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**RECORD OF PROCEEDINGS
SPECIAL MEETING AGENDA OF THE
TOWN COUNCIL OF THE TOWN OF FRISCO
AUGUST 31, 2020
6:00PM**

STARTING TIMES INDICATED FOR AGENDA ITEMS ARE ESTIMATES ONLY AND MAY CHANGE

CALL TO ORDER:

Hunter Mortensen, Mayor

ROLL CALL:

Hunter Mortensen, Andrew Aerenson, Jessica Burley, Daniel Fallon, Andy Held, Rick Ihnken, and Melissa Sherburne

PUBLIC COMMENTS:

Citizens making comments during Public Comments or Public Hearings should state their names and addresses for the record, be topic-specific, and limit comments to no longer than three minutes.

NO COUNCIL ACTION IS TAKEN ON PUBLIC COMMENTS. COUNCIL WILL TAKE ALL COMMENTS UNDER ADVISEMENT AND IF A COUNCIL RESPONSE IS APPROPRIATE THE INDIVIDUAL MAKING THE COMMENT WILL RECEIVE A FORMAL RESPONSE FROM THE TOWN AT A LATER DATE.

NEW BUSINESS:

Agenda Item #1: Consideration of a Collateral Assignment of Rights Under Purchase, Sale and Development Agreement between Nathaniel Kelly Foote and Collegiate Peaks Bank a Division Of Glacier Bank Staff: Nancy Kerry 1) Mayor opens public hearing 2) Staff report 3) Public comments 4) Mayor closes public hearing 5) Council discussion 6) Motion made 7) Motion seconded 8) Discussion on motion 9) Question called

ADJOURN:



MEMORANDUM

P.O. BOX 4100 ♦ FRISCO, COLORADO 80443

TO: MAYOR AND TOWN COUNCIL
FROM: NANCY KERRY, TOWN MANAGER
RE: CONSIDERATION OF A COLLATERAL ASSIGNMENT OF RIGHTS UNDER PURCHASE, SALE AND DEVELOPMENT AGREEMENT BETWEEN NATHANIAL KELLY FOOTE AND COLLEGIATE PEAKS BANK A DIVISION OF GLACIER BANK
DATE: AUGUST 31, 2020

Summary and Background: On March 14, 2017, the Town of Frisco entered into a Purchase, Sale and Development Agreement “Development Agreement,” with Nathaniel Kelly Foote, which was amended by the Town Council on January 23, 2018 and again on June 25, 2019.

Recently, Mr. Foote approached the Town to request the Town Council consider authorizing him entering into the attached Collateral Assignment of Rights under Purchase, Sale and Development Agreement, (“Collateral Agreement”). The Collateral Agreement is a lender’s security agreement between Mr. Foote, the John Stephen Lockton 1998 Irrevocable GST Trust (“GST Trust”) and Collegiate Peak Bank, a Division of Glacier Bank.

Analysis: The attached agreement has no impact on the design or approved building plans of the Foote’s Rest project.

Financial Impact: Authorizing Mr. Foote to enter into the Collateral Agreement may strengthen the financial position of Mr. Foote thereby having a positive impact on the project moving forward. Mr. Foote requested the Town Council hold a special meeting to consider the Collateral Agreement to allow him to close escrow between the lender and himself on a specific date.

Staff Recommendation:

Given this is a special meeting of the Town Council at the request of a community member, staff recommends a fee of \$2,500 be charged to Mr. Foote to cover the Town’s legal and administrative cost of holding the meeting.

Attachments:

Attachment 1: Collateral Agreement

**COLLATERAL ASSIGNMENT OF RIGHTS UNDER PURCHASE, SALE AND
DEVELOPMENT AGREEMENT**

This Collateral Assignment of Rights Under Purchase, Sale and Development Agreement (“**Assignment**”) is given as of August __, 2020, by **510 E. MAIN ST., LLC**, a Colorado limited liability company, successor by assignment from Nathaniel Kelly Foote (“**Assignor**”) to **COLLEGIATE PEAKS BANK a Division of Glacier Bank**, its successors and assigns (together with its successors and assigns, “**Assignee**”).

