Agreement Provisions have nevertheless been substantially complied with, particularly those relating to the public notice requirements and to hearings before the County Planning Commission and the Board of County Commissioners.

## II. CERTAIN DEFINITIONS.

2.1 Committed Area. The "Committed Area" shall mean the property described on Exhibit A attached hereto. This property consists of approximately 8200 acres or 38% of the 21,437 acres originally subject to the Development Guide. The Committed Area includes approximately 5146 acres which, under the original Development Guide, was to remain in private ownership subject to a Conservation Easement and approximately 994 acres which, under the original Development Guide, was part of the land authorized to be developed and sold as Ranch Homesites. It is expected that at least 2170 acres of the Committed Area will be required to be credited as Open Space under the Open Space Agreement, dated October 20, 1980, between Mission and the County ("Open Space Agreement") in order to satisfy the Open Space Requirements for Highlands Ranch as defined in the Open Space Agreement and County agrees that so much of the Committed Area as may be necessary shall be credited to meet such Open Space Requirements. In addition to the Committed Area, there are and will be other nonurban areas within Highlands Ranch as indicated on the Development Plan so that the total nonurban area equals approximately 60% of the 21,437 areas originally subject to the Development Guide.

2.2 Development Guide. The "Development Guide" shall mean the Planned Community District Development Guide for the New Town of Highlands Ranch approved September 17, 1979 by the County, as the same has now been amended or may hereafter be



amended with the written consent of Mission and shall be deemed incorporated herein by reference as if set forth in full.

2.3 Development Plan. The "Development Plan" shall mean the Planned Community District Development Plan - Statistical Summary and the Planned Community District Development Plan - Zoning Map included in the Development Guide, as the same has now been amended or may hereafter be amended with the written consent of Mission and shall be deemed incorporated herein by reference as if set forth in full.

2.4 Highlands Ranch. "Highlands Ranch" shall mean the area covered by the Development Guide.

2.5 Definitions in Development Guide. Except as the context may otherwise require, any words, terms or phrases which are defined in the Development Guide shall have the same meaning as used in this Agreement.

### III. CONVEYANCE AGREEMENT.

3.1 Agreement to Convey. Subject to the terms and provisions of this Agreement, Mission and Sand Creek hereby agree to convey the Committed Area to the Community Association and the Community Association hereby agrees to accept conveyance of the Committed Area. If, for any reason, the Community Association shall not accept conveyance of the Committed Area or any portion thereof at the time determined for its conveyance, such conveyance shall be made to a Community Body or a Public Body, as those terms are defined in the Open Space Agreement, dated October 20, 1980, between Mission and the County, and the Committed Area shall be preserved by such Community Body or Public Body for the purposes provided herein.

3.2 Time for Conveyance. Conveyance of the Committed Area to the Community Association shall be made no later than two years after the substantial completion of either residential or nonresidential buildout of the area covered by the Development Guide, or 75 years after the date of this Agreement, whichever occurs first. Substantial completion of residential buildout shall be deemed to have occurred when building permits have been issued for 90% of the dwelling units permitted under the Development Guide or, since all permitted dwelling units may not be fully utilized, when 90% of the acreage of all planning areas designated in the Development Guide for residential use have been finally subdivided under duly approved and recorded final plats and building permits have been issued for each lot or parcel shown on such plats intended for the construction of dwelling units. Substantial completion of Nonresidential Buildout shall be deemed to have occurred when 90% of the acreage of developable land within Planning Areas designated in the Development Guide for nonresidential use are the subject of duly approved and recorded final plats or of duly approved site plans.

3.3 Interim Conveyances. Notwithstanding the foregoing designation of an ultimate time for conveyance of the Committed Area, Mission or Sand Creek may convey portions of the Committed Area or all of the Committed Area to the Community Association or otherwise as permitted herein prior to the time required for such conveyance. Unless otherwise consented to by the Community Association, no conveyance of all or any part of the Committed Area shall be made to the Community Association prior to the ultimate time for conveyance until at least two years after written notice to the Community Association of the intent to make such conveyance.

3.4 Title. The property conveyed by Mission or Sand Creek to the Community Association shall be conveyed by special warranty deed excluding all mineral and water rights and subject to all easements, covenants, conditions, restrictions and other matters affecting title as now exist and/or appear of record, including a long term lease for a law enforcement training facility, and shall be subject to or except or reserve such other matters affecting title which may hereafter arise in connection with utilization of the Committed Area for Permitted Incidental Uses and for Active Recreational Facilities and Public Facilities as hereinafter provided.

3.5 Use Restrictions. Any conveyance of property by Mission or Sand Creek to the Community Association pursuant to this Agreement shall be subject to restrictions (a) limiting ownership thereof to the Community Association, or a Public Body or a Community Body as those terms are defined in the Open Space Agreement, dated October 20, 1980, between Mission and the County; (b) limiting use thereof, in perpetuity, to open space and recreational purposes and to Permitted Incidental Uses as hereinafter defined and, as to a limited portion of the Committed Area, to Active Recreational Facilities and to Public Facilities as hereinafter provided; and (c) providing that 50% of any consideration payable for any subsequent transfer of any interest in the Committed Area shall be paid to Mission or Sand Creek as the case may be. Any such conveyance shall provide for reversion of title to the property to Mission if the restrictions contained therein are violated.

3.6 Permitted Incidental Uses. Except to the extent prohibited by or inconsistent with provisions of the Development Guide relating to uses in the Committed Area (including provisions added to the Development Guide pursuant to the presently contemplated Open Space Conservation Area Plan), the Committed Area may at all times be used in ways which may be necessary, appropriate or desirable to support or facilitate development of Highlands Ranch consistent with the Development Guide; to support or facilitate development of property outside of Highlands Ranch; or to permit development of nonagricultural resources which may exist on or under the Committed Area ("Permitted Incidental Uses"). Except as aforesaid, such

Permitted Incidental Uses may include, but are not limited to, the following:

(a) Public and private roads, trails and public transportation facilities.

(b) Utilities lines, systems and facilities including, but not limited to, electricity, gas, telephone, telegraph, communications and cable television.

(c) Water lines, systems and facilities including, but not limited to, water wells, storage reservoirs, and water treatment plants.

(d) Sanitation lines, systems and facilities including, but not limited to, sewage treatment and reclamation plants.

(e) Drainage discharges and drainage and flood control lines, systems and facilities including, but not limited to, impoundment reservoirs and retaining basins, ditches, conduits and culverts.

(f) Signs identifying property, the owner thereof or the use thereof, or advertising uses on the Committed Area or nearby land, or warning or cautioning of danger, or giving directions, or as may be required by law.

(g) Accessory structures or uses which are customarily incident or necessary to any permitted use.

Mission or Sand Creek may convey portions of the Committed Area or interests therein to third parties when necessary, appropriate or desirable for the above Permitted Incidental Uses upon such terms and for such consideration as Mission or Sand Creek may deem appropriate, without consent of the Community Association, provided that Mission or Sand Creek shall have given written notice of the proposed conveyance to the Community Association at least 60 days prior to the conveyance and shall pay 50% of any consideration received to the Community Association. At the time of conveyance of any of the Committed Area to the Community Association, Mission or Sand Creek shall except such portions or interests previously conveyed and may except and reserve to itself, its successors and assigns, easements for Permitted Incidental Uses. Use of the Committed Area for utility lines, systems and facilities as set forth in (b) above, which lines, systems and facilities are wholly or principally to support or facilitate development of property outside of Highlands Ranch, shall be permitted only after approval by the County under County procedures for uses permitted by special review.

**3.7 Recreational and Public Facilities.** Except to the extent prohibited by or inconsistent with provisions of the Development Guide relating to uses in the Committed Area

(including provisions added to the Development Guide pursuant to the presently contemplated Open Space Conservation Area Plan), up to 1200 acres of the Committed Area may be used for Active Recreational Facilities and Public Facilities but only with the written consent of Mission and the Community Association and the County. "Active Recreational Facilities" shall mean any improvements of a substantial nature for active recreational uses. "Public Facilities" shall mean buildings and improvements of a substantial nature including, but not limited to, facilities for fire and police protection, public and governmental buildings and facilities, educational facilities, and radio, television and communication transmission and reception facilities. Nothing contained in the foregoing shall limit the ability to use any of the Committed Area for Permitted Incidental Uses. Mission or Sand Creek may convey portions of the Committed Area or interests therein to third parties when necessary, appropriate or desirable for Active Recreational Facilities and Public Facilities provided the written consent of the Community Association and the County has been obtained. Any such conveyance shall be subject to the restrictions set forth in Section 3.5 of this Agreement. At the time of subsequent conveyance of the Committed Area pursuant to this Agreement, Mission shall except such portions or interests previously conveyed.

3.8 Interim Use. Prior to conveyance of the Committed Area to the Community Association, the Committed Area may be used for any purposes permitted under the foregoing section of this Agreement entitled Permitted Incidental Uses and may be used for any agricultural or nonurban purposes including, but not limited to, ranching, farming, production and sale of crops, raising, breeding, feeding and selling of livestock, gardening and horticulture, open space and forests and, if approved by the Community Association and the County, may be used for any other uses which will not adversely affect or impact the Committed Area upon ultimate conveyance thereof, and, with the written consent of the Community Association, may be used for Active Recreational Facilities and Public Facilities.

3.9 Open Space Conservation Area Plan. Except as hereinafter provided, no development, issuance of building permits, construction, grading or removal of earthen material shall be permitted in the Committed Area until an Open Space Conservation Area Plan for the Committed Area has been submitted for review and the Board of County Commissioners has approved the Plan. The Plan will provide direction in determining appropriate land uses for the Committed Area as well as which specific areas of the Committed Area are to remain as open space, which are necessary for support of wildlife, which are suitable for the construction of necessary public facilities, and the type of and location for specific land uses and public and private recreation facilities including parks, trails and commercial recreation facilities. Exempted from these restrictions are the public utility facilities such as wells, pump stations, waterlines, and the electrical transmission lines and roads necessary to serve

these facilities, and other similar uses as may be allowed by the approval of the Planning Director of the County, and any other uses required for continued ranching. Once the Open Space Conservation Area Plan has been approved by County, the Development Guide and Plan shall be amended to establish acceptable Uses by Right and by Special Review for the Committed Area. After such amendment is completed, the restrictions stated above will be deemed removed.

3.10 No Public Trespass. Nothing herein contained shall be deemed to authorize any person or party to enter upon the Committed Area or use the same other than Mission and Sand Creek, prior to conveyance thereof to the Community Association, and other than the Community Association after such conveyance.

3.11 Condemnation Awards. In the event of any taking of the Committed Area or any portion thereof as a result of the exercise of the right of condemnation or eminent domain or a transfer or a conveyance made under threat of such taking, 50% of any award or consideration received shall be payable to Mission or Sand Creek as the case may be including any portion thereof which may be deemed an award or consideration for the rights of the Community Association or of Douglas County under this Agreement. This provision shall survive the conveyance of the Committed Area to the Community Association. The parties hereto will allow the County to resist any such taking.

#### IV. VESTING AGREEMENTS

4.1 Vesting of Certain Property Rights. Consistent with the purpose of this Agreement, the parties hereby agree that the Development Guide shall constitute a "site specific development plan" as defined in C.R.S. § 24-68-102(4); that certain rights under the Development Guide shall be vested property rights under the County Development Agreement Provisions and as provided in this Agreement; and that the owners of the property covered by the Development Guide shall have a vested property right to undertake and complete development and use of such property as provided in this Agreement. The rights and obligations under this Agreement shall vest in the owners of the property covered by the Development Guide and their heirs, personal representatives, successors and assigns as benefits and burdens to the land and shall run with title to the land.

4.2 Rights Which Are Vested. Only the rights which are identified herein shall constitute vested property rights under this Development Agreement. These rights are as follows:

(a) No Downzoning. The County shall not initiate any zoning action to reduce the maximum number of residential dwelling units or acres or to reduce the total gross acres for commercial, business or industrial development as set forth in the Development Guide and the Development Plan except as provided herein.

(b) Residential Dwelling Units and Acreage. The right to develop substantially the total number of residential dwelling units set forth on the Development Plan and the right to utilize substantially the total gross acres for residential use as set forth on the Development Plan.

(c) Commercial Acres and Density. The right to utilize substantially the total gross acres for commercial and industrial use as set forth on the Development Plan and the right to develop substantially the gross floor area for commercial and industrial use as is permitted under the provisions, limitations and constraints of the Development Guide.

(d) Development Guide and Plan. The right to develop land and engage in land uses in the manner and to the extent set forth in and pursuant to the Development Guide and the Development Plan on the terms and conditions set forth herein.

(e) Timing of Development. In recognition of the size of the development contemplated under the Development Guide, the time required to complete development, the need for development to proceed in phases, and the possible impact of economic conditions and economic cycles and varying market conditions during the course of development, the right to develop Highlands Ranch in such order and at such rate and at such time as the market dictates within the structure of this Agreement.

(f) Uniformity of Requirements. The right to continue and complete the development of Highlands Ranch with conditions, standards, dedications, exactions and requirements which are no more onerous than those set forth in the Development Guide or than those then being imposed by the County on other developers in Douglas County on a reasonably uniform and consistent basis.

4.3 Term for Vested Rights. In recognition of the size of the development contemplated under the Development Guide, the time required to complete development, the need for development to proceed in phases, and the possible impact of economic cycles and varying market conditions during the course of development, the County has concluded and hereby agrees that the rights identified in Section 4.2 of this Agreement, as vested property rights, shall continue and have a duration until 30 years after the date hereof. Extension of this period of vesting may be granted by the County upon request of an affected landowner.

4.4 Natural and Manmade Hazards. Nothing in this Agreement or otherwise shall require the County to approve development or use of any portion of Highlands Ranch where there exists natural or manmade hazards on or in the immediate vicinity of the proposed area of use, whether or not such natural or manmade hazards could reasonably have been discovered at the time

of approval of the Development Guide and Development Plan, provided that such hazards are not or cannot be corrected and that such hazards, if uncorrected, would pose a serious threat to the public health, safety and welfare.

4.5 Compliance With General Regulations. The establishment of the rights vested under this Agreement shall not preclude the application of county regulations of general applicability including, but not limited to, impact fees, the application of local improvement districts, building, fire, plumbing, engineering, electrical and mechanical codes, the Douglas County Subdivision Resolution, and the Douglas County Zoning Resolution, or the application of regional, state or federal regulations, as all of the foregoing exist on the date of this Agreement or may be enacted or amended after the date hereof, except as otherwise provided within the Development Guide or the Development Plan. Mission does not waive its rights to oppose adoption of any such regulations.

4.6 No Monetary Liability of County. Although C.R.S. § 24-68-101 et seq. allows for monetary damages in the event of breach or default by the County, the sole remedies hereunder shall be the equitable remedies of specific performance or mandatory or prohibitory injunction. Mission and Sand Creek hereby waive any rights to money damages either may have under the Constitution and laws of the United States or the State of Colorado for any such breach or default.

4.7 County Right to Cure Defaults. Before bringing any action against the County under this Agreement, the County shall be given written notice of any claim of a breach or default by the County hereunder and the County shall have 60 days after receipt of such notice in which to cure any such breach or default.

4.8 No County Responsibility for Outside Causes. The County shall not be responsible for and there shall be no remedy against the County if development of Highlands Ranch is prevented or delayed for reasons beyond the control of the County. Furthermore, the County shall have no liability for normal administrative delays in its land use and development process.

4.9 Effect of Rezoning/Major Amendments of Development Guide. Rezoning or major amendment (as defined in the Douglas County Zoning Resolution or the Development Guide) to the Development Guide or the Development Plan, agreed to by a landowner, shall grant the County the right to modify this Agreement as to the lands of such landowner to the extent the rezoning or major amendment affects this Agreement. Any such rezoning or amendment shall not have the effect of extending the term of this Agreement.

4.10 Effect of Annexation. The vested property rights arising under this Agreement shall be effective against any other

and the affected landowner of [unclear] 5.

local government which may subsequently obtain or assert jurisdiction over Highlands Ranch unless otherwise agreed to by the County through resolution at a publicly noticed hearing. Mission and Sand Creek agree that neither will initiate annexation of Highlands Ranch to a municipality whose main body of population or center of government is located outside Douglas County except with the express consent of the County.

4.11 County Remedies. Should any landowner fail to comply with the terms of this Agreement, the County shall give such landowner written notice of breach or default and the landowner shall have 60 days after receipt of said notice in which to cure any breach or default. Should any such landowner fail to cure any breach or default, the County shall have the right to pursue all legal remedies against such landowner to enforce this Agreement including, but not limited to, filing an action for a specific performance or terminating this Agreement insofar as it affects such landowner causing this Agreement, as to such landowner, to be null and void and no longer binding on the County or such landowner.

4.12 Assurance of Adequate Services. It is understood and agreed that proof of adequate services within the control of the developer such as water availability and transportation, to serve any specific site must be provided to the County, as and to the extent and under the same standards as required of other developers in Douglas County, as a prerequisite to County approval of a final subdivision plat or a site plan. Adequate services shall be as defined by the Douglas County Board of County Commissioners and uniformly applied throughout the County.

4.13 Indemnification of County. Each landowner benefited hereby shall indemnify and save harmless the County, its officers and employees, against any and all claims, damages, actions or causes of action and expenses to which the County, its officers and employees, may be subjected by reason of any work done or omission made by such landowner, its agents, officers or employees, in connection with, arising out of, or resulting from the performance of this Agreement as set forth in this Agreement.

## V. MISCELLANEOUS

5.1 Amendments. This Agreement may be amended or terminated only with the prior written consent and approval of each of the parties hereto following public notice and public hearing. The consent and approval of the County to amendments or to termination of this Agreement shall be required notwithstanding that all or any part of the Committed Area may hereafter be included in an incorporated city or town.

5.2 Entire Agreement. This Agreement and the Development Guide constitute the entire understanding between the parties with respect to the subject matter hereof. The Conservation Easement dated April 14, 1980, except as modified by



this Agreement, and the Open Space Agreement, dated October 20, 1980, between Mission and Douglas County shall continue in full force and effect.

5.3 No Implied Representations. No representations, warranties or certifications, express or implied, shall exist as between the parties except as stated herein.

5.4 Waivers and Modifications in Writing. No amendments, waivers or modifications hereof shall be made or deemed to have been made unless in writing executed by the party to be bound thereby.

5.5 Severability. If the zoning embodied in the Development Guide shall be held invalid, illegal or unenforceable, or is revoked prior to expiration of the 30-year term for the vesting of rights as provided in this Agreement, Mission may at its option, declare this Agreement terminated and of no further effect, in which case all parties shall be released from all further obligations hereunder. If any other provision of this Agreement shall be invalid, illegal or unenforceable, it shall not affect or impair the validity, legality or enforce-ability of any other provision of this Agreement, and the parties agree to renegotiate that provision to be valid, legal and enforceable and to reflect as closely as possible the original intent of the parties hereto as expressed herein with respect to the subject matter of that provision.

5.6 No Third Party Beneficiaries. Except as provided in Section 4.1 of this Agreement with respect to Vesting of Certain Property Rights, none of the terms, conditions or covenants contained in this Agreement shall be deemed to be for the benefit of any person not a party hereto, and no such person shall be entitled to rely hereon in any manner. Nothing in this Section is intended to conflict with the rights of Mission and Sand Creek to convey portions of the Committed Area or interests therein to third parties for the Permitted Incidental Uses set forth in Section 3.6.

5.7 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

5.8 Headings for Convenience. All headings and captions used herein are for convenience only and are of no meaning in the interpretation or effect of this Agreement.

5.9 Applicable Law. This Agreement shall be interpreted and enforced according to the laws of the State of Colorado.

5.10 Exhibits Incorporated. All exhibits to this Agreement are incorporated herein and made a part hereof as if fully set forth herein.

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

MISSION VIEJO COMPANY, a California corporation

By [Signature]  
President  
Colorado Division

COUNTY OF DOUGLAS, STATE OF COLORADO, acting by and through its Board of County Commissioners

By Clark Huff  
County Commissioner

ATTEST:

By Lyn S. Pierce  
Assistant Secretary

By Francis D. McQuay  
County Commissioner

By \_\_\_\_\_  
County Commissioner

SAND CREEK CATTLE COMPANY, a Colorado Corporation

By [Signature]  
President

ATTEST:

By Wanda E. Fisher  
Clerk and Recorder of Douglas County

ATTEST:

By Lyn S. Pierce  
Asst. Secretary

HIGHLANDS RANCH COMMUNITY ASSOCIATION, INC., a Colorado nonprofit corporation

By Victoria J. Strick  
President

ATTEST:

By [Signature]  
Secretary





**Case Study 2**  
**Denver Union Terminal - Denver**

**Private Sector Representative: Thomas Ragonetti**  
**Public Sector Representative: Robert M. Kelly**

**Background:** *This development agreement represents a unique application of vested development rights - historic preservation. In the face of potential redevelopment of the Denver Union Terminal built in the 1800's, and the rail yards surrounding it, a compromise was reached through a development agreement. The landowners agreed to preserve the station building, and set aside land for planned roads, and the City allowed for the development of two 250 foot high tower buildings around the station. A development agreement achieved both the preservation of the Denver Union Terminal, and development consistent with the Lower Downtown planning objectives and the Platte River Zoning Ordinance.*



DENVER UNION TERMINAL DEVELOPMENT AGREEMENT - DENVER  
**Private Sector Commentary -Thomas Ragonetti**

***The Background and the Deal***

Since the late 1800's, the Denver Union Terminal ("DUT") has been the main railroad station for the City of Denver. It is a large and handsome building, constructed in part of native Colorado sandstone, and occupying the central portion of an 18-odd acre site, roughly shaped like a cigar. It lies at the foot of Downtown Denver, essentially defining the historic border between the developed portion of downtown and a vast sea of rail yards extending from the back of the station to the South Platte River, Denver's only river, which partially encircles the downtown area on the west and north. The front door of the station opens into an area commonly known as "Lower Downtown", a several-block historic area containing some of Downtown Denver's oldest buildings.

Like most major western railroad stations, DUT thrived during the golden age of rail, from its construction through the 1940's. With near universal use of the automobile and air travel becoming inexpensive and widespread, by the 1960's the station served only a few trains a day. As the station's transportation role waned, its value as a real estate asset increased significantly.

The 1960's saw the beginning of two key real estate themes which have defined the station's major significance ever since. In 1965, the South Platte experienced its last major flood, inundating miles of river valley property - including the swath bordering Downtown Denver - and stimulating construction of a major dam and flood improvement system designed to contain the river from then on.

With prospects for control of the South Platte looking promising for the first time in Denver history, and with rail on the wane, the City began a process, now over 25 years old, of planning and making provisions for reuse of the rail yards that dominated the Central Platte Valley ("CPV"), or that approximately 500-acre portion of the river valley which borders downtown on the west and north. DUT, of course, was the gateway from downtown to the CPV beyond.

The late 1960's were also the beginning of Denver's historic preservation efforts for Lower Downtown, which had become a collection of warehouses, flophouses and light manufacturing enterprises, virtually all housed in handsome two to four story buildings. Historically these buildings played a far more important role before Denver's downtown area grew from the CPV eastward. The station was the largest and most dominant of the Lower Downtown collection of buildings, and was increasingly viewed as an important historic landmark. Initial redevelopment planning efforts in Lower Downtown resulted in rezoning from industrial classifications to a new zoning designation - "B-7" - designed to stimulate and protect redevelopment of the area for housing, retail and office purposes.

The population of Colorado and metropolitan Denver grew rapidly in the 1960's and 1970's, stimulating substantial increases in real estate values in almost every geographic sector and type of property in the Denver area. In particular, from the mid 1970's through the early 1980's, downtown Denver and near-downtown areas were a hot bed of real estate activity, from rampant speculation to substantial new development. Significant and substantial investments were being made in Lower Downtown properties. Noticeable redevelopment of buildings, and in some cases whole blocks of buildings, was occurring.

For the first time since the 1965 flood, major blocks of property in the CPV (which had been the subject of several redevelopment planning efforts to little, if any, effect), were being assembled in the hands of parties with designs and genuine capability for major development.

Against this backdrop, the owners of DUT - a consortium of five railroads - began to consider the ways in which they might capitalize on the station's value as a real estate asset. In 1981, they empaneled a "Real Estate Development Advisory Committee" (REDAC) to solicit and consider proposals for redevelopment of the station and its site. Over 30 developers expressed interest, and eventually a number made formal proposals, all calling for dramatic development (in some cases involving fifty story buildings or higher!) around the station. The winning proposal was an unusual one, suggesting construction of a new convention center complex for the City of Denver surrounding - and using - the station, the exchange of the new convention center to the City for its then-existing convention center (Currigan Hall), and redevelopment of Currigan Hall and its three city-block site for commercial purposes.

Although the winning proposal proved unsuccessful after several years of effort, the REDAC process had two real points of significance in leading to the DUT Development Agreement. First, the station's owners' appetites had been whetted for substantial development, and second, the City was alerted to the fact that the DUT property and the CPV rail yards behind it were poised for major redevelopment.

The City's response, coming in the last year of Mayor William McNichol's last term (1982-83), was to create a Central Platte Valley Planning Committee composed of the major landowners, surrounding neighborhoods, and affected public agencies. The committee, which had hardly started work as McNichols left office, was revived and expanded by the new mayor, Federico Peña, and continued work for the next five years, leading to official adoption of a plan in 1986 and a unique CPV zoning ordinance in 1988.

For planning and zoning purposes, the 1986 plan and 1988 zoning ordinance divided the CPV into "subareas", generally coinciding with major landholdings. A development concept, including permitted uses and suggested standards, was defined for each subarea, with more general valley-wide limitations and controls filling in the picture. Development was generally envisioned to be less intense than that downtown, with an overall density limit of 2:1 (floor area ratio, or "FAR") and generally moderate heights, save for a number of designated "point tower" locations where buildings of up to 250 feet tall could be constructed.

The appropriate way to treat the DUT property in the CPV plan and zoning ordinance was a problem. First, there was widespread disagreement about whether the DUT property should be addressed as part of the CPV efforts at all, since at least the station portion had always been considered a vital part of Lower Downtown and was already subject to B-7 zoning. Second, the City's vision for the DUT property and the expectations of the DUT owners were almost 180 degrees apart. The City envisioned a low-rise "Faneuil Hall Marketplace" type redevelopment, using and preserving the station building itself, with the remainder of the 18 acre site largely given over to a new system of public streets designed to open up the Valley. The owners, on the other hand, whose views had been shaped by the dramatic redevelopment proposals coming out of the REDAC process, expected substantial development and viewed even the 2:1 FAR limitation of the CPV plan and ordinance as an unwarranted imposition. It was no secret



that if the station building were to be kept in existence and the City's proposed roads built, there would be almost no room for new development on the site.

The collision between the expectations of the owners and the preferences of the City resulted in a classic compromise, giving each side some, but not all, of what they wanted. To satisfy the City, the owners agreed to preserve the station building and to set aside land for the City's proposed roads. In return, the City agreed to permit redevelopment of the station building and development of two 250 foot towers adjoining it, all for commercial use. The towers were allowed on the theory that so much of the site was consumed by the station building and the proposed roads, one would have to build "up" rather than "out" to allow the owners to at least reach the 2:1 base density permitted by the CPV plan and zoning.

The compromise was hammered out in a series of sessions during the CPV planning process and then embodied in the resulting plan and zoning ordinance. It was not, however, universally favored. Some preservationists and downtown activists were disturbed by the prospect of the two towers at the edge of Lower Downtown, and that aspect of the compromise was closely scrutinized and criticized. The station's owners, in return, continued to be troubled by what they viewed as a considerable scale down of their original plans.

With both sides uneasy as to the other's commitment to the compromise, it was suggested, originally by the City, to embody the arrangement in a development agreement to be adopted along with the CPV zoning. The agreement would spell out in detail each party's rights and obligations, and attendant limitations and standards. Development agreements were beginning to be used in high growth states like California, and the city planner in charge of the CPV efforts had studied and written about them, and favored their use in the CPV. The terminal owners, on the other hand, saw the wisdom of solidifying an uneasy compromise. The entire notion was given added momentum by Colorado's adoption of a "vested rights" law in 1987 (Colo. Rev. Stat. §24-68-101, *et seq.*, 1987), designed to supplement and amplify common law notions as to when and how land use approvals became "vested" and irrevocable, which made brief, but approving mention of development agreements as a means to achieve vested rights in a more "customized" version than that permitted by the vested rights statute.

### ***The Agreement***

To the DUT owners, one of the most troubling aspects of the previous year's discussions regarding the future of the DUT was the tendency by some representatives of the City, the community and preservation interests to treat the DUT as essentially public property, based on the notion that it was, indeed, one of Denver's more significant historic landmarks and an important part of the Downtown and Lower Downtown landscapes. They foresaw the potential for endless wrangling about the DUT's future, with their control being progressively diminished over time. The owners' primary goal in pursuing the development agreement, then, was to solidify - through vested rights - the development prospects for the DUT for a period long enough that they might be realized. This primary goal had a number of facets, but a preliminary issue was the City's recognition of the Colorado vested rights statute.

The vested rights statute envisioned implementation by local legislation, which Denver had never adopted, and Denver had no intention of implementing the state

scheme according to the City's negotiators. They stated the City's fundamental policy as being opposed to any type of limitation on its legislative powers. However, in connection with adoption of the CPV zoning, the City had adopted a "Right to Develop" policy in the CPV (attached), which provided a basis, especially given Denver's home rule status, for approval of the DUT Development Agreement. The agreement was so premised (Agreement, Paragraph VI.A.), although it also made reference to and incorporated some of the provisions of the vested rights statute.

Accomplishing DUT's primary goal required addressing a number of key sub-issues. First, it was important that the CPV zoning scheme control eventual redevelopment of the DUT and its site. After over five years of participation in the CPV planning efforts and the difficult negotiations over the DUT's future in that context, the owners rightly felt that the DUT should be treated as part of the Platte Valley, and not Lower Downtown, for planning and zoning purposes. Adding fuel to that fire were efforts by the Lower Downtown preservation community to adopt new, strict preservation regulations as part of the Lower Downtown B-7 zoning. Nevertheless, given the City's choice to involve the DUT property in the CPV planning process and the discussions concerning it, the City had little choice but to agree that the DUT and its property would be governed by the CPV plan and zoning. (Agreement, Paragraphs II.A. and V.A.).

Second, the compromise reached had to be stated clearly, and with no ambiguity, given the critics who were anxious to see the deal undone at any time possible. This was simply a matter of adequate drafting and led to little controversy in the negotiations and drafting of the agreement (Agreement, Articles I, II, III and IV).

Third, the development rights promised had to be vested for a time frame in which the development might conceivably occur. During the mid-1980's, the Colorado and Downtown Denver real estate economies had tumbled precipitously, sending values plummeting and essentially bringing any new development of significance to a halt. The development binge of the late 1970's and early 1980's left a vast oversupply of almost all types of real estate products, especially office, retail and hotel space, the very kinds of uses likely to be housed in the redeveloped DUT building and adjoining point towers. Accordingly, to realize the type of development envisioned for the DUT would take decades given the depressed state of the real estate economy. The standard provisions of the Colorado vested rights law were no help here because the statutory vesting period, absent use of a development agreement to the contrary, granted only three years of protection.

The parties had conflicting motives in addressing this issue. The DUT obviously wanted as many years of protection as could be obtained, if for no other reason than to ride out the uncertainty of real estate cycles. The City, on the other hand, wanted its ability to freely legislate concerning the DUT property impaired for the shortest time agreeable. Eventually, after heated discussions, the parties agreed to a two part scheme, where the DUT's rights would be vested for fifty years, but some of its remedies, if the City breached, were to terminate after 25 years (Agreement, Paragraphs V.A. and VI.C.).

The question of remedies was another area of major contention and critical to the realization of DUT's goals. The statutory vested rights scheme provided limited remedies in the event those rights were impaired by the government during the period of vesting, essentially limiting the protected owner to collecting the amounts spent in preparing and furthering (but not actually implementing) the vested development plan (Colo. Rev.

Stat. §24-68-105(1)(c), 1987). To the DUT this was inadequate protection to ward off, and compensate for, a breach of the agreement by the City.

The remedies scheme agreed to was threefold (Agreement, Paragraphs V.C. and D.). First, both parties would be entitled to the standard remedies of terminating the agreement and seeking specific performance and damages in the event of breach by the other. Additionally, the DUT would be permitted to demolish the station building without interference from the City. The notion here was that the City's primary goal in entering the agreement was to preserve the DUT building, and that if a breach by the City put that goal at risk, the City would be considerably less likely to breach. Finally, for the first 25 years of the agreement, the DUT would be entitled specifically to seek the sort of damages afforded by the Colorado vested rights statute.

All of this, of course, turned on what a "breach" by either party would consist of, and this question too led to complex and heated negotiations. The definition of a breach was especially difficult for breaches by the City since the DUT's obligations, and failure to fulfill them, were fairly easy to identify. The principal difficulty in defining a breach by the City came in envisioning what kinds of municipal legislation or actions could impair the development rights granted to the DUT, and the conflict between the parties centered upon how far the agreement would go in limiting legislation not specifically directed at, but nevertheless having the effect of diminishing or impairing, the DUT's development rights. The resulting language is a fascinating concoction of imagination, paranoia and negotiation (Agreement, Paragraph V.A.).

In describing the agreement process and the results, it is important not to give the impression that the City's only concern was for impairment of its legislative prerogatives. In fact, one of the City's most important, if not foremost goals, was to insure that the development agreed upon would be carried out in a high quality manner, befitting the DUT's historic importance, complementing Lower Downtown and providing a suitable gateway to the CPV. Given the framework of the development compromise, the City's planning and urban design staffs went to work on the details, with thoughtful and precisely articulated results appended to the agreement as mandatory design and development controls (Agreement, Article II and Exhibits C and D). They were accepted by the DUT with relatively little negotiation, based on the philosophy that quality development sensitive to the surroundings was in DUT's best interests as well, and the conclusion that the controls proposed did not appear to prohibit realistic development.

The remaining portions of the agreement addressed matters of title, engineering, timing and other detail necessary to carry out, and logical to address, in implementing the major concepts. Overall, the agreement is remarkably simple and straight forward given the scale of the development addressed and its 50 year life span. Nevertheless, the resulting document is easily understood in terms of the events leading up to it and the parties' respective motivations in entering it.

The DUT Development Agreement was officially adopted and entered into as of May 10, 1988, and remains in effect today.



DENVER UNION TERMINAL DEVELOPMENT AGREEMENT - DENVER  
Public Sector Commentary - Robert M. Kelly

***Description of the Agreement***

This Agreement was entered into on May 10, 1988, between the City and County of Denver (the "City") and The Denver Union Terminal Railway Company ("the DUT").

The DUT is a consortium of companies which is the owner of certain real property located in the City (the "Property"). The Property is the site of the Denver Union Terminal, a railroad station whose facilities are shared by the railroad companies constituting the DUT (the "Station"); and the Property is located in Denver's Central Platte River Valley (the "Valley"), a piece of property consisting of approximately 500 acres, located adjacent to the City's central downtown district.

In January of 1984, in connection with its efforts to revitalize and promote development in the Valley, the City convened the Central Platte Valley Development Committee ("PVDC"), a group of Valley landowners and other interested parties, to develop a comprehensive plan (the "Comprehensive Plan Amendment Central Platte Valley") and zoning regulations (the "Platte River Valley Zoning Ordinance") for redevelopment of the Valley. A Comprehensive Plan Amendment Central Platte Valley was adopted by the Denver City Council (the "Council") on August 5, 1986, and the Comprehensive Plan Amendment Central Platte Valley adopted at this time called for realignment of the railroad tracks which run through the Valley to the middle of the Valley. As a result of this, DUT was considering redeveloping the Station and the Property.

The City desired to preserve the Station due to its unique status as the major significant remaining structure representing Denver's railroading prominence, which distinguished Denver in the 19th Century as the transportation hub of the region; and the preservation of the Station reduced DUT's flexibility in developing the Property because it occupies a large portion of the Property.

The Comprehensive Plan Amendment Central Platte Valley permitted development on the Property of two buildings of not more than 250 feet in height conditioned upon certain agreements by DUT regarding the location and configuration of such buildings, the preservation of the main train room of the Station (the "Train Room") and the two-story wings with sloped roofs adjoining either side of the Train Room (the "Wings"), and the integration from a design standpoint of any new development so as to respect the historic character of the Train Room and the Wings.

The parties, concurrently with adoption by the Denver City Council of the Platte River Valley Zoning Ordinance, desired to set forth and further describe their agreements with respect to general guidelines for development of the Property, location of open space, pedestrian access and building envelopes on the Property, and preservation of the Train Room and the Wings.

***Explanation of the Agreement***

DUT agreed to perform routine and ordinary maintenance on the Train Room and the Wings and not to demolish, add to, reconstruct or otherwise alter any "Facade" of the Train Room or the Wings, except with the approval of the Denver Landmark Preservation Commission (the "Commission").

In the event that DUT desired to demolish, add to, reconstruct or otherwise alter

any Facade of the Train Room or the Wings, before seeking a building permit for such work, DUT agreed to submit its plans for such work (the "Plans") to the Commission for its review and approval or disapproval, which approval shall not be unreasonably withheld.

If the Commission delivered written notice to DUT within a thirty (30) day period explaining why the Plans would adversely affect the Facades or any exterior architectural feature of the Train Room or the Wings or were otherwise incompatible with the objectives of maintaining the historical integrity of the Station, DUT and the Commission agreed to meet within ten (10) days after delivery of such notice to review the Commission's objections to the Plans and agreed to use reasonable efforts to reach a mutually agreeable resolution to such objections. In the event that DUT and the Commission were unable to reach a mutually agreeable resolution to such objections at such meeting, the Commission agreed to notify DUT in writing within ten (10) days after such meeting. The determination of the Commission is binding on DUT, except that DUT has the right to obtain judicial review of such determination. Should DUT receive judicial approval to demolish the Train Room and Wings, the Agreement is to terminate without further liability to either party.

If the Commission were to find that the Plans are of a nature which will not adversely affect or destroy any Facade of the Train Room or the Wings and are compatible with the objective of maintaining the historic integrity of the Train Room and the Wings, it agreed to cause the secretary of the Commission to endorse the Plans, with any changes thereto, with the Commission's approval.

Notwithstanding any redevelopment of the Property or the Station, DUT must preserve a major entrance to the Station on that side of the Station which faces downtown Denver.

DUT has the right, at its option, to develop on the Property any improvements and buildings which are permitted by the Comprehensive Plan Amendment Central Platte Valley and Platte River Valley Zoning Ordinance in effect as of the date of the Agreement, including, but not limited to, two tower-type buildings, each having a maximum height which shall not exceed 250 feet (the "New Buildings"), together with related amenities.

To accommodate the provision in the Comprehensive Plan Amendment Central Platte Valley which provides that the New Buildings shall not block the Train Room and shall be integrated from a design standpoint so as to respect the historic character of the Train Room and the Wings, DUT agreed that the New Buildings shall, if and when constructed, be designed and located as provided in an Exhibit attached to the Agreement. In addition, DUT agreed that development of the New Buildings would comply with the applicable provisions of the Platte River Valley Zoning Ordinance, including without limitation, the "DUT Subarea Zoning Standards", and the subarea plan for the Property to be approved by the Denver Planning Board pursuant to the Platte River Valley Zoning Ordinance ("the DUT Subarea Plan"). Without limitation, DUT's plans for the New Buildings would be subject to minimum design guidelines for the Property as adopted concurrently or subsequent to adoption of the DUT Subarea Plan pursuant to Section 59-499 of the Platte River Valley Zoning Ordinance (the "Design Guidelines"), and would otherwise be reviewed in accordance with the applicable provisions of the Platte River Valley Zoning Ordinance, except as modified in the Agreement.

On or before July 1, 1988, DUT agreed to convey to the City by special warranty deed, subject to real property taxes for the year of dedication, and to easements, reservations, rights-of-way and restrictions of record or in existence, if any, those portions of the Property necessary for the construction of the public rights-of-way for Wewatta, 16th, 18th, 19th and 20th Streets which lie on the Property to the City without charge to the City. The City agreed to vacate such conveyed property ten (10) years from the date of such conveyance if the City Council finds that public use, convenience and necessity no longer require Wewatta Street in the system of thoroughfares within the City. The parties acknowledged and agreed, however, that completion of such dedications is subject to any prior rights of Amtrak pursuant to statute and/or agreements with DUT to use the Station and/or the Property for its operations, and that the failure of DUT to complete such dedications on or before July 1, 1988, because of any such prior rights of Amtrak shall not be considered a default under the Agreement.

If the 16th Street Mall was extended to Wewatta Street, DUT agreed to pay for design and construction of any connections serving improvements on the Property, to that portion of the 16th Street Mall which is located between Wynkoop and Wewatta Streets.

Prior to the conveyance by DUT to the City, the City agreed to execute and deliver to DUT a quitclaim deed, quitclaiming to DUT any right, title or interest of the City in and to the Property, to the extent any such right, title or interest is not required by the City for public use and can be conveyed without vacation proceedings. To the extent vacation proceedings are required for the City to convey any such right, title or interest, the City agreed to commence and diligently process such vacation proceedings prior to the conveyance by DUT, and, if the City Council found that public use, convenience and necessity no longer required the City to hold such right, title or interest, to pass an ordinance vacating such right, title and interest as soon as possible following commencement of such vacation proceedings.

At any time following the execution of the Agreement, DUT has the right to demolish or otherwise alter the Flat-Roofed Wings, subject only to such approvals as are customarily required to obtain a permit for such demolition or alteration under the Denver Building Code. Subsequent to such demolition or alteration and prior to redevelopment of the Property, DUT is required to temporarily cover any openings in the Wings caused by such demolition or alteration in a reasonable manner which, to the extent practical and economical given the temporary nature of such covering, reasonably complements the appearance of the Wings and the Train Room, and which is consistent with the requirements of the Denver Building Code and other applicable regulations.

The Agreement, also, contained provisions for default, cure and remedies and various miscellaneous provisions.

This Agreement provided for the development and preservation of the Denver Union Terminal, and the Terminal has been preserved.





DEVELOPMENT AGREEMENT

This Development Agreement (this "Agreement") is made and entered into this 10th day of May, 1988 by and between THE DENVER UNION TERMINAL RAILWAY COMPANY, a Colorado corporation ("DUT") and CITY AND COUNTY OF DENVER, a municipal corporation of the State of Colorado (the "City").

WITNESSETH

WHEREAS, DUT is a consortium of companies which is the owner of certain real property located in the City and legally described on Exhibit A attached hereto and made a part hereof (the "Property"). The Property is the site of the Denver Union Terminal, a railway station whose facilities are shared by the railroad companies constituting the DUT (the "Station"); and

WHEREAS, the Property is located in Denver's Central Platte River Valley (the "Valley"), a piece of industrially-zoned property consisting of approximately 500 acres, located adjacent to the City's central downtown district; and

WHEREAS, in January, 1984, in connection with its efforts to revitalize and promote development in the Valley, the City convened the Central Platte Valley Development Committee (the "PVDC"), a group of Valley landowners and other interested parties, to develop a comprehensive plan (the "Comprehensive Plan Amendment Central Platte Valley") and zoning regulations (the "Platte River Valley Zoning Ordinance") for redevelopment of the Valley; and

WHEREAS, the Comprehensive Plan Amendment Central Platte Valley was adopted by the Denver City Council (the "Council") on August 5, 1986; and

WHEREAS, the Comprehensive Plan Amendment Central Platte Valley calls for realignment of the railroad tracks which run through the Valley to the middle of the Valley, thereby eliminating the need for the Station's railway facilities. Once the railroad tracks are relocated, DUT may decide to redevelop the Station and the Property to enhance their vitality and facilitate their reuse; and

WHEREAS, the City and the community at large desire to preserve the Station due to its unique status as the major significant remaining structure representing Denver's railroading prominence, which distinguished Denver in the 19th Century as the transportation hub of the region; and

WHEREAS, preservation of the Station substantially reduces DUT's flexibility in developing the Property because it occupies a large portion of the Property; and

WHEREAS, the Comprehensive Plan Amendment Central Platte Valley permits development on the Property of two buildings of not more than 250 feet in height conditioned upon certain agreements by DUT regarding the location and configuration of such buildings, the preservation of the main train room of the Station (the "Train Room") and the two-story wings with sloped roofs adjoining either side of the Train Room (the "Wings"), and the integration from a design standpoint of any new development

so as to respect the historic character of the Train Room and the Wings, as more particularly described in that portion of the Comprehensive Plan Amendment Central Platte Valley which is attached as Exhibit B hereto and made a part hereof.

WHEREAS, concurrently with adoption by the Denver City Council of the Platte River Valley Zoning Ordinance, the parties desire to set forth and further describe their agreements with respect to general guidelines for development of the Property, location of open space, pedestrian access, and building envelopes on the Property, and preservation of the Train Room and the Wings; and

WHEREAS, the City has determined that the terms and conditions set forth herein will serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants and taxpayers of the City.

#### AGREEMENT

NOW THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

#### ARTICLE I.

#### Preservation of Train Room and Wings.

A. DUT covenants and agrees that it shall perform routine and ordinary maintenance on the Train Room and the Wings and that it shall not demolish, add to, reconstruct or otherwise alter any "Facade," as defined below, of the Train Room or the

Wings, except with the approval of the Denver Landmark Preservation Commission (the "Commission") as provided in Paragraph I(B) below. As used herein, "Facade" shall mean any exterior, including the walls, roof, signage and features thereof, of the Train Room or the Wings except that "Facade" shall not mean any exterior of the first floor of the Wings which currently abuts the one-story, flat-roofed wings located at the ends of and connected to the Wings (the "Flat-Roofed Wings").

B. (i) In the event that DUT desires to demolish, add to, reconstruct or otherwise alter any Facade of the Train Room or the Wings, before seeking a building permit for such work, DUT shall submit its plans for such work (the "Plans") to the Commission for its review and approval or disapproval, which approval shall not be unreasonably withheld. The Commission shall have thirty (30) days after receipt of the Plans to review and approve the same; failure by the Commission to notify DUT in writing of its disapproval of the Plans within such 30-day period shall be deemed approval of the same.

(ii) If the Commission delivers written notice to DUT within such 30-day period explaining why the Plans would adversely affect the Facades or any exterior architectural feature of the Train Room or the Wings or are otherwise incompatible with the objectives of maintaining the historical integrity of the Station, DUT and the Commission shall meet within ten (10) days after delivery of such notice to review the Commission's objections to the Plans and shall use reasonable

efforts to reach a mutually agreeable resolution to such objections. In the event that DUT and the Commission are unable to reach a mutually agreeable resolution to such objections at such meeting, the Commission shall notify DUT in writing within ten (10) days after such meeting. The determination of the Commission shall be binding on DUT, except that DUT shall have the right to obtain judicial review of such determination, provided such action to obtain judicial review is brought no later than thirty (30) days after the final action or decision from which review is sought. Should DUT receive judicial approval to demolish the Train Room and Wings, this Agreement shall terminate without further liability to either party.

(iii) If or when the Commission finds that the Plans are of a nature which will not adversely affect or destroy any Facade of the Train Room or the Wings and are compatible with the objective of maintaining the historic integrity of the Train Room and the Wings, it shall cause the secretary of the Commission to endorse the Plans, with any changes thereto, with the Commission's approval.

C. Notwithstanding any redevelopment of the Property or the Station, DUT shall preserve a major entrance to the Station on that side of the Station which faces downtown Denver.

## ARTICLE II.

### Development of the Property and Station.

A. Subject to the provisions of Paragraphs B and C below, DUT shall have the right, at its option, to develop on the

Property any improvements and buildings which are permitted by the Comprehensive Plan Amendment Central Platte Valley and Platte River Valley Zoning Ordinance in effect as of the date of this Agreement, including, but not limited to, two tower-type buildings, each having a maximum height which shall not exceed 250 feet (the "New Buildings"), together with related amenities.

B. To accommodate the provision in the Comprehensive Plan Amendment Central Platte Valley which provides that the New Buildings shall not block the Train Room and shall be integrated from a design standpoint so as to respect the historic character of the Train Room and the Wings, DUT agrees that the New Buildings shall, if and when constructed, be designed and located as provided in Exhibit C attached hereto and made a part hereof. In addition, DUT agrees that development of the New Buildings shall comply with the applicable provisions of the Platte River Valley Zoning Ordinance, including without limitation, the "DUT Subarea Zoning Standards" attached as Exhibit D hereto and made a part hereof, and the subarea plan for the Property to be approved by the Denver Planning Board pursuant to the Platte River Valley Zoning Ordinance (the "DUT Subarea Plan"). Without limitation, DUT's plans for the New Buildings shall be subject to minimum design guidelines for the Property as adopted concurrently or subsequent to adoption of the DUT Subarea Plan pursuant to Section 59-499 of the Platte River Valley Zoning Ordinance (the "Design Guidelines"), and shall otherwise be reviewed in accordance with the applicable provisions of the Platte River Valley Zoning Ordinance, except as modified herein.

C. Notwithstanding anything in the Platte River Valley Zoning Ordinance to the contrary, the Design Guidelines shall include, but not be limited to, those guidelines for the New Buildings contained in Exhibit C. In addition, the Design Guidelines may include guidelines for the following additional categories: fenestration and articulation, exterior materials, building setbacks and rooflines, scale and architectural relationships with regard to the historical character of the Train Room and the Wings.

### ARTICLE III.

#### Public Improvements.

A. On or before July 1, 1988, except as provided below, DUT agrees to convey to the City by special warranty deed, subject to real property taxes for the year of dedication, and to easements, reservations, rights-of-way and restrictions of record or in existence, if any, those portions of the Property necessary for the construction of the public rights-of-way for Wewatta, 16th, 18th, 19th and 20th Streets which lie on the Property (as such rights-of-way are shown on Exhibit E attached hereto and made a part hereof) to the City without charge to the City. The City agrees to vacate such conveyed property ten (10) years from the date of such conveyance if the City Council finds that public use, convenience and necessity no longer require Wewatta Street in the system of thoroughfares within the City. The parties acknowledge and agree, however, that completion of such dedications is subject to any prior rights of Amtrak pursuant to

statute and/or agreements with DUT to use the Station and/or the Property for its operations, and that the failure of DUT to complete such dedications on or before July 1, 1988, because of any such prior rights of Amtrak shall not be considered a default hereunder. The exact alignment of such public rights-of-way may differ from Exhibit E by mutual agreement of DUT and the City.

B. If the 16th Street Mall is extended to Wewatta Street, DUT agrees to pay for design and construction of any connections serving improvements on the Property, to that portion of the 16th Street Mall which is located between Wynkoop and Wewatta Streets.

C. Prior to the conveyance by DUT to the City described in III(A) above, the City shall execute and deliver to DUT a quitclaim deed, quitclaiming to DUT any right, title or interest of the City in and to the Property, to the extent any such right, title or interest is not required by the City for public use and can be conveyed without vacation proceedings. To the extent vacation proceedings are required for the City to convey any such right, title or interest, the City agrees to commence and diligently process such vacation proceedings prior to the conveyance by DUT described in III(A) above and, if the City Council finds that public use, convenience and necessity no longer require the City to hold such right, title or interest, to pass an ordinance vacating such right, title and interest as soon as possible following commencement of such vacation proceedings.



ARTICLE IV.

Demolition of Flat-Roofed Wings.

At any time following the complete execution hereof, DUT shall have the right to demolish or otherwise alter the Flat-Roofed Wings, subject only to such approvals as are customarily required to obtain a permit for such demolition or alteration under the Denver Building Code. Subsequent to such demolition or alteration and prior to redevelopment of the Property, DUT shall temporarily cover any openings in the Wings caused by such demolition or alteration in a reasonable manner which, to the extent practical and economical given the temporary nature of such covering, reasonably complements the appearance of the Wings and the Train Room, and which is consistent with the requirements of the Denver Building Code and other applicable regulations.

ARTICLE V.

Default, Cure and Remedies.

A. It is the parties' intention that, by virtue of this Agreement, the Property shall be developed pursuant to Article II above, and shall be subject, for purposes of land use control and design and development review, only to the provisions of this Agreement, the Comprehensive Plan Amendment Central Platte Valley, the Platte River Valley Zoning Ordinance and any DUT Subarea Plan adopted pursuant thereto, and the general zoning regulations of the City which relate to the Platte River Valley Zoning Ordinance, and shall not be subject to any City ordinance establishing a "district for preservation" or "structure for

preservation", as defined in Article 30 of the Denver Revised Municipal Code or otherwise. Accordingly, a "breach or default" by the City under this Agreement shall be defined as a zoning, land use or historic preservation action, direct or indirect, taken without DUT's consent, which: (i) diminishes or alters the heights, densities or uses permitted on the Property by this Agreement, the Comprehensive Plan Amendment Central Platte Valley, the Platte River Valley Zoning Ordinance and, if and when adopted, the DUT Subarea Plan; (ii) materially and adversely alters any development standard or guideline applied to the Property by this Agreement, the Comprehensive Plan Amendment Central Platte Valley, the Platte River Valley Zoning Ordinance and, if and when adopted, the DUT Subarea Plan; or (iii) includes the Property in a "district for preservation" or designates the Station or any portion thereof as a "structure for preservation," each as defined in Chapter 30 of the Denver Revised Municipal Code. Exercise by the City of its other police or governmental powers shall not constitute a breach or default under this Agreement. It shall be an additional and independent breach of this Agreement by the City if, after termination by DUT for an uncured breach or default by the City, the City prevents demolition of the Station by means of the application of any ordinance, resolution, rule, regulation or other City-imposed control which does not also apply to the demolition of any non-historic or non-architecturally significant structure or any structure in non-historic areas in the City. This additional and

independent breach and the City's liability therefor shall survive termination of this Agreement by DUT for any breach or default by the City.

B. In the event of a default by either party hereunder, the nondefaulting party shall deliver written notice to the defaulting party of such default, at the address specified in Paragraph VI(F) below and the defaulting party shall have thirty (30) days from and after receipt of such notice to cure such default. In the event that such default is not of a type which can be cured within such thirty (30) day period and the defaulting party gives written notice to the nondefaulting party within such thirty (30) day period that it is actively and diligently pursuing such cure, the defaulting party shall have a reasonable period of time given the nature of the default following the end of such thirty (30) day period to cure such default, provided that such defaulting party is at all times within such additional time period actively and diligently pursuing such cure.

C. In the event that any such default is not cured as above-described, the nondefaulting party shall have the right to (i) declare this Agreement null and void, in which case neither party shall have any further obligations or duties under this Agreement, or (ii) enforce the defaulting party's obligations hereunder by an action for any equitable remedy, including injunction and/or specific performance, or an action to recover damages. In the event of a breach or default by the City, in

addition to any of the remedies provided for herein, DUT shall be entitled to demolish or otherwise alter the Train Room and Wings with no further approval required of the City except such approvals as are customarily required to obtain a permit for demolition or alteration of non-historic or non-architecturally significant buildings or of buildings in non-historic areas in the City. In the event that DUT attempts to alter any Facade of the Train Room or the Wings contrary to the provisions of Article I above, then, in addition to any other remedies the City may have at law or in equity, the City shall be entitled to temporary and permanent injunctive relief to preserve the Station. DUT agrees that alteration of a Facade of the Train Room or Wings contrary to the provisions of Article I constitutes irreparable harm which cannot be compensated by monetary damages and hereby waives any objection to the enforceability of this Agreement in a court of equity.

