

TOWN OF SUPERIOR
RESOLUTION NO. R-51
SERIES 2017

A RESOLUTION OF BOARD OF TRUSTEES OF THE TOWN OF SUPERIOR APPROVING THE FINAL PLAT AND FINAL DEVELOPMENT PLAN FOR ETHAN ALLEN, LOT 12, BLOCK 1, FILING NO. 6, SUPERIOR MARKETPLACE, CASE NOS. FP-2017-03 & FDP-2017-03, AND THE ASSOCIATED DEVELOPMENT IMPROVEMENT AGREEMENT

WHEREAS, Ethan Allen Retail, Inc. (the "Applicant"), owns and would like to develop certain property within the Superior Marketplace (the "Property");

WHEREAS, Applicant has filed an application for approval of Final Plat and Final Development Plan ("FDP") for development of the Property as a retail shop (the "Application");

WHEREAS, Section 16-8-60 of the Superior Municipal Code (the "Code") requires a replat to be treated as a new subdivision;

WHEREAS, Section 16-1-70 of the Code specifies that, as applicable here, the division of a lot or parcel into six or fewer lots is a "minor subdivision";

WHEREAS, Section 16-8-40 of the Code controls minor subdivisions and requires a public hearing and recommendation from the Planning Commission before consideration by the Board of Trustees;

WHEREAS, Section 16-8-10 of the Code contains general subdivision requirements that apply to both major and minor subdivisions;

WHEREAS, Section 16-10-40 of the Code requires a public hearing and recommendation from the Planning Commission before consideration of a FDP by the Board of Trustees;

WHEREAS, the specific approval criteria for an FDP are set forth in Section 16-10-40(b) of the Code;

WHEREAS, on November 7, 2017, the Planning Commission held a properly-noticed public hearing on the Application, and following such hearing, recommended that the Board of Trustees approve the Application with conditions; and

WHEREAS, on November 13, 2017, the Board of Trustees held a properly-noticed public hearing on the Application.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF TRUSTEES OF THE TOWN OF SUPERIOR, COLORADO, as follows:

Section 1. The Board of Trustees hereby finds and determines that the Application meets all of the applicable criteria set forth in the Code and is consistent with the Town of Superior Comprehensive Plan.

Section 2. The Board of Trustees hereby approves the Application, subject to the following conditions, all of which shall be fully satisfied within 60 days of approval of this Resolution:

A. Applicant shall make minor technical and redline corrections to plans as identified by Town staff;

B. Applicant shall revise the parapet design for the building façade to wrap the building corners;

C. Applicant shall revise the plat and take such additional steps as necessary to create a sidewalk or access easement along the west side of the lot;

D. All easements required on Lot 3, including without limitation storm drainage and dry utilities, shall be granted by separate instrument, recorded, and reflected on the Final Plat; and

E. The Final Plat shall be recorded prior to recording of the FDP.

Section 3. The Development Improvement Agreement between the Town and Ethan Allen Retail, Inc. is hereby approved in substantially the form attached hereto, subject to final approval by the Town Attorney. Upon such approval, the Mayor is authorized to execute the Development Improvement Agreement on behalf of the Town.

DEVELOPMENT IMPROVEMENT AGREEMENT

THIS DEVELOPMENT IMPROVEMENT AGREEMENT (the "Agreement") is entered into as of this 13th day of November, 2017 (the "Effective Date"), by and between THE TOWN OF SUPERIOR, COLORADO, a Colorado municipal corporation with an address of 124 East Coal Creek Drive, Superior, Colorado (the "Town"), and Ethan Allen Retail, Inc., a Delaware corporation with an address of 25 Lake Avenue Extension, Danbury, CT 06813 ("Developer") (each individually a "Party" and collectively the "Parties").

