

RESOLUTION #R-32-2015

A RESOLUTION APPROVING THE TERMS AND CONDITIONS OF THE ESH'S SURPLUS MARKET INCENTIVE AGREEMENT

WHEREAS, Esh's Surplus Market, LLC , a Colorado limited liability company (the "Company") is in the process of purchasing, and intends to build an approximately 75,000 square foot Esh's Discount Grocery Store, warehouse, and corporate headquarters (the "Store") on that real property described as Lots 4 & 5, Block 6, Longview-Midway Fourth Addition to the City of Loveland, Colorado and located at 301 West 71st Street, Loveland, Colorado 80538 ("the Property"); and

WHEREAS, if the Company constructs the Store, it will be required to pay certain City fees, including building plan check fees, permit fees, and capital expansion fees ("CEFs") (collectively, "Fees") and City use tax ("Use Taxes") as a precondition to receiving from the City a building permit and/or a final certificate of occupancy or letter of completion for the Store; and

WHEREAS, pursuant to City Code Section 16.38.071, the City Council may by resolution allow for the deferral of the Fees, if it makes a determination and finding that such deferral will serve a public purpose, which may include providing the public with significant economic benefits, and if Council's resolution approves a written agreement with the person owing the Fees containing such terms and conditions as the City Council determines are in the best interests of the City; and

WHEREAS, pursuant to City Code Section and 3.16.590, the City Council may grant by resolution a use tax credit against Use Taxes that would otherwise be collected on such terms and conditions as it determines is in the best interest of the City and if it finds that such deferral and waiver serves a public purpose, including, without limitation, providing the public with significant social, economic or cultural benefits, resulting in a waiver of such taxes; and

WHEREAS, the Company has informed the City that the requested financial incentives are required to make the budget for the purchase of the Property and the construction and opening of the Store feasible; and

WHEREAS, the Company has asked the City to allow the Company to defer payment of Fees in an amount not to exceed \$200,000.00 and to grant a credit waiving Use Taxes that will otherwise be due with respect to development of the Store in an amount not to exceed \$50,000.00, in accordance with City Code Sections 16.38.071 and 3.16.590 respectively; and

WHEREAS, the City Council believes that the construction and the operation of the Store in Loveland would produce significant economic benefits to the citizens of Loveland, primarily in the form of increased property tax and sales tax revenues to the City and therefore a deferral of a portion of the Fees and waiver of Use Taxes is in the best interests of the public by encouraging activities that provide significant economic benefits; and

WHEREAS, to achieve such public purposes and to serve the public interests of the City, the Company and the City have negotiated and desire to enter into that certain Esh's Surplus Market Incentive Agreement attached hereto as **Exhibit "A"** and incorporated by reference (the "Incentive Agreement").

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LOVELAND, COLORADO THAT:

Section 1. The City Council hereby finds that the assistance granted to the Company in the Incentive Agreement, including the deferral of the Fees in an amount not to exceed \$200,000.00 and granting a credit or waiver for Use Taxes in an amount not to exceed \$50,000.000, in accordance with City Code Sections 16.38.071 and 3.16.590 respectively, are in the best interests of the public and the City and will serve the public purposes of providing significant social and economic benefits to the citizens of Loveland, primarily in the form of jobs, economic development, and increased tax revenues.

Section 2. The Incentive Agreement is hereby approved.

Section 3. The City Manager is hereby authorized, following consultation with the City Attorney, to modify the Incentive Agreement in form or substance as deemed necessary to effectuate the purposes of this resolution or to protect the intrests of the City.

Section 4. The City Manager and the City Clerk are hereby authorized and directed to execute the Incentive Agreement on behalf of the City.

Section 5.
This Resolution shall be effective as of the date of its adoption.

ADOPTED this 2nd day of June, 2015.

CITY OF LOVELAND, COLORADO,
a municipal Corporation

By: _____
Cecil A. Gutierrez, Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

J. Yost Schmidt
Deputy City Attorney

EXHIBIT A

**ESH'S SURPLUS MARKET
INCENTIVE AGREEMENT**

THIS ESH'S SURPLUS MARKET INCENTIVE AGREEMENT is made and entered into this _____ day of _____, 2015, by and between **THE CITY OF LOVELAND, COLORADO**, a home rule municipality (the "City"), **ESH'S SURPLUS MARKET, LLC**, a Colorado limited liability company (the "Company") and **REUBEN ESH** ("Guarantor").

