

**AMENDMENT TO INTERGOVERNMENTAL AGREEMENT  
(Town Center Park)**

THIS AMENDMENT TO INTERGOVERNMENTAL AGREEMENT (the “Amendment”) entered into and made effective as of the date set forth on the City’s signature page below by and between the **TOWN CENTER METROPOLITAN DISTRICT**, a quasi-municipal corporation and political subdivision of the State of Colorado (the “District”) with an address of 4908 Tower Road, Denver, Colorado 80249, and the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado (the “City”). The City and/or the District are sometimes individually referred herein as a “Party” and jointly as the “Parties”.

**RECITALS:**

1. During 2006, the City and the District were interested in facilitating the development of the Regional Park located within Green Valley Ranch (“Regional Park”) which was the responsibility of the City to construct, operate and maintain under a Development Agreement for Green Valley Ranch North dated February 20, 2003 (“Development Agreement”) and for which the City had appropriated sufficient funds to complete the Regional Park development.

2. The work necessary to complete this Regional Park development was defined and agreed upon by the Parties with the expectation that the District would retain and pay a contractor to perform the work (the “Project”) for which the City would reimburse the District.

3. The City and the District entered into an Intergovernmental Agreement dated January 30, 2007 (Contract Control # CE52145; Clerk Filing # 07-304) (the “Agreement”) defining the Project and establishing the basis for the District to undertake the bidding and construction administration for the Regional Park, as provided in the Agreement.

4. Following the receipt of bids, the District contractually retained Golden Triangle Construction, Inc. (“GTC”), to perform the Project in conformance with the Landscape Construction Plans dated July 26, 2006 (the “Plans”), a copy of which may be found in the office the Department of Parks and Recreation for the City and County of Denver.

5. Subsequently, GTC failed to perform the Project as contemplated under the Plans, with some of the specified work not being completely performed and other work or materials being improperly installed or being defective or deficient (collectively, “Deficiencies”), and despite repeated efforts, the District has been unable to resolve most of these Deficiencies with GTC.

6. As a consequence, and with the concurrence of the District, the City has retained the services of Goodland Construction, Inc. (“Goodland”), to identify and correct the Deficiencies, which work Goodland is in the process of performing.

7. Litigation between the District and GTC is also currently in process regarding, among other things, GTC’s potential liability for the Deficiencies (the “Litigation”).

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8. In order to best serve the public and to assure that the Regional Park development is completed as soon as practically possible, the City and the District concur that it is in the best interest of both Parties to correct the Deficiencies through the services being provided by Goodland under the direction of the City.

9. To that end, the City and the District have agreed to compromise the potential claims and interests they have under the Agreement in order to reach the accommodation and resolution as set forth in this Amendment.

IN CONSIDERATION OF THE ABOVE PREMISES, and the mutual promises and covenants contained herein, the Parties agree as follow:

1. Retainage; Reimbursement Obligation; Compromise.

A. Retainage. All of the City Funding, as described in the Agreement (including the contingency amounts for changes and additional services), has been paid to the District for the billed costs of the Project, EXCEPT for the retainage of \$179,533.17 still held by the City (the "Retainage"). The District alleges that it is entitled to receive from the City the entire balance of the Retainage.

B. Reimbursement Obligation. The current estimated cost for Goodland to correct the Deficiencies in the Regional Park is \$185,738.44. Subject to the terms of agreement with Goodland, the City will pay Goodland \$185,738.44 or the total amount actually chargeable by Goodland, to correct the Deficiencies in the Regional Park. The City alleges that it is entitled to receive a reimbursement from the District for the total amount of \$185,738.44 or any other amount that is actually chargeable by Goodland for correcting the Deficiencies in the Regional Park (the "Reimbursement Obligation").

C. Compromise. In order to resolve this dispute, the City and the District agree that the Retainage shall be utilized to pay the total costs of Goodland to correct the Deficiencies in the Regional Park, including the costs of maintenance by Goodland during warranty periods ("Warranties"). In compromise of their respective claims, the City agrees to accept the Retainage as full payment of the costs it may incur for correcting the Deficiencies and paying for Warranties and agrees to release any claim it has with respect to the Reimbursement Obligation, and the District agrees to release any claim it might have with respect to the Retainage, including but not limited to any unpaid portion of the Project Management Fee as specified in the Agreement (the "Compromise").

