

INCENTIVIZING DEVELOPMENT, REDEVELOPMENT AND AESTHETIC IMPROVEMENTS

Herbert C. (Lee) Phillips, The Phillips Law Offices, LLC
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What are Development Incentives:

Development incentives can be broadly defined as any concession or benefit offered by a governmental entity to encourage or assist industry, business or residential development.

History:

Colorado municipalities have a long history of offering incentives to crucial industries, notably the railroad industry.

Colorado Constitution Prohibition Against Aid to Corporations:

Article XI, Section 2 states:

Section 2. No aid to corporations – no joint ownership by state, county, city, town or school district. Neither the state, nor any county, city, town, township, or school district shall make any donation or grant to, or in aid of, or become a subscriber to, or a shareholder in any corporation or a joint owner with any person, company, or corporation, public or private

Cases construing Article XI, Section 2.

Initially Article XI, Section 2 was strictly construed and enforced.

[I]t was undoubtedly the intention of the framers of the Constitution, whether wisely or not, to prohibit by the fundamental law of the new State, all public aid to railroad companies, whether by donation, grant or subscription, no matter what might be the public benefit and advantages flowing from the construction of such roads

If the existence of a public benefit is to give such an agreement the character of a sale of stock, and take it out of the constitutional prohibition, then the prohibition is utterly nugatory and valueless, as such consideration would exist in every probable case.

The Colorado Central R.R. v. Lea, 5 Colo. 192 (1879).

A “public purpose” exception to the prohibition of Article XI, Section 2 develops.

Our prior cases have held that article XI, section 2 of the Colorado Constitution does not prohibit a municipality from conferring a monetary benefit on a private company in consideration of the company's undertaking a project . . . as long as the expenditure by a municipality furthers a valid public purpose.

City of Aurora v. Public Utils. Comm’n, 785 P.2d 1280, 1289 (Colo. 1990).

Ultimately the “public purpose” exception expands to effectively repeal the prohibition of Article XI, Section 2. Following the 1992 United Airlines Maintenance Facility case, any private project that arguably improves the local economy may most likely be incentivized with public funds.

The public purposes specifically enunciated by the General Assembly in H.B. 1003 include increased employment and economic development in Colorado. In addition to these general public benefits, the General Assembly has also identified at least two “discrete and particularized public purpose[s].” . . . The first is the “development of new businesses and the expansion of existing businesses [resulting from] entities making a commitment to build and operate new business facilities which will result in substantial and long-term expansion of the new employment within the state.

In re Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005, 814 P.2d 875, 884 (Colo. 1991).

In other words, new or expanded businesses may be subsidized with public funds so long as they create new or expanded businesses.

TABOR:

- Article X, Section 20(4) requires voter approval for “creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years.”
- Under TABOR any financial development incentive requiring payments in future years must either receive voter approval or be subject to annual appropriation.

TYPES OF INCENTIVES:

Development incentives include a broad spectrum of activities including:

- Tax abatement or sharing
- Waivers of building permit fees and charges
- Waivers of utility connection fees and charges
- Extension of infrastructure
- Approval of Title 32 district formation
- Creation of SIDs, GIDs or LIDs
- Approval of entitlements and vested rights

This presentation will be limited to three specific types of incentive programs known as ESTIP, BIZ and PIIP.

**ENHANCED SALES TAX INCENTIVE
PROGRAM
(ESTIP)**

The impetus for the creation of ESTIP was economic necessity and local political reality!

1980's recession was damaging for Colorado as a whole, and municipalities in particular.

Wheat Ridge, where ESTIP was born, was politically divided, but hurting economically

Urban Renewal was not a concept likely to be embraced

Concept of utilizing only locally controlled sales taxes as incentive arose out of TIF concept

Contemporaneous legal developments

Margolis v. District Court, 638 P.2d 297 (Colo. 1981) recently decided

SCOTUS had recently decided Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) providing extent of "public use is coterminous with the scope of a sovereign's police power." (Precursor to In re Interrogatories case)

Bethlehem Evangelical Lutheran Church v. Lakewood, 626 P.2d 668 (Colo. 1981) – requirement for dedication of land/improvements caused by development not a taking

Clear local governments had authority to be creative – ESTIP was just that

- Local sales taxes equal to amount generated by development on property prior to re-development remains exclusive property of City
- “Enhanced” sales taxes (i.e. those over and above amount historically generated without redevelopment) are shared on an agreed basis (up to 50/50) once agreed improvements are completed and enhanced taxes are received by municipality, for agreed number of years
- Owner/developer agrees to install/construct agreed public or public related improvements agreed between developer and municipality which would otherwise not be able to be exacted by municipality
- Paid to developer in monthly increments - if no “enhanced” tax collected in any month, no reimbursement to owner
- Agreement required between owner and municipality

ADVANTAGES OF ESTIP

No need to involve other jurisdictions – utilizes only local sales taxes, no property taxes

No impairment of existing sales tax base

No prior appropriation – no enhanced taxes received, no payment to developer

No necessity of “blight” findings

No debt created, no change in tax policy - hence no TABOR implications

Public gets more “public” or “public related” improvements – generates more local acceptance of project – not just for benefit of developer

Developer has source of reimbursement for extra improvements he constructs

BUSINESS IMPROVEMENT ZONE (BIZ)

Waiver of Fees and Charges:

BIZ involves a waiver of fees and charges that would otherwise be attributable. These can include:

- Building permit and plan inspection fees
- Land use approval application fees
- Utility connection charges (such a water and sewer tap fees)
- Annexation fees and charges
- Plant Investment Fees
- Development Exactions

RELATIONSHIP TO ESTIP

- Some municipalities require an election, i.e ESTIP or BIZ, but not both.
- BIZ is particularly useful to incentivize development that is desirable but does not generate sales tax revenues.

Sample BIZ Ordinance:

A sample BIZ ordinance is included in the materials.

**PROPERTY IMPROVEMENT INCENTIVE
PROGRAM
(PIIP)**

Purpose of PIIP:

To provide financial incentives to property owners to improve the exterior appearance of their property. In other words to enhance the appearance of the community.

Fundamentals of PIIP

- PIIP pays up to 50% of the actual cost of improvements to the exterior of property.
- Municipal participation limited to 50% of the property taxes paid to the municipality in preceding 5 years for the subject property.
- "Improvements" clearly defined and limited to those which enhance the aesthetics of the municipality.

The term "improvements" shall mean improvements to the exterior façade of structures or the landscaping of real property located in the Town of Fairplay which improvements are visible from the street located directly to the front of the property or, as to properties located on street corners, from the street adjacent to the property. The term shall not include improvements to the interior of a structure, structural improvements or landscaping that do not enhance the appearance of the property, landscaping improvements that are temporary in nature, or structural improvements or landscaping that are screened from street view by fencing or other similar visual barriers.

- No PIIP participation shall be approved where the total cost of the improvements is less than five hundred dollars (\$500.00).
- The PIIP project must, as determined by the municipal governing body, enhance the overall appearance of the municipality and the property for which the application is made.
- The improvements must be constructed or installed by a contractor or professional experienced and capable of performing the work. In no case shall the work be performed by the applicant unless the applicant can establish, to the satisfaction of the governing body, that the applicant is himself or herself, experienced and capable of performing the work in question.

- The scope of work and accompanying plans submitted with the application shall be sufficiently detailed for their intended purpose.
- The municipality and the owner enter into a binding PIIP agreement.
- Availability of budgeted funds.

The PIIP Agreement

- A scope of work and plans for the improvements to be constructed or installed.
- The estimated cost of the project.
- The name of the contractor or other person by whom the work will be performed.
- The maximum amount of property tax to be rebated by the municipality, and the maximum time during which said agreement shall continue, it being expressly understood that any such agreement shall expire and be of no further force and effect upon the termination date whether or not the work has been completed.

- The period during which the owner or the owner's successor in interest shall be obligated to maintain the improvements.
- A provision providing that the property tax rebate shall only occur after completion of the work and final inspection and approval by the municipality.
- A statement that the agreement shall never constitute a debt or obligation of the municipality within any constitutional or statutory provision;
- An affirmative statement that the obligations, benefits, and/or provisions of the agreement may not be assigned in whole or in any part without the expressed authorization of the municipal governing body, and further that no third party shall be entitled to rely upon or enforce provision hereof;

- An affirmative statement that the agreement will be recorded, and that the owner's obligation will run with the land and be binding upon the owner's heirs, successors and assigns; and
- Any other provisions agreed upon by the parties and approved by the municipal governing body.

Forms

A sample PIIP ordinance and agreement is included in the materials.

INCENTIVIZING DEVELOPMENT, REDEVELOPMENT AND AESTHETIC IMPROVEMENTS

ESTIP, BIZ, PIIP AND OTHER OBSCURE ACRONYMS

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I. What are Development Incentives:

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II. History:

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IV. Cases construing Article XI, Section 2.

A. Initially Article XI, Section 2 was strictly construed and enforced.

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City of Aurora v. Public Utils. Comm’n, 785 P.2d 1280, 1289 (Colo. 1990). See also Witcher v. Canon City, 716 P.2d 445 (Colo. 1986); Denver Urban Renewal Auth. V. Byrne, 618 P.2d 1374 (1980); Lyman v. Town of Bow Mar, 188 Colo. 216, 533 P.2d 1129 (1975); McNichols v. City & County of Denver, 131 Colo. 246, 280 P.2d 1096 (1955).

C. Ultimately the “public purpose” exception expands to effectively repeal the prohibition of Article XI, Section 2. Following the 1992 United Airlines Maintenance Facility case, any private project that

arguably improves the local economy may most likely be incentivized with public funds.

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ENHANCED SALES TAX INCENTIVE PROGRAM (ESTIP)

I. LEAD-UP TO CREATION

In the late 1980's, Colorado was in the midst of a sharp economic downturn.

Wheat Ridge, which I represented at the time, was (and apparently remains) a unique political entity which suffers from a very strong divide between well-established "growth" and "no-growth" factions

Wheat Ridge, being land-locked and politically dead-locked, had very few promising growth options, but it did have the opportunity for some infill projects

Urban Renewal designation was torturous to pursue, between requiring designation of "blight" in area and the thought of issuance of

bonds (Wheat Ridge had no bonded indebtedness, to the best of my recollection, at that point – and wasn't likely to approve any!)

During discussions about potential creation of an urban renewal area, it occurred to me that it might be possible to simply rely on local sales taxes generated by new projects to fund public improvements related to those improvements.

Remember what was happening in the legal realm at this time – *Margolis* had recently been decided, granting referendum status to rezoning actions; SCOTUS had recently decided *Midkiff* (which clearly set the stage for the United Airlines case (i.e. *In re Interrogatories Propounded by Governor Roy Romer, supra.*) to come in 1992) therein finding the concept of public use to be coterminous with the police power; takings cases were making clear that municipalities could extract exactions which ameliorate public burdens imposed by new development without violating takings clauses (i.e. *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P. 2d 668 (Colo. 1981)).

Using only local sales taxes took every other jurisdiction out of the equation altogether – they would lose nothing.

I like most municipal attorneys, had gotten tired of hearing developers talk about their proposed projects being the “salvation” of the community, while at the same time balking at providing anything in the way of public improvements or enhancements.

Even against backdrop of expanding local authority to authorize exactions and to validate public actions having a broad public purpose, getting anything “radical” (like urban renewal) approved in Wheat Ridge would have been unrealistic

ESTIP ordinance result of attempt to create economic incentive to developers while recognizing the realities of Wheat Ridge politics – make developers “put their money where their mouth was” and make “development pay for its own way”, while obtaining for public enhancements to public works consistent with needs and desires of the community.

Based on the realities of Wheat Ridge politics, I chose to limit the uses for which enhanced local sales taxes could be used to public or public related purposes

To satisfy those who thought the City was giving something away, we determined that local sales taxes generated from property prior to ESTIP contract would remain exclusive property of City. Only enhanced revenues subject to sharing. We were careful to avoid creating anything that looked or smelled like debt – if there was no enhanced revenue, there was no obligation to share. And the sharing provisions did not come into effect until the City was made whole (had received at least the amount of local sales taxes generated on the property prior to the redevelopment).