WHEREAS, the Company is in the process of purchasing, and intends to build an approximately 75,000 square foot Esh's Discount Grocery Store, warehouse, and corporate headquarters (the "Store") on that real property located at 301 West 71st Street, Loveland, Colorado, 80538 and legally described on **Exhibit "A"** attached hereto and incorporated herein by reference ("the Property"); and

WHEREAS, if the Company constructs the Store, it will be required to pay the City certain City fees, including building plan check fees, permit fees, capital expansion fees ("Fees") and City use tax ("Use Taxes") as a precondition to receiving from the City a building permit and/or a final certificate of occupancy or letter of completion for the Store; and

WHEREAS, pursuant to City Code Section 16.38.071, the City Council may by resolution allow for the deferral of the Fees, if it makes a determination and finding that such deferral will serve a public purpose, which may include providing the public with significant economic benefits, and if Council, by resolution, approves a written agreement with the person owing the Fees containing such terms and conditions as the City Council determines are in the best interests of the City; and

WHEREAS, pursuant to City Code Section and 3.16.590, the City Council may grant by resolution a use tax credit against the collection of the Use Taxes on such terms and conditions as it determines is in the best interest of the City and if it finds that such deferral and waiver serves a public purpose, including, without limitation, providing the public with significant social, economic or cultural benefits, resulting in a waiver of such taxes; and

WHEREAS, the Company has informed the City that the financial incentives set forth herein are required to make the budget for the purchase of the Property and the construction and opening of the Store feasible; and

WHEREAS, the Company has asked the City to allow the Company to defer payment of Fees in an amount not to exceed \$200,000.00 and to grant a credit waiving Use Taxes that will otherwise be due with respect to development of the Store in an amount not to exceed \$50,000.00, in accordance with City Code Sections 16.38.071 and 3.16.590 respectively; and

WHEREAS, by the adoption of Resolution No. _____, the City Council has made a finding that the construction and the operation of the Store in Loveland will produce significant economic benefits to the citizens of Loveland, primarily in the form of

increased property tax and sales tax revenues to the City, as well as jobs and other significant economic benefits, and therefore deferral a portion of the Fees and a waiver of Use Taxes is in the best interests of the public by encouraging activities that provide significant economic benefits;

WHEREAS, Guarantor is the principal and manager of the Company and is entering into the guarantee set forth in this Agreement in consideration of the City's agreement to defer payment of Fees as set forth herein; and

WHEREAS, by the adoption of its Resolution _____, the City Council has approved this Agreement allowing the Company to defer payment of Fees in an amount not to exceed \$200,000.00 and granting a credit or waiver for Use Taxes in an amount not to exceed \$50,000.00 on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

1. Company Obligations

- A. The Company agrees to:
 - i. Obtain on or before December 31, 2015 all necessary City planning and development approvals and permits and all building permits necessary to construct the Store in accordance with the Loveland Municipal Code and all other governmental rules and regulations;
 - ii. Complete construction of the Store and obtain a temporary or permanent certificate of occupancy ("C.O.") prior to July 1, 2016;
 - iii. Obtain a City sales tax license and remain current on all sales tax obligations during the Deferral Period (as hereinafter defined); and
 - iv. Perform all other obligations set forth in this Agreement, including but not limited to the payment of Deferred Fees (as hereinafter defined).

B. If the Company fails to obtain necessary building permits for the Store on or before December 31, 2015, the City shall have no further obligation to defer Fees or waive Use Taxes under this Agreement and this Agreement shall terminate.

