

ECM01NTH

TYPE OF RECORD: PERMANENT

CATEGORY OF RECORD: **DEVELOPMENT IMPROVEMENTS AGREEMENT**

NAME OF CONTRACTOR: CITY MARKET

SUBJECT/PROJECT: EASTGATE CITY MARKET #418

LOCATION: 2830 NORTH AVENUE

TAX PARCEL #: 2943-073-17-001

FILE #: SPR-2001-149

CITY DEPARTMENT: COMMUNITY DEVELOPMENT

YEAR: 2001

EXPIRATION DATE: NONE

DESTRUCTION DATE: NONE

**DEVELOPMENT IMPROVEMENTS AGREEMENT**

1. Parties: The parties to this Development Improvements Agreement ("the Agreement" or "Agreement") are City Market ("the Developer") and THE CITY OF GRAND JUNCTION, Colorado ("the City" or "City").

FOR valuable consideration, the receipt and adequacy of which is acknowledged, the Parties agree as follows:

2. Effective Date: The Effective Date of the Agreement will be the date that this agreement is signed which shall be no sooner than recordation of the final plat or final plan approval whichever first occurs.

**RECITALS**

The Developer seeks permission to develop property within the City to be known as City Market #418 2830 North Avenue - Grand Junction, Colorado which property is more particularly described on Exhibit A attached and incorporated by this reference ("the Property" or "Property"). The City seeks to protect the health, safety and general welfare of the community by requiring the completion of various improvements in the Property and limiting the harmful effects of substandard developments. The purpose of this Agreement is to protect the City from the cost of completing necessary improvements itself and is not executed for the benefit of materialmen, laborers, or others providing work, services or material to the Developer and/or the Property or for the benefit of the owners, purchasers or users of the Property. The mutual promises, covenants, and obligations contained in this Agreement are authorized by state law, the Colorado Constitution and the City's land development ordinances.

**DEVELOPER'S OBLIGATION**

3. Improvements: The Developer will design, construct and install, at its own expense, those on-site and off-site improvements listed on Exhibit B attached and incorporated by this reference ("the Improvements" or "Improvements"). The Developer agrees to pay the City for inspection services performed by the City, in addition to amounts shown on Exhibit B. The hourly rate of "in-house" City inspection services is \$45.00 per hour. The scope of this project is such that the City may have to engage independent consultant(s) to adequately provide inspection services; Developer agrees to pay such costs, in addition to all others for which Developer is responsible hereunder. The Developer's obligation to complete the improvements is and will be independent of any obligations of the City contained herein.

4. Security: To secure the performance of its obligations under this Agreement the Developer shall supply a guarantee in a form and with terms acceptable to the City. A copy of which or a memorandum thereof is attached as Exhibit C.

5. Standards: The Developer shall construct the Improvements according to the standards and specifications required by the City Engineer or as adopted by the City.

03/06/00

6. **Warranty:** The Developer warrants that the Improvements, each and every one of them, will be free from defects for a period of twelve (12) months from the date that the City Engineer accepts or