WHEREAS, Developer owns the property more particularly described as Lot 12, Superior Marketplace Filing No. 6, as recorded in the office of the Boulder County Clerk and Recorder at Reception No. 2874252 (the "Property");

WHEREAS, Developer wishes to develop the Property as a commercial building and parking lot (the "Project");

WHEREAS, the Project is subject to the Final Development Plan approved by the Board of Trustees on November 13, 2017 (the "FDP"); and

WHEREAS, the Town and Developer mutually acknowledge and agree that the matters hereinafter set forth are reasonable conditions and requirements to be imposed by the Town in connection with its approval of the FDP for the Property, and that such matters are necessary to protect, promote and enhance the public health, safety and welfare of the Town.

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, the Parties agree as follows:

1. Purpose. The purpose of this Agreement is to set forth the terms, conditions and fees to be paid by Developer in connection with the Public Improvements for the FDP. All conditions in this Agreement are in addition to any requirements of the Superior Municipal Code, state law and other Town ordinances, and are not intended to supersede any requirements contained therein.

2. Construction of Improvements.

a. All Public Improvements associated with the FDP shall be installed and completed at the expense of Developer, and dedicated or conveyed to the Town. The complete list of Public Improvements associated with the FDP and the estimated costs of these improvements are set forth in **Exhibit A**, attached hereto and incorporated herein by this reference (the "Estimated Costs"). The Public Improvements shall be constructed in a workmanlike manner accordance with the applicable plat and associated construction documents drawn according to applicable regulations and construction standards for such improvements.

b. The Town may make reasonable engineering observations at Developer's expense. Observation, acquiescence in or approval by any engineering inspector of the construction of physical facilities at any particular time shall not constitute the approval by the Town of any portion of such Public Improvements.

c. Developer shall provide all necessary engineering designs, surveys, field surveys and incidental services related to the construction of the Public Improvements at its sole cost and expense, including reproducible "as-built" drawings certified accurate by a professional engineer registered in the State of Colorado.

d. Developer shall construct, or cause to be constructed, all necessary water and sanitary sewer facilities in accordance with the rules and regulations of Superior Metropolitan District No. 1 ("SMD#1"). All lines shall be dedicated, constructed, and maintained in accordance with SMD#1's rules and regulations and subject to any agreements between Developer, the Town and SMD#1.

e. Developer shall construct, or cause to be constructed, drainage improvements in accordance with the rules and regulations of the Town. All drainage improvements within the public rights-of-way shall be dedicated to the Town and thereafter maintained by the Town. All drainage improvements on private property shall be maintained by Developer.

f. Developer shall install, or cause to be installed, all necessary parking improvements and access drive improvements in accordance with the FDP.

g. To the extent any construction traffic damages any Town streets, Developer shall be responsible for repair of such damage or the reconstruction of such streets, as the Town determines appropriate.

h. Construction of the Public Improvements shall be completed on or before November 1, 2018, and proper application for acceptance of the Public Improvements shall be made on or before such date.

3. Applicable Law. Developer shall comply with all applicable law, including without limitation all current and future federal, state and local statutes, regulations, ordinances and rules relating to: the emission, discharge, release or threatened release of a Hazardous Material into the air, surface water, groundwater or land; the manufacturing, processing, use, generation, treatment, storage, disposal, transportation, handling, removal, remediation or investigation of a Hazardous Material; and the protection of human health, safety or the indoor or outdoor environmental, including without limitation the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.* ("CERCLA"); the Hazardous Materials Transportation Act, 49 U.S.C. § 1801, *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* ("RCRA"); the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.*; the Clean Water Act, 33 U.S.C. § 1251, *et seq.*; the Clean Air Act; the Federal Water Pollution Control Act; the Occupational Safety and Health Act; all applicable environmental statutes of the State of Colorado; and all other federal, state or local statutes, laws, ordinances, resolutions, codes, rules, regulations, orders or decrees regulating, relating to, or imposing liability or standards of conduct concerning any hazardous, toxic or dangerous waste, substance or material, as now or at any time hereafter in effect.

4. Warranty. Developer shall warrant any and all Public Improvements for a period of 2 years from the date the Town grants probationary acceptance of the Public Improvements. The warranty period shall extend to the date final acceptance is granted in writing by the Town.