Wondrously, the Wheat Ridge City Council, as divided as it was, agreed with the concept and unanimously adopted Ordinance No 758, Series of 1988, on May 23, 1988, in the form attached to this presentation.

II. The Legal Justifications for ESTIP

I want to pay a long-over-due public debt here and acknowledge the wonderful work Paul Godec did on the ESTIP article that appeared in The Urban Lawyer in the Winter 1990 edition, and which is attached to this presentation.

The task I gave him was to consider every conceivable legal objection that might be raised to ESTIP and knock it down. He did that very well indeed.

I think the analysis contained in the article is as valid today as it was in 1990.

III. Advantages of ESTIP

No need to involve other jurisdictions in urban renewal considerations (especially given the General Assembly's newest foray into matters of purely local concern!)

No prior appropriation – nothing due until specific threshold reached, then division per agreement. Threshold not reached, no obligation to share!

No urban renewal political considerations – no finding of “blight” within the community.

No debt in the constitutional sense created – no absolute obligation to repay a specific amount within a specific time frame – what the developer gets, he gets. What he doesn't get, he isn't entitled to in the first place.

The municipality's tax base – both *ad valorem* and sales tax – is not at risk. No sharing or reduction of property tax, and no impact on sales taxes since nothing due to owner until threshold is reached.

The public gets more in the way of public or public-related improvements than it would otherwise get in a straight land use approval process, at no direct cost to the public. (One could always argue that the

municipality is losing the “enhanced” portion of the revenue, but the counter argument is that the public would have had to expend the money up-front to obtain the improvements that it gets as a result of the ESTIP agreement.)

Owner/developer gets a source of reimbursement for provision of improvements which make his project more locally friendly and acceptable than it might have otherwise been.

BUSINESS IMPROVEMENT ZONE

(BIZ)

I. Waiver of Fees and Charges:

BIZ involves a waiver of fees and charges that would otherwise be attributable. These can include:

- Building permit and plan inspection fees
- Land use approval application fees
- Utility connection charges (such a water and sewer tap fees)
- Annexation fees and charges
- Plant Investment Fees
- Development Exactions

Relationship to ESTIP:

- A. Some municipalities require an election, i.e ESTIP or BIZ, but not both.
- B. BIZ is particularly useful to incentivize development that is desirable but does not generate sales tax revenues.

II. Sample BIZ Ordinance:

A sample BIZ ordinance is included in the materials.

PROPERTY IMPROVEMENT INCENTIVE PROGRAM

(PIIP)

I. Purpose of PIIP:

To provide financial incentives to property owners to improve the exterior appearance of their property. In other words to enhance the appearance of the community.

II. Fundamentals of PIIP:

- A. PIIP pays up to 50% of the actual cost of improvements to the exterior of property.
- B. Municipal participation limited to 50% of the property taxes paid to the municipality in preceding 5 years for the subject property.
- C. "Improvements" clearly defined and limited to those which enhance the aesthetics of the municipality:

The term "improvements" shall mean improvements to the exterior façade of structures or the landscaping of real property located in the Town of Fairplay which improvements are visible from the street located directly to the front of the property or, as to properties located on street corners, from the streetstreets adjacent to the property. The term shall not include improvements to the interior of a structure, structural improvements or landscaping that do not enhance the appearance of the property, landscaping improvements that are temporary in nature, or structural improvements or landscaping that are screened from street view by fencing or other similar visual barriers.

III. Approval Criteria:

- A. No PIIP participation shall be approved where the total cost of the improvements is less than five hundred dollars (\$500.00).

- B. The PIIP project must, as determined by the municipal governing body, enhance the overall appearance of the municipality and the property for which the application is made.
- C. The improvements must be constructed or installed by a contractor or professional experienced and capable of performing the work. The municipality may maintain a list of pre-approved contractors but shall consider the qualifications of other contractors and professionals submitted by the applicant. In no case shall the work be performed by the applicant unless the applicant can establish, to the satisfaction of the governing body, that the applicant is himself or herself, experienced and capable of performing the work in question.
- D. The scope of work and accompanying plans submitted with the application shall be sufficiently detailed for their intended purpose.
- E. The municipality and the owner enter into a binding PIIP agreement.
- F. Availability of budgeted funds.

IV. The PIIP Agreement:

- A. A scope of work and plans for the improvements to be constructed or installed.
- B. The estimated cost of the project.
- C. The name of the contractor or other person by whom the work will be performed.
- D. The maximum amount of property tax to be rebated by the municipality, and the maximum time during which said agreement shall continue, it being expressly understood that any such agreement shall expire and be of no further force and effect upon the termination date whether or not the work has been completed.

- E. The matching funds to be furnished by the owner, which amount shall be not less than fifty percent (50%) of the total cost of the work to be performed.
- F. The period during which the owner or the owner's successor in interest shall be obligated to maintain the improvements.
- G. A provision providing that the property tax rebate shall only occur after completion of the work and final inspection and approval by the municipality.
- H. A statement that the agreement shall never constitute a debt or obligation of the municipality within any constitutional or statutory provision;
- J. An affirmative statement that the obligations, benefits, and/or provisions of the agreement may not be assigned in whole or in any part without the expressed authorization of the municipal governing body, and further that no third party shall be entitled to rely upon or enforce provision hereof;
- K. An affirmative statement that the agreement will be recorded, and that the owner's obligation will run with the land and be binding upon the owner's heirs, successors and assigns; and
- L. Any other provisions agreed upon by the parties and approved by the municipal governing body.

V. Forms:

A sample PIIP ordinance and agreement is included in the materials.

Taxation Innovations: Enhanced Sales Tax Incentive Programs

John E. Hayes

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Paul D. Godec

Associate, Hayes, Phillips & Maloney, P.C., Denver, Colorado; B.S.C.E., Rice University, 1983; J.D., Washington University, 1986.

I. Introduction and Overview

IN THIS ERA of disappearing federal grants and proliferating taxpayer revolts, many local governments face revenue shortfalls which threaten to cause reductions in services. Because such shortfalls often occur in communities suffering economic downturns, residents of those communities are apt to object to increases in such traditional tax sources as sales and *ad valorem* taxes. In those situations, local governments need mechanisms to expand general revenues without burdening those community members with the least ability to pay more taxes. The City of Wheat Ridge, Colorado (a home rule city), has recently responded to such circumstances by adopting an innovative tax increment financing program using newly generated sales taxes.*

The Enhanced Sales Tax Incentive Program (ESTIP) adopted by Wheat Ridge encourages local retailers who participate in the program to invest in public and public-related improvements at their establishments. As an incentive, the city agrees by separate contract to share some fraction of its incremental increase in municipal sales taxes received after the retailer completes the improvements.** The city has no obligation to share any sales tax revenues until municipal sales tax receipts exceed the contractually established tax base level. The city's

*A co-author of this article, John E. Hayes, is the city attorney for the City of Wheat Ridge, Colorado.

**Hayes, Phillips & Maloney, P.C., also represents the City of Sheridan, Colorado (a statutory city), and the Town of Parker, Colorado (a home rule municipality), which have similarly used sales taxes as incentives for expanding their municipal tax bases.

contracts with retailers also limit the time period during which the city will share any part of its newly generated sales taxes.

ESTIP plans encourage retailers to build public and public-related improvements which are designed to enhance their retail developments. By enhancing those retail developments, the improvements should produce greater gross retail sales and expanded sales tax revenues. Thus, cities with ESTIP plans benefit from both public improvements and greater tax revenues. In addition, the participating retailers benefit with both reduced costs for modernization and greater gross profits.

This article discusses potential legal obstacles to using sales taxes for tax increment financing and the political and practical advantages of ESTIP plans over traditional tax increment financing. Although this article in large part relies on federal and Colorado law, the analysis applies to analogous provisions in other states' constitutions. Indeed, these authors believe that ESTIP plans, if carefully drafted, clear the likely constitutional hurdles and will survive legal challenges.

II. "Public Purpose" Requirement

Under ESTIP plans, local governments arguably distribute public funds to private parties to offset public and public-related improvements constructed on private property. Thus, critics of ESTIP plans may claim that such programs exceed municipal police powers, or lack a valid public purpose. Such attacks may also appear couched in terms of substantive due process arguments for unreasonable, irrational or arbitrary governmental actions. The U.S. Supreme Court, however, has so broadly defined what constitutes a "public purpose" that any such attack will likely fail.

The bellwether case of *Berman v. Parker*¹ construed the public use clause of the fifth amendment in an eminent domain case.² *Berman* involved an attack on the power of Congress to enact a program for urban renewal in the District of Columbia.³ The act allowed the federal government to buy private property under its eminent domain powers and sell the property to private developers for urban renewal purposes.⁴ In responding to the attack on the legislation, the Court held that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation,

1. 348 U.S. 26 (1954).

2. The U.S. Constitution limits Congress' power by providing that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V (emphasis added).

3. 348 U.S. at 28-30.

4. *Id.* at 30.

whether it be Congress legislating concerning the District of Columbia, or the States legislating concerning local affairs.’⁵

The Supreme Court has recently affirmed, if not expanded, *Berman*. In *Hawaii Housing Authority v. Midkiff*,⁶ the Court reviewed an attack on Hawaii’s plan to redistribute land ownership. Hawaii’s plan allowed qualified lessees to buy their lessor’s property in order to reduce the concentration of land ownership in Hawaii.⁷ Thus, Hawaii used its eminent domain and police powers to redistribute private land from one private owner to another private owner.⁸

The Court upheld Hawaii’s plan against a public use clause challenge stating that “[t]he ‘public use’ requirement is . . . coterminous with the scope of a sovereign’s police powers.”⁹ The Court also directed that a court must “not substitute its judgment . . . as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’”¹⁰ Thus, Hawaii’s legislation satisfied the public use requirement because the program helped to remove the oligopoly in Hawaii’s real estate market.¹¹

This construction of the public use clause can arguably trace its origins as far back as *McCulloch v. Maryland*.¹² The “public purpose” doctrine, however, probably had its modern genesis in the substantive due process context on June 11, 1923. On that day, the U.S. Supreme Court decided three cases which strongly endorsed the “public purpose” doctrine. In *Rindge Co. v. County of Los Angeles*,¹³ the Court upheld the condemnation of a private road for a public highway against attacks based on the fourteenth amendment. The challengers attacked the condemnation as unreasonable because the road only serviced private properties. The Court, however, summarily accepted the legislative finding that the dead-end highway could someday be extended to connect to other public highways. The Court also recognized that the use of a scenic roadway for recreational purposes served a legitimate public purpose.¹⁴

5. *Id.* at 32 (citations omitted); see also *Tierney v. Planned Indus. Expansion Auth.*, 742 S.W.2d 146, 150–51 (Mo. 1988) (reaching the same result as *Berman* on very similar facts).

6. 467 U.S. 229 (1984).

7. *Id.* at 231–34.

8. *Id.*

9. *Id.* at 240.

10. *Id.* at 241 (quoting *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 680 (1896)).

11. *Id.* at 241–42.

12. 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional”).

13. 262 U.S. 700 (1923).

14. *Id.* at 706–09.

In *Milheim v. Moffat Tunnel Improvement District*,¹⁵ the Court upheld the Colorado Legislature's creation of a special district to build a tunnel through the Continental Divide. The challengers argued on fourteenth amendment grounds that the tunnel would improperly benefit a private railroad by shortening its existing route by twenty-three miles. The Court, however, accepted the legislative conclusion that the tunnel had numerous potential uses for linking Colorado's eastern and western halves. Thus, the Court agreed that the tunnel would serve the public purpose of lessening the mountains as a barrier to communication and transportation in Colorado.¹⁶

In *Joslin Manufacturing v. City of Providence*,¹⁷ the Court upheld a state statute that authorized municipalities to condemn property for water works purposes. The Court rejected challenges based on the fourteenth amendment that the statute improperly authorized the city to sell water outside its municipal boundaries. Similarly, the Court rejected arguments that the state statute required the state legislature—not municipalities—to decide when to condemn property. Moreover, the Court refused to find that the municipality acted unreasonably by condemning more property than the water works plant actually required. Throughout the opinion, the Court expressed a strong reluctance to interfere with legislative findings regarding public purpose or necessity.¹⁸ Thus, this "public purpose trilogy" introduced severe limitations on private parties' ability to challenge governmental determinations regarding the propriety of, and need for, legislation.