RECITALS:

- A. The Town of Frisco (“**Town**”) and Nathaniel Kelly Foote (“**NKF**”) entered into that certain Purchase, Sale and Development Agreement, dated as of March 14, 2017, as amended by that certain First Amendment to Purchase, Sale and Development Agreement, dated as of January 23, 2018, as amended by that certain Second Amendment to Purchase, Sale and Development Agreement, dated as of June 25, 2019, as may be further amended from time to time (collectively, the “**Development Agreement**”).
- B. In accordance with Section 7.01 of the Development Agreement, NKF has assigned all right title and interest in and to the Development Agreement to Assignor.
- C. Assignor is the owner of the real property known as 510 E. Main Street, Frisco, Colorado (“**Property**”) to which the Development Agreement relates.
- D. Pursuant to a Credit Agreement, dated on or about the date hereof, by and between Assignor as Borrower, and Assignee as Lender (as may be amended, supplemented, amended and restated, or modified from time to time, the “**Credit Agreement**”), Assignee agreed, upon the terms and subject to the conditions contained therein, to make a loan to Assignor the principal amount of Five Million Two Hundred Sixty Five Thousand and 00/100 Dollars (\$5,265,000.00) (“**CPB Loan**”) for, among other things, to finance certain improvements to the Property.
- E. The John Stephen Lockton 1998 Irrevocable GST Trust, under Trust Agreement dated November 2, 1998, as amended (the “**GST Trust**”) is a member of Assignor and has agreed to make a loan to Assignor in the amount of Two Million Six Hundred Thirty-Five and 00/100 Dollars (\$2,635,000.00) (“**Subordinate Loan**”).
- F. Pursuant to a Subordination Agreement, dated on or about the date hereof, among Assignor, Assignee and the GST Trust (“**Subordination Agreement**”), the GST Trust has agreed to subordinate the Subordinate Loan to the CPB Loan.
- G. As additional collateral for the CPB Loan, Assignor desires to assign its interest in the Development Agreement to Assignee in order to secure the performance under the Credit Agreement and the other Loan Documents referred to therein.
- H. Terms not otherwise defined herein have the same respective meanings given to them in the Credit Agreement.

ASSIGNMENT:

NOW, THEREFORE, as security for the payment and performance of all obligations of Assignor to Assignee evidenced by or referred to in the Note and the other Loan Documents, whether now existing or

subsequently incurred, Assignor hereby undertakes and agrees as follows:

1. Assignment. Subject to the provisions hereinafter set forth and the terms of the Development Agreement, Assignor hereby collaterally assigns, transfers, sells, and conveys to Assignee all of Assignor's right, title and interest in and to the Development Agreement.
2. Creation of Security Interest. To the extent, if any, the foregoing assignment is ineffective or not complete, Assignor hereby grants to Assignee a lien and security interest in the Development Agreement and any general intangibles arising from the Development Agreement for the purpose of securing the CPB Loan. Under such circumstances, this Assignment shall be deemed the Security Agreement as defined in the Uniform Commercial Code of Colorado. Assignor hereby authorizes Assignee to file such Financing Statements as Assignee reasonably deems necessary to evidence or perfect Assignee's interest in the Development Agreement and any general intangibles arising from the Development Agreement.
3. Ownership and Preservation. Assignor represents, warrants and covenants that it has full right to assign the Development Agreement, subject to any limitations set forth in applicable statutes of the State of Colorado, and that there are no outstanding assignments or pledges thereof. Assignor will not make any subsequent assignment thereof without the prior written consent of Assignee. In addition, Assignor hereby covenants and warrants that it will not, without the prior written consent of Assignee, transfer any rights set forth in the Development Agreement for use on any property other than the Property, that it will comply with all applicable laws and regulations and procedures regarding the Development Agreement, and that Assignor will not perform any act or fail to perform any act which will cause the Development Agreement to expire, be revoked or terminated. Assignor covenants and warrants that it will notify Assignee of any material complaints, investigations, or other proceedings (collectively, "**Proceedings**") by the Town or any other Person regarding the Development Agreement within ten (10) calendar days of the date it obtains knowledge of such Proceedings.
4. Performance by Assignee. It is specifically understood that Assignor will, after revocation of the waiver set forth in Paragraph 5, cooperate fully with Assignee in the formal assignment and/or transfer of the Development Agreement to Assignee. Assignor further agrees that it will be liable for any costs or expenses of Assignee involved in such formal assignment and/or transfer of the Development Agreement. It is further understood that prior to any such formal assignment and/or transfer, this Assignment shall not operate to place responsibility for Assignor's duties under the terms of the assigned Development Agreement upon Assignee, nor for the carrying out by Assignee of any of the terms any conditions of the Development Agreement.
5. Revocable Waiver of Assignee's Rights. By accepting this Assignment, Assignee waives the right to exercise the rights and powers granted to Assignee above, and covenants and agrees not to revoke such waiver until and unless there has been an Event of Default (as defined in the Credit Agreement) by Assignor. If any such Event of Default occurs, Assignee may at any time during the continuation of such Event of Default, revoke such waiver, in writing, and upon such revocation may proceed to exercise any or all of the rights and powers conferred upon Assignee in Paragraph 4 hereof.
6. Additional Rights of the GST Trust. Pursuant to the terms of the Subordination Agreement, upon the occurrence and continuance of an uncured Event of Default, the GST Trust shall have the right, but not the obligation, to purchase the CPB Loan from Assignee for the then outstanding principal amount of the CPB Loan, plus any accrued and unpaid interest (including interest at the Default Rate), late fees and other fees and costs (including reasonable Attorney Fees and Costs). If the GST Trust becomes the owner of the Property, Assignor shall transfer the development rights and obligations set forth in the Development Agreement to the GST Trust.