Developer shall be responsible for scheduling the necessary inspections for probationary and final acceptance. Specifically, but not by way of limitation, Developer shall warrant that:

- a. The title conveyed is marketable and its transfer rightful;
- b. All Public Improvements dedicated or conveyed are free from any security interest or other lien or encumbrance; and
- c. All Public Improvements dedicated or conveyed are free of defects in materials or workmanship for a period of 2 years, as stated above.

5. Performance Guarantee. To secure the construction and installation of the Public Improvements, Developer shall provide a letter of credit or alternate security pursuant to Chapter 16, Article XV of the Superior Municipal Code based on the Estimated Costs.

a. Approval of the FDP shall be contingent upon Developer's provision of the Performance Guarantee within 30 days of the Effective Date. Failure of Developer to provide the Performance Guarantee shall negate the Town's approval of the FDP.

b. Developer shall not start the construction of any public or private improvement on the Property, including without limitation staking, earth work, overlot grading or the erection of any structure, temporary or otherwise, until the Town has received and approved the Performance Guarantee.

c. The purpose of the Estimated Costs is solely to determine the amount of security. No representations are made as to the accuracy of these estimates, and Developer agrees to pay the Actual Costs of all such Public Improvements, regardless of the Estimated Costs.

d. The Estimated Costs may increase in the future. Accordingly, the Town reserves the right to review and adjust the Estimated Costs on an annual basis. Adjustments shall be made according to changes in the Construction Costs Index as published by the Engineering News Record. If the Town adjusts the Estimated Costs, the Town shall give written notice to Developer. Developer shall, within 30 days after receipt of said written notice, provide the Town with a new or amended Performance Guarantee in the amount of the adjusted Estimated Costs. If Developer fails to provide a new or amended Performance Guarantee, the Town may exercise the remedies provided for in Section 9 hereof; provided, however, that prior to increasing the amount of the Performance Guarantee, the Town shall give credit to Developer for all Public Improvements which have actually been completed, so that the amount of the Performance Guarantee relates to the cost of required Public Improvements not yet constructed.

e. If the Public Improvements are not constructed or completed within the period of time specified by Section 2 hereof, the Town may draw on the Performance Guarantee of credit to complete the Public Improvements. If the Performance Guarantee is to expire within 14 calendar days and Developer has not yet provided a satisfactory replacement, or completed the Public Improvements, the Town may draw on the Performance Guarantee and either hold such funds as security for performance of this Agreement or spend such funds to finish the Public Improvements or correct problems with the Public Improvements as the Town deems appropriate. If the Town has drawn on the Performance Guarantee, and a satisfactory

replacement guarantee is provided or the Public Improvements have been completed, then the Town will release any funds received as a result of its draw on the Performance Guarantee within a reasonable period of time, or within 10 calendar days of a request by Developer.

f. Upon completion of construction and compliance with all conditions and requirements within the required time and the written approval of the Town, the Performance Guarantee may be reduced to the amount of 25% of the total actual cost of construction and installation of the Public Improvements. The reduced Performance Guarantee shall be held by the Town during the 2-year warranty period.

6. Nuisance Conditions. Developer shall prevent the existence of any nuisances by way of its construction activities, as nuisances are defined by the Superior Municipal Code. If the Town determines that a nuisance exists, Developer shall be subject to the provisions of the Superior Municipal Code regarding the abatement of nuisances and the cost assessed therefor. If the nuisance is not abated or an abatement plan is not submitted to the satisfaction of the Town, the Town may, upon 30 days' notice under this Agreement, draw upon the Performance Guarantee to pay the cost of abating the nuisance, including any expenses and penalties incurred under the Superior Municipal Code. The Town may exercise this right in addition to, or in lieu of, the withholding of permits or certificates of occupancy. The decision to draw on the Performance Guarantee shall be within the sole discretion of the Town.

