ORDINANCE 97-39
TO ADOPT THE PROVISIONS OF INDIANA CODE 36-1-14.3-1 et. seq.
REGARDING PUBLIC-PRIVATE AGREEMENTS

WHEREAS, Indiana Code 36-1-14.3-1 et.seq. creates a mechanism for political subdivisions to enter into agreements with private entities for construction, operation, maintenance and management of public facilities; and

WHEREAS, the provisions of IC 36-1-14.3-1 et. seq. must be adopted by resolution or ordinance of a political subdivision before such an agreement may be entered into;

NOW THEREFORE, BE IT HEREBY ORDAINED BY THE COMMON COUNCIL OF THE CITY OF BLOOMINGTON, MONROE COUNTY, INDIANA, THAT:

SECTION I. Construction of ordinance. The powers conferred by IC 36-1-14.3-1 et. seq., as adopted and amended by the Bloomington Common Council, shall be liberally construed in order to accomplish their purposes and shall be in addition and supplemental to the powers conferred by any other law. This ordinance is intended to be fully consistent with IC 36-1-14.3-1 et. seq.

SECTION II. Authority to enter public-private agreements. The City of Bloomington may enter into public-private agreements with operators under the terms of this ordinance.

SECTION III. Definitions. The definitions in this section apply throughout this ordinance:

"Board" means the board or commission of the City having the power to award contracts on behalf of the City.

"BOT agreement" means any agreement between the City and an operator to construct, operate, and maintain a public facility and to transfer the public facility back to the City at an established future date.

"City" means the City of Bloomington, Indiana, and its boards and commissions.

"Construction" means the process of building, renovating, reconstructing, expanding, modernizing, or assembling a public work, including any material enhancements or upgrades to an existing public facility. The term does not include normal repair, operation, general maintenance, or preservation of a public work.

"Cost" means the cost of entering into any public-private agreement, including, without limitation, the following: (1) The cost of acquisition and construction of any public facility or any modification, improvement, or extension of that facility.
(2) Any cost incident to the acquisition of any necessary property, easement, or right-of-way.
(3) Engineering or architectural fees, legal fees, and fiscal agents' and financial advisors' fees. (4) Any cost incurred for preliminary planning to determine the economic or engineering feasibility of a proposed public-private agreement. (5) Costs of economic investigations and studies, surveys, preparation of designs, plans, working drawings, specifications, and the inspection and supervision of the construction of any public facility and any other cost incurred by the City.

"Operating agreement" means any agreement between an operator and the City for the operation, maintenance, repair, or management of any public facility.

"Operator" means a person who has entered into either an operating agreement or a BOT agreement with the City to provide services to or on behalf of the City.

"Original term" means the initial term of a public-private agreement. The term includes all automatic renewals and automatic extensions of a public-private agreement.

"Person" means an association, a corporation, a limited liability company, a fiduciary, an individual, a joint stock company, a joint venture, a partnership, a sole proprietorship, or any other private legal entity.

"Public agency" means: (1) The state, its departments, agencies, boards, commissions, and institutions; and, (2) A political subdivision or any department, board, or other subdivision of a political subdivision.

"Public facility" means any facility located on, or to be located on, real property

owned or leased by the City and upon which a public service is or may be provided.

"Public funds" means money that is derived from the revenue sources of the City deposited into a general or special fund of the City. The term does not include: (1) Money received by any person managing or operating a public facility under an authorized operating agreement; or (2) Proceeds of bonds payable exclusively by a private entity.

"Public-private agreement" means a BOT agreement or an operating agreement.

"Public service" means any service customarily provided by a state or political subdivision.

"Public work" means any public building, highway, street, alley, bridge, sewer, drain, or any other public facility that is paid for out of public funds.

SECTION IV. Authority to enter BOT agreement; construction of public facilities.

(a) The City may enter into a BOT agreement with an operator for the acquisition, planning, design, development, reconstruction, repair, maintenance, or financing of any public facility on behalf of the City.

(b) BOT agreements may provide the following:

(1) The design, construction, operation, management, maintenance, or financing of the cost of a public facility shall be partially or entirely the responsibility of the operator.