2. Deferral of Fees

A. The City agrees, as authorized under City Code Section 16.38.071, that the Company may defer payment of the following Fees in an amount not to exceed a total of \$200,000.00 (the "Deferred Fees") that the Company will owe to the City when it applies for one or more building permits and/or a final certificate of occupancy or letter of completion for the Store for a period of five (5) years (the "Deferral Period"):

Capital Expansion Fee - Fire Protection
 Capital Expansion Fee – General Government
 Capital Expansion Fee - Law Enforcement
 Capital Expansion Fee - Streets

B. The Company acknowledges and agrees that the actual Fees that will be due in connection with the construction of the Store have not been finally determined and have been estimated on the basis of information provided to the City by the Company. All Fees in excess of the Deferred Fees shall be paid by the Company, and any portion of the Deferred Fees not utilized when actual Fees are determined shall be forfeited.

3. Payment of Deferred Fees

A. The Company promises to pay the Deferred Fees to City in five (5) annual installments (“Annual Payment(s)”) in accordance with the following schedule:

Year 1	Year 2	Year 3	Year 4	Year 5	TOTAL
\$20,000	\$30,000	\$40,000	\$50,000	\$60,000	\$200,000

B. The five (5) year deferral period shall commence on the earlier of (i) July 1, 2016; or (ii) that date on which the Store opens for business; and shall expire on the fifth anniversary of such date (the “Deferral Period”). The first Annual Payment shall be due on that date which is one year after the date on which Deferral Period commences (the “First Annual Payment Date”). Each subsequent Annual Payment shall be due on the first, second, third, and fourth anniversary of the First Annual Payment Date, respectively. To the extent that the actual Deferred Fees are less than \$200,000.00, the fifth Annual Payment shall be reduced to that amount necessary to repay the balance of the actual Deferred Fees within the Deferral Period. All Deferred Fees shall be paid no later than the last day of the Deferral Period.

C. If the Company obtains one or more building permits for the Store within the time set forth in this Agreement and fails to construct and open the Store before July 1, 2016, the Deferral Period shall be deemed to have ended on July 1, 2015 and the Company shall pay any portion of the Deferred Fees then due to the City on or before August 1, 2016. Notwithstanding the foregoing, if the Company’s failure to construct and open the Store on or before July 1, 2016 is the result of force majeure or for good cause shown, and such force majeure or good cause is approved by the City Manager in his discretion, the Deferral Period shall be deemed to end on that date which is six (6) months after the date on which such force majeure or good cause is so approved by the City Manager.

D. Notwithstanding anything to the contrary set forth herein, if at any time prior to the end of the Deferral Period the Company discontinues the operation of its business in the Store for a reason other than a Permitted Reason (as defined below), the Company shall pay the outstanding balance of the Deferred Fees on that date that is sixty (60) days after the date the Company so discontinues its business. As used herein, “Permitted Reasons” shall mean (i) damage or destruction due to casualty; (ii) force majeure; (iii) condemnation; (iv) labor disputes; or (v) reasonable periods of remodel, remerchandising, renovation or repair.

4. Waiver of Construction Materials Use Tax

A. On the express condition that the Company completes construction of the Store and obtains a temporary or permanent certificate of occupancy for the Store before July 1, 2016, the City use tax imposed pursuant to Code Section 3.16.040 upon the construction and building materials used for the Store (the "Use Taxes") in a total sum not to exceed Fifty Thousand Dollars (\$50,000) shall be waived (the "Waived Use Taxes"). The Waived Use Taxes shall not, in any event, exceed the total sum of Fifty Thousand Dollars (\$50,000) (the "Cap") and the Company shall pay all Use Taxes in excess of the Cap.

B. If the Company fails to complete the Store and obtain a temporary or permanent certificate of occupancy before July 1, 2016, then:

- i. Any portion of the Waived Use Taxes not utilized before July 1, 2016 shall expire at that time and the City shall have no obligation to waive any Use Taxes due with respect to the Store after such date.
- ii. Any Waived Use Taxes that would have been due with respect to the Store in the absence of the foregoing waiver shall be deemed to have been deferred and shall be paid to the City by the Company on or before August 1, 2016. If not timely paid, the City may use any or all collection remedies available to it under Loveland Municipal Code, including but not limited to Chapter 3.16 as it pertains to the Use Taxes.

C. The Waived Use Taxes shall not include any amounts for use taxes or fees payable to Larimer County or any other governmental entity in connection with the Store, which shall be paid by the Company as required by law.