7. Indemnification.

a. Developer hereby agrees to indemnify and hold harmless the Town, its officers, employees, agents or servants from any and all suits, actions and claims of every nature and description caused by, arising from or on account of any act or omission of Developer, or of any other person or entity for whose act or omission Developer is liable, with respect to construction of the Public Improvements (the "Claims"); and Developer shall pay any and all judgments rendered against the Town as the result of any suit, action or claim, together with all reasonable expenses and attorney fees incurred by the Town in defending any such suit, action or claim arising out of or related to Claims.

b. Developer shall pay all property taxes on property underlying the Public Improvements to be dedicated to the Town before acceptance by the Town, and shall indemnify and hold harmless the Town for any such property tax liability related thereto.

8. Waiver. In executing this Agreement, Developer waives all objections it may have concerning defects, if any, in the formalities whereby it is executed, or concerning the power of the Town to impose conditions on Developer as set forth herein, and concerning the procedure, substance and form of the ordinances or resolutions adopting this Agreement. Developer expressly agrees that the Town cannot be legally bound by the representations of any of its officers or agents or their designees, except in accordance with the Superior Municipal Code and the laws of the State of Colorado.

9. Breach and Remedies.

a. If Developer breaches this Agreement, the Town may take such action as permitted or authorized by law, this Agreement or the ordinances of the Town, as the Town

deems necessary to protect the public health, safety and welfare. The remedies include, but are not limited to:

- i. The refusal to issue any building permit or certificate of occupancy;
- ii. The revocation of any building permit previously issued under which construction directly related to such building permit has not commenced, except a building permit previously issued to a third party;
- iii. A demand that the security given for the completion of the Public Improvements be paid or honored; or
- iv. Any other remedy available at law or in equity.

b. Unless necessary to protect the immediate health, safety and welfare of the Town, or to protect the interest of the Town with regard to the Performance Guarantee, the Town shall provide Developer 30 days' written notice of its intent to take any action under this Section, during which Developer may cure the breach and prevent further action by the Town.

c. The rights and remedies of the Town under this Agreement are in addition to any other rights and remedies provided by law. The expiration of this Agreement shall in no way limit the Town's legal or equitable remedies, or the period in which such remedies may be asserted, for work negligently or defectively performed.

10. Miscellaneous.

a. Assignment. This Agreement shall not be assigned by Developer in whole or in part without the prior written authorization of the Town.

b. Governing Law and Venue. The laws of the State of Colorado shall govern this Agreement, and the exclusive venue for any legal proceeding arising out of this Agreement shall be Boulder County, Colorado.

c. No Third-Party Beneficiaries. There are no intended third-party beneficiaries to this Agreement.

d. Severability. If any provision of this Agreement is found by a court of competent jurisdiction to be unlawful or unenforceable for any reason, the remaining provisions hereof shall remain in full force and effect.

e. Governmental Immunity. Nothing herein shall be construed as a waiver of any protections or immunities the Town or its employees, officials or attorneys may have under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, as amended.

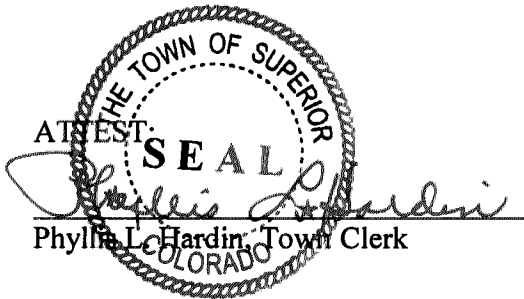
f. No Joint Venture. Notwithstanding any provision hereof, the Town shall never be a joint venture in any private entity or activity which participates in this Agreement, and the Town shall never be liable or responsible for any debt or obligation of any participant in this Agreement.

g. Notice. Notices under this Agreement shall be sufficiently given if sent by regular U.S. mail, postage prepaid, to the address on the first page of this Agreement.

h. Integration. This Agreement, together with all exhibits attached hereto, constitute the entire understanding and agreement of the Parties, integrates all the terms and conditions mentioned herein or incidental thereto, and supersedes all negotiations or previous arrangements between the Parties with respect to any and all of the subject matter hereof.

i. Recordation. This Agreement shall be recorded in the real estate records of the Clerk and Recorder for the County of Boulder, State of Colorado, and shall be a covenant running with the Property.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.