2. Resolution of Claims. The Compromise is intended, and shall be construed, to be a complete resolution of all issues and claims between the Parties related to the Retainage and the Reimbursement Obligation and shall provide the basis for the eventual termination of the Agreement as set forth in this Amendment. The City shall be solely responsible for directing the services of Goodland to correct the Deficiencies and paying Goodland for these services and any Warranties. The District shall be solely responsible for resolving, and paying if necessary, any valid claims, settlement or judicial judgment or order with respect to GTC's work on the Project.

3. Litigation. The District shall be solely responsible for the prosecution and defense of the Litigation with GTC, although the City shall endeavor to cooperate with the District, within the limits of the City's reasonable abilities and available resources, by identifying the Deficiencies and their associated costs to correct. The District will take no action to name the City or any of the City's officials, employees or contractors as parties to the Litigation or any related action brought by the District. In the event that GTC should name the City or any of the City's officials, employees or contractors as parties to the Litigation or any related action brought by GTC, the District agrees to defend the City in a diligent manner against all such claims and actions if the City so elects for such defense. The District is under no obligation to the City to refuse any reasonable settlement with GTC or to take an appeal of any unfavorable judicial judgment or order. In the event that the District should obtain a monetary settlement, a judicial judgment or order for damages, or contract or insurance funds from GTC ("Proceeds"), net of any unrecovered attorneys fees and costs incurred by the District in the generation or collection of the Proceeds, the District agrees to share those Proceeds with the City as provided in paragraph 5.B below. Provided there is no breach or default under any other provision of this Amendment and the other provisions are performed as provided in this Amendment, the Amendment, along with the Agreement, shall expire upon the final distribution and/or expenditure of the Proceeds as contemplated in this paragraph 3.

4. Settlement. The City and the District hereby release, acquit, and forever discharge each other, and each entities' officials, officers, directors, employees, agents, insurers, sureties, successors, assigns, and other related persons and entities of and from any and all liabilities, claims, demands, rights, damages, losses, employee claims, expenses, costs, fees, actions, causes of action, attorney's fees, interests, penalties, fines, judgments, and any and all actual, consequential, incidental, or punitive damages or claims thereto, of whatsoever kind and nature, either in law or equity, known or unknown, relating to any default or breach, alleged or proven, of the Agreement and any financial obligations or liabilities arising from or associated with the Deficiencies, Retainage, Reimbursement Obligation and Litigation as set forth in paragraphs 1 through 3 of this Amendment. Both the City and the District acknowledge and agree that the release and discharge set forth in this paragraph 4 is absolute and final and shall constitute a complete resolution of any remaining or potential claims of either Party under the Agreement. The release and discharge set forth in this paragraph 4 shall be binding on the Parties' officials, officers, directors, employees, agents, insurers, sureties, successors, assigns, and any and all other persons or entities which have or may have any claim on behalf of themselves or be entitled to share in any settlement thereof.

5. Development Agreement. Upon the execution of this Amendment by both Parties, it is anticipated that the Parties will negotiate and enter an amendment to the Development Agreement ("DA Amendment").

A. Regional Park. Among those matters to be addressed in the DA Amendment will be section 2.1 of the Development Agreement related to the "Regional Park." Through the DA Amendment, the Parties shall acknowledge and agree that upon completion of the corrections of the Deficiencies by Goodland, as reasonably determined by the Manager of the City's Department of Parks and Recreation, the Regional Park shall be deemed finally completed

and all City financial obligations under the City Funding Plan to pay for this development of Regional Park have been fully satisfied, as specified in sections 2.1 and 2.1.2.