5. Remedies upon Default

A. Default by the Company shall be deemed to have occurred under this Agreement upon the occurrence of any one of the following events:

- i. Application for appointment of a receiver for the Company or the Property;
- ii. Commencement of any proceeding under any bankruptcy or insolvency laws by or against the Company;
- iii. The sale, transfer or conveyance of the Property or the Store without the prior written consent of the City, such consent not to be unreasonably withheld;
- iv. The failure of the Company to timely pay the Deferred Fees or Use Taxes as required in paragraphs 3 or 4 above; or
- v. The failure of the Company to perform any other obligation under this Agreement.

B. Upon the occurrence of any one or more of these events of default and the failure

by the Company to cure such default within thirty (30) days written notice from the City, the City shall have, as provided in City Code Section 16.38.071 and as granted in paragraph 14 below, a perpetual lien upon the Property from the date all or any portion of the Deferred Fees or Use Taxes become due under this Agreement until paid, and such lien shall have priority over all other liens against the Property except those for real property taxes. In addition, upon the occurrence of any one or more of the defaults set forth in this paragraph, all unpaid Deferred Fees due under paragraph 3 above and/or all Use Taxes that become due under paragraph 4 above shall at once become due and payable without further notice at the option of the City. Such unpaid sum shall thereafter accrue the interest at the default rate as provided in paragraph 7 below.

C. The City may pursue all remedies available to it under the law or in equity to collect any or all of the amounts owed to it under this Agreement including, without limitation, by judicially foreclosing its lien against the Property. The City Clerk may also certify such amounts in default to the Treasurer of Larimer County and those amounts may then be collected in the same manner as though they were real property taxes. In addition, the City shall have the right to revoke the certificate of occupancy or letter of completion which has been issued for the Store.

6. Expenses and Costs of Collection

In the event that the Company is in default under this Agreement and the City pursues collection and/or enforcement efforts through suit or otherwise, the Company agrees to pay all of the City's reasonable expenses and costs of collection incurred by the City in connection with any such collection efforts and/or suit, in addition to the other amounts owed under this Agreement, which expenses and costs of collection shall include, without limitation, the following: attorneys fees; receiver's fees and costs; treasurer's fees and costs; payment of real property taxes owed for the Property; appraisal fees; property inspection fees; environmental audit costs; expert witness fees; deposition costs; filing fees; the cost of mailing, notice and other documents; the cost of serving process, notice and other documents; copy costs; and title insurance premiums or abstracting charges.

7. Default Interest

Upon the Company's default under this Agreement to timely pay any or all of the amounts owed to the City by the Company under this Agreement, which amounts shall include, without limitation, the costs and expenses of collection as described in paragraph 6 above, such amounts in default shall bear interest at the default rate of twelve percent (12%) per annum compounded annually from the date of default until paid in full.

8. Applicable Law and Venue

This Agreement shall be governed by and enforced in accordance with the laws of the State of Colorado. In addition, the hereto acknowledge that there are legal constraints imposed upon the City by the constitutions, statutes, and rules and regulations of the State of Colorado and of the United States, and imposed upon the City by its Charter and Code, and that, subject to such constraints, the parties intend to carry out the terms and conditions of this Agreement. Notwithstanding any other provisions of this Agreement to the contrary, in no event shall any of

the parties hereto exercise any power or take any action which shall be prohibited by applicable law. Whenever possible, each provision of this Agreement shall be interpreted in such a manner so as to be effective and valid under applicable law. Venue for any judicial proceeding concerning this Agreement shall be in the District Court for Larimer County, Colorado.

9. **Time is of the Essence**

Time shall be of the essence for the performance of all obligations under this Agreement.

10. **Assignment**

The Company shall not assign or transfer any or all of its interests, rights or obligations under this Agreement without the prior written consent of the City, which consent shall not be unreasonably withheld.

11. **Entire Agreement**

This Agreement contains the entire agreement between the parties relating to the subject matter hereof and may not be modified or amended except by written agreement signed by both parties.

12. **Headings**

Paragraph headings used in this Agreement are used for convenience of reference only and shall in no way control or affect the meaning or interpretation of any provision of this Agreement.