D. Pursuant to the "Right to Develop" Policy described in Paragraph VI(A) below, in the event of a breach or default under this Agreement by the City during the first twenty-five years of the term hereof, which is not cured pursuant to Paragraph V(B) above, in addition to any other remedies it may have at law, pursuant to this Agreement or otherwise, DUT shall be entitled to recover the following damages: (i) the market value, at the time of such default, of any land dedicated to the City or set aside for public use at the direction or request of the City by DUT pursuant to this Agreement; (ii) an amount which

constitutes the diminution or reduction in value, attributable to the City's breach or default, of the Property or any portion or portions thereof or improvements or structures thereon; (iii) any reasonable costs, expenses, and liabilities incurred by DUT during the five years prior to the City's breach or default, including, but not limited to, all fees paid in consideration of financing, and all architectural, planning, marketing, legal, and other consultants' fees incurred by DUT in planning for development on the Property allowed by this Agreement, together with interest thereon at the legal rate until paid, which costs, expenses and liabilities cannot be reasonably applied to subsequent development on the Property.

#### ARTICLE VI.

##### Miscellaneous Provisions.

A. The City acknowledges and agrees that this Agreement satisfies all of the requirements for development agreements contained in that certain City policy (the "Policy") entitled "Right to Develop," which was filed with the City Clerk, Ex-Officio Clerk of the City and County of Denver on February 3, 1988, as City Clerk's Filing No. 87-748A, and that DUT shall be entitled to all of the rights of property owners within the Valley established by the Policy.

B. This Agreement shall be binding on and inure to the benefit of the parties, and their respect heirs, successors and assigns, and shall be enforceable according to its terms and conditions under the laws of the State of Colorado.

C. In order to preserve the Station for as long as possible, the initial term of this Agreement shall be fifty (50) years from the date hereof unless earlier terminated pursuant to the provisions hereof. If by the end of such 50-year period, DUT has not constructed or obtained a building permit for construction of the New Buildings, this Agreement shall terminate and be of no further force and effect. If during such 50-year period, DUT has either constructed or obtained a building permit for construction of the New Buildings, the term of this Agreement shall be extended beyond the initial 50-year term for so long as the New Buildings are in place or DUT has the right to construct the New Buildings.

D. This Agreement shall not be amended except in writing signed by each of the parties hereto.

E. DUT shall have the right to assign its rights under this Agreement, provided, however, that any such assignee shall be subject to all of the duties and obligations imposed on DUT hereunder.

F. All notices provided for herein shall be in writing and shall be deemed effective when personally delivered or three days after such notices have been mailed by certified or registered mail, postage-prepaid, return receipt requested, to the parties at the addresses given below or at such other address as may be specified by written notice.

If to DUT:

Denver Union Terminal Railway Company  
1701 Wynkoop Street, Suite 223  
Denver, Colorado 80202  
Attn: Manager

With a copy to:

Denver Union Terminal Railway Company  
1701 Wynkoop Street, Suite 223  
Denver, Colorado 80202  
Attn: Chairman of the Board of Directors

And with a copy to:

Thomas J. Ragonetti, Esq.  
Otten, Johnson, Robinson, Neff & Ragonetti  
950 17th Street, Suite 1600  
Denver, Colorado 80202

If to the City:

City and County of Denver  
353 City and County Building  
Denver, Colorado 80202  
Attn: City Attorney

And with a copy to:


Planning Department  
City and County of Denver  
1445 Cleveland Place, Room 400  
Denver, Colorado 80202  
Attn: Director of Planning

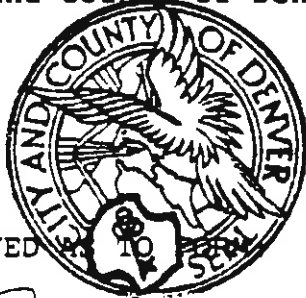
G. The provisions of this Agreement shall be construed as to their fair meaning, and not for or against any party based upon any attributions to such party of the source of the language in question.

H. In the event any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, this entire Agreement shall be deemed void and of no further force or effect.

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

ATTEST:

  
Felicia Muftic, Clerk and Recorder, Ex-officio of the City and County of Denver



APPROVED

By:   
City Attorney

CITY:

CITY AND COUNTY OF DENVER, a Colorado municipal corporation

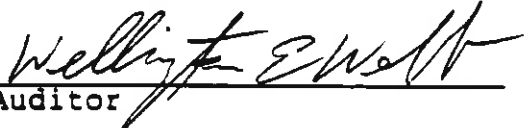
By:   
Federico Peña, Mayor

RECOMMENDED AND APPROVED:

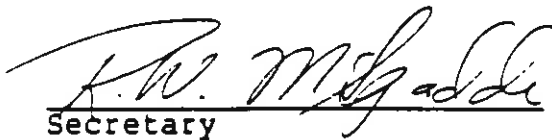
By:   
Manager of Public Works

By:   
Director of Planning

REGISTERED AND COUNTERSIGNED:

By:   
Auditor

ATTEST:

  
Secretary

THE DENVER UNION TERMINAL RAILWAY COMPANY, a Colorado corporation

By:   
John S. Walker, President



STATE OF COLORADO )  
 ) ss.  
CITY AND COUNTY OF DENVER )

The foregoing Development Agreement was subscribed and sworn to before me this 10th day of May, 1988 by Federico Peña, as Mayor, John S. Mrazek, as Manager of Public Works, William Lamont, Jr., as Director of Planning, and Wellington E. Webb, as Auditor, for the City and County of Denver.

Witness my hand and official seal.

My commission expires: 5-23-89

Luigi Gichel  
Notary Public

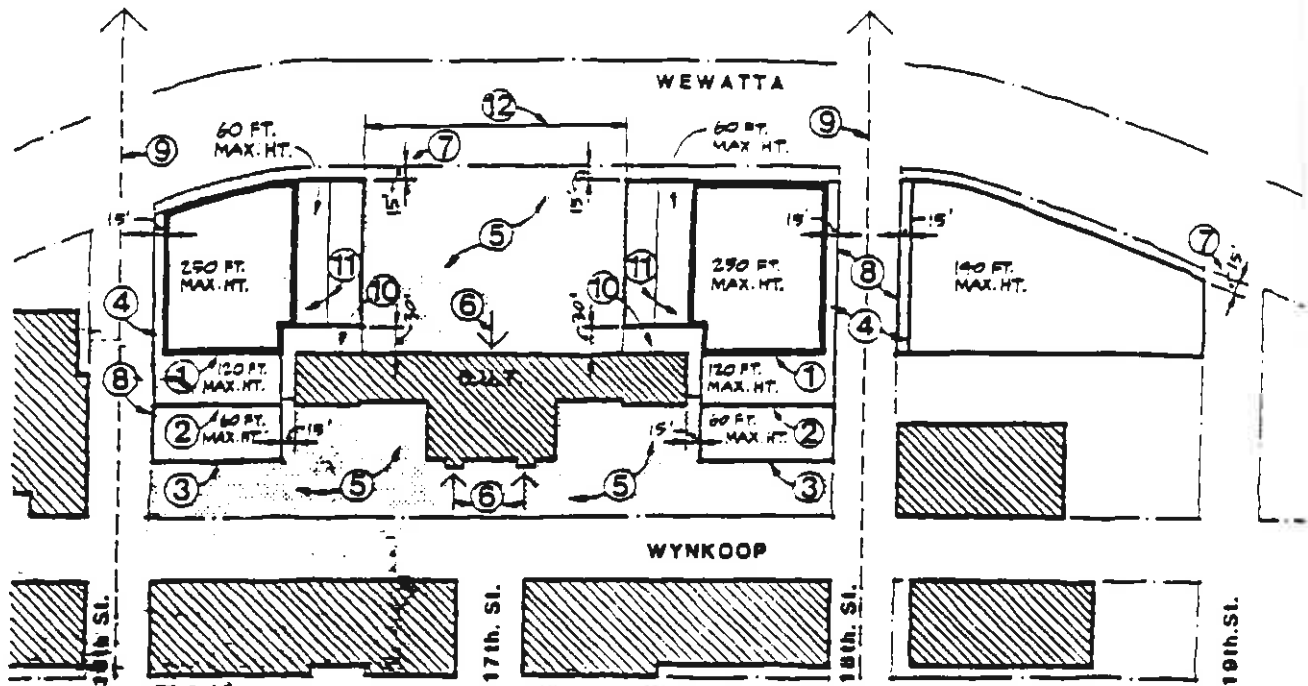
STATE OF COLORADO )  
 ) ss.  
CITY AND COUNTY OF DENVER )

The foregoing Development Agreement was subscribed and sworn to before me this 10th day of May, 1988 by John S. Walker, as President of The Denver Union Terminal Railway Company, a Colorado corporation.

Witness my hand and official seal.

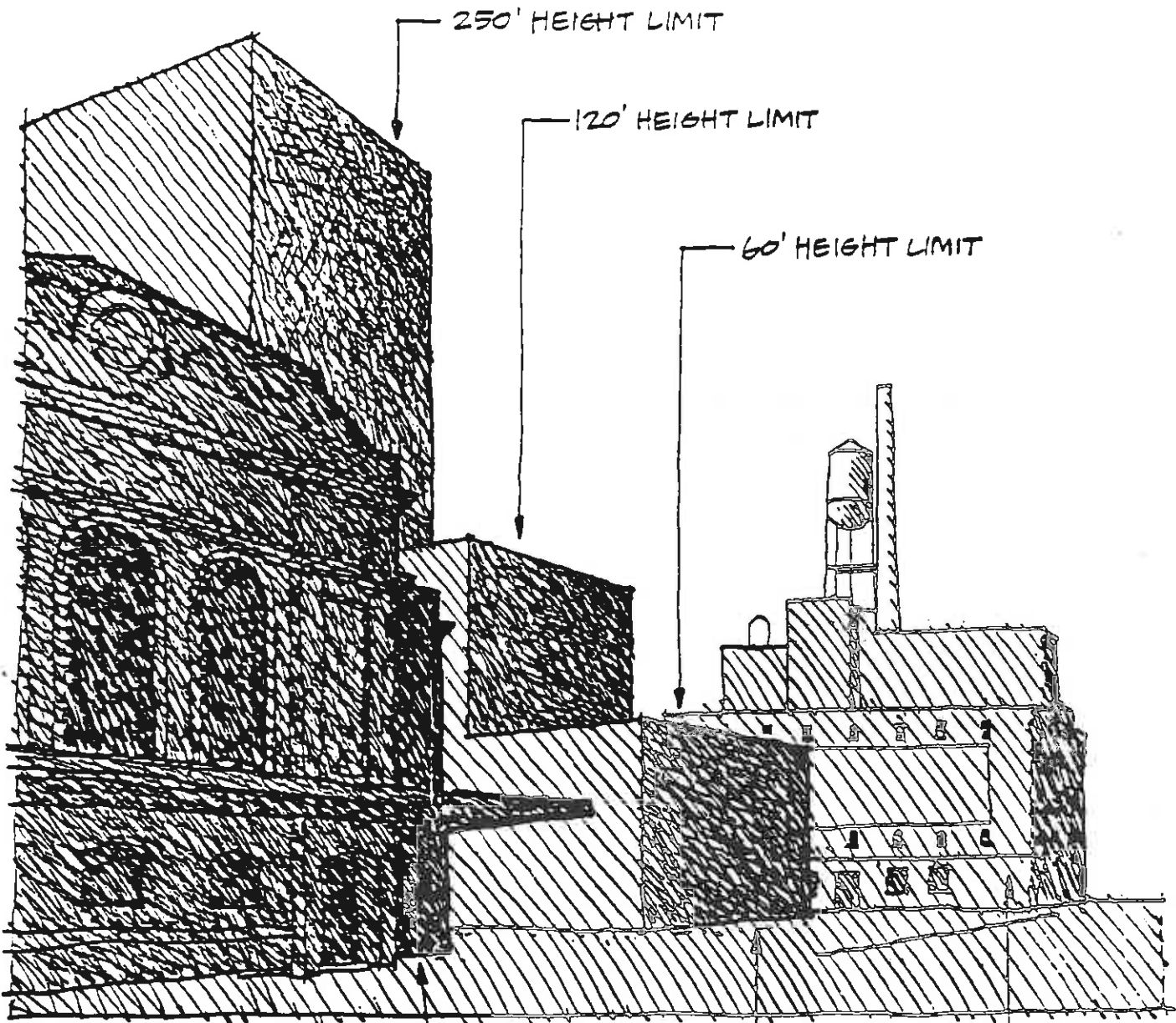
My commission expires: 5-23-89

Luigi Gichel  
Notary Public



### EXHIBIT C

1. 250' height envelope extends no further than the Wewatta facade of the two story wings.
2. 120' height envelope extends no further than the Wynkoop facade of the two story wings.
3. 60' height envelope extends no further than the Wynkoop facade of the main train room building.
4. Low level light setback to occur between 20' and 120' high.
5. Landscaped publicly accessible at grade open space with no surface parking lots (except for a small number of VIP and handicapped spaces). Driveways for visitor drop-off permissible.
6. Entries from Wewatta and Wynkoop to the main train room building are to be maintained as being among the primary pedestrian entries to the new and renovated development.
7. Building setbacks
8. Buildings are to be constructed approximately up to the property line.
9. View corridor of mountains framed by 16th Street and 18th Street R.O.W.'s to be maintained along 16th Street and 18th Street R.O.W.
10. Connection not to exceed 15' high.
11. Building setback - see guidelines-6M, and illustration 8.
12. Development shall not extend toward the main train room further than a line perpendicular with the face of the D.U.T. at the architectural demarcation of the hip-roofed ends.

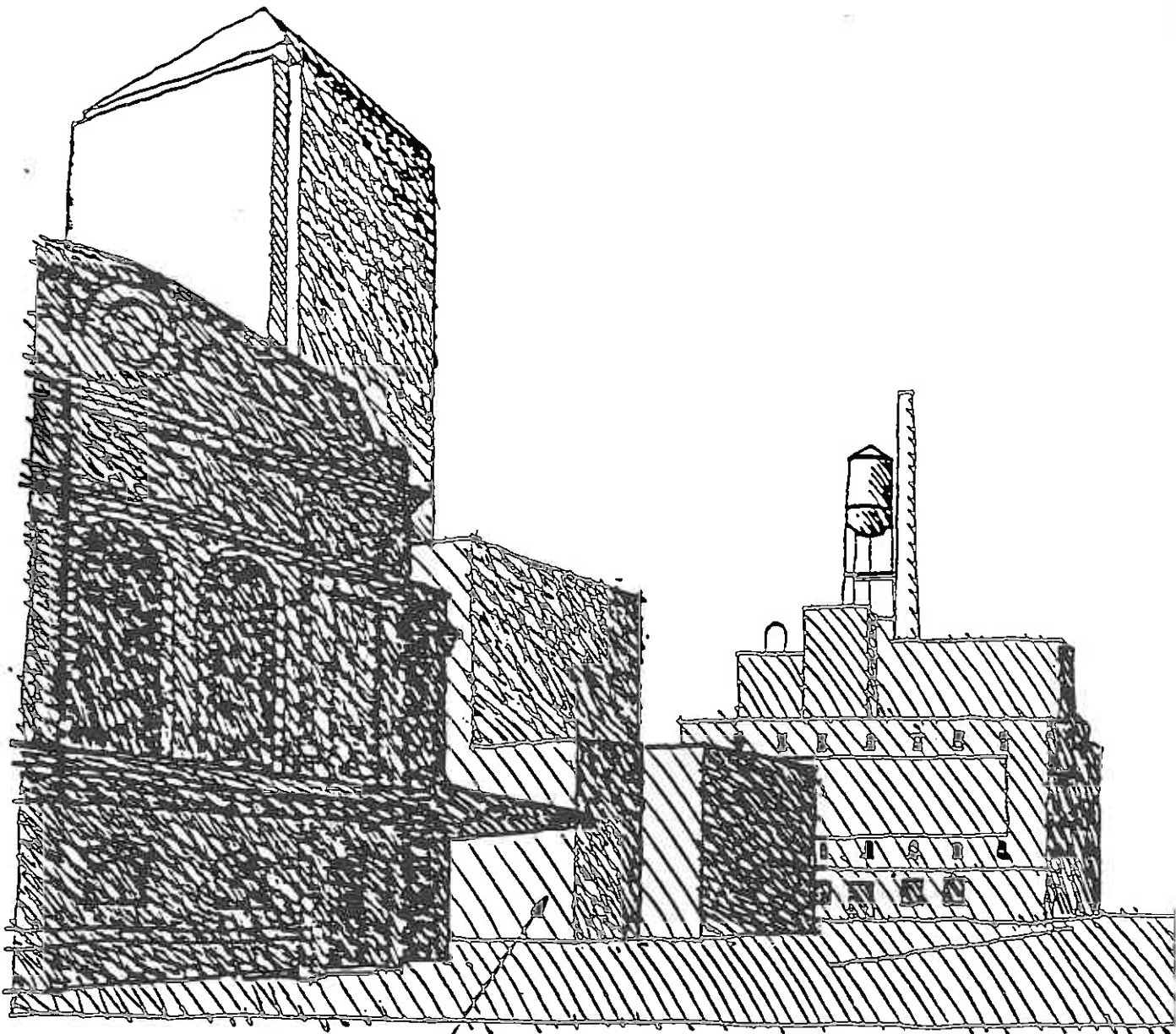


**ILLUSTRATION 1**

DENVER UNION TERMINAL —

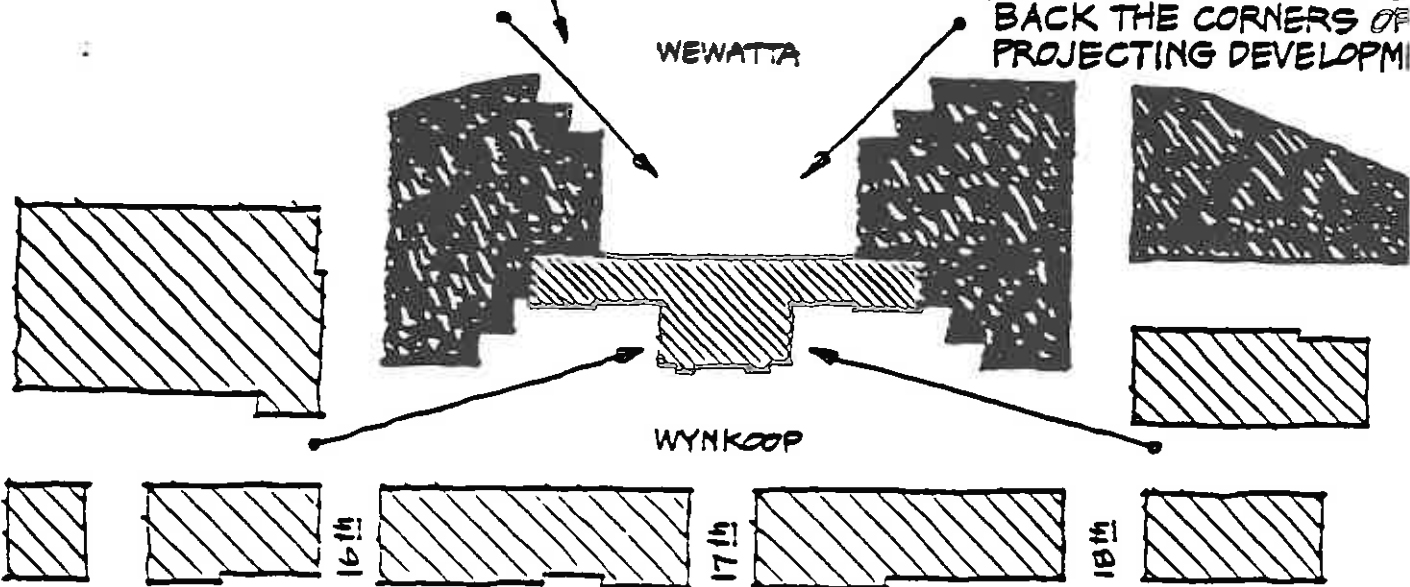
ICE HOUSE —

DIAGRAMMATIC MASSING OF  
 NEW DEVELOPMENT SHOWING  
 APPROXIMATE MAXIMUM  
 ALLOWABLE HEIGHTS IN RELATION  
 TO ADJOINING BUILDINGS —

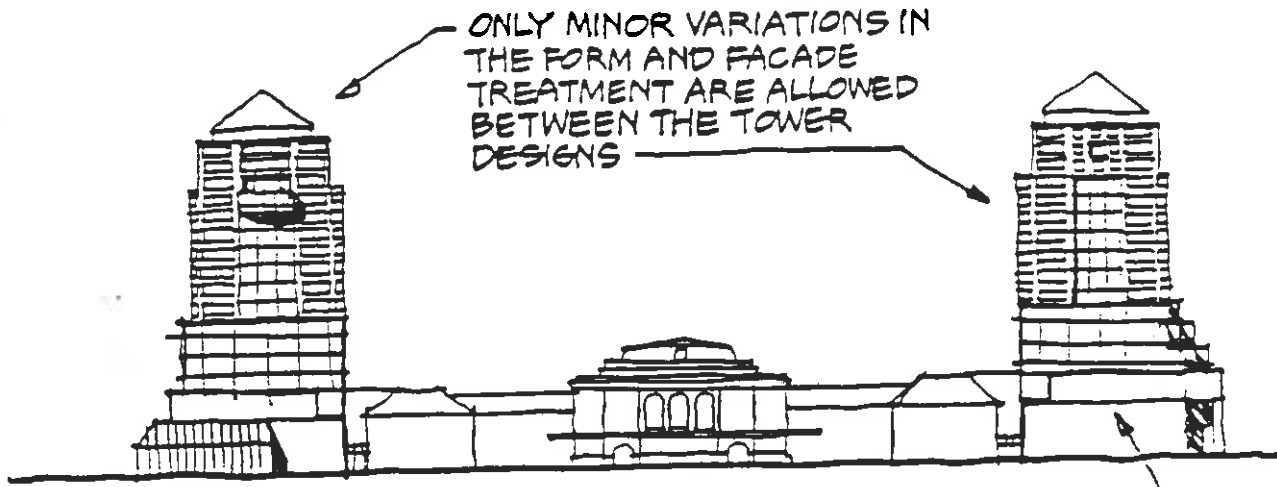


**ILLUSTRATION 5**

VIEWS OF THE D.U.T. WINGS AND TRAIN ROOM SHOULD BE MAXIMIZED, POSSIBLY BY CUTTING BACK THE CORNERS OF PROJECTING DEVELOPM

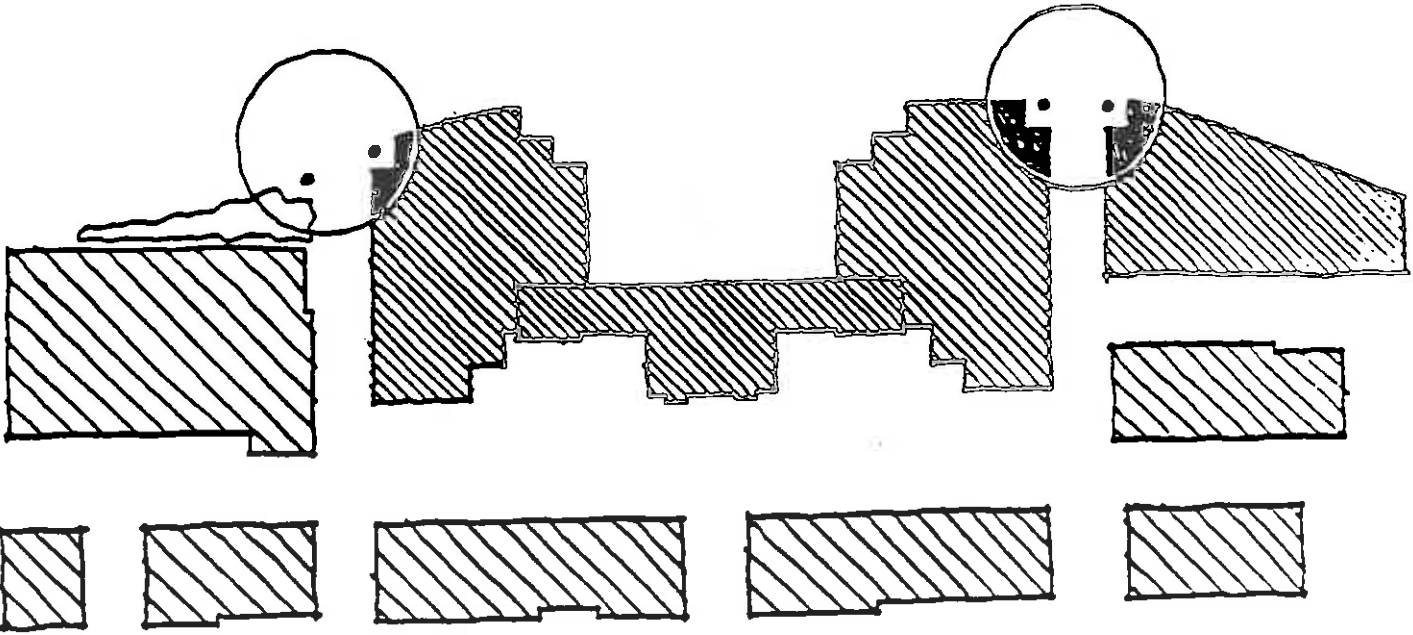


**ILLUSTRATION 5A**

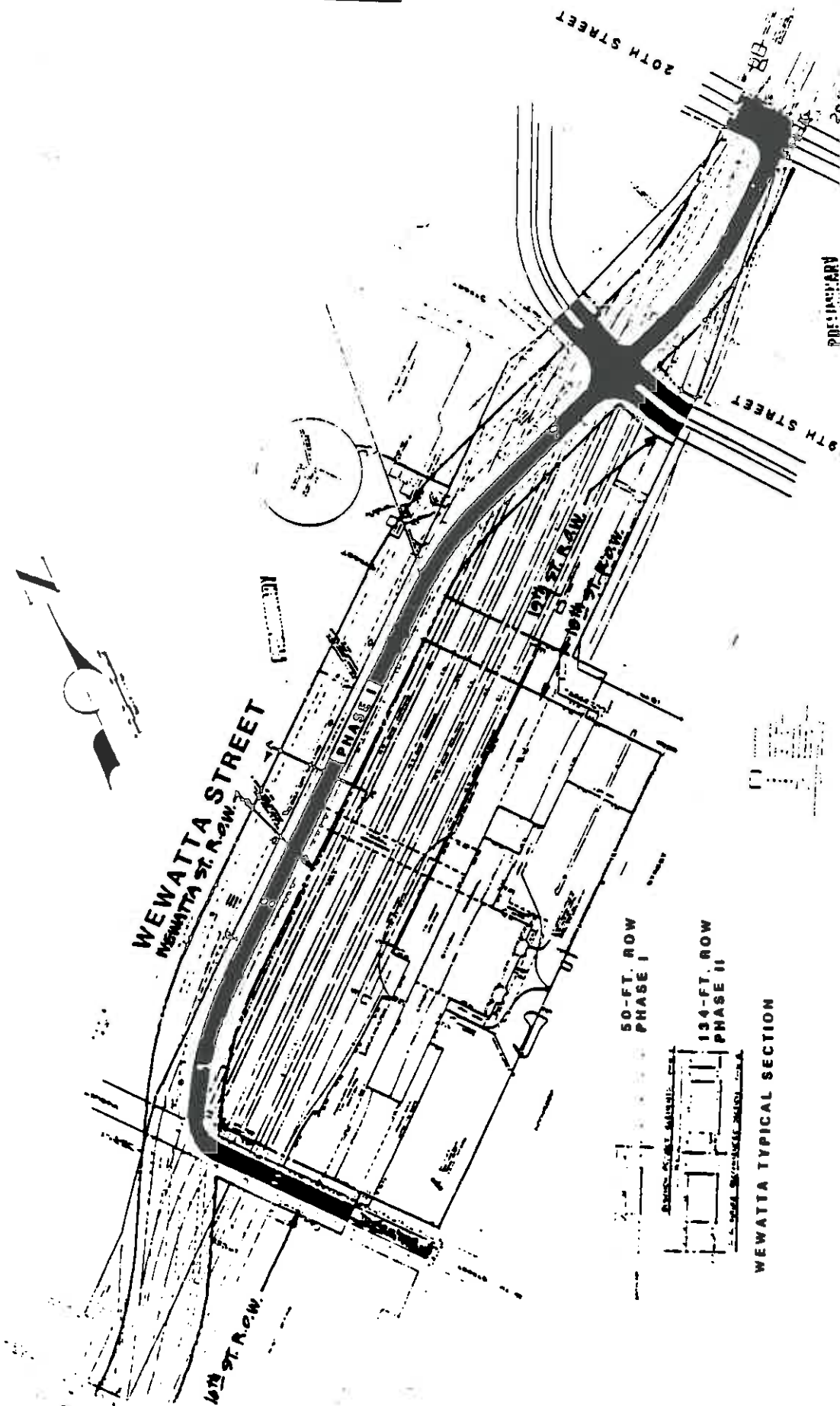


**ILLUSTRATION 6**

MORE VARIATION IS ALLOWED AT THE LOWER LEVELS, AS LONG AS THE OVERALL DESIGN COHESIVENESS IS NOT DESTROYED



**ILLUSTRATION 7**



WEWATTA TYPICAL SECTION

## RIGHT TO DEVELOP

WHEREAS, it is important for private landowners to have assurances that the level of density, building height, and uses by right which exist in the Platte River Valley Zone District, on which landowners have based their investment in the Valley, will not change; and

WHEREAS, the development of the Platte River Valley will require unusually large amounts of capital investment; and

WHEREAS, the Platte River Valley Zone District contains requirements unique to the Platte River Valley compared to any other portion of the City, including a requirement to dedicate six percent (6%) of property for open space, a requirement to designate housing sites or to pay a fee in lieu thereof, and a unique development review system; and

WHEREAS, the willingness of private landowners to make an investment in the infrastructure, and to comply with the open space, housing and development review requirements, is predicated upon their ability to develop to the densities described in the Platte River Valley Zone District Requirements, to develop those uses by right and use by special review which are listed in the Platte River Valley Zone District Requirements, and subject to the height limitations in the Platte River Valley Zone District Requirements.

NOW, THEREFORE, BE IT THE POLICY OF THE CITY AND COUNTY OF DENVER:

### Section 1. Right to Develop.

(a) It shall be the policy of the City and County of Denver to grant owners of property within the Platte River Valley Zone District the right to develop their property according to the densities, heights, and uses provided in the zone district requirements in effect at the time of execution of a written development agreement which addresses any of the following:

(1) An agreement with the City, committing the owner to certain dedications, the construction of certain public improvements; or other obligations;

(2) An agreement documenting the acceptance by the City of a dedication of open space or major right-of-way by the owner, excluding dedication of all or any portion of the right-of-way for Speer Boulevard or the viaducts for 15th Street or 16th Street;

(3) A document executed by the City acknowledging or agreeing to the expenditure of funds or the issuance of bonds by the owner, special district, or improvement district for a public objective, including housing;

(4) An agreement documenting the sale of a major parcel of land to either the City, another public entity, or a private owner in order to achieve a major public objective. Major public objective shall be determined by mutual agreement with the City regarding all such sales.

(b) The written development agreement shall define the specific area to which the right to develop applies, the specific rights which are guaranteed, the major public objectives to be achieved, the time frame for accomplishing said objectives, the time period for which the rights are guaranteed, and the categories of financial losses which may be suffered by an owner which are included in the reimbursement categories. Such development agreements shall be approved by City Council. Granting a right to develop shall preclude changes in the zoning of the property, without the consent of the owner, which reduces density or height or eliminates a permitted use or increases the exactions (housing requirements, open space requirements or the like) imposed on an owner, unless the City reimburses the owner for financial loss incurred as a result of the change in the zoning.

(c) Preparation of approval of a subarea plan shall not qualify as one of the instruments defined by this paragraph.

(d) The provisions of this section shall not apply to the subareas west of I-25.



87-748A

PLATTE RIVER VALLEY - Amend agree to replace 87-748

RIGHT TO DEVELOP

WHEREAS, it is important for private landowners to have assurances that the level of density, building height, and uses by right which exist in the Platte River Valley Zone District, on which landowners have based their investment in the Valley, will not change; and

WHEREAS, the development of the Platte River Valley will require unusually large amounts of capital investment; and

WHEREAS, the Platte River Valley Zone District contains requirements unique to the Platte River Valley compared to any other portion of the City, including a requirement to dedicate six percent (6%) of property for open space, a requirement to designate housing sites or to pay a fee in lieu thereof, and a unique development review system; and

WHEREAS, the willingness of private landowners to make an investment in the infrastructure, and to comply with the open space, housing and development review requirements, is predicated upon their ability to develop to the densities described in the Platte River Valley Zone District Requirements, to develop those uses by right and use by special review which are listed in the Platte River Valley Zone District Requirements, and subject to the height limitations in the Platte River Valley Zone District Requirements.

NOW, THEREFORE, BE IT THE POLICY OF THE CITY AND COUNTY OF DENVER:

Section 1. Right to Develop.

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(1) An agreement with the City, committing the owner to certain dedications, the construction of certain public improvements; or other obligations;

(2) An agreement documenting the acceptance by the City of a dedication of open space or major right-of-way by the owner, excluding dedication of all or any portion of the right-of-way for Speer Boulevard or the viaducts for 15th Street or 16th Street;

(3) A document executed by the City acknowledging or agreeing to the expenditure of funds or the issuance of bonds by the owner, special district, or improvement district for a public objective, including housing;

(4) An agreement documenting the sale of a major parcel of land to either the City, another public entity, or a private owner in order to achieve a major public objective. Major public objective shall be determined by mutual agreement with the City regarding all such sales.

(b) The written development agreement shall define the specific area to which the right to develop applies, the specific rights which are guaranteed, the major public objectives to be achieved, the time frame for accomplishing said objectives, the time period for which the rights are guaranteed, and the categories of financial losses which may be suffered by an owner which are included in the reimbursement categories. To be effective, such development agreements shall be approved by City Council. In order to preserve the right of referendum, the effective date of such development agreements shall be 90 days from the effective date of the approving ordinance.

(c) Granting a right to develop shall preclude changes in the zoning of the property, without the consent of the owner, which reduces density or height or eliminates a permitted use or increases the exactions (housing requirements, open space requirements or the like) imposed on an owner, unless the City reimburses the owner, as provided in the development agreement, for financial loss incurred as a result of the change in the zoning.

(d) Preparation of approval of a subarea plan shall not qualify as one of the instruments defined by this paragraph.

(e) The provisions of this section shall not apply to the subareas west of I-25.





### *Case Study 3* *Cherry Creek Mall - Denver*

**Private Sector Representative: Steve Farber**  
**Public Sector Representative: Patricia L. Wells**  
**Public Planner: Maggie Sperling**

**Background:** *The redevelopment of the Cherry Creek Shopping Center involved the resolution of a long-standing community debate concerning the interests of the neighboring residents. Once the Cherry Creek Neighborhood Plan was accomplished, a development agreement was used to make the plan enforceable and binding. Denver risked the potential of a much denser development under existing regulations, which was not subject to design controls or traffic impact mitigation. The developer faced continuing neighborhood opposition to any redevelopment. Both parties desired and accomplished a greater degree of certainty regarding the consensus finally reached between the City, developer, and neighborhood interests. In addition, the development agreement was needed to apportion the various responsibilities regarding the financing, construction, and maintenance of substantial public improvements required by the plan. This agreement was made before the Colorado Vested Property Rights statute became effective.*



CHERRY CREEK SHOPPING CENTER DEVELOPMENT AGREEMENT - DENVER  
**Private Sector Commentary - Steven W. Farber and Gary M. Reiff**

The Cherry Creek Shopping Center (the "Shopping Center") sits on 47 acres in the middle of Denver, Colorado. The redevelopment of the Shopping Center in the mid-1980s required the integration of a new regional shopping mall with an existing mall, supermarket and other structures on the Shopping Center site, neighboring commercial and residential property surrounding the Shopping Center site, and nearby public amenities, including the Cherry Creek and open-space parks.

In February 1984, the Cherry Creek Steering Committee (the "Committee") was established to guide the formation of a new plan for the entire Cherry Creek neighborhood.<sup>1</sup> In early 1986, the Plan was approved by the Denver Planning Board and Denver City Council, and is a comprehensive redevelopment map for the entire Cherry Creek neighborhood. Based on the Plan, the City and the developer of the Shopping Center, Taubman-Cherry Creek Limited Partnership ("Taubman"), executed the General Development Agreement (the "Development Agreement"), for the construction of a major new regional shopping mall and associated amenities. On August 17, 1990, the Shopping Center opened.

The Plan and Development Agreement are important examples of how neighborhood groups, existing commercial development, local government and a new developer can work together to integrate a major new facility into the fabric of an existing neighborhood.

***The Cherry Creek Neighborhood***

The Cherry Creek neighborhood is centrally located in Denver, three miles southeast of downtown. The neighborhood had, by the time the Committee was formed, witnessed substantial increase in housing costs. The area had become attractive to all types of households, including young professionals, families with children and couples whose children had grown.<sup>2</sup> The neighborhood was, and is, divided into four areas: the existing property on which the Shopping Center was constructed, small retailers north of the Shopping Center, a duplex-zoned residential area north of the Shopping Center and a mixed residential and commercial area east of the Shopping Center.

The issues facing the Committee were particularly complex because of four basic factors:

1. Open-ended potential for new development in the Shopping Center and redevelopment of other areas.
2. The City desired to encourage shopping that would complement rather than detract from downtown redevelopment efforts.
3. The neighborhood is located in the midst of a heavily travelled regional

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<sup>1</sup> The plan, entitled "Cherry Creek - A Proposed Neighborhood Plan", was adopted by the City on March 3, 1986, by Ordinance No. 113, Series of 1986, and hereinafter is referred to as the "Plan."

<sup>2</sup> Plan, at p. 2.

arterial street system.

4. New development was projected to have traffic impacts on existing residential areas.<sup>3</sup>

### ***The Committee and the Plan***

In late 1983 and early 1984, the Denver Planning Office and the neighborhood residents and landowners negotiated the types of groups and interests which should be represented on the Committee, and the groups in turn individually selected who would be their representatives. People on the Committee represented the four subareas: the neighborhoods surrounding Cherry Creek; the Cherry Creek Commerce Association; the Mayor's Office; the resident City Councilman's Office; the Planning Board and Taubman.<sup>4</sup>

The Committee identified fifty-four goals for the Plan, which primarily could be broken into the following areas: (i) the need for an economically viable Shopping Center which complemented Downtown Denver; (ii) the need to integrate the urban design of the Shopping Center with the existing neighborhoods; (iii) the need to alleviate traffic and improve transportation and parking in the neighborhood; (iv) the desire to provide affordable housing, including rental housing; (v) the desire to reduce noise and air pollution and clean the bed and banks of the Cherry Creek; (vi) the need to improve street lighting, maintenance and security; (vii) the desire to provide low density, high quality retail in Cherry Creek North; (viii) the desire to develop a unified residential area east of the Shopping Center; and (ix) the need to maintain the stability and neighborhood in the residential duplex area.<sup>5</sup>

### ***Guidelines For Development of the Shopping Center***

At the time of the Plan's development, the existing shopping center site was 47 acres with a development potential of two million square feet and B-3 zoning. Retail uses already occupied 435,000 square feet, which included two major local department stores and an open mall. In addition, the site contained a cinema, supermarket, five smaller buildings and surface parking.<sup>6</sup> The Shopping Center site was surrounded by arterial streets and did not integrate with the neighborhood or the Cherry Creek. Although there was ample parking, there was very little usable open space or pedestrian amenities.<sup>7</sup>

The Plan desired to stimulate the creation of an important new mixed use development in the heart of the neighborhood with retail uses integrated with housing,

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<sup>3</sup> Plan, at p. 2.

<sup>4</sup> Plan, at p. 3.

<sup>5</sup> Plan, at pp. 4-6.

<sup>6</sup> Plan, at p. 15.

<sup>7</sup> *Id.*



offices, open space and, perhaps, a hotel.<sup>8</sup> In addition, the Plan desired to create pedestrian access to connect the Shopping Center with the surrounding subareas, including the retail area to the north, and to provide usable open space and pedestrian connections to the Cherry Creek. The Plan also desired to avoid any long "dead walls" and windowless facades and to minimize surface parking. Finally, the Plan desired to encourage shared parking between different uses.<sup>9</sup>

The Committee assumed that a down-zoning of the shopping center land was not feasible, and decided to negotiate with Taubman regarding the mix and density of uses on the site. Taubman was willing to negotiate on the types of uses on the site, but not on the amount of square footage which would be developed.<sup>10</sup> The Plan ultimately recommended that:

1. The Shopping Center property should be developed as a mixed-use site, complementing high-end retail uses with existing neighborhood retail, residential and office uses.
2. A quality hotel should be considered for the site, although the existing zoning does not permit such use.
3. Office space should be minimized to reduce peak-coincident traffic generation.
4. The regional mall should be between 750,000 to 1.2 million square feet.
5. Between 250,000 to 550,000 square feet should be devoted to residential use.
6. Between 250,000 to 550,000 square feet should be devoted to office use.
7. A significant amount of land should be devoted to usable open space.
8. The majority of the parking on the site should be accommodated in parking structures.
9. Land should be dedicated to accommodate right-of-way improvements.<sup>11</sup>

On March 3, 1986, the City Council adopted the Plan by ordinance, and the Mayor thereafter approved the same.

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<sup>8</sup> *Id.*

<sup>9</sup> Plan, at p. 16.

<sup>10</sup> *Id.*

<sup>11</sup> Plan, at pp. 16-17.

### ***The General Development Agreement***

After the Plan was completed, Taubman and representatives of the City, including the Mayor, City Attorney and Planning Department representatives, met on numerous occasions in many lengthy meetings to negotiate a development agreement for the Shopping Center. Ultimately, in late 1986, Taubman and the City executed the Development Agreement to set the general parameters for the development of the Shopping Center, consistent with the Plan.

The Development Agreement provides in pertinent part that:

1. The development will be phased as Taubman determines, with the initial phase to be an enclosed regional shopping mall. Future development will be determined by market conditions.<sup>12</sup>
2. The site ultimately could include up to 1.2 million square feet of leasable retail area (exclusive of existing buildings and residential, office, and/or hotel components). The 1.2 million square feet could not include more than 4 anchor stores (i.e, 90,000 square feet each).<sup>13</sup>
3. The total development of the site is limited to a 1:1 floor to area ratio.<sup>14</sup>
4. At full development, the site must include 250,000 square feet of residential gross building area and may include up to 550,000 square feet of office gross building area. If Taubman desires to construct a hotel, it must submit a request to the City for the necessary approvals, including zoning approvals.<sup>15</sup>
5. The City agreed to pay for \$1.5 million in improvements to adjacent parks and recreational lands and facilities, including site cleanup and regrading, landscaping, channelization and diversion of the Cherry Creek and the removal of paving from vacated roadways based on conceptual plans developed by an architect retained by Taubman.<sup>16</sup>
6. Taubman agreed to complete certain street improvements surrounding the Shopping Center, including lane and median construction and the reconstruction of certain intersections.<sup>17</sup>

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<sup>12</sup> Development Agreement, at Sections I.B.1, I.B.2.b.

<sup>13</sup> Development Agreement, at Section I.B.2.a.

<sup>14</sup> Development Agreement, at Section I.B.2.a.

<sup>15</sup> Development Agreement at Section I.B.2.b.

<sup>16</sup> Development Agreement, at Section II.B.1.

<sup>17</sup> Development Agreement, at Section II.B.1.

7. Taubman agreed to pay for certain storm drainage and water utility improvements.<sup>18</sup>
8. Taubman agreed to the closure and vacation of part of Cherry Creek North Drive.<sup>19</sup>
9. The City agreed not to approve any special district or improvement district which would include any part of the Shopping Center without Taubman's prior written approval.<sup>20</sup>

In addition, Taubman agreed to maintain the landscaped medians around the shopping center and the new park.

### ***Conclusion***

The redevelopment of the Cherry Creek Shopping Center provides substantial guidance on the importance of involving all affected neighborhood groups, including commercial and retail, and local government agencies at the start of a redevelopment process. By encouraging all relevant groups to work together to develop a shared vision of the neighborhood, the neighborhood groups, city and developer were able to improve the quality of life in the local neighborhood and also improve the tax base and economic viability of a major city resource.

Throughout the process, the group focused on the issues of concern, such as traffic and parking, and the areas of opportunity, such as major public improvements to infrastructure and parks and the creation of a substantial new regional mall, and developed a comprehensive plan to take advantage of the opportunities to solve the problems.

The result of the process was a comprehensive and successful approach to integrate older with newer uses and to redevelop an aging commercial complex.

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<sup>18</sup> Development Agreement at Section II.C.4.

<sup>19</sup> Development Agreement, at Section II.C.4.

<sup>20</sup> Development Agreement, at Section III.A.



CHERRY CREEK SHOPPING CENTER DEVELOPMENT AGREEMENT - DENVER  
**Public Sector Commentary - Patricia L. Wells**

In contrast to the long and arduous task of developing a consensus on the land use plan for the Cherry Creek Shopping Center, the negotiation of the development agreement implementing the plan was relatively easy. The difficult process of balancing neighborhood, design, development and traffic concerns, considering cumulative impacts of the proposed development and reducing the resulting agreements to writing in the Cherry Creek Neighborhood Plan had already been accomplished, so that the legitimacy of the development parameters had already been established.

The Denver City Council had adopted by ordinance the land use plan for the Shopping Center as part of the Cherry Creek Neighborhood Plan.<sup>1</sup> The goal of the Cherry Creek Development Agreement was to make the Neighborhood Plan enforceable and binding.<sup>2</sup> Without a legally binding mechanism, the carefully crafted consensus could fade over time, resulting in renewed impasse and squabbling. A greater degree of certainty was important to both the developer and Denver. Without the land use agreements in the Neighborhood Plan, Denver ran the risk of a much denser development pursuant to existing zoning, without any specific site design controls and no resolution of traffic impacts. The developer risked sophisticated and well-financed neighborhood opposition and a difficult process of obtaining requisite permits, especially those based in part on traffic impacts.

In addition, the Cherry Creek Agreement was needed to divide responsibility for financing, constructing and maintaining the substantial public improvements envisioned in the Plan. These goals for the Agreement had to be accomplished within the existing legal framework; the Colorado statute granting vested development rights pursuant to development agreements and other land use approvals had not yet been adopted.<sup>3</sup>

***Outline of Agreement Contents***

For such a major development, the Cherry Creek Agreement itself was quite short, sixteen double-spaced pages. However, it incorporated as an exhibit the Cherry Creek Neighborhood Plan, an extensive and detailed document. The "whereas" clauses indicate the intent of both the city and the developer that the Shopping Center be developed, and public improvements be constructed and maintained, consistent with the Neighborhood Plan.

The Agreement leaves quite a bit of flexibility for the developer regarding development of the property. While development is required to be "consistent with the guidelines set forth in the Neighborhood Plan," the exact timing, phasing, uses and square footages of development are left to the developer based on market conditions. Mandatory requirements include: a maximum of 1,200,000 square feet of leasable retail

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<sup>1</sup> Ordinance No. 113, Series of 1986, was adopted on March 3, 1986.

<sup>2</sup> Under Denver statutory authority, Denver Rev. Mun. Code §41-18, plans are not binding, but constitute only guidelines for future development.

<sup>3</sup> In fact, the city had been quite active in opposing vested rights legislation, which was eventually passed in 1987, and applied to development approvals occurring on or after January 1, 1988. C.R.S. §§ 24-68-101 et seq.

area (exclusive of retail "accessory" to residential or office uses contemplated for the western portion of the property); a maximum of four anchor stores, included within the 1,200,000 square feet and located on the eastern portion of the property; a floor-area ratio of 1:1; a minimum of 250,000 square feet of residential uses; and a maximum of 550,000 square feet of office space. The Agreement requires the developer to request zoning approval for a hotel "at such time as [the developer] deems feasible," but makes no promise that such approval will be granted.<sup>4</sup>

The Agreement lists a significant number of public improvements, categorized as park improvements involved in developing Cherry Creek Park; storm drainage and utility facilities; and street improvements along East First Avenue and Steele Street. Denver agreed to be responsible for all park improvements, up to a maximum of \$1,500,000. The developer was responsible for all storm drainage, utility and street improvements, with the exception of one intersection and the landscaping of new medians located along Steele Street, for which Denver would pay. The completion of Denver's improvements was to be required no earlier than November 1, 1988.<sup>5</sup> Further, it was agreed that the developer's improvements would be designed and constructed in accordance with Denver's specifications and pursuant to a section of the Denver Charter that allows, with the permission of the Manager of Public Works, improvements to be constructed in the public right of way solely at the expense and under the control of a private party.

Unlike some other development agreements, the Cherry Creek Agreement did not freeze existing zoning approval procedures. Instead, it provides that the developer must submit development plans to the city, to be reviewed in accordance with requirements applicable at the time of submittal. Denver agrees to "cooperate fully" with the granting of permits and approvals, but only "consistent with its laws and regulations." The protection for the developer is contained in the consideration received by Denver: the limited and agreed-upon land uses and the construction of public improvements. The Agreement explicitly recognizes the developer's reliance on city approvals in agreeing to the limits in the Plan. In addition, if Denver should fail to approve the final development plan<sup>6</sup> for the Shopping Center, the developer is granted the remedy of terminating the Agreement, thus depriving the city of its benefits.

The Agreement provides that it is a covenant running with the land, and is recorded as such in the real estate records. Remedies "available under the laws of the State of Colorado" are provided by the Agreement, along with the right of either Denver or the developer to terminate under specific circumstances.

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<sup>4</sup> Because a hotel is part of the Neighborhood Plan and is clearly contemplated by the Agreement, approval would likely be granted. As discussed later, the length and thoroughness of the planning process has enhanced the likelihood of completing discretionary acts consistent with the Plan.

<sup>5</sup> At the time of negotiating the Agreement, it was anticipated that the Shopping Center would open for the 1988 Christmas season. However, the Denver economy was just beginning a decline, and the Shopping Center did not open until August 1990.

<sup>6</sup> The preliminary plan had already been approved pursuant to Planned Building Group regulations, and the Agreement states that the final plan "will be a natural progression of the approved Preliminary Plan." Therefore, some general constraints were imposed on the content of the final plan.

### **Legal Issue: Binding Future Legislature**

One of the thorniest legal issues in drafting a development agreement is to avoid running afoul of the fundamental constitutional prohibition against a government entering into a contract which purports to bind a future legislature. This prohibition has come to be known as the "reserved powers doctrine"; violation of the prohibition renders a government contract invalid *ab initio*. As the United States Supreme Court stated in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 1518 (1976):

The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future. As early as *Fletcher v. Peck*, the Court considered the argument that 'one legislature cannot abridge the powers of a succeeding legislature.' 6 Cranch [87], at 135 [1810]. It is often stated that 'the legislature cannot bargain away the police power of a State.' *Stone v. Mississippi*, 101 U.S. 814, 817, 25 L.Ed. 1079 (1880).<sup>7</sup>

In the local government context, this prohibition applies most specifically to the zoning power. *Id.* Zoning by contract is considered illegal "as an *ultra vires* bargaining away of the police power." *Ford Leasing Development Co. v. Board of County Commissioners*, 528 P.2d 237, 240 (Colo. 1974). The primary purpose of a development agreement, at least from a developer's point of view, is to achieve some certainty regarding land uses in the future. The drafting challenge is to reconcile the developer's need for certainty with the city's retention of essential police power.<sup>8</sup>

The Cherry Creek Agreement carefully avoids binding a future City Council. It contains no promise about future zoning and instead provides that future development may be accomplished in accordance with requirements applicable at the time.<sup>9</sup> The land uses contained in the Neighborhood Plan are secured for the developer by mutual consideration, rather than by freezing existing rules. The Agreement recognizes that the developer "is relying on the City's approval of the development concepts" in the Neighborhood Plan in agreeing to the land use limitations in the Plan. If Denver were to alter significantly the agreed-upon land uses by means of its approval process, or by rezoning, the developer would be able to argue that it was no longer bound by the

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<sup>7</sup> *Accord*, *City of Denver v. Hubbard*, 17 Colo. App. 346, 368, 68 P. 993 (1902); *Keeling v. City of Grand Junction*, 689 P.2d 679 (Colo. App. 1984).

<sup>8</sup> Some would argue that the vested rights statute, C.R.S. § 24-68-105, (1987), has resolved this dilemma by precluding, once a right is vested, "any zoning or land use action by a local government . . . which would alter, impair, prevent, diminish, or otherwise delay the development . . ." However, a state statute cannot overcome a fundamental principle grounded in the United States Constitution. It seems wise, therefore, to avoid broad-based surrender of local government zoning powers, even when acting pursuant to the vested rights statute. As discussed later, if a development agreement provides for a reservation of certain land use powers, along with continuing benefit to the local government, it is more likely to be enforceable.

<sup>9</sup> Certain provisions of the Agreement do bind the city in the future. For example, Denver agreed not to approve without the developer's consent any petition to create a special district that includes the shopping center property. While creation of a special district is ultimately a legislative function, approval of petitions is an administrative function performed by the Manager of Public Works. Therefore this promise did not involve the issue of reserved power, which is concerned primarily with legislative authority. See *Perl-Mack Enterprises Co. v. City and County of Denver*, 568 P. 2d 468, 472 (Colo. 1977) (contract providing for fees to be charged for sewer facilities did not involve legislative or police powers).

concepts in the Plan.

More specifically, the Agreement provides that if Denver does not approve the final plan for the Shopping Center, the developer may terminate the Agreement. Thus, Denver would lose the benefits negotiated in the planning process, including public amenities, site design, and more restrictive land uses than provided under existing zoning. In this sense, the Agreement was similar to a classic contract: both sides conditioned their commitments on performance by the other side, rather than relying on "vested rights".

### **Legal Issue: Prior Appropriation**

A corollary of the rule that one legislature cannot bind a future legislature is the rule that a legislature cannot contract general obligation debt. Colo. Const., Art. XI, Sec. 6. A contract that purports to require a future legislature to provide funds for a certain purpose would be invalid as a violation of this constitutional prohibition.<sup>10</sup> In the Cherry Creek Agreement, this issue arose with regard to Denver's responsibility for the park improvements, which would cost approximately \$1.5 million over two or three years.

The standard means to avoid constitutional debt is to provide that any future financial obligations are subject to "annual appropriation of funds sufficient to discharge such obligations,"<sup>11</sup> which is what the Cherry Creek Agreement provided. While this provision protected the city, it provided little comfort to the developer, who was committed by the Agreement to spending several million dollars on street and storm drainage improvements.

To provide certainty for the developer, two other provisions were included. First, Denver agreed to include an initial \$500,000 in its capital improvements budget for 1987. This action was administrative and within the discretion of the Mayor, and therefore did not implicate legislative powers.<sup>12</sup> Second, the Agreement provided that if Denver failed to appropriate funds for the park improvements, the developer would be relieved of its obligations to pay for street and storm drainage improvements. Thus Denver's performance was secured primarily by mutual consideration; Denver's desire to benefit from substantial improvements paid for by the developer supplied the incentive to appropriate funds in future years.<sup>13</sup>

### **Lessons Learned**

Since the Cherry Creek Shopping Center has now been constructed and is extremely successful, it can probably be said that the Cherry Creek Agreement was also

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<sup>10</sup> A contract would create a debt in violation of the constitution if it pledged revenues of future years or required nondiscretionary appropriation of monies by future legislatures. *Glennon Heights, Inc. v. Central Bank & Trust*, 658 P.2d 872, 878 (Colo. 1983).

<sup>11</sup> This mechanism has been perfected since the decision in *Gude v. City of Lakewood*, 636 P.2d 691 (Colo. 1981), which in approving a lease-purchase arrangement held that discretionary or contingent obligations are not debt. *Id.* at 699.

<sup>12</sup> See note 8, *supra*. The capital improvements budget had to be approved by City Council, but the Charter at that time [Sec. A6.9-1] required a two-thirds majority to override the budget submitted by the Mayor, a relatively unlikely event.