B. **New Park.** In addition, the DA Amendment will address a new park, of approximately 4 acres in size (“New Park”), to be conveyed by the appropriate signatory to the Development Agreement to the City and the commitment of funding for the development of that New Park under the City Funding Plan. Since it is anticipated that the available funds under the City Funding Plan needed to develop the New Park will be approximately \$40,000 to \$50,000 short, the District agrees to commit up to \$50,000 of any Proceeds actually received as a result of, or in association with, the Litigation to be paid into the City Funding Plan, as prescribed by the Manager of the City’s Department of Parks and Recreation, for the development of the New Park. Any additional Proceeds, beyond \$50,000, actually received shall be spent, as mutually agreed by the City and the District, for improvements or maintenance of the parks, recreational facilities or trails located in Green Valley Ranch North.

6. **General Provisions.**

A. **Reasonable Efforts; Good Faith:** The City and the District agree to work diligently together and in good faith, using reasonable efforts to perform the terms and conditions of this Amendment, to resolve any unforeseen issues and disputes, and to expeditiously take such actions as are necessary and appropriate to perform the duties and obligations of this Agreement.

B. **Fair Dealing.** In all cases where the consent or approval of one Party is required before the other may act, or where the agreement or cooperation of the Parties is separately or mutually required as a legal or practical matter, then in that event the Parties agree that each will act in a fair and reasonable manner with a view to carrying out the intents and goals of this Amendment as the same are set forth herein, subject to the terms hereof; provided, however, that nothing in this Amendment shall be construed as imposing on either Party any greater duty or obligation to the other than that which already exists as a matter of Colorado law, including but not limited to any fiduciary duty or other responsibility greater than that of reasonable parties contracting at arm’s length.

C. **Financial Interests:** The Parties agree and covenant that any financial interests created in, or used to secure financing and payment for the costs of, any work performed under the Agreement, including but not limited to any bonds, certificates of participation, purchase agreements, Uniform Commercial Code filings and other liens, shall expressly exclude, and not encumber, property title, rights and interests held by the City from such debt or financial security contained in such financial instruments.

D. **Appropriation:** Notwithstanding any provision of this Amendment to the contrary, the Parties agree that the rights and obligations under this Amendment are contingent upon all funds necessary for work or expenditures contemplated under this Amendment being budgeted, appropriated and otherwise made available by the respective Parties. The Parties acknowledge that this Amendment is not intended to create a multiple-fiscal year direct or indirect debt or financial obligation of either Party, except to the extent that capital

improvement funds that are lawfully appropriated can be lawfully carried over to subsequent years.

E. Non-waiver: No Party shall be excused from complying with any provision of this Amendment by the failure of the other Party to insist upon or to seek compliance. No assent, expressed or implied, to any failure by a Party to comply with a provision of this Agreement shall be deemed or taken to be a waiver of any other failure to comply by said Party.

F. Examination of Records/Audit: The Parties agree that, during the duration of this Amendment and for a period of at least three (3) years after the expiration or termination of this Amendment, any duly authorized representative of either Party, including the Denver Auditor or designee, shall have access to and the right to examine any directly pertinent books, documents, papers, and records of the other Party involving any matter related to this Amendment. Any Party shall be entitled to review and audit the performance of this Amendment at that Party's sole expense.

G. Applicable Law/Exercise of Authority: The Parties agree to comply with all applicable Federal, State and local statutes, charter provisions, ordinances, resolutions, rules, regulations, policies, and standards in existence as of the effective date of this Amendment or as may be subsequently enacted or adopted and become applicable; provided, however, both Parties agree that neither Party shall enact or adopt any ordinance, resolution, rule, regulation, policy or standard (other than those necessary to comply with a lawful citizen initiative or referendum) which would substantially interfere with or diminish the obligations and rights under this Amendment or result in effectively nullifying this Amendment, in whole or part, but otherwise this paragraph shall not limit the powers and authority of the respective Parties.

H. No Discrimination In Employment: In connection with the performance of work under this Amendment, the Parties agree 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, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability; and the Parties further agree to insert the foregoing provision in all approved contracts and subcontracts hereunder.