State supreme courts have followed the lead of the public purpose trilogy in rejecting substantive due process challenges to state legislation. "Neither the equal protection clause of the fourteenth amendment to the United States Constitution nor the due process clause . . . of the Colorado Constitution requires that mathematical symmetry be attained between benefits received and payment for those benefits."¹⁹ The U.S. Supreme Court has similarly rejected more recent substantive due process challenges to legislative acts which provide economic advantages:

It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that

15. 262 U.S. 710 (1923).

16. *Id.* at 717-21.

17. 262 U.S. 668 (1923).

18. *Id.* at 670-78.

19. *City of Montrose v. Public Utilities Comm'n*, 732 P.2d 1181, 1190 (Colo. 1987) (construing COLO. CONST. art. II, § 25); *see also City of Sparks v. Best*, 96 Nev. 134, 605 P.2d 638, 639-40 (1980) (construing NEV. CONST. art. I, § 8); *Colliseum Square Ass'n v. City of New Orleans*, 528 So. 2d 205, 209-10 (La. App. 4 Cir. 1988).

the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.²⁰

The "public purpose" doctrine arose, at least in part, because without it, parties who dislike political results could constantly ask the courts to second-guess legislatures. The public purpose doctrine, thus, allows courts to avoid the political fray. "Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision."²¹ In every political decision, disagreement naturally occurs. Without the public purpose doctrine, the courts would be asked to intervene in every political dispute. Such a situation would prove unsatisfactory for the operations of the legislative and executive branches as well as the judiciary.

In light of these public purpose cases, ESTIP plans satisfy the public purpose requirement. In fact, since *Midkiff*, courts have approved a variety of governmental programs as serving public purposes.²² In ESTIP plans, "such public purposes as increasing revenues, sales, commerce and employment cannot be gainsaid."²³ Thus, ESTIP plans which use a

20. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (citing *Ferguson v. Skrupa*, 372 U.S. 726 (1963)); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955); see also *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (quoting with approval *Turner Elkhorn*, *supra*).

21. *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 552 (1946) (quoted with approval in *Midkiff*, 467 U.S. at 240-41).

22. See, e.g., *National Wildlife Fed'n v. ICC*, 850 F.2d 694 (D.C. Cir. 1988) (Ginsburg, J., upholding conversion of private railroad right-of-way into nature trails); *Oberndorf v. City and County of Denver*, 696 F. Supp. 552, 556 (D. Colo. 1988) (urban renewal for "renewing and improving the character and environment of the City's central business district, enhancing the sales and property tax base, providing incentive for the private development of retail shopping and commercial activity within the area, eliminating crime, and improving the economy by stabilizing and upgrading property values"); *United States ex rel. T.V.A. v. An Easement & Right-of-Way*, 682 F. Supp. 353, 357 (M.D. Tenn. 1988) (acquiring an easement and right-of-way for power lines); *United States v. Frame*, 658 F. Supp. 1476, 1480 (E.D. Pa. 1987) (one-dollar surcharge on cattle sales for use in the promotion of the beef industry); *Department of Transp. v. Fortune Fed. Sav. & Loan*, 532 So. 2d 1267, 1269 (Fla. 1988) (condemnation of more property than necessary for project); *City of Duluth v. State*, 390 N.W.2d 757, 762-64 (Minn. 1986) (condemnation of a food processing plant in order to build a paper mill); *Ullrich v. Board of Comm'rs of Thomas County*, 234 Kan. 782, 676 P.2d 127 (1984) (transfer of county hospital's assets to a private hospital association); *Meierhenry v. City of Huron*, 354 N.W.2d 171, 176-77 (S.D. 1984) (community redevelopment through tax increment financing). See generally Dushoff and Henslee, *Public Use and Necessity—The Right to Take Revisited*, 1988 INST. OF PLAN., ZONING & EMINENT DOMAIN 14-1; cf. *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1275 (9th Cir. 1986) (rejecting mobile home rent control ordinance which required leases be for unlimited periods); *City of Center Line v. Chmelko*, 164 Mich. App. 251, 416 N.W.2d 401, 406-07 (1987) (condemnation which predominately benefits private parties subjected to heightened scrutiny and overruled).

23. *Thornton Dev. Auth. v. Upah*, 640 F. Supp. 1071, 1081 (D. Colo. 1986).

tax increment for specified public purposes will not violate the public use clause or the fourteenth amendment merely because public funds benefit private retailers.

III. Equal Protection Requirements

Tax increment financing plans often encounter equal protection challenges because individual taxpayers receive benefits not enjoyed by all taxpayers in general. "Equal protection of the laws is guaranteed to all persons by the fourteenth amendment to the United States Constitution and the due process clause[s]" of state constitutions.²⁴ On the other hand, "[a] regulatory classification that neither impinges on fundamental rights nor affects suspect classes does not deny equal protection of the laws if the distinctions made have a reasonable basis and are rationally related to a legitimate state interest."²⁵

An ESTIP plan involves neither fundamental rights nor suspect classes and, therefore, the "rational relation" test applies.²⁶ ESTIP plans serve the public purposes of extending the lives of municipal revenue sources and enhancing businesses that attract sales tax-generating shoppers.²⁷ "It is not essential that the entire community, nor even a considerable portion, . . . directly enjoy or participate in any improvement in order (for it) to constitute a public use."²⁸ Therefore, ESTIP plans reasonably further and rationally relate to legitimate governmental interests. Moreover, courts have long recognized that analogous tax increment financing programs using *ad valorem* property taxes, or the analogous "special funds" doctrine, satisfy the rational relation test.²⁹

The U.S. Supreme Court has similarly made equal protection challenges to tax legislation virtually impossible. "Legislatures have espe-

24. *City of Montrose*, 732 P.2d at 1189 (construing COLO. CONST. art. II, § 25).

25. *Id.*; see also *Richards v. City of Muscatine*, 237 N.W.2d 48, 61 (Iowa 1975).

26. See, e.g., *City of Montrose*, 732 P.2d at 1181; *City of Muscatine*, 237 N.W.2d at 48.

27. See *Witcher v. Cañon City*, 716 P.2d 445, 455 (Colo. 1986); accord, *In re Interrogatories by the Colo. State Senate*, 193 Colo. 298, 566 P.2d 350 (1977).

28. *Hawaii Hous. Auth.*, 467 U.S. at 244 (quoting *Rindge Co. v. Los Angeles County*, 262 U.S. at 707).

29. See, e.g., *Meierhenry*, 354 N.W.2d at 178; *Gude v. City of Lakewood*, 636 P.2d 691 (Colo. 1981); *Denver Urban Renewal Auth. v. Byrne*, 618 P.2d 1374 (Colo. 1980); *People ex rel. City of Canton v. Couch*, 79 Ill. 2d 356, 38 Ill. Dec. 154, 403 N.E.2d 242 (1980); *State ex rel. Schneider v. City of Topeka*, 227 Kan. 115, 605 P.2d 556 (1980); *Best*, 605 P.2d 683; *Sigma Tau Gamma Frat. House Corp. v. City of Menomonie*, 93 Wis. 392, 288 N.W.2d 85 (1980); *Tribe v. Salt Lake City*, 540 P.2d 499 (Utah 1975).

cially broad latitude in creating classifications and distinctions in tax statutes.³⁰

The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that *in taxation, even more than in other fields, legislatures possess the greatest freedom in classification*. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. *The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.*³¹

Clearly, opponents of ESTIP could not negate the various articulated rationales that support such plans. Thus, ESTIP plans will certainly survive equal protection challenges.

IV. Uniform Assessment Requirements

State constitutions often contain provisions which require uniform taxation.³² Because an ESTIP plan could give some taxpayers advantages not enjoyed by all taxpayers, opponents may attack the plan as violative of uniform assessment requirements. Some state constitutions, however, expressly restrict these uniform assessment provisions to property taxes.³³ Moreover, some state courts have restricted uniform assessment provisions to *ad valorem* taxes by judicial construction.³⁴ In addition, some state courts have held that "[c]onstitutional requirements of equality and uniformity relate to the *levy* of taxes, and neither the requirement of uniformity nor of equal protection of the law limit [sic] the legislature's authority to *allocate* or distribute public funds."³⁵ ESTIP plans do not affect the levy of sales taxes, but only change the alloca-

30. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983).

31. *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940) (emphasis added and footnotes omitted) (quoted with approval in *Regan*, 461 U.S. at 547-48); *see also* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40-41 (1973); *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 359-60 (1973).

32. *See* COLO. CONST. art. X, § 3 (as amended, 1982) ("Each property tax levy shall be uniform upon all real and personal property not exempt from taxation under this article located within the territorial limits of the authority levying the tax"); *see also* KAN. CONST. art. 11, § 1; PENN. CONST. art. VIII, § 1; S.D. CONST. art. XI, § 2.

33. *See* COLO. CONST. art. X, § 3; *cf.* S.D. CONST. art. XI, § 2, 10.

34. *See, e.g., Zelinger v. City and County of Denver*, 724 P.2d 1356, 1358 (Colo. 1986).

35. *Meierhenry*, 354 N.W.2d at 177 (emphasis added).

tions of collected municipal sales tax revenues. Thus, a tax increment financing program using sales taxes such as ESTIP will survive any challenges under uniform assessment provisions.

A. *Prohibitions Against Donations of Public Funds*

Many state constitutions prohibit governmental entities from aiding private corporations. For example, the Colorado Constitution prohibits any city from "mak[ing] any donation or grant to, or in aid of, . . . any corporation or company in or out of the state."³⁶ Under ESTIP, the city's direct payments to a corporate retailer or property owner from its sales tax revenues would appear to violate the donations prohibition.

Several states have held that such donations provisions do not apply when the city's donation or grant serves a public purpose.³⁷ The Colorado Supreme Court has also held that "improving and extending the life of a valuable source of municipal revenue and enhancing a major attraction that brings visitors to the city" constitutes a valid public purpose.³⁸ In Colorado, therefore, because ESTIP encourages improvements which enhance sales tax revenues, it serves a public purpose which apparently exempts it from the prohibition against donating public funds to private parties.

For states without "public purpose exceptions," ESTIP plans may face other challenges under donations prohibitions. Common municipal financing programs avoid the donations prohibition in two ways other than the public purpose exception. First, some cities avoid making grants or donations by foregoing the collection of revenues.³⁹ By foregoing payments "the City . . . neither issue[s] bonds to cover the expense of the improvements nor transfer[s] any money or tax receipts to [private parties]."⁴⁰ If the local government does not issue bonds or transfer funds to private parties, it cannot violate a donations prohibition, irrespective of the public purpose exception.

36. COLO. CONST. art. XI, 2; *see also* CONN. CONST. art. I, § 1; IDAHO CONST. art. VIII, § 2; MO. CONST. art. VI, 23, 25.

37. *Witcher*, 716 P.2d at 455; *see also* *Duckworth v. City of Kansas City*, 243 Kan. 386, 758 P.2d 201, 202-03 (1988) (construing statutory, not constitutional, provisions); *Gude*, 636 P.2d at 695 n.2; *State ex rel. Jardon v. Indus. Dev. Auth. of Jasper County*, 570 S.W.2d 666, 673-76 (Mo. 1978); *In re Interrogatories*, 566 P.2d at 356; *Wilson v. Connecticut Product Dev. Corp.*, 167 Conn. 111, 355 A.2d 72 (1974); *McNichols v. City and County of Denver*, 131 Colo. 246, 280 P.2d 1096, 1099-1100 (1955).

38. *Witcher*, 716 P.2d at 455.

39. *See* *Perl-Mack Enters. v. City and County of Denver*, 194 Colo. 4, 568 P.2d 468, 472-73 (1977) (foregoing collection of fees for sewer services); *Witcher*, 716 P.2d at 455 (foregoing payments under a lease).

40. *Witcher*, 716 P.2d at 455.