<sup>13</sup> In order to avoid running afoul of other constitutional prohibitions against using public funds to benefit private parties, Colo. Const. Art. XI, Sec. 1 and Sec. 2, the city's funds were spent on facilities which were legitimate, government-owned public works, a park and an intersection. Denver merely agreed to design and timing which were coordinated with the Shopping Center project.



successful. Viewing the matter from a governmental perspective, several lessons regarding the viability and enforceability of development agreements can be learned.

One of the most fundamental is to precede a development agreement with a public process for planning proposed land uses. A development agreement should not serve as the forum for negotiating densities, site design, traffic patterns and other land use criteria between the developer and the government, because the land use decisions will lack the legitimacy and consensus required to be implemented over long periods of time. A public process involving all interested groups allows both the developer and the public to become aware of each other's needs and desires. The public will understand the trade-offs that may be required in order to obtain certain desired amenities, and the developer will realize that not all good ideas come from high-priced consultants. This process often leads to mutual respect, allowing the subsequent development agreement to have more flexibility and more reliance on the good faith of the parties, which are essential to longterm performance. Such a process also results in a desire by both parties to see the property developed according to the agreed-upon plan, thus producing the mutual consideration which, as discussed above, tends to make the agreement more likely to be fully performed by the government, despite the legal constraints of reserved powers and prior appropriation.

A development agreement should provide for the government some benefit that it could not obtain legislatively or as part of the permitting process,<sup>14</sup> such as the site design concepts and restructuring of traffic patterns contained in the Neighborhood Plan. Such benefits provide further incentive for the government to perform its obligations over time, and allow the agreement to leave more matters to the future discretion of the government. The more discretion left to the government in the agreement, the less the reserved powers issue is implicated, and the greater the enforceability of the agreement. If a development agreement were to surrender zoning power in exchange for nothing more than payment for public improvements, it would lack public legitimacy and, in the long term, enforceability because it could be viewed as the crudest form of contract zoning: zoning for money.

For the same reasons, a development agreement should preserve the government's police powers to the extent possible. In the Cherry Creek Agreement Denver was not acting as a co-developer or entrepreneur, where different rules might pertain, but strictly in its governmental capacity as arbiter of land uses and funder of public improvements. By acting in this capacity, Denver needed to retain as much of its governmental powers as possible.

One means to limit relinquishment of governmental power is to restrict development agreements to developments which are likely to occur in the relatively near future, so that power need only be surrendered (and rights vested) for as short a time as possible. This advice runs contrary to the common theory about the usefulness of development agreements for longterm, multi-phase developments, but the longterm surrender of power can undermine enforceability as a legal matter and engender public

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<sup>14</sup> A development agreement can allow a government to obtain benefits from a developer that might be unconstitutional in a standard permitting process as lacking the required "nexus" to the government's land use powers. See *Nollan v. California Coastal Commission*, 107 S. Ct. 3241 (1987). In the Cherry Creek Agreement, the limit on the number of anchor stores and the requirement for landscaped street medians would probably fall within this category.

dissatisfaction as a practical matter.<sup>15</sup> Even the type of consensus reached in the Cherry Creek Neighborhood Plan could evaporate over twenty or thirty years. Either a relatively short term for the agreement or a politically and legally viable means of amending the agreement is required in order to respond to changing circumstances.

Despite the success of the Cherry Creek Agreement, development agreements are not a panacea, especially for local governments. For government attorneys negotiating development agreements, the best advice is to keep the public interest firmly in mind and describe fully the public benefits in the document. Be as parsimonious as possible in giving up fundamental governmental powers and vesting rights, and do not use development agreements when some other, more traditional land use process will suffice.

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<sup>15</sup> The author admits a failure to follow her own advice in the agreement involving the Denver Union Terminal, discussed elsewhere in this volume, which granted a vested right for fifty years. In that agreement, the desired public benefit was preservation of an historic building in a manner unavailable under Denver's historic preservation ordinance, so that an unusually long term was required, despite the author's misgivings. The agreement covered only a relatively small area of land, and the trade-off (two tall towers for preservation of the terminal) was simple and clear.

**CHERRY CREEK SHOPPING CENTER DEVELOPMENT AGREEMENT - DENVER**  
**Public Planner Commentary - Maggie Sperling**

Because the major players, the City of Denver and the Taubman Company worked together to produce the Cherry Creek Neighborhood Plan, the mood was amicable when they sat down again around the negotiating table to draw up the development agreements. At the end of the planning process, the parties had agreed that such a legal instrument was necessary to implement the provisions set forth in the plan. The plan, albeit adopted by City Council, was an advisory document with no real teeth in law.

The Cherry Creek Plan established general guidelines for the redevelopment of the shopping center site. The parties at the table had two main tasks: to translate the guidelines into binding actions and to haggle over financial responsibilities for on and off-site improvements. The City and County of Denver team was represented by planner Maggie Sperling and attorneys Steve Kaplan, Patricia Wells and Bob Kelly. The Taubman team was represented by developers John Simon and Steve Helm augmented with two teams of attorneys: the local firm of Brownstein, Hyatt, Farber, and Madden (now Brownstein, Hyatt, Farber and Strickland) and a Detroit firm, Honigman, Miller,,Schwartz and Cohn represented by Richard Burstein.

Provisions of the plan included:

- development of mixed-uses on the shopping center's business-zoned site, specifying maximums for amount of square footage in retail and office and minimums for residential use;
- a recommendation in favor building a quality hotel, not normally allowed under the B-3 zoning
- creation and preservation of "significant" amounts of usable open space;
- the use of parking structures to accommodate the majority of cars;
- dedication of shopping center land off the north (First Ave.) and east (Steele Street) edges of the site to accommodate new planted medians and extra laneage;
- a site plan showing the general location of uses, with regional shopping on the eastern two thirds of the land; housing, hotel and office clustered on the west;
- additionally, the plan called for closing Cherry Creek North Drive to through traffic and the creation of a new park to the south of the shopping center. (a schematic plan is enclosed.)

Negotiations took place from March of 1986, when the Cherry Creek Plan was adopted by City Council, over the next year. The felicitous venue for the work was the Brown Palace Hotel, where participants were amply supplied with morsels from the kitchen, thanks to Taubman. Negotiations were based on a long-seated mutual trust.

Not surprisingly, therefore, hammering out of the details was generally friendly, with some posturing to insure that the lawyers had some real work to do. The developer's representatives tempers rose during the discussion of the shopping center's maintenance of off-site improvements. In the end they were persuaded that it was in their enlightened self interest to do so.

The group at the table solidified as a team when during review of the final construction drawings, the Denver Fire Department demanded that Taubman put in a costly (and in most people's minds, counter productive) sprinkler system in the parking

garages. The City negotiators took up the cudgel against their own bureaucrats, and won. From then on any undercurrents of discord vanished.

The general development agreement, signed the day after Christmas, 1986, became the first of two to be finalized.

In addition to sanctifying all the major provisions of the Cherry Creek Plan, new points that were hammered out and included spoke to:

- phasing of improvements;
- maximum number of anchor stores (4);
- the development approval process;
- responsibility for making park improvements (the City made and paid for them conditioned on the approval of the developer);
- storm drainage and utility improvements, made by Taubman in accordance with City rules;
- street improvements, easements and vacations, a joint responsibility
- miscellaneous provisions covered a number of points: the city agreed that it would not fold the developer into a special district without the developer's express written consent (the formation of a local improvement district, since passed, was being contemplated for Cheery Creek North); the City and Developer agreed to mutually cooperate to discharge the obligations of the Agreement, and that the obligations would run with the land.
- remedies for default by either party were spelled out.

A second legal instrument, a cooperative agreement, was signed in July 1987. It laid out responsibilities for maintaining the abutting landscaped medians in First and Steele Streets and the newly developed park to the south of the shopping center. The developer was persuaded that the City had neither the staff or money to maintain the adjacent green spaces to a level that would be compatible with the high-end shopping center. It made it easier that the Taubman people already had in place a grounds crew to keep up their own improvements. To that end, a cooperative agreement was drawn up which specified which duties Taubman would be willing to undertake on its own, with the proviso neither party would be held liable for doing so, except for acts of willful negligence.

This agreement became very detailed. At no cost to the City, Taubman is responsible for mowing the grass, maintaining and operating sprinkler heads, sweeping the pedestrian and bike paths, maintaining and replacing scrubs and flowers, maintaining the plaza areas, collecting trash, maintaining the diverted waterway system, and maintaining and replacing sidewalks. The City is responsible for maintaining the creek amenities, trees, a decorative fountain and underground pipes.

### **Summary**

The development agreements proved to be an eminently satisfactory solution to both parties. They ensured implementation of a number of specific actions on the part of both the City and Taubman, whose goals were by this time mutual and inter-dependent. The City of Denver, for its part, could take comfort in the fact that the provisions of a hard-fought plan would be implemented, and the resulting shopping center would provide high end shopping to its citizenry and enhance the City's tax base. Taubman was assured of the City's financial participation in a number of needed nearby

improvements and did not have to rely solely on the good will of a possibly changing Mayor and City Council.

As a non-legal spokesperson for the City, I feel our goals were accomplished. The end result has been a first class shopping center which abided by the provisions of the agreements. With hindsight, the City should have insisted on at least one more: mandatory decorated display windows in all stores facing First and Steele Streets would have been good.

I can't vouch for the efficacy of negotiated agreements when the parties sitting down to the table don't already share a level of trust. I can vouch for their usefulness under our felicitous circumstances in Denver; we hammered out a couple of documents that were mutually beneficial and have served us well.



12/9/86

GENERAL DEVELOPMENT AGREEMENT

THIS AGREEMENT is made and entered into as of this 26<sup>TH</sup> day of December, 1986, by and between the CITY AND COUNTY OF DENVER, a municipal corporation of the State of Colorado (the "City") and TAUBMAN-CHERRY CREEK LIMITED PARTNERSHIP, a Colorado limited partnership (the "Developer").

WITNESSETH:

WHEREAS, the Developer is the ground lessee of that certain parcel of land known as Blocks A and B, Coloden Moor Subdivision located in the City and County of Denver, Colorado (the "Property"), as more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference; and

WHEREAS, there is presently located on the Property certain retail buildings and improvements; and

WHEREAS, the City adopted on March 3, 1986, by Ordinance No. 113, Series of 1986, a Neighborhood Plan for the Cherry Creek Neighborhood (the "Neighborhood Plan"), a copy of which is attached hereto as Exhibit "B" and incorporated herein by this reference, of which the Property is a part; and

WHEREAS, the Developer intends to redevelop the Property consistent with the Neighborhood Plan as a mixed use development including retail, hotel, office, residential and other commercial components (the "Development"), all in accordance with the specific terms and conditions set forth herein; and

WHEREAS, the Developer and the City desire to set forth their agreements with respect to the Property and the Development, including their agreements concerning the land use concepts governing the Development, the public improvements required by the City to be constructed and maintained in connection with the implementation of the Neighborhood Plan (the "Improvements"), and other matters relating to the Neighborhood Plan and the Development generally; and

WHEREAS, the City has determined that the terms and conditions set forth herein will serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants and taxpayers of the City.

NOW, THEREFORE, in consideration of the premises above and the terms and conditions set forth below, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and the Developer hereby agree as follows:

## ARTICLE I

### LAND USE CONCEPTS

#### A. Concept

Redevelopment of the Property is to take place consistent with the guidelines set forth in the Neighborhood Plan so as to create a mixed use project containing a varied mixture of uses, including, by way of example and not limitation, residential, office, retail, hotel and related commercial uses, with an enclosed mall retail center being a major component thereof.



B. Scope of Development - Phasing

1. The mixed use development will be accomplished in phases as Developer determines based on market conditions, with the initial phase of the Development to include an enclosed mall shopping center ("Phase I"). A Preliminary Plan for the enclosed mall retail center has heretofore received Planned Building Group approval. It is contemplated by the Parties that the Final Plan, which will be a natural progression of the approved Preliminary Plan, will be submitted and processed for approval as soon as practicable.

2. a. Development of the Property may include up to 1,200,000 square feet of leaseable retail area (exclusive of any retail building(s) currently on the Property scheduled for demolition, and, also exclusive of any accessory retail uses to be developed in connection with the residential, office and/or hotel components of the Development). The 1,200,000 square feet of retail area shall not include more than four (4) anchor stores. For purposes hereof an anchor store shall mean a department and/or specialty store consisting of at least 90,000 square feet of leaseable area located in a building separate and distinct from the enclosed mall retail center, connected to and integrated therewith, or as a single, distinct unit operating under one name and located within the enclosed mall.

b. Total development of the Property shall be limited by the one-to-one floor-to-area ratio(s) currently pertaining to the Property as currently set forth in the City's zoning and/or building code(s). Future phases of the Development shall be established based on Developer's assessment of market conditions, feasibility and economic benefit. Full development shall include a residential component of not less than 250,000 square feet of gross building area. Any office component shall contain not

more than 550,000 square feet of gross building area, including building area for accessory retail uses as a part thereof. Development of a hotel is not permitted by current zoning. Developer shall, at such time as it deems feasible, submit a request to the City for the necessary approvals for a hotel component consistent with the concepts set forth in the Neighborhood Plan and such other ordinances and regulations as shall be relevant at the time of the application.

c. Developer's final determination of the amount of square footage, the uses and the phasing thereof shall be consistent with this Agreement and shall be a product of (i) market conditions; (ii) the availability of hotel zoning as aforesaid; and (iii) their resultant effect upon the Developer's plan.

3. There is a water easement which runs through and dissects the Property. That portion of the Property located to the west of said water easement shall contain most, if not all, of the residential uses. Except for the Denver Dry currently located west of the water easement, no anchor store shall be located in said portion of the Property to the west of the water easement. With the exception of the uses currently in existence in the area to the west of the water easement, retail uses shall be limited to such uses as are accessory and/or related to any office, residential, hotel or other commercial components as may be located in said area.

#### C. Approval Process

Development may be accomplished only in accordance with the procedures from time to time in effect in the City and County of Denver. Developer shall be responsible for preparing Development Plans for submittal in accordance with the requirements applicable at the time of submittal. It is

understood and agreed that City shall have the right to approve or disapprove same in accordance with its normal procedures and based on compliance with the development concepts set forth in this Article I. It is recognized that Developer is relying on the City's approval of the development concepts set forth in the Neighborhood Plan in Developer's agreeing to the development concepts and limitations set forth in this Article I.

## ARTICLE II

### PUBLIC IMPROVEMENTS

#### A. Scope of Improvements

The Improvements to be provided in accordance with the terms and conditions of this Agreement are described in detail in Exhibits "C" and "D" attached hereto and incorporated herein by reference, and generally set forth below.

1. "Park Improvements" shall include dedicated park and recreational lands and facilities in and around Cherry Creek, as shown in the plans and budget attached hereto as Exhibit "C," including portions of certain vacated roadways as more specifically described in Paragraph II.C.4 below, all to be developed, constructed and installed in accordance with that certain Conceptual Plan prepared by BRW, Incorporated included and identified in Exhibit "C." The public improvements relating to the Park Improvements shall include:

- a. site clean-up and regrading;
- b. landscaping;

c. channelization and diversion of Cherry Creek water and modifications to the Cherry Creek Channel which shall be done in accordance with the Flood Plain Ordinance of the City and County of Denver; and

d. all other construction activities or improvements necessary or appropriate for the provision of the Park Improvements as described by the Conceptual Plan, including, but not limited to, the removal of paving from the vacated roadway and the construction or installation of those structures or other facilities shown on the Conceptual Plan, and Exhibit "E" attached hereto and incorporated herein by this reference.

City shall retain qualified personnel to provide urban design, landscape and architectural services in connection with the preparation of the final plans and specifications for the Park Improvements, which final plans and specifications shall be consistent with and a logical progression from the Conceptual Plan identified in Exhibit "C." City shall provide Developer with said final plans and specifications prior to commencement of construction so that Developer may review and comment thereon.

2. "Storm Drainage and Utility Facilities" shall include:

a. improvements, both on-site and off-site, on the eastern portion of the Property as required by a comprehensive storm drainage study approved by the Wastewater Management Division to convey storm water originating off-site generally from properties to the east and north of the Property to Cherry Creek;

b. storm drainage improvements sized in accordance with Wastewater Management Division criteria in and around East First Avenue, designed to tie-in with storm water improvements to be

constructed (by others) in and around East Second Avenue (Cherry Creek North);

c. on-site storm drainage facilities required to service the Property and the Development to be constructed thereon;

d. a storm water line on the western portion of the site to convey storm drainage originating off-site from the area generally to the north of the Property to Cherry Creek; and

e. off-site water mains through the park area to the east and south of the Property.

3. "Street Improvements" shall include the following described improvements shown on Exhibit "D" attached hereto and made a part hereof:

a. improvements to East First Avenue between South University Boulevard and South Steele Street consisting of the construction of three (3) eastbound lanes, an approximately 30-foot landscaped median and a pedestrian crossing at Fillmore;

b. reconstruction of the intersection of East First Avenue and South Steele Street to provide continuous traffic movement between East First Avenue and South Steele Street;

c. improvements to South Steele Street between East First Avenue and Cherry Creek North Drive consisting of roadway widening, reconstruction of portions of the existing medians into larger landscaped medians, development of a comprehensive pedestrian crossing at Ellsworth, and the reconstruction of the intersection of Cherry Creek North Drive and South Steele Street and the realignment of Steele Street as it goes through Pulaski Park;

d. all appurtenant curbs, gutters, sidewalks adjoining the Property, medians, striping, landscaping and traffic signalization; and

e. improvements to the intersection of Cherry Creek North Drive and Alameda Avenue.

B. Responsibility for Improvements

The City and the Developer agree to undertake responsibility for the funding and completion of the Improvements as follows:

1. The City shall fund and complete the Park Improvements identified in Paragraphs II.A.1.a through 1.d. above, provided that the City shall not be obligated to appropriate or spend more than One Million Five Hundred Thousand Dollars (\$1,500,000.00) in connection with the funding and completion of said Park Improvements. The City also shall fund and complete the Street Improvements at Cherry Creek North Drive and Alameda Avenue identified in Paragraph II.A.3.e. above, and the City shall pay Thirty-eight Thousand Dollars (\$38,000.00) toward the installation of landscaping in connection with the reconstruction of the existing South Steele Street medians into landscaped medians as referred to in Paragraph II.A.3.c.

2. Subject to the City's obligation to pay Thirty-eight Thousand Dollars (\$38,000.00) toward the cost of installation of landscaping in medians as set forth in Paragraph II.B.1. above, the Developer shall fund and complete the Storm Drainage and Utility Facilities identified in Paragraphs II.A.2.a. through 2.e, the Street Improvements identified in Paragraphs II.A.3.a through 3.d and all costs incurred by City pursuant to Paragraph II.C.6.

3. Each party shall fund and complete all design and construction engineering and project administration for the Improvements for which they are responsible pursuant to Paragraphs 11.B.1. and 2., above, except that the Developer has heretofore provided and paid for the conceptual planning and design for the Park Improvements by BRW, Incorporated for which Developer shall not be entitled to reimbursement.

C. Other Agreements Concerning Improvements

The City and Developer further agree as follows:

1. The City's obligations under this Article 11 are subject to annual appropriation of funds sufficient to discharge such obligations; provided, however, that (a) the parties hereby acknowledge and agree that for 1987 the City will include in its Capital Improvements Budget Five Hundred Thousand Dollars (\$500,000.00) for the discharge of its obligations to fund and partially complete the Park Improvements identified in this Article 11; (b) the City and the Developer covenant to exercise their best efforts to complete the Improvements for which they are respectively responsible in a timely fashion; and (c) the City expressly acknowledges that the Developer's actions and expenditures made pursuant to this Article 11 are undertaken in reliance upon the City's completing performance of its obligations on a time schedule consistent with Developer's completion of Phase I of its Development as contemplated by Article I hereof, but in no event shall the City be obligated to complete such improvements prior to November 1, 1988. Developer shall provide to the City as soon as possible a time schedule of its Phase I Improvements and shall periodically update and advise City as to same. In the event that the City shall fail to appropriate funds as

aforesaid, Developer, in addition to such other remedies which it may have, shall, at its sole option, be relieved of its obligations under this Article II.

2. All Improvements shall be designed and constructed in accordance with the City's standards and specifications.

3. The City shall permit the Developer to construct the Improvements identified in Paragraphs II.A.2.a. through 2.e above and Paragraphs II.A.3.a. through 3.d above, in accordance with the City and County of Denver Charter section A.2.3-1(1).

4. In order to facilitate the creation and expansion of the Park Improvements as described above, Developer has consented to the recommendation of the Neighborhood Plan to close and vacate Cherry Creek North Drive from University Boulevard to Steele Street. The ownership of the property so vacated shall be as set forth on Exhibit "E" and the City and Developer shall execute and deliver such deeds as may be necessary to accomplish same. Notwithstanding the vacation, Developer shall grant to City an easement in form attached hereto and made a part hereof as Exhibit "F" granting City the right to keep said vacated roadway open for use by the public until such time as Developer completes the roadway improvements on First and Steele Streets as described in Paragraph II.A.3 hereof.

5. If either party defaults in the timely performance of any of its obligations under this Article II, then, subject to the provisions of Paragraph III.1.6. below, the non-defaulting party shall have the right but not the obligation (a) to complete the defaulting party's obligations



concerning which a default has occurred; and (b) subject to the City's appropriation of funds sufficient to discharge its obligations concerning which a default has occurred, to assess against the defaulting party the actual costs expended by the non-defaulting party in completing such obligations.

6. Developer's obligation to complete the applicable Improvements described in Paragraph 11.A.2. and Paragraph 11.A.3. shall be subject to there being adequate rights-of-way, or easements or permits therefor.

ARTICLE III  
MISCELLANEOUS

A. Districts

The City agrees that it shall not approve any petition for the organization of or service plan for any special district proposed pursuant to Titles 31 or 32, Colorado Revised Statutes, or for any improvement district proposed pursuant to Title 31, Colorado Revised Statutes, or the Charter of the City and County of Denver, that would include the Property within the boundaries thereof, without the Developer's express written consent.

B. Mutual Cooperation

The City and the Developer covenant and agree that they shall mutually cooperate and perform all acts necessary or appropriate to discharge all obligations contained in or contemplated by this Agreement, and with respect to any other matters which may arise affecting the Development. Without limiting the foregoing, the City agrees, consistent with its laws and regulations, to cooperate fully in the development of the Improvements and

the Development as defined herein, including, but not limited to, the granting of all permits, easements, licenses, approvals and consents necessary or appropriate for the construction and subsequent operation of the Development and the Improvements as defined herein, including the installation of a water main through the Park to and for the benefit of the Property. The parties further agree to cooperate in obtaining all permits, easements, licenses, approvals and consents required by local, state or federal agencies in connection with the Development and the Improvements. Such cooperation as set forth above shall include the parties' best efforts to adhere to the timing and scheduling set by the parties for the efficient and expeditious installation and construction of the Improvements and the Development, and the parties' execution and delivery of all deeds, agreements and other documents necessary or appropriate for the effectuation of this Agreement as contemplated herein.

C. Agreement as Covenant

The City and the Developer agree that this Agreement, and all obligations contained herein, shall run with the land and shall be deemed a covenant with respect thereto, and shall be binding upon the parties' respective heirs, successors and assigns. In order to effectuate this provision, the parties agree that this Agreement shall be recorded in the real estate records of the City and County of Denver, Colorado.

D. Integrated Agreement and Amendments

This Agreement and any special terms and conditions appended hereto at the time of execution of this Agreement, as permitted below, constitute the entire, integrated agreement of the parties hereto with respect to the matters

addressed herein. This Agreement, and each and every of its terms and conditions, may be added to or amended only by the mutual written agreement of the parties hereto, which agreement shall be executed with the same formalities as this Agreement shall have been executed. Special terms and conditions, if any, which are agreed upon by the parties hereto at the time this Agreement is executed shall be reduced to writing in accordance with this paragraph and appended to this Agreement.

E. Notice

Any notices, demands, or other communications required or permitted to be given in writing hereunder shall be delivered personally or sent by registered or certified mail, postage prepaid, return receipt requested, addressed to the parties at the addresses set forth below, or at such other address as either party may hereafter or from time to time designate by written notice to the other party given in accordance herewith. Notice shall be considered given when personally delivered or mailed and shall be considered received by the party to whom it is addressed on the third day after such notice is given.

Notices to the City:

Federico Pena, Mayor  
City and County of Denver  
City and County Building  
1437 Bannock Street  
Denver, Colorado 80202

with copies to:

Stephen H. Kaplan, Esquire  
City Attorney  
City and County of Denver  
Room 353  
City and County Building  
1437 Bannock Street  
Denver, Colorado 80202

Notices to the Developer:

Taubman-Cherry Creek Limited Partnership  
200 East Long Lake Road  
Bloomfield Hills, Michigan 48303-0200  
Attention: Robert C. Larson

with copies to:

Richard J. Burstein, Esquire  
Honigman Miller Schwartz and Cohn  
2290 First National Building  
Detroit, Michigan 48226

and

Steven W. Farber, Esquire  
Brownstein Hyatt Farber & Madden  
410 - 17th Street  
Suite 2222  
Denver, Colorado 80202

F. Severability

It is understood and agreed by the parties hereto that if any part, term or provision of this Agreement is held by the courts to be illegal or in conflict with any law of the State of Colorado, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Agreement did not contain the particular part, term or provision held to be invalid; provided, however, that the parties shall use their best efforts to attempt to accomplish the same objectives of the invalidated provisions through other means.

G. Enforcement

This Agreement shall inure to the mutual benefit of the parties hereto and their respective heirs, successors and assigns, and shall be enforceable according to its terms and conditions under the laws of the State of Colorado. In this regard, the parties hereto agree that this Agreement may be enforced

by an action in law or in equity, by decree of specific performance or damages, or pursuant to such other legal and/or equitable relief as may be available under the laws of the State of Colorado. In the event that the Developer's Final Plan for Phase I as specified in Article I above is not approved by the City, or in the event the City shall not perform its obligations under Article II above, then, in addition to all other rights or remedies which may be available to the Developer under this Agreement or in an action at law or in equity, the Developer shall have the right to terminate this Agreement. In the event that the Developer's Final Plan for Phase I as specified in Article I above is approved by the City, and there are adequate dedicated rights-of-way, easements or permits for the Developer's performance of its obligations to complete the Improvements described in Paragraph II.A.2. and Paragraph II.A.3. above, but the Developer nevertheless shall not perform its obligations under Article II above, then, in addition to all other rights or remedies which may be available to the City under this Agreement or in an action at law or in equity, the City shall have the right to terminate this Agreement.

#### H. Other

1. All schedules, exhibits and addenda attached to this Agreement and referred to herein shall for all purposes be deemed to be incorporated in this Agreement by this reference and made a part hereof.

2. The performance by the parties hereto of their respective obligations provided for in this Agreement shall be in strict compliance with all applicable laws and the rules and regulations of all governmental agencies, municipal, county, state and federal, having jurisdiction in the premises.

3. Each of the parties hereto represents to the other that as of the effective date of this Agreement, each such party has full power and authority to execute, deliver, and perform this Agreement; that such execution, delivery and performance will not contravene any contractual restriction binding upon such party or any of its assets; and that there is no legal action, proceeding or investigation of any kind now pending or, to the knowledge of such parties, threatened against or affecting such party as the same may pertain to execution, delivery or performance of this Agreement.

4. The article and paragraph captions of this Agreement are inserted herein for convenience and reference only and shall not be deemed to define, limit or construe the provisions hereof.

5. Any one or more waivers of any covenant or condition by any party hereto shall not be construed as a waiver of a subsequent breach of the same covenant or condition; and a consent or approval to, or of, any act requiring consent or approval shall not be deemed to waiver or render unnecessary such consent or approval to, or of, any subsequent similar acts.

6. In the event a party alleges that the other is in default hereunder, the non-defaulting party shall first notify the defaulting party in writing of such default. The defaulting party shall have twenty (20) working days from receipt of such notice within which to cure such default before the non-defaulting party may exercise any of its remedies hereunder. If the default is not of a nature that can be cured in such twenty (20) day period,

corrective action must be commenced within said period by the defaulting party and be thereafter diligently pursued.

7. The term of this Agreement shall be twenty (20) years from the date hereof.

CITY:

CITY AND COUNTY OF DENVER,  
a Colorado municipal corporation

By: *Federico Pena*  
Federico Pena, Mayor

ATTEST:  
By: Deputy *Felicia Muftic*  
By: *Felicia Muftic*  
Felicia Muftic, Clerk  
and Recorder  
Clerk of the City and  
County of Denver



APPROVED AS TO FORM:  
Stephen H. Kaplan, Attorney  
for the City and County of  
Denver

RECOMMENDED AND APPROVED:

By: *John S. Myrozek*  
Manager of Public Works

By: *William J. ...*  
Director of Planning

By: *Patricia Wells*  
Assistant City Attorney

REGISTERED AND COUNTERSIGNED:

By: *Nickie Riehl*  
Auditor XCLY 025

(signatures continued)

DEVELOPER:

TAUBMAN-CHERRY CREEK LIMITED PARTNERSHIP, a Colorado limited partnership

By: TL-Troy Associates, a Michigan co-partnership - General Partner

By: [Signature]  
Robert C. Larson - Partner

[Signature]  
[Signature]

STATE OF COLORADO    )  
                                  ) ss  
COUNTY OF DENVER    )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of December, 1986, by Federico Pena, Mayor, and Felicia Muftic, Clerk and Recorder, Ex-Officio Clerk of the City and County of Denver, a Colorado municipal corporation.

WITNESS my hand and official seal.

My commission expires: \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Notary Public  
Address: \_\_\_\_\_  
\_\_\_\_\_

STATE OF MICHIGAN    )  
                                  ) ss.  
COUNTY OF OAKLAND    )

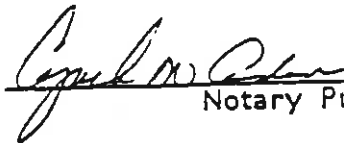
The foregoing instrument was acknowledged before me this 10<sup>th</sup> day of December, 1986, by Robert C. Larson, as a Partner of TL-Troy Associates, a



Michigan co-partnership, the General Partner of Taubman-Cherry Creek Limited Partnership, a Colorado limited partnership.

WITNESS my hand and official seal.

My commission expires:

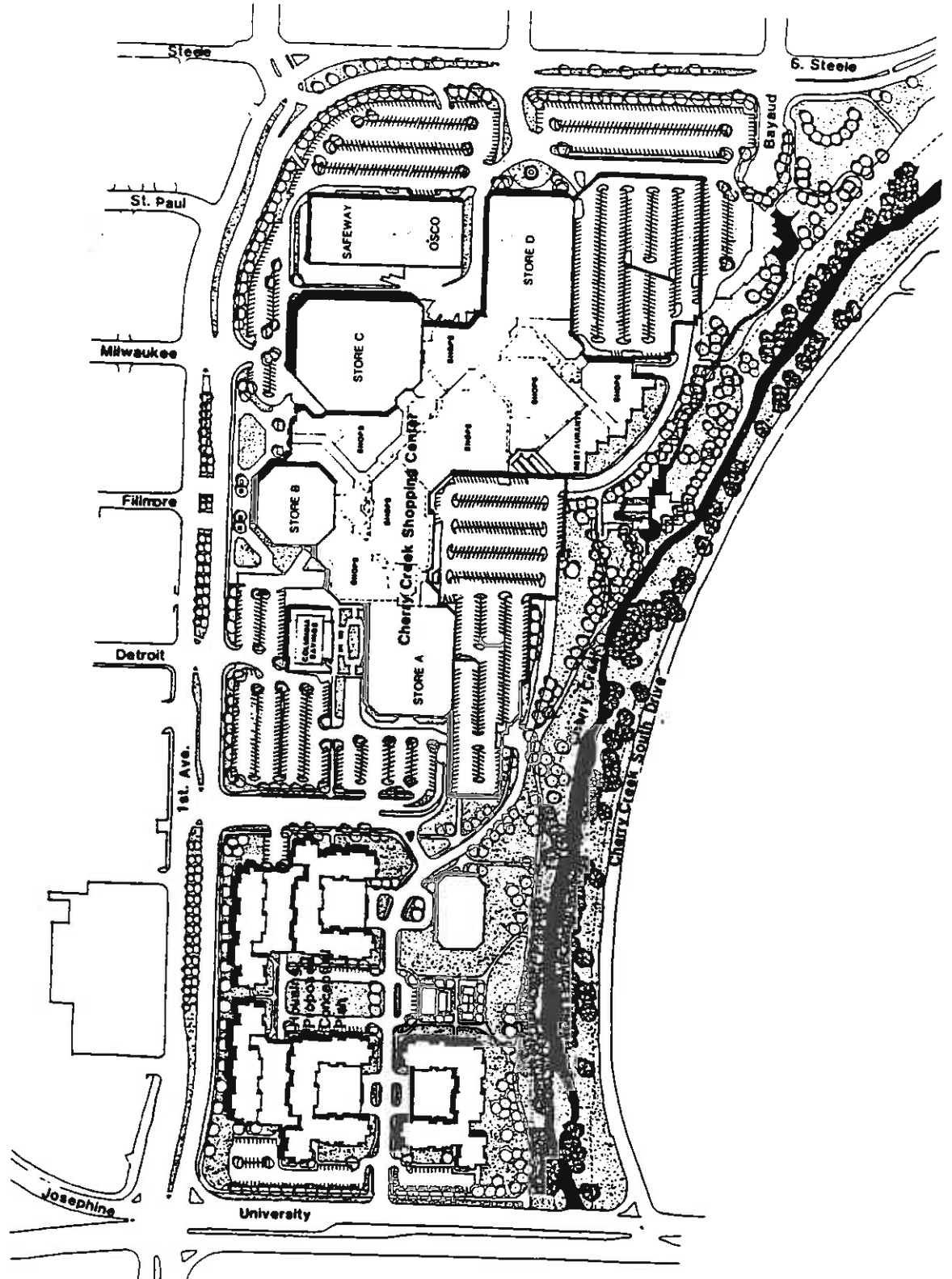
  
\_\_\_\_\_  
Notary Public

Address: \_\_\_\_\_  
\_\_\_\_\_

When recorded return to:

CYNTHIA M. ADAMS  
Notary Public, Oakland County, Michigan  
My Commission Expires February 3, 1990

Richard J. Burstein, Esquire  
Honigman Miller Schwartz and Cohn  
2290 First National Building  
Detroit, Michigan 48226



# Proposed Development Plan For Shopping Center Site





**Case Study 4**  
**Denver Gateway - Parkfield Development Agreement - Denver**

**Private Sector Representative: Gilbert F. McNeish**  
**Public Sector Representative: Don Elliott**

**Background:** *The Parkfield development agreement resulted from a major PUD zone amendment that was precipitated by the annexation and planning associated with the Denver Gateway Area, part of the anticipated development surrounding the new Denver International Airport. The development agreement amended the original PUD by incorporating the primary access corridor to the new airport, and providing for schools, parks, streets and other public improvements. In addition, the agreement resolved several matters, including previous disputes and ongoing litigation concerning the property.*

*Another interesting aspect of this agreement is that the landowner, the FDIC, did not intend to develop the property itself, but wanted to resolve existing problems and lay the groundwork for future development. Because of the owner's intent, and the undeveloped nature of the entire Gateway area, both parties were able to focus on necessary planning objectives, while leaving as much flexibility as possible for specific elements to be determined at the time of development.*



DENVER GATEWAY - PARKFIELD DEVELOPMENT AGREEMENT - DENVER  
**Private Sector Commentary - Gilbert F. McNeish**

***Description of the Project***

The Parkfield property is a 647-acre site in the Denver Gateway area adjacent to the new Denver International Airport. Parkfield is now owned by the Federal Deposit Insurance Corporation (FDIC), but it was annexed to Denver in 1973 at which time it was zoned as a Planned Unit Development (PUD) Zone District and made subject to a detailed Annexation Agreement. The Annexation Agreement contained a series of specific commitments concerning City and owner responsibilities for public dedications and infrastructure development. According to that Agreement and under previous Parkfield ownership, portions of perimeter roads including Chambers Road, East 48th Avenue, and East 56th Avenue were dedicated to the City and some previously planned and approved residential public improvements on the property were wholly or partially completed. No housing was constructed on the residentially platted areas of the property; however, a small part of the original Parkfield PUD was sold, and later developed as a retail shopping area.

Due to the proposed construction of the new Denver International Airport, in May 1988 the City further annexed approximately 2,000 acres of land near the new airport site which when combined with 2500 largely undeveloped acres previously in the City made up the new "Denver Gateway Area". As a result of the anticipated construction of the new airport, the City developed and adopted the Gateway Concept Plan, which has been incorporated into the City Comprehensive Plan, for the Gateway area which lies between the established Denver neighborhoods of Montbello and Green Valley Ranch along the transportation corridor that connects Interstate 70 with the new airport.

The original Parkfield PUD Zoning and Annexation Agreement did not contemplate the development of the new airport, nor the location of the primary access corridor to the airport located on its eastern boundary. As a result of this changed circumstance, the FDIC as new owner, and the City were desirous of amending the original Planned Unit Development Zone District to reflect the new Gateway Area Concept Plan, and entering into a new agreement concerning schools, parks, the construction of perimeter streets and other public rights of way, and the construction of other public improvements to supersede agreements under the original Annexation Agreement. In addition, the FDIC and the City were desirous of reaching an agreement for a settlement of a lawsuit which had developed between the owner and the school district related to the school site dedication associated with the 1973 Annexation Agreement.

Thus, the Development Agreement approach was undertaken in conjunction with a major zoning amendment to the existing PUD Zone District and the restructuring of the companion Annexation Agreement. The Development Agreement together with the rezoning provided a mechanism by which various matters and disputes associated with the property, including the school district litigation and the release of public improvement guaranties associated with earlier plats, could be resolved.

***The Development Agreement - The Process and the Product***

This Development Agreement process was somewhat unique from the outset for at least two reasons. First, the Agreement and its companion rezoning effort were

undertaken in order to provide a suitable substitute public/private development mechanism which would supersede an annexation agreement nearly 20 years old regarding a major project which had been partially developed from an infrastructure perspective. This effort was undertaken against the backdrop of a highly visible and fast-paced planning process for the new Denver Gateway Area, but prior to a time when all of the planning and regulatory elements for that area were in place.

Second, the "client"/property owner was not a private developer, rather it was the federal government acting through the agency of the FDIC. In this regard, the FDIC was represented primarily by a project asset manager under contract with the FDIC. The project asset manager was retained to develop and implement a business plan for the property consistent with the goals of the FDIC - maximize value in the shortest period of time practical and dispose of the asset. In comparison to the typical developer owner, the FDIC did not intend to be the developer of the site and did not bring a developer mentality or business decision process to the negotiating table.

The negotiation process for the Development Agreement was further impacted and to some degree complicated by the fact that the duration of the process transcended two mayoral administrations, two planning directors, and the merger of what was initially a separate Gateway planning office into the City Planning and Community Development office. This was combined with the fact that the ownership decision-making responsibility for the property from the FDIC perspective started first in California, then shifted to Texas and ultimately ended up in the FDIC Denver regional office. And, the regional decisions for Parkfield required an additional approval from the FDIC Washington, D.C. office.

Furthermore, as noted above, the comprehensive planning and regulatory package for the Gateway area was still very much in the process of development during the negotiations. Notwithstanding the fact that the Gateway plan and associated land use policies had been adopted by City Council, the specially devised zoning ordinance for the entire area together with design standards and infrastructure finance policy were still being formulated. Because Parkfield had been zoned a PUD district in 1973, it was permitted to advance through the amendatory process prior to the adoption of the Gateway Zoning Ordinance. This advancement was also motivated in part by the City's interest in negotiating an early resolution to issues associated with the 1973 Annexation Agreement, road improvement requirements, and the school/park dedication requirements among others.

The City did not have a long history of dealing with development agreements per se. Thus, while the City's initial position was to simply utilize the PUD zone district mechanism as the place to include a series of narrative stipulations concerning these various matters, they became more willing to adopt a development agreement approach as a separate but inter-related part of the amendment process to the 1973 PUD zoning. As the process unfolded, it became more apparent to all parties that a development agreement format was an appropriate and very suitable vehicle to address the various matters, including a detailed listing of expectations and commitments of the parties.

The Parkfield Development Agreement as initially offered on behalf of the FDIC was much more comprehensive than the final agreement format. Initially, it was proposed to include a series of provisions, including statements of intent, (i.e., "mutual benefits and assurances", "public objectives served by the agreement", "private objectives served by the agreement"), and special limitations on additional fees, assessments or



special charges"), but the City expressed a strong reluctance to broaden the scope of the Agreement in that regard. The essence of the Development Agreement focused on owner and City commitments in the following areas:

*1. Airport Boulevard Dedication and Related Infrastructure Improvements.*

The Agreement earmarked monies received by FDIC from the acquisition of the property for the Airport Boulevard right-of-way for the design and construction of abutting roadways serving both the Parkfield property as well as the nearby area. The City in turn, committed to request capital fund monies to complete East 48th Avenue roadway improvements over the Airport Boulevard corridor in order to complete the roadway connection between the Montbello area to the west of Parkfield and the Green Valley Ranch area to its east.

*2. Public Dedications/Related Infrastructure Improvements.*

Among the various improvements initially completed under the original Parkfield PUD was a large lake which was developed as an area amenity in conjunction with the management of the high groundwater situation in the northwest portion of the property. That lake is now part of a 90-acre large urban park, which together with the Highline Canal lateral trail corridor (10.7 acres) are key open space amenity elements of the Gateway Concept Plan for the region.

An arrangement was negotiated with the City in the Agreement to dedicate the lake, the Highline Canal lateral and approximately 61 acres of the urban park to the City initially, and to reserve approximately 40 acres of the urban park for future dedication. That reservation was subject to the provision that certain improvements are funded within the next ten-year period for those park and trail amenities according to a park improvement plan. Failure to develop the improvement plan, and initial grading and seeding stabilization work for the park will cause the remaining reserved portion of the park to be released back to the owner of the property.

Additional dedication commitments were made by the FDIC for a 15-acre elementary or middle school site, and a 1.5 acre fire or police station site within the Parkfield property at identified locations. The Agreement further provided for additional dedications or reservations for roadway rights-of-way, a sanitary sewer master plan and a storm drainage master plan, both of which are triggered by a subdivision plat or site plan approval request for any part of the property. In turn, the City made commitments to include park and recreation improvements in its capital improvement budgets and use best efforts to fund additional park improvements as triggered by specific development thresholds calculated by residential dwelling units and/or business/commercial usage of the property. Commitments were also made by the City to allow use of the urban park lake and a portion of its environs for on-site storm water detention and transmission from time to time according to accepted master drainage reports.

*3. Other Infrastructure Matters, Including Gateway Area-Wide Improvements.*

Various other roadway rights-of-way improvements, together with grading requirements were committed by the owner to occur contemporaneously with the construction of the elementary or middle school. Other similar improvements were committed to construction subject to the development of specified numbers of dwelling units or square footage of non-residential areas. All of these commitments were made

subject to the regional Gateway-wide infrastructure financing policy and community amenity policy as uniformly applicable to other similar properties in the Gateway area or regional infrastructure, but only if and when those policies are adopted at a later date by the City. The Agreement recognized appropriate "credits" for Parkfield's share of any regional infrastructure requirements. The City in turn, together with the school district, also agreed to settle the school land dedication issues related to the 1973 Annexation Agreement and the pending litigation among the parties to the Development Agreement.

In conjunction with that settlement the City agreed to release previously posted sureties for public improvements to the Parkfield site in an amount in excess of \$2,000,000, subject to a determination that previously installed public improvements had been satisfactorily completed, and that some previously planned improvements were no longer necessary. The City further agreed to accept from the owner substitute surety, if necessary, for unfinished public improvements in previously platted areas. Existing improvements which are to remain will be accepted by the City upon repair and completion of the same based upon the City's current construction quality standards, but only subject to dimensional standards in effect at the time of the installation. This last provision was important for a significant part of the previously completed facilities because current dimensional standards have changed and increased over the years since the improvements in question were initially installed.

#### *4. General Conditions.*

The City agreed to modify its policy concerning title requirements related to the conveyances of real property interests from the FDIC. Quit claim deeds with a current title commitment evidencing to the satisfaction of the City merchantable title in the owner were more acceptable than general warranty deeds. The parties also agreed that the Development Agreement would require approval simultaneously with the approval by the City of the amended Parkfield PUD as submitted by the owner; otherwise, the "package" nature of the overall proposal would be lost.

The underlying zoning under the amended PUD included a sliding scale provision for the ultimate development of residential units permitted in certain development areas within the Parkfield site. Thus, the Development Agreement provided additional dedication requirements (land or cash in lieu) in the event that all or any part of the additional permitted 500 dwelling units were, in fact, developed on the site over time, according to a set formula related to dwelling unit type.

The Agreement also recognized the relationship of the Parkfield site to the Rocky Mountain Arsenal property to the north, and the fact that the Arsenal historically has received certain drainage flows from the Parkfield site and beyond. At the time of the Agreement, it was contemplated that a new water management agreement with the U.S. Army Department of Defense for the Rocky Mountain Arsenal property would resolve on-site water quality matters based on best management practices and techniques, including a formula which fairly allocated drainage benefits and costs affecting Parkfield and other properties served throughout the drainage basin. Because that new water management agreement had not been executed at the time of the Development Agreement, the Agreement provided an alternative, if necessary, which required certain drainage contributed by new development of the Parkfield property to be retained on site, in specific identified areas.

##### *5. Miscellaneous Considerations.*

It was agreed that the term of the Agreement would be for a 15 year period subject to extension by mutual consent of the parties, including the school district to the extent that any extension affected an interest of the District at that time. The Agreement contemplates modification from time to time and recognizes that any major changes to the Agreement must be made according to the same requirements of the original Agreement, but that minor changes as determined by the Office of Director of Planning could be made without formal amendment. Although the Development Agreement and the amended Parkfield PUD are interrelated and were adopted concurrently, any change to the Agreement will not be a change to the zoning. Thus, any necessary changes to the Agreement over time can be accomplished with greater administrative ease. By comparison, a PUD agreement may require a formal amendment to the underlying PUD district which may prove cumbersome.

Because the FDIC did not contemplate being the developer of the property, specific attention was paid to the assignment and transfer of rights and responsibilities under the Agreement to successors in interest. The owner is permitted to sell, transfer, etc., all or any part of its rights and obligations under the Agreement in connection with the sale of the Parkfield Property, subject to the provision that the City must be notified promptly in writing of any such conveyance. Provision is also made for a pro rata share of all obligations of the owner which are not related to any particular portion of the property. It further provides a release for the owner from any obligations under the Agreement to the extent that those obligations were assumed in writing by a purchaser.

The matter of vested rights is addressed in the Agreement as those rights concern density, heights and the range of land uses which are set forth in the Amended Parkfield PUD. First, the rights are specifically connected to the "vesting of rights" contained in the proposed "development review and approval process for the Gateway Zone District" as and if adopted by the City for the entire Gateway area. However, for an interim period of time not to exceed three years after the Agreement, but prior to the adoption by the City of the Gateway Zone District provisions, the development rights as identified are vested. Typically, this time period feature of a project is subject to greater negotiation, but due to the anticipated adoption of the new Gateway Zoning Ordinance, including a vested rights provision, the City was reluctant to give specific consideration on this matter to Parkfield. The Agreement further provides that the vested property rights as established in the Agreement for that interim period of time may be extended for an additional period or periods agreeable to the parties.

Remedies under the Agreement are enforceable at law or in equity by the parties. In addition, a breach may be addressed in court by seeking to restrain or compel performance. Mediation and arbitration options are not addressed, nor is there any specific provision regarding compensation for costs, expenses or liabilities incurred by any of the parties.

##### ***Perspective and Thoughts on the Development Agreement and Related Process***

Because the Parkfield property is currently under FDIC ownership, the Development Agreement objectives may be somewhat different from an approach taken by a private development interest. Since the negotiations lacked a specific developer at the table, the agreement does not reflect a particular style, approach, or sense of priorities of a major project development interest. Rather, the approach was one of a

government entity trying to anticipate market needs in order to create an overall development package which would maximize the property's value.

Those two agendas need not necessarily be different but as a practical matter, a negotiation process which included the developer of all or a portion of the property would in all likelihood have taken on a different emphasis with regard to selected features of the agreement. For example, more immediate and quantifiable funding and other commitments from the City may have been achieved if similar near-term commitments could have been made by a developer owner. That approach was attempted in part in the Agreement through the establishment of development thresholds which when accomplished triggered certain commitments on behalf of the City.

Typically, reasons for engaging in the development agreement process include establishing some insurance that rules over time will not change which helps the management of risk, especially for the private sector developer. The agreement may also provide sufficient predictability to allow a developer at an earlier stage in the process to commit to certain public benefits with a clear expectation of how the overall project may ultimately develop over time. The early dedication of the large urban park with the lake was an example of this feature.

Parkfield is a large and somewhat complex project and the development agreement vehicle seems to be particularly well-suited to deal with a range of development components over a staged development process. To the extent that such predictability can minimize costs, some of those costs hopefully may be reflected in the ultimate product, especially housing and its affordability.

The frustrations of the negotiation process, especially concerning its duration, perhaps were inevitable given the history of the property and the number and mix of participants, especially in the context of a changing political environment at the City administration level. Notwithstanding the delays, the Parkfield property is now positioned for potential development well in advance of many other properties in the new Denver International Airport Gateway area, given its location adjacent to the airport access corridor, including two major interchanges, combined with immediate availability of infrastructure (access, water and sewer).

The final form of the Development Agreement, while less comprehensive than the initial proposals, nevertheless provides a comprehensive document outlining the various expectations, rights and responsibilities of three key parties who will contribute to the ultimate development of the property (i.e., the owner, the City and the school district). All or a portion of the Property may be purchased by one or more development interests. The FDIC also may find itself in the position of having to consider a joint development effort with a private developer, at least in the early stages of the Parkfield development process. In any event, the agreement approved by the City together with the amended PUD zoning for the Parkfield property provides a meaningful and comprehensive basis upon which the sale and development of the site may occur. Changes to the Agreement are quite likely and perhaps are inevitable (as well as desirable) when that first developer steps up to the plate and puts his own signature on the property.

DENVER GATEWAY – PARKFIELD DEVELOPMENT AGREEMENT - DENVER  
**Public Sector Commentary - Don Elliott**

***Background***

The Parkfield area includes one square mile (640 acres) of undeveloped land in far northeast Denver. The land is almost flat except for a man-made drainage lake in the center and an old water ditch that crosses the site from southeast to northwest. The Parkfield land was annexed to Denver in 1973 and zoned for residential uses similar to those in the Montbello neighborhood to its west and the Green Valley Ranch neighborhood one mile to the east. Small amounts of commercial zoning were included on major peripheral roads. Some of the land was successfully platted for residential lots, and streets, sidewalks and water and sewer lines were installed. Initial attempts to develop the property failed, however, and no lots were sold. The reasons for failure included the financial resources of its owners, problems in arranging for acceptable stormwater drainage across neighboring properties, and the site's location outside the general north-south path of growth in the metro Denver area.

After passing through several private owners, the property came to be owned by the Federal Deposit Insurance Corporation. In the mid-1980s, Denver decided to build the new Denver International Airport about 5 miles northeast of the Parkfield site, with an airport access freeway along the east side of the Parkfield site. As a result of this decision, the FDIC became interested in revising the original Parkfield zoning and development conditions to take advantage of potential changes in market demand toward commercial development. The FDIC replanned its property and negotiated with Denver towards a revised PUD and accompanying Development Agreement from the summer of 1989 until the summer of 1992, when the revised package was approved by the Denver City Council.

***Introduction***

In 1988, Denver annexed almost 2,000 acres of raw land between its existing northeast boundary and the site of the new Denver International Airport. Because Denver was subject to an anti-annexation provision in the Colorado Constitution, the annexation would not have been possible except for the simultaneous annexation of the new airport site. When added to existing undeveloped land in northeast Denver, the new annexation created a contiguous tract of 4,500 acres of new development land in the path of growth towards the new airport.

To take advantage of this opportunity and to ensure that the development of private lands would be compatible with FAA regulations and the new airport design and operation, Denver created the Airport Gateway Development Office to undertake comprehensive planning, zoning, and an infrastructure finance policy for the area. The new office was charged with re-planning the land that had previously been within the City limits and integrating it with new planning for the newly annexed land to strengthen the existing neighborhoods and create new mixed use development opportunities.

Six hundred and forty acres of the Gateway land that was already in Denver prior to the 1988 annexation was known as the Parkfield land. This square-mile section of land had been annexed to Denver in 1973 and zoned through a Planned Unit Development primarily for single family residential development and supporting minor commercial uses. Three separate residential plats had been filed covering the western

part of the property, but no lots had been sold or houses constructed.

As a result of Denver's decision to build Denver International Airport, a 2,000 foot-wide airport use corridor was planned to pass along the eastern edge of the Parkfield land. That corridor would contain a six-lane freeway to the airport and might also contain other airport-related facilities such as mass transit lines and frontage roads. Airport Boulevard interchanges were planned at 56th Avenue (which borders the north side of the property) and 48th Avenue (which borders the south side of the property). As a result of the new airport, therefore, the character of this area of northeast Denver would change from a suburban residential area without significant traffic to a prime development opportunity bordering a very active highway.

This summary piece will cover the history of the Parkfield land, the role of the Parkfield land in the Gateway planning project, the need for a Development Agreement specific to this land, and how the content of the Development Agreement was negotiated. In all cases, the view presented is that of the Denver city government, which may or may not coincide with the view of other parties involved.

### ***The History of the Parkfield Land***

The Parkfield land had a history of failed development attempts. As successive attempts at development failed, the land changed hands many times. In the process, the various owners in the chain of title became involved in litigation with the City and County of Denver and Denver Public Schools regarding their duty to dedicate land for parks and schools. This protracted lawsuit had been pending for several years, and was known as the Cordillera lawsuit (after one of the prior landowners).

In addition, some of the prior owners of the land had installed preliminary infrastructure on part of the site – including streets, sidewalks, water lines, sewer lines, and a stormwater detention lake. Some of these improvements had been dedicated to and accepted by Denver, while others had not. Of the undedicated improvements, some met current Denver size and quality standards, while others did not. There was some question about whether the prior owners had posted security with Denver for the successful completion of the improvements, and if so, whether some or all of that security should be returned.

The owners had also become involved in a difficult and prolonged dispute with the U.S. Army Corps of Engineers regarding their right to allow stormwater drainage from the Parkfield land to flow north onto the Rocky Mountain Arsenal (which was owned by the Federal government). The Arsenal land had serious surface contamination and was listed as a Superfund cleanup site, and the Army was reluctant to allow additional surface drainage until more was known about its potential effects on the land.

As a result of a foreclosure by the savings and loan association that had financed the latest private owner of the Parkfield land, and the subsequent failure of that savings and loan, the Federal Deposit Insurance Corporation obtained title to the property. Unlike most other property held by the FDIC during this time frame, the Parkfield property was not conveyed to the Resolution Trust Corporation when that agency was created to dispose of federally owned real estate. Instead, the FDIC hired the Palmieri Company of California to manage this asset and attempt to recoup its value. The Palmieri Company in turn brought together a team of urban planners, lawyers, engineers, and public finance consultants based in Denver to get the Parkfield property ready for development.

Finally, the proposed route of the Airport Boulevard freeway to the new airport required approximately 60 acres of land from the southeast corner of the Parkfield property for the 2,000 foot wide airport use corridor. The FDIC and the Airport stipulated to give Denver immediate possession of the property, and an initial deposit of condemnation proceeds was made.