I. Conflict of Interest: The Parties agree that no official, officer or employee of the City shall have any personal or beneficial interest whatsoever in the services or property described herein, and the District further agrees not to hire or contract for services any official, officer or employee of the City or any other person which would be in violation of the Denver Revised Municipal Code Chapter 2, Article IV, Code of Ethics, or Denver City Charter provisions 1.2.9 and 1.2.12.

J. Liability:  
1) To the extent authorized by law, the District shall be responsible for any and all claims, damages, liability and court awards, including costs, expenses and attorney fees, incurred as a result of any action or omission of the District or its officers, employees, and agents in connection with the subject matter of this Amendment.

2) To the extent authorized by law, the City shall be responsible for any and all claims, damages, liability and court awards, including costs, expenses, and attorney fees, incurred as a result of any act or omission by the City or its officers, employees, and agents in connection with the subject matter of this Amendment.

3) Nothing in this sub-section 6.J. or any other provision of this Amendment shall be construed as a waiver of the notice requirements, defenses, immunities and limitations the Parties may have under the Colorado Governmental Immunity Act (§24-10-101, C.R. S., et. seq.) or to any other defenses, immunities, or limitations of liability available to the Parties against third parties by law.

K. Force Majeure: Neither Party shall be liable for delay or failure to perform hereunder, despite best efforts to perform, if such delay or failure is the result of *force majeure*, and any time limit expressed in this Amendment shall be extended for the period of any delay resulting from any *force majeure*. Timely notices of the occurrence and the end of such delay shall be provided by the Party asserting *force majeure* to the other Party. “*Force majeure*” shall mean causes beyond the reasonable control of a Party such as, but not limited to, adverse weather conditions, acts of God or the public enemy, strikes, work stoppages, unavailability of or delay in receiving labor or materials, faults by contractors, subcontractors, utility companies or third parties, fire or other casualty, or action of government authorities other than the Parties.

L. Further Assurances: From time to time, upon the request of a Party, the other Party agrees to make, execute and deliver or cause to be made, executed and delivered to the requesting Party any and all further instruments, certificates and documents consistent with the provisions of this Amendment as may, in the reasonable opinion of the requesting Party, be necessary or desirable in order to effectuate, complete or perfect the rights of said Party under this Amendment, provided said requesting Party is currently in full compliance with the provisions of this Agreement and has tendered or offered to tender any reciprocal instruments, certificates and documents to which the other Party is entitled under the Amendment.

M. Contracting or Subcontracting: Any work that is allowed to be contracted or subcontracted under this Amendment shall be subject, by the terms of the contract or subcontract, to every provision of this Amendment. Compliance with this provision shall be the responsibility of the Party who arranged the contract or authorized the subcontract. No Party shall be liable or have a financial obligation to or for any contractor, subcontractor, supplier, or other person or entity with which the other Party contracts or has a contractual arrangement.

N. Enforcement: The Parties agree that this Amendment may be enforced in law or in equity for specific performance, injunctive, or other appropriate relief, including actual damages (notwithstanding termination of the Amendment), as may be available according to the laws and statutes of the State of Colorado; provided, however, the Parties agree to and hereby release any claims for incidental, consequential, or punitive damages; provided, further, no provision of this Amendment nor the rules and regulations of the District may be enforced by the creation or recording of any type of lien against real property owned by the City, nor may any foreclosure process be utilized to recover any moneys owed by the City to the District. It is specifically understood that, by executing this Amendment, each Party commits itself to perform pursuant to these terms and conditions contained in this Amendment, and that any failure to

comply which results in any recoverable damages shall not cause, by itself, the termination of any rights or obligations under this Amendment.

O. Governing Law; Venue: This Amendment shall be construed and enforced in accordance with the laws of the United States, the State of Colorado, and the applicable provisions of the Charter and Revised Municipal Code of the City and County of Denver, and the applicable resolutions and ordinances of the District. Venue for any legal action relating to this Agreement shall lie in either the District Court in and for the City and County of Denver.