Second, some local governments avoid making donations to private companies by making grants to other quasi-public agencies which later distribute the funds to private parties.⁴¹ In those circumstances, public entities make *indirect* grants or donations to private parties by funneling the funds through other quasi-public agencies. This funnelling distances the public entities from the constitutional prohibition of direct grants or donations to private parties.⁴²

ESTIP plans involve neither the "foregoing revenue" approach nor the "funnelling funds" approach. ESTIP plans serve the public purpose more directly. Under ESTIP, local governments collect the sales taxes and verify companies' reports regarding gross sales and, thus, serve the public purpose of accountability. Local governments also account for the tax increment and place the appropriate fraction of the increment into special funds for disbursement under individual agreements. By not funnelling funds through other public agencies, local governments save the expense of establishing and administering quasi-governmental agencies. By saving the administrative expenses, ESTIP plans provide more public improvements and more public revenue which both serve public purposes.

A local government should bolster the public purpose emphasis of its ESTIP plan with some drafting foresight. The legislation enacting the program should direct the local government's authorized department to review all proposed improvements under the program. The individual contracts under the program should also allow the termination of the agreement if the participant or owner fails to obtain the proper approvals or building permits. The pre-construction approvals of proposed improvements guarantee that the improvements themselves also serve public purposes. Those requirements will more strongly direct a court's attention to the public purposes served and away from donations prohibitions. If the court focuses, as it should, primarily on the public purposes served by the shared tax increment, ESTIP plans will likely survive legal challenge. The public purpose emphasis will also prevent the court from focusing primarily on the guises used by other cities to dodge the literal application of constitutional prohibitions.

The "funnelling funds" and "foregoing revenues" guises discussed

41. See *In re Interrogatories*, 566 P.2d at 356 (general assembly grants funds to Housing Finance Authority which then uses the funds to purchase or finance housing); *Byrne*, 618 P.2d at 1385 (city distributes tax increment to the Authority which uses funds to reimburse the moving expenses of parties displaced by improvements under the program); *Tribe*, 540 P.2d at 501 (formation of a "quasi-municipal corporation" to administer funds for neighborhood development).

42. See, e.g., COLO. CONST. art. XI, § 2.

above were developed in response to the original intent of donations prohibitions.⁴³ Older cases may hold that donations prohibitions "utterly prohibit the mingling of public moneys with those of private persons, either directly or indirectly, or in any manner whatsoever."⁴⁴ Other courts, however, have upheld public financing mechanisms remarkably similar to the programs rejected in those older cases.⁴⁵ Holdings which reject financing mechanisms under donations prohibition provisions reflect the basic evil that those provisions sought to avoid: municipal and public corporations *aiding* in the construction of private railroads.⁴⁶ Recently, courts have used donations prohibitions to reject plans in which public entities become *partners* with private corporations in a joint enterprise to build improvements.⁴⁷

Despite the judicial limitations on the scope of donations prohibitions, those provisions still may retain some vitality.⁴⁸ ESTIP plans, however, may avoid the repercussions of even vital donations prohibitions. ESTIP plans obviously should not involve joint enterprises to build improvements.⁴⁹ A participant in the program should meet two conditions *before* the city would have any disbursement obligations. First, the participating retailer or owner would have to construct and complete the approved public improvements at its own expense. Second, the business where improvements were constructed would need to generate sales taxes in excess of the contractually established base level. These precedent conditions distance the city from the participant and dispel any arguments about partnerships or joint enterprises. If the city makes disbursements before the participant constructs improvements, however, the program may resemble a joint enterprise.⁵⁰

Even for states which lack favorable case law construing donations prohibitions,⁵¹ ESTIP plans may survive donations prohibitions challenges. ESTIP plans do not provide for donations or grants of public funds by legislative appropriation. ESTIP plans allow public entities to

43. See *Lord v. City and County of Denver*, 58 Colo. 1, 143 P. 284, 288-89 (1914).

44. *Id.* at 288.

45. *Milheim v. Moffat Tunnel Improvement Dist.*, 72 Colo. 268, 211 P. 649, 652, 660-61 (1922), *aff'd*, 262 U.S. 710 (1923) (see notes 15 & 16, *supra*, and accompanying text).

46. *Lord*, 143 P. at 288 (citing 1 Dill. 313, 318).

47. See *McCray v. City of Boulder*, 165 Colo. 383, 439 P.2d 350, 354 (1968).

48. See *Witcher*, 716 P.2d at 455 (quoting with approval the prohibition against mingling public funds with those of private persons).

49. See generally *McCray*, 439 P.2d at 354.

50. *Id.*

51. See *Mitchell v. North Carolina Indus. Fin. Auth.*, 273 N.C. 137, 159 S.E.2d 745, 753 (1968) (analyzing favorable industrial development financing histories of several states but rejecting North Carolina's enabling legislation as primarily benefitting

enter into contracts with private parties regarding how the public entities will collect sales taxes from retailers. Under ESTIP, local governments make a normal collection of sales taxes from retailers. The local governments then hold some of the incremental taxes in trust for disbursement under ESTIP contracts while the remainder is disbursed to public treasuries. Because the incremental revenues remain separated from general revenues, the amounts disbursed to private parties under ESTIP contracts never become "public funds." Therefore, local governments, by definition, could not "donate" or appropriate those funds in violation of a donations prohibition.

B. *Special Legislation Prohibitions*

The constitutions of many states prohibit special legislation which grants an exclusive privilege to certain individuals or a narrow class. "The general assembly shall not pass local or special laws . . . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever[, or] . . . where a general law can be made applicable no special law shall be enacted."⁵² A special legislation prohibition "prohibits the legislature from exempting classes or members of a class from the coverage of a particular statute without justification."⁵³ "A law is not local or special when it is general and uniform in its operation upon all in like situation."⁵⁴

A special legislation challenge to an ESTIP plan will likely fail. The legislation authorizing the ESTIP plan will apply generally and uniformly to all who participate in the plan. In contrast, the *agreements* between the city and participating individuals or corporations will not constitute "laws" falling under the special legislation prohibition.⁵⁵ Such agreements constitute business contracts executed under the city's proprietary powers and are not laws falling under special legislation prohibitions.⁵⁶ Thus, the special legislation prohibition will invalidate neither ESTIP plans nor individual ESTIP contracts.

private corporations); but see, *In re Denial of Approval to Issue \$30,000,000.00 of Hous. Bonds*, 307 N.C. 52, 296 S.E.2d 281, 286 (1982) (approving legislation to provide money for low-interest mortgages in order to expand housing for low and moderate income families as serving a public purpose without overruling *Mitchell*).

52. COLO. CONST. art. V, § 25; see also CONN. CONST. art. I, § 1; ILL. CONST. art. IV, § 13; IOWA CONST. art. I, § 6.

53. *City of Montrose*, 732 P.2d at 1191; see also *City of Muscatine*, 237 N.W.2d at 59.

54. *City of Montrose*, 732 P.2d at 1191 (citing *Byrne*, 618 P.2d at 1385).

55. See *Perl-Mack Enters.*, 568 P.2d at 472; see also *City of Canton*, 403 N.E.2d at 250; *Ullrich*, 676 P.2d at 131-32.

56. See *Perl-Mack Enters.*, 568 P.2d at 472.

C. *Impairment of Contracts Prohibitions*

ESTIP plans, like other tax increment financing arrangements, will probably encounter claims that they interfere with the public entity's ability to satisfy its general obligation bonds. Opponents have argued that such interference "constitutes an impairment of contracts in violation of U.S. Const. Art. I, Sec. 10, [cl. 1,]" and state constitutional provisions.⁵⁷ This claim argues that because the public entity pledges the incremental revenues to others, it fails to honor the "full faith and credit" previously pledged to repay general obligation bonds.⁵⁸

This argument fails for at least two reasons. First, the tax increment program involves only new or previously unpledged revenues. Thus, the program does not impair previously pledged funds for repayment of existing general obligations.⁵⁹ Second, the city agrees by *contract* to distribute the funds from the new increment. State constitutional prohibitions generally only forbid the enactment of *laws* which impair contracts.⁶⁰ Thus, ESTIP would not violate any interference with contracts prohibition.

D. *Impairment of Financial Base Prohibitions*

Opponents of any tax increment financing program often claim that the program "unconstitutionally excludes certain property from its proportionate share of municipal taxes."⁶¹ Opponents base their argument on state constitutional provisions which "proscribe the legislative power to impair the financial base of government operations."⁶² The Colorado Supreme Court, at least, has rejected this argument for tax increment financing:

[The city] is not indebted, nor does [it] lose the benefit of its tax revenues which would have otherwise been available for its use. The portion of tax revenues allocated to [others] represent the amount generated by virtue of increased [tax base] which would not have existed but for the project. In this light, it becomes clear that the fiscal base of [the city] is not impaired.⁶³

For ESTIP plans, only a fraction of the incremental tax revenues is disbursed to others. Indeed, the cornerstone logic of ESTIP plans precludes

57. *Byrne*, 618 P.2d at 1387; see also COLO. CONST. art. II, § 11; ILL. CONST. art. I, § 16; IOWA CONST. art. I, § 21.

58. *Byrne*, 618 P.2d at 1387.

59. See *id.*; see also *City of Muscatine*, 237 N.W.2d at 63; accord, *City of Canton*, 403 N.E.2d at 252.

60. *Perl-Mack Enters.*, 568 P.2d at 472.

61. *Byrne*, 618 P.2d at 1386.

62. *Allardice v. Adams County*, 173 Colo. 133, 476 P.2d 982, 995 (1970) (construing COLO. CONST. art X, 8-10); see also *City of Muscatine*, 237 N.W.2d at 57.

63. *Byrne*, 618 P.2d at 1387.

local governments from disbursing any funds before participating businesses surpass their base tax levels. Moreover, local governments only disburse a portion of newly generated funds in excess of the contractually established base tax levels for the participating businesses. Because of these requirements, ESTIP plans not only do not impair the tax base, but actually expand it. Therefore, the constitutional provisions concerning the impairment of the tax base cannot invalidate ESTIP plans.

E. *Debt Limitations Prohibitions*

Opponents of an ESTIP plan may claim that the ESTIP contracts with private parties violate the debt limitations provisions of the state constitution.⁶⁴ Such constitutional provisions prohibit cities from contracting for debts "unless the question of incurring the same be submitted to and approved by a majority of the qualified taxpaying electors voting thereon[.]"⁶⁵ Such claims against ESTIP plans, are specious. First, ESTIP plans do not "contract any general obligation debt *by loan*."⁶⁶ Under ESTIP plans, local governments make no loans and expressly incur no debts or obligations. Indeed, local governments have no obligations until sales tax revenues actually exceed contractually established base levels. Second, if a local government issues general obligation bonds to be paid only from incremental sales tax revenues, such a program would also likely survive constitutional challenge.⁶⁷ Thus, the debt limitation provisions of state constitutions may not invalidate ESTIP plans.

F. *Releasing Tax Obligations Prohibitions*

Opponents of ESTIP plans may also claim that the individual participants in the programs do not pay their entire tax obligation. These opponents may argue that the program releases a tax liability in violation of a state constitutional provision:

No obligation or liability of any person, association, or corporation, held or owned by the state, or any municipal corporation therein, shall ever be exchanged transferred, remitted, released, or postponed or in any way diminished by the general assembly, *nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury*. This section shall not prohibit the write-off or release of uncollectible accounts as provided by general law.⁶⁸

64. See COLO. CONST. art. XI, § 6(1); see also MO. CONST. art. VI, § 26(a)-(g), 27.

65. COLO. CONST. art. XI, § 6(1).

66. *Id.* (emphasis added).

67. See, e.g., *Gude*, 636 P.2d at 696; *Jardon*, 570 S.W.2d at 669-73; see also COLO. REV. STAT. § 31-25-107(9)(a) (1986) (authorizing the use of sales taxes to retire urban renewal bonds).

68. COLO. CONST. art. V, § 38 (emphasis added).

This argument fails for at least two reasons. First, ESTIP plans do not release any participants from their sales tax obligations. Local governments collect, and account for, all sales tax owed and disburse the collected amounts pursuant to ESTIP contracts. Second, constitutional provisions generally prevent only the "general assembly" from releasing obligations owned by, or owed to, municipal corporations.⁶⁹ The constitutional provisions do not ordinarily prevent municipal corporations from deciding when to release the tax obligations owed to them.⁷⁰ Thus, ESTIP plans do not violate the state constitutional provisions which prohibit releasing tax obligations.