### ***Parkfield's Role in the Gateway***

When the Airport Gateway Development Office began its work in 1988, Parkfield's development team participated as one of the twenty landowners within the Gateway area. The size of the Parkfield land made the FDIC one of the larger landowners. The Gateway Office proposed to replan and rezone the Gateway land to protect the existing neighborhoods of Montbello and Green Valley Ranch and still take advantage of the new commercial development opportunities created by the new airport. The goal was to create a distinctive low-scale, mixed use area that would maintain high quality standards and capture the highest quality airport spinoff growth. Additional goals included environmental protection, the avoidance of strip commercial development, reducing reliance on the private automobile, conserving water, creating a single Town Center focal point for larger retail uses, creating several smaller Town Square focal points for convenience retail, and creating an integrated park and trail system involving large park amenities.

Because the construction of the new airport had created new commercial development possibilities, and because the current zoning on the Parkfield land would not allow it to take advantage of airport-related commercial growth, Parkfield actively participated in the replanning effort. This joint planning effort, which involved the City, the landowners, and citizens and business owners from neighboring Montbello and Green Valley Ranch, took about eighteen months.

As it evolved, the Gateway Concept Plan called for low density single-family residential uses to occupy the western part of the Parkfield land to create an appropriate mix of land uses in the Gateway and to reinforce the residential neighborhood character of Montbello. Along the eastern edge of the property bordering Airport Boulevard, mixed uses and commercial development would be allowed. Near the two interchanges with Airport Boulevard, a small number of buildings could be built up to an FAR of 1:1 and a height of 150 feet – which matched the highest densities and heights available elsewhere in the Gateway. In order to place the Gateway area park and trail system on a par with Denver's existing park system, the Gateway Plan called for two large, consolidated parks to serve the area. One of these, the Large Urban Park, was to be located on the Parkfield site.

The Gateway Concept Plan outlined an infrastructure finance system aimed at making new private development "pay its own way". The City's goal was to minimize Denver's role in paying for new infrastructure required to serve private development in the Gateway. The City felt additional infrastructure in the Gateway was primarily needed to serve private developments, that the primary benefits of the new infrastructure would flow to the owners of private development land, and that those landowners should bear the costs of such infrastructure. While the Gateway Plan did not contain the specific infrastructure financing provisions, it did lay out a proposed set of financing tools to be finalized later. Those tools included (1) development impact fees, (2) special taxing districts, and (3) local tax rebates for specific projects.

Finally, the Gateway Concept Plan set out a new zoning approach to implement the Plan. The zoning outline envisioned a single new zone district, called the "Gateway Zone District", which would incorporate several distinct "use areas" designed to match the land use designations on the Plan. Once the new zone district was adopted, new developments could be approved without the need for further approvals by City Council, which would expedite and simplify the approval process.

Because Parkfield site already had existing zoning, because prior owners had already executed agreements for water and sewer service from adjacent utility mains and constructed some on-site infrastructure, and because the FDIC had assembled a team of development planners and engineers ready to move forward, the FDIC asked the City if it could opt out of the single Gateway Zone District and pursue a PUD instead. The City agreed, provided that Parkfield's PUD would reflect the same substantive land uses and controls that would otherwise have applied under the Gateway Zone District. As such, the PUD would act as an alternative mechanism for zoning the land, but not an alternative to full participation in the development and implementation of the Gateway Plan. In addition, the City required that the use of a PUD zoning mechanism would not reduce or excuse Parkfield's participation in any system of infrastructure finance applicable to the rest of the Gateway.

### ***The Need for a Development Agreement***

Denver staff felt that any revised Parkfield PUD needed to be accompanied by a new development agreement for a several reasons, including the following:

#### ***1. Shortcomings in the Parkfield Annexation Agreement.***

Although an annexation agreement had been executed in 1973, its provisions were addressed towards potential residential development. It did not address the issues of traffic, drainage, or infrastructure required by commercial development. The width of peripheral streets reflected a low-density residential area, and not a new commercial growth area of the city. In addition, it was based on municipal finance policies in effect in 1973, which Denver no longer considered appropriate.

#### ***2. The Complexity of the Cordillera Litigation.***

The pending Cordillera litigation over land dedications was at least five-sided. The parties included the City, the School District, the FDIC, and at least two prior owners. Since any revised PUD would have to resolve the same issues of land dedication involved in the suit, all parties looked forward to settling the litigation. By 1990, the City and the School District had agreed between themselves as to what land dedications to each of them would allow them to settle the Cordillera suit, and authorized the City to settle the suit as long as the School District's conditions were met. However, there needed to be some agreement on how the lawsuit would be settled once the basic land agreement had been negotiated, including who would execute what documents, in what order, and on what timetable.

#### ***3. The Desire to Obtain Airport Boulevard Right-of-Way.***

Although Denver was willing to use its powers of eminent domain to obtain the 60 acres of Parkfield land that it needed for Airport Boulevard, it wanted to have the FDIC grant the City immediate possession of the land. FDIC was willing to stipulate to



immediate possession as part of a complete package of rezoning and infrastructure obligations. The City felt that the Airport Boulevard condemnation should not be part of zoning deliberations for the property, but was willing to negotiate a development agreement simultaneously with the condemnation proceedings.

*4. The Need for Equitable Provision of the Large Urban Park.*

The Large Urban Park called for in the Gateway Plan was larger than Parkfield's pro rata share of the Gateway parks and trails. Therefore, if the Parkfield zoning was to zone the full area of the Large Urban Park for park uses, the FDIC needed some agreement with the City about how its "extra" dedication would be repaid.

*5. The Need to Tie Parkfield to Gateway Zoning and Urban Design Requirements.*

Although the FDIC had agreed that the Parkfield land would be subject to those administratively-adopted zoning and urban design regulations applicable to other Gateway landowners, those regulations would not be finished by the time the Parkfield rezoning would be ready. The City wanted a clear commitment that those regulations would apply, and that future owners of the Parkfield land would be bound by the FDIC's commitment.

*6. The Need to Tie Parkfield's Financial Obligations to Future Gateway Agreements.*

Although the FDIC had agreed, in theory, that the Parkfield land would be a part of the same Gateway infrastructure financing policies applicable to the rest of the Gateway landowners, the City and the Gateway landowners had not yet agreed what those policies would be. All parties anticipated that the Parkfield rezoning would provide for substantial increases in commercial zoning along Airport Boulevard to take advantage of airport-induced growth, and the City expected that this rezoning would significantly increase the value of the Parkfield land. The City also anticipated that the new Gateway infrastructure financing policies would place increased financial obligations on the owners of the Parkfield land, and wanted it clear from the outset that the new Parkfield zoning was tied to future financial obligations which could not yet be quantified.

***Negotiation of the Development Agreement***

All drafts of the agreement were drafted by the Denver law firm of Calkins, Kramer, Grimshaw & Haring, who served as the FDIC's local counsel for this purpose. The City would have preferred to draft the Agreement itself, but since the first draft Agreement had been created by the FDIC's counsel, it deferred to the FDIC's desire to leave the drafting in the office where it originated.

Over the three year negotiation process, numerous drafts were circulated. Early drafts were generally very lengthy and tried to specify what detailed design regulations would apply and what Parkfield's total infrastructure construction/financing obligation would be. Those drafts also included requests that the City agree to approve one or more Title 32 Metropolitan Districts. Title 32 Districts were a form of special taxing district widely used throughout Colorado in the 1970s and 1980s and currently in disfavor with the Denver City Council because of some well publicized financial defaults. Along with the request for Title 32 Districts, early drafts were accompanied by draft "Service Plans" for those districts to be reviewed by City staff.

In general, the City staff felt that the early drafts were not very consistent with the ground rules for the revised PUD itself, namely, that the Parkfield land would be bound by *whatever* design regulations were eventually adopted in the Gateway and *whatever* infrastructure financing obligations were eventually adopted for the area as a whole. Staff also felt that the City could not commit to approving Title 32 Metropolitan Districts because of serious doubts about their appropriateness among other city departments and the City Council. Finally, City staff felt that the early drafts attempted to tie Parkfield's infrastructure obligations to the City's willingness to provide the money for construction, either through direct payments, rebated taxes, or allocations of fees paid by other Gateway landowners. City staff felt that development could not be allowed to proceed in advance of adequate infrastructure, whether or not the eventual Gateway financing policy included specific payments or transfers to Parkfield.

Upon receipt of each draft, City planning and legal staff would consolidate their comments into a response memorandum and return it to FDIC's counsel. Included in such comments were the opinions of the City Attorney's Office regarding the legality, enforceability, and advisability of various provisions under the Denver City Charter. In addition, planning staff reviewed the FDIC's proposed infrastructure investments against the total predicted infrastructure costs of the Gateway area to see if the proposal appeared to bear a pro-rata portion of those costs. In early drafts, the value of the FDIC infrastructure commitments invariably fell far short of its pro rata share of Gateway infrastructure costs. Significant amounts of time elapsed between the delivery of a response memo and the City's receipt of the next draft of the Agreement.

A breakthrough occurred in early 1991, when the drafts first began to contain general language committing the Parkfield owners to future Gateway design regulations and financing policies. By ending the attempt to "cap" Parkfield's obligations at a particular dollar value, the FDIC was able to stop the ongoing debate about what the dollar value of the committed investments was. In addition, the later drafts avoided requests for Title 32 districts in favor of a request for those taxing districts available to other Gateway landowners – a request that the City was willing and able to agree to.

### ***The Content of the Final Development Agreement***

By 1992, the Agreement had been shortened to about 15 pages plus exhibits. In addition, it was decided that the entire Parkfield PUD would be added as an exhibit to underscore the interrelatedness of the two documents and to assist in reading their cross-references.

Some of the more interesting and complex provisions of the Agreement included the following:

- Airport Boulevard Condemnation Proceeds
- The Large Urban Park Dedication and Improvement
- 56th Avenue Right-of-Way Issues
- The Half-Street Issue
- The Internal Development Parcel Issue
- Gateway Area-Wide Improvement Obligations
- Settlement of the Cordillera Lawsuit
- Return of Infrastructure Security
- Vesting of Development Rights

Each of these provisions are discussed below.

### *1. Airport Boulevard Condemnation Proceeds - Taking Advantage of an Opportunity*

Instead of entangling itself in the Airport Boulevard condemnation, the Agreement simply provided that the FDIC and the New Denver Airport Office would enter into a separate agreement governing immediate possession of the property. The Agreement did, however, address how the FDIC would spend the money it received from the City's Airport Enterprise Fund as condemnation proceeds. The City's Airport staff were not involved in these discussions or in the drafting of this part of the Agreement. It provided that FDIC would first use those funds to build the northernmost two lanes of 48th Avenue along the south border of the Parkfield site. That construction would take place within 18 months of the date FDIC received the money. Under the draft Gateway infrastructure financing policies, the construction of the two lanes of a peripheral arterial closest to the landowner's curb would be the financial responsibility of the landowner. Therefore, the Agreement did not obligate the FDIC to build anything that other landowners would not have to build along their properties, but it did obligate the FDIC to complete that construction sooner than it otherwise would have had to.

This provision was valuable to the City because construction of 48th Avenue would link the two neighborhoods of Montbello and Green Valley Ranch and dramatically shorten the drive to the Middle School and High School that the two neighborhoods share. The completion of this street was a very high priority for the two neighborhoods. In return for FDIC's commitment to spend its Airport Boulevard proceeds here, rather than somewhere else on their site, the City agreed to request funds from its Capital Improvements Fund to complete three missing links in 48th Avenue for which there was no active adjoining landowner. Importantly, the City did not commit to obtaining those funds, since the allocation of those funds was subject to City Council action tied to a fixed set of capital investment criteria, a fixed funding cycle, and a chronic shortage of capital improvement funds for worthy projects. The City's commitment to request such funds until they are received or the missing segments otherwise built was the most the City could do to help connect the communities.

Given the constraints on the City's ability to commit funds, staff felt this was a fair result. Clearly, the use of a negotiated agreement allowed the City to address an unusual opportunity (the existence of Airport Boulevard condemnation funds) and meet an important public need (to help connect two neighboring communities). It also allowed FDIC to obligate the City to include continuation segments of the street in its capital budget request. This amounted to a compromise of the City's original position not to use capital improvement funds to pay for Gateway infrastructure. Because the payments for Airport Boulevard land were one time events that would soon end, similar provisions would have been difficult to incorporate into a general Gateway financing ordinance applicable to all landowners.

### *2. The Large Urban Park Dedication and Improvement - Cooperating to Create a Gateway-Wide Amenity*

The Agreement obligated the FDIC to dedicate to the City 90 acres for the Large Urban Park on their site, 10.7 acres for a trail corridor, 15 acres for a school site, 1.5 acres for a fire or police station site, and a 69 foot right-of-way for the north half of 48th Avenue. In almost all cases, the use of a negotiated agreement allowed the parties to tailor the conditions of the dedication or reservation to address the unique history of the site, and to ensure that the end result would be consistent with the future Gateway

infrastructure financing policies.

For instance, the 100.7 acre park and trail dedication was split into two parts: *First*, the FDIC dedicated 61.4 acres outright, which represented Parkfield's "fair share" of the total Gateway park and trail system based on the ratio of its population under the PUD to the Gateway's predicted population under the adopted Plan. *Second*, the FDIC reserved the remaining 39.3 contiguous acres for a period of ten years. If the City proceeds to adopt a plan, budget, and schedule for the entire 90 acre park and grades the initial 61.4 acres pursuant to the plan and seeds the initial 61.4 acres, all within ten years, then the owners of the Parkfield land will be obligated to dedicate the remaining 39.3 acres to the City to expand the initial park. The Agreement clearly specified that the initial 61.4 acre dedication fully satisfied Parkfield's duty to dedicate park land.

This arrangement allowed the City to move toward its ultimate goal of a 90 acre park on the site, while giving the FDIC some assurance that the City would move promptly to treat the site as a park and not leave it vacant and unimproved. On its part, the City also agreed to use its best efforts to fund other, less basic, improvement to the park on a fixed schedule. That obligation is triggered when certificates of occupancy have been issued for 40% of the approved development within Parkfield. This gave the FDIC additional security that by the time people are actively working and living in the future development, the City will be moving forward to develop a more "finished" park.

Again, the FDIC could not obligate the City to expend funds on the park, but could obligate the City to process a request for such funds and could offer a strong incentive to encourage the City to do so. The City felt the final arrangement was fair, and represented an excellent mechanism to achieve the parties mutual goal of a quality park amenity on the Parkfield site. One alternative would have been for the City to purchase the last 39.3 acres of the Large Urban Park Site and then collect fees from nearby Gateway landowners whose park obligations had been satisfied by that purchase. Since the City did not have funds to buy that acreage, however, the arrangement was very satisfactory.

### 3. 56th Avenue Right-of-Way Issues - Addressing Uncertainty Tied to Pending Legislation

The FDIC also agreed to reserve for future City purchase 83 feet of right-of-way along 56th Avenue (just south of, and in addition to, the 60 feet of right-of way originally dedicated for the existing 56th Avenue). The City negotiated for this additional reservation because it was unsure whether it would be able to obtain the northern half of the additional right-of-way for 56th Avenue from the Rocky Mountain Arsenal. Although a bill was working its way through Congress to grant the necessary right-of-way to Denver, the fate and timing of that bill were unsure, and the Arsenal had historically been very reluctant to part with peripheral lands. If the additional right-of-way was not forthcoming on the north, then the street would have to shifted to the south in order to accommodate its full cross-section of six lanes and median.

To accommodate this uncertainty, FDIC agreed to hold the additional 83 feet of right-of-way off the market for up to five years. The Agreement split the FDIC's reservation of this additional right-of-way into several parts. *First*, the City would have the right to purchase the land at any time during the five year period as long as it had not been platted. *Second*, because the FDIC hoped to see early development near the corner of 56th and Airport Boulevard before the five years elapsed, the Agreement also provided that Denver's right to purchase the 1,000 feet of right-of-way closest to Airport

Boulevard would expire as soon as the first time the first plat for that corner of the Parkfield site was filed. The FDIC gained the security that its early development opportunity would not be held up by uncertainty about the eventual southern boundary line of 56th Avenue.

Once again, the negotiated agreement allowed the parties to word detailed compromises on issues specific to the Parkfield site. The difficulties in negotiating with the Arsenal for 56th Avenue right-of-way affected only the Parkfield site, and would have been awkward to incorporate into a Gateway-wide policy document. Although the City would have preferred a reservation period longer than five years, Parkfield argued that the fate of the Congressional grant would be known in one or two years, which still left the City three or four years to find funds to purchase the right-of-way.

#### *4. The Half-Street Issue - Transitioning to a New Development Policy*

Although the original Parkfield annexation agreement had provided that the Owner was not responsible for constructing that one-half of streets bordering on sites dedicated to the City for public uses, City staff were actively pursuing a different policy for the Gateway. Under the proposed policy, the landowners would be responsible for all internal streets (regardless of what they bordered), but the City would participate in the final two lanes of major regional traffic arterial and parkways. The FDIC was unwilling to commit to the staff's new proposal when it was unsure whether the staff would prevail in negotiations with the other landowners. The agreement tied the FDIC's obligations to the outcome of those negotiations. It stated that:

"The Owner shall be subject to and governed by the regional Gateway-wide infrastructure financing policy as, and if, adopted by the City and uniformly applied to similar properties in the Gateway area regarding design and/or construction or reconstruction of that one-half portion of any streets, curbs, gutters or sidewalks which abuts any police or fire facility site, the urban park, or any additional school site requirements...."

#### *5. The Internal Development Parcel Issue - Plugging Up a Loophole*

Pursuant to Denver's general development policies, the Agreement provided that the FDIC would construct all internal infrastructure on the site, and specifically stated that FDIC would rough grade the school site, extend utilities to it, and pave the one half of those streets abutting the school site. Consistent with existing Denver policy and the proposed Gateway infrastructure policy, the FDIC agreed to pave the closest two lanes and to complete curb, gutter, and sidewalk improvements on 56th Avenue, 48th Avenue, and Chambers Road abutting the site.

The City's general development policy required that street improvements be completed at the time the land along a street frontage is first platted, but did not address possible development of internal parcels that would generate traffic on those same streets. After extensive negotiations, the City and FDIC also agreed on the amount of development that could occur on portions of the Parkfield land that did not have frontage on the existing two-lane 56th Avenue or Chambers Road before widening of those streets would be required.

6. *Gateway Area-Wide Improvement Obligations - Tying Obligations to the Outcome of Broader Negotiations*

In accordance with the City's policy that development of the Gateway should generally "pay its own way", City staff evaluated infrastructure needs on the basis of two broad categories. The first category included those elements that were clearly "local" in nature – generally those required to serve a particular developer's on-site development needs. The second list contained those elements that were regional or Gateway-wide in nature – those where the need was generated by the Gateway development as a whole, but were not clearly attributable to a single Gateway landowner, such as street capacity for intra-Gateway trips. In order to fund the second type of improvement, staff explored various means of pooling Gateway landowner contributions into area-wide funds. Since the list of Gateway-wide improvements and the financing mechanism had not been established, however, it was difficult to quantify what Parkfield's obligations might be. To address this issue, the Agreement provided that:

"The Owner agrees that the area of the Amended Parkfield PUD shall be subject to and governed by the regional Gateway-wide infrastructure financing policy, including any related fees, charges and assessments under such policy as, and if adopted by the City."

In addition,

"The Owner shall be obligated to pay in a timely manner all fees, assessments or special charges associated with the development of the Amended Parkfield PUD on the same basis applicable to other property similarly situated in the Gateway area. The Owner shall also be obligated to participate in, contribute, or otherwise provide those development dedications uniformly imposed on all similar development in the Gateway area."

Finally,

"The City shall credit the Amended Parkfield PUD property for the value of the fire or police station site ... and any and all other Gateway area-wide infrastructure improvements or conveyances for dedication by the Owner (except Airport Boulevard) subject to the regional Gateway area-wide infrastructure financing policy as, and if, adopted by the City. Credit shall be calculated for those items which are designed or constructed by or so caused by the Owner and which serve the Parkfield property when the requirements and costs of Gateway area-wide infrastructure improvements attributed to the Parkfield property are later determined, and to the same extent that other properties in the Gateway area would receive credit for construction or conveyance of similar items."

The City felt that these provisions adequately fulfilled the ground rule that the use of a Parkfield PUD would not excuse the Owner of the site from participation in overall financing policies and mechanisms. If it did result in reduced participation, the reduction would have had to have been made up by the City (which did not have the funds) or the other Gateway landowners (which might have been unjust).

In addition, Parkfield wanted to direct the use of Gateway-wide funds to improvements benefitting its property to the greatest extent possible. The Agreement went on to state that:

"If adequate funds resulting from the regional Gateway-wide infrastructure financing policy are made available, some of which may be advanced by and

credited to the Owner"

then the Owner would construct certain additional improvements such as the northern two lanes of 56th Avenue, the western two lanes of Chambers Road, and its share of a regional trail system along the reserved trail right-of-way.

Since the FDIC has assured the City that the property would be a full partner in any area-wide infrastructure financing arrangement, it was willing to agree that Parkfield could effectively reduce its contributions to the Gateway-wide financing system if it chose to construct the Gateway-wide improvements itself. While the City would have preferred to keep the Gateway-wide improvements as a cash obligation to enable the City to pool and use those contributions more efficiently, staff realized that the willingness of all Gateway landowners to accept their share of "Gateway-wide" obligations would be increased if they had the ability to direct which "Gateway-wide" improvements they funded.

#### *7. Settlement of the Cordillera Lawsuit - Outlining the Steps to Resolve a Multi-Sided Dispute*

Since the dedication and acceptance of park, trail, and school lands by the FDIC would resolve the basic dispute which gave rise to the Cordillera lawsuit, the City agreed that upon its receipt of adequate deeds and title commitments for those sites it would settle the lawsuit. The Agreement clarified that the settlement agreements would provide for dismissal of the suit "with prejudice", so that all parties would be discouraged from trying to revive the suit in any form in the future. Since the Denver Public Schools were also a party to the suit and would have to participate in the settlement, they were made a party to the Agreement. The City's and School District's obligations to execute releases were made contingent upon the receipt of mutual releases from the FDIC and the former landowners. The forms of the releases to be required of each party were attached as exhibits, and their content was negotiated simultaneously with the development agreement. In essence, the Agreement established a timetable of performance for the dismissal of the suit and prevented later arguments about the terms of the settlement.

Since the School District's agreement to settle the suit in return for an acceptable 15 acre school site was based on the estimates of the number of school children that might live in the Amended PUD development, the Agreement also protected the School District against changes that might increase the number of school children. It stated that if more residential units are authorized in the future, then actual school land requirements would be calculated based on a formula in the Agreement. If the total school land requirement from currently approved units and proposed additional units exceeded 15 acres, then the School District and the Owner would together decide whether the additional need would be met through a land dedication or cash payment. If an additional land dedication is agreed upon, then the site of the new dedication will be decided with the consent of the City.

#### *8. Return of Infrastructure Security - Helping a New Owner to Start Over*

In addition, the City agreed to determine how many of the previously constructed (but undedicated) public improvements on the property could be accepted for dedication to the City, and which pieces of infrastructure originally required would no longer be required due to the new uses on the site. Based on those determinations, the City would release all or a part of the surety which earlier landowners had posted with the City to

ensure the successful completion of the infrastructure. Although new infrastructure would need to be built under the new plan, the City agreed to accept new or substitute surety from the Owner for those new items. This provision allowed the Owner to start with a clean slate in fulfilling its new infrastructure obligations. The City felt this was a fair provision, given the many years since the original security agreements had been negotiated and the large number of unforeseen changes in the property and the neighborhood since the security had been posted. By releasing security to the Owner, the City could encourage faster investment in the site, and by requiring new or substitute security for future infrastructure, the City's interest in adequate construction was protected.

#### *9. Vesting of Development Rights - Adopting an Interim Solution*

The development agreement also explicitly made the vesting of development rights under the PUD and development agreement subject to those vesting provisions eventually adopted for the other Gateway landowners. Since those provisions had not yet been adopted, it gave the Owner "interim" vesting of three years to allow the Gateway negotiations to be finalized.

#### ***Conclusion***

Although the process of negotiating the Parkfield Development Agreement was lengthy, the final product successfully addressed a number of complex problems. In particular, it proved to be a good vehicle to address problems caused by, (1) site specific development constraints, (2) earlier failed attempts at development, (3) the need to have landowners cooperate in the creation of large public amenities, and (4) the existence of ongoing and unresolved policy decisions affecting the broader community.

The City clearly did not get all that it initially wanted from the negotiations. For instance, it would have been helpful if the FDIC had agreed with more of the proposed Gateway infrastructure policies, since that would have helped City staff negotiate those issues with the other Gateway landowners. Since the FDIC chose not to do that, the next best option was to obtain a written commitment to participate in whatever outcome was applied to the other landowners. Taken as a whole, however, the City felt that the final document represented a fair balancing of the diverse interests of several parties.

It is likely that development agreements will be negotiated with other Gateway landowners in the future. Although the completion of Gateway negotiations on design regulations and infrastructure financing policies will eliminate one of the four types of problems listed above, several others will remain. In the case of each Gateway landowner, site specific development constraints may exist, and the need to cooperate in the creation of large public amenities will remain. The need to replace or revise earlier annexation and development agreements may also recur within the Gateway area. For all of these reasons, the power to negotiate and enforce individual development agreements will remain an important municipal tool to protect the public interest.



DEVELOPMENT AGREEMENT  
AMENDED PARKFIELD PLANNED UNIT DEVELOPMENT (PUD)

THIS DEVELOPMENT AGREEMENT (hereinafter referred to as the "Agreement") is made and entered into as of SEPTEMBER 21, 1992, by and between the CITY AND COUNTY OF DENVER, COLORADO (the "City"), and SCHOOL DISTRICT NO. 1 OF THE CITY AND COUNTY OF DENVER (the "School District"), and THE FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for San Marino Savings and Loan Association, Irvine, California (the "Owner"); sometimes City, School District and Owner are hereinafter individually referred to as "Party" and collectively referred to as the "Parties."

I. RECITALS.

WHEREAS, the Owner owns substantially all of that certain real property in the City originally known as the Parkfield Planned Unit Development (the "Parkfield PUD"), generally located southeast of the intersection of Chambers Road and East 56th Avenue; and

WHEREAS, Parkfield was annexed to the City in 1973 at which time it was zoned under City's Planned Unit Development Zone District, and a detailed Parkfield Annexation Agreement was executed by the City and the Colorado and Western Properties Corporation ("Colorado and Western") which was then owner of Parkfield; and

WHEREAS, the 1973 Parkfield Annexation Agreement contained certain specific agreements including but not limited to the April 30, 1973 "Memorandum of Agreement" between Colorado and Western and the City; Resolution No. 1708; Chambers 56th Avenue Annexation; and the February 15, 1973 Agreement between Colorado and Western and the School District; and

WHEREAS, under previous Parkfield ownership, portions of Chambers Road, East 48th Avenue and East 56th Avenue were dedicated to the City; and, certain previously planned and approved public improvements in Parkfield were wholly or partially completed; and

WHEREAS, in light of changed circumstances arising from proposed construction of the new Denver International Airport, in May, 1988, the City further annexed approximately 2,000 acres of land near the New Denver International Airport site which, when combined with 2,500 largely undeveloped acres previously in the City, make up the "Denver Gateway Area"; and

WHEREAS, the City, the School District and the Owner desire to enter into a new agreement concerning schools, parks, the construction of perimeter streets and other public rights-of-way, and the construction of other public improvements; and

WHEREAS, the Parties are desirous of reaching an agreement for settlement of the dispute between the Owner and the School

District as it relates to the school site dedication associated with the 1973 Annexation Agreement and all other disputed matters between the Parties; and

WHEREAS, certain public and private benefits now provide appropriate inducements to the Owner to amend the Parkfield PUD ("Amended Parkfield PUD"), and thus the Parties, in consideration of the benefits to and the rights and obligations of the Parties, desire to voluntarily enter into a Development Agreement ("Agreement") in order to more fully describe the agreements and understandings of the Parties.

NOW, THEREFORE, in consideration of the foregoing facts and the mutual covenants set forth herein, the Parties hereto agree as follows:

II. PROPERTY AND THE PROJECT.

Description of the Property.

The Owner is the Owner of the Amended Parkfield PUD Property (Exhibit 1, Page 9) which is approximately six hundred forty-seven partially developed acres (647 A.) in a square mile area bounded by Chambers Road on the West, East 56th Avenue on the North, proposed Airport Boulevard on the East, and East 48th Avenue on the South, except for that twelve acre (12.0 A.) portion thereof located in the southwest corner and known as the Shopping Center (Exhibit 1, page 10).

III. INFRASTRUCTURE FINANCING.

The Owner agrees that the area of the Amended Parkfield PUD shall be subject to and governed by the regional Gateway-wide infrastructure financing policy, including any related fees, charges and assessments under such policy, as, and if, adopted by the City.

IV. OBLIGATIONS OF THE PARTIES AND CONDITIONS REGARDING DEDICATIONS AND MAJOR INFRASTRUCTURE IMPROVEMENTS.

A. Airport Boulevard Dedication and Related Infrastructure Improvements.

1. Parties Commitment/Separate Agreement.

The Owner and the City, acting by and through the New Denver Airport Office, shall enter into a separate agreement which shall address all matters concerning Airport Boulevard. (Exhibit 2).

2. Owner's Commitment. The Owner has negotiated a Stipulation for Immediate Possession (the "Stipulation") with the City for Superblock R, Amended Parkfield PUD, for Airport Boulevard right-of-way in exchange for a payment of the fair market value for that Superblock to be used for improvements benefitting the property and the surrounding neighborhoods. The Owner agrees to use funds received in connection with the acquisition of the property for the Airport Boulevard right-of-way under the Stipulation to design and construct two continuous lanes of East 48th Avenue (or as much of such street as the payment will permit) including the north side curb and gutter from the end of the existing pavement at the Kittredge Street alignment to the west edge of the Airport Boulevard right-of-way. All such construction, to the extent permitted by such funds, shall be completed to City standards and shall commence within eighteen (18) months of the date on which the initial deposit of such funds is made under the Stipulation. All other funds, if any, paid in addition to the initial deposit as a final payment under the Stipulation shall also be used within eighteen (18) months of the date on which that final payment is made, as and if necessary to complete the construction of East 48th Avenue as described herein. If any portion of the funds paid under the Stipulation remain unused after the completion of all East 48th Avenue improvements, as described herein, the Owner shall invest those unused funds in improvements to the property covered by the Amended Parkfield PUD.

3. City's Commitment. The City shall request monies from the City's Capital Improvements Fund and use its best efforts to complete two continuous lanes of East 48th Avenue including north side curb and gutter from the west edge of the Airport Boulevard corridor until it connects up with the west side on/off ramps of Airport Boulevard, annually, until funds for such construction are received or such construction is otherwise funded.

B. Parkfield Public Dedications, Infrastructure Improvements, and Related Conditions.

1. Owner's Commitment.

a. The Owner shall convey or reserve, as provided herein below, a total of ninety acres (90.0 Ac.), including Parkfield Lake for the designated large urban park (the "urban park"). In addition, the Owner shall convey ten and seven-tenths acres (10.7 Ac.) for the Highline Canal Lateral Trail Corridor (80 foot wide right-of-way) (Exhibit 3-a), subject to all rights and obligations in the Owner's agreement with the U.S. Army. (Reference IV.C.3.g. - Page 12, below.)

(1) The ninety acre (90.0 Ac.) urban park and the ten and seven-tenths acres (10.7 Ac.) Highline Canal Lateral shall be conveyed to the City as follows:

(a) Sixty-one and four tenths acres (61.4 Ac.) of the urban park, including Parkfield Lake, and the Highline Canal Lateral, shall be conveyed by the Owner and accepted by the City according to C.3.b., below, upon approval of this Agreement.

(b) Thirty-nine and three tenths acres (39.3 Ac.) of the urban park, including previously dedicated rights-of-way, shall be designated and reserved as an "out lot" (Exhibit 3-b) and shall be conveyed by the Owner and accepted by the City when, and if, one-hundred percent (100%) of the following described items is completed by the City:

1 - Preparation of a park improvement plan ("park improvement plan"), including budget and schedule for the entire ninety acre (90.0 Ac.) urban park and the ten and seven-tenths acres (10.7 Ac.) Highline Canal lateral. The Owner shall have the right to review and comment during the preparation of this plan.

2 - Grading of that part of the urban park initially conveyed by the Owner hereunder described in Section B.1.a.(1).(a) (61.4 Ac.) in accordance with the park improvement plan.

3 - Stabilization by hydroseeding or other similar means the graded part of the urban park described in 2 - above.

If, after ten (10) years from the date of this Agreement, such items are not completed for the urban park as described herein, then the "out lot" shall be released from this reservation, and that lot in its entirety shall be released from this reservation and shall revert to the Owner. The Owner may then make use of that lot as currently platted or later modified for a legal development.

(2) The sixty-one and four tenths acres (61.4 Ac.) conveyed in (1)(a), above, not including the "out lot", shall be deemed to meet all park/open space dedication requirements for the Amended Parkfield PUD.

b. The Owner shall convey to the School District fifteen acres (15.0 Ac.) for an elementary or middle school site (Exhibit 4), subject to the requirements for infrastructure installation in C.1.a.(1), below.

c. The Owner shall convey to the City up to one and one-half acres (1.5 Ac.) for a fire or police station site at either a mutually agreeable location in Superblock F or I, Amended Parkfield PUD, near the Kittredge Street/East 48th Avenue intersection, or another suitable location, to be agreed upon by

the Parties at the time of subdivision plat approval for property within Superblocks F or I. The Owner shall receive credit for this conveyance under C.2.c., below.

d. The Owner shall be subject to and governed by the regional Gateway-wide infrastructure financing policy, as, and if, adopted by the City and uniformly applied to similar properties in the gateway area regarding design and/or construction or reconstruction of that one-half portion of any streets, curbs, gutters or sidewalks which abuts any police or fire facility site, the urban park, or any additional school site required pursuant to C.3.e., below. The Owner shall not be responsible for any internal roads for the police or fire facility site, the urban park, or an additional school site required pursuant to C.3.e., below.

e. The Owner shall reserve for future purchase by the City, or by the Gateway Area-wide financing entity, through negotiated sale or condemnation, approximately nine (9±Ac.) acres representing the excess or non-dedicated portion of the right-of-way for that part of East 56th Avenue between the Airport Boulevard Right-of-Way and the Chambers Road Right-of-Way [eighty-three (83) feet in addition to the previously dedicated sixty (60) feet from the section line]. The City's right to purchase this reserved acreage shall be completed in two stages, as follows: the first one thousand (1000) foot reserved segment of East 56th Avenue which is located immediately West of the Airport Boulevard right-of-way shall be purchased no later than either the date of approval for the first subdivision plat or site plan for any land which abuts any portion of that segment of East 56th Avenue, or five (5) years from the date of this Agreement, whichever ever occurs first. If such segment is not purchased by City, it shall then be released from this reservation. The remaining segment of East 56th Avenue located west of the above-described segment, and continuing to the point of intersection of East 56th Avenue and Chambers Road shall be purchased no later than five (5) years from the date of this Agreement. If such remaining segment is not purchased by the City, it shall then be released from this reservation.

f. The Owner shall convey a right-of-way to the City for the East 48th Avenue alignment which includes the area measuring to a point sixty-nine (69) feet North from the South Section line, between Kittredge Street and the west right-of-way line of Airport Boulevard.

g. The Owner shall prepare a sanitary sewer master plan in accordance with Section 204 of the City's Wastewater Management Division's Sanitary Sewer Design Technical Manual for the Amended Parkfield PUD property prior to or in conjunction with any request for subdivision plat or site plan approval for any part of the property. The conveyance by the Owner of any property for public use or purpose, including but not limited to the school site, parks, trails or roadways, shall not trigger the requirement

for a sanitary sewer master plan unless that conveyance is made in conjunction with a subdivision plat or site plan submittal. This master plan shall address both on-site and off-site flows to the point of connection with the existing interceptor sewer.

h. The Owner shall prepare a storm drainage master plan for the Amended Parkfield PUD property prior to or in conjunction with any request for subdivision plat or site plan approval for any part of the property. The conveyance by the Owner of any property for public use or purpose, including but not limited to the school site, parks, trails or roadways, shall not trigger the requirement for a storm drainage master plan unless that conveyance is made in conjunction with a subdivision plat or site plan submittal. This plan shall be in conformance with the concepts of the Irondale Gulch Master Drainage Report (May, 1990) and the pending Irondale Gulch Implementation Plan. The construction of storm drainage facilities shall be consistent with all agreements, if any, concerning storm drainage matters made between the Owner and the U.S. Army Department of Defense for the Rocky Mountain Arsenal property (IV.C.3.g., below); and further, such facilities shall be constructed to the satisfaction of the City's Wastewater Management Division, the Urban Drainage and Flood Control District, and the City's Parks Department, as appropriate, according to the same requirements for other similar drainage facilities in the Denver Gateway Area, where applicable.

## 2. City's Commitments.

a. Upon the approval of this Agreement, the City Department of Parks and Recreation shall use its best efforts to include as part of its 1993 capital improvement program budget such appropriations as may be necessary in order to prepare a park improvement plan and to design and construct at the City's sole expense those basic improvements to the urban park pursuant to 1.a.(1), above.

b. The City Department of Parks and Recreation, shall in good faith, use its best efforts to complete at a later date certain additional improvements to the urban park included in the park improvement plan. The City's commitment to use its best efforts to fund additional park improvements shall commence upon the occurrence of any one of the following development events:

(1) The issuance of certificates of occupancy for forty percent (40%) of the approved base number of residential dwelling units, or

(2) The completion of development of forty percent (40%) of the land approved for business/commercial use, or

(3) The combined issuance of certificates of occupancy for twenty percent (20%) of the approved base number

of residential dwelling units, and the completion of development of twenty percent (20%) of the land approved for business/commercial use.

At that time the City shall use its best efforts to complete the improvements included in the park improvement plan by including same in the City's next cycle of capital improvements program budget planning, which may include regional funds if available through the Gateway-wide financing entity.

If any such additional park improvements have already been completed at the time of such budget request, those improvements do not need to be included in that budget request.

c. The City shall allow use of the urban park lake and a portion of its environs, as the same is generally shown in Exhibit 9a and 9b, and the Highline Canal Lateral Trail Corridor to accommodate storm water for on-site storm water detention, and transmission in accordance with the terms and conditions of the Irondale Gulch Master Drainage Report (May, 1990).

C. Other Infrastructure Matters, Including Gateway Area-wide Improvements, and Related Commitments and Conditions.

1. Owner's Commitments.

a. The Owner shall design and construct or cause the design and construction of the following in accordance with the storm drainage master plan, and with those dimensions, design and amenity (i.e., tree lawn, landscaping, median, lighting, signalization, sidewalks, etc.) and standards and requirements uniformly applicable to other similar properties in the Gateway area, and if no such standards and requirements exist, then in accordance with other applicable city standards:

(1) all interior infrastructure, consistent with City policy, including without limitation the construction or installation of the following items contemporaneously with the construction of an elementary school or middle school on Superblock G:

(a) one-half of the street, including gutter, curb and sidewalk around the perimeter of Superblock G, where such perimeter is adjacent to a public right-of-way (excluding Highline Canal Lateral); and

(b) rough grading of Superblock G based on a grading plan mutually agreeable to the Parties with a standard allowable deviation of one (1) foot, plus or minus (1 ± ft.); and

(c) installation of all necessary utilities (water, sewer, gas, electric and telephone) to Superblock G, but not to include user hook-up fees, or other similar fees, if any.

(2) two (2) standard lanes along the eastern edge of Chambers Road between the northern boundary of the Chambers Place Shopping Center and East 56th Avenue. The portion of such road abutting the urban park shall be constructed according to standards and requirements uniformly applicable to similar properties in the Gateway area for regional infrastructure.

(3) two (2) standard lanes including curb, gutter and sidewalk along the southern edge of East 56th Avenue between Chambers Road and the western boundary of the Airport Boulevard Right-of-Way.

(4) Two (2) standard lanes, including curb gutter and sidewalk along the northern edge of East 48th Avenue between Kittredge Street and the western boundary of the Airport Boulevard Right-of-Way.

No more than 250 dwelling units may be constructed on zone lots without frontage on Chambers Road before the improvements in (2) above are installed. No more than 415,000 square feet of non-residential area may be constructed on zone lots in Superblocks K, M, and N without frontage on east 56th Avenue before the improvements in (3) above are installed. Development of zone lots with frontage along east 56th Avenue or Chambers Road shall require the improvements in (2) or (3) above to be constructed pursuant to standard City policies.

b. If adequate funds resulting from the regional Gateway-wide infrastructure financing policy are made available, some of which may be advanced by and credited to Owner if consistent with that regional policy, the Owner shall design and construct or cause the design and construction of the following area-wide amenities in accordance with those dimensions, designs and amenities (i.e., tree lawn, landscaping, median, lighting, sidewalks, signalization, etc.) and standards and requirements uniformly applicable to other similar properties in the Gateway area for regional infrastructure:

(1) two (2) additional standard lanes along the northern edge of East 56th Avenue with full median, lighting and signalization between Chambers Road and the Airport Boulevard Right-of-Way; and

(2) required up-grading, if any, of the two (2) standard lanes along the western edge of Chambers Road with full median, lighting and signalization between East 48th and East 56th Avenues; and



(3) a trail system along the Highline Canal Lateral Corridor for that part of the Lateral which extends through the Amended Parkfield PUD property between the western boundary of the Airport Boulevard Right-of-Way and the Southern Boundary of the East 56th Avenue Right-of-Way.

2. City Commitments.

a. Upon receipt of deeds in conformance with the provisions of paragraph IV.C.3.b. by City and School District for the property identified in paragraphs IV.B.1.a.(1)(a) and B.1.b. respectively, and upon receipt of title commitments for such property evidencing to the satisfaction of City and School District merchantable title in Owner, City and School District shall execute and deliver to Owner a Settlement Agreement and Stipulation which settles the public and school land dedication issues relating to the 1973 Annexation Agreement and the pending litigation identified as Cordillera Corporation et al. v. Nu-West Development Corporation et al., Case No. 86CV8727, District Court, City and County of Denver, State of Colorado. The Settlement Agreement and Stipulation shall provide for the dismissal with prejudice of all claims, counterclaims and the School District's third party claims contained within the lawsuit. City and School District, upon the receipt of the above-identified deeds, will execute appropriate mutual releases substantially in the form of Exhibit 6A-6D attached hereto, between the City, the School District and Cordillera Corporation and between the City, School District and Nu-West, Inc., releasing Cordillera Corporation and Nu-West, Inc. from any and all future claims and obligations regarding Parkfield or the Amended Parkfield P.U.D., provided however that Cordillera Corporation and Nu-West, Inc. shall also execute releases substantially in the form of Exhibit 6E-6H attached hereto, of City and School District relating to any claims, whether existing or future which in any way relate to the Parkfield property or the 1973 Annexation Agreement. By its signature hereon, School District agrees to accept the school site offered for dedication in paragraph B.1.b., as illustrated in the Amended Parkfield P.U.D. (Exhibit 4). City and School District further agree to cooperate with Owner regarding the release to Owner of funds in the approximate amount of Two Million Dollars (\$2,000,000.00), plus interest, now held in escrow by the United Bank of Denver, N.A. (Escrow No. 40-887400) in connection with the current dispute, by executing the above-identified releases and Settlement Agreement and Stipulation. Should the escrow agent require additional documentation verifying that a settlement of the pending litigation has occurred, City and School District agree to execute reasonable verification documents after the Court has entered an Order dismissing the pending litigation and after the date upon which any appeal to the dismissal must be filed.

b. The City shall effectuate as provided herein the immediate release to Owner of all or a part of certain surety

instruments in the amount of Two Million Four Thousand Nine Hundred Dollars (\$2,004,900) which were previously posted with City as surety for public improvements in Parkfield. The amounts of the surety instruments to be released by the City shall be calculated by determining which public improvements for platted areas have been satisfactorily completed, which improvements remain unfinished, and which improvements are no longer planned due to the vacation of existing plats or land dedications. City shall accept the existing public improvements as provided in e., below, and further, shall accept from Owner substitute surety if necessary for unfinished public improvements in previously platted areas which are not otherwise vacated. Any such substitute surety shall be in a form mutually acceptable to the Parties, which may include plat restrictions or other similar limitations associated with instruments of real property conveyance.

c. The City shall credit the Amended Parkfield PUD property for the value of the fire or police station site, conveyed to City under l.C., above, and any and all other Gateway area-wide infrastructure improvements or conveyances for dedication by the Owner (except Airport Boulevard), subject to the regional Gateway area-wide infrastructure financing policy, as, and if, adopted by the City. Credit shall be calculated for those items which are designed and constructed by or so caused by Owner and which serve the Parkfield property when the requirements and costs of Gateway area-wide infrastructure improvements attributed to the Parkfield property are later determined, and to the same extent that other properties in the Gateway area would receive credit for construction or conveyance of similar items.

d. Pursuant to standard procedures, the City shall accept, maintain or provide for maintenance of all public improvements on City-owned or dedicated land constructed to applicable City standards, including East 48th Avenue, Chambers Road, East 56th Avenue and Memphis Street along with all related medians, and the urban park and the Highline Canal Lateral, including the trail corridor system, in the Amended Parkfield PUD.

e. The Manager of Public Works for the City shall recommend acceptance of the existing infrastructure in Parkfield as offered by Owner according to Exhibit 7A-7E upon repair and completion of same based on the City's current construction quality standards, and dimensional standards in effect at the time of installation.

f. Upon approval by the Transportation Division of the Department of Public Works, the City shall permit the Owner to construct curb cuts and median breaks in a timely manner for ingress and egress from perimeter streets of the Amended Parkfield PUD as generally described on Exhibits 8 and 5.

g. The Manager of Public Works for the City shall recommend and present a Bill for an Ordinance to the City Council to grant a revocable permit which shall not be unreasonably denied across East 56th Avenue to the Owner, when requested, adequate to install, operate and maintain the extension of the water irrigation pipeline which will be constructed underground and parallel to the Highline Canal Lateral. The revocable permit shall be assignable by the Owner to the U.S. Army.

### 3. General Conditions.

a. Any and all conveyances of real property interests by the Owner to the City under this Agreement shall reserve and otherwise retain for the Owner such utility easements, which now exist (Exhibit 10) or may be reasonably necessary to serve the properties within the Amended Parkfield PUD. Furthermore, all conveyances for public dedication of the school site, parks, trails and roadways shall provide reasonable access for the Owner to complete its obligations, if any, for construction, grading or stubbing of utilities related to those sites.

b. Any and all conveyances of real property interests by Owner to the City shall be made by subdivision plat, or by quit claim deed with a current title insurance commitment evidencing to the satisfaction of the City merchantable title in the Owner for that property not subject to a plat at the time of conveyance; subject, however, to the provision that title to the conveyed portion of the urban park, East 48th Avenue and the School site shall be transferred by quit claim deed with a current title commitment evidencing to the satisfaction of the City or the School district, as appropriate, merchantable title in the Owner, within thirty (30) days after final approval of the Amended Parkfield PUD by the City. In addition, within the same thirty (30) day period and coincident with the delivery of the deeds referenced herein for the urban park and the school site, the Owner shall provide to the City a written legal description of the thirty-nine and three tenths acres (39.3 Ac.) "out lot" (Exhibit 3-b). All land areas dedicated and not abutting a dedicated public street shall include a general access easement to the nearest dedicated public street. Any such general access easement shall be recommended for vacation by the Manager for the City Department of Public Works when alternative public access acceptable to the City is made available.

c. This Development Agreement, including all terms and conditions; specifically those references to conveyances of real property interests by the Owner to the City, shall be approved simultaneous with the approval by City of the Amended Parkfield PUD as submitted by the Owner. (Application Number 3947).

d. This Agreement shall supersede and override the following previous agreements concerning Parkfield; the April

30, 1973 "Memorandum of Agreement" between Colorado and Western Properties Corporation and the City and County of Denver (except paragraphs 3, 6 and 7), and Resolution No. 1708 Chambers 56th Avenue Annexation and attached February 15, 1973 "Agreement" between Colorado and Western and the School District.

e. If additional residential dwelling units are approved in the future by City Council amendment to the Amended Parkfield PUD, up to five hundred (500) such residential dwelling units may be permitted in Superblocks K, N, or O, without any further requirement by City for additional park land dedications. A fifteen acre (15.0 Ac.) site has already been set aside and dedicated hereunder for school purposes. If the actual development of additional residential dwelling units under this paragraph e. results in a dedication requirement greater than the fifteen acre (15.0 Ac.) site based upon total school acreage required by the table below, the School District and the Owner shall mutually decide whether the additional requirement shall be met through dedication of additional land or through cash payment of the fair market value of such lands; and, in the event the School District and the Owner decide that additional dedicated land is required, the location of such additional land shall be determined with the consent of the City.

<u>Students Generated</u>	<u>Elementary School</u>	<u>Middle School</u>	<u>High School</u>
Single Family	.6	.2	.2
Multi-Family			
1-2 Bedroom	.1	.035	.03
3 Bedroom	.15	.065	.05
4 Bedroom	.2	.095	.07
<u>School Size Standards</u>	650 students	1200 students	2000 students
<u>School Site Standards</u>	10 acres	15 acres	40 acres

f. Any and all major amendments to the Amended Parkfield PUD, as determined by the City Director of Planning shall cause a concurrent review of this Agreement by the Parties to determine which, if any, of its provisions relate to the proposed PUD amendment. Appropriate amendments of those portions of this Agreement which relate to such PUD Amendment may be made a condition of such PUD Amendment.

g. This Agreement contemplates the execution of a new water management agreement with the U.S. Army Department of Defense for the Rocky Mountain Arsenal property resolving on-site

water quality matters based on best management practices and techniques, including a formula which fairly allocates drainage benefits and costs effecting the Amended Parkfield PUD property and other properties served throughout the drainage basin. The Owner commits to use its best efforts to conclude such an agreement with the U.S. Army. If that new water management agreement is not executed, and drainage contributed by new development of the Amended Parkfield PUD property is required to be retained on site, the volume of water to be retained along with the area to be reserved for retention purposes shall be identified as part of the storm drainage master plan prepared by the Owner under IV.B.1.h., above. The development area so reserved shall be released from this reservation and shall revert for development to the Owner upon the execution of a water management agreement with the U.S. Army. Any such agreement between the Owner and the U.S. Army which includes commitments or otherwise binds City owned lands that were conveyed to City under this Agreement shall require prior approval by the City as to those provisions which impact such City lands.

h. The Owner shall deliver and maintain with the City adequate surety for all local public improvements which are required under this Agreement, and such surety shall be administered and then released upon acceptance of such improvement by the City according to regulations uniformly applicable to other similar property.

V. TERM OF AGREEMENT.

In consideration of the size of the Amended Parkfield PUD project, the projected long-term completion date, the size and character of public dedications, and the specificity of planning and regulatory features contained in the Amended Parkfield PUD, and the timing and obligations for infrastructure financing, the duration of this Agreement shall be for a period of fifteen (15) years. This term may be extended by mutual consent of the City and the Owner, and the School District to the extent that such extension effects an interest of the District.

VI. CONDITIONS TO THE AGREEMENT.

This Agreement shall be considered by City concurrently with the proposed amendment by Owner of the Parkfield Planned Unit Development Zone District, and the Parties further agree that this Agreement shall not be approved by the City and shall not become effective until and unless the Amended Parkfield PUD is approved.

VII. AMENDMENTS TO AGREEMENT.

This Agreement may be amended at any time and from time to time by the Parties subject to the same requirements of the original Agreement. Amendments to documents serving as exhibits to

this Agreement shall be permitted without requiring formal amendment to this Agreement. Certain other changes to this Agreement which may be considered as minor changes shall not require a formal amendment. The office of Director of Planning for City shall determine whether a formal amendment is necessary; and, where the School District's interest is involved, such determination shall only be made with the consent of the District. This Agreement may be amended or canceled by mutual consent of the Parties to the Agreement, or by their successors-in-interest.

**VIII. ASSIGNMENTS AND TRANSFERS.**

The Owner shall be permitted to sell, assign, transfer or otherwise convey freely any part or all of its rights and obligations under this Agreement in connection with the sale of the Amended Parkfield PUD property, in whole or in part. Owner shall promptly provide the City and the School District with written notice of any such conveyance. The Owner will include in any document transferring title to any portion or all of the Amended Parkfield PUD property a clause requiring a purchaser to assume any and all obligations of the Owner relating to that portion of the Amended Parkfield PUD property which is purchased, and a pro-rata share of all obligations of the Owner not related to any particular portion of said property. The Owner shall be released from any and all obligations under this Agreement to the extent that such obligations are thereby assumed in writing by a purchaser or purchasers.

**IX. FEES, ASSESSMENTS AND SPECIAL CHARGES OR EXACTIONS.**

The Owner shall be obligated to pay in a timely manner all fees, assessments or special charges associated with the development of the Amended Parkfield PUD on the same basis applicable to other property similarly situated in the Gateway area. The Owner shall also be obligated to participate in, contribute or otherwise provide those development dedications uniformly imposed on all similar developments in the Gateway area.

**X. VESTED RIGHTS.**

All rights to develop and engage in land uses as established and set forth in the Amended Parkfield PUD and all the terms and conditions set forth in that PUD regarding matters of density, heights and range of land uses, shall be vested property rights according to the provisions for "vesting of rights" contained in the "Development Review and Approval Process for Gateway Zone District", as and if adopted by the City for the entire Gateway area.

However, for an interim time period not to exceed three (3) years after the date of execution of this Agreement, but prior to the time of adoption by City of such Gateway Zone District

provisions, the development rights referenced herein above shall be vested property rights, and the Owner shall, therefore, have a vested property right to undertake and complete development in accordance with such vested rights as provided by City Code 59-29. These rights shall vest to and benefit the owner of any land that is part of the Amended Parkfield PUD, and the Owner's heirs, personal representatives, successors and assigns, and such rights shall run with title to said land. Nevertheless, however, the vested property rights established herein for the interim period noted above may be extended for such additional periods or period of time as agreed to by the Parties.

#### XI. DEFAULTS AND REMEDIES.

The Parties hereby agree and acknowledge that this Agreement may be enforced at law or in equity. In addition to any other available remedies, in the event of a breach of this Agreement, either Party may ask a court of competent jurisdiction to enter a writ of mandamus to compel the other Party to perform under this Agreement, and either Party may seek from a court of competent jurisdiction temporary and/or permanent restraining orders, or orders of specific performance, to compel the other to perform in accordance with the obligations set forth under this Agreement.

#### XII. MISCELLANEOUS PROVISIONS.

A. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective successors and assigns.

B. Waiver. The waiver of a breach of any of the provisions of this Agreement by either Party shall not constitute a continuing waiver or a waiver of any subsequent breach of the same or other provision of this Agreement.

C. Severability. Invalidation of any of the provisions of this Agreement or any paragraph, sentence, clause, phrase or word herein or the application thereof in any given circumstance, shall not affect the validity of any other provision of this Agreement.

D. Governing Law. This Agreement shall be governed and constructed in accordance with the laws of the State of Colorado.

E. Headings for Convenience Only. The headings, captions and titles contained herein are intended for convenience and reference only and are not intended to define, limit or describe the scope or intent of any of the provisions of this Agreement.

F. Recordation. This Agreement, or a memorandum or other evidence thereof, shall be recorded by the City with the Clerk and Recorder's Office of the City.