P. No Third Party Beneficiaries: It is expressly understood and agreed that enforcement of the terms and conditions of this Amendment, and all rights of action relating to such enforcement, shall be strictly reserved to the City and the District; and nothing contained in this Amendment shall give or allow any such claim or right of action by any other or third person on such agreements. It is the express intention of the City and the District that any person or entity other than the City and the District receiving services or benefits under this Amendment shall be deemed to be an incidental beneficiary only.

Q. Claims: In the event that any claim, demand, suit, or action is made or brought in writing by any person or entity against one of the Parties related in any way to this Amendment, the Party in receipt of same shall promptly notify and provide a copy of said claim, demand, suit, or action to the other Party.

R. Notice: All notices, demands or consents required or permitted under this Amendment shall be in writing and delivered personally, or by appropriate facsimile transmission (receipt verified by telephone), or by certified mail, return receipt requested, to the following:

To the District:

Town Center Metropolitan District  
4908 Tower Road  
Denver, Colorado 80249  
Attention: Charles Foster

To the City:

Manager of Parks and Recreation  
201 West Colfax, Dept. 601  
Denver, Colorado 80202

City Attorney  
City and County of Denver  
1437 Bannock Street, Room 353  
Denver, Colorado 80202

The persons or addresses set forth above may be changed at any time by written notice in the manner provided herein.

S. Entire Agreement: Except for the Agreement and the Development Agreement referred to in this Amendment, this Amendment constitutes the entire agreement of the Parties. The Parties agree there have been no representations, oral or written, other than those contained herein and that the various promises and covenants contained herein are mutually agreed upon and are in consideration for one another.

T. Amendment: This Amendment may be amended, modified, or changed, in whole or in part, only by written agreement executed by the Parties in the same manner as this Amendment.

U. No Assignment: No Party shall assign its rights or delegate its duties hereunder, with the exception of contracting and subcontracting as provided in this Amendment, without the prior written consent of the other Party.

V. Severability: Should any one or more provisions of this Amendment be determined to be illegal or unenforceable, all other provisions nevertheless shall remain effective unless the provision which is deemed illegal or unenforceable results in a substantial failure of consideration under this Amendment, in which case this Amendment shall be deemed null and void.

W. Headings for Convenience: Headings and titles contained herein are intended for the convenience and reference of the Parties only and are not intended to combine, limit, or describe the scope or intent of any provision of this Amendment.

X. Authority: Each Party represents and warrants that it has taken all actions that are necessary or that are required by its applicable law to legally authorize the undersigned signatories to execute this Amendment on behalf of the Party and to bind the Party to its terms. The person(s) executing this Amendment on behalf of each Party warrants that he/she/they have full authorization to execute this Amendment.

Y. Execution of Amendment: This Amendment shall not be or become effective or binding, and shall not be dated, until it has been fully executed by all signatories of the City and the District.

Z. Electronic Signatures and Electronic Records: The District consents to the use of electronic signatures by the City. The Amendment, and any other documents requiring a signature hereunder, may be signed electronically by the City in the manner specified by the City. The Parties agree not to deny the legal effect or enforceability of the Amendment solely because it is in electronic form or because an electronic record was used in its formation. The Parties agree not to object to the admissibility of the Amendment in the form of an electronic record, or a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature, on the ground that it is an electronic record or electronic signature or that it is not in its original form or is not an original.



**Contract Control Number:** CE52145 (1)

**Vendor Name:** TOWN CENTER METROPOLITAN DISTRICT

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at Denver, Colorado as of

SEAL

**CITY AND COUNTY OF DENVER**

ATTEST:

By \_\_\_\_\_

\_\_\_\_\_

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

DOUGLAS J. FRIEDNASH, Attorney  
for the City and County of Denver

By \_\_\_\_\_

By \_\_\_\_\_

By \_\_\_\_\_



Contract Control Number: CE52145 (1)

Vendor Name: TOWN CENTER METROPOLITAN DISTRICT

By: \_\_\_\_\_

Name: Charles P. Leder  
(please print)

Title: President  
(please print)

ATTEST: [if required]

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(please print)

Title: \_\_\_\_\_  
(please print)

