



THE WHITMER LAW FIRM, LLC

◆ www.whitmerlawfirm.com ◆

Physical: 63331 U.S. Hwy. 40, Granby CO 80446
Mailing: P.O. Box 38, Hot Sulphur Springs, CO 80451
Phone 970.725.3460

Kent H. Whitmer (Kent@whitmerlawfirm.com)‡
Sean C. Lemieux (Sean@whitmerlawfirm.com)◇

William G. Berry (Will@whitmerlawfirm.com)†
Kaitlin Randall (Katie@whitmerlawfirm.com)◇

MEMORANDUM

TO: BOARD OF TRUSTEES

FROM: KENT WHITMER
TOWN ATTORNEY

DATE: February 23, 2023

RE: Subdivision Improvements Agreement Template Updates

The Town Attorney previously recommended an update to the Subdivision Improvements Agreement (SIA) template found at Appendix 3 of Chapter 19 of the Fraser Town Code. The purpose of the recommended update is to comply with changes in Colorado law which initially prohibited use of the term “illegal alien” in public contracts and now prohibits consideration of lawful presence in the United States in public contracts.

Amendment of the SIA template is necessary because the current version in the Town Code contains a provision, paragraph 40, which is now prohibited by State law.

February 15, 2023 Emergency Proposal

A proposed ordinance was submitted to the Board for consideration on February 15, 2023 – Ordinance 492, Series 2023. The Ordinance was proposed to the Board as an emergency measure with immediate effect, requiring a vote of 6 members to pass. The vote was 5-2 so the measure did not pass by its terms. After the vote, the Town Attorney was asked to review the proposed ordinance and suggest next steps. This memo is an update to the previous memo dated February 2, 2023.

Proposed Ordinance 492 was mistakenly presented to the Board as an emergency measure requiring a supermajority vote. As I understand it, the purpose of the emergency declaration was to make the change effective on passage, rather than 30 days after publication, because of upcoming SIAs the Town plans to enter before the 30-day period would run. However, the applicable statute permits emergency, immediate effectiveness only for ordinances “... necessary to the immediate preservation of the public health or safety and containing the reasons making the same necessary in a separate section...” C.R.S. § 31-16-105. Removal of paragraph 40 from the model SIA in the Code appendix would not qualify as necessary to the immediate preservation of the public health or safety as required by statute.

Current Proposal

The current proposed ordinance to remove paragraph 40 from the SIA template will require a simple majority to pass and will become effective following publication as required. The Town Attorney recommends the Board adopt the ordinance so that the Town is compliance with the requirements of current state law. Retaining language in the Town Code appendix which is expressly prohibited by State statute is not in the Town's best interests.

State Law Requirements

To reiterate the substantive provisions of the earlier memo regarding current State law, two changes have occurred which necessitate the change to the template. First, under House Bill 21-1075, use of the term "illegal alien" in public contracts was changed to "worker without authorization" while retaining the requirement that public contracts still prohibit the performance of services by workers without authorization.

Second, after HB 21-1075 was adopted, subsequent legislation prohibited consideration of lawful presence in public contracts entirely. Effective July 1, 2022, C.R.S. §24-76.5-103 provides that lawful presence is not a requirement of public benefits, which are defined to include any contract entered into by a local government. In other words, Fraser can no longer require in its contracts that services be provided by those lawfully present in the country.

SIAs Prior to Effective Date of Ordinance

In my opinion, the Town can still enter into SIAs without paragraph 40 prior to the effective date of its removal from the template in the Code appendix.

First, the model SIA in the Code appendix is just that – a model or sample. The substantive provision of the Code concerning the terms of an SIA requires only that it include "a description of required on-site and off-site improvements, an estimate of the cost of such improvements, the form of guarantee for the improvements and any other provisions or conditions deemed necessary by the Board of Trustees to ensure that all improvements will be completed in a timely, quality and cost-effective manner." Code §19-3-410. The Code does not require paragraph 40, nor does it require exclusive use of the model SIA.

Second, even if the Code could be read to require inclusion of paragraph 40, such a provision would be unenforceable considering the State law changes. The Town must comply with the state law regardless of whether the model SIA has been amended. I recommend amending the Code appendix to eliminate paragraph 40 from the model SIA for clarity, but it is not necessary that the amendment precede entering SIAs without the provision.

I recommend the following next steps:

1. Enact a new ordinance amending the model SIA to remove paragraph 40, on a non-emergency basis.

2. Any SIAs entered before the model SIA is updated should not include paragraph 40. The Code does not require the paragraph – it is a model only – and State law prohibits it.