G. *Lending or Pledging Credit Prohibitions*

Opponents of ESTIP plans may claim that the program unconstitutionally lends or pledges the city's credit:

Neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount, or for any purpose whatever; or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state.⁷¹

Such constitutional prohibitions, however, will not invalidate an ESTIP plan.

Municipal financing programs do not violate the lending of credit provision if the city cannot become liable for a private party's debts.⁷² ESTIP contracts do not create an obligation for a local government to answer for, or in any way be responsible for, any debt of any private party. Moreover, ESTIP plans do not involve municipal bonds which arguably resemble loans of a local government's credit. Thus, the lending of credit prohibition of state constitutions cannot invalidate ESTIP plans. Moreover, in Colorado at least, the lending of credit prohibition does not apply when a city lends its credit for a public purpose.⁷³

V. *Potential Advantages of Home Rule Cities*

In Colorado, the courts have broadly construed the home rule powers of cities over sales taxes. Colorado home rule cities enjoy plenary consti-

69. See *Allardice*, 476 P.2d at 992-93.

70. See *id.*; see also COLO. CONST. art. V, § 38.

71. COLO. CONST. art. XI, § 1; see also IDAHO CONST. art. VIII, § 2; IOWA CONST. art. VII, § 1; UTAH CONST. art. XIV, § 3, 4.

72. See, e.g., *People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62, 11 Ill. Dec. 307, 368 N.E.2d 915, 919 (1977); *City of Muscatine*, 237 N.W.2d at 62; *Tribe*, 540 P.2d at 503; *Ginsberg v. City and County of Denver*, 164 Colo. 572, 436 P.2d 685, 691 (1968).

73. *Witcher*, 716 P.2d at 455; see also COLO. CONST. art. XI, § 1.

tutional authority over the imposition, collection and uses of local sales taxes:

[T]he power to levy sales and use taxes for the support of the home rule government is "essential . . . to the full exercise" of the right of self-government granted to such cities under Article XX, section 6. [T]he power to levy and collect within [the city] excise taxes such as the sales tax is [a] purely "'local and municipal' concern. . . ."⁷⁴

Colorado courts, therefore, have expressed a strong reluctance to interfere with home rule cities' programs involving local sales taxes. Thus, at least in Colorado, the use of a home rule city's sales taxes for tax increment financing will likely receive judicial approval.⁷⁵

VI. Conclusion

Enhanced Sales Tax Incentive Programs offer a "win-win" option both for local governments and for businesses operating in economically depressed communities. ESTIP plans give businesses an opportunity to recoup some of the expense of constructing public and public-related improvements at their locations. ESTIP plans also give businesses the opportunity to expand their markets and increase their profits. In return, local governments with ESTIP plans get expanded tax bases, expanded tax revenues, and public improvements at no public cost. Thus, ESTIP plans may both help depressed communities weather hard economic times and provide the catalyst to reverse those communities' economic doldrums.

ESTIP plans offer local governments significant advantages over traditional tax increment financing mechanisms. ESTIP plans do not involve the time and expense of issuing bonds for typical tax increment financing.⁷⁶ Moreover, because ESTIP plans involve only the sales taxes attributable solely to a local government, such plans avoid disputes with other governmental entities. For example, ESTIP plans involving sales taxes allow local governments to avoid disputes with special service districts and school districts over *ad valorem* property taxes.⁷⁷ Similarly, because ESTIP plans involve municipal sales taxes exclusively, local governments avoid disputes over sharing, collecting or disbursing state and county sales taxes.

74. *Security Life and Accident Co. v. Temple*, 177 Colo. 14, 492 P.2d 63, 64 (1972) (quoting *Berman*, 156 Colo. at 538, 400 P.2d at 434); see also COLO. CONST. art. XX, § 6.

75. *Accord, City of Muscatine*, 237 N.W.2d at 57.

76. See, e.g., cases cited in note 29, *supra*; see also COLO. REV. STAT. §§ 31-25-101 to -1119 (1986 & Supp. 1988) (Public Improvements).

77. See, e.g., *Byrne*, 618 P.2d at 1380.

ESTIP plans also allow local governments to avoid legislative declarations of "blighted areas" necessary to establish urban renewal districts. Such declarations of blight always draw complaints regarding unwarranted community stigma, and frequently breed legal challenges by businesses included within urban renewal districts.⁷⁸ Indeed, under ESTIP plans, local governments deal by contract only with businesses which volunteer to enter the program. Therefore, local governments which adopt ESTIP plans may avoid many of the dilatory and expensive legal challenges that often accompany other financing options. Taken together, the advantages for both local governments and local retailers make ESTIP plans an appealing alternative for economic revitalization of communities.

78. See, e.g., *Oberndorf*, 696 F. Supp. 552; *Berman*, 348 U.S. at 31; *Tierney*, 742 S.W.2d at 150-51.

**TOWN OF ALMA
STATE OF COLORADO**

ORDINANCE NO. 2002-_____

**AN ORDINANCE CREATING AN ENHANCED SALES TAX INCENTIVE
PROGRAM AND PROVIDING CRITERIA FOR INCLUSION OF
BUSINESSES WITHIN SAID PROGRAM.**

WHEREAS, the Town of Alma is a municipal corporation possessing all powers granted to statutory municipalities by Title 31 of the Colorado Revised Statutes, included within such powers being the power to levy and collect taxes, including sales taxes; and

WHEREAS, the "County and Municipal Sales or Use Tax" provisions of the statutes of the State of Colorado, C.R.S. § 29-2-101, *et seq.* further authorizes the Town to impose sales and use taxes; and

WHEREAS, the Town uses sales taxes in the operation of government for the purpose of providing municipal services to the citizens, residents and business owners of the Town of Alma; and

WHEREAS, the Town Board of the Town of Alma deems the development of new, and the substantial expansion of existing, retail sales tax generating businesses to be a vital and important step in the economic development of the Town of Alma; and

WHEREAS, the Town Board of the Town of Alma wishes to establish hereby a fund derived from a portion of the enhanced sales taxes, which fund may be shared with owners as an incentive for establishing or expanding retail sales tax generating businesses within the Town of Alma, and

WHEREAS, so as to avoid an impact to the General Fund of the Town, the source of funding for said Program shall be limited to a portion of increased sales taxes generated solely by businesses involved in the Program; and

WHEREAS, the Town Board wishes to establish such an Enhanced Sales Tax Incentive Program as set forth herein to serve the public purposes of providing employment, additional taxes and public and public-related improvements through deferred expenditure of public funds, while promoting economic development within the Town of Alma, thereby continuing to encourage and to provide for the vitality of retail businesses within the Town, as well as providing opportunities for employment for the residents of the Town, and enabling the Town to carry forward its functions in the preservation of the health, safety, and welfare of the citizens and residents of the Town.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF TRUSTEES OF THE TOWN OF ALMA, THAT:

Section 1. There is hereby established within the Town of Alma an Enhanced Sales Tax Incentive Program ("ESTIP").

Section 2. The purpose of the Enhanced Sales Tax Incentive Program created hereby is to encourage the establishment and/or substantial expansion of retail sales tax generating businesses within the Town of Alma, thereby stimulating the economy of and within the Town, thereby providing employment for residents of the Town and others, thereby further expanding the goods available for purchase and consumption by residents of the Town, and further increasing the sales taxes collected by the Town, which increased sales tax collections will enable the Town to provide expanded and improved municipal services to and for the benefit of the residents of the Town, while at the same time providing public or public-related improvements at no cost, or at deferred cost, to the Town and its taxpayers and residents.

Section 3. As used in this Chapter 3.36 and all sections thereof, the following phrases shall have the following meanings:

(a) The phrase "enhanced sales tax" shall mean the amount of the sales tax collected by the Town over and above a base amount negotiated by, and agreed upon by, the applicant and the Town, and which amount is approved by the Town Board, which base amount shall never be lower than the amount of sales tax collected by the Town at the property in question in the previous twelve (12) months plus a reasonable and agreed upon percentage of anticipated increase in sales taxes, or, in the case of a newly established business, an amount which represents the good faith determination by the applicant and the Town as to the amount of sales taxes which could be generated from the new business without the participation by applicant in the ESTIP created hereunder.

(b) The phrase "owner or proprietor" shall mean the record owner or operator of an individual business, or the owner of the real property upon which more than one (1) business is operated, provided that said owner (whether an individual, corporation, partnership or other entity) is the owner or lessor of the individual businesses operated thereon.

Section 4. Participation in ESTIP shall be based upon approval by the Town Board of the Town of Alma, exercising its legislative discretion in good faith. Any owner or proprietor of a newly established or proposed retail sales tax generating business or location, or the owner or proprietor of an existing retail sales tax generating business or location which wishes to expand substantially, may apply to the Town for inclusion within the ESTIP provided that the new or expanded business is reasonably likely to generate enhanced sales taxes of at least one thousand dollars (\$1,000.00) in the first year of operation.

Section 5. Approval by the Town Board of an agreement implementing this ESTIP shall entitle the successful applicant to share in enhanced sales taxes derived from applicant's property or business in an amount which shall not in any event exceed fifty percent (50%) of the enhanced sales taxes; provided, however, that applicant may use said amounts only for public and/or public-related purposes such as those specified herein and which are expressly approved by the Town Board at the time of consideration of the application. The time period in which said enhanced sales taxes may be shared shall not commence until all public or public-related improvements are completed, and shall be limited by the Town Board, in its discretion, to a specified time, or until a specified amount is reached.

Section 6. The uses to which said-shared enhanced sales taxes may be put by an applicant shall be strictly limited to those, which are public or public-related in nature. For the purposes of this ordinance, public or public related purposes shall mean public improvements, including but not limited to streets, sidewalks, curbs, gutters, pedestrian malls, street lights, drainage facilities, landscaping, decorative structures, statuary, fountains, identification signs, traffic safety devices, bicycle paths, off-street parking facilities, benches, restrooms, information booths, public meeting facilities, building upgrades, historical restoration, construction that will generate additional employment opportunities and/or sales tax revenues, and all necessary, incidental, and appurtenant structures and improvements, together with the relocation and improvement of existing utility lines, and any other improvements of a similar nature which are specifically approved by the Town Board upon the Town Board's finding that said improvement are public or public-related improvements or will serve the purposes set forth in Section 2 of this ordinance.

Section 7. The base figure for sales taxes shall be divided into four (4) quarterly increments, which increments are subject to agreement between the parties, and approval by the Town Board, and which increments shall be reasonably related to the average quarterly performance of the business or property in question, or similar businesses in the area (i.e., adjust for seasonal variations). If in any quarter the agreed upon base figure is not met by applicant so as to create enhanced sales tax for that quarter, no funds shall be shared with applicant for said quarter, and no increment shall be shared until that deficit, and any other cumulative deficit, has been met, so that at the end of any twelve (12) month cycle, funds in excess of those "enhanced sales taxes" agreed to be shared shall not have been shared with any applicant.

Section 8. It is an overriding consideration and determination of the Town Board that existing sources of Town sales tax revenues shall not be used, impaired, or otherwise affected by this Enhanced Sales Tax Incentive Program. Therefore, it is hereby conclusively determined that only enhanced sales taxes generated by the properties described in an application shall be subject to division under this ESTIP. It shall be the affirmative duty of the Finance Director of the Town of Alma to collect and hold all such "enhanced sales taxes" in a separate account apart from the sales taxes generated by and collected from the other

sales tax generating uses and businesses within the Town and to provide an accounting system which accomplishes the overriding purpose of this ordinance. It is conclusively stated by the Town Board of the Town of Alma that this ordinance would not be adopted or implemented but for the provisions of this Section 8.

Section 9. Approval of an application for inclusion in this ESTIP shall be given by the Town Board, at a public hearing held as a portion of a regularly scheduled Town Board meeting, based upon the following criteria:

- a. The amount of enhanced sales taxes which are reasonably to be anticipated to be derived by the Town through the expanded or new retail sales tax generating business;
- b. The public benefits which are provided by the applicant through public works, public improvements, additional employment for the Town residents, etc.;
- c. The amount of expenditures which may be deferred by the Town based upon public improvements to be completed by the applicant;
- d. The conformance of the applicant's property or project with the comprehensive plan and zoning ordinances of the Town; and
- e. The agreement required by Section 10 having been reached, which agreement shall contain and conform to all requirements of said Section 10.