(2) The City shall lease the public facility and real property owned by the City upon which the public facility is to be located to the operator for a predetermined period. The BOT agreement must provide for ownership of all improvements by the City, unless the City elects to provide for ownership of the public facility by the operator during the term of the BOT agreement. In this case, ownership reverts back to the City upon the termination of the BOT agreement.

(3) The BOT agreement must identify which costs are to be the responsibility of the operator and which costs are to be the responsibility of the City.

(4) The operator may be authorized to retain a mutually agreed upon percentage of the revenues received in the operation and management of the public facility or the operator may be paid an established amount by the City, which shall be applied as follows:

(A) Capital outlay costs for the public facility and public service plus interest and principal repayment for any debt incurred.

(B) Costs associated with the operation, management, and maintenance of the public facility.

(C) Payment to the City for reimbursement of the costs of maintenance, police, and other services if the services are performed by the City under the BOT agreement.

(D) An agreed upon return on investment to the operator.

(5) The operator may pay the City either a lease payment or a percentage of gross revenue per month for the operator's operation and use of the public facility.

(6) The BOT agreement may require a performance bond and provide for the payment of contractors and subcontractors under IC 5-16-5.

(c) If the City enters into a BOT agreement which involves the construction of a public facility with public funds under this section, the operator or any contractor or subcontractor engaged in the construction of that public facility shall pay the prevailing wage rate as determined under IC 5-16-7.

(d) If the City enters into a BOT agreement that involves the construction of a public facility with public funds under this section, the construction of that public facility is subject to IC 36-1-12.

SECTION V. Authority to enter operating agreements; construction of public facilities.

(a) The City may enter into an operating agreement with an operator for the operation, maintenance, repair, management, or any combination of operation, maintenance, repair, or management of any public facility for any public service to be performed on behalf of the City.

(b) If the City enters into an operating agreement that involves the construction of a public facility with public funds under this section, the operator or any contractor or

subcontractor engaged in the construction of this public facility shall pay the prevailing wage rate as determined under IC 5-16-7.

SECTION VI. Inspection and copying of operator's record. Records of an operator that is a party to a public-private agreement are subject to inspection and copying to the same extent the records would be subject to inspection and copying if the operator were a public agency under IC 5-14-3. This section is limited to records directly relating to the public-private agreements.

SECTION VII. Records provided to the City. Records that are provided by an operator to the City that relate to compliance by the operator with the terms of a public-private agreement are subject to inspection and copying in accordance with IC 5-14-3.

SECTION VIII. Maximum term of agreements. Under the provisions of this chapter, the City may enter into a public-private agreement for an original term not to exceed one (1) year with board approval. Any public-private agreement with an original term in excess of one (1) year must be approved by the board and by the Common Council.

SECTION IX. Annual report; information required from operator; and, notice of change in policy. (a) Every public-private agreement entered into under this ordinance shall include a provision that the operator shall provide the board at least annually a written report containing information regarding the amount and frequency of usage of the facility by the public; hours the facility is open and available to the public; fees charged; and such other information as the public-private agreement may require. Every agreement entered into under this ordinance shall also provide that the report shall be listed as an agenda item at a board meeting within sixty days after provision of the report, at which meeting the operator shall appear, and that the operator's contractual duties shall include attending such additional public meetings and providing such additional information regarding the facility as the board deems necessary.

(b) Every public-private agreement entered into under this ordinance shall include a requirement that, during the term of the agreement, the operator shall inform the board in writing of its intent to implement any of the following changes:

(1) A change in the amount of fees charged to users of the public facility;

(2) A significant change to programs offered at the public facility;

(3) A change in the hours or days of operation of the public facility;

(4) A change that may have a major environmental impact on the public facility or its surrounding areas; and

(5) A major alteration to a physical structure within the public facility.

The written notice must specify in detail the proposed changes and the reasons therefore and must be provided to the board within a reasonable time prior to the enactment of the changes, and the board shall then place the matter on the next agenda. The notice provision does not apply if the proposed change is already provided for by the public-private agreement.

SECTION X. Request for proposals required. Any public-private agreement contemplated by this chapter must require the City to request proposals under section XI. of this chapter before entering into the public-private agreement.

SECTION XI. Preparation and administration of requests for proposals. (a) A request for proposal shall be prepared and administered under the provisions of this section.