G. Notices. All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed given when personally delivered, or after the lapse of ten business days following the mailing by registered or certified mail, postage prepaid, addressed as follows:

For the City:

Manager of Public Works of the  
City and County of Denver  
1437 Bannock Street  
Denver, CO 80202

With Copies to:

City Attorney of the  
City and County of Denver  
1437 Bannock Street  
Denver, CO 80202

Director of Planning and  
Development of the  
City and County of Denver  
201 West 14th Avenue  
Denver, CO 80202

For the Owner:

Stephen M. Buck  
Federal Deposit Insurance  
Corp.  
707 17th Street, Suite 3000  
Denver, CO 80202

With Copies to:

David W. Miller  
Federal Deposit Insurance  
Corp.  
707 17th Street, Suite 3000  
Denver, CO 80202

For the School District:

Michael H. Jackson  
1120 Lincoln Street  
Suite 1300  
Denver, CO 80203

With Copies to:

or at any other such addresses as said Parties may hereinafter or from time to time designate by written notice to the other Party.

H. Effective Date. This Agreement shall become effective the day and year first written above.



IN WITNESS WHEREOF, the Parties execute this Agreement as of the date set forth above.

THE FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR SAN MARINO SAVINGS AND LOAN ASSOCIATION, IRVINE, CALIFORNIA

*DM*

By *Stephen C. Kane*  
Stephen C. Kane  
Managing Liquidator and  
Attorney-in-Fact

ATTEST:

CITY AND COUNTY OF DENVER:

*Arie P. Taylor*  
ARIE P. TAYLOR, Clerk and  
Recorder, Ex-Officio Clerk  
of the City and County of  
Denver

By *Wally Smith*  
Mayor



RECOMMENDED AND APPROVED:

APPROVED AS TO FORM:  
DANIEL E. MUSE, Attorney for  
the City and County of Denver

By *[Signature]*  
Manager of Public Works

By *Robert M. Kelly*  
Assistant City Attorney

By *[Signature]*  
Director, of Planning

REGISTERED AND COUNTERSIGNED:

By *Robt L. Gilder*  
Auditor

SCHOOL DISTRICT NO. 1 IN THE CITY  
AND COUNTY OF DENVER AND STATE OF  
COLORADO

By *D. S. [Signature]*  
President

ATTEST:

*[Signature]*  
Secretary-Treasurer

Approved as to form:

*Michael H. Jackson*  
School District Attorney





**Case Study 5**  
**Twilight Park Development Agreement**

**Private Sector Representative: Andy Loewi and Bruce A. James**  
**Public Sector Representative: Robert M. Kelly**

**Background:** *The Twilight development agreement is an innovative solution to a difficult, yet not unusual problem. An older golf course adjacent to a state highway was being considered for infill commercial development that would serve new residential areas sprouting in southeast Denver. Surrounding local residents wanted to protect the parcel from any further development. An agreement was eventually reached where the developer was allowed to develop 18 acres of the 23 acre parcel. However, in addition to developing a 5.5 acre park on the remainder of the site, the developer acquired and developed an additional 6.5 acres for park purposes. The agreement provided for the reimbursement of land and development costs associated with the 6.5 acre parcel, tied to the tax increment generated by the project.*

*This development agreement succeeded in resolving a common problem that is often avoided in favor of less controversial sites. In this situation, a development agreement created infill development that provided an economic benefit and served the needs of the surrounding area, in addition to providing needed amenities and preventing further deterioration of the site.*



***A Creative Approach to Financing Public Improvements***

In our years of practice in the land use area, no project on which we have worked better illustrates the old saying that "necessity is the mother of invention" than the Twilight Development Agreement. An accompanying article in this book by Denver Assistant City Attorney Bob Kelly describes in detail the substance of this unusual development agreement. In this article, we will outline the history of the Twilight project in order to explain the genesis of the Agreement. Perhaps the unique circumstances which gave rise to the Agreement will relegate it to the status of a mere oddity. We believe, however, that the creative approach used here may have broader applicability in the increasingly challenging climate for development and the increasingly scarce availability of public resources.

When it was built decades ago, the Twilight Golf Course – a par 3 "pitch and putt" course and adjacent driving range located in east Denver on Leetsdale Boulevard – was a modest but conveniently situated alternative to the country clubs and public courses which dotted the Denver Metropolitan area. By the 1980's, however, Twilight faced increasing competition from a plethora of modern golf facilities. At the same time, development in the southeast Denver area in general – and in the area surrounding the Twilight course in particular – had boomed, making the Twilight course a most attractive in-fill development site, positioned as it was on a major state highway linking southeast Denver with the central city.

Beginning in the mid 1980's, several developers began to take a serious look at the site, and at least two efforts were undertaken to develop the property. Both failed. Increased growth and its accompanying traffic congestion led to a predictable reaction among local residents, with nineteen neighborhood groups and condominium associations banding together to form a powerful coalition aimed at blocking further development which they deemed undesirable. The group called itself "Neighbors Organized to Maintain Our Residential Environment," or "NOMORE." The name well reflected the group's attitude toward new commercial development, and it was hardly surprising that the most recent development proposal, to convert the golf course to a water slide recreational facility, had been beaten back handily.

Despite these earlier failures, a partnership led by Ross Investment Group, the development arm of the venerable Denver real estate firm of Frederick Ross Company, acquired the rights to the northern 23.5 acres of the site in 1990. At that time, the southern 6.5 acres, part of a separate zone lot resulting from a street realignment years earlier, remained under separate ownership. As sophisticated developers, Ross immediately undertook negotiations with NOMORE in an effort to gain acceptance for its plan to develop a strip center anchored by a 65,000 square foot Safeway Marketplace store. In an effort to facilitate the negotiations, Ross provided funding to NOMORE to allow the group to retain an independent planner to help frame the group's concerns.

But after more than a dozen meetings over many months, negotiations reached an impasse and our firm was retained by Ross in an effort to break the log jam. Although there were many issues discussed, including, of course, traffic concerns and limitations on permitted uses, negotiations ultimately had foundered over NOMORE's distress at the loss of open space in the area. In NOMORE's view, this now densely populated

residential area had been overlooked by the City and was sorely in need of a public park. To meet this concern Ross offered to restrict the developed portion of its site to 18 acres, and to develop a 5.5 acre public park on the remainder of the site – a commitment of nearly twenty-five percent of the parcel.

Initially, this proposal was attractive to NOMORE. But the group's position changed when the Denver Department of Parks and Recreation announced that it had no interest in obtaining a new park of such limited size. While the neighbors had expressed the need for a so-called "passive" park, the Department's interest was in acquiring larger parks upon which soccer fields could be located, relieving the increasing pressure this popular sport had placed upon existing City facilities. Given the area required in order to support a commercially viable development, the only way to meet the City's concerns was to add the 6.5 acre parcel to the south.

Adding the additional ground posed two new problems: first, whether the parcel would be available at a reasonable price; and, second, who would pay that price, as well as pay for the cost of developing the parcel as a park. The economics of the project clearly precluded such an additional investment by Ross; Ross was already prepared to dedicate nearly a quarter of its site and to develop the 5.5 acres to Parks Department specifications. Unfortunately, even though it was the City's demands that had created this impasse, the Parks Department was also unwilling to pay for the acquisition and development of the additional ground. The Department's city-wide wish list already had been fixed for several years into the future, and there simply was no funding available for this additional, unanticipated project.

In an effort to break this new impasse, we began to consider the possibility of using tax increment financing as a vehicle for funding the additional park land. Traditionally, tax increment financing, or "TIF", has been employed in connection with various types of special districts, such as urban renewal districts, in order to fund the assemblage of large parcels for development and for certain public improvements. A base line is established to measure the sales tax revenue generated within the area in question prior to development. The district then issues bonds to finance the assemblage or public improvements, pledging as revenue to support these bonds the additional sales tax revenue, or increment, which will be generated by the new development. Given the low baseline level generated by the by now defunct Twilight Golf Course, and the significant sales tax revenue anticipated from the planned shopping center, use of a TIF seemed particularly appropriate here.

Once again, however, the political realities of dealing with a city government with broader concerns interfered. The City was embroiled in a highly controversial proposal to develop, further to the south, a major new retail center to be anchored by a Nordstroms store, the public improvements for which were to be funded by a TIF. With this political hot potato still in play, the City was understandably reluctant even to consider an additional proposal for tax increment financing. The City wanted a park and it wanted the additional sales tax revenue from the project, but tax increment financing, or any similar proposal which could be considered a public "subsidy" was deemed unacceptable.

From these discussions, the Twilight Development Agreement emerged. As described in more detail in Bob Kelly's article, the Agreement essentially provides that Ross would be directly responsible for acquiring the additional 6.5 acre parcel and developing fully 12 acres of the now-30 acre assemblage to Parks Department



specifications. The City agreed, subject to the annual appropriation process, to reimburse Ross for the cost of acquiring and improving the 6.5 acre parcel. Although, in contrast with a TIF, no specific revenues would be pledged toward this reimbursement, the amount of the reimbursement was tied to the tax increment generated by the project, with no more than one-third of Ross' total costs to be reimbursed in any single year. Based on the anticipated revenues, the Agreement should insure that the developer will recoup its expenses in a reasonable period of time, while the City will enjoy the benefits not only of a new park, but also of additional tax revenues, only a portion of which will be used to refund the developer for park-related costs.

Obviously, this unusual arrangement has many of the earmarks of a TIF. However, it departed from a traditional TIF by not creating a specifically enforceable revenue pledge, relying instead upon a reimbursement covenant which is subject to annual appropriation. While some may question the reliability of such a covenant, it allowed the project to gain public finance participation in a climate that many observers predicted would never allow any form of a public "subsidy". The willingness to depart from a traditional TIF structure allowed the City the comfort it needed to approve the project, which now had the strong backing of NOMORE.

Whether this arrangement has broader applicability we will leave for others to judge. It does appear to have succeeded here. Ross eventually sold the project to the Denver Tech Center, which has built the new park and is fast nearing completion of the retail development.



**TWILIGHT PARK DEVELOPMENT AGREEMENT - DENVER**  
**Public Sector Commentary - Robert M. Kelly**

***Introduction***

This Agreement was entered into on February 22, 1991, between the City and County of Denver ("City") and Leetsdale Partners, L.P., a Colorado limited partnership ("Developer").

The Developer was the owner of approximately twenty-four acres of real property (the "Property") upon which it desired to construct a mixed use commercial project (the "Development"), and had an option to purchase (the "Option Contract") a parcel of real property consisting of approximately 6.5 acres ("the 6.5 Acre Parcel"), adjacent to the Property.

In connection with the approval of the Development by the City, the Developer agreed to improve and maintain the 6.5 Acre Parcel as a park site, and agreed to donate as a park site approximately 5.5 acres ("the 5.5 Acre Parcel") of the Property. The Developer was also willing to pay the costs of improving and maintaining the 6.5 Acre Parcel and the 5.5 Acre Parcel on the condition that the City purchase the 6.5 Acre Parcel from the Developer and reimburse the Developer for costs incurred by the Developer in acquiring, improving and maintaining the 6.5 Acre Parcel on the terms and conditions set forth in the Agreement.

***The Agreement***

The Developer agreed to pay all costs necessary to improve the 6.5 Acre Parcel and 5.5 Acre Parcel to the design and specifications of the City Department of Parks and Recreation ("the Parks Department"), up to a maximum cost of \$500,000. The Developer also agreed to prepare, or cause to be prepared, all necessary design drawings for the park improvements in accordance with the specifications of the Parks Department. The park design and improvements must be completed pursuant to the specifications of the Parks Department on or before the date when the Developer applies for a temporary or permanent certificate of occupancy to occupy any building or structure on the Property.

On or before the earlier of (a) the date when the Developer applies for a temporary or permanent certificate of occupancy to occupy any building or structure upon the Property or (b) January 1, 2008, the Developer agreed to convey and dedicate to the City, and the City agreed to accept from the Developer, the 6.5 Acre Parcel and the 5.5 Acre Parcel. For a period of one (1) year from and after the date of conveyance, the Developer agreed to maintain the 6.5 Acre Parcel and the 5.5 Acre Parcel in accordance with the maintenance provisions. The Developer is also responsible for all costs to acquire, improve and maintain, for a period of one (1) year only the 5.5 Acre Parcel.

If the Developer does not apply for a temporary or permanent certificate of occupancy to occupy any building or structure upon the Property, the Developer has no obligation to construct or maintain park improvements upon the 6.5 Acre Parcel or the 5.5 Acre Parcel, and the sole obligation of the Developer is to convey the 6.5 Acre Parcel and the 5.5 Acre Parcel to the City on January 1, 2008.

The City agreed to reimburse the Developer for the costs of acquiring, improving and maintaining the 6.5 Acre Parcel from and after the date of the Agreement, up to an

amount not to exceed \$750,000.00, together with interest on the costs of funds expended by the Developer, at two percent (2%) per annum over the prime rate published from time to time by the United Bank of Denver (collectively, the "Park Costs"). The obligation of the City shall extend only to the payment of monies appropriated in the future fiscal year or otherwise made available by Denver City Council for the purposes of the Agreement, and paid into the Treasury of the City and County of Denver. Subject to the foregoing, the City agreed to reimburse the Developer for the Park Costs as follows:

- a. The City annually is to determine the amount of all sales tax revenues generated from the Development and received by the City (the "Development Revenues");
- b. The City annually is to repay to the Developer an amount equal to the referenced Development Revenues toward the repayment of the Park Costs, but shall not be required in any one (1) year to repay more than one-third (1/3) of the Park Costs, except at its sole discretion; and
- c. The obligation of the City to reimburse to the Developer for the Park Costs is to expire on the earlier of (a) the fifteenth (15th) anniversary of the date of the first issuance of a non-residential building permit for any structure or building upon the Property or (b) January 1, 2008, and the City will have no further obligations under the Agreement and will retain ownership of the 5.5 Acre Parcel and 6.5 Acre Parcel.

The financial obligations of the City are contingent upon the funds for the purpose being appropriated, budgeted and otherwise made available. It was understood and agreed that any obligations of the City for the payment of any money only extended to payment of monies appropriated by the City for the purpose of the Agreement and paid into the Treasury of the City.

The Agreement allowed the Developer to purchase the 6.5 Acre Parcel, to complete the park improvements on the 6.5 Acre Parcel and the 5.5 Acre Parcel and to be reimbursed by the City for the costs of acquiring, improving and maintaining the 6.5 Acre Parcel subject to certain conditions.

The Agreement made a 12 acre park with completed improvements available to the City with the City paying for a portion of the 12 acre site. This payment by the City is over a period of years, and each payment is subject to being appropriated, budgeted and otherwise made available.

As of December of 1992, the Development is being constructed, and the improvement of the 12 acre park site is completed.

## AGREEMENT

This Agreement (the "Agreement"), is entered into on the date or dates indicated below by and between THE CITY AND COUNTY OF DENVER ("City") and LEETSDALE PARTNERS, L.P., a Colorado limited partnership ("Developer").

### R E C I T A L S

A. Developer is the owner of approximately twenty-four (24) acres of real property (the "Property"), located in the City and County of Denver, State of Colorado, as described in Exhibit A attached hereto and made a part hereof, upon which Developer desires to construct a mixed use commercial project (the "Development").

B. Developer has an option to purchase (the "Option Contract") a parcel of real property consisting of approximately 6.5 acres (the "6.5 Acre Parcel"), adjacent to the Property, as described on Exhibit B attached hereto and made a part hereof.

C. In connection with the approval of the Development by the City, the Developer has agreed to improve and maintain the 6.5 Acre Parcel as a park site, and the Developer has agreed to donate as a park site approximately 5.5 Acres (the "5.5 Acre Parcel"), of the Property, as described in Exhibit C attached hereto and made a part hereof.

D. Developer is also willing to pay the costs of improving and maintaining the 6.5 Acre Parcel and 5.5 Acre Parcel on the condition that the City purchase the 6.5 Acre Parcel from the Developer and reimburse the Developer for costs incurred by Developer in acquiring, improving and maintaining the 6.5 Acre Parcel on the terms and conditions set forth herein.

Park Agr  
[RIG. 01A]  
December 14, 1990

NOW THEREFORE, in consideration of the covenants and conditions contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Acquisition of 6.5 Acre Parcel. The obligations of Developer under this Agreement are expressly conditioned upon Developer's acquisition of the 6.5 Acre Parcel on or before December 31, 1990. If Developer has not acquired the 6.5 Acre Parcel on or before December 31, 1990, (a) this Agreement shall be null and void, (b) the Developer shall promptly file an application to rezone the 6.5 Acre Parcel and the Property to the zoning classification which applies to the 6.5 Acre Parcel and the Property as of July 1, 1990, , and shall use its best efforts to prosecute said application, and (c) the Developer agrees not to apply for a building permit to build or construct any building or structure on the Property until after the 6.5 Acre Parcel is acquired or until the rezoning in (b) above has been approved.

2. Completion of Park Improvements. Developer hereby agrees to pay all costs necessary to improve the 6.5 Acre Parcel and 5.5 Acre Parcel to the design and specifications of the City Department of Parks and Recreation (the "Parks Department"), up to a maximum cost of \$500,000. The Developer will prepare, or cause to be prepared, all necessary design drawings for the park improvements in accordance with the specifications of the Parks Department. There shall be no storm water detention on the 6.5 Acre Parcel or 5.5 Acre Parcel without the prior written consent of the Manager of the Parks Department. The park design and improvements must be completed pursuant to the specifications of the Parks Department on or before the date when the Developer applies for a temporary or permanent certificate of occupancy to occupy any building or structure on the Property.

Park Agr  
[RIG. 01A]  
December 14, 1990

3. Conveyance to City. On or before the earlier of (a) the date when the Developer applies for a temporary or permanent certificate of occupancy to occupy any building or structure upon the Property or (b) January 1, 2008, the Developer shall convey and dedicate to the City, and the City will accept from the Developer, the 6.5 Acre Parcel and the 5.5 Acre Parcel. For a period of one (1) year from and after the date of conveyance, the Developer shall maintain the 6.5 Acre Parcel and 5.5 Acre Parcel in accordance with the maintenance provisions contained in Exhibit D attached hereto and made a part hereof; provided, however, that if at the time of the conveyance the Developer has not been required to complete the park improvements pursuant to paragraph 2 above, the City shall be solely responsible for all cost of maintenance to the 6.5 Acre Parcel and 5.5 Acre Parcel following the conveyance.

4. Cost to Acquire, Improve and Maintain 5.5 Acre Parcel. The Developer shall be solely responsible for all costs to acquire, improve and maintain (for a period of one (1) year only) the 5.5 Acre Parcel.

5. Failure to Construct Buildings or Structures Upon the Property. Notwithstanding anything to the contrary contained in this Agreement, if Developer does not apply for a temporary or permanent certificate of occupancy to occupy any building or structure upon the Property, Developer shall have no obligation to construct or maintain park improvements upon the 6.5 Acre Parcel or 5.5 Acre Parcel, and the sole obligation of the Developer shall be to convey the 6.5 Acre Parcel and 5.5 Acre Parcel to the City on January 1, 2008.

6. Reimbursement of Cost of Acquiring, Improving and Maintaining 6.5 Acre Parcel. The City hereby agrees, subject to the conditions set forth below, to reimburse the Developer for costs of acquiring, improving and maintaining the 6.5 Acre Parcel from and after the date of this Agreement, up to an amount not to

exceed \$750,000.00, together with interest on the costs of funds expended by the Developer, at two percent (2%) per annum over the prime rate published from time to time by the United Bank of Denver (collectively, the "Park Costs"). It is understood and agreed by the parties hereto that the obligation of the City shall extend only to the payment of monies appropriated in the future fiscal year or otherwise made available by Denver City Council for the purposes of this Agreement, and paid into the Treasury of the City and County of Denver, as more fully set forth in paragraph 7 of this Agreement. Subject to the foregoing, the City agrees to reimburse the Developer for the Park Costs as follows:

a. The City annually shall determine the amount of all sales tax revenues generated from the Development and received by the City (the "Development Revenues");

b. The City annually shall repay to the Developer an amount equal to the referenced Development Revenues toward the repayment of the Park Costs, but shall not be required in any one (1) year to repay more than one-third (1/3) of the Park Costs, except at its sole discretion; and,

c. The obligation of the City to reimburse to the Developer for the Park Costs shall expire on the earlier of (a) the fifteenth (15th) anniversary of the date of the first issuance of a non-residential building permit for any structure or building upon the Property or (b) January 1, 2008, and the City will have no further obligations under this Agreement and will retain ownership of the 5.5 Acre Parcel and 6.5 Acre Parcel.

7. Failure to Make Annual Appropriations. Financial obligations of the City and County of Denver are contingent upon the funds for the purpose being appropriated, budgeted and otherwise made available. It is expressly understood and agreed

Park Agr  
[RIG. 01A]  
December 14, 1990



that the obligation of the City for the above payment or any part thereof shall only extend to payment of monies appropriated by the City for the purpose of this Agreement and paid thereto into the Treasury of the City. It is the City's intent not to appropriate any of the funds for the Project Costs from the Parks Department budget for capital improvement funds, lottery funding or operational budget, although this sentence shall not diminish the obligations of the City as set forth in this Agreement.

8. Conveyance. Title to the 6.5 Acre Parcel and the 5.5 Acre Parcel shall be subject only to the "Permitted Exceptions" listed on Exhibits E-1 and E-2, respectively. Following the execution of this Agreement, the Permitted Exceptions may be amended only by the consent of the City, which consent shall not be unreasonably withheld or delayed. The Developer shall convey title to the 6.5 Acre Parcel and the 5.5 Acre Parcel to the City by special warranty deed, free and clear of all liens, encumbrances and taxes (except general taxes for the year of conveyance) subject only to the Permitted Exceptions.

9. Waiver. No waiver of any breach or default under this Agreement shall be held to be a waiver of any other or subsequent breach or default. All remedies afforded in this Agreement shall be constructed as cumulative, in addition to every other remedy provided herein or by law.

10. Binding Effect. This Agreement shall be binding upon the parties and shall inure to the benefit of their respective successors, assigns, representatives, and heirs.

11. No Third Party Beneficiaries. It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the City and Developer, and nothing contained in this Agreement shall give or allow any such claim or

right of action by any other or third person on such Agreement. It is the express intention of the City and Developer that any person other than the City or Developer receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only.

12. Conflict of Interest. The parties agree that no employee of the City shall have any personal or beneficial interest whatsoever in the services or property described herein and Developers further agree not to hire or contract for the services of any employee or officer of the City which would be in violation of the Revised Municipal Code, Chapter 2, Article IV, Code of Ethics, or Denver City Charter provisions C5.13 and C5.14.

13. Subject to Local Laws. Notwithstanding any other terms, provisions or conditions herein, each and every term, provision and condition herein, is subject to the provisions of the laws of the State of Colorado and of the Charter and Revised Municipal Code of the City and County of Denver.

14. No Discrimination in Employment. In connection with the performance of work under this Agreement, Developer agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, creed, color, religion, sex, age, national origin or ancestry; and further agrees to insert the foregoing provision in all subcontracts hereunder.

15. Agreement as Complete Integration-Amendments. This Agreement is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion or other amendment shall have any force or effect, unless embodied herein in writing. No subsequent novation renewal, addition, deletion, or other amendment hereto shall have

any force or effect unless embodied in a written amendatory or other agreement executed by the parties.

16. City Council Approval. This Agreement is subject to approval by the City Council of the City and County of Denver or this Agreement shall be null and void. This Agreement is also conditional upon the approval by the City of C.B. 535, or this Agreement shall be null and void.

17. Condition of Property.

(a) The Developer has obtained a Phase I Environmental Audit (the "Audit") for the 6.5 Acre Parcel and 5.5 Acre Parcel dated October 2, 1989 and July 18, 1990, which has been prepared by Industrial Compliance, Inc. ("Engineer"). Developer hereby represents and warrants that it does not have actual knowledge of any use, release, leak, discharge, spill, disposal, emission, storage, treatment, or transportation of Hazardous Substances that has occurred in or on any of the 6.5 Acre Parcel or the 5.5 Acre except as indicated in the Audit. Engineer is an independent contractor and Developer does not warrant or guarantee the accuracy of the Audit.

(b) As used herein, "Hazardous Substance" means any substance that is toxic, ignitable, reactive, or corrosive and that is or becomes regulated by any local government, the State of Colorado, or the United States Government. "Hazardous Substance" includes any and all material or substances that are defined as "hazardous waste," "extremely hazardous waste," or a "hazardous substance," pursuant to state, federal, or local governmental law. "Hazardous Substance" includes but is not restricted to asbestos, polychlorobiphenyls ("PCBS"), and petroleum.

(c) The Developer agrees to defend, indemnify and hold harmless the City from any and all claims, damages, fines,

judgments, penalties, costs, liabilities, or losses (including without limitation, any and all sums paid for settlement of claims, attorneys' fees, consultant, and expert fees) arising during or after the term of this Agreement in connection with the presence or alleged presence, on or before the expiration of the one (1) year maintenance period described in Paragraph 3 above, of Hazardous Substances in or on any of the 6.5 Acre Parcel or the 5.5 Acre Parcel, unless the Hazardous Substances are present as a result of the acts or omissions of the City's agents, employees, contractors or invitees.

(d) The City hereby acknowledges receipt of the Audit and, except for the corrective measures described on Exhibit F attached hereto and made a part hereof, the findings of the Audit do not indicate the presence or potential risk of environmental contamination or other problems requiring further investigation. Developer agrees to complete the corrective measures described on Exhibit F promptly following the acquisition of the 6.5 Acre Parcel. The Developer agrees to defend, indemnify and hold harmless the City from any and all claims, damages, fines, judgments, penalties, costs, liabilities, or losses (including without limitation, any and all sums paid for settlement of claims, attorneys' fees, consultant, and expert fees) arising from the Developer's failure to properly complete the corrective measures.

18. Notices. All notices and other communications hereunder shall be deemed to have been sufficiently given upon delivery if delivery is made by personal delivery or on the third (3rd) day following their mailing if sent postage prepaid, addressed as follows: to the City Attorney, 353 City and County Building, Denver, Colorado 80202 for the City, and to Developer at 730 Seventeenth Street, Suite 500, Denver, Colorado 80202.

IN WITNESS WHEREOF, the parties have executed this Agreement on the 22<sup>nd</sup> day of FEBRUARY, 1998.

ATTEST:

Felicia Muftic

FELICIA MUFTIC, Clerk and Recorder, Ex-Officio Clerk of the City and County of Denver

By: [Signature]  
DEPUTY CITY CLERK



CITY AND COUNTY OF DENVER

By: [Signature]  
MAYOR

RECOMMENDED AND APPROVED:

By: [Signature]  
Planning Director

By: [Signature]  
Manager of Parks and Recreation

By: [Signature]  
Finance Director

APPROVED AS TO FORM:

PATRICIA L. WELLS, Attorney for the City and County of Denver

By: [Signature]

REGISTERED AND COUNTERSIGNED:

By: [Signature]  
Auditor

"CITY"

LEETSDALE PARTNERS, L.P., a Colorado limited partnership

Ross Investment Group general partner

By: [Signature]  
Title: President  
Date: 12-14-90



**Case Study 6**  
**Indian Tree Subdivision - Arvada**

**Private Sector Representative: Richard J. Scheurer**  
**Public Sector Representative: Roy S. Howard**  
**Public Planner: D. Michael Elms**

**Background:** *The Indian Tree subdivision represents another typical development situation. The 12.7 acre parcel had PUD-R zoning, but remained undeveloped due to the nationwide economic slump of the 1980's. Surrounding areas had built out to lower population densities, and the property owners objected to new, higher density development on the parcel. The resulting agreement provided for more compatible development and resolved road and drainage problems within the existing developed areas. The final development plan provided for a high quality, successful project that is now fully developed. This case study represents a small-scale application of a development agreement, that provided the developer with a reasonable period of time to establish the project, resolved existing problems, and created a high quality development.*





INDIAN TREE SUBDIVISION - ARVADA  
**Private Sector Commentary - Richard J. Scheurer**

***Project Description***

The project involves a 12.7 acre site which was annexed to the City of Arvada in 1963. Historically, it had been zoned General Residential District until 1971 when it was rezoned to Planned Unit Development Residential. In 1982 it was again the subject of a city ordinance that assigned a density of eight dwelling units to the acre.

In October of 1988 application was made to down-zone the property to 5.28 dwelling units to the acre. City council rejected the rezoning request and the accompanying Preliminary Development Plan which would have allowed for 67 single family dwelling units. In January of 1989 City Council approved the request for rezoning to 4.65 dwelling units to the acre and approved a Preliminary Development Plan allowing for the construction of 59 moderately priced single family dwelling units.

The project is one often characterized as an "infill" area because of the surrounding completed development. To the North, the adjacent land was zoned and developed as single family at a density of 4.53 dwelling units to the acre. To the East and South lies a developed public golf course. To the West lies a multi-family apartment complex.

The final review process took about one year and involved numerous meetings with the neighboring homeowner's association, planning staff, legal staff, a lending institution, representatives of the quasi-municipal recreation district which owns and operates the contiguous golf course, planning commission and finally the City Council.

***Indian Tree Development Agreement***

Most any land use approval process in Colorado today will end in the execution of a developers subdivider's agreement. The agreements generally identify the developer's commitment to the governmental entity on construction of public improvements as well as other agreements to the community for mitigation of impacts of the development. A number of distinct segments of the community frequently present divergent interests in the public hearing process. The principal interests represented in the development of the Indian Tree Subdivision were typical. In order for the developer to successfully secure necessary approvals from the Arvada Planning Commission and the City Council, it was first necessary to establish and maintain good communications with the following groups:

- Planning, engineering and legal staff of the City of Arvada.
- Board of Directors of the Indian Crest Homeowners Association,
- Representatives of the North Jeffco Park and Recreation District,
- The fee landowner/lender.

As negotiations progressed with each of these entities, it would be necessary to draft the documents in which commitments would be memorialized and future performance and enforcement would be guaranteed. In the instance of the Indian Tree development those documents would take the form of both a Subdivider's Agreement and restrictive covenants.

The developer had to be weighing each commitment or concession against the economic viability of the project. The parcel involved what is referred to as an "infill" project, an enclave surrounded by fully developed land. Surrounding development had already, in effect, defined a rather narrow market that dictated the product that could be built and successfully sold. In addition, the context in which this development was to occur was a very weak real estate market. In this instance, the Developer had identified the product to be a moderately priced home which would suit the needs of young families or retired couples. Mindful that most negotiated concessions would add cost to the sale price of each unit, the developer had to continually factor and consider each such commitment. Failure to do so would drive up the cost of the homes to be built and very possibly place the product out of the reach of the current market. Tolerance of higher home costs in such a restrictive market is much lower than one might expect.

The price range of a home was not the only concern of the developer. There existed a number of equally important elements in planning the successful development of Indian Tree. Indian Tree would not only have to be compatible with surrounding development but it would also have its own sense of community and identity. It was the goal of the developer to create a community within a community. That identity is in part created physically by limited access and architectural theme. The design criteria needed to accomplish this goal were not always consistent with the demands of city staff or the neighboring homeowners association. As an example, existing landowners learned that replication of the brick structures featured in their fifteen year old development would not sell in today's market. Once the issue was explained and discussed, the neighborhood group accepted the realities of the market and dialogue moved on to other subjects. A good amount of give and take would be required. Issues such as lot sizes, the number of units, set backs, sidewalks, access, landscaping, architectural treatment and the like all had to be resolved in the context of impact on the community, economic and design viability of the community to be created and compliance with the land development regulations of the City. The objective was to appear before the city council able to demonstrate compliance with City development standards together with active community support.

The first step in the long process to approval of the rezoning and platting of the Indian Tree Subdivision began in the living room of a Director of the Indian Crest Homeowners Association. The unsuccessful initial attempt to down-zone the subject property was due in large part because of the opposition of these homeowners. They had expressed concerns about the traffic impact on their neighborhood, the access to the adjoining development, drainage problems, visual impact, construction impact, maintenance responsibilities for the perimeter fencing, the type of neighbors that could be expected, and the economic impact of the development on the home values.

The concerns of the staff at the City were focused on how well the plan worked. Specifically, staff concerned itself with such issues as sight distance for access into traffic on the main collector, limited direct lot access to the collector street, traffic movement within the development, ease of negotiation of the driveways, on and off street parking, location of sidewalks, landscaping and design required to facilitate some of the smaller lot configurations proposed, routing of utilities, visual impact of the development, avoidance of linear streetscapes, and the siting of the planned off site facilities for the adjacent golf course.

Experience had taught the developer that community support for the project was the key to a city council approval. Accordingly, initiative was taken to schedule meetings with the most affected homeowners group. Much time was taken to identify the interests of the neighborhood and, in turn to communicate the interests and needs of the developers for a successful project. A failed project, no matter how pricey the homes would be, would result in uncertainty for the local community and a protracted period of time for the completion of the buildout. The community representatives were well aware of the fact that this proposal presented some inherent opportunities. In discussions with the home owners it was evident that they had taken the time to investigate the developer and to appraise some of its developments in other locations in the region. They were cognizant of the fact that if this particular proposal failed, the prospects for a better development or a more cooperative developer were dubious.

While there were the frustrations of dealing with a representative group of directors of the Homeowner's association, and consultation resulted in some delays, the progress was steady on agreements. Shake roofs would be used. Models would be varied on a given street. The number of lots on the northerly boundary contiguous with the existing neighborhood would be reduced with the greater density occurring internal to the development. Agreement was reached on the perimeter fencing in term of construction materials, maintenance and timing of construction. Covenants were to be written for the development that assured no pedestrian or vehicular access would be allowed from West 78th Place, which separated the project from the existing residential development. Commitments were reached with regard to grading and drainage improvements on some contiguous open space parcels under the control of the Indian Crest Homeowners Association.

The specific opportunities afforded to the neighborhood can be summarized as the chance to have direct input on matters of landscaping, access, architectural guidelines, maintenance of common areas, lighting and similar matters which have an impact on the surrounding neighborhood. The developer had learned in the meetings with the homeowners that they were particularly concerned with the effect the proposed development would have on existing home values. They stressed that they had experienced a substantial deflation of the value of their homes as a result of an economic down turn in the area. The specter of further devaluation by the wrong type of development was foremost in their minds. Issues of enforcement of the commitments were discussed and, where appropriate, these agreements were to be integrated into the covenants that would first be reviewed by the City's legal counsel and then placed of record.

The fact that the development borders a public golf course presented several additional issues. The North Jefferson County Park and Recreation District owns and operates the Indian Tree Golf Course. Representatives of the District articulated several concerns relating to the development. First, they had an interest in limiting the liability for errant golf balls that might cause injury to persons and property. Second, they expressed concerns relating to fencing and access from the development to the golf course. Third, they wished to coordinate a project for the construction of rest room facilities on the westerly portion of the course near the Indian Tree Development. The facility would require utilities supplied through easements across the project. Neighbors to the north were concerned with the visual impact of the facility and the specific location of the structure. Accordingly there were multilateral discussions of the golf

course project as well. The District was specific with regard to fencing that would separate the development from the golf course. If the fence were a chain link, the District would accept and maintain it. The Developer had valid marketing reasons for avoiding chain link in favor of a more aesthetically pleasing iron fence. The developer provided for an upgraded fence which would be under the ownership and maintenance of the Indian Tree Home Owners Association and appropriate language was thereafter included within the covenants. The matter was resolved to the satisfaction of the parties. After obtaining the assent of the homeowner's group and the District representatives, the developer included the needed easements on the final plat for the golf course facility.

In the negotiation process, it was also necessary to coordinate all substantive developer agreements with the fee owner of the property. In this case, consultation and approval was needed with First Federal Savings Bank on matters that would be included within the covenants and the Subdivider's Agreement as it would be a signatory to these documents.

The vast majority of the time expended was devoted to meetings, negotiations and telephone conferences aimed at reaching an accord by all parties. The time that it took to incorporate the agreements in both the subdivider's agreement and the covenants was in fact a relatively small portion of the total effort.

With the major issues of the neighborhood, city staff and the recreation district being addressed, the final drafts of the covenants and subdivider's agreement were circulated and the matter was set for hearing before the city planning commission. At the hearing the previous objectors now attended in support of the proposal. Issues raised independently by the planning commission members were for the most part technical questions and responses were from the engineering or land design consultants. The proposal then proceeded to city council for final action. While there were several homeowners testifying in a dissenting capacity, the Association representatives met their commitment to the developer to appear in support. City council passed the proposal and the project moved ahead.

As expected from the onset, the final negotiated agreements were incorporated in the Subdivider's Agreement. In the twenty three separate provisions of the agreement, the Developer agreed to construction and funding of public improvements, park fees, drainage fees, installation of fencing, installation of utilities, landscaping, off-street parking, specific setbacks, construction of sidewalks, and recordation of the negotiated restrictive covenants. The covenants, in turn, embodied the assurances given to the Indian Crest Homeowners regarding limited access on their common boundary and maintenance perimeter fencing and of intervening open space.

A developer's appraisal of a given municipalities land use approval process is essentially based upon its fairness, its certainty and its timeliness. In this case, the municipality clearly articulated and published its development standards. Efforts were made to fully identify issues at the commencement of the process rather than seriatim and the developer had the sense that standards were equally applied to all developments within the city. Finally, timely review of the application was provided and no undue delays were thereby encountered. The specific provisions of subdivider's agreements or covenants are often times less important than the assurance to the developer that it knows with reasonable certainty, from the onset, what standards must be met, what costs of development will be incurred, what political/community issues must be resolved and how long it will take to get to final approval.

## INDIAN TREE SUBDIVISION - ARVADA

**Public Sector Commentary - D. Michael Elms and Roy S. Howard**

### ***Introduction***

Indian Tree Subdivision is a 12.7 acre single-family subdivision located at W. 78th Place and Allison Way, approximately 1/4 mile west of Wadsworth Boulevard (Colorado State Highway 121), and 1/4 mile south of W. 80th Avenue. The Indian Tree Subdivision was originally part of an overall 23 acre planned unit development property known as Indian Crest. The Indian Tree Golf Course, which is owned and managed by North Jeffco Park and Recreation District, is located adjacent to the property on the east. The Indian Crest Filing No. 1 residential subdivision is located to the north, and the Indian Tree Apartments and Club Crest single-family residential development are located to the west.

### ***History***

The Indian Tree property (the "site") was annexed to the City in 1963 and zoned General Residence District for single family development. In 1971, with the adoption of a new zoning ordinance, the site was zoned Planned Unit Development-Residential (PUD-R). In 1976, Ralph Jacobson, a local developer, received approval of an outline development plan (a sketch plan denoting major land uses, densities, and streets) from the City for the Club Crest development, which included the property in question. In 1977, Reitler & Company purchased 23 acres from Ralph Jacobson and named the proposed subdivision Indian Crest. During 1977, Reitler & Co. also received approval of a rezoning to PUD-R (8 dwelling units per acre) for 127 attached and detached single family dwelling units (a mixture of duplexes, tri-plexes and single family detached units). Reitler & Company named the overall development the Indian Crest Subdivision. In 1978, Reitler & Company received final development plan and final plat approval for Indian Crest Filing No. 1 on 11 acres of the 23 acre parcel. The approved final plat included 54 total units consisting of 24 duplex, 1 tri-plex and 3 single-family detached units. Reitler & Company subsequently constructed 40 of the approved 54 units. Following the construction of the 40 units in the late 1970's and early 1980's, the residential housing development market went flat and there was little demand for housing of the type that Reitler & Company was constructing. Subsequently, the remaining 12 acres proposed as part of the Indian Crest Subdivision remained vacant, and ownership changed from Reitler & Company to First Federal Savings Bank.

### ***The Development Proposal and Public Hearing***

In June 1988, Genesee Associates, Ltd. as the applicant and developer, and First Federal Savings Bank as the owner of the property, filed an application with the City for rezoning, outline development plan amendment, and preliminary development plan approval on 12.7 acres. Genesee Associates, Ltd. requested rezoning of the property from PUD-R (8 dwelling units per acre), to PUD-R (5.28 dwelling units per acre), outline development plan amendment from attached units (duplex and tri-plex units) to single-family detached units, and preliminary development plan approval for 67 single-family detached homes.

Under Arvada's land use procedures, applications for rezoning and development plan approval are considered concurrently at the Planning Commission and subsequently

at the City Council public hearing. On September 20, 1988, the Arvada Planning Commission held a public hearing to consider the request by Genesee Ltd. During the process of the Planning Commission public hearing, a number of citizens and residents of the existing Indian Crest Filing No. 1 Subdivision to the north appeared to oppose the proposed rezoning and development plan. The property owners had previously met with the developer, as well as the staff, to highlight their concerns. Primarily, the residents concerns revolved around approximately 11 items. In addition, the North Jeffco Park and Recreation District had several concerns over the project related to its location adjacent to the Indian Tree Golf Course.

The principle concerns of the adjacent residents living in the Indian Crest Filing No. 1 Subdivision revolved around the issues of density, building materials, roofing materials, fencing, access onto W. 78th Place (a private road in the Indian Crest Filing No. 1 Subdivision), drainage, landscaping of vacant tracts within Indian Crest Filing No. 1 left over by Reitler & Company, and building heights. Concern expressed by the North Jeffco Park & Recreation District had to do with prohibiting access from the development onto the Indian Tree Golf Course, and the desire to have Genesee extend water and sewer lines to the boundary of the golf course in order to allow a restroom to be located on the golf course.

With respect to the density issue, the Indian Crest Homeowners Association was concerned over the proposal by Genesee to build 67 single-family, two-story homes adjacent to their single-story duplex development. Even though the original zoning on the property allowed for 8 units per acre, Reitler & Company had constructed Indian Crest Filing No. 1 at less than 5 units per acre; however, the perception by the homeowners association was that the request by Genesee to construct the homes at a density of 5.28 dwelling units per acre was a significant increase over their development and would have a negative impact on their quality of life. During the public hearing, the property owners expressed an opinion that the City should require the developer to build single story, all brick homes in a similar size and price range as those existing in the development in which they lived. In addition to the concern about the overall density, there was a concern about the density of the proposed development along the north property line adjacent to the existing Indian Crest development. During the public hearing, several property owners expressed their opinion that they would be more accepting of the development if the density along the north property line was reduced in order to mitigate the impact on their homes.

The Indian Crest Homeowners Association also had concerns about the proposed building and roof materials. The homeowners association had met with City staff and the developer and requested that Genesee construct their homes of all brick similar to those that had been built by Reitler & Company. The developer indicated that because of the market for the homes and the added cost for brick, they wanted to build a product with lap siding and only provide for the front elevation in brick or rock. With regards to roof materials, Genesee had proposed asphalt composition shingles, and the homeowners proposed all wood shake shingles similar to their development. Another area of primary importance to the homeowners association was that of correcting existing storm water drainage problems and improving W. 78th Place, a private street within their development, even though W. 78th Place would have no beneficial effect on Genesee's development. The homeowners association had approached the City on two occasions in 1988 requesting that the City accept a dedication of their private street to make it

public, and then have the City repave and upgrade that street. West 78th Place was originally conveyed as a private street to the homeowners association and the association had not maintained the road. Because this street was not built to City standards, the City refused to take over ownership and maintenance unless it was brought up to City standards. Because of the small size of the homeowners association and its limited funds, the association was unable to upgrade the street to City standards. Following refusal of the City to take over W. 78th Place, the homeowners requested that the development agreement for the Indian Tree Subdivision prohibit access from that subdivision onto W. 78th Place and prohibit gates from the backyards of the new homes into the vacant tracts from the new development. When Reitler & Company developed Indian Crest Filing No. 1, two vacant tracts on the south side of W. 78th Place were left over from that development. The intent of Reitler & Company was to include these tracts into a future Filing No. 2 to the south of W. 78th Place. Since Reitler & Company intended to develop the vacant tracts as part of a second filing of Indian Crest Subdivision, the properties were never properly graded, causing storm water drainage problems to the existing homes in Indian Crest Filing No. 1. The Indian Crest Homeowners Association approached Genesee to either purchase the vacant property and include it in their development, or to regrade the property in order to help solve existing drainage problems. The vacant tracts had also become overgrown with weeds and used as a dumping ground for grass clippings, tree limbs and excess dirt. Therefore, the homeowners requested that Genesee assist them in landscaping those vacant tracts so as to reduce its unsightliness.

Since the proposed development abutted the Indian Tree Golf Course and two vacant properties adjacent to an existing subdivision, Genesee had proposed a perimeter fence along the boundaries of the project in order to more define their development and provide a better sense of community. Along W. 78th Place, Genesee originally proposed constructing a wood stockade fence. The homeowners in the Indian Crest Subdivision were concerned about the appearance of the fence and requested one that would more closely match what they had in their subdivision. The homeowners association requested that Genesee construct an upgraded fence with board and battens, along with brick posts at approximately 60 ft. intervals. Along the golf course, the developer agreed that they would take down a dilapidated wood fence that had been installed many years before by North Jeffco Park and Recreation District. The developer's desire was to provide a fence that provided rear yard security as well as golf course viewing, while North Jeffco had a desire to provide security and restrict access onto the golf course from the homes. North Jeffco had originally proposed a solid wood stockade type fence. Genesee and North Jeffco finally agreed that Genesee could build a wrought iron fence without gates that allowed golf course viewing and restricted access onto the golf course.

Finally, as part of the negotiations for the development between North Jeffco and Genesee, North Jeffco requested that Genesee extend water and sewer lines through the vacant tracts owned by the Indian Crest Homeowners Association in order to allow North Jeffco to locate a restroom on the golf course. Genesee originally had been concerned over the location of the restroom and the negotiations revolved primarily around the location of the restroom so that it would not be seen from the new homes, or impact the existing homes in the Indian Crest Subdivision. In addition to this negotiation, Genesee had to negotiate with the Indian Crest Homeowners Association for

easements through the vacant tracts for these water and sewer lines.

### ***Planning Commission Hearing***

On September 20, 1988, the Arvada Planning Commission held a public hearing on the proposed Indian Tree Subdivision. As part of the question period of the public hearing, Planning Commission members expressed a concern about the density, stating they felt 4.5 dwelling units per acre was more representative of the overall City and the neighborhood than the 5.28 dwelling units per acre proposed by Genesee. In addition, there was concern over the small lot sizes of 5,000 sq. ft. being proposed by Genesee and their lack of compatibility with the Indian Crest Filing No. 1. Finally, the Planning Commission members expressed a concern over the quality of the proposed construction, and indicated they wanted more brick and shake shingles versus that proposed by the developer. A motion was made to approve the proposed rezoning and preliminary development plan by a Planning Commission member who stated the following findings for the motion: there were changed conditions since the Comprehensive Plan had been adopted in 1985, and that this project was in conformance with the City's goals and targets and the City's PUD ordinance, and finally, that the proposed development was compatible with adjacent land uses and zoning. However, based on concerns expressed by several Planning Commission members and the public, the vote for approval of the rezoning to PUD-R (5.28 dwelling units per acre) and the preliminary development plan for 67 units failed on a vote of three in favor to three against with one member absent. Since Arvada's code requires four affirmative votes to approve a rezoning request, the motion was defeated and the application was recommended to City Council for denial.

Following the denial by Planning Commission, the developer appealed the denial to the City Council. On October 17, 1988, the City Council held a public hearing and by a vote of five to two, denied the request to rezone the property and approve a preliminary development plan.

During the intervening two months, the developer, the Indian Crest Homeowners Association and the City staff met on several occasions to negotiate development plan issues and density considerations. On December 20, 1988, a new public hearing was held before the Arvada Planning Commission. Genesee Associates, Ltd. had submitted a new request to rezone this property from PUD-R (8 dwelling units per acre) to PUD-R (4.53 dwelling units per acre) and approval of a new preliminary development plan for 59 single family dwelling units. At this public hearing, Planning Commission voted unanimously to recommend approval of all three requests based on the changes that had been proposed by the developer and the testimony generally in support by the homeowners association. Specifically, Genesee had agreed to change the following items: reduce the total number of lots from 67 units to 59 units, thereby reducing the density from 5.28 dwelling units per acre to 4.53 dwelling units per acre. Genesee increased the overall minimum lot size from 5,000 sq. ft. to 6,000 sq. ft. Genesee increased the size of the lots on the north side adjacent to the Indian Crest development to a minimum of 7,500 sq. ft. In addition, Genesee increased the lot widths adjacent to the Indian Crest development, on the north side, from 50 ft. lot frontage to a minimum of 75 ft. lot frontage. The homeowners association agreed not to oppose Genesee's request to construct homes with only front brick or rock facades, and to allow Genesee to construct two-story homes instead of the one-story homes. In addition, the developer



then agreed to upgrade the roofs from an asphalt composition shingle to wood shake shingles on all units. The developer also agreed to upgrade the perimeter fence on the north side from a plain stockade fence to a board and batten type fence with brick posts every 60 feet. North Jeffco and Genesee negotiated to allow Genesee to be allowed to construct a wrought iron perimeter fence adjacent to the golf course without gates opening onto the golf course. Finally, the developer and homeowners association agreed that in exchange for utility and drainage easements on the two vacant tracts in the Indian Crest Subdivision, Genesee would regrade those tracts in order to help correct any existing drainage problems, and would provide a minimal amount of landscaping on those tracts. After presentation by the developer and discussion of the concessions between the developer and the homeowners association, and after testimony by the homeowners association speaking in favor of the development, the Planning Commission and City Council approved the rezoning and preliminary development plan on January 16, 1989.

Following approval of the zoning and preliminary development plan, the developer proceeded to prepare a final development plan and plat for the 59 units. Because of the original concern by the property owners and homeowners association in Indian Crest and because of some continued posturing by certain members of the homeowners association for additional improvements and upgrades to the proposed homes, Genesee Associates, Ltd. chose to proceed with obtaining vested rights for the site specific development plan for this development. Therefore, on March 21, 1989 and April 17, 1989, the Planning Commission and City Council respectively approved the final development plan and final plat and vested rights ordinance for the Indian Tree Subdivision by a unanimous vote.

### ***Arvada's Vested Rights Ordinance***

The Arvada vested rights ordinance requires a landowner to make an application to the City for the establishment of a statutory vested property right. See Colo. Rev. Stat. § 24-68 101 et seq. (1987). The City approval process for plat and development plans does not require either a public notice or a public hearing for City Council consideration of plats or development plans, which are requirements of the vested property rights statute.

Plats and development plans are considered by the City Council as routine business items at a meeting. Plats and development plans are approved or disapproved by a simple motion to approve or disapprove.

In order to comply with Colo. Rev. Stat. § 24-68-103(1) (1987), requirements for the notice and a public hearing by the local government, it was necessary for the City to alter its plat and development plan approval process to provide for the required notice and public hearing. The City did so by adopting an alternate procedure providing for approval of final plats and final development plans by ordinance.

The "site specific development plan" as defined in Colo. Rev. Stat. § 24-68-102(4) (1987), is the final plat or final development plan for the City. An applicant for either final plat or final development plan approval may elect either approval by a motion of the City Council, for which there is no vested property right established for the property, or by an ordinance that has the notice and public hearing required by the vested property rights statute. Moreover, the ordinance establishing a vested property right is subject to the referendum, which is a requirement of Colo. Rev. Stat. § 24-68-103(1)

(1987). The home rule charter for the City of Arvada provides that only ordinances legislative in nature are subject to the referendum.

In deciding whether to elect approval by either a motion or by an ordinance, applicants for vested property rights will generally take into consideration the time involved in an ordinance approval or subjecting their developments to a referendum. It takes an additional two weeks for ordinance approval because of the City charter requirements of at least seven days notice for a public hearing on an ordinance.

### ***Conclusion***

Indian Tree Subdivision was the second attempt by Genesee Associates, Ltd. to receive approval and develop the property. This property represents a classic infill development project where a property has remained vacant for a number of years while residential development has grown up around the property. In this case, the property had remained vacant for over 10 years. The development of infill property such as the proposed Indian Tree Subdivision causes increased expectations by existing property owners who desire to have either no development of the property or development that is equal to or at a higher level than the property in which they live. In addition, in this instance the adjacent property owners felt that there was an obligation by the new developers to correct previous problems such as storm water drainage and inadequate street construction by the previous developer since this new developer was taking over a portion of that project. Therefore, there was a perceived need by Genesee Associates, Ltd. to obtain vested rights to protect their investment.

The final outcome of this development indicates the need for a high level of communication, cooperation, negotiation and compromise between not only the developer and the City, but also the developer, adjacent property owners, and the City. The final development plan approved for the Indian Tree Subdivision is a result of those negotiations and compromises and has resulted in a high quality, highly marketable development for Genesee Associates, Ltd. The development has built out in less than a three year time period, and Genesee subsequently purchased and developed the remaining 14 lots in the Indian Crest Filing No. 1 Subdivision. In 1991, Genesee negotiated an agreement between the existing homeowners association and the City to replat the existing 14 approved lots into 13 lots, and construct 13 single-family homes. In addition, the developer agreed to build at least 4 of those homes as ranch style homes that were immediately adjacent to other existing ranch style homes. All the homes have now sold and the Indian Crest/Indian Tree neighborhood has been stable. No adverse relations have developed between Filing No. 1 and Filing No. 2.

From a legislative history point of view, this case presents the type of situation that the vested rights statute was meant to address. Clearly, if this had been a new development with no surrounding or adjacent development, it would not have made sense for Genesee Associates, Ltd. to spend the time or money to obtain vested rights.

This case illustrates that the applicability of the vested rights ordinance is limited to controversial infill projects. The use of vested rights for infill projects is ideal, especially in a volatile political environment. The process in Arvada permitted citizen comment and input. The granting of vested rights by the City allowed the developer to have a reasonable period of time to establish their project without threat of loss of their investment. In this case, the 3 years of vested rights permitted Genesee to develop the site and sell homes in an orderly and efficient manner.

COUNCIL BILL NO. 89-16  
ORDINANCE NO. 2609

AN ORDINANCE APPROVING A SITE SPECIFIC DEVELOPMENT PLAN  
AND GRANTING A VESTED PROPERTY RIGHT FOR INDIAN  
TREE SUBDIVISION FILING NO. 1

WHEREAS, a public hearing was held on the 21st day of March, 1989, before the Planning Commission, and at the conclusion of said public hearing, the Planning Commission recommended approval of the Final Development Plan for the Indian Tree Subdivision Filing No. 1.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ARVADA, COLORADO:

Section 1. The City of Arvada hereby approves the final development plan for Indian Tree Subdivision Filing No. 1, as more particularly described in Exhibit A attached hereto and by reference incorporated herein, as a site specific development plan subject to the following conditions:

1. The setbacks for this subdivision shall be:

Front setback:

front entry garage	16 1/2 feet from property line
side entry garage	12 feet from property line

Side setback: 5 feet from property line

Rear setback: 10 feet from property line

The maximum building lot coverage shall be 40 %.

2. The plot plans for Lots 9-10, Block 1, and Lots 22-27, Block 2, will provide a minimum of two off-street parking spaces in addition to the two-car garage.
3. No more than three front or side entry garage units will be placed in a row without a three foot front setback variation.
4. The irrigation and front yard landscaping on all lots and along Allison Street, as indicated on the approved final development plan, shall be installed prior to the issuance of a Certificate of Occupancy for an affected lot.
5. The fencing along Allison Street and the Indian Tree Golf Course, as indicated on the approved final development plan, shall be installed prior to the issuance of a Certificate of Occupancy for an affected lot.
6. The fencing along the entire north property line of the subdivision, as indicated on the approved final development plan, shall be installed prior to the issuance of the first Certificate of Occupancy for the subdivision.
7. A four foot detached sidewalk shall be constructed on the east side of Allison

Street adjacent to Indian Tree Filing No. 1.

- 8. All internal local streets shall be dedicated and constructed to the City local street standards.

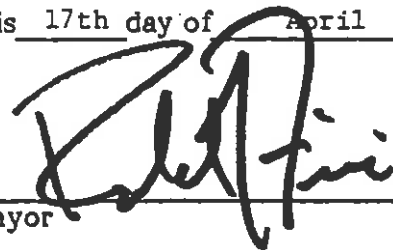
Section 2. Approval of this site specific development plan creates a vested property right pursuant to CRS § 24-68-103. This vested property right shall expire on April 10, 1992.