13. **Notices**

Any written notice given under this Agreement and all other correspondence between the parties shall be directed to the following and shall be deemed received when hand-delivered or three (3) days after being sent by certified mail, return receipt requested, to the following addresses:

If to the City: William D. Cahill
 City Manager
 City of Loveland
 500 East Third Street
 Loveland, CO 80537

With Copy to: City Attorney
 City of Loveland
 500 East Third Street
 Loveland, CO 80537

If to the Company:
(Before C.O.) Esh’s Surplus Market
 4221 W. Eisenhower Blvd.

Loveland, Colorado 80537

If to the Company:
(*After C.O.*) Esh's Surplus Market
301 West 71st Street
Loveland, Colorado 80538

If to Guarantor:
(*Before C.O.*) Reuben Esh
4221 W. Eisenhower Blvd.
Loveland, Colorado 80537

If to Guarantor:
(*After C.O.*) Reuben Esh
301 West 71st Street
Loveland, Colorado 80538

14. Grant of Lien and Recording of Agreement

A copy of this Agreement shall be recorded with the Larimer County Clerk and Recorder and upon the occurrence of any event of default under this Agreement as provided in paragraph 5 above, this Agreement shall constitute a consensual grant by the Company, and by its successors and assigns, to the City of the lien against the Property securing payment of all amounts in default that are due and owing to the City under this Agreement. The lien herein granted shall remain a lien against the Property until the full amounts owed to the City under this Agreement are paid in full to the City. The parties also agree that this lien shall be deemed a lien against the Property as a matter of law as provided in City Code Section 16.38.071.

15. Waiver of Confidentiality

Under C.R.S. § 24-72-204 of the Colorado Open Records Act and under City Code Section 3.16.230, the City is required to maintain as confidential documents that are not subject to public inspection, including the Company's sales tax information and records that are submitted to and on file with the City. However, notwithstanding these provisions of law or any other applicable provisions of the law, the Company hereby authorizes the City to provide such sales tax information and records to members of the Loveland City Council provided that such information and records are provided to City Council members in a confidential communication from the City Attorney, and are not otherwise used except for the purposes provided in this Agreement.

16. Binding Effect

This Agreement shall be binding upon and, except as otherwise provided in this Agreement, shall inure to the benefit of successors and assigns of the respective parties hereto.

17. Right of Offset.

The Company agrees that the City shall have the right to withhold and set off any amounts which may become payable to the Company by the City under this Agreement against any amounts which the Company may owe to the City, whether arising under this Agreement or otherwise. For example, but not by way of limitation, if the Company fails to pay any amounts due to the City for services not related to this Agreement, such as utility or other services, the City shall have the right to withhold payment of and set off any amounts that may be due by the City to the Company against any amounts that may be due to the City by the Company, if the Company fails to cure the amount of the claimed offset within thirty (30) days after written notice by the City to the Company.

18. Extension.

The deadlines for obtaining approvals and permits for and completion of the Store as set forth in this Agreement and the Deferral Period set forth above shall be subject to extension by the City Manager for good cause shown, provided that any such extension shall be set forth in writing and signed by the City Manager.

19. Guarantee.

A. Reuben Esh, an individual who is a principal and manager of the Company (“Guarantor”) unconditionally guarantees to the City, its successors and assigns, the Company’s full and punctual performance any and all of its obligations under this Agreement and the repayment by Deferred Fees in a maximum total amount not to exceed \$200,000.00, plus default interest on such amount in accordance with Section 7 and expenses and costs of collection as set forth in Section 6 (the “Guarantee Amount”). The Guarantor waived notice of any breach of default by the Company of obligations under this Agreement, and upon the City’s written request, the Guarantor shall promptly perform all such obligations.

B. The Guarantor agrees that any act of the City consisting of a waiver of any of the terms and conditions of this Agreement, or the giving of any consent to any matter or thing related to this Agreement, or the granting of any indulgences or extensions of time to the Company may be done without prior notice to the Guarantors and without affecting the Guarantor’s obligations under this Section 19.