(b) Proposals for public-private agreements shall be solicited through a request for a proposal, which must include the following:

(1) The factors or criteria that will be used in evaluating the proposals.

(2) A statement concerning the relative importance of price and the other evaluation factors.

(3) A statement concerning whether the proposal must be accompanied by a certified check or other evidence of financial responsibility.

(4) A statement concerning whether discussions may be conducted with the offerors for the purpose of clarification to assure full understanding of and

responsiveness to, the solicitation requirements.

(c) Notice of the request for proposals shall be given by publication in accordance with IC 5-3-1.

(d) As provided in the request for proposals, discussions may be conducted with the offerors for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements.

(e) Eligible offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revisions of proposals.

(f) The City may refuse to disclose the contents of proposals during discussions with eligible offerors.

(g) The City shall negotiate the best and final offers of responsible offerors who submit proposals that are determined to be reasonably susceptible of being selected for a public-private agreement.

(h) After the best and final offers from responsible offerors have been negotiated under subsection (g), the City shall either make a recommendation to the board to award the public-private agreement to an offeror or offerors or shall terminate the request for proposal process.

(i) If a recommendation to award the public-private agreement is made to the board, the board shall schedule a public hearing on the recommendation and publish notice of the hearing one (1) time in accordance with IC 5-3-1 at least seven (7) days before the hearing. The notice shall include the following:

(1) The date, time, and place of the hearing.

(2) The subject matter of the hearing.

(3) A description of the public-private agreement to be awarded.

(4) The recommendation that has been made to award the public-private agreement to an identified offeror or offerors.

(5) The address and telephone number of the board.

(6) A statement indicating that the proposals and an explanation of the basis upon which the recommendation is being made are available for public inspection and copying at the principal office of the board during regular business hours.

(j) The proposals and a written explanation of the basis upon which the recommendation is being made shall be delivered to the board and made available for inspection and copying in accordance with IC 5-14-3 at least seven (7) days before the hearing scheduled under subsection (I) of this section.

(k) At the hearing, the board shall allow the public to be heard on the recommendation.

(l) After the procedures required in this section have been completed, the board shall make a determination as to the most appropriate response to the request for proposals and may award the public-private agreement to the successful offeror or offerors.

(m) If the request for proposal process is terminated under subsection (h), all proposals may, at the option of the City, be returned to the offerors, and the City may refuse to disclose the contents of the offers.

SECTION XII. Termination of agreement; liquidated damages. (a) A public-private agreement may be terminated by the board in conformity with the terms of the public-private agreement.

(b) The public-private agreement may provide for the payment of money to either party if the public-private agreement is terminated. The payments may be used in the form of liquidated damages to compensate the operator for demonstrated unamortized costs, to retire or refinance indebtedness created to improve or construct assets owned by the City, or for any other purpose mutually agreeable to the operator and the City.

SECTION XIII. Severability. If any section, sentence, or provision of this ordinance, or the application thereof to any person or circumstances shall be declared invalid, such invalidity shall not affect any of the other sections, sentences, provisions, or applications of this ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable.

SECTION XIV. This ordinance shall be in full force and effect from and after its passage by the Common Council of the City of Bloomington and approval of the Mayor.

PASSED and ADOPTED by the Common Council of the City of Bloomington, Monroe County, Indiana, upon this 15th day of October, 1997.

ANTHONY PIZZO, President
Bloomington Common Council

ATTEST:

PATRICIA WILLIAMS, Clerk
City of Bloomington

PRESENTED by me to the Mayor of the City of Bloomington, Monroe County, Indiana, upon this 16th day of October, 1997.

PATRICIA WILLIAMS, Clerk
City of Bloomington

SIGNED and APPROVED by me upon this 24 day of October, 1997.

JOHN FERNANDEZ, Mayor
City of Bloomington

SYNOPSIS

This ordinance adopts the provisions of Indiana Code 36-1-14.3-1 et. seq. regarding public-private agreements into the Bloomington Municipal Code, thereby giving the City authority to enter into agreements as provided in that statute, and sets forth the procedures and requirements for entering into such agreements. *Note: The Council adopted three amendments to this ordinance: Am 1(amending Section IX), Am 3 (Amending Section VIII & Am 4 (Striking the third "Whereas" clause).*

Signed copies:
Legal
Mayors Office
Parks