7. Rights and Remedies Upon Foreclosure Event. Notwithstanding anything to the contrary contained in the Development Agreement (including Section 7.01 of the Development Agreement relating to limitation on assignment), in the event of a Foreclosure Event and in the event the GST Trust has not exercised its right to purchase the CPB Loan as set forth above in Paragraph 6, Assignee shall have the right to transfer the development rights and obligations set forth in the Development Agreement to any subsequent purchaser of the Property from Assignee. The Town of Frisco shall consent to the transfer of the development rights and obligations in the Development Agreement, and the Town of Frisco shall not unreasonably withhold its consent of such transfer. “**Foreclosure Event**” as used herein shall mean a foreclosure, deed in lieu of foreclosure or receivership of the Property.

8. Power of Attorney. Assignor hereby irrevocably constitutes and appoints Assignee its true and lawful attorney in Assignee’s name or in Assignor’s name, which appointment shall be effective only upon the occurrence and during the continuation of an Event of Default, to enforce all rights of Assignee under, in and to the Development Agreement subject to this Assignment, and to sign any and all documents or forms on Assignor’s behalf in connection with any formal assignment and/or transfer of the Development Agreement to Assignee. This constitutes a power of attorney coupled with an interest.

9. Termination of Assignment. The full payment of the Note shall operate as a termination and release of this Assignment.

10. Notice. All notices required or permitted to be given under this Assignment shall be in conformance with the notice provisions of the Credit Agreement.

11. Further Assurances. Assignor shall execute or cause to be executed such additional instruments and shall do or cause to be done such further acts, as Assignee may reasonably request, in order to permit Assignee to perfect, protect, preserve and maintain the assignment made to Assignee by this Assignment.

12. Choice of Governing Law. This Assignment, and the rights and duties of the parties hereto, shall be construed and determined in accordance with the internal laws of the State of Colorado. The parties hereby submit to the exclusive jurisdiction of the United States District Court for the District of Colorado and of any Colorado state court sitting in Summit County for purposes of all legal proceedings arising out of or relating to this Assignment, the other Loan Documents or the transactions contemplated hereby or thereby. The Assignor and Assignee irrevocably waive, to the fullest extent permitted by law, any objection which they may now or hereafter have to the venue of any such proceeding brought in such a court and any claim that any such proceeding brought in such a court has been brought in an inconvenient forum.