C. The Guarantor agrees that his obligations under this Section 19 shall not be released by any modification of this Agreement and, in case of any such modification, that his liability under this Section 19 shall be deemed modified in accordance with the terms of any such modification. The Guarantor shall be automatically released from his guarantee obligation upon the Company’s payment in full of the Deferred Fees, including all default interest on such amount in accordance with Section 7 and expenses and costs of collection as set forth in Section 6.

D. The Guarantor agreed that his obligations under this Section 19 shall not be affected by: (1) the release or discharge of the Company from its obligations under this Agreement in any creditors’, receivership, bankruptcy, or other proceeding or the commencement or pendency of any such proceeding; (2) the impairment, limitation, or modification of the liability of the Company of the estate of such party in bankruptcy, or of any

remedy for the enforcement of the Company's liability under this Agreement, resulting either from the operation of any present or future bankruptcy code or other statute or from the decision of any court; (3) the rejection nor disaffirmance of this Agreement in any such proceeding; (4) the assignment or transfer of this Agreement by the Company or by operation of law; (5) any disability or other defense of the Company; or (6) the cessation from any cause whatsoever of the liability of the Company under this Agreement.

E. Until all of the Company's obligations under this Agreement are fully performed, the Guarantor agrees to subordinate any liability or indebtedness of the Company held by the Guarantor to the Company's obligations to the City under this Agreement.

F. The Guarantor agrees that his obligations under this Section 19 may not be discharged or terminated orally or in any manner other than by agreement in writing signed by the Guarantor and the City.

G. The Guarantor agrees that he is primarily, jointly, and severally liable and obligated under this Agreement for the Guarantee Amount and that the City may, at its option, proceed against the Guarantor for collection under this Agreement without proceeding against the Company or against anyone else obligated under this Agreement.

H. The Guarantor agrees to pay to the City on demand all of the City's reasonable attorneys' fees and cost of collection which are incurred in connection with its enforcement of the Guarantor's obligations under this Section 19 and this Agreement.

I. The Guarantor agree that his obligations under this Section 19 shall apply to and extend to the obligations and agreements under this Agreement of any and all successors and assigns of the Company and such obligations and agreements shall inure to the benefit of the City's successors and assigns.

J. The Guarantor agrees that his obligations under this Section 19 shall be binding upon the Guarantor and his personal representatives, estates, and heirs.

Dated this 13th day of May, 2015.

THE "COMPANY"
ESH'S SURPLUS MARKET, LLC, a
Colorado limited liability company

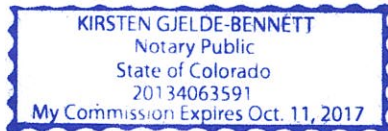
By: Reuben Esh
Its OWNER

STATE OF Colorado
County of Harmer ss.

The foregoing instrument was acknowledged before me this 15th day of May, 2015
by Reuben Esh, as owner of
Esh's Surplus Market, LLC, a Colorado limited liability company.

Witness my hand and official seal. My commission expires: 10-11-2017

(S E A L)



Kirsten Gjelde-Bennett
Notary Public

**THE "CITY"
CITY OF LOVELAND, COLORADO**

By: _____
William D. Cahill, City Manager

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

STATE OF COLORADO)
) ss.
County of Larimer)


The foregoing instrument was acknowledged before me this ____ day of _____, 2015 by William D. Cahill as City Manager and by Teresa G. Andrews as City Clerk of the City of Loveland, Colorado, a home rule municipality.

Witness my hand and official seal. My commission expires: _____.

Notary Public

(S E A L)

"GUARANTOR"

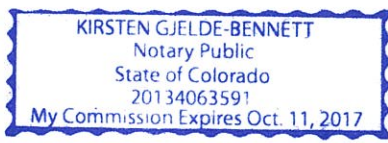


Reuben Esh, an individual

STATE OF COLORADO)
) ss.
County of Larimer)

The foregoing instrument was acknowledged before me this 13th day of May, 2015 by Reuben Esh, an individual.

Witness my hand and official seal. My commission expires: 10-11-2017.





Notary Public

(S E A L)

EXHIBIT A
LEGAL DESCRIPTION OF PROPERTY

Lots 4 & 5, Block 6
Longview-Midway Fourth Addition to the City of Loveland