Approval shall be by motion adopted by a majority of the entire Town Board.

Section 10. Each application for approval submitted to the Town Board shall be subject to approval by the Board solely on its own merits. Approval of an application shall require that an agreement be executed by the owner and the Town, which agreement shall, at a minimum, contain:

- a. A list of those public or public-related improvements which justify applicant's approval, and the amount which shall be spent on said improvements.
- b. The maximum amount of enhanced sales taxes to be shared, and the maximum time during which said agreement shall continue, it being expressly understood that any such agreement shall expire and be of no further force and effect upon the occurrence of the earlier to be reached of the maximum time of the agreement (whether or not the maximum amount to be shared has been reached) or the maximum amount to be shared (whether or not the maximum time set forth has expired);

c. A statement that this is a personal agreement which is not transferable and which does not run with the land;

d. That this agreement shall never constitute a debt or obligation of the Town within any constitutional or statutory provision;

e. The base amount which is agreed upon by quarter, and the fact that if, in any quarter as specified, sales taxes received from the property do not at least equal said amount, that there shall be no sharing of funds for said quarter;

f. The base amount shall be agreed upon which shall consider the historic level of sales at the property in question, or a similar property within the area in the event of a new business, and a reasonable allowance for increased sales due to the improvements and upgrades completed as a result of inclusion within this Program;

g. A provision that any enhanced sales taxes subject to sharing shall be escrowed in the event there is a legal challenge to this Enhanced Sales Tax Incentive Program or the approval of any application therefore;

h. An affirmative statement that the obligations, benefits, and/or provisions of this agreement may not be assigned in whole or in any part without the expressed authorization of the Town Board of the Town of Alma, and further that no third party shall be entitled to rely upon or enforce provision hereof; and

i. Any other provisions agreed upon by the parties and approved by the Town Board.

Section 11. The Town Board has enacted this ESTIP as a joint benefit to the public at large and to private owners for the purpose of: providing the Town with increased sales tax revenues generated upon and by properties improved as a result of this Program; public improvements being completed by private owners through no debt obligation being incurred on the part of the Town, and allowing applicants an opportunity to improve properties which generate sales activities, which improvements make those properties more competitive in the marketplace and further provide to the applicant additional contingent sources of revenues for upgrading said properties. The Town Board specifically finds and determines that creation of this ESTIP is consistent with the Town's powers as a statutory municipal corporation, and that exercise of said powers in the manner set forth herein is in furtherance of public health, safety and welfare. Notwithstanding any provision hereof, the Town shall never be a joint venture in any private entity or activity which participates in this ESTIP, and the Town shall never be liable or responsible for any debt or obligation of any participant in this ESTIP.

READ, APPROVED and ADOPTED at a regular meeting of the Board of Trustees of the Town of Alma, Colorado, this _____ day of _____, 2002.

Bob Ensign, Mayor

ATTEST:

Nancy A. Reed, Town Clerk

ORDINANCE NO. 2000-_____

AN ORDINANCE CREATING A BUSINESS INCENTIVE ZONE ("BIZ") PROGRAM, AND PROVIDING CRITERIA FOR INCLUSION OF BUSINESSES WITHIN SAID PROGRAM.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CRIPPLE CREEK, COLORADO, THAT:

Section 1. Short Title. This ordinance shall be known and may be cited as the "Cripple Creek Business Incentive Zone Ordinance."

Section 2. Legislative Declarations.

(a) The City Council of the City of Cripple Creek hereby finds and declares:

(1) That the health, safety and welfare of the people of this City are in large part dependent upon the continued encouragement, development and expansion of opportunities for employment in the private sector in this City;

(2) That there currently exist in this City businesses or vacant land which require new development or revitalization opportunities to overcome conditions of unemployment, underemployment, net out-migration of the population, diminution of tax revenues, chronic economic distress, deterioration of business districts, deterioration of public infrastructures or sudden severe economic dislocations;

(3) That by creating new development opportunities for businesses within the City, the City Council will increase the likelihood that new and improved businesses will generate more municipal tax revenues for the City in the future.

(b) It is therefore declared to be the policy of the City, in order to provide incentives for private enterprises to expand and for new businesses to locate in the City to develop a program which declares the City a "**Business Incentive Zone**" and provides for the abatement of certain categories of fees, taxes and other business development-related charges for new development or redevelopment expected to generate revenue to the City, within a one-year period, equal to or exceeding the amount of the abatement.

(c) The City Council has enacted this ordinance as a joint benefit to the public at large and to private owners for the purposes of providing the City with increased tax revenues generated upon and by properties improved as a result of this program and allowing owners and proprietors opportunities to improve properties, which improvements make those properties more competitive in the marketplace and further provide to owners and proprietors additional contingent sources of revenues for upgrading said properties.

(d) The City Council specifically finds and determines that creation of this "Business Incentive Zone" ordinance is consistent with the City's powers as a municipal corporation and that exercise of those powers in this ordinance promotes the public health, safety and general welfare of the citizens of Cripple Creek. Notwithstanding any provision hereof, the City shall never be a joint venturer in any private entity or activity which participates in this program, and the City shall never be liable or responsible for any debt or obligation of any participant.

Section 3. Definitions. As used in this ordinance, the following phrases shall have the following meanings unless the context clearly indicates another meaning:

(a) The phrase "**eligible City fees, charges and taxes**" shall mean, and shall be limited to tax on machinery, furniture and fixtures associated with the initial development or redevelopment "project," tax on building materials, building permit fees, zoning fees and plan check fees.

(b) The phrase "**expected incremental future revenues**" shall mean the amount of the additional sales tax, use tax, property tax and water/sewer user charges as projected by the City, expected to be generated over a one year period from the time of completion of the "project" over and above the taxes and fees generated on the premises in the twelve months preceding the application described in Section 5.

(c) The phrase "**owner or proprietor**" shall mean the record owner, tenant or operator of an individual business or, in the case of a shopping center, the owner of the real property upon which more than one business is operated.

(d) "**Project**" shall mean the specific development or redevelopment expenditures which relate both to the abatement of "eligible City fees, charges and taxes" and "expected incremental future revenues."

Section 4. Eligibility. Participation in the "Business Incentive Zone" fee, charge and tax abatement program shall be based upon approval by the City Council. Any owner or proprietor of a newly purchased, established, or proposed business, or the owner or proprietor of an existing business which wishes to expand, may apply to the City for inclusion within the program. Abatement of "eligible City fees, charges and taxes" shall be granted up to the amount of "expected incremental future revenues" to be generated by the project during the ensuing one year period.

Section 5. Application. Any owner or proprietor may file a written application for inclusion in the "Business Incentive Zone" program on forms provided by the City and attaching such information as the City may require. Such application shall be filed with the City's Administrator who shall refer the application to the City Council.

Section 6. Review of Application. The City Council shall review the application, and any other information which it may reasonably require from the

applicant, and shall determine the expected incremental future revenues, if any, attributable to the project. If the application is approved by the City Council, the applicant's eligible City fees, charges and taxes attributable to the project shall be reduced by an amount equal to the expected incremental future revenues.

Section 7. Recourse for Inaccurate Estimates of Expected Incremental Future Revenue. Neither the City nor the applicant shall have cause to recover amounts resulting from differences in actual versus estimated collections of taxes, charges and fees during the one year estimate period.

PASSED ON THE FIRST READING AND ORDERED PUBLISHED THIS ____
DAY OF _____, 2000.

Kathleen Conley, City Clerk

PASSED ON SECOND READING AND ADOPTED BY THE CITY COUNCIL
THIS ____ DAY OF _____, 2000.

Approved: _____
Mayor

Attest: _____
Kathleen Conley, City Clerk

Approved as to form: _____
City Attorney

ORDINANCE NO. 2014-_____

AN ORDINANCE ADDING A NEW ARTICLE IX TO CHAPTER 4 OF THE FAIRPLAY MUNICIPAL CODE CREATING A PROPERTY IMPROVEMENT INCENTIVE PROGRAM AND PROVIDING CRITERIA FOR PARTICIPATION IN SUCH PROGRAM.

WHEREAS, the Town of Fairplay is a municipal corporation possessing all powers granted to statutory cities by Title 31 of the Colorado Revised Statutes, included within such powers being the power to levy and collect taxes, including property taxes; and

WHEREAS, the Town uses property tax revenues in the operation of government for the purpose of providing municipal services to the citizens, residents and business owners of the Town of Fairplay; and

WHEREAS, the Town Board of the Town of Fairplay deems improvements to the physical appearance of the Town to be a critical element in attracting new businesses, increasing tourist visits, and enhancing the general livability of the Town with the result that the Town Board finds the improvement of the appearance of the Town to be a vital public purpose; and

WHEREAS, the Town Board of the Town of Fairplay wishes to establish hereby a fund derived from a portion of the Town's property tax revenues to be used for providing incentives for property owners to improve the appearance of their property; and

WHEREAS, the Town Board wishes to establish a Property Improvement Incentive Program as set forth herein to serve the public purposes of described above.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF TRUSTEES OF THE TOWN OF FAIRPLAY, COLORADO, THAT:

The Municipal Code of the Town of Fairplay is hereby amended by the addition of a new Article IX to Chapter 4 to read as follows:

ARTICLE IX

Property Improvement Incentive Program

Sec. 4-9-10. Short Title.

There is hereby established within the Town of Fairplay a Property Improvement Incentive Program ("PIIP").

Sec. 4-9-20. Legislative Purpose.

The purpose of the Property Improvement Incentive Program created hereby is to encourage improvements to the exterior appearance of privately-owned structures and properties within the Town, thereby stimulating the economy of and within the Town, increasing tourist visits; and generally enhancing the livability of the Town all of which will, in the long term, increase property values and retail sales thereby increasing property and sales tax revenues to the Town for the provision of public services.

Sec. 4-9-30. Definitions.

As used in this Article and all sections thereof, the following phrases shall have the following meanings:

(a) The term "improvements" shall mean improvements to the exterior façade of structures or the landscaping of real property located in the Town of Fairplay which improvements are visible from the street located directly to the front of the property or, as to properties located on street corners, from the street adjacent to the property. The term shall not include improvements to the interior of a structure, structural improvements or landscaping that do not enhance the appearance of the property, landscaping improvements that are temporary in nature, or structural improvements or landscaping that are screened from street view by fencing or other similar visual barriers.

(b) The term "owner" shall mean the record owner of taxable real property or improvements thereon located in the Town of Fairplay, but shall not include the owner of public or governmental property.

Sec. 4-9-40. Participation.

Participation in the PIIP shall be based upon approval by the Town Board of the Town of Fairplay, exercising its legislative discretion in good faith. Any owner of property may apply for participation in the PIIP as set forth in this Article. The Town Board shall consider complete applications in the order submitted and may approve, deny or approve in part, such applications based on the merit of the proposed project. Nothing contained in this Article shall be interpreted or construed to create an entitlement to participation in the PIIP. The Town Board may deny any application which it concludes does not adequately serve the public purposes of this Article.

Sec. 4-9-50. Agreement.

Approval by the Town Board of an agreement implementing this PIIP shall result in the granting of a rebate of all or a portion of the real property taxes paid to the Town by the Owner of the property making the application for a period not to exceed the preceding five

(5) tax years. The agreement shall contain, at a minimum, the terms set forth in Section 4-9-90 below.

Sec. 4-9-60. Uses.

The uses to which the PIIP rebate may be put by an applicant shall be strictly limited to the installation or construction of improvements to the property owned by the applicant and only upon the Town Board's finding that said improvements will serve the purposes set forth in Section 4-9-20 of this Article.

Sec. 4-9-70. Amount of PIIP Rebate—Matching Funds.

(a) The total amount of the PIIP rebate paid to an applicant shall not exceed the amount of real property taxes paid by the owner of the property (whether the applicant or a preceding owner) to the Town for the preceding five (5) tax years. No PIIP rebate shall be made for property taxes paid to other public entities.