TOWN OF SUPERIOR

Clint Folsom
Clint Folsom, Mayor

ETHAN ALLEN RETAIL, INC.

By: [Signature]

STATE OF NEW YORK)
) ss.
COUNTY OF WESTCHESTER)

9th The foregoing instrument was subscribed, sworn to, and acknowledged before me this day of NOVEMBER, 2017, by FAROOQ KATHWARI as the PRESIDENT/CHAIRMAN/CEO of Ethan Allen Retail, Inc.

My commission expires:
(SEAL)

[Signature]
Notary Public

ERIC D. KOSTER
Notary Public, State of New York
No. 4623262
Qualified in Westchester County
Commission Expires October 31, 2021

EXHIBIT A PUBLIC IMPROVEMENTS

Ethan Allen, Superior - Retail Public Improvements Engineer's Opinion of Probable Construction Cost

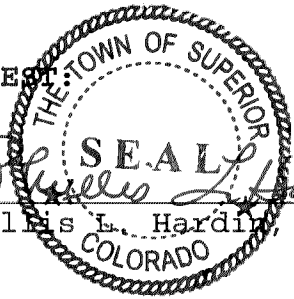
2-Nov-17

	Quantity	Unit	Unit Cost	Current OPC
Contractor's Estimate				
Right-Of-Way Improvements				
Curb and Gutter Demolition	100	LF	\$9.00	\$900
Pavement Demolition (including subbase)	480	SY	\$19.00	\$9,120
Sawcut Asphalt	380	LF	\$4.00	\$1,520
Curb and Gutter (including excavation and grading)	110	LF	\$35.00	\$3,850
Concrete Sidewalk (including excavation and grading)	65	SY	\$36.00	\$2,340
Curb Ramp (including excavation and grading)	1	Each	\$2,500.00	\$2,500
Asphalt Roadway Pavement - 7" thick asphalt (including excavation)	215	Ton	\$110.00	\$23,650
Asphalt Roadway Subgrade - 12" thick (including excavation and grading)	480	SY	\$25.00	\$12,000
Pavement Striping	54	LF	\$2.50	\$135
Landscape	0	LS	\$15,000.00	\$0
Irrigation	0	LS	\$5,000.00	\$0
Silt Fence	400	LF	\$4.00	\$1,600
Grout Protection	1	Each	\$200.00	\$200
Sanitary Sewer Manhole (including excavation, backfill, casting)	1	Each	\$5,000.00	\$5,000
Sanitary Sewer Pipe	20	LF	\$50.00	\$1,000
Water Installations	1	LS	\$25,000.00	\$25,000
18" R.C.P. (including excavation and backfill)	105	LF	\$80.00	\$8,400
18" Flared End Section	1	Each	\$1,000.00	\$1,000
Rip Rap	8	CY	\$175.00	\$1,400
Subfill at Pond (sawcut, correct pipe and repair)	1	LS	\$10,000.00	\$10,000
48" Diameter Drainage Manhole (including excavation, backfill, casting)	1	Each	\$6,000.00	\$6,000
Sub-total Marshall Right-of-Way Improvements				
SUB TOTAL PARKING LOT, ACCESS DRIVE, and MARSHALL RIGHT-OF-WAY IMPROVEMENTS				\$115,615
Contingency & Contractor OH&P	10%			\$11,562
GRAND TOTAL INCLUDING SITEWORK, CONTINGENCY, AND TAX				\$127,177
Assumptions for this OPC:				
<i>Based on 85% Design</i>				

ADOPTED this 13th day of November, 2017.

Clint Folsom
Clint Folsom, Mayor

ATTEST



Phyllis L. Hardin
Phyllis L. Hardin, Town Clerk

THE TOWN OF SUPERIOR
SEAL
COLORADO