13. Waiver of Jury Trial. **THE ASSIGNEE AND THE ASSIGNOR EACH HEREBY WAIVES ITS RIGHT TO A JURY TRIAL WITH RESPECT TO ANY ACTION OR CLAIM ARISING OUT OF ANY DISPUTE IN CONNECTION WITH THIS ASSIGNMENT, ANY RIGHTS OR OBLIGATIONS HEREUNDER OR THE PERFORMANCE OF SUCH RIGHTS AND OBLIGATIONS. EXCEPT AS PROHIBITED BY LAW, EACH OF THE ASSIGNEE AND THE ASSIGNOR HEREBY WAIVES ANY RIGHT WHICH IT MAY HAVE TO CLAIM OR RECOVER IN ANY LITIGATION REFERRED TO IN THE PRECEDING SENTENCE ANY SPECIAL, EXEMPLARY, PUNITIVE, OR CONSEQUENTIAL DAMAGES, OR ANY DAMAGES OTHER THAN, OR IN ADDITION TO, ACTUAL DAMAGES.**

14. Amendments; Waivers; Modifications. Any provision of this Assignment may be amended or waived if, but only if, such amendment or waiver is in writing and is signed by the Assignor and

Assignee; provided, however, that such waiver shall be limited to the specific provision or provisions expressly so waived

15. Successors in Interest. This Assignment shall create a continuing security interest in the Collateral and shall be binding upon each of the parties hereto, and their respective successors and assigns, and shall inure, together with all rights and remedies of each of the parties hereto and their respective permitted successors and assigns; provided, however, that Assignor may assign its rights or delegate its duties hereunder without the prior written consent of Assignee.

16. Severability. If any provision of any of the Assignment is determined to be illegal, invalid or unenforceable, such provision shall be fully severable and the remaining provisions shall remain in full force and effect and shall be construed without giving effect to the illegal, invalid or unenforceable provisions.

17. Miscellaneous.

A. Assignor hereby agrees to indemnify Assignee against all liability arising in connection with or on account of the Development Agreement.

B. No failure or delay on the part of the Assignee to exercise any right, power or privilege under this Assignment shall operate as a waiver thereof.

C. The provisions of this Assignment shall govern and control over any inconsistent provision in any of the Loan Documents.

D. Assignee's rights under this Assignment shall be in addition to all rights of Assignee under the Loan Documents.

E. Assignor shall reimburse Assignee for all reasonable attorneys' fees, costs and expenses, expert witness fees, investigation costs and expenses, court costs, and receivership fees and costs, and disbursements incurred in connection with the enforcement of the Assignee's rights under this Assignment.

F. Time is of the essence as to all of the obligations of Assignor under this Assignment.

18. Counterparts. This Assignment may be executed in any number of counterparts, and by the different parties hereto on separate counterpart signature pages, and all such counterparts taken together shall be deemed to constitute one and the same instrument.

[Signature Page to Follow]

IN WITNESS WHEREOF, the parties hereto have caused this Assignment to be duly executed by their respective authorized officers as of the day and year first above written.

“ASSIGNOR”

510 E. MAIN ST., LLC
a Colorado limited liability company

By: _____
Name: Nathaniel Kelly Foote
Title: Manager

“ASSIGNEE”

COLLEGIATE PEAKS BANK A DIVISION OF GLACIER BANK

By: _____
Name: Kristina Greeno
Title: Vice President Commercial Lending

**Town of Frisco Acknowledgement and Agreement of Collateral Assignment of Rights
Under Purchase, Sale and Development Agreement**

The undersigned, being an authorized representative of the **TOWN OF FRISCO**, hereby (i) acknowledges receipt of a copy of the foregoing Collateral Assignment of Rights Under Purchase, Sale and Development Agreement, (ii) acknowledges and agrees to the terms of Collateral Assignment of Rights Under Purchase, Sale and Development Agreement, (iii) acknowledges and consents to Nathaniel Kelly Foote's assignment of all of his right title and interest in and to the Development Agreement to 510 E. Main St., LLC, a Colorado limited liability company, (iv) expressly consents to Paragraph 7 of the Collateral Assignment of Rights Under Purchase, Sale and Development Agreement regarding Assignee's ability, after the occurrence of a Foreclosure Event (as defined in Paragraph 7), to subsequently transfer the development rights outlined in the Development Agreement to subsequent purchaser of the Property, and (v) consents to the Collateral Assignment of Rights Under Purchase, Sale and Development Agreement notwithstanding the limitation on Assignment set forth in Section 7.01 of the Development Agreement.

Dated as of August ___, 2020.

TOWN OF FRISCO

By: _____
Name: _____
Title: _____