(b) The total amount of PIIP rebate paid out by the Town in any calendar year to all PIIP participants shall not exceed the amount budgeted and appropriated for that purpose by the Town Board for that calendar year. PIIP applications received after the funds budgeted and appropriated for the PIIP Program in any calendar year are fully committed may be held in abeyance for consideration by the Board in the following year. Projects may be divided into phases and funded in successive years.

(c) The owner of the property shall, as a condition of participation in the PIIP, pay not less than an amount equal to fifty percent (50%) of the total cost of the improvements.

Sec. 4-9-80. Criteria for Approval.

Approval of an application for participation in the PIIP shall be given by the Town Board, at a public hearing held as a portion of a regularly scheduled Town Board meeting, based upon the following criteria:

a. No PIIP participation shall be approved where the total cost of the improvements is less than five hundred dollars (\$500.00).

b. The PIIP project must, as determined by the Town Board, enhance the overall appearance of the Town and the property for which the application is made.

c. The improvements must be constructed or installed by a contractor or professional experienced and capable of performing the work. The Town may maintain a list of pre-approved contractors but shall consider the qualifications of other contractors and professionals submitted by the applicant. In no case shall the work be performed by the

applicant unless the applicant can establish, to the satisfaction of the Board, that the applicant is himself or herself, experienced and capable of performing the work in question.

d. The scope of work and accompanying plans submitted with the application shall be sufficiently detailed for their intended purpose.

e. The agreement required by Section 4-9-50 shall contain all of the terms set forth in Section 4-9-90 and shall be otherwise acceptable to the Board.

Approval shall be by motion adopted by a majority of the entire Town Board .

Sec. 4-9-90. Terms of Agreement.

Each application for approval submitted to the Town Board shall be subject to approval by the Board solely on its own merits. Approval of an application shall require that an agreement be executed by the owner and the Town, which agreement shall, at a minimum, contain:

- a. A scope of work and plans for the improvements to be constructed or installed.
- b. The estimated cost of the project.
- c. The name of the contractor or other person by whom the work will be performed.
- d. The maximum amount of property tax to be rebated by the Town, and the maximum time during which said agreement shall continue, it being expressly understood that any such agreement shall expire and be of no further force and effect upon the termination date whether or not the work has been completed.
- e. The matching funds to be furnished by the owner, which amount shall be not less than fifty percent (50%) of the total cost of the work to be performed.
- f. The period during which the owner or the owner's successor in interest shall be obligated to maintain the improvements.
- g. A provision providing that the property tax rebate shall only occur after completion of the work and final inspection and approval by the Town.
- h. A statement that this is a personal agreement which is not transferable and which does not run with the land;

- i. A statement that the agreement shall never constitute a debt or obligation of the Town within any constitutional or statutory provision;
- h. An affirmative statement that the obligations, benefits, and/or provisions of this agreement may not be assigned in whole or in any part without the expressed authorization of the Fairplay Town Board , and further that no third party shall be entitled to rely upon or enforce provision hereof;
- i. An affirmative statement that the agreement will be recorded, and that the owner's obligation will run with the land and be binding upon the owner's heirs, successors and assigns; and
- i. Any other provisions agreed upon by the parties and approved by the Town Board .

Sec. 4-9-100. Public Purpose.

The Town Board has enacted this PIIP as a joint benefit to the public at large and to private owners for the purpose of: improving the appearance and livability of the Town; providing the Town with increased sales tax revenues by increasing tourism; and allowing applicants an opportunity to improve properties, which improvements make those properties more valuable, thus increasing property tax revenues. The Town Board specifically finds and determines that creation of this PIIP is consistent with the Town's powers as a statutory municipal corporation, and that exercise of said powers in the manner set forth herein is in furtherance of public health, safety and welfare. Notwithstanding any provision hereof, the Town shall never be a joint venture in any private entity or activity which participates in this PIIP, and the Town shall never be liable or responsible for any debt or obligation of any participant in this PIIP.

PASSED ON THE FIRST READING AND ORDERED PUBLISHED THIS _ DAY
OF _____, 2014.

Tina Darrah, Town Clerk

PASSED ON SECOND READING AND ADOPTED BY THE TOWN BOARD
THIS _____ DAY OF _____, 2014.

Approved: _____
Gabby Lane, Mayor

Attest: _____
Tina Darrah, Town Clerk

Approved as to form: _____
Herbert C. Phillips, Town Attorney

PROPERTY IMPROVEMENT INCENTIVE PROGRAM AGREEMENT
(Insert name of project)

THIS PROPERTY IMPROVEMENT INCENTIVE PROGRAM AGREEMENT (_____) (hereafter referred to as the "_____ PIIP Agreement") is made and executed this ____ day of _____, 20__, by and between the TOWN OF FAIRPLAY, COLORADO, a Colorado statutory municipal corporation, (hereafter referred to as the "Town"), and _____, a Colorado _____, (hereafter referred to as the "Owner").

W I T N E S S E T H

WHEREAS, the Owner is the owner of certain real property in the Town commonly described as _____, located at _____ (the "Property"); and

WHEREAS, the Owner proposes to improve the Property by **[insert brief description of the project]** which improvement will enhance the appearance of the Property and of the Town; and

WHEREAS, in entering into this PIIP Agreement, the Town Board of the Town specifically finds that the criteria for approval of a PIIP Agreement set forth in Section 4-9-80 of the Fairplay Municipal Code are met; and

WHEREAS, the parties hereto wish to set forth in full their agreement as to the nature and extent of the improvements which shall be constructed and installed by the Owner within and upon the Property, and the manner for and extent of the reimbursement to the Owner for a portion of the cost of such construction and installation; and

WHEREAS, the parties wish to memorialize all aspects of their agreement as to the terms and conditions of such reimbursement in this PIIP Agreement.

NOW THEREFORE, the parties hereto, for themselves, their successors and assigns (to the extent this PIIP Agreement is assignable, as specified hereinafter), in and for the consideration of the performance of the mutual covenants and promises set forth herein, the receipt and adequacy of which are hereby acknowledged, do hereby covenant and agree as follows:

1. **Authority.** This PIIP Agreement is entered into in compliance with the provisions of Article 9, Chapter 4 of the Fairplay Municipal Code.
2. **Scope of Work.** The parties hereby mutually agree that Owner shall construct, or cause to be constructed, the improvements to the Property set forth in **Exhibit A** hereto (the "Work"

or the "Project"). Such work shall be completed to the reasonable satisfaction of the Town prior to any reimbursement pursuant to this PIIP Agreement. Any change in the Scope of Work shall require the prior written approval of the Town and may result in a decrease in the amount of the reimbursement should the Town reasonably determine that the change diminishes the cost or value of the improvements. The construction or installation of the improvements shall commence no later than _____, 20__, and shall be completed no later than _____, 20__. Should the work not commence or not be completed by the dates specified above this PIIP Agreement shall terminate and be of no further force or effect and the Town shall have no further obligations hereunder.

3. **Cost of Project.** The estimated cost of the Project is _____ Dollars (\$_____).

4. **Contractor.** The contractor performing the Work is _____, whose address is _____. Any change of contractor shall require prior Town approval.

5. **Property tax rebate and matching funds.** The parties hereby mutually agree that the maximum amount of real property taxes to be rebated to Owner by the Town shall be _____ Dollars (\$_____) and that such amount does not exceed the amount of real property taxes paid on the Property to the Town during the preceding five years. Owner shall pay not less than an amount equal to fifty percent (50%) of the total cost of the Project. Should the cost of the Project decrease during the Work the property tax rebate provided by the Town shall be reduced to assure that the Owner contributes at least fifty percent (50%) of the total cost of the Project.

6. **Maintenance of improvements.** Owner shall maintain the improvements in good condition and repair for a period of five years from and after the date of completion. Should Owner not perform this maintenance obligation Owner shall, upon written demand from the Town, refund to the Town all monies rebated to the Owner by the Town pursuant to this PIIP Agreement.

7. **Completion of work and payment of rebate.** Upon completion of the Work, Owner shall notify the Town of such completion and the Town shall perform an inspection of the improvements. If the improvements are completed in a satisfactory and workmanlike manner the Town shall accept same and shall, within thirty (30) day following such acceptance, rebate to the Owner the amount required by Paragraph 5 above.

8. **Annual appropriation.** The parties specifically acknowledge and agree that no undertaking on the part of the Town to rebate property taxes as specified herein constitutes a debt or obligation of the Town within any constitutional or statutory provision. The Town's obligations hereunder shall be subject to annual appropriation by the Town Board unless and until approved by the Town's electors.

9. **Assignment/Third party beneficiaries.** None of the obligations, benefits, and provisions of this PIIP Agreement shall be assigned in whole or in any part without the express written authorization of the Fairplay Town Board. In addition, no third party may rely upon or enforce any provision of this PIIP Agreement, the same being an agreement solely between the Town and the Owner, and which agreement is made for the benefit of no other person or entity.

10. **Successors and assigns.** This PIIP Agreement may be recorded and shall be binding on Owner's successors and assigns.

11. **Amendments.** This PIIP Agreement shall be subject to amendment only by a written instrument executed by each party. Any such amendment shall require the approval by the Town Board of the Town of Fairplay at a regular or special meeting of the Town Board, and execution thereof by the Mayor and attestation by the Town Clerk.

12. **Notices.** Any written notices provided for or required in this PIIP Agreement shall be deemed delivered when either personally delivered or mailed, postage fully prepaid, certified or registered mail, return-receipt requested, to the parties at the following addresses:

To the Town: Town Administrator
 Town of Fairplay
 PO Box 267
 Fairplay, CO 80440

With a copy to: Hayes, Phillips, Hoffmann & Carberry, P.C.
 PO Box 1046
 Fairplay, CO 80440

To the Owner:

With a copy to:

EXECUTED the day and year fist above-written.

THE TOWN OF FAIRPLAY, COLORADO

Gabby Lane, Mayor

Tina Darrah, Town Clerk

APPROVED AS TO FORM:

Herbert C. Phillips, Town Attorney

OWNER:

Subscribed, sworn to and acknowledged before me this ____ day of _____,
20__ by _____ as _____ of _____, a Colorado
_____.

My commission expires:

(SEAL)

Notary Public

INTRODUCED BY COUNCILMEMBER Worth

Ordinance No. 758
Series of 1988

TITLE: AN ORDINANCE AMENDING THE CODE OF LAWS OF THE CITY OF WHEAT RIDGE BY CREATING CHAPTER 24, ENHANCED SALES TAX INCENTIVE PROGRAM, AND PROVIDING CRITERIA FOR INCLUSION OF BUSINESSES WITHIN SAID PROGRAM.

WHEREAS, the City of Wheat Ridge is a home rule municipal corporation possessing all powers granted to home rule cities by Article XX, Section 6 of the Constitution of the State of Colorado, included within such powers being the power to levy and collect taxes, including sales taxes;

WHEREAS, the "County and Municipal Sales or Use Tax" provisions of the statutes of the State of Colorado, specifically C.R.S. 29-2-107(1), provide that nothing in state statutes "limit(s) the powers of home rule municipalities organized under Article XX of the State Constitution to impose, administer, or enforce any local sales or use tax . . . " such as the tax discussed herein;

WHEREAS, Section 11.1 of the Home Rule Charter of the City of Wheat Ridge authorizes the imposition of a sales tax after the same has been approved by a "majority of the electorate voting at a regular or special municipal election" at which the question of imposition of such a sales tax is a question upon the ballot;

WHEREAS, a majority of the registered electors voting at an election called for the purpose of creating a sales tax in the City of Wheat Ridge has approved a sales tax of two percent (2%) upon retail sales, one-half (one percent (1%)) of which goes to a "Capital Improvement Fund" and the other one-half (one percent (1%)) of which goes to the General Fund;

WHEREAS, the City uses sales and use taxes in the operation of government for the purpose of providing municipal services to the citizens, residents and business owners of the City of Wheat Ridge;

WHEREAS, there is currently an economic downturn which is negatively affecting the City of Wheat Ridge, the metropolitan Denver area, and the State of Colorado, which economic downturn is such as to justify a local program to encourage economic development;

WHEREAS, the City Council of the City of Wheat Ridge deems the development of new, and the substantial expansion of existing, retail sales tax generating businesses to be a vital and important step in the economic development of the City of Wheat Ridge;

WHEREAS, the City Council of the City of Wheat Ridge wishes to establish hereby a fund derived from a portion of enhanced sales taxes, which fund may be shared with owners as an incentive for establishing or expanding retail sales tax generating businesses within the City of Wheat Ridge;

WHEREAS, so as to avoid an impact to the General Fund and Capital Improvement Fund of the City, the source of funding for said Program shall be limited to a portion of increased sales taxes generated solely by businesses involved in the Program;

WHEREAS, the City Council wishes to establish such an Enhanced Sales Tax Incentive Program as set forth herein to serve the public purposes of providing public and public-related improvements through deferred expenditure of public funds, while promoting economic development within the City of Wheat Ridge, thereby continuing to encourage and to provide for the vitality of retail business and retail businesses within the City, as well as providing opportunities for employment for the residents of the City, and enabling the City to carry forward its functions in the preservation of the health, safety, and welfare of the citizens and residents of the City.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WHEAT RIDGE, COLORADO:

Section 1. The Code of Laws of the City of Wheat Ridge is hereby amended by the addition of the following Chapter 24 Enhanced Sales Tax Incentive Program.