Section 3. This ordinance is legislative in character and subject to referendum as provided in § 5.14 of the Arvada Home Rule Charter.

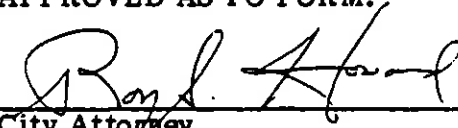
Section 4. This ordinance shall be effective five days after publication following final passage.

INTRODUCED, READ AND ORDERED PUBLISHED this 3rd day of April, 1989.

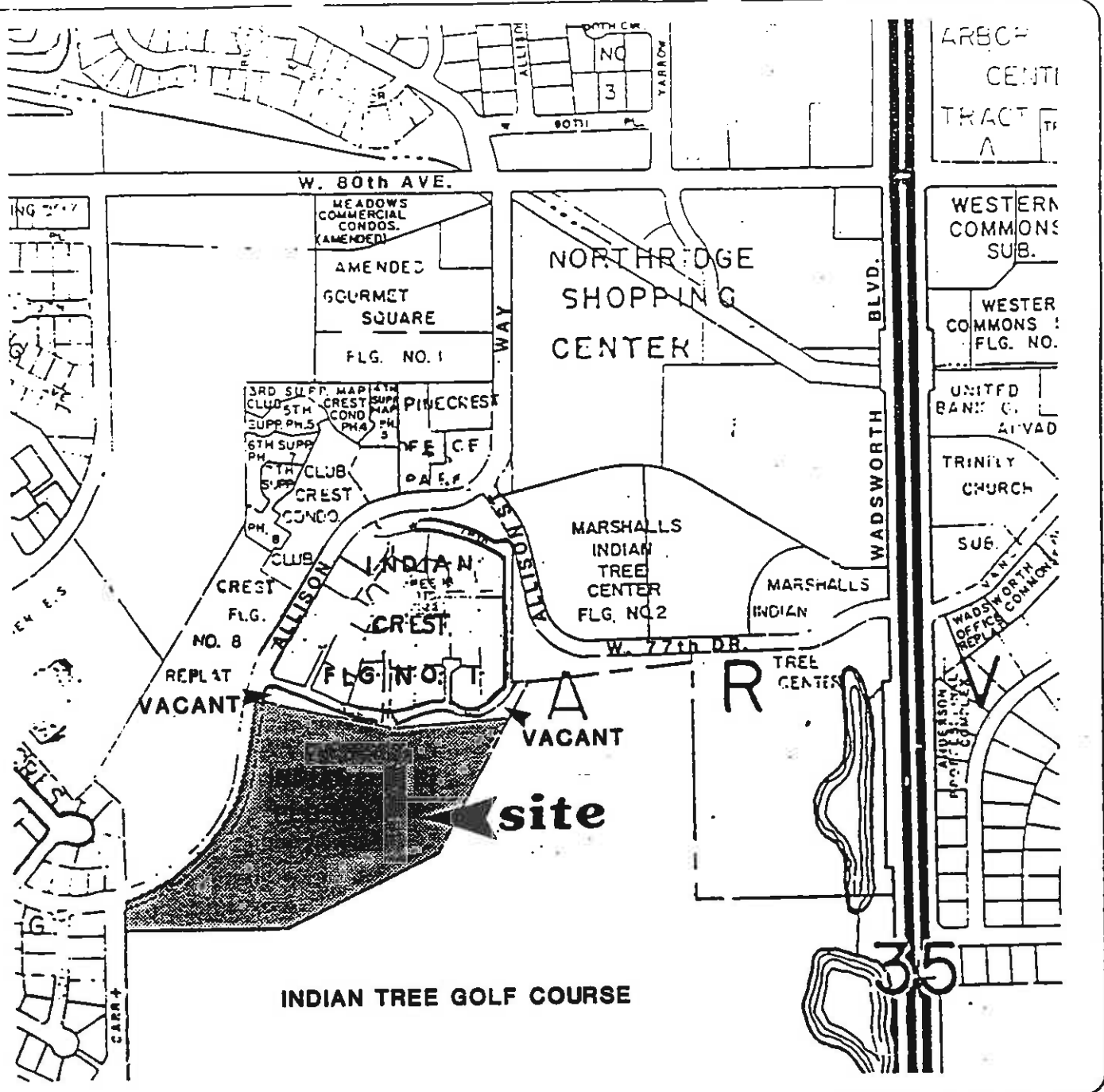
PASSED, ADOPTED AND APPROVED this 17th day of April, 1989.

  
 \_\_\_\_\_  
 Mayor

ATTEST:  
  
 \_\_\_\_\_  
 City Clerk  


APPROVED AS TO FORM:  
  
 \_\_\_\_\_  
 City Attorney

Publication Dates: April 5, 1989 .  
April 19, 1989 .



# INDIAN TREE SUBDIVISION FLG. 1 89-FDP-5

**vicinity map**

RECEPTION NO. 89035953





**Case Study 7**  
**Moses Lot Split - Aspen**

**Private Sector Representative: Michael J. Herron**

**Public sector Representative: Edward M. Caswall**

**Home Owner Association Representative: Charles T. Brandt**

**Background:** *This development agreement is unusual in that the City of Aspen determined that the resolution of the issues involved in the agreement were important enough to grant vested rights in perpetuity. This agreement provided a condominium HOA with ownership of open space and tennis courts that were previously leased, the city accomplished the elimination of development potential of a sensitive parcel, and the purchaser of an existing 3800 square foot home acquired additional acreage, which allowed for the right to demolish the existing house and rebuild a larger home on the parcel.*

*This is a very unique development agreement, and represents the wide range of elements that development agreements can address and issues that can be resolved through the process of negotiation.*





## MOSES LOT SPLIT - ASPEN

### Private Sector Commentary - Michael J. Herron

#### **Background**

Moses Aspen View Homesite, Inc., a Colorado corporation ("Moses"), was the owner of Lot 2, the Moses Lot Split, located on Aspen Mountain in Aspen, Pitkin County, Colorado ("Subject Property").

The Subject Property was located in the immediate vicinity of the Aspen Alps Condominiums ("Alps"), a multi unit condominium complex, located in Aspen, Pitkin County, Colorado, and abutting the main ski slopes of Aspen Mountain. Both the Subject Property and the Alps were accessed by a private road to which each property had an easement. The road was part of a parcel of property of approximately 4.07 acres running along side of Aspen Mountain, a portion of which was improved by tennis courts which were leased to the Alps by virtue of a lease expiring in the early part of the 21st century ("M & B Property"). The M & B Property also included vested development rights, depending on the applicable zoning, from seven to nine units which could have included three free-market units and two employee units which would not have to be competed for under Aspen's Growth Management Plan. In other words, a building permit could be applied for without any other land use approvals.

Moses was represented by Michael J. Herron of the law firm of Garfield & Hecht, P.C. The Alps was represented by Charles T. Brandt of Holland & Hart, P.C. The M & B Property was owned by Messers, Mitchell and Bornefeld, who were represented by Leonard M. Oates of Oates, Hughes & Knezevich, P.C. The land use application was prepared by Alan Richman Planning Services, Alan Richman being a former Aspen/Pitkin County Planning Director.

#### **Objectives**

Objectives of the land use application were to accomplish all of the following:

1. Increase the size of the Subject Property so that its allowable floor area ratio, according to the City of Aspen Land Use Code, would increase to allow a 5,000 square foot house. The present lot split plat restricted the size of the house to 3,800 square feet.
2. Obtain a conveyance of a portion of the M & B Property sufficient to accomplish number 1. above and to convey the balance to the Alps so as to convey to them the existing tennis courts in perpetuity.
3. Pay a consideration to the owners of the M & B Property for the value of that property based upon the value of the development parcel and the parcel upon which the tennis courts were located. That latter parcel would increase in value once the tennis court lease expired.

To accomplish the foregoing, Moses agreed to pay the consideration to Messers, Mitchell and Bornefeld so as to accomplish what it wanted to accomplish on the Subject Property and to benefit the Alps by accomplishing what they needed and benefit Messers, Mitchell and Bornefeld to pay them the value of the M & B Property. Special conditions of the contract were that all of the land use approvals would be approved as noted below and that the vesting would be of a permanent nature.

### ***The Land Use Application***

The following constitute matters that were considered by the Aspen Planning and Zoning Commission and the City Council in connection with the land use application:

1. A lot line adjustment to increase the size of the Subject Property by including a portion of the Mitchell/Bornefeld Property so it would support 5,000 square feet of floor area ratio.
2. 8040 green line approval for the home located on the Subject Property.
3. The subdivision of the M & B Property so that it could be divided between the Alps and Moses to accomplish the above.

The Aspen City Planning and Zoning Commission has the authority to preliminarily approve the application, which was granted at a series of public hearings, and the sole authority to approve 8040 green line review. 8040 green line review is a semi architectural control review for any development of land located in the City of Aspen above the 8040 elevation line. The subdivision, lot split and all other related issues then went to the Aspen City Council for their approval. All approvals were granted, except that the City Council was not willing to vest in perpetuity the approvals granted to the Subject Property, including the right to construct 5,000 square feet of floor area. The City Planning Director, City Attorney and City Council were reluctant to vest in perpetuity by virtue of the precedents it could create and the fact that all previous vesting in the City of Aspen followed the State Statutes and provided for a three year vesting period. Moses was unwilling to pay the consideration unless it received its vesting in perpetuity. At the last City Council meeting the application was tabled for two weeks to see if the parties could resolve the issue. Various members of the City Council were brought to the Subject Property and the M & B Property so that the situation could be more clearly explained. For example, the Subject Property was not visible from most of the City of Aspen, therefore, in reality there was no necessity for an 8040 green line review. The additional square footage of 1,200 square feet was shown to be nominal by virtue of what could have been asked for based upon the lot line adjustment. As a further consideration, all of the development rights in the M & B Property, with the exception of that portion added to the Subject Property, were forever neutralized and eliminated.

Based upon all of the foregoing and especially the fact that the development potential of the M & B Property both by right and by application (the latter being to develop a series of townhouses near the central core of Aspen) was neutralized forever was sufficient to sway the City Council so that by a 5 - 0 vote all land use applications were granted and the rights given to the Subject Property were vested in perpetuity.

### ***Final Analysis and Conclusion***

The City of Aspen Land Use Code does not allow for any variances in the floor area allowed by virtue of zoning to property in the City, regardless of whether by PUD from a special application or a variance process. The size of floor area of properties in Aspen and their regulation represents sacrosanct concepts which are never varied. At first blush, the entire application goals appeared non-attainable, especially the seeking of vested rights in perpetuity. This latter concept being one that literally scared the hell out

of both the Planning Office and the City Council. It is a concept totally foreign to them and one which they felt was fraught with danger for reasons both articulated and unknown. I suspect that the latter was a great fear of City Planners and the City Council, i.e. giving away something in the public domain forever.

As a result of a lobbying process, as well as making cogent arguments to all involved, it was determined that the public good to be gained (elimination of development rights in the M & B Property) by far outweighed the unknown danger (perpetual and permanent vesting of the Subject Property). Cool, logical heads prevailed with the result that all parties involved, including the citizenry of the City of Aspen benefitted by this land use application.



***The High Cost of Residential Square Footage and Open Space: The Aspen Alps Condominiums, Aspen, Colorado***

The Aspen Alps Condominium complex is comprised of 83 individual condominium units in eight separate buildings at the base of Aspen Mountain, in Aspen, Colorado, a world famous ski resort. Some of the Aspen Alps Units have the highly coveted ski-in/ski-out access. Built in the early 1960s, the first buildings constructed by the developers of the Aspen Alps, George P. Mitchell and H.A. Bornefeld, Jr., from Houston, Texas, were among the first condominium units created under the Colorado Condominium Ownership Act.

Messrs. Mitchell and Bornefeld, in a sense, never completed the Aspen Alps project. Some density availability remained on undeveloped lands, even after several down-zonings and other development limitations were placed on the property by the City of Aspen. The undeveloped areas, depending upon which development scenario was pursued, could support between two and five additional condominium units or single family dwellings. The more logical development sites within the parcel were quite close to existing Alps buildings. Alps unit owners, quite protective of their views and adjacent open areas, had been concerned for some years about additional adjacent development. Consequently, the unit owners, acting through the Aspen Alps Condominium Association, a non-profit Colorado association, sought to acquire the undeveloped areas owned by George Mitchell and H.A. Bornefeld as well as own the title to the access road servicing four Alps buildings and two tennis courts. Unfortunately, although the Association had the legal ability to hold title to real property, it did not have the authority under the condominium documentation to purchase real property. Nor did the condominium declaration permit the association the ability to levy a special assessment among the Alps owners to raise the necessary acquisition monies. Further, the value of the undeveloped area made such an assessment, even if legally permissible, prohibitively expensive.

Adjacent to the Aspen Alps complex is a two lot subdivision called the Moses (after the owner Gaard Moses) Lot Split. The owner of an Aspen Alps condominium unit also owned Lot 2, Moses Lot Split. However, the two lots in the Moses Lot Split were limited by agreement with the City of Aspen to two family dwellings, neither of which could exceed 3,800 square feet of living floor area. Moses Aspen View Homesite, Inc., the owner of Lot 2, desired a larger home on Lot 2, one totalling 5,000 square feet. The general manager of the Aspen Alps Condominium Association, Pamela Cunningham, became aware of Moses Aspen View's desire to construct a larger home and approached Leon Hirsch, President of Moses Aspen View, to determine if he would be interested in acquiring the undeveloped parcel from Messrs. Mitchell and Bornefeld, pursue the necessary City approvals to transfer sufficient land area from the undeveloped parcel to support the additional square footage for Lot 2, and deed the balance of the parcel to the Aspen Alps Condominium Association to own as "open space".

A deal was struck. The Association entered into a purchase and sale agreement with Messrs. Mitchell and Bornefeld to acquire the undeveloped parcel. The purchase and sale agreement expressly provided for its assignment to Moses Aspen View. It was also expressly contingent upon Moses Aspen View successfully obtaining City approval

to the transfer of the desired 1,200 square feet of living space to Lot 2, from the undeveloped parcel, within six months from the date of the agreement. The agreement was assigned by the Association to Moses Aspen View. The assignment agreement placed the responsibility for obtaining the necessary approvals from the City of Aspen squarely on the corporate shoulders of Moses Aspen View. The following approvals would have to be obtained from the City of Aspen in order for the sale to go through under the terms of the purchase and sale agreement:

- (a) The demolition of the existing structure or its expansion on Lot 2, at the option of Moses Aspen View;
- (b) The allowance of a total floor area for the improvements on Lot 2, either expanded or to be constructed, of 5,000 square feet;
- (c) The approval of a building envelope on Lot 2 in a location acceptable to Moses Aspen View;
- (d) That Moses Aspen View be allowed to construct a 5,000 square foot house within the designated building envelope without any further restrictions on area, bulk or setbacks other than the City of Aspen existing height limitations and the limitations of the building envelope.
- (e) The waiver of any other approvals required in order to expand or construct a residence on Lot 2 in accordance with the above conditions, which waiver included obtaining City approval to construct a residence above the 8040 "Greenline". (The 8040 Greenline refers to the contour elevation line of 8,040 feet above sea level. The benchmark elevation of the City of Aspen is 7,903 feet above sea level. The 8040 Greenline rule precludes development on lands above 8040 feet unless a special review approval is obtained from the City of Aspen).

Once the necessary approvals were obtained, Moses Aspen View would acquire the property and deed to the Association the areas it sought.

A detailed and technical land use application was prepared and submitted for approval by Alan Richman, a former director of planning for the City of Aspen/Pitkin County Planning Office, now a private land use consultant, to accomplish the objectives of Moses Aspen View and the Aspen Alps and to satisfy the conditions of the agreement. The application, filed in February, 1992, proposed a lot line adjustment adjusting the common boundary line between Lot 2, Moses Lot Split and the adjacent undeveloped parcel in order to include sufficient land area to support (under the applicable City of Aspen Code provisions) the additional residential square footage needed to permit the enlargement of a dwelling on Lot 2 from 3,800 square feet to 5,000 square feet. Special review approval for development above the 8040 Greenline was also requested as was the subdivision of the balance of the Alps open space parcel into Lots 2A and 2B. On April 21, 1992, the City of Aspen Planning and Zoning Commission approved the 8040 Greenline review and recommended approval to the Aspen City Council of the requested lot line adjustment for Lot 2, Moses Lot Split and a subdivision of the Alps open space parcel.

On June 8, 1992, the City Council, pursuant to Ordinance No. 31 (Series of

1992), approved the application dividing the property into Lots 2, 2A and 2B. Lots 2A and 2B were approved subject to deed restrictions in favor of and for the benefit of the City of Aspen which permanently prohibited any future development of the lots. In other words, the property to be conveyed to the Association was specifically prohibited from being used to support additional floor area, bedrooms and density on the lots themselves as well as for any of the existing or future Aspen Alps Condominium Units. The City ordinance contemplated the execution of a subdivision plat reflecting the replat of Lot 2, Moses Lot Split (a lot line adjustment) and final subdivision plat of the George P. Mitchell and H.A. Bornefeld, Jr. property. A subdivision agreement was also entered into between the parties to the transaction. The latter document, unlike the more typical subdivision agreement, did not deal with the applicant's obligations to perform development improvements. Instead, it contained the restrictions placed on the lots and the enforcement mechanisms for such restrictions.

Of importance to Moses Aspen View was the obtaining of vested rights with respect to the ability to construct a 5,000 square foot residence on Lot 2, Moses Lot Split. The State of Colorado and the City of Aspen have vested rights legislation which specifically denominate the period of time in which land use approval rights are vested in the applicant, i.e., not subject to alteration by subsequent zoning and land use legislation. In this case, the City of Aspen initially proposed the "standard" three year vested rights with respect to the increased square footage for Lot 2. Moses Aspen View objected on the grounds that the City of Aspen was indirectly obtaining a benefit which would last in perpetuity with respect to the non-development of Lots 2A and 2B. Moses Aspen View argued that the right to develop a 5,000 square foot single family residence on Lot 2 should also be vested in perpetuity. This right was ultimately recommended by the City attorney and incorporated into Ordinance No. 31.

Following the recordation of the Subdivision Plat and the Subdivision Agreement for the Replat of Lot 2, Messrs. Mitchell and Bornefeld conveyed Lot 2 (as expanded) to Moses Aspen View and Lots 2A and 2B to the Association, subject to the restrictions against further development.

The purchase price for the privilege of obtaining 1,200 additional square feet for the construction of a larger residence was \$900,000.00 or \$750 per square foot plus approval expenses, land planning and attorneys fees. However, notwithstanding the cost, this transaction was clearly a "win-win" situation for all concerned. Moses Aspen View obtained the right to build a larger single family residence adjacent to the ski runs on Aspen Mountain, the Association protected its owner/members against adjacent development, George Mitchell and H.A. Bornefeld obtained a fair price for their undeveloped property and the City of Aspen obtained additional open space in an area of considerable visibility to the lower surrounding properties.





### ***The Context***

Aspen, Colorado, is situated at the upper end of a typically beautiful and environmentally sensitive mountain valley, enveloped between high peaks and protected wilderness areas, and nestled comfortably at the base of one of the world's most challenging ski slopes. With a total incorporated area of approximately 2.2 square miles at 8,000 feet above sea level, the community of 5,600 year-round residents has historically striven to maintain deliberate, if not always controlled growth. However, with the average selling price for single-family home at well over one million dollars, development pressures on the town can be intense.

At the pinnacle of Aspen's land use priorities is the maintenance and preservation of the city's historic community character as a mountain town blessed with natural surroundings unsurpassed in beauty and wild open spaces. Combatting creeping urbanization and suburbanization is a social and political imperative. Pursuant to long established community policy, and despite being virtually encircled by thousands of square miles of mostly pristine forest and wilderness, Aspen continues to place a premium upon development projects which create or preserve open space within its municipal boundaries.

### ***A Cooperative Approach to One Development Project***

In early 1992, several property owners approached the city with an idea to reconfigure and redevelop a number of adjoining parcels of property at the eastern edge of the base of Aspen Mountain. The subject parcels were comprised of two condominium complexes (Parcels A and B), one undeveloped homesite (Parcel C), one developed single-family homesite (Parcel D), one undeveloped triangular parcel owned by the U.S. Forest Service (Parcel E), and one four-acre irregularly-shaped and undeveloped lot upon a portion of which was located two tennis courts subject to a long-term lease (Parcel F). The total combined area for the parcels amounted to 6.4 acres.

The homeowners' association owning the common areas appurtenant to Parcels A and B desired to purchase the four-acre Parcel F so as to secure for its members a large open space buffer around their existing condominium units. The association also wanted to obtain ownership of the tennis courts. However, due to certain legal and financial constraints, the association found it difficult to effectuate a purchase of Parcel F.

At about the same time the homeowners' association was investigating its purchase of Parcel F, a potential buyer for Parcel D was trying to find a way in which he could demolish the existing 3,800 sq. ft. residence on the parcel and build a new 5,000 sq. ft. home in its place. Prevailing zoning and lot size requirements prohibited a 5,000 sq. ft. home on Parcel D. Additionally, a condition of approval for the land use action creating Parcel D in 1987 limited any residence built on the lot to 3,800 sq. ft.

Due to the undeveloped nature of the four-acre parcel and its sensitive location near the base of Aspen Mountain, the city's concerns relevant to the subject area focused upon the density of any eventual build-out and the corresponding loss of open space. After several negotiations involving the interested parties and various members of the city planning staff, the property owners submitted the following development plan for

approval to the city. The buyer for Parcel D would, along with Parcel D, buy Parcel F, the four-acre open space parcel. Thereafter, a new subdivision would be created consisting of three new lots. Lot 1 (approx. 1 acre) would be comprised of old Parcel D and so much of Parcel F as to permit the construction of a 5,000 sq. ft. home in place of the existing 3,800 sq. ft. home. Lot 2 would consist of the balance of old Parcel F, except for the area comprising the tennis courts, which would become Lot 3 (0.8 acre). Lots 2 and 3 would then be conveyed at no cost to the homeowners' association subject to covenants prohibiting all future development on the lots and, thus, preserving Lot 2 (2.2 acres) as natural open space. In return for restricting and conveying the lots to the homeowners' association, the owner of new Lot 1 wanted the city to lift the 3,800 sq. ft. house limitation imposed on the lot in 1987 and to vest in perpetuity his right to build a new 5,000 sq. ft. home. Except for a minor lot line adjustment, Parcels C and E would remain unchanged.

### ***The Process***

In order to accomplish the desired end result of the proposed plan, several land use approval procedures were initiated with the support of the city's planning staff. First, a special environmental review and approval was necessary from the Planning and Zoning Commission. This review and approval, called "8040 Greenline Review", was required in that the elevation of the proposed site for the new 5,000 sq. ft. home to be constructed on old Parcel D was at or above 8040 feet and, thus, within a designated environmentally sensitive zone. Next, subdivision approval was needed. Subdivision approval under the municipal code consisted of a two-step process. Initially, conceptual approval needed to be obtained from the Planning and Zoning Commission followed by final approval from the City Council. A lot line adjustment was also necessary to realign a boundary line between Parcels C and F.

### ***The Agreement***

The key to the preservation of the open space within the proposed subdivision was the voluntary imposition of restrictive covenants on the property restricting the space from future development. In order to secure the covenants, the city was asked to vest in perpetuity the right of the owner of new Lot 1 to build the 5,000 sq. ft. home as approved by the Planning and Zoning Commission through the 8040 Greenline review process. Under Colo. Rev. Stat. § 24-68-104(2) (1987), property rights as authorized and vested in accordance with a site specific development plan may be vested for period of time in excess of the normal three-year period when circumstances so warrant. In this instance, the City Council made a legislative finding in the ordinance creating the new subdivision that neighborhood and general community open space interests would be served by granting perpetual vesting for the 5,000 sq. ft. residence.

### ***The Result***

As a result of the negotiations and cooperation between the various parties as described above, several private and public goals were achieved.

- The condominium association obtained the buffer it wanted around its members' units, an amenity that has added aesthetic and financial value to the condominium properties.
- The owner of Lot 1 of the new subdivision obtained the lifting of the house size

restriction on his property while simultaneously securing a permanent vested property right to build a new 5,000 sq. ft. residence on an enlarged lot.

- The city secured the preservation of a significant piece of open space within its boundaries, thus, foreclosing further development in a sensitive area at the base of Aspen Mountain.

- The mountain character of the neighborhood was protected and enhanced.

### ***Conclusion***

Given a shrinking and ever more expensive land base, flexibility and creativity are often required in devising and implementing proposed development projects within Aspen. In the instance described above, the city exercised its discretion and authority in awarding a permanent vested development right for the very first time. This was done in a cooperative effort to further an overriding community interest, the protection and preservation of the remaining natural open space within the city. The result was satisfactory to all involved.



**SUBDIVISION AGREEMENT**  
**FOR THE**  
**REPLAT OF LOT 2, MOSES LOT SPLIT**  
**(A Lot Line Adjustment)**

**AND**  
**THE GEORGE P. MITCHELL AND H.A. BORNEFELD, JR. PROPERTY**

THIS SUBDIVISION AGREEMENT is made and entered into this <sup>th</sup> 25 day of ~~August~~ August, 1992, by and between MOSES ASPEN VIEW HOMESITE, INC., a Colorado corporation ("Moses Aspen View") and GEORGE P. MITCHELL AND H.A. BORNEFELD, JR. ("Mitchell/Bornefeld") (collectively "Owners") and THE CITY OF ASPEN, a municipal corporation ("City").

**WITNESSETH:**

WHEREAS, Moses Aspen View owns that certain real property located in the City of Aspen, County of Pitkin, State of Colorado, known as Lot 2, Moses Lot Split, according to the plat thereof recorded in Book 19 at page 83 of the Office of the Clerk and Recorder of Pitkin County, Colorado; and

WHEREAS, Mitchell/Bornefeld own that certain real property (the "Property") located in the City of Aspen, County of Pitkin, State of Colorado, a complete metes and bounds description of which is attached hereto as Exhibit A; and

WHEREAS, on June 8, 1992, the City Council of the City of Aspen granted approval pursuant to Sections 24-7-503 and 24-7-1004 of the Municipal Code of the City of Aspen (the "Code") for the Replat of Lot 2, Moses Lot Split and the Subdivision of the Property (see Ordinance No. 31, Series of 1992, a copy of which is attached hereto as Exhibit B); and

WHEREAS, the approval of the Replat of Lot 2, Moses Lot Split and the Subdivision of the Property, was conditioned upon Moses Aspen View and Mitchell/Bornefeld complying with certain requirements, including the entering into and execution of a subdivision agreement for Lot 2, Moses Lot Split, as replatted, and the Property; and

WHEREAS, Moses Aspen View and Mitchell/Bornefeld have submitted to the City for approval, execution and recordation a plat for the Replat of Lot 2, Moses Lot Split and the subdivision of the Property (the "Plat") and the City agrees to approve, execute and record the Plat on the agreement of Moses Aspen View and Mitchell/Bornefeld to the matters described herein, subject to the provisions of the Code, the conditions contained herein and other applicable rules and regulations; and

WHEREAS, the City has imposed conditions and requirements in connection with its approval, execution and acceptance of the Plat and such matters are necessary to protect, promote and enhance the public health, safety and welfare; and

WHEREAS, Moses Aspen View and Mitchell/Bornefeld are willing to enter into such agreement with the City.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and the approval, execution and acceptance of the Plat for recordation by the City, it is agreed as follows:

1. Description of the Replat and Subdivision. The Replat and Subdivision which the City Council approved consists of three (3) parcels. Lot 2, Moses Lot Split, and a portion of the Property, have been approved and replatted as the Replat of Lot 2, Moses Lot Split as shown on the Plat. The balance of the Property has been further subdivided into Lots 2A and 2B as shown on the Plat.

2. Acceptance of Plat. Upon execution of this Agreement by all parties hereto, and upon approval of the Plat by the Engineering Department and Planning Office, the City agrees to approve and execute the final Plat of the Property submitted herewith, which conforms to the requirements of Section 24-7-1004 of the Code. The City agrees to accept such Plat for recording in the Office of the Pitkin County Clerk and Recorder upon payment of the recordation fee and costs to the City by Moses Aspen View and Mitchell/Bornefeld. A reduced size copy of the Plat has been approved as part of this Subdivision Agreement and is attached hereto as Exhibit C.

3. Public Improvements and Landscaping. The Replat of Lot 2, Moses Lot Split and the Subdivision of the balance of the Property involves no public improvements or landscaping.

4. Restrictions. Lots 2A and 2B of the Property are hereby restricted pursuant to the provisions of Ordinance No. 31 as follows:

- (a) The floor area, bedroom and density attributed to Lots 2A and 2B shall not be utilized by the Aspen Alps Condominium Unit Owners for purposes of increasing the floor area, bedroom number or density of existing or future Aspen Alps Condominium Units;
- (b) No further development or additional lot area for floor area, bedrooms and additional density or major new recreational facilities such as tennis courts and swimming pools shall occur on said Lots 2A and 2B;
- (c) Parking along the Aspen Alps South Road shall only be allowed outside the twenty (20) foot paved road unless approved by the Fire Marshal of the City of Aspen; and
- (d) In the event either Moses Aspen View or Mitchell/Bornefeld or the Aspen Alps Condominium Association acquires title to Government Lot 42, Section 18, Township 10 South, Range 84 West, of the 6th P.M., as depicted on the Plat, such party shall restrict said Government Lot 42 against all development.

The "Revised Mitchell Homesite" parcel shown on the Plat shall not be entitled to utilize any additional floor area due to the increase in lot size over and above that allowed the parcel as originally described in Book 256 at page 812 in the office of the Clerk and Recorder of Pitkin County, Colorado.

5. Material Representations. All material representations made by the Owners on record to the City in accordance with the approval of the Subdivision shall be binding upon the Owners, their successors, assigns and personal representatives.

6. **Enforcement.** In the event the City determines the Owners are not in substantial compliance with the terms of this Agreement or the Plat or Ordinance No. 31, the City may serve a Notice of Non-Compliance and request that the deficiency be corrected within a period of forty-five (45) days. In the event the Owners, or either of them, believe that they are in compliance or that the non-compliance is insubstantial, the Owners, or either of them, may request a hearing before the City Council to determine whether the alleged non-compliance exists or whether any amendment, variance or extension of time to comply should be granted. On request, the City shall conduct a hearing according to standard procedures and take such action as it then deems appropriate. The City shall be entitled to all remedies at equity and at law to enjoin, correct and/or receive damages for any non-compliance with this Agreement.

7. **Notices.** Notices to the parties shall be sent by the United States Certified Mail, Return Receipt Requested, Postage Prepaid, to the addresses set forth below or to any other address which the parties may substitute in writing. Such notices shall be deemed received, if not sooner received, three (3) days after the date of mailing of same.

To the Owners: Moses Aspen View Homesite, Inc.  
150 Glover Avenue  
Norwalk, Connecticut 06850

With a copy to: Michael J. Herron, Esq.  
Garfield & Hecht  
601 East Hyman Avenue  
Aspen, Colorado 81611

George P. Mitchell  
Mitchell Energy & Development Corp.  
2001 Timberloch Place  
The Woodlands, Texas 77380

H.A. Bornefeld, Jr.  
Mitchell Energy & Development Corp.  
2001 Timberloch Place  
The Woodlands, Texas 77380

With a copy to: Leonard M. Oates, Esq.  
Oates, Hughes & Knezevich  
533 East Hopkins  
Aspen, Colorado 81611

To the City of Aspen: c/o City Manager  
130 South Galena Street  
Aspen, Colorado 81611

With a copy to: City of Aspen Attorney  
130 South Galena Street  
Aspen, Colorado 81611

8. **Binding Effect.** The provisions of this Agreement shall run with and constitute a burden on said Lot 2, Moses Lot Split and the Property and shall be binding on and enure

to the benefit of the Owners, their successors and assigns and to the City, its successors and assigns.

9. Amendment. This Agreement may be altered or amended jointly by written instrument executed by all parties hereto with the same formality as this Agreement is executed.

10. Severability. If any of the provisions of this Agreement are determined to be invalid, it shall not effect the remaining provisions hereof.

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

ATTEST:

CITY OF ASPEN, a municipal corporation

Kathleen J. Strickland  
Katherine S. Koch, City Clerk  
Chief Deputy Clerk

By: John Bennett  
John Bennett, Mayor

APPROVED AS TO FORM:

Sam M. Caswell  
9/1/92, City Attorney

MOSES ASPEN VIEW HOMESITE, INC., a Colorado corporation

By: Leon Hirsch  
Leon Hirsch, President

George P. Mitchell  
George P. Mitchell

H.A. Bornefeld, Jr.  
H.A. Bornefeld, Jr.



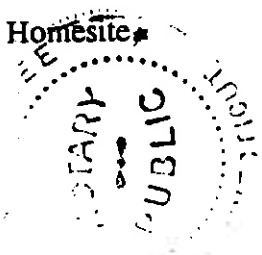
*Connecticut*  
STATE OF COLORADO )  
*Fairfield* ) ss.  
COUNTY OF PITKIN )

This instrument is hereby acknowledged before me this 18<sup>th</sup> day of August, 1992, by Leon Hirsch as President of Moses Aspen View Homesite Inc., a Colorado corporation.

Witness my hand and official seal.

My commission expires: March 31, 1995

*Min C. Lee*  
Notary Public

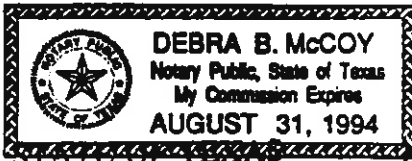


STATE OF TEXAS )  
COUNTY OF HARRIS ) ss.

This instrument is hereby acknowledged before me this 25<sup>th</sup> day of August, 1992, by George P. Mitchell.

Witness my hand and official seal.

My commission expires: August 31, 1994



*Debra B. McCoy*  
Notary Public

STATE OF TEXAS )  
COUNTY OF HARRIS ) ss.

This instrument is hereby acknowledged before me this 25<sup>th</sup> day of August, 1992, by H.A. Bornefeld, Jr.

Witness my hand and official seal.

My commission expires:



*Amy J. Slanis*  
Notary Public

EXHIBIT B

#348316-07-13792 16:22 Rec \$60.00 BK 687 PG 901  
Silvia Davis, Pitkin Cnty Clerk, Doc \$.00

ORDINANCE NO. 31  
(SERIES OF 1992)

AN ORDINANCE OF THE ASPEN CITY COUNCIL GRANTING SUBDIVISION FOR LOT 2 OF THE MOSES LOT SPLIT, A LOT LINE ADJUSTMENT BETWEEN THE MITCHELL PARCEL AND THE MITCHELL/BORNEFELD PARCEL, AND VESTED RIGHTS FOR 8040 GREENLINE REVIEW, SUBDIVISION, AND THE LOT LINE ADJUSTMENT ALL LOCATED ON ASPEN ALPS SOUTH ROAD, CITY AND TOWNSITE OF ASPEN

WHEREAS, pursuant to Sections 24-7-503 and 24-7-1004 C of the Municipal Code the applicant, Moses Aspen View Homesite, Inc., the Aspen Alps Condominium Association and George Mitchell have submitted an application for subdivision of Lot 2 of the Moses Lot Split and a lot line adjustment for the Mitchell parcel and the Mitchell/Bornefeld parcel all located on the Aspen Alps South Road, City of Aspen; and

WHEREAS, pursuant to Section 24-6-207 of the Municipal Code, the applicant has also requested Vested Rights of the subdivision and lot line adjustment and 8040 Greenline; and

WHEREAS, at a duly noticed public hearing held April 7, 1992, the Planning and Zoning Commission reviewed the 8040 Greenline and Subdivision proposal; and

WHEREAS, the Commission approved the 8040 Greenline review (see Commission Resolution 6 (1992), Exhibit A attached hereto and incorporated herein); and

WHEREAS, the Commission also recommends to the City Council subdivision approval for Lot 2 Moses Lot Split; and

WHEREAS, the subdivision of Lot 2 eliminates the floor area cap of 3,800 square feet that was originally imposed upon Lot 2 during the 1987 Moses Lot Split; and

WHEREAS, the applicants have offered to voluntarily prohibit all future development on Lots 2A and 2B of the new subdivision as created herein, consisting of approximately three acres of valuable open space and an existing tennis court area, in exchange for the City granting permanent vesting for the development of a 5,000 square foot (allowable floor area) residence upon Lot 2 within the subdivision; and

WHEREAS, the existing underlying zoning for the subdivision allows for the construction of a single family residence of 5,000 square feet (allowable floor area) on Lot 2; and

WHEREAS, the City Council has determined that the neighborhood and community at large will derive a significant benefit from the

permanent preservation of remaining open space within the City; and

WHEREAS, the City Council may grant vesting of site specific development plans for periods in excess of three years where warranted in light of all relevant circumstances in accordance with C.R.S. Section 24-68-104(2); and

WHEREAS, subdivision and lot line adjustment were reviewed by the City Council.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ASPEN, COLORADO:

Section 1

That it does hereby approve the Moses Lot 2 Subdivision as recommended by the Aspen Planning and Zoning Commission consisting of Lots 2, 2A, and 2B, Aspen Alps South Road, City and Townsite of Aspen subject to the following conditions:

1. Simultaneous with the recordation of the final plat, Lots 2A and 2B shall be conveyed to the Aspen Alps Condominium Association subject to deed restrictions in favor and for the benefit of the City of Aspen permanently prohibiting any future development on said lots. Further development shall include the application or crediting of the lots toward additional lot area for floor area, bedrooms and density purposes for all existing or future Aspen Alps Condominium Association buildings. For Lots 2A and 2B, further development shall include additional floor area, bedrooms and density or major new recreational facilities such as tennis courts and swimming pools. The deed restrictions shall be reviewed and approved by the City Attorney.
2. A final plat and subdivision agreement shall be filed within 180 days of final land use approval by the City Council in the Pitkin County Clerk and Records office. The final plat shall be reviewed and approved by the Engineering and Planning Departments.
3. The final plat shall depict the following:
  - a. Lots 2, 2A and 2B;
  - b. that Lots 2A and 2B are restricted against any further development or additional lot area for floor area, bedrooms and density purposes for all existing and future Aspen Alps Condominium Association buildings. The documents restricting Lots 2A and 2B shall be referenced by the Book and Page number.
  - c. the new access onto Lot 1 Moses Lot Split;
  - d. graphic description of the zoning designations for Lot 2;

- e. no parking allowed along the Aspen Alps South Road unless approved by the Fire Marshal;
  - f. an easement indicating Lot 2 access off of the Aspen Alps South Road.
  - g. all improvements on Lot 2 including the entire length of the actual access road and the revised access easement including the roadway surface;
  - h. the contents of the final plat must meet Sections 24-7-1004-D.1 and -D.2 of the Municipal Code. There must be a statement by the surveyor, either in a surveyor's certificate or in a general note, that all easements of record have been shown on the plat. The date must be within the past 12 months;
  - i. in the event any of the applicants obtain title to the USFS Tract as depicted on the plat they shall deed restrict said tract against all development. Said deed restriction shall be in favor and for the benefit of the City of Aspen and shall be approved by the City Attorney.
4. The width of the access easement to Lot 1 Moses Lot Split across Lot 2 shall meet code requirements (20').

**Section 2**

That it does hereby approve the Lot Line Adjustment between the Mitchell parcel and the Mitchell/Bornefeld parcel (to be conveyed to the Aspen Alps Condominium Association) on Aspen Alps South Road with the following conditions:

1. The lot line adjustment between the Mitchell parcel and the Mitchell/Bornefeld parcel (to be conveyed to the Aspen Alps Condominium Association) shall be depicted on the final subdivision plat for Moses Lot 2.
2. The final plat shall contain a note stating that no additional floor area shall be granted due to the increase in lot size of the Mitchell parcel.

**Section 3:**

That it does hereby grant Vested Rights in perpetuity for this Subdivision, Lot Line Adjustment, and 8040 Greenline including a 5,000 square foot single family residence (allowable floor area which includes exemptions allowed for in Chapter 24 of the Municipal Code) as approved by the Commission on April 7, 1992, (please see Resolution 6 (1992), Exhibit A attached hereto and incorporated herein) with conditions as follows:

1. Any failure to abide by the terms and conditions attendant to this approval shall result in forfeiture of said vested rights. Failure to timely and properly record all plats and agreements as specified herein and or in the Municipal Code shall also result in the forfeiture of vested rights.
2. The approvals as granted herein are subject to all rights of referendum and judicial review.
3. Nothing in the approvals provided in this Ordinance shall exempt the site specific development plan from subsequent reviews and or approvals required by this Ordinance or the general rules, regulations or ordinances of the City provided that such reviews or approvals are not inconsistent with the approvals granted and vested herein.
4. The establishment herein of the vested property right shall not preclude the application of ordinances or regulations which are general in nature and are applicable to all property subject to land use regulation by the City of Aspen including, but not limited to, building, fire, plumbing, electrical and mechanical codes. In this regard, as a condition of this site development approval, the developer shall abide by any and all such building, fire, plumbing, electrical and mechanical codes, unless an exemption therefrom is granted in writing.

#### Section 4:

The City Clerk shall cause notice of this Ordinance to be published in a newspaper of general circulation within the City of Aspen no later than fourteen (14) days following final adoption hereof. Such notice shall be given in the following form:

Notice is hereby given to the general public of the approval of a site specific development plan, and the creation of a vested property right pursuant to Title 24, Article 68, Colorado Revised Statutes, pertaining to the following-described property:

The property shall be described in the notice and appended to said notice shall be the ordinance granting such approval.

#### Section 5:

If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such provision and such holding shall not affect the validity of the remaining portions

thereof.

**Section 6:**

This ordinance shall not effect any existing litigation and shall not operate as an abatement of any action or proceeding now pending under or by virtue of the ordinances repealed or amended as herein provided, and the same shall be conducted and concluded under such prior ordinances.

**Section 7:**

A public hearing on the Ordinance shall be held on the 26<sup>th</sup> day of May at 5:00 P.M. in the City Council Chambers, Aspen City Hall, Aspen Colorado, fifteen (15) days prior to which hearing a public notice of the same shall be published once in a newspaper of general circulation within the City of Aspen.

INTRODUCED, READ AND ORDERED PUBLISHED as provided by law, by the City Council of the City of Aspen on the 27 day of April, 1992.

John Bennett

John Bennett, Mayor

ATTEST:

Kathryn S. Koch  
Kathryn S. Koch, City Clerk

FINALLY, adopted, passed and approved this 8 day of June, 1992.

John Bennett

John Bennett, Mayor

ATTEST:

Kathryn S. Koch  
Kathryn S. Koch, City Clerk

**REPLAT OF LOT 2, MOSES LOT SPLIT (A LOT LINE ADJUSTMENT) AND FINAL SUBDIVISION PLAT OF THE GEORGE P. MITCHELL AND H. A. BORNEFIELD, JR. PROPERTY RANGE 84 WEST OF THE 6TH PRINCIPAL MERIDIAN, PITKIN COUNTY, COLORADO**

**DEDICATION**

THE ROAD AND DRIVE SHOWN ON THIS PLAT ARE HEREBY DEDICATED TO THE PUBLIC AS A PUBLIC ROAD AND DRIVE UNDER THE COLORADO ROAD AND DRIVE ACT OF 1931. THE DEDICATED ROAD AND DRIVE ARE TO BE MAINTAINED BY THE PUBLIC AND ARE NOT TO BE SUBJECT TO ANY PRIVATE RIGHTS OR EASEMENTS. THE DEDICATED ROAD AND DRIVE ARE TO BE SUBJECT TO ALL APPROPRIATE LAWS, ORDINANCES, AND REGULATIONS. THE DEDICATED ROAD AND DRIVE ARE TO BE SUBJECT TO ALL APPROPRIATE LAWS, ORDINANCES, AND REGULATIONS.

**ASPHEN CITY COUNCIL APPROVAL AND ACCEPTANCE**

THE CITY ENGINEER HAS REVIEWED THIS PLAT AND FINDS THAT IT COMPLIES WITH THE CITY ENGINEERING CODE AND THE CITY ENGINEERING REGULATIONS. THE CITY ENGINEER HAS REVIEWED THIS PLAT AND FINDS THAT IT COMPLIES WITH THE CITY ENGINEERING CODE AND THE CITY ENGINEERING REGULATIONS.

**SURVEYOR'S CERTIFICATE**

I, the undersigned, have personally examined the original plat and the original survey data and find that the same are correct and conform to the original survey data. I, the undersigned, have personally examined the original plat and the original survey data and find that the same are correct and conform to the original survey data.

**PLANNING AND ZONING COMMISSION APPROVAL**

THE PLANNING AND ZONING COMMISSION HAS REVIEWED THIS PLAT AND FINDS THAT IT COMPLIES WITH THE PLANNING AND ZONING COMMISSION REGULATIONS. THE PLANNING AND ZONING COMMISSION HAS REVIEWED THIS PLAT AND FINDS THAT IT COMPLIES WITH THE PLANNING AND ZONING COMMISSION REGULATIONS.

**CITY ENGINEER APPROVAL**

THE CITY ENGINEER HAS REVIEWED THIS PLAT AND FINDS THAT IT COMPLIES WITH THE CITY ENGINEERING CODE AND THE CITY ENGINEERING REGULATIONS. THE CITY ENGINEER HAS REVIEWED THIS PLAT AND FINDS THAT IT COMPLIES WITH THE CITY ENGINEERING CODE AND THE CITY ENGINEERING REGULATIONS.

**PLANNING DEPARTMENT APPROVAL**

THE PLANNING DEPARTMENT HAS REVIEWED THIS PLAT AND FINDS THAT IT COMPLIES WITH THE PLANNING DEPARTMENT REGULATIONS. THE PLANNING DEPARTMENT HAS REVIEWED THIS PLAT AND FINDS THAT IT COMPLIES WITH THE PLANNING DEPARTMENT REGULATIONS.

**NOTES**

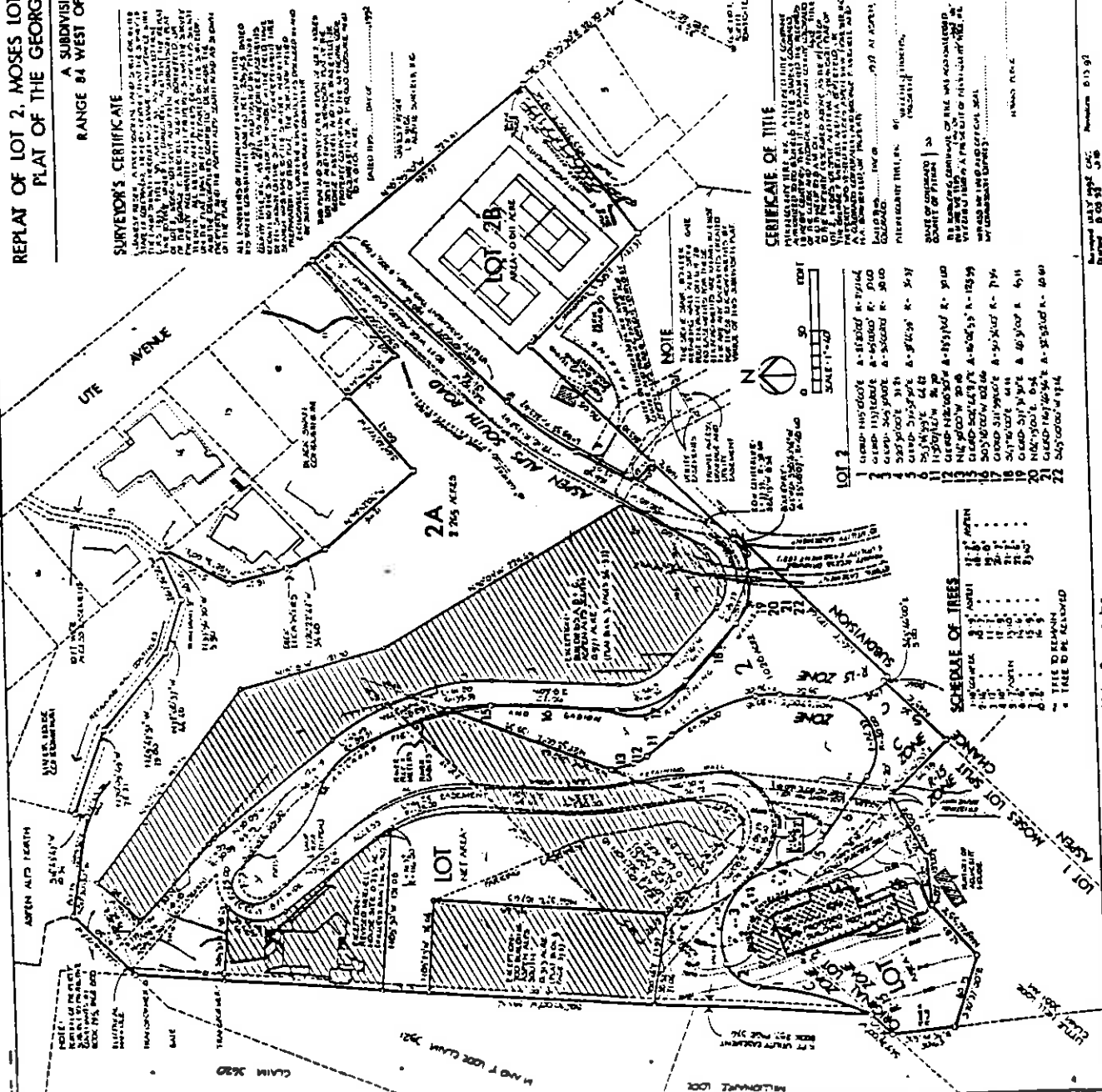
1. THE PLAT SHOWS THE ADJUSTMENT OF THE LOT LINE BETWEEN LOT 2 AND LOT 1.
2. THE PLAT SHOWS THE ADJUSTMENT OF THE LOT LINE BETWEEN LOT 2 AND LOT 1.
3. THE PLAT SHOWS THE ADJUSTMENT OF THE LOT LINE BETWEEN LOT 2 AND LOT 1.
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8. THE PLAT SHOWS THE ADJUSTMENT OF THE LOT LINE BETWEEN LOT 2 AND LOT 1.
9. THE PLAT SHOWS THE ADJUSTMENT OF THE LOT LINE BETWEEN LOT 2 AND LOT 1.
10. THE PLAT SHOWS THE ADJUSTMENT OF THE LOT LINE BETWEEN LOT 2 AND LOT 1.

**CERTIFICATE OF TITLE**

THE STATE ENGINEER HAS REVIEWED THIS PLAT AND FINDS THAT IT COMPLIES WITH THE STATE ENGINEERING CODE AND THE STATE ENGINEERING REGULATIONS. THE STATE ENGINEER HAS REVIEWED THIS PLAT AND FINDS THAT IT COMPLIES WITH THE STATE ENGINEERING CODE AND THE STATE ENGINEERING REGULATIONS.

**SCHEDULE OF TREES**

NO.	DESCRIPTION
1	10" DBH RED PINE
2	12" DBH RED PINE
3	14" DBH RED PINE
4	16" DBH RED PINE
5	18" DBH RED PINE
6	20" DBH RED PINE
7	22" DBH RED PINE
8	24" DBH RED PINE
9	26" DBH RED PINE
10	28" DBH RED PINE
11	30" DBH RED PINE
12	32" DBH RED PINE
13	34" DBH RED PINE
14	36" DBH RED PINE
15	38" DBH RED PINE
16	40" DBH RED PINE
17	42" DBH RED PINE
18	44" DBH RED PINE
19	46" DBH RED PINE
20	48" DBH RED PINE
21	50" DBH RED PINE
22	52" DBH RED PINE
23	54" DBH RED PINE
24	56" DBH RED PINE
25	58" DBH RED PINE
26	60" DBH RED PINE
27	62" DBH RED PINE
28	64" DBH RED PINE
29	66" DBH RED PINE
30	68" DBH RED PINE
31	70" DBH RED PINE
32	72" DBH RED PINE
33	74" DBH RED PINE
34	76" DBH RED PINE
35	78" DBH RED PINE
36	80" DBH RED PINE
37	82" DBH RED PINE
38	84" DBH RED PINE
39	86" DBH RED PINE
40	88" DBH RED PINE
41	90" DBH RED PINE
42	92" DBH RED PINE
43	94" DBH RED PINE
44	96" DBH RED PINE
45	98" DBH RED PINE
46	100" DBH RED PINE



**ALPINE SURVEYS, INC.**  
 300 2nd Ave S.E.  
 Grand Junction, CO 81505  
 Phone: (970) 241-1211  
 Fax: (970) 241-1212





**Case Study 8**  
**Willow Park PUD Subdivision - Broomfield**

**Private Sector Representative: Michael A. Littman**  
**Public Sector Representative: Roy S. Howard**

**Background:** *The Willow Park project represents the classic confrontation between a city and a developer, regarding a 138 acre development parcel in Broomfield. The city required the construction of a major thoroughfare, a parkway, water taps for the parkway, and drainage improvements, as conditions of approval of the proposed project. These conditions made the project economically infeasible from the perspective of the developer. However, the parkway and road improvements were of primary importance to the city, and eventually a development agreement was created that allowed the project to be constructed, and provided for the construction of Midway Boulevard, a substantial benefit to the city's transportation system. Through the process of negotiation and compromise, a development agreement in this situation overcame problems that had prevented earlier development of the parcel.*



WILLOW PARK PUD SUBDIVISION - BROOMFIELD  
Private Sector Commentary - Michael A. Littman

***A Hard "Deal"***

What do you do when you think you've bought the deal of the century (an REO property, of course) and the City tells you, "Gee, we need that parkway through the property (\$1,400,000), more parks, and by the way, the water taps for the parks are yours for only \$500,000." You have some choices:

- a. Call your broker and tell him to sell the property for what you have in it;
- b. Call your lawyer to sue the City for inverse condemnation;
- c. Call a meeting with the City and start negotiating; or
- d. Give in to the City's demands just to keep the project going, and hope it all works out.

If you chose a., you lose the benefit of the bargain, and you may have "condemned" your property because any buyer will call the City about the development possibilities and be told the same thing. Answer b. rarely wins, so you lose time and more money. Answer d. is a sure trip to the Bankruptcy Court, so you are left with answer c.

Such are the choices which confronted the developer of a 120 acre parcel of land at Sheridan and Midway in Broomfield, Colorado. Fortunately, this developer was a tenacious and imaginative veteran of the "infrastructure wars." He had very competent engineers with extensive experience and a good working relationship with upper City management. As in most endeavors, the first task was to define the nature and extent of the infrastructure problems to be confronted. As many developers have experienced over the years, initial conferences with City planning staff mislead developers as to what will ultimately be required to obtain approval of a subdivision - always with the result that the developer ends up paying a lot more for what sometimes appear to be newly imagined "improvements" and requirements under the guise of the "PUD process." Hidden agendas, or so they seem, are the rule, rather than the exception in the planning process, and it seems to be a game to see how much some city planners can force a developer to give in the nature of parks, land, roads, intersections, improvements, drainage ways; and at the same time, how much density in the project the planners can reduce. As an experienced developer, the client decided to take on the City by calling for a meeting with the top City Engineer, the Planning Director and the City Manager, to get all of the issues out in the open.

Very early in the process the City let it be known that the Midway Blvd. parkway improvements were key in their desires to see this property developed, because it was an integral part of the Broomfield master transportation plan. As that information developed, it became obvious that the expense and the land area used for such a parkway would be a great economic impact on the feasibility of the project.

At the initial meeting with top City staff, rather than skirt the issues, the developer laid his concerns on the table and pointed out the economic realities implicit in the wish list of improvements which planning staff had initially presented. The City Manager, City Engineer and Planning Director of Broomfield were receptive to the concerns and

immediately began to address the developer's concerns in a constructive manner - but not necessarily by giving in. They were firm in their positions about needed items. The best part about the meeting at this point was that the decision makers were in the room and the decisions did not have to be translated by junior staffers and referred upstairs and then reinterpreted by junior staffers as the decisions came back down.

Simply, the developer faced the following facts:

1. To put in Midway Blvd. would cost approximately \$1,400,000 because parkway standards required a 120 foot right-of-way, landscaped dividers, and landscape and sidewalks on the sides of the parkway, and paving to full arterial standards over what amounts to four-lane widths.
2. Nearly 11 acres of parks, with foot/bike paths, sod, and landscaping with irrigation were required, designed to coordinate with off-site paths/parks.
3. The City required that water taps for the park area be paid for by the developer (\$400,000).
4. The project could not be commenced without effectively putting in Midway at the very beginning of the project, because it was the only access to the interior streets within the project.
5. Over \$187,000 in drainage improvements were going to be necessary under Sheridan Blvd. to connect with drainage in the project.

On the other hand, the City faced the following impending issues:

1. The pending Tax Limitation Constitutional Amendment, a limit upon government spending, which, if passed, might make future funding of major street and infrastructure projects difficult, if not impossible, for municipalities. The City wanted to make sure that this Midway street project was committed before the Tax Limitation Amendment became law.
2. Midway Blvd., as proposed through this property, was a key to tying the east side of the City to the West side of the City, and would effectively open up the development of several other large parcels of land east of Sheridan Blvd.

It is important to note that this was a proposed replat of a plat from the mid-1980's to a lower density, so it was not a subdivision likely to be opposed by the City staff, or successfully by neighbors. However, in the replatting, the City had the opportunity to make new requirements for necessary infrastructure as a condition of approval of the new plat.

One of the initial areas of discussion was whether or not it would be feasible to form a reimbursement district or a special improvement district to pay for the infrastructure improvements, including Midway Blvd., since the developer believed it unlikely that the project was financable with all of the burdens of the costs of Midway at the beginning of the project. The City attorney and developer's counsel examined both the state statutes and the City Charter to determine whether the necessary law and charter provisions were in place. The City, however, indicated that it would not

consider anything that required an election, and further, the City was not interested in seeing any type of bond issue that would require a long payout due to all of the special improvement districts that had failed or were in Chapter 9 Bankruptcy proceedings. The developer contacted George K. Baum Company about the feasibility of a bond issue, who felt if certain issues could be resolved, that a bond issue was possible.

When those issues were examined, however, they were impractical to attempt. The first issue was the need for a bond guarantee through a letter of credit from the developer. The second issue was the need for a commitment from a major builder to purchase lots. As to the first issue, the proposed bond issue amount was deemed too small to interest a letter of credit issuer, and the developer could not qualify for a larger issue. The second issue was a committed purchase from a major builder, which was available, but the builder was operating in Chapter 11, so any commitment amounted to a conditional option. As a result of these facts, the bond issue pursuit was abandoned.

The developer made it plain to City officials that such large costs (of building Midway as a parkway through the project and payment of water tap fees for the parks) would make the project economically infeasible when combined with the proposed costs of improving Sheridan, the intersection of Sheridan and Midway, signaling the intersection, and the water tap fees for the parks in addition to the park installation costs. The City, due to its experienced and practical senior personnel, indicated that it would examine its requirements and funding availabilities to determine if there was some flexibility in either its requirements or in the way certain requirements could be co-funded. In the meantime, the City Attorney was instructed to draft the Subdivision Agreement.

The Subdivision Agreement, in its first draft, was the typical "Standard Agreement," containing several provisions that in any normal interpretation, were unacceptable. The first was that all of the improvements had to be guaranteed by a letter of credit at the beginning of the project. The second was the requirement of a letter of credit guarantee. The first problem was resolved by negotiating that the improvement requirements could be phased under a schedule due to the financing difficulties inherent in the high cost of the improvements, if all of them had to be installed and paid for at the outset of the project.

A second meeting was called to discuss the Subdivision Agreement and the letter of credit guarantee, and at the same time, what possibilities the City had designed to help alleviate the burden on the developer so that the project could go forward. First, the provision regarding the enormous cost of building Midway to parkway standards was discussed. After a full discussion about the problem, a satisfactory solution was reached to amend the language to provide that: a) the City would allow the formation of a reimbursement district to allow the developer to recover the cost of the intersection improvements for the southeast corner of Midway and Sheridan from an adjacent landowner when that landowner develops his property, and b) the City would provide a repayment of a portion of the construction cost of the Midway parkway, and provide intersection improvements at Sheridan and Midway at its own expense. The second item was one in which the City required a letter of credit to guarantee the performance of the improvements within the subdivision. It was pointed out that in today's banking climate, it is almost impossible to get such letters of credit, and the City agreed to allow language which allowed bonds, letters of credit, "or other acceptable performance guarantee." The author had previously used a bank loan commitment for the funding of the

improvements required in a PUD in Broomfield to satisfy a similar requirement in a subdivision agreement.

As to the cost of constructing Midway, the City agreed to fund some other cost items as an offset to the Midway costs. The first item was the City's agreement to fund approximately \$187,000 of off-site drainage improvements at the Sheridan drainage crossing and certain intersection improvements at Sheridan. The second item was the City's agreement to waive \$500,000 in water tap fees for the park areas within the subdivision. (The developer rather acidly noted that his landscape plan for the parks was cacti, prairie dogs, buffalo grass and rattlesnakes, which don't need water taps.) The third item was the City's agreement to repay the developer the sum of \$350,000 over 10 years at 6% interest, to help offset the cost of Midway. These concessions had an aggregate dollar value of over \$1,000,000, a significant percentage of the estimated \$5,000,000 cost of the improvements. Although such concessions did not solve all of the problems of financing the improvements, at least the overall burden was lessened.

Another provision of the Subdivision Agreement that was amended after negotiation was a provision that would have allowed the City to draw on the performance guarantee in the event of a breach of the agreement, "for such other purposes as it sees fit." Due to its overbreadth, that phrase was deleted.

The Subdivision Agreement also contemplated that the improvements had to be completed within one year of the final approval. The City and the developer discussed this timing in light of the difficulties of obtaining the necessary financing for such a large project and completing the improvements in such a short time. The developer and the City reached a compromise by which the City allowed three years for the completion of the improvements in order to retain the incentives which the City had agreed to in order to alleviate some of the financial burdens.

The result of these negotiations and compromises, while not perfect, made the project economically feasible for the developer, and provided needed infrastructure and amenities for the City, which otherwise might have taken longer to accomplish. The success of the negotiations in reaching a feasible project was in large part due to the straight forward and businesslike approach of the City and the developer and the involvement of the top City management directly in the negotiations. This type of working relationship is necessary for successful development in an environment where more demands are being placed upon cities, without the ability to raise taxes easily, which demands (and costs) are often passed on to the developer. Development financing will remain difficult because of the strict banking regulations, and if City officials are cognizant of that fact, and structure Subdivision Agreements with that in mind, then development will continue. Otherwise, development in those cities will largely cease.

WILLOW PARK PUD SUBDIVISION - BROOMFIELD  
Public Sector Commentary - Roy S. Howard

**Background**

Willow Park is a 138 acre undeveloped parcel of property located near the geographic center of the City of Broomfield. Attachment 1 is a vicinity map from the most recent land-use submittal to the city for development of the property.

The property was annexed to the city in 1985 and zoned PUD- Residential. The preliminary PUD plan submitted by the developer, entitled The Willows, proposed a mixed-use residential development, including multi-family and single-family homes, a small commercial site, and a public park with recreational facilities.

The PUD plan proposed 1,196 dwelling units for the development. Thirteen acres were designated for a public park. Four acres were planned for neighborhood commercial use. In a letter accompanying the annexation petition, the developer requested that the city support the creation of a special improvement district to finance street, utility, and park improvements for the development. After the annexation and zoning of the property were completed, the developer did not develop the property.

In 1986 the new owner and developer of the property submitted a preliminary plat and preliminary PUD plan for a development now called Country Meadows. The preliminary PUD plan proposed a mixed use development, including 657 units of single-family detached residential, a church, a neighborhood commercial use, and parks and open space. In early 1987 the city council approved the preliminary PUD plan proposed by the developer deleting the commercial site. The developer also proposed that a special improvement district be created in order to finance the public improvements required by the city for the project. The developer of Country Meadows did not seek approval of either a plat or final PUD plan.

In early 1992 a new developer<sup>1</sup> submitted a land-use application to the city for the property. Willow Park was the new name given to the development. The application requested the city to amend its master plan by changing the master plan designation of the property from medium density residential to low density residential. The Willow Park PUD plan reduced single family homes from the 657 proposed in Country Meadows to 474, which reduced the density from 4.77 units per acre to 3.44 units per acre. The project was proposed to be constructed in eight phases. In order to finance the public improvements, the developer requested that the city consider creating either a special improvement district or a general improvement district.

The amendment to the master plan, the PUD plan/preliminary plat, and the final plat was heard by the city planning and zoning commission at a public hearing in June 1992. The commission voted unanimously to deny both the master plan amendment and the PUD plan and plats.

Prior to the vote by the commission, a planning commissioner suggested that the developer revise the plan to address issues raised at the hearing and return to the commission with a revised plan. The developer, however, requested that the commission vote on the plan so that he could have it considered by the city council as

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<sup>1</sup> The owner/developer is Midwest Builders, Inc.; the engineer is Gillans Engineering, Inc.; and the attorney is Michael A. Littman, Esq.

early as possible. Because of overriding financial considerations, the developer's representative said he was willing to submit the master plan amendment, the PUD plan, and the plats to the city council notwithstanding the commission's denial.

Under the city's land use procedures, an application is scheduled for city council consideration after a review and recommendation by the planning and zoning commission, regardless of the decision made by the commission. The developer first appeared before the city council at a public hearing on the plan on July 14, 1992. After a lengthy public hearing, the mayor closed the public hearing. The city council debated the application but could not arrive at a consensus. The city council tabled the matter until its next regular meeting. The city staff was directed to negotiate amendments to the subdivision agreement and to the PUD plan based on the comments and concerns of the city council.

At the council meeting held on July 28, 1992, the city council took the Willow Park project from the table. The city staff discussed the changes to the PUD plan and to the subdivision agreement proposed by the developer. After considerable discussion and debate, the council voted six to two in favor of a resolution amending the master plan, approving the Willow Park PUD plan, approving the preliminary and final plats, and approving a renegotiated subdivision agreement.

### ***Development Issues***

The major development issues of the Willow Park development confronting the city and the developer were the cost of the park and street improvements. Although there were a number of secondary issues, the approval or denial of the project by the city council hinged on resolving the park and street improvement issues.

The two controversial issues relating to the park were the park layout and the payment of water tap fees for the park. One of the reasons for denial by the planning and zoning commission of Willow Park was that the park site selected by the developer was not suitable for park purposes. The developer proposed a greenbelt throughout the project area with a small combination park and storm water detention site in the southeast corner of the project area. Both the city council and the commission raised concerns about the park site and the configuration of the greenbelt.

The city requires a developer to pay for both the construction of the park and the water tap fees<sup>2</sup> to irrigate the park after it is dedicated to the city. The cost of park construction was estimated at \$436,500. The cost of the water tap fee for the park was estimated at \$544,000. The total cost to the developer would be \$980,500. The developer proposed that the city pay the cost of the water tap fees for the park. The cost to the developer of the improvements to Sheridan Boulevard was estimated at almost \$200,000, and the cost of constructing Midway Boulevard through the development was estimated at \$1.2 million. The developer informed city staff and city council that the costs of the street improvements, if borne entirely by the developer, would make the project financially infeasible. The developer proposed that the city participate in both the cost of constructing Midway Boulevard and improving Sheridan Boulevard. The developer desired that the city contribute approximately one-third of the

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<sup>2</sup> The City of Broomfield grants a water license to water users. The term "water license" in Broomfield is equivalent to "water tap" as used in other cities. In the text of this case study, the term "water tap" refers to Broomfield's water license.



cost of Midway Boulevard and pay the cost of culvert work and a signalized intersection at the crossing of Sheridan and Midway Boulevards. Also, the developer wanted to delay the work on Sheridan Boulevard until sixty percent of the project was built.

Both the city council and the city staff believed that construction of Midway Boulevard through the property would be a substantial benefit to the city's transportation system. The major street plan in the city's master plan designates Midway Boulevard as an essential element to an east-west parkway connecting to U.S. Highway 287 on the west and Zuni Street on the east side of the city.<sup>3</sup>

There were no capital improvement funds to pay for either the construction of Midway Boulevard or the improvement to Sheridan Boulevard in the 1992 city budget. The developer suggested that if he were to construct Midway Boulevard, the city could repay him for its share of the construction cost over a ten-year period. In addition, the improvements on the east side of Sheridan Boulevard adjacent to the project were attractive to the city because it would result in widening a heavily-traveled arterial.<sup>4</sup>

The issue to be decided by the city council was whether the city transportation system would be significantly improved by participating in the development of Willow Park by contributing nearly \$900,000 of city funds toward the cost of the development. The cost of the water tap is not absorbed by the water fund. Under the city's financial policies, the cost must be paid by the general fund to the water fund. Both the street improvements and the water tap fee would result in cash expenditures by the city.

### ***The Development Agreement***

After a lengthy public hearing before the city council on July 14, 1992, the council tabled action on the application to its next regular meeting scheduled for July 28, 1992. The city staff was directed by the city council to continue negotiations with the developer and submit the results to the council at its next meeting.

Meetings between the city staff and developer continued for the next two weeks. Many of the issues, including several platting issues, were resolved by the staff. On the day before the meeting of July 28 the city staff and the developer agreed to a subdivision agreement which was submitted to the city council at the meeting.

In the subdivision agreement, the city agreed to pay \$544,000 for the water tap and \$350,000 toward the construction of Midway Boulevard. In addition, the city and the developer agreed to delay improvements to Sheridan Boulevard until sixty percent of the building permits have been issued. The city also agreed to install the traffic signal at the intersection of Midway and Sheridan Boulevards.

These compromises were embodied in paragraphs 14 and 15 of the subdivision agreement. The final terms of the subdivision agreement were approved by the developer's attorney and the city attorney, and the agreement was submitted to the city council at its July 28 meeting. Paragraphs 14 and 15 of the subdivision agreement are reproduced in redline as follows:

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<sup>3</sup> The master plan defines a parkway as a broad landscaped thoroughfare that carries traffic from one part of the city to another.

<sup>4</sup> Sheridan Boulevard is designated on the city's major street plan as a principal arterial. There are four lanes in some locations and two lanes in other locations. The improvement to Sheridan Boulevard adjacent to Willow Park would result in a widening to four lanes.

14. Special Provisions:

14.1 The Developer agrees to pay for park improvements described in the Schedule of Improvements for Tracts A through N~~O~~ as depicted on the final subdivision plat.

14.2 The City agrees to pay for the water licenses, water taps, and tap and meter fees for the parks in Tracts A through N~~O~~ as depicted on the final subdivision plat ~~including the landscape area in Midway at Sheridan.~~

14.3 The Developer agrees to pay the entire cost of constructing Midway Boulevard as described in the Schedule of Improvements. The City agrees to reimburse the Developer \$350,000. ~~However, should the City expend its funds to improve Midway Boulevard within the Subdivision prior to the commencement of construction by the Developer, any such expenditure shall be deducted from the reimbursable amount of \$350,000.~~

14.3.1 The City shall pay the Developer in ten annual installments. The amount of each installment shall not be less than \$35,000 plus 6-1/2 percent annual interest on the unpaid principal. The first installment will be paid by the City to the Developer not later than six months from the date of acceptance by the City of Midway Boulevard as constructed by the Developer. At any time after the first installment is due to the Developer, the City may elect to pay the entire balance due and owing the Developer, or any portion thereof that is greater than an annual installment, without prepayment penalty. If the City pays the entire balance due and owing the Developer, the City shall pay the Developer interest on such unpaid balance only to the day that such entire balance is paid. Further, the City may at any time accelerate annual payments without penalty.

14.3.2 Subsequent installments shall be paid by the City to the Developer annually thereafter on the anniversary of the day and month that the first installment was paid.

14.3.3 The Developer agrees to commence and complete construction of Midway Boulevard simultaneously with development of Phase I as such phase is shown on the Willow Park PUD Plan/Preliminary Plat. The Developer agrees that the City may withhold issuance of building permits in Phases 2 through 8 if Midway Boulevard is not constructed or construction is not completed.

14.4 The Developer agrees to pay for the cost of constructing the improvements on Sheridan Boulevard, as prescribed in the Schedule of Improvements, from the Nissen Reservoir Channel, north to the south property line of the Calvary Evangelical Free Church, including the frontage for the land currently owned by Harold J. Brachle, as depicted of the

Willow Park PUD Plan/Preliminary Plat. The Developer agrees to construct such improvements before the issuance by the City of the 283rd building permit within the final subdivision plat. The Developer further agrees that the City may withhold the issuance of building permits commencing with the 284th building permit if the improvements are not constructed or if construction is not completed.

14.4.1 The Developer may recover the cost of improving ~~that those~~ portions of Sheridan Boulevard and Midway Boulevard adjacent to and especially benefiting the land currently owned by Harold J. Brachle after Sheridan Boulevard has been constructed by applying to the City for the establishment of a reimbursement assessment district as provided in Chapter 14.06 of the Broomfield Municipal Code.

14.5 The City accepts responsibility for the installation of the traffic control signals in the intersection of Midway Blvd. and Sheridan Blvd.

15. Voiding Special Provisions: Within ~~90 days~~ ~~three years~~ from the date of this Agreement, the Developer agrees to provide the City with ~~an irrevocable letter of credit as the performance guarantee~~ required in paragraph 7 of this Agreement for cost of constructing all of the Phase 1 improvements described in paragraph 1.5 of this Agreement and for the cost of constructing the improvements to Sheridan Boulevard as described in paragraph 14.4 above. Should the Developer fail to deliver to the City the ~~irrevocable letter of credit performance guarantee~~ within said ~~90 day three year~~ period or if delivery is made within said ~~90 days three year~~ period and the ~~irrevocable letter performance guarantee~~ is determined to be unsatisfactory by the city attorney, paragraph 14 and all subparagraphs thereunder of this Agreement shall be null and void and of no force or effect.

After a considerable amount of discussion, the subdivision agreement was approved by a six to two vote of the city council at the July 28 meeting. The master plan amendment, PUD plan, and preliminary and final plats were also approved by a six to two vote of the city council.

### **Conclusion**

Willow Park was the third attempt by a developer since 1985 to develop the property. It was an in-fill development project that presented a significant barrier to the completion of Midway Boulevard through the city. Moreover, Willow Park was a key link in the city's goal of constructing a major east-west thoroughfare through the center of the city.

Since 1985 all three developers of the property requested some form of financial assistance from the city, either through the creation of a special improvement district or by direct financial participation. On the third attempt to develop the property, most members of the city staff and the city council believed that concessions to the developer would be required in order to develop the property so that Midway Boulevard could be constructed through the property. To what extent would the city grant concessions to

the developer became the issue for both the city staff and the city council.

In deciding to commit \$900,000 in city funds toward the water tap for the park and the construction of Midway Boulevard, the city departed from its past practice of not contributing city funds to aid residential development projects. This departure, although not universally supported by either the city council or the city staff, would result in the realization of a long-standing goal of the city; that is, the construction of Midway Boulevard through the Willow Park property.

Although it did not appear to be a major factor in the city council's decision, the reduction in residential units from the 657 approved in the Country Meadows preliminary PUD plan to 474 units for Willow Park was looked on favorably by several members of the council.

7/27/92

SUBDIVISION AGREEMENT  
FOR  
WILLOW PARK

BOOK 3953 PG 203

01089911

THIS AGREEMENT, made and entered into this 28<sup>th</sup> day of July, 1992, by and between the CITY OF BROOMFIELD, COLORADO, a municipal corporation, hereinafter referred to as "City", and Midwest Builders, Inc., hereinafter referred to as "Developer";

W I T N E S S E T H:

WHEREAS, Developer is the owner of a parcel of property (hereinafter called the Subdivision) situated in the City of Broomfield, County of Adams, State of Colorado, the description of which is set forth on the attached Exhibit A, and is incorporated herein by this reference; and

WHEREAS, Developer has designated the Subdivision as Willow Park and wishes to obtain the City's approval of a final subdivision plat, a copy of which is attached hereto as Exhibit B and is incorporated herein by this reference;

NOW, THEREFORE, in consideration of the premises cited hereinabove and the mutual covenants and promises contained herein, the sufficiency of which is acknowledged, the parties hereto agree as follows:

1. Improvements: Developer shall furnish and install at its own expense, the Improvements described on the "Schedule of Improvements", Exhibit C, attached hereto and incorporated herein by this reference and hereinafter referred to as the "Improvements".

1.1 Standards and Specifications: Construction of the Improvements shall be in strict conformance with the plans to be prepared by Developer and reviewed and approved by the City Engineer and with all policies, standards, and standards and specifications adopted by the City relating thereto. The City Engineer's review and approval of the plans shall not limit or affect Developer's responsibility for design and construction.

1.2 Testing: Developer shall employ, at its own expense, a qualified testing company, previously approved by the City, to perform all testing of materials or construction that may be required by the City and shall furnish copies of test results to the City Engineer.

1.3 Inspection: At all times during construction of the Improvements, the City shall have the right, but not the duty, to inspect materials and workmanship, and all materials and work shall conform to the approved plans and specifications. Any material or

work not conforming to the approved plans and the City's Standards and Specifications shall promptly be removed or replaced to the satisfaction of the City Engineer at the Developer's expense.

1.4 Utilities: When requested by the City, Developer shall furnish proof that proper arrangements have been made for the installation of water, sanitary sewer, gas, electric, cable television, and telephone services.

1.5 Completion of Improvements: The obligations of the Developer provided for in this Article 1, including all subsections hereof, shall be performed on or before September 1, 1995, and proper application for acceptance of the Improvements shall be made by such date. The improvements shall be completed in the phases as set forth in Exhibit C and in accordance with following schedule. Prior to the start of each phase, the full amount of required security shall be furnished. After acceptance by the City the Developer shall post the required retainage for the one-year warranty period for each completed phase. The Developer may post additional security to cover the cost of completion of a phase when outside conditions prevent completion of construction of any given phase.

Phase 1 public improvements, as listed in Exhibit C, including Midway Blvd. from Sheridan Blvd. to W. 128th Ave., with the full acceleration and deceleration lanes required at the intersection of Midway Blvd. and Sheridan Blvd., and the parks shown as Tracts B,C,D,E,F,G, and H shall be completed prior to the issuance of the 75th building permit for the subdivision.

Phase 2 public improvements, as listed in Exhibit C, shall be complete prior to the issuance of the 133rd building permit for the subdivision.

Phase 3 public improvements, as listed in Exhibit C, including the park shown as Tract J, shall be completed prior to the issuance of the 184th building permit for the subdivision.

Phase 4 public improvements, as listed in Exhibit C, including the park shown as Tract I, shall be completed prior to the issuance of the 218th building permit for the subdivision.

Phase 5 public improvements, as listed in Exhibit C, including the parks shown as Tracts M, N, and O, shall be completed prior to the issuance of the 302nd building permit for the subdivision.

Phase 6 public improvements, as listed in Exhibit C, including the park shown as Tract K, shall be completed prior to the issuance of the 369th building permit for the subdivision.

Phase 7 public improvements, as listed in Exhibit C, including the park shown as Tract L, shall be completed prior to the issuance of the 446th building permit for the subdivision.

Phase 8 public improvements, as listed in Exhibit C, including the park shown as Tract A, shall be completed prior to the issuance of the 455th building permit for the subdivision.

Unless or until the improvements for each phase are completed and accepted, no further building permits or certificates of occupancy shall be issued unless additional security, as set forth above, is furnished by the Developer.

1.5.1 No Improvements shall be deemed to be completed until the City Engineer has certified, in writing, that the Improvement has been completed in accordance with the plans therefor as approved by the City.

1.5.2 Developer shall provide the City Engineer and the City Finance Director with a sworn affidavit, signed by the Developer's authorized representative, that the Improvements completed have been paid for, in full, by the Developer. The Developer shall be responsible for the information so provided. Said written certification will be reviewed by the City, but the City shall assume no responsibility or liability to any party regarding the veracity of the information so provided.

1.5.3 Before the City accepts the Improvements, Developer shall furnish to the City reproducible "as built" drawings, certified accurate by the engineer referred to in Paragraph 3.1.

2. Rights-of-way and Easements: Before commencing the construction of any Improvements herein agreed upon, Developer shall acquire at its own expense good and sufficient rights-of-way or easements, clear of any encumbrances, on all lands and facilities, if any, traversed by the proposed Improvements. All such rights-of-way and easements shall be conveyed to the City and the documents of conveyance shall be furnished to the City for recording. A policy of title insurance insuring title in the City may be required by the City.

3. Engineering Services: Developer shall furnish, at its own expense, all engineering services in connection with the Subdivision and the Improvements.

3.1 Engineering services shall be performed by a Professional Engineer registered in the State of Colorado and shall conform to the City's Standards and Specifications.

3.2 Engineering services shall consist of, but not be limited to, survey, designs, plans and profiles, estimates, construction supervision, and the furnishing of necessary documents in connection therewith. All engineering plans shall be submitted for review and be subject to acceptance by the City Engineer. The City Engineer's review will be limited and will not relieve Developer or Developer's engineer of the responsibility for design and construction.

4. Liability

4.1 Release of Liability: Developer shall indemnify and hold harmless the City from any and all suits, actions, and claims of every nature and description caused by, arising from or on account of, any act or omission of the Developer, or of any other person or entity for whose act or omission Developer is liable, with respect to such construction of the Improvements; and Developer shall pay any and all judgments rendered against the City as a result of any suit, action, or claim together with all reasonable expenses and attorney's fees incurred by the City in defending any such suit, action or claim. The Developer shall require that all contractors and other employees engaged in construction of Improvements shall maintain adequate workmen's compensation insurance and public liability coverage and shall faithfully comply with the provisions of the Federal Occupational Safety and Health Act.

4.2 Drainage Liability: The Developer shall indemnify and hold harmless the City for any liability the latter may have on account of any change in the nature, direction, quantity, or quality of historical drainage flow resulting from the development of this subdivision or from the construction of streets or storm sewers therein. In addition, the Developer promises to reimburse the City for any and all costs including, but not limited to, reasonable attorney's fees, which the City incurs in acquiring or condemning any rights-of-way or easements which the City is required to acquire or condemn or which the City is held to have acquired or condemned, for drainage as a result of the development of this subdivision.

4.3 Tax Liability: The Developer shall pay all property taxes on property dedicated to the City, and shall indemnify and hold harmless the City for any property tax liability.

5. Acceptance: If the Improvements are satisfactorily completed, then upon written request of Developer, accompanied by documents required by the City's Standards and Specifications, the City shall accept the Improvements in accordance with then-applicable procedures. Upon acceptance, said Improvements shall become public facilities and property of the City. Until acceptance by the City



Council, the Developer shall bear all risk of loss, damage, or failure to any of the Improvements.

5.1 If desired by the City, portions of the Improvements may be placed in service when completed, but such use shall not constitute an acceptance. Until the Improvements are accepted by the City, Developer shall be solely liable for any repairs or replacements which, in the opinion of the City Engineer, shall become necessary. If, within ten days after Developer's receipt of written notice from the City requesting such repairs or replacements, the Developer shall not have undertaken with due diligence to make same, the City may make such repairs or replacements at the Developer's expense and shall be entitled to draw upon the performance guarantee described in Paragraph 7 either before undertaking to make such repairs or at any time thereafter. In case of emergency, such written notice shall be waived, and the City shall proceed as it deems necessary, at Developer's expense.

5.2 The City may, at its option, issue building permits for construction on lots for which the Improvements detailed herein have been started, but not completed. The City shall not issue Certificates of Occupancy or install water meters for lots unless: (1) the Improvements serving those lots are completed and placed in service; (2) the progress of work on the Improvements throughout the Subdivision is satisfactory to the City; and (3) all terms of this Agreement have been faithfully kept by the Developer. Any waiver of the terms of this Agreement by the City in any particular instance shall not be deemed a waiver of such terms in any subsequent instance. No delay in enforcement of the terms of this Agreement by the City shall be deemed a waiver of the City's rights hereunder.

6. Repair and Replacement: During a period of one year from and after the acceptance of the Improvements, the Developer shall, at its own expense, make all needed repairs or replacements which, in the opinion of the City Engineer, shall become necessary. If, within ten days after Developer's receipt of written notice from the City requesting such repairs or replacements, the Developer shall not have undertaken with due diligence to make same, the City may make such repairs or replacements at the Developer's expense and shall be entitled to draw upon the performance guarantee described in Paragraph 7 either before undertaking to make such repairs or at any time thereafter. In case of emergency, such written notice shall be waived, and the City shall proceed as it deems necessary, at Developer's expense.

7. Performance Guarantee: Before starting work on any phase of the Improvements and before any building permit is issued for any structure to be erected in the Subdivision, Developer shall furnish to the City, at Developer's expense, a bond, irrevocable letter of

credit, or other performance guarantee in a form and content satisfactory to the City Attorney in which the City is designated as beneficiary of an amount equal to the total for the items shown on the "Schedule of Improvements" (Exhibit C). Letters of credit shall be substantially in the form and content set forth in Exhibit D, attached hereto and incorporated herein, and shall be subject to the review and approval of the City Attorney.

7.1 The estimated cost of completion of the Improvements may increase in the future. Accordingly, the City reserves the right to review and adjust the cost estimates at any time in the future, before or after Developer provides a letter of credit. Adjusted cost estimates will be made according to changes in the Construction Cost Index as published by the Engineering News Record. If the City adjusts cost estimates for the Improvements, the City shall give written notice to Developer. The Developer shall, within thirty days after receipt of said written notice, provide the City with a new or amended letter of credit in the amount of the adjusted cost estimates. If the Developer refuses or fails to so provide the City with a new or amended performance guarantee, the City may withhold building permits, water licenses, and certificates of occupancy within the Subdivision.

7.2 Releases of the letter of credit shall be in accordance with the City's Standards and Specifications as adopted in Title 14 of the Broomfield Municipal Code.

7.3 The letter of credit shall be maintained at an amount sufficient to fund all remaining improvements, said amount to be determined by the City Engineer, until all improvements have been accepted by the City. Thereafter, the letter of credit shall be maintained at the amount required by the Standards and Specifications during the one year repair and replacement period referred to in Paragraph 6.

7.4 If a letter of credit is to expire within 14 calendar days and the Developer has not yet provided a satisfactory replacement, the City may draw on the letter of credit and either hold such funds as security for performance of this agreement, or spend such funds to finish improvements or correct problems within the Subdivision, as the City deems appropriate.

8. Availability of Utilities: The City will use every reasonable means to plan for and provide water and sewer services for the Subdivision. However, it is specifically understood that the City cannot guarantee its ability to provide water or sewer services. The Developer, for himself, his heirs, successors, and assigns hereby acknowledges the municipal utility limitations of the City of Broomfield and agrees to accept and comply with all policies, ordinances,

development criteria and platting restrictions currently in effect or enacted in the future to allocate or regulate the use of the City's utility resources.

9. Breach of Agreement: If at any time this Agreement or any part hereof has been breached by the Developer or if satisfactory progress has not been made on the Improvements, the City may draw on the performance guarantee described in Paragraph 7, may withhold approval of any or all building permits, certificates of occupancy, and water licenses applied for in the Subdivision, and, until the breach has been corrected by the Developer, shall be under no obligation to approve or to issue any additional building permits, certificates of occupancy or water licenses for any area within the Subdivision. If the City draws on the performance guarantee, it shall not be under obligation to complete the subdivision improvements. The City may use the proceeds for engineering expenses, consultants' fees and charges, legal fees and costs, subdivision improvements, reimbursements, or other expenses connected with the subdivision. Notwithstanding the rights guaranteed by this paragraph, the City may pursue whatever additional remedies it may have at law or in equity. If the City brings legal action against the Developer or the issuer of the letter of credit, and if the City is successful in such litigation, the Developer shall pay the City's costs and attorneys' fees. The waiver of any one or more breaches of the Agreement shall not constitute a waiver of the remaining terms thereof.

10. Recording of Agreement: This Agreement shall be recorded and shall be a covenant running with the property herein described in order to put prospective purchasers or other interested parties on notice as to the terms and provisions hereof.

11. Binding Effect: This Agreement shall be binding upon the successors and assigns of the parties hereto.

12. Transfer or Assignments: No transfer or assignment of any of the rights or obligations of the Developer under this Agreement shall be permitted except as follows:

12.1 Prior to the sale or other transfer of the Subdivision as a unit, the Developer shall obtain from the buyer or transferee a letter acknowledging the existence of this Subdivision Agreement, and agreeing to be bound thereby. Said letter shall be signed by the buyer or transferee, notarized, and delivered to the Clerk of the City of Broomfield prior to the transfer or sale.

12.2 In the event of a sale or transfer of any portion of the Subdivision, except to a bona-fide home buyer, the seller or transferor and the buyer or transferee shall be jointly and severally liable for the performance of each of the obligations contained in

this Subdivision Agreement, unless prior to the transfer or sale an agreement satisfactory to the City, delineating and allocating between Developer and buyer or transferee the various rights and obligations of Developer under this Agreement, has been approved by the City Council.

13. Title and Authority: The Developer expressly warrants and represents to the City that it is the record owner of the property constituting the Subdivision, and further represents and warrants, together with the undersigned individual, that the undersigned individual has full power and authority to enter into this Subdivision Agreement. The Developer and the undersigned individual understand that the City is relying on such representations and warranties, in entering into this Agreement.

14. Special Provisions:

14.1 The Developer agrees to pay for park improvements described in the Schedule of Improvements for Tracts A through O as depicted on the final subdivision plat.

14.2 The City agrees to pay for the water licenses, water taps, and tap and meter fees for the parks in Tracts A through O as depicted on the final subdivision plat.

14.3 The Developer agrees to pay the entire cost of constructing Midway Boulevard as described in the Schedule of Improvements. The City agrees to reimburse the Developer \$350,000. However, should the City expend its funds to improve Midway Boulevard within the Subdivision prior to the commencement of construction by the Developer, any such expenditure shall be deducted from the reimbursable amount of \$350,000.

14.3.1 The City shall pay the Developer in ten annual installments. The amount of each installment shall not be less than \$35,000 plus 6-1/2 percent annual interest on the unpaid principal. The first installment will be paid by the City to the Developer not later than six months from the date of acceptance by the City of Midway Boulevard as constructed by the Developer. At any time after the first installment is due to the Developer, the City may elect to pay the entire balance due and owing the Developer, or any portion thereof that is greater than an annual installment, without prepayment penalty. If the City pays the entire balance due and owing the Developer, the City shall pay the Developer interest on such unpaid balance only to the day that such entire balance is paid. Further, the City may at any time accelerate annual payments without penalty.

14.3.2 Subsequent installments shall be paid by the City to the Developer annually thereafter on the anniversary of the day and month that the first installment was paid.

14.3.3 The Developer agrees to commence and complete construction of Midway Boulevard simultaneously with development of Phase I as such phase is shown on the Willow Park PUD Plan/Preliminary Plat. The Developer agrees that the City may withhold issuance of building permits in Phases 2 through 8 if Midway Boulevard is not constructed or construction is not completed.

14.4 The Developer agrees to pay for the cost of constructing the improvements on Sheridan Boulevard, as prescribed in the Schedule of Improvements, from the Nissen Reservoir Channel, north to the south property line of the Calvary Evangelical Free Church, including the frontage for the land currently owned by Harold J. Brachle, as depicted of the Willow Park PUD Plan/Preliminary Plat. The Developer agrees to construct such improvements before the issuance by the City of the 283rd building permit within the final subdivision plat. The Developer further agrees that the City may withhold the issuance of building permits commencing with the 284th building permit if the improvements are not constructed or if construction is not completed.

14.4.1 The Developer may recover the cost of improving those portions of Sheridan Boulevard and Midway Boulevard adjacent to and especially benefiting the land currently owned by Harold J. Brachle after Sheridan Boulevard has been constructed by applying to the City for the establishment of a reimbursement assessment district as provided in Chapter 14.06 of the Broomfield Municipal Code.

14.5 The City accepts responsibility for the installation of the traffic control signals in the intersection of Midway Blvd. and Sheridan Blvd.

15. Voiding Special Provisions: Within three years from the date of this Agreement, the Developer agrees to provide the City with the performance guarantee required in paragraph 7 of this Agreement for cost of constructing all of the Phase 1 improvements described in paragraph 1.5 of this Agreement and for the cost of constructing the improvements to Sheridan Boulevard as described in paragraph 14.4 above. Should the Developer fail to deliver to the City the performance guarantee within said three-year period or if delivery is made within said three-year period and the performance guarantee is determined to be unsatisfactory by the city attorney, paragraph 14 and all subparagraphs thereunder of this Agreement shall be null and void and of no force or effect.

Subdivision Agreement  
for Willow Park

BOOK 3953 PG 212

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the day and year first above-written.

MIDWEST BUILDERS, INC.

By *R. Haag*  
President

ATTEST:

*Celia Haag*  
Secretary

(SEAL)

STATE OF COLORADO )  
COUNTY OF Jefferson ) ss.

The foregoing instrument was acknowledged before me this 23<sup>th</sup> day of July, 1992, by R. Haag, as President and Celia Haag, as Secretary of Midwest Builders, Inc.

My commission expires: 1-20-95

*Margaret Dazzo*  
Notary Public

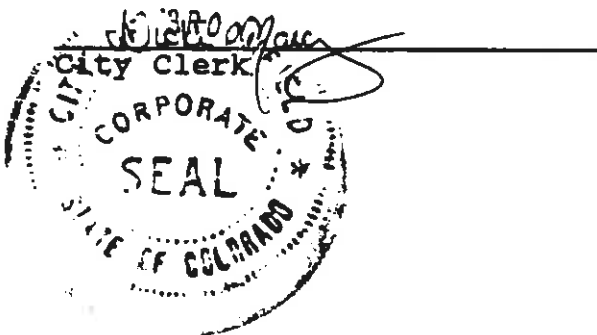


WITNESS my hand and official seal.

CITY OF BROOMFIELD,  
a Municipal Corporation

*[Signature]*  
Mayor

ATTEST:

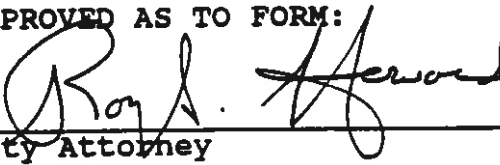


Subdivision Agreement  
for Willow Park

BOOK 3953 PG 213

(SEAL)

APPROVED AS TO FORM:

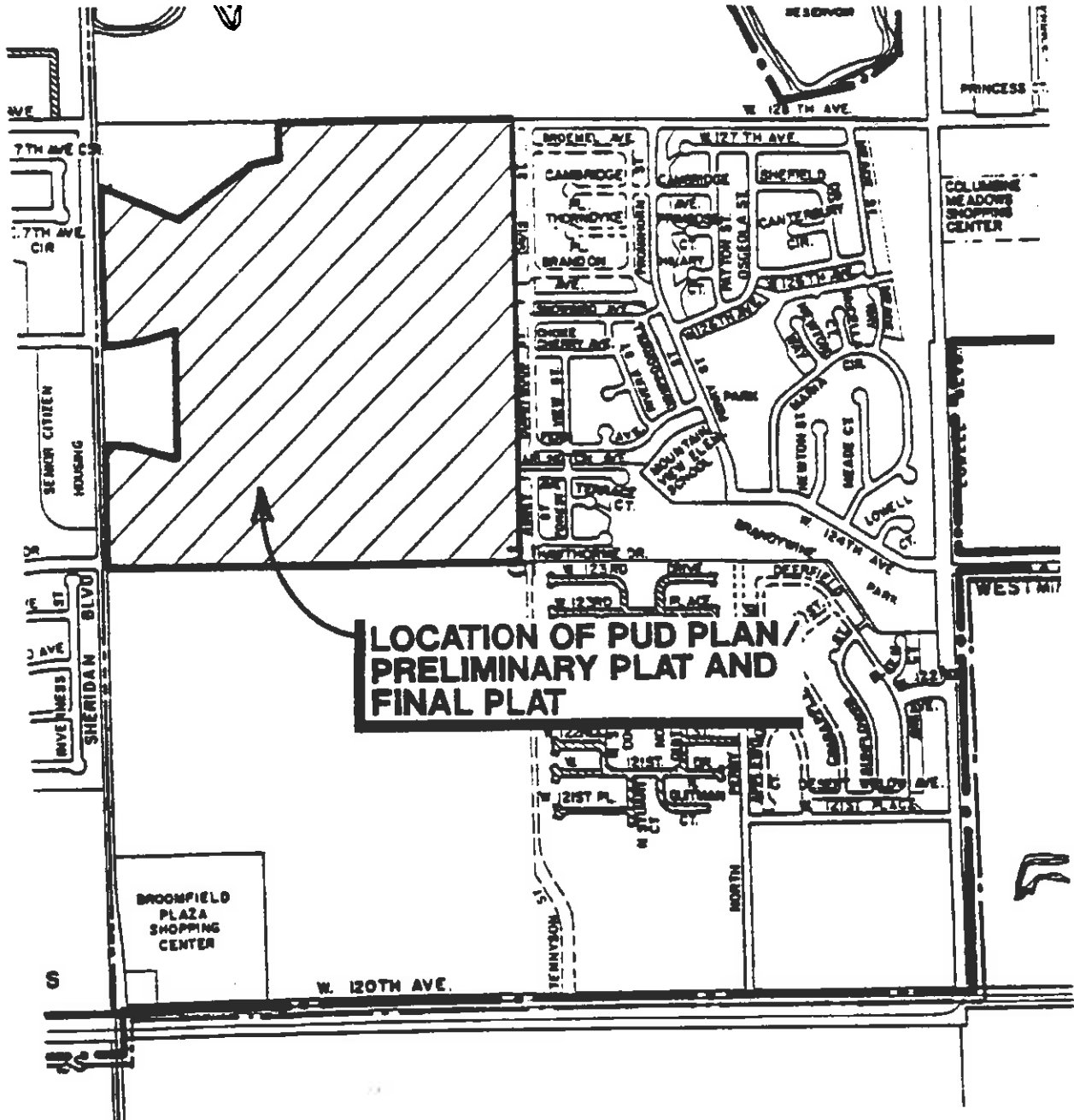
  
\_\_\_\_\_  
City Attorney

Section 31  
T1S R68W



Attachment 1  
**VICINITY MAP**  
JUNE 3, 1992

# WILLOW PARK





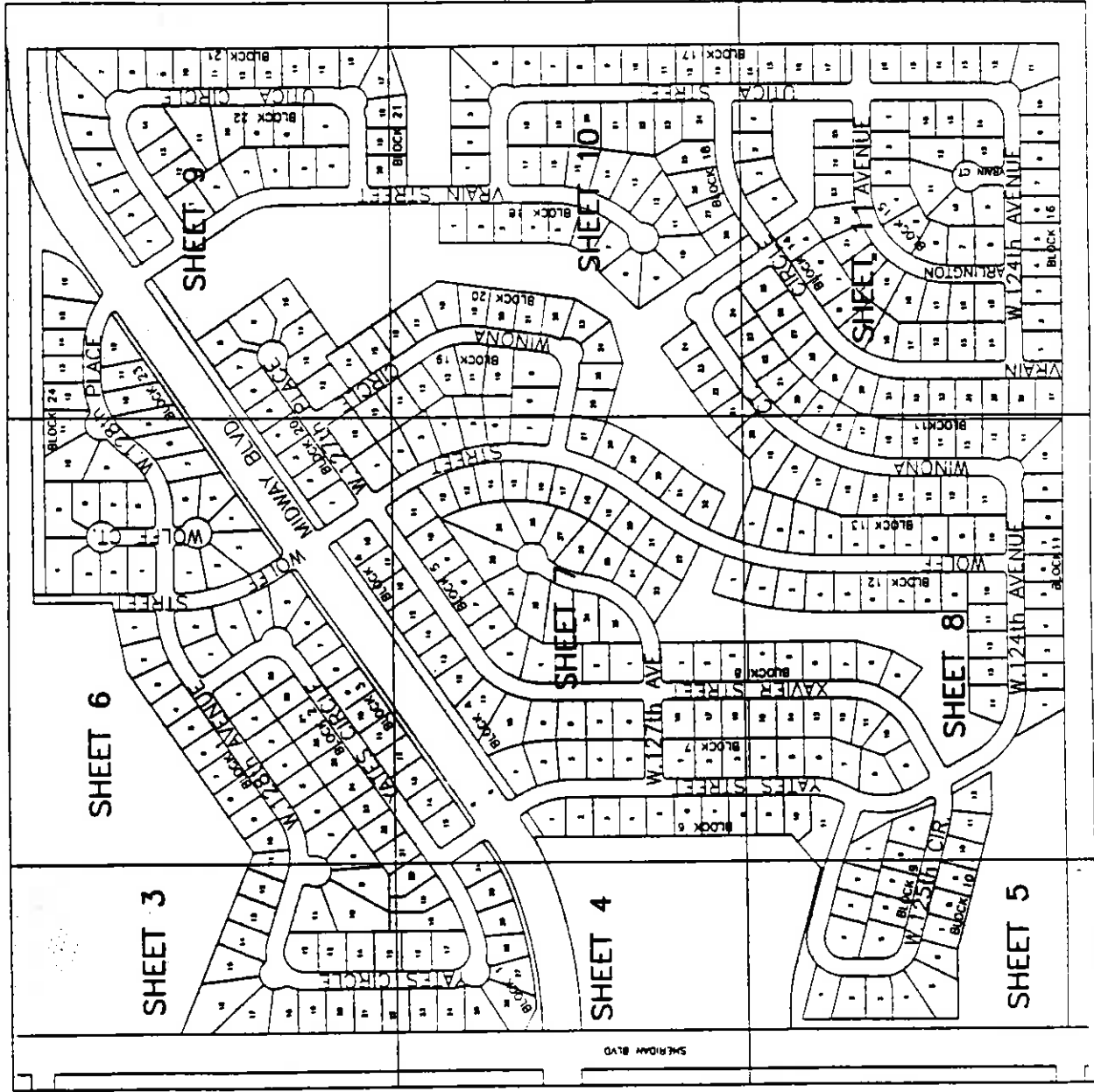


SCALE 1" = 200'

GILLAN'S ENGINEERING, INC.  
912 LAKESIDE LAKE - SUITE 150  
DENVER, COLORADO 80212  
(303) 480 0471

SHEET 2 OF 11

WILLOW I GILLY  
BROOMFIELD, COLORADO  
SHEET 2 OF 11



KEY MAP



Chapter VI  
**POINTERS FOR NEGOTIATION**

Gary Stout

**Introduction**

An important point to public/private negotiations is to realize that these negotiations are not just bargaining, but are also the exchange of information - if done properly. This is extremely important in the difficult times that exist now and that will exist for the foreseeable future regarding real estate development and financing.

The following are some overlapping and related suggestions in preparation of a public/private negotiation:

- 1. Define your objectives.** Write them down so you don't stray too far from them.
- 2. Anticipate the objectives of your negotiation partner.** Write them down for future reference to see how close you were. This can be an excellent learning experience.
- 3. Anticipate obstacles in reaching an agreement.** Again, write these down for future comparison.
- 4. Anticipate the "negotiation style" of your partner.**
- 5. Analyze the degree of commitment from your partner.** Is financing attainable? Is this nothing more than a "talking commitment"?
- 6. Put some controls on the information you disclose.** Make sure that important information is disclosed in a timely fashion.
- 7. Exchange information for information.** The willingness of staff to expose information too quickly results in nothing learned.
- 8. Attempt to obtain information informally** prior to initiation of formal negotiations. I have generally found out more about the capability of an organization over lunch than a group of us have found during an afternoon of negotiations.
- 9. Plan on the need for several sessions,** over a period of time, as it is not normally possible to conclude a sound complex development agreement with one comprehensive negotiation session.
- 10. Have in mind a negotiation strategy.** Keep in mind the above suggestion.
- 11. Make an effort to understand your partner's problems and concerns.** This may be used as a restraining measure to keep from getting too far ahead of the project.

**12. Understand the other side's time constraints.** Keep special attention on such dates as when options elapse, when financing commitments expire and when tenant pre-lease commitments terminate.

**13. Control the other side's expectations.** Avoid statements like "anything you want" or "we'll do our best". If the potential for a problem exists, say so.

**4. Retain objectivity.** Respect the psychological needs of your negotiation partner. "Hard-ball" negotiation, although sometimes necessary, shouldn't be protocol.

**15. Keep an accurate record of your partner's commitments,** perhaps by meeting minutes. I have often prepared development agreements from such minutes.

**16. Patience is a virtue.** All deals are going to be tough. Realize at the beginning of negotiations that nothing is going to go easy for an extended period of time. At some point, however, you must be able to sort the projects which will probably proceed from the ones which will probably fail.

**17. Independently assess your partner's risks and position** in relation to such factors as the market, financing, rezoning and pro forma financial assumptions. Evaluate and verify this data independently.

**18. Realize that, with the state that the financing market is in, fewer deals are going to get done** and that a higher percentage of those which do get done are going to rely on public/private partnerships.

**19. If you reach an impasse, keep talking for a while.** However, have a schedule your partner is aware of, and cut it off at a reasonable time.

**20. Remember that a deal gone wrong can be a very difficult situation to untangle.** If the deal doesn't "feel right" initially, proceed with further caution.

This is an incomplete list of considerations and suggestions; everything depends on the specifics of an individual situation. Given the state of the market as it is today, success in the field of public/private ventures is essential, and being prepared is important and imperative to ensure successful negotiations.





Chapter VII  
***CHECKLIST FOR DRAFTING DEVELOPMENT AGREEMENTS***

David Callies

**Introduction**

Whether a development agreement will provide the security and control which both parties seek will depend in part upon how well the approved draft of the agreement expresses the interests, intentions and expectations of both parties. The following checklist describes the basic issues which a development agreement should address either because development agreement statutes require them or because experience - primarily from California - indicates that they arise often in the development agreement process.

**1. Definitions.** All technical terms to be used in the development agreement should be precisely defined in a "table" of definitions. The agreement should also include all terms which have been defined in any applicable statute or ordinance.

**2. Parties.** The agreement should name all parties to the agreement, together with their capacities to enter into the agreement. In the case of developers/owners, their equitable or legal interests in the property should be stated. In the case of government entities, their authority to enter into development agreements should be recited.

**3. Relationship of the parties.** The relationship between the parties to the agreement should be stated clearly. Typically, the statement will specify that the relationship is contractual and that the owner/developer is an independent contractor, and not an agent of the county.

**4. Property.** The property to be subject to the agreement should be clearly and thoroughly identified. An attachment specifically describing the property should be provided and incorporated into the agreement by reference.

**5. Authorization.** The state and local government legislation under which the parties are enabled and authorized to enter into this agreement should be cited. This is particularly important in the event a state agency is a party. The resolution or ordinance by which the agreement has been approved by the local government body should be cited.

**6. Intent of the parties.** The intent of the parties to be bound by the terms of the agreement should be clearly stated.

**7. Recitation of the benefits and burdens.** The parties should recite the benefits each expects to gain from entering into the agreement, as well as the burdens each agrees to bear. Because a development agreement will be treated as a contract, the consideration each party is to receive from the other should be stated clearly in order to ensure enforceability. It is especially critical that the benefits to the local government

and community be expressed in terms which exhibit the agreement as consistent with - or as an exercise of - the local government's police powers. For example, all benefits which promote the community's health and welfare should be underscored. Stressing such benefits may help protect the agreement against a "bargaining away of the police power" challenge.

**8. Notice and Hearings.** The date upon which any statutorily required public hearing was held should be noted, as well as all relevant findings resulting from such hearing. All other pertinent notice and hearing requirements should be recited.

**9. Consistency with plans.** The findings of the local legislative body that the agreement is consistent with local plans must be stated. This is a requirement of some of the development agreement statutes.

**10. Administrative or legislative act.** The agreement should state that it is deemed to be an administrative or legislative act of the governmental body made party to the agreement. The relevant section of the enabling statute should be cited. While this does not guarantee a court will so treat it, it increases the probability that it will.

**11. Applicable land use regulations.** The agreement should contain a precise statement of all land use regulations to which the development project will be subject. The agreement should specify precisely which regulations will apply to the project regardless of future changes, or otherwise be affected by the agreement. The statement should make it clear that regulations not specifically so identified will not be affected by the terms of the agreement, and will be subject to enforcement and change under the same criteria that would apply if no agreement were in effect.

**12. Status of applicable land use regulations and plans.** The agreement should contain a statement that no applicable land use regulations or plans are currently under review or reconsideration, and that there are no legal challenges to the validity of such regulations or plans pending.

**13. Approval and permit requirements.** As far as possible at the time the agreement is written, the parties should specify all discretionary approvals and permits which will have to be obtained before the development can proceed beyond its various stages. Permits and approvals obtained prior to execution of the agreement should be specified. Any and all conditions precedent to the obtaining of permits and approvals should be listed.

**14. Permitted uses under the agreement.** Under some of the development statutes, the agreement must specify:

- (1) the permitted uses of the property;
- (2) the density or intensity of use; and
- (3) the maximum height and size of proposed buildings.

**15. Uses prohibited by the agreement.** The parties to the agreement are free to set limits to permissible uses beyond those specified by the applicable zoning



classification. All additional limits and requirements should be clearly stated.

**16. Dedications and reservations.** The agreement should provide, where appropriate, a statement of all reservations or dedications of land for public purposes as are required pursuant to laws, ordinances, resolutions, rules or policies in effect at the time of entering into the agreement. The agreement should also state all reservations or dedications which are permitted under existing laws at the time the agreement is entered, and to which the parties have agreed.

**17. Duration of the agreement.** The agreement must usually provide for a termination date. It may also specify project commencement and completion dates, either for the project as a whole, or for its various phases. The agreement should specify that the termination date can be extended by mutual agreement, and that commencement and completion dates may also be extended at the discretion of the governmental agency, if requested by the developer upon good cause shown.

**18. Amendments, cancellation or termination.** The agreement should recite the statutory conditions under which the agreement can be amended, cancelled, or otherwise terminated. In particular, the agreement should note that the local government retains the power and right to alter the terms of the agreement and impose additional requirements under circumstances spelled out in the applicable development agreement statutes. For example, if the failure to do so would place the citizens of the community in a perilous condition, or in the event of substantially changed conditions. An express statement of this retention of police power should help to protect the agreement against possible charges that the government has bargained away its police power.

**19. Periodic review.** The agreement should provide for periodic reviews of the project in order to determine compliance with the terms of the agreement, as required by statute and ordinance, if appropriate. The agency responsible for performing such reviews should be identified and specific times for such reviews should be stated. Procedure should be developed and specified for dealing with situations in which minor and major noncompliance is discovered.

**20. Progress reports.** If the parties agree, the agreement should specify that progress reports should be made available to the government agency by the developer at specified intervals, or upon completion of specified phases of the project, or at whatever time periods the parties choose.

**21. Remedies.** Remedies for breach on the part of either party should be provided. Specific remedies for specific breaches should be stated, if possible. The agreement should include a statement clarifying whether remedies stated in the agreement are to be exclusive, or whether other statutory or common law remedies will also be available.

**22. Enforcement.** The agreement should specify that it shall be enforceable, unless lawfully terminated or cancelled, by any party to the agreement or any party's successor in interest, notwithstanding any subsequent changes in any applicable law

adopted by the government entity, which alters or amends the laws, ordinances, resolutions, rules or policies frozen by the agreement, except as noted in #18 above.

**23. Hold harmless clause.** If the parties so agree, the agreement should contain a clause whereby the developer/property owner holds the government and its agents harmless from liability for damages, injury or death, which may arise from the direct or indirect operations of the owner, developer, contractors, and subcontractors, which relate to the project.

**24. Insurance, bonds.** Any insurance coverage required and/or secured by either party to the agreement, and affecting any aspect of the development project, should be specified. Existing performance bonds should be listed in detail, as well as bonds not yet obtained, but required as conditions precedent for final approval of the subdivision plan. Applicable ordinances relating to bond requirements should be cited.

**25. Severability clause.** The agreement should include a clause specifying that the provisions of the agreement are severable, if the parties so agree. Any limitations upon the severability of any particular clause or clauses should be clearly stated.

**26. Merger clause.** A merger clause or other statement should be provided specifying that the terms of the agreement as stated in the written document are both a final and complete expression of the parties' intentions.

**27. Statements of incorporation by reference.** All documents related to the agreement or otherwise attached or appended thereto should be expressly stated to be incorporated into the agreement by reference. These might include lists of conditions, schedules of completion for public facilities, imposition of dedications, impact fees, and development plans and specifications.

**28. Cooperation.** The agreement should include a statement of the extent to which the government will cooperate with the owner in his efforts to secure required permits from nonparty government agencies.

**29. Subsidiary or collateral agreements.** If the owner has obtained additional agreements relating to the development project from any nonparty agencies or persons, such agreements and the parties thereto should be specified.

**30. Conflict of laws.** Procedures should be specified for dealing with situations in which changes in laws promulgated by nonparty government bodies (state or federal) might preempt or otherwise affect local laws frozen by the agreement.





Appendix A  
**COLORADO'S VESTED PROPERTY RIGHTS STATUTE**

**TITLE 24. GOVERNMENT - STATE  
PLANNING - STATE  
ARTICLE 68. VESTED PROPERTY RIGHTS**

**24-68-101. Legislative declaration**

(1) The general assembly hereby finds and declares that:

(a) It is necessary and desirable, as a matter of public policy, to provide for the establishment of vested property rights in order to ensure reasonable certainty, stability, and fairness in the land use planning process and in order to stimulate economic growth, secure the reasonable investment-backed expectations of landowners, and foster cooperation between the public and private sectors in the area of land use planning.

(b) The ability of a landowner to obtain a vested property right after local governmental approval of a site specific development plan will preserve the prerogatives and authority of local government with respect to land use matters, while promoting those areas of statewide concern described in paragraph (a) of this subsection (1).

(c) The establishment of vested property rights will promote the goals specified in this subsection (1) in a manner consistent with section 3 of article II of the state constitution, which guarantees to each person the inalienable right to acquire, possess, and protect property, and is therefore declared to be a matter of statewide concern.

**24-68-102. Definitions**

As used in this article, unless the context otherwise requires:

(1) "Landowner" means any owner of a legal or equitable interest in real property, and includes the heirs, successors, and assigns of such ownership interests.

(2) "Local government" means any county, city and county, city, or town, whether statutory or home rule, acting through its governing body or any board, commission, or agency thereof having final approval authority over a site specific development plan, including without limitation any legally empowered urban renewal authority.

(3) "Property" means all real property subject to land use regulation by a local government.

(4) "Site specific development plan" means a plan which has been submitted to a local government by a landowner or his representative describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property. Such plan may be in the form of, but need not be limited to, any of the following plans or approvals: A

planned unit development plan, a subdivision plat, a specially planned area, a planned building group, a general submission plan, a preliminary or general development plan, a conditional or special use plan, a development agreement, or any other land use approval designation as may be utilized by a local government. What constitutes a site specific development plan under this article that would trigger a vested property right shall be finally determined by the local government either pursuant to ordinance or regulation or upon an agreement entered into by the local government and the landowner, and the document that triggers such vesting shall be so identified at the time of its approval. A variance shall not constitute a site specific development plan. "Site specific development plan" shall not include a sketch plan as defined in section 30-28-101 (8), C.R.S., or a preliminary plan as defined in section 30-28-101 (6), C.R.S.

(5) " Vested property right" means the right to undertake and complete the development and use of property under the terms and conditions of a site specific development plan.

#### **24-68-103. Vested property right - establishment**

(1) A vested property right shall be deemed established with respect to any property upon the approval, or conditional approval, of a site specific development plan, following notice and public hearing, by the local government in which the property is situated. Such vested property right shall attach to and run with the applicable property and shall confer upon the landowner the right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan including any amendments thereto. A local government may approve a site specific development plan upon such terms and conditions as may reasonably be necessary to protect the public health, safety, and welfare. Such conditional approval shall result in a vested property right, although failure to abide by such terms and conditions will result in a forfeiture of vested property rights. A site specific development plan shall be deemed approved upon the effective date of the local government legal action, resolution, or ordinance relating thereto. Such approval shall be subject to all rights of referendum and judicial review; except that the period of time permitted by law for the exercise of such rights shall not begin to run until the date of publication, in a newspaper of general circulation within the jurisdiction of the local government granting the approval, of a notice advising the general public of the site specific development plan approval and creation of a vested property right pursuant to this article. Such publication shall occur no later than fourteen days following approval.

(2) Zoning that is not part of a site specific development plan shall not result in the creation of vested property rights.

#### **24-68-104. Vested property right - duration - termination**

(1) A property right which has been vested as provided for in this article shall remain vested for a period of three years. This vesting period shall not be extended by any amendments to a site specific development plan unless expressly authorized by the local government.

(2) Notwithstanding the provisions of subsection (1) of this section, local governments are hereby authorized to enter into development agreements with landowners providing that property rights shall be vested for a period exceeding three years where warranted in light of all relevant circumstances, including, but not limited to, the size and phasing of the development, economic cycles, and market conditions. Such development agreements shall be adopted as legislative acts subject to referendum.

(3) Following approval or conditional approval of a site specific development plan, nothing in this article shall exempt such a plan from subsequent reviews and approvals by the local government to ensure compliance with the terms and conditions of the original approval, if such reviews and approvals are not inconsistent with said original approval.

#### **24-68-105. Subsequent regulation prohibited - exceptions**

(1) A vested property right, once established as provided for in this article, precludes any zoning or land use action by a local government or pursuant to an initiated measure which would alter, impair, prevent, diminish, or otherwise delay the development or use of the property as set forth in a site specific development plan, except:

(a) With the consent of the affected landowner;

(b) Upon the discovery of natural or man-made hazards on or in the immediate vicinity of the subject property, which hazards could not reasonably have been discovered at the time of site specific development plan approval, and which hazards, if uncorrected, would pose a serious threat to the public health, safety, and welfare; or

(c) To the extent that the affected landowner receives just compensation for all costs, expenses, and liabilities incurred by the landowner, including, but not limited to, all fees paid in consideration of financing, and all architectural, planning, marketing, legal, and other consultants' fees incurred after approval by the governmental entity, together with interest thereon at the legal rate until paid. Just compensation shall not include any diminution in the value of the property which is caused by such action.

(2) The establishment of a vested property right shall not preclude the application of ordinances or regulations which are general in nature and are applicable to all property subject to land use regulation by a local government, including, but not limited to, building, fire, plumbing, electrical, and mechanical codes.

#### **24-68-106. Miscellaneous provisions**

(1) As used in this article, the term "development" includes redevelopment.

(2) A vested property right arising while one local government has jurisdiction over all or part of the property included within a site specific development plan shall be effective against any other local government which may subsequently obtain or assert jurisdiction over such property.

(3) Nothing in this article shall preclude judicial determination, based on common law principles, that a vested property right exists in a particular case or that a compensable taking has occurred.

(4) This article shall apply only to site specific development plans approved on or after January 1, 1988.







Appendix B  
**LOCAL GOVERNMENT ORDINANCES**

1. CITY OF ARVADA
2. CITY OF ASPEN
3. CITY OF BOULDER
4. TOWN OF BRECKENRIDGE
5. CITY AND COUNTY OF DENVER
6. DOUGLAS COUNTY
7. CITY OF FORT COLLINS
8. CITY OF GLENWOOD SPRINGS
9. CITY OF NORTHGLENN
10. CITY OF STEAMBOAT SPRINGS
11. TOWN OF TELLURIDE
12. CITY OF WOODLAND PARK

## 1. CITY OF ARVADA

### ARTICLE V. VESTED PROPERTY RIGHTS

#### Sec. 25-71. Purpose.

The purpose of this article is to provide the procedures necessary to implement the provisions of Article 68 of Title 24, Colorado Revised Statutes, which article establishes a vested property right to undertake and complete development and use of real property under the terms and conditions of a site specific development plan. (Ord. No. 2469, § 1, 12-7-87)

#### Sec. 25-72. Definitions.

When not clearly otherwise indicated by context, the following words and phrases as used in this article shall have the following meanings:

(1)*Site specific development plan* means a plan describing with reasonable certainty the type and intensity of use proposed for a specific parcel or parcels of property, which plan shall create a vested property right. For PUD districts or PUD overlays, the final development plan as defined in section 3.4.7 of the zoning ordinance, as amended, shall constitute the site specific development plan. For all districts where an Article 8 development plan approval is required by the zoning ordinance, the site specific development plan is the plan provided in Article 8 shall constitute the site specific development plan. For all other uses, the final plat as defined in section 3.3.C of the subdivision regulations depicting the final building lot size shall constitute the site specific development plan. The city may create a separate document that designates another document as a site specific development plan. No minor plat or amendment to any development plan or plat, where the plan or plat was approved prior to January 1, 1988, shall constitute as site specific development plan.

(2)*Vested property right* means the right to undertake and complete the development and use of property under the terms and conditions of a site specific development plan. (Ord. No. 2469, § 1, 12-7-87)

#### Sec. 25-73. Approval by ordinance.

(a)Site specific development plans shall be approved by ordinance.

(b)No site specific development plan shall be placed on the city council agenda until the submission is complete, all construction drawings have been approved by the city engineer, all agreements necessary for the development have been executed by all nongovernmental parties, all planning commission conditions have been completed, all third party approvals have been received, and all fees tendered by the applicant. (Ord. No. 2469, § 1, 12-7-87)

#### Sec. 25-74. Plat and plan language.

Each plat or plan constituting a site specific development plan shall contain the following language: "Approval of this plan or plat creates a vested property right pursuant to Colorado Revised Statutes 24-68-103. The effective date is [insert date] . This plan or plat is subject to all conditions of approval." (Ord. No. 2469, § 1, 12-7-87)

**Sec. 25-75. Date of approval.**

A site specific development plan shall be deemed approved upon the effective date of the city council action relating thereto and no rights shall vest prior to the date. (Ord. No. 2469, § 1, 12-7-87)

**Sec. 25-76. Duration.**

A vested property right shall remain vested for a period of 3 years from its effective date, unless otherwise agreed to by the city. An amendment to any site specific development plan will not extend the period of vested rights, unless otherwise authorized by agreement approved by city council. (Ord. No. 2469, § 1, 12-7-87)

**Sec. 25-77. Waiver.**

A landowner may waive a vested property right by separate agreement, which will be recorded in the county where the property is located. Unless otherwise agreed to by the city, any landowners requesting annexation to the city shall waive in writing any pre-existing vested property rights as a condition of such annexation. (Ord. No. 2469, § 1, 12-7-87)

**Sec. 25-78. Other provisions unaffected.**

Approval of a site specific development plan shall not constitute an exemption from or waiver of any other provisions of this Code pertaining to the annexation, development, and use of property. (Ord. No. 2469, § 1, 12-7-87)

## 2. CITY OF ASPEN

### **Sec. 6-207. Vested property rights.**

A. *Purpose.* The property of this section is to provide the procedures necessary to implement the provisions of Article 68 of Title 24, C.R.S., as amended, which establishes a vested property right under the circumstances set put herein. In the event of the repeal of said article, this chapter shall be deemed to be repealed, and the provisions hereof no longer effective.

B. *Exceptions.* A vested property right, once established, shall preclude any zoning or land use action by the City of Aspen or pursuant to an initiated measure which would alter, impair, prevent, diminish, or otherwise delay the development or use of the property as set forth in the site specific development plan, except:

1. With the consent of the applicant; or
2. Upon the discovery of natural or manmade hazards on or in the immediate vicinity of the property, which hazards could not reasonably have been discovered at the time of this approval, and which hazards, if uncorrected, would pose a serious threat to the public health, safety and welfare; or
3. To the extent that compensation is paid as provided in Title 24, Article 68. C.R.S.

C. *Notice and hearing.* No site specific development plan shall be approved or conditionally approved unless and until notice thereof has been given and a public hearing thereon has been conducted. At least fifteen (15) days prior to the date of the public hearing, notice of the time and place of the hearing shall be published in a newspaper of general circulation in the City of Aspen. In those matters delegated to the commission or HPC for final approval, approval of the site specific development plan shall be by written resolution of the commission or HPC. In those matters in which the council has final approval, final approval shall be by ordinance. A site specific development plan shall be deemed approved on the effective date of the approving resolution or ordinance. The public hearing required by this section may be the same public hearing required under this chapter for any final approval. Such approval shall be subject to all rights of referendum and judicial review; except that the period of time permitted by law for the exercise of such rights shall not begin to run until the date of publication, in a newspaper of general circulation within the city, of the notice specified in Section 6-207(D) advising the general public of the site specific development plan approval and creation of a vested property right pursuant to Title 24, Article 68, C.R.S.

D. *Notice of final approval.* As soon as practicable following the date a site specific development plan is approved as provided in Section 6-207(C) above, and not later than fourteen (14) days following such approval date, the city clerk shall cause a notice to be published advising the general public of the site specific development plan approval and creation of a vested property right pursuant to Title 24, Article 68, C.R.S.

Such notice shall be substantially in the following form:

Notice is hereby given to the general public of the approval of a site specific development plan, and the creation of a vested property right pursuant to Title 24, Article 68, Colorado Revised Statutes, pertaining to the following-described property:

The property shall be described in the notice and appended to said notice shall be the ordinance or resolution granting such approval.

E. *Requirements of ordinance or resolution.* Any ordinance or resolution approving a site specific development plan, shall, but not by way of limitation, include the following provisions, unless expressly exempted by the approving body:

1. The rights granted by this site specific development plan shall remain vested for a period of three (3) years from the effective date hereof. However, any failure to abide by any of the terms and conditions attendant to this approval shall result in the forfeiture of said vested property rights.
2. The approval granted hereby shall be subject to all rights of referendum and judicial review; except that the period of time permitted by law for the exercise of such rights shall not begin to run until the date of publication provided for in Section 6-207(D).
3. Zoning that is not part of the site specific development plan approved hereby shall not result in the creation of a vested property right.
4. Nothing in this approval shall exempt the site specific development plan from subsequent reviews and approvals required by this approval of the general rules, regulations and ordinances or the City of Aspen provided that such reviews and approvals are not inconsistent with this approval.
5. The establishment of a vested property right shall not preclude the application of ordinances or regulations which are general in nature and are applicable to all property subject to land use regulation by the City of Aspen including, but not limited to, building, fire, plumbing, electrical and mechanical codes. In this regard, as a condition of this site development approval, the applicant shall abide by any and all building, fire, plumbing, electrical and mechanical codes, unless an exemption therefrom is granted in writing.

F. *Non-vested development.* Any development receiving site specific development plan approval which does not establish a vested property right nor obtain a building permit shall have its approval expire eighteen (18) months subsequent to the date of site specific development plan approval.  
(Ord. No. 6-1989, § 8)

### 3. CITY OF BOULDER

#### ORDINANCE NO. 5098

#### AN EMERGENCY ORDINANCE AMENDING TITLE 9, LAND USE REGULATION, B.R.C. 1981 PROVIDING FOR VESTED PROPERTY RIGHTS

WHEREAS, Senate Bill No. 219, concerning the establishment of vested real property rights, was signed into law on August 27, 1987, and

WHEREAS, said Bill purports to declare the establishment of vested property rights to be a matter of statewide concern: and

WHEREAS, the city council finds it desirable to clarify any ambiguities created by the adoption of Senate Bill 219.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1 Chapter 9-4, B.R.C. 1981 is amended by the addition of Section 9-1-14, entitled "Creation of Vested Rights," as follows:

#### 9-4-14 Creation of Vested Rights

- (a) For the purposes of this title and of Article 68 of Title 24, C.R.S., as amended, the term "site specific development plan" means any planned unit development, any height review, those special review uses accompanied by a detailed site plan, and those high density overlay zone developments requiring review under subsections 9-4-13 (c) and (d), B.R.C. 1981.
- (b) In order to establish a vested property right as defined in Section 24-68-102(5), C.R.S. for a site specific development plan, the applicant shall meet all of the following requirements:
  - (1) For those site specific development plan approvals not requiring a public hearing before the planning board, the applicant shall request, in writing, that its application be referred to the planning board for hearing under the city manager's discretionary power pursuant to Section 9-4-3(b)(1), B.R.C. 1981. The city manager will refer any such requested application to the planning board for



public hearing pursuant to Section 9-4-4, B.R.C. 1981.

- (2) The applicant shall state clearly in its application those specific elements of the plan in which the applicant seeks to create vested rights, including without limitation, type of use, density, building height, building footprint location, and architecture.
- (3) If a site specific development plan is approved by the planning board, the applicant shall cause a notice advising the general public of site specific development plan approval and the creation of a vested property right to be published in a newspaper of general circulation no later than fourteen days following final approval meeting the requirements of Section 9-4-5, B.R.C. 1981. Further, the applicant shall provide the city manager with the newspaper's official notice of said publication no later than ten days following the date of publication.
- (4) The applicant shall meet and maintain all conditions of final approval for the site specific development plan.

An applicant's failure to meet all of the above requirements renders the site specific development plan approval void and results in the waiver of the applicant's right to create a vested property right pursuant to Section 24-68-103(1), C.R.S.

- (c) The establishment of a vested property right shall not preclude the application of city ordinances or regulations which are general in nature and are applicable to all property subject to land use regulation including without limitation the provisions of Chapters 9-5, 9-6, 9-7, 9-8, and 9-9 B.R.C., 1981, and the city's building, fire, plumbing, electrical, and mechanical codes. Approval of a site specific development plan shall not constitute an exemption from or waiver of any other provisions of this code pertaining to the development and use of property.
- (d) The three year vesting period for site specific development plan approvals shall not be extended to a longer time period, including by amendments to such approvals, unless such extensions are included in the development agreement pursuant to Section 9-4-5(a) B.R.C. 1981, and adopted by ordinance of the city council.

Section 2. Section 9-2-5, entitled "Annexation Requirements" is hereby amended by the addition of the following subsection:

- (e) No annexation of land to the city shall occur for land that has obtained a vested property right arising under county jurisdiction unless the land owner thereof waives said right prior to annexation.

Section 3. Section 9-4-8, entitled "Expiration of Development Approval" is amended as follows:

9-4-8 Expiration of Development Approval.

- (a) Approval of a special review, planned unit review, height review, or high density overlay zone review expires three years after the date of final approval and approval of a nonconforming review automatically expires one year after the date of final approval, unless at least one building permit or certificate of completion is issued within that time for the development, unless otherwise specified under the terms of the development agreement. Nothing in this section is deemed to create a vested property right in any applicant; such vested property right may only accrue pursuant to the provisions of section 9-4-14, B.R.C. 1981.

Section 4. Nothing in this ordinance shall preclude judicial determination, based on common law principles, that a vested property right exists in a particular case: however, this ordinance is not intended to create any vested property right pursuant to Article 69 of Title 21. C.R.S., as amended which would duplicate any common law vested right, and no land owner shall be entitled to recover damages under both a common law theory and under the provisions of this ordinance. In the event of the repeal of said article or of a judicial determination that said article is invalid or unconstitutional, this ordinance shall be deemed to be repealed automatically, and the provisions hereof no longer effective. Further, no statutory vested rights are deemed to accrue to any project approved prior to January 1, 1988.

Section 5. It is hereby declared to be the intention of the city council that each and every part of this ordinance is severable, and if any term, phrase, clause, sentence, paragraph, or section of this ordinance shall be declared unconstitutional or invalid by the valid judgment or decree of any Court of competent jurisdiction, such unconstitutionality or invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs, and sections of this ordinance since the same would have been enacted by the city council without the incorporation in this ordinance of any such unconstitutional or invalid term, phrase, clause, sentence, paragraph, or section.

Section 6. Nothing in this ordinance shall be construed to affect any right, duty, or liability under any ordinance in effect prior to the effective date of this ordinance, and the same shall be continued and concluded under such prior ordinances.

Section 7. The city council finds that an emergency exists, in that Senate Bill 219 has an effective date of January 1, 1988, and, therefore, determines that this ordinance should be adopted as an emergency measure on first reading in order to avoid any unnecessary delay to land owners desiring to create a vested property right in the approval of their site specific development plan by the city. This ordinance is necessary to protect the public health, safety, and welfare of the residents of the city and covers matters of local concern.

Section 8. The city council deems it appropriate that this ordinance be published by title only and directs the city clerk to make available in his office copies of the text of the within ordinance for public inspection and acquisition.

INTRODUCED, ORDERED PUBLISHED BY TITLE ONLY, READ, PASSED,  
AND ADOPTED AS AN EMERGENCY MEASURE BY A TWO-THIRDS VOTE OF THE  
CITY COUNCIL PRESENT THIS \_\_\_\_\_ DAY OF JANUARY, 1988.

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
Director of Finance and Record  
Ex-Officio City Clerk

**Vested Rights Option Form and/or Waiver**

\_\_\_\_\_  
Type of Review

\_\_\_\_\_  
Property Owner's Name

\_\_\_\_\_  
Address of Property

\_\_\_\_\_  
Applicant's Name

**OPTION #1**

I, \_\_\_\_\_, intend to pursue the creation of a vested property right as provided for in Section 9-4-14, B.R.C. 1981. In order to accomplish that, I am requesting that my application be referred to the Planning Board for a public hearing pursuant to Section 9-4-3(b)(1), B.R.C. 1981. I understand that if my development is approved by the Board, I shall cause a notice advising the general public of the Planning Board's approval and the creation of a vested property right to be published in a newspaper of general circulation no later than fourteen days following final approval and shall provide the Planning Director with the newspaper's official notice of publication no later than ten days following the date of publication, in order to perfect my vested right. Said right will be vested for three years from the date of final approval and will cover the following elements of the approval:

[type of use; number of units; building footprint; building square footage; etc.]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I understand and acknowledge that certain delays in my project's approval time may result in order to meet the hearing and notice requirements of state law for the creation of a vested property right.

Property Owner

By: \_\_\_\_\_  
Date

Witness: \_\_\_\_\_  
Date

\*\*\*\*\*

**OPTION #2**

I, \_\_\_\_\_, understand that I may pursue the creation of a vested property right as provided for in Section 9-4-14, B.R.C. 1981, and Section 24-68-103, C.F.R. 1973, and I choose to voluntarily waive this right. I have been advised by the City to consult an attorney prior to signing this waiver. Further, I understand that this waiver does not abridge any common law vested rights which I may acquire nor does it diminish any right which may exist under the City's land use regulations, except for Section 9-4-14, B.R.C. 1981.

Property Owner

By: \_\_\_\_\_  
Date

Witness: \_\_\_\_\_  
Date

#### 4. TOWN OF BRECKENRIDGE

C. Class A and Class B Applications (Site Specific Development Plan). Vested property rights for Class A and Class B applications, except for applications for the demolition or relocation of historic structures, shall be established and administered under the provisions of this section.

1. Vested Property Right Created. A vested property right shall be deemed to have been created only upon the approval or affirmation of the Town Council of a site specific development plan in accordance with this Section.
2. Notice and Hearing. No site specific development plan shall be approved until after a public hearing preceded by notice. In all cases, such hearing shall be held before the Planning Commission in connection with the normal development application process. In those instances where the decision of the Planning Commission is called up, a second hearing, also preceded by notice, shall be held before the Town Council. At all such hearings, interested persons shall have an opportunity to be heard.
3. Notice of Approval. Each map, plat, site plan or other document constituting a site specific development plan shall contain the following language:

The failure of the map, plat, site plan or other document constituting a site specific development plan to contain this language shall invalidate the creation of the vested property right. In addition, a notice generally describing the type and intensity of the use approved, the specific parcel or parcels of property affected, and stating that a vested property right has been created shall be published once by the Town in a newspaper of general circulation in the Town not more than 14 days after the approval of the site specific development plan.

4. Duration of Vested Right. Subject to the provisions of Section 5 of this Section, a property right which has been vested pursuant to this Section shall remain vested for a period of three (3) years; provided, however, that a development agreement may provide that a property right shall be vested for a period exceeding three years when warranted in light of all relevant circumstances, including, but not limited to, the size and phasing of the development, economic cycles and market conditions.
5. Execution of Development Permit. Within twenty-one (21) days following approval of a site specific development plan the Town

shall prepare and mail or hand deliver to the affected landowner, or the landowner's designated agent or representative, a development permit for the approved project. Within 30 days following mailing or hand delivery of the development permit the affected landowner, or the landowner's designated agent or representative, shall execute and return the development permit to the Town. Failure to execute and return the development permit within such time period shall operate as a waiver of any vested right with respect to the development, and the time for the construction of the development shall thereafter be governed by the provisions of Section 9-1-17:8 of this Code.

6. Other Provisions Unaffected. Approval of a site specific development plan shall not constitute an exemption or waiver of any other provisions of this Code pertaining to the development and use of property.
7. Amendment to Site Specific Development Plan. In the event amendments to a site specific development are proposed and approved, the effective date of such amendments, for the purposes of determining the duration of a vested property right, shall be the date of the creation of the original site specific development plan unless the Town Council specifically finds to the contrary and incorporates such finding in its approval or affirmation of the amendment.
8. Effect of Termination of Vested Property Right on Public Rights of Way. The termination of a vested property right shall have no effect upon public streets, alleys or rights of ways previously dedicated with respect to such property.
9. Development Agreements. The Town Council may, by agreement with a landowner or developer, designate an approval other than that described in this Section as the site specific development plan for a specific project.

## 5. CITY AND COUNTY OF DENVER

### Sec. 59-29. Vested Property Rights.

Approval of a district plan for a PUD by city council following notice and a public hearing shall constitute a site specific development plan which triggers a vested property right pursuant to 24-68-102(4), C.R.S. Such property right shall not vest until ninety (90) days after the effective date of the ordinance approving the PUD. Pursuant to 24-68-104(1), C.R.S., a property right which has been vested shall remain vested for a period of three (3) years. A notice advising the general public of the site specific development plan approval and the creation of a vested property right shall be published no later than fourteen (14) days after the effective date of the ordinance approving the PUD. Every PUD district plan shall contain a statement that a vested property right shall be created ninety (90) days after the effective date of the ordinance approving the PUD. (Ord. No. 389-88, eff. 6-28-88)

## 6. DOUGLAS COUNTY

### Section 9 VESTED PROPERTY RIGHTS

#### A. Intent

To provide procedures and standards for review and approval of a site specific development plan for the purpose of vesting property rights in property other than single family residential property.

#### B. Site Specific Development Plan

1. The site plan is designated as the Site Specific Development Plan for the purpose of vesting property rights in property other than single family residential property.
2. Property rights may be vested by the Board of County Commissioners only upon the approval of a Site Specific Development Plan.
3. Concurrent processing of the site plan and the site specific development plan shall be permitted only with the approval of the Director of Planning and Community Development or his/her designee.
4. The Board of County Commissioners shall have the option to designate site plans approved by the County Referral Group prior to January 1, 1988 as site specific development plans for the purpose of vesting property rights.
5. Minor changes to site plans (as determined by the Director of Planning and Community Development or his/her designee) which have been designated as site specific development plans:
  - a. Do not affect the terms and conditions of vesting as specified in the site specific development plan; and
  - b. Do not extend the vesting period unless expressly authorized by the Board of County Commissioners.
6. Major changes to site plans (as determined by the Director of Planning and Community Development or his/her designee) which have been designated as site specific development plans shall render the terms and conditions of the original site specific development plan null and void, and vested property rights shall be forfeited.
7. Only the landowner(s), or their designated representative, is permitted to apply for designation of a site specific development plan for the purpose of vesting property rights.



Application for Approval of a Site Specific Development Plan

1. For site plans approved after January 1, 1988, the application for vested property rights as set forth herein must be made within 90 days of site plan approval. Failure to so apply shall render the approval of the site plan not a site specific development plan and no vested rights shall be deemed to have been created.
2. At least thirty days prior to the hearing before the Board of County Commissioners, the applicant shall publish a notice in at least one publication of a newspaper of general circulation in Douglas County and provide a publisher's affidavit of said notice to the Planning Division at least ten days prior to the Board hearing. The notice shall read:

NOTICE OF PUBLIC HEARING BEFORE THE  
BOARD OF COUNTY COMMISSIONERS

A public hearing will be held on (day of week), (date), at (time), in the County Commissioner's Hearing Room at 101 Third Street, Castle Rock, CO, for a vesting of property rights. Said property is located approximately (distance and direction from nearest major intersection).

Owner: \_\_\_\_\_

Legal Description: \_\_\_\_\_

Type and intensity of proposed use: (Amended 4/24/91)

Published in (newspaper) (date)

D. Approval of a Site Specific Development Plan

1. The Board of County Commissioners may approve, conditionally approve or deny a site specific development plan.
2. Douglas County may approve the site specific development plan upon such terms and conditions as may reasonably be necessary to protect the public health, safety and welfare. Such conditions shall include but not be limited to:
  - a. The applicant agrees to comply with area-wide regulations which may be promulgated following approval of the site specific development plan based upon reasons of public health, safety, and welfare.
  - b. The applicant agrees:
    - 1) That the information submitted at site plan was sufficient and reasonable to conclude that the subject property and its immediate vicinity are free of all natural or manmade hazards, or that the applicant has identified any such hazard

and has taken such necessary measures to ensure that such hazard will not pose a serious threat to the public health, safety, or welfare.

- 2) That subsequent discoveries of any hazard which are not corrected by the applicant to the satisfaction of the Board of County Commissioners, and is determined by the Board of County Commissioners to pose a serious threat to the public health, safety, or welfare shall render the site specific development plan void resulting in a forfeiture of vested property rights.
- c. The applicant agrees to comply fully with the public notice requirements provided in C.2. and E.1. of this Section 10.
3. Any conditional approval shall result in a vested property right, although failure to abide by such terms and conditions will result in a forfeiture of vested property rights.
4. Upon approval of a site specific development plan, the vested property rights shall attach to and run with the property and shall confer upon the landowner the right to undertake and complete the development and the use of said property under the terms and conditions of the site specific development plan including any amendments and modifications thereto which have been approved by the Board of County Commissioners or their designated representative.
5. Douglas County is authorized to extend vested property rights for a period exceeding three years where warranted in light of all relevant circumstances, including, but not limited to, the size and phasing of the development, economic cycles and market conditions as a condition of the site specific development plan.
6. Following approval or conditional approval of the site specific development plan, as provided herein, nothing in this subsection shall exempt such a site specific development plan from subsequent reviews and approvals by the local government to ensure compliance with the terms and conditions of the original approval.
7. A vested property right, once established as provided for in this subsection, precluded any zoning or land use action concerning the subject property by Douglas County or pursuant to an initiated measure which would alter, impair, prevent, diminish, or otherwise delay the development or use of the property as set forth in a site specific development plan, except:
  - a. With the consent of the affected landowner.

- b. Upon the discovery of natural or man-made hazards on or in the immediate vicinity of the subject property, which hazards could not reasonably have been discovered at the time of site specific development plan approval, and which hazards, if uncorrected, would pose a serious threat to the public health, safety and welfare, or as provided in D. 2. b. of this Section 10;
  - c. To the extent that the affected landowner receives just compensation for all costs, expenses, and liabilities incurred by the landowner, including financing and all architectural, planning, marketing, legal and other consultant's fees incurred after approval by Douglas County, together with interest thereon at the legal rate until paid. Just compensation shall not include any diminution on the value of the property which is caused by such action.
  - d. The establishment of a vested property right shall not preclude the application of ordinances or regulations subject to land use regulation by a local government, including, but not limited to, building, fire, plumbing, electrical and mechanical codes.
8. A vested property right arising while one local government has jurisdiction over all or part of the property included within a site specific development plan shall be effective against any other local government which may subsequently obtain or assert jurisdiction over such property.
9. Nothing in this subsection shall preclude judicial determination, based on common law principles, that a vested property right exists in a particular case or that a compensable taking has occurred.

E. Post Approval Actions

- 1. Any approval shall be subject to judicial review; except that the period of time permitted by law for the exercise of such rights shall not begin to run until the date of publication, in a newspaper of general circulation within Douglas County, of a notice advising the general public of the site specific development plan approval and creation of a vested property right pursuant to this Section 10. Such publication shall be the responsibility of the applicant and shall occur no later than 14 days following approval. The applicant shall present to the Planning Department an affidavit of such notice within 15 days of publishing. The notice shall read as follows:

NOTICE

Notice is hereby given that on the \_\_\_\_ day of \_\_\_\_\_, 19\_\_, the Douglas County Board of Commissioners approved a site specific development plan for the property and purpose described below, which approval may have created a vested property right pursuant to Colorado

law. Such approval is subject to all rights of judicial review.

Legal description:

Type and intensity of use:

Published in:

Date of Publication:

## 7. CITY OF FORT COLLINS

### *Subdivision F. Vested Property Rights.*

The following terms, when used in this Chapter, shall have the meanings ascribed to them in this Section:

*Site Specific development plan* shall mean and be limited to: the final plan, as approved pursuant to § 29-526; the final subdivision plat, as approved pursuant to § 29-643; a minor subdivision plat, as approved pursuant to § 29-644; final site plans in the R-M District, as provided pursuant to § 29-179; final site plans in the R-H District, as provided pursuant to §§ 29-205 and 29-206; cluster development plans as provided pursuant to § 29-116; site plans in the I-L and I-P Districts, as provided pursuant to § 29-372; site plans in the RC District, as provided pursuant to § 29-419; nonconforming use review, as provided pursuant to Chapter 29, Article III, Division 6; and group home review, as provided pursuant to § 29-475.

*Vested property right* shall mean the right to undertake and complete the development and use of property under the terms and conditions of a site specific development plan.

(Ord. No. 2, 1988, 1-19-88)

**Cross reference** - Definitions and rules of construction generally, § 1-2.

### **Sec. 29-513. Notice and hearing.**

(a) No site specific development plan shall be approved or extended pursuant to the provisions of § 29-514 or the Code until after a public hearing, preceded by notice of such hearing published in a newspaper of general circulation within the city at least seven (7) days prior to such hearing. Such notice may, at the city's option, be combined with any other required notice. At such hearing, interested persons shall have an opportunity to be heard.

(b) A "notice of approval" describing generally the type and intensity of use approved, the specific parcel or parcels of property affected, and stating that a vested property right has been created or extended, shall be published once, not later than fourteen (14) days after approval or extension of the site specific development plan, in a newspaper of general circulation within the city. The period of time permitted by law for the exercise of any applicable right of referendum or judicial review shall not begin to run until the date of such publication, whether timely made within said fourteen-day period, or thereafter.

(Ord. No. 2, 1988, 1-19-88)

### **Sec. 29-514. Approval; effective date; amendments.**

(a) A site specific development plan shall be deemed approved upon the effective date of the approval by the Planning and Zoning Board or Director of Planning, as

applicable, relating thereto, subject to the right of appeal and judicial review. The developer must have undertaken and completed the development of an approved site specific development plan within three (3) years from the effective date of approval. For the purposes of this Subdivision, a developer has "undertaken and completed the development" when all engineering improvements (water, sewer, streets, curbs, gutter, street lights, fire hydrants and storm drainage) are installed and completed in accordance with city rules and regulations.

(b) A vested property right may be extended for two (2) successive periods of six (6) months by the Director of Planning. Upon receipt of such request for extension, the Director shall hold a public hearing in his/her office for the purpose of approving, disapproving or approving with conditions the requested extension. Any additional extensions of a vested property right shall be approved, if at all, only by the Planning and Zoning Board. Any request for an extension must be submitted by the owner to the Director in writing at least thirty (30) days prior to the date of expiration of the vested property right. Failure to submit a written request within the specified time period shall cause forfeiture of the right to extension of the vested property right. Failure to undertake and complete the development within the term of the vested property right shall cause a forfeiture of the vested property right and shall require resubmission of all materials and reapproval of the same. All dedications as contained on the final plat shall remain valid unless vacated in accordance with law. The granting of administrative extensions may, at the discretion of the Director, be referred to the board.

(c) In the event that administrative changes to a final plan, as approved pursuant to § 29-526(f)(5)(a), are approved, the effective date of such changes, for the purposes of duration of a vested property right, shall be the date of the approval of the original plan.

(d) The approval of major amendments to final plan, pursuant to § 29-526(f)(5)(b), shall, if established pursuant to notice and hearing as provided in § 29-513, create a new vested property right with effective period as provided herein and duration as provided by law.

(Ord. No. 2, 1988, 1-19-88)

#### **Sec. 29-515. Other provisions unaffected.**

Approval of a site specific development plan shall not constitute an exemption from or waiver of any other provisions of this Code pertaining to the development and use of property.

(Ord. No. 2, 1988, 1-19-88)

#### **Sec. 29-516. Payment of costs.**

In addition to any and all other fees and charges imposed by this Code, the applicant for approval or extension of a site specific development plan shall pay all costs occasioned to the city pertaining to such application, including publication of notices, public hearing and review costs, which costs are hereby imposed as a flat fee of fifty dollars (\$50.00).

(Ord. No. 2, 1988, 1-19-88)

**Sec. 29-517. Automatic repeal; waiver.**

Nothing in this Subdivision is intended to create any vested property right, but only to implement the provisions of Article 68, Title 24, C.R.S. In the event of the repeal of said article or a judicial determination that said article is invalid or unconstitutional, this Subdivision shall be deemed to be repealed and the provisions hereof no longer effective. Nothing herein shall be construed to prohibit the waiver of a vested property right pursuant to mutual agreement between the city and the affected landowner. Upon recordation of any such agreement with the county clerk and Recorder, any property right which might otherwise have been vested shall be deemed to be not vested.

## 8. CITY OF GLENWOOD SPRINGS

### ORDINANCE NO. 13 Series of 1992

AN ORDINANCE OF THE CITY OF GLENWOOD SPRINGS, COLORADO,  
CONCERNING VESTED PROPERTY RIGHTS FOR DEVELOPMENTS AND  
SUBDIVISIONS.

WHEREAS, C.R.S. 224-68-101, et. seq. declares vested property rights to be a matter of state-wide concern and required municipalities to honor a three year vested rights period after the approval of "site-specific development plans."

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF GLENWOOD SPRINGS, COLORADO, ORDAINS:

#### Section 1.

Subsection 070.020.020(C) of the Glenwood Springs Municipal Code is hereby repealed and re-enacted to read as follows:

#### C. Term of Development Permits.

Any development permit shall be valid for a period of three years after final approval of the development permit by the City, unless a different term for the development permit is expressly agreed upon by the City and the developer and include in the development permit. The development permit shall expire and become null and void if the developer fails to make application for a building permit for the development within the aforesaid three year period. If the developer makes timely application for a building permit according to a development permit, the development permit shall then remain in effect for so long as the building permit remains in effect.

#### Section 2.

Article 070.020 of the Glenwood Springs Municipal Code is hereby amended by the addition of a new section 070.020.120 as follows:

#### 070.020.120 Vested Property Rights.

- A. Purpose. The purpose of this section is to provide the procedures necessary to implement the provisions of C.R.S. 24-68-101, et seq. as amended.
- B. Definitions. As used in this section, unless the context otherwise requires:
  - 1. "Site-specific development plan" means:



- (a) Any development plan.
  - (b) Any subdivision plat.
  - (c) Any special review use site plan.
2. "Vested property right" means the right to undertake and complete the development and use of property under the terms and conditions of a site-specific development plan and any accompanying permit or agreement.
- C. Approval - Effective Date - Amendments. For the purpose of determining the date upon which a vested property right shall be deemed established as set forth in C.R.S. 24-68-103, a site-specific development plan shall be deemed approved upon the date of final action by the City according to the procedures set forth in this development code. Any subsequent amendment to the site-specific development plan shall not extend or otherwise affect the duration of the vested property right unless the City Council specifically finds to the contrary and incorporates such finding in its approval of the amendment.
- D. Notice of Approval. Within fourteen days after the approval of a site-specific development plan, the City shall publish or cause to be published in the City's official newspaper a notice describing generally the type and intensity of use approved, the specific parcel or parcels of property affected and stating that a vested property right has been created according to state law. In addition to any and all other fees and charges imposed by this code, the City may charge an additional fee for publication of the notice of approval in any amount not to exceed \$20.00, which fee shall be assessed at the time of application and shall be reimbursed to the applicant if the site-specific development plan is not approved.
- E. Other Provisions Unaffected. Approval of a site-specific development plan shall not constitute an exemption from or waiver of any other provisions of this code pertaining to the development and use of property.
- F. Limitations. Nothing in this section is intended to create any vested property right, but only to implement the provisions of C.R.S. 24-68-101, et seq. as amended. In the event of the repeal of said article, this section shall be deemed to be repealed, and the provisions hereof no longer effective.

INTRODUCED, READ ON SECOND READING, ORDERED PUBLISHED BY TITLE  
ONLY TO BE EFFECTIVE TEN DAYS FOLLOWING THE DATE OF PUBLICATION, THIS  
\_\_\_\_ DAY OF MAY, 1992.

## 9. CITY OF NORTHGLENN

### Section 11-16-4. Rezoning Procedure.

(a) Request for Planned Unit Development zoning shall normally be processed in two phases, as follows:

- of:
- (1) Phase I, Preliminary PUD, which shall consist
    - (a) Staff review;
    - (b) Planning Commission review and public hearing; and
    - (c) City Council review, public hearing, and adoption of a special zoning ordinance.
  - (2) Phase II, Final PUD, which shall consist of:
    - (a) Staff review; and
    - (b) Planning Commission review, public hearing, and approval.

(b) At the option of the applicant, the PUD process may be completed in one phase, provided that the application contains all of the information required of any final PUD and is reviewed according to the procedure for any preliminary PUD. In this event, the plans shall be entitled "PRELIMINARY AND FINAL." (Source: Ord. 1023, 6/13/91)

(c) The schedule of review for preliminary and final PUD requests shall be as determined by the Director of Community Development, but in any event shall proceed as expeditiously as is practical and consistent with the size, complexity, and potential impact of the plans submitted.

(d) Unless otherwise provided in this Article 16, requests for Planned Unit Development zoning approval shall be subject to the same requirements, procedures and public hearing requirements as any zone change request as specified in Article 37 of the Zoning Ordinance.

(e) Preliminary PUD approval, including adoption of a special zoning ordinance by City Council, shall create no vested right to develop any property nor shall such approval be deemed approval of a site specific development plan.

## 10. CITY OF STEAMBOAT SPRINGS

### Sec. 17-133. Term; extension generally.

(a) Unless otherwise provided in this article, written development permits issued under section 17-132 shall be effective for a period of twenty-four (24) months from the date of issuance unless the term of such permit is deemed to be permanent in accordance with this section. Applications for an extension shall be in writing to the department and received prior to the expiration of the permit. An application for an extension received prior to the expiration of the development permit shall be considered even though, at the time of such consideration, the permit has expired. Extension applications shall be processed as applications for minor development permit approval under section 17-127, unless otherwise provided in this article. (See illustration 1-2 following section 17-137.)

(b) Denial or approval of an extension application shall be carried out in accordance with the following:

- (1) If the first phase of a development, as defined in the approved permit, has been completed, the permit shall be granted permanent approval. For plans approved prior to the adoption of this article, the first phase shall be defined by the planning commission pursuant to a hearing held in accordance with section 17-121, subject to review and approval of the city council.
- (2) If the first phase of a development has not been completed, and if the development plan is in substantial conformity with the comprehensive plan adopted pursuant to article II of this chapter, the development permit shall be extended for a renewable term of twelve (12) months.
- (3) If the first phase of a development has not been completed, and if the development plan is not in substantial conformity with the comprehensive plan adopted pursuant to article II of this chapter, the development permit shall be extended for a nonrenewable term of twelve (12) months.

(Code 1975, § 16.130.120)

### Sec. 17-134. Automatic extension.

Whenever litigation is commenced challenging the issuance of a development permit or seeking an injunction prohibiting construction or similarly prohibiting the issuance of a building permit or otherwise prohibiting the property owner from constructing pursuant to the issued development permit, the term of the development permit shall be automatically extended without the necessity of application or approval so that the developer shall have a full 24-month period, excluding the period of the litigation, including appeals, in which to use the development permit. For example, should a development permit be issued in January 1991 and the issuance of the development permit be challenged by litigation filed in February 1991 and ultimately

disposed of on appeal in March 1994, the property owner would have until February 1996 to use the development permit without obtaining an extension, a period of twenty-three (23) additional months after completion of the litigation, even should no stay be issued in the litigation. Prior to the expiration of this extended term, the developer may obtain a further extension in accordance with section 17-133. It is the intent of the city council that this section shall be effective for all development permits previously issued and valid as of September 18, 1990, and all development permits which may be approved after September 18, 1990.  
(Code 1975, § 16.130.121)

**Sec. 17-135. Revision of approved plans.**

(a) Existing approved development plans may be revised through application for and receipt of a new development permit pursuant to this division.

(b) Revisions proposed to existing approved plans which are not in conformance with the provisions of the comprehensive plan shall only be approved if the revisions result in the development plan being closer to conformity with the comprehensive plan than the existing approved plan. The degree of conformity required of the revised plan shall be commensurate with the degree of change proposed in the revised plan and the council's determination as to the benefits to the community and surrounding neighborhood of the proposed revisions.  
(Code 1975, § 16.130.125)

**Sec. 17-136. Development agreements.**

Notwithstanding any other provisions of this article, the city is hereby authorized to enter into development agreements with landowners and other qualified applicants, providing that property rights shall be vested for a period exceeding three (3) years where warranted in light of all relevant circumstances, including but not limited to the size and phasing of the development, economic cycles and market conditions. Such development agreements shall include, specifically or by reference, all of the requirements set forth in this article; provided, however, the city council may, when it determines such to be in the best interest of the city, vary the conditions required in this article by means of a development agreement. A development agreement may contain and include any provision which the city and the developer for the term of the development agreement.  
(Code 1975, § 16.130.128)

# 11. TOWN OF TELLURIDE

## Chapter 18.03

### VESTED REAL PROPERTY RIGHTS (3-26-91)

#### Sections:

18.03.010	Purpose
18.03.020	Definitions
18.03.030	Notice and Hearing
18.03.040	Approval - Effective Date - Amendments
18.03.050	Notice of Approval
18.03.060	Payment of Costs
18.03.070	Other Provisions Unaffected
18.03.080	Limitations

#### 18.03.010 Purpose

The purpose of this Chapter is to provide the procedures necessary to implement the provisions of Article 68 of title 24, C.R.S., as amended and to effectuate local control over creation of vested real property rights to the fullest extent permitted under the Telluride Home Rule Chapter.

#### 18.03.020 Definitions

- A. "Site specific development plan" means a map, plat, site plan, or other document as more particularly described below, including all terms and conditions thereof or incorporated by reference which describes with reasonable certainty the type and intensity of use permitted for a specific parcel or parcels of land:
1. Final subdivision plat; or
  2. Final planned unit development plan; or
  3. As otherwise agreed between the Town Council or the Planning and Zoning Commission and the owner for a specific project or development phases.
- B. Notwithstanding anything herein to the contrary, neither an annexation map, a variance or adjustment from the Board of Adjustment/Appeals, a Certificate of Appropriateness, nor a floodplain or geohazard permit shall constitute a site specific development plan.
- C. "Vested real property right" means the right to undertake and complete the

development and use of property under the terms and conditions of a site specific development plan.

18.03.030 Notice And Hearing

No site specific development plan shall be approved until after a public hearing, preceded by written notice of such hearing. Such notice may, at the Town's option, be combined with the notice required by Section 31-23-304, C.R.S., as amended, for zoning regulations, or with any other required notice. At such hearing interested persons, including owners of the described property, their representative, neighborhood residents, and local citizens, shall have an opportunity to be heard.

18.03.040 Approval - Effective Date - Amendments

A site specific development plan shall be deemed approved upon the effective date of final Town Council or Planning and Zoning Commission action approving such plan. In the event amendments to a site specific development are approved, the effective date of such amendments, for purposes of duration of a vested property right, shall be the date of the approval of the original site specific development plan, unless the Town Council or the Planning and Zoning Commission, as the case may be, specifically finds to the contrary and incorporates such findings in its approval of the amendment.

18.03.050 Notice of Approval

Each map, plat, or site plan or other document constituting a site specific development plan shall contain the following language: "Approval of this plan may create a vested real property right pursuant to article 68 of title 24 C.R.S., as amended subject to the limitations of Telluride Land Use Code Section 18.03.080." Failure to contain this statement shall not invalidate the creation of the vested real property right. In addition, a notice describing generally the type and intensity of use approved, the specific parcel or parcels of property affected, and stating that a vested real property right has been created, shall be published once by the applicant, not more than fourteen (14) days after approval of the site specific development plan, in a newspaper of general circulation with the Town of Telluride.

18.03.060 Payment of Costs

In addition to any and all other fees and charges imposed by this Code, the applicant for approval of a site specific development plan shall pay all costs occasioned to the Town as a result of the site specific development plan review, including publication of notice, public hearing and review costs.

18.03.070 Other Provisions Unaffected

Approval of a site specific development plan shall not constitute an exemption from or waiver of any other provisions of this Code pertaining to the development and

use of property.

**18.03.080            Limitations**

Nothing in this Chapter is intended to create any vested real property right, but only to implement the provisions of article 68 of title 24, C.R.S., as amended. In the event of the repeal of said article or a judicial determination that said article is invalid or unconstitutional, this Chapter shall be deemed to be repealed, and the provisions hereof no longer effective.

(Ord. 924, 1991; Ord. 843, 1988; Ord. 817, 1988)

## 12. CITY OF WOODLAND PARK

### Title 19

#### VESTED PROPERTY RIGHTS

##### Chapters:

- 19.04 Purpose
- 19.08 Designation of a Site Specific Development Plan
- 19.12 Request for Site Specific Development Approval
- 19.16 Notice of Hearing
- 19.20 Approval, Effective Date and Amendments
- 19.24 Notice of Approval
- 19.28 Payment of Costs
- 19.32 Other Provisions Unaffected
- 19.36 Limitations

##### Chapter 19.04

#### PURPOSE

##### Sections:

- 19.04.010 Purpose.
- 19.04.020 Definitions.

19.04.010 Purpose. The purpose of this title is to provide the procedures necessary to implement the provisions of Article 68 of Title 24, CRS. (Ord. 464-1988 § 1(part), 1988).

19.04.020 Definitions. As used in this title, unless the context otherwise requires:

A. "Site specific development plan" means a plan, approved by the city, which has been submitted by a landowner or his representative describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property.

B. "Vested property right" means the right to undertake and complete the development and use of property under the terms and conditions of a site specific development plan.  
(Ord. 464-1988 § 1(part), 1988).

##### Chapter 19.08

#### DESIGNATION OF A SITE SPECIFIC DEVELOPMENT PLAN

##### Sections:

- 19.08.010 Designation of a site specific development plan.



19.08.010 Designation of a site specific development plan. The designation of a site specific development plan for purposes of this title shall be as follows:

A. Minor Residential Development. Residential development for single or two family dwellings, upon final plat approval for a minor subdivision;

B. Major Residential Development. Residential development for single or two family dwellings, upon preliminary plan acceptance by the city council and improvement plan approval by the city engineer for a major subdivision;

C. Multi-family Residential Development. Residential development for multi-family dwellings upon site plan review approval;

D. Commercial Development. Commercial development, upon site plan review approval;

E. Industrial Development. Industrial development, upon site plan review approval;

F. Planned Unit Development. Planned unit development, upon final development plan approval;

G. Other Development Not Specified. Other development not specified, upon determination of the planning commission of a designated required plan and approval of said plan.  
(Ord. 464-1988 § 1 (part), 1988).

#### Chapter 19.12

#### REQUEST FOR SITE SPECIFIC DEVELOPMENT APPROVAL

##### Sections:

19.12.010 Request for site specific development plan approval.

19.12.010 Request for site specific development plan approval.

For those developments for which the landowner wishes the creation of vested rights, the landowner shall specifically request the approval by the city of the designated site specific development plan and development agreement. The plan shall be clearly labeled "Site Specific Development Plan for the Vesting of Property Rights Pursuant to Article 68 of the Title 24 CRS." Failure of the landowner to request such an approval renders the plan not a "site specific development plan," and no vested rights shall be deemed to have been created.  
(Ord. 464-1988 § 1(part), 1988).

#### Chapter 19.16

#### NOTICE OF HEARING

##### Sections:

19.16.010 Notice and hearing.

19.16.010 Notice and hearing. No site specific development plan and development agreement shall be approved until after a public hearing, preceded by written notice of such hearing. Such notice may, at the city's option, be combined with the notices required by any other regulation. At such hearing interested persons shall have an opportunity to be heard.  
(Ord. 464-1988 § 1 (part), 1988).

#### Chapter 19.20

#### APPROVAL, EFFECTIVE DATE AND AMENDMENTS

##### Sections:

19.20.010 Approval, effective date and amendments.

19.20.010 Approval, effective date and amendments. A site specific development plan and development agreement shall be deemed approved upon the effective date of the city council approval action relating thereto, as set forth in Chapter 19.12. In the event amendments to a site specific development are proposed and approved, the effective date of such amendments, for purposes of duration of a vested property right, shall be the date of the approval of the original site specific development plan, unless the city council specifically finds to the contrary and incorporates such finding in its approval of the amendment.  
(Ord. 464-1988 § 1 (part), 1988).

#### Chapter 19.24

#### NOTICE OF APPROVAL

##### Section:

19.24.010 Notice of approval.

19.24.010 Notice of approval. Each map, plat or site plan or other document constituting a site specific development plan and development agreement shall contain the following language: "Approval of the site Specific Development Plan and Development Agreement may create a vested property right pursuant to Article 68 of Title 24 CRS." Failure to contain this statement shall invalidate the creation of the vested property right. In addition, a notice describing generally the type and intensity of use approved, the specific parcel or parcels of property affected and stating that a vested property right has been created shall be published once, not more than fourteen days after approval of the site specific development plan, in a newspaper of general circulation within the city.  
(Ord. 464-1988 § 1 (part), 1988).

#### Chapter 19.28

## PAYMENT OF COSTS

### Sections:

19.28.010 Payment of costs.

19.28.010 Payment of costs. In addition to any and all other fees and charges imposed by this code, the applicant for approval of a site specific development plan and development agreement shall pay all costs occasioned to the city as a result of the site specific development plan review, including publication of notices, public hearings and review costs, as specified in the schedule of planning fees as approved by city council. (Ord. 464-1988 § 1 (part), 1988).

## Chapter 19.36

### OTHER PROVISIONS UNAFFECTED

### Sections:

19.32.010 Other provisions unaffected.

19.32.010 Other provisions unaffected. Approval of a site specific development plan and development agreement shall not constitute an exemption from or waiver of any other provisions of this code pertaining to the development and use of property. (Ord. 464-1988 § 1 (part), 1988).

## Chapter 19.36

### LIMITATIONS

### Sections:

19.36.010 Limitations.

19.36.010 Limitations. Nothing in this title is intended to create any vested property right, but only to implement the provisions of Article 68 of Title 24, CRS. In the event of the repeal of said article or a judicial determination that said article is invalid or unconstitutional, this chapter shall be deemed to be repealed, and the provisions hereof no longer effective. (Ord. 464-1988 § 1 (part), 1988).



Appendix C  
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