Section 24-1. There is hereby established within the City of Wheat Ridge an Enhanced Sales Tax Incentive Program ("ESTIP").

Section 24-2. The purpose of the Enhanced Sales Tax Incentive Program created hereby is to encourage the establishment and/or substantial expansion of retail sales tax generating businesses within the City of Wheat Ridge, thereby stimulating the economy of and within the City, thereby providing employment for residents of the City and others, thereby further expanding the goods available for purchase and consumption by residents of the City, and further increasing the sales taxes collected by the City, which increased sales tax collections will enable the City to provide expanded and improved municipal services to and for the benefit of the residents of the City, while at the same time providing public or public-related improvements at no cost, or at deferred cost, to the City and its taxpayers and residents.

Section 24-3. As used in this Chapter 24, and all sections thereof, the following phrases shall have the following meanings:

(a) The phrase "enhanced sales tax" shall mean the amount of sales tax collected by the City over and above a base amount negotiated by, and agreed upon by, the applicant and the City, and which amount is approved by the City Council, which base amount shall never be lower than the amount of sales taxes collected by the City at the property in question in the previous twelve (12) months plus a reasonable and agreed upon percentage of anticipated increase in sales taxes, or, in the case of a newly established business, an amount which represents the good faith determination by the applicant and the City as to the amount of sales taxes which could be generated from the new business without the participation by applicant in the ESTIP created hereunder.

(b) The phrase "owner or proprietor" shall mean the record owner or operator of an individual business, or, in the case of a shopping center, the owner of the real property upon which more than one business is operated, provided that said owner (whether an individual, corporation, partnership or other entity) is the owner or lessor of the individual businesses operated thereon.

Section 24-4. Participation in ESTIP shall be based upon approval by the City Council of the City of Wheat Ridge, exercising its legislative discretion in good faith. Any owner or proprietor of a newly established or proposed retail sales tax generating business or location, or the owner or proprietor of an existing retail sales tax generating business or location which wishes to expand substantially, may apply to the City for inclusion within the ESTIP provided that the new or expanded business is reasonably likely to generate enhanced sales taxes of at least twenty thousand dollars (\$20,000.00) in the first year of operation.

Section 24-5. Approval by the City Council of an agreement implementing this ESTIP shall entitle the successful applicant to share in enhanced sales taxes derived from applicant's property or business in an amount which shall not in any event exceed fifty percent (50%) of the enhanced sales taxes; provided, however, that applicant may use said amounts only for public and/or public-related purposes such as those specified herein and which are expressly approved by the City Council at the time of consideration of the application. The time period in which said enhanced sales taxes may be shared shall not commence until all public or public-related improvements are completed, and shall be limited by the City Council, in its discretion, to a specified time, or until a specified amount is reached.

Section 24-6. The uses to which said shared enhanced sales taxes may be put by an applicant shall be strictly limited to those which are public or public-related in nature. For the purposes of this Chapter 24, public or public related purposes shall mean public improvements, including but not limited to streets, sidewalks, curbs, gutters, pedestrian malls, street lights, drainage facilities, landscaping, decorative structures, statuaries, fountains, identification signs, traffic safety devices, bicycle paths, off-street parking facilities, benches, restrooms, information booths, public meeting facilities, and all necessary, incidental, and appurtenant structures and improvements, together with the relocation and improvement of existing utility lines, and any other improvements of a similar nature which are specifically approved by the City Council upon the City Council's finding that said improvement are public or public-related improvements, and that such improvements shall enhance the competitive position of the applicant within the Denver Metropolitan area marketplace.

Section 24-7. The base figure for sales taxes shall be divided into twelve (12) monthly increments, which increments are subject to agreement between the parties, and approval by the City Council, and which increments shall be reasonably related to the average monthly performance of the business or property in question, or similar businesses in the area (i.e. adjust for seasonal variations). If in any month the agreed upon figure is not met by applicant so as to create enhanced sales tax for that month, no funds shall be shared with applicant for said month, and no increment shall be shared until that deficit, and any other cumulative deficit, has been met, so that at the end of any twelve (12) month cycle, funds in excess of those "enhanced sales taxes" agreed to be shared shall not have been shared with any applicant.

Section 24-8. It is an overriding consideration and determination of the City Council that existing sources of City sales tax revenues shall not be used, impaired, or otherwise affected by this Enhanced Sales Tax Incentive Program. Therefore, it is hereby conclusively determined that only enhanced sales taxes generated by the properties described in an application shall be subject to division under this ESTIP. It shall be the affirmative duty of the Treasurer of the City of Wheat Ridge to collect and hold all such "enhanced sales taxes" in a separate account apart from the sales taxes generated by and collected from the other sales tax generating uses and businesses within the City and to provide an accounting system which accomplishes the overriding purpose of this Section 24-8. It is conclusively stated by the City Council of the City of Wheat Ridge that this Chapter 24 would not be adopted or implemented but for the provisions of this Section 24-8.

Section 24-9. The one percent (1%) of sales and use taxes earmarked for the Capital Improvement Fund may be utilized in this ESTIP for public improvements as herein defined so long as the same are within the meaning of the phrase "capital improvements" as defined in the voter approved sales tax referendum previously held within the City of Wheat Ridge, and provided that the same are found and determined by the City Council to be capital improvements which could be provided by the City from the Capital Improvement Fund but for the provision of said improvements by the applicant; provided, however, that such use of capital improvement funds as part of this ESTIP shall be limited to the amount agreed pursuant to Section 24-11 hereof; provided further, however, that nothing contained herein shall limit the City Council in the determination to appropriate additional capital improvement funds for capital improvements affecting the property in question as a part of the City's regular appropriation and budget process.

Section 24-10. Approval of an application for inclusion in this ESTIP shall be given by the City Council, at a public hearing held as a portion of a regularly scheduled City Council meeting, based upon the following criteria:

a. The amount of enhanced sales taxes which are reasonably to be anticipated to be derived by the City through the expanded or new retail sales tax generating business;

b. The public benefits which are provided by the applicant through public works, public improvements, additional employment for City residents, etc.;

c. The amount of expenditures which may be deferred by the City based upon public improvements to be completed by the applicant;

d. The conformance of the applicant's property or project with the comprehensive plan and zoning ordinances of the City;

e. The agreement required by Section 24-11 having been reached, which agreement shall contain and conform to all requirements of said Section 24-11.

Approval shall be by motion adopted by a majority of the entire City Council.

Section 24-11. Each application for approval submitted to the City Council shall be subject to approval by the Council solely on its own merits. Approval of an application shall require that an agreement be executed by

the owner and the City, which agreement shall, at a minimum, contain:

a. A list of those public or public-related improvements which justify applicant's approval, and the amount which shall be spent on said improvements;

b. The maximum amount of enhanced sales taxes to be shared, and the maximum time during which said agreement shall continue, it being expressly understood that any such agreement shall expire and be of no further force and effect upon the occurrence of the earlier to be reached of the maximum time of the agreement (whether or not the maximum amount to be shared has been reached) or the maximum amount to be shared (whether or not the maximum time set forth has expired);

c. A statement that this is a personal agreement which is not transferable and which does not run with the land;

d. That this agreement shall never constitute a debt or obligation of the City within any constitutional or statutory provision;

e. The base amount which is agreed upon by month, and the fact that if, in any month as specified, sales taxes received from the property do not at least equal said amount, that there shall be no sharing of funds for said month;

f. The base amount shall be agreed upon which shall consider the historic level of sales at the property in question, or a similar property within the area in the event of a new business, and a reasonable allowance for increased sales due to the improvements and upgrades completed as a result of inclusion within this Program;

g. A provision that any enhanced sales taxes subject to sharing shall be escrowed in the event there is a legal challenge to this Enhanced Sales Tax Incentive Program or the approval of any application therefore;

h. An affirmative statement that the obligations, benefits, and/or provisions of this agreement may not be assigned in whole or in any part without the expressed authorization of the Wheat Ridge City Council, and further that no third party shall be entitled to rely upon or enforce any provision hereof;

i. Any other provisions agreed upon by the parties and approved by the City Council.

Section 24-12. The City Council has enacted this ESTIP as a joint benefit to the public at large and to private owners for the purposes of: providing the City with increased sales tax revenues generated upon and by properties improved as a result of this Program; public improvements being completed by private owners through no debt obligation being incurred on the part of the City, and allowing applicants an opportunity to improve properties which generate sales activities, which improvements make those properties more competitive in the marketplace and further provide to the applicant additional contingent sources of revenues for upgrading said properties. The City Council specifically finds and determines that creation of this ESTIP is consistent with the City's powers as a home rule municipal corporation, and that exercise of said powers in the manner set forth herein is in furtherance of the public health, safety and welfare. Notwithstanding any provision hereof, the City shall never be a joint venturer in any private entity or activity which participates in this ESTIP, and the City shall never be liable or responsible for any debt or obligation of any participant in ESTIP.

Section 2. Severability. If any clause, sentence, paragraph, or part of this ordinance or the application thereof to any person or circumstances shall for any reason be adjudged by a court of competent jurisdiction invalid, such judgment shall not affect application to other persons or circumstances.

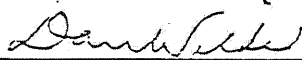
Section 3. Safety Clause. The City Council hereby finds, determines, and declares that this ordinance is promulgated under the general police power of the City of Wheat Ridge, that it is promulgated for the health, safety, and welfare of the public, and that this ordinance is necessary for the preservation of health and safety and for the protection of public convenience and welfare. The City Council further determines that the ordinance bears a rational relation to the proper legislative object sought to be attained.

Section 4. This ordinance shall become effective forty-five (45) days from the date of final passage.

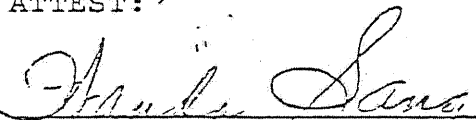
INTRODUCED, READ, AND ADOPTED on first reading by a vote of 7 to 0 on this 2nd day of May, 1988, ordered published in full in a newspaper of general circulation in the City of Wheat Ridge and Public Hearing and consideration on final passage set for Monday, May 23, 1988, at 7:30 o'clock p.m., in the Council Chambers, 7500 West 29th Avenue, Wheat Ridge, Colorado.

READ, ADOPTED, AND ORDERED PUBLISHED on second and final reading by a vote of 8 to 0 this 23rd day of May 1988, 1988.

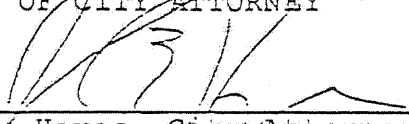
SIGNED by the Mayor on this 24th day of May,
1988.


Dan Wilde, Mayor

ATTEST:


Wanda Sang, City Clerk

APPROVED AS TO FORM BY
OFFICE OF CITY ATTORNEY


John E. Hayes, City Attorney

1st Publication: May 5, 1988
2nd Publication: June 2, 1988
Wheat Ridge Sentinel:
Effective Date: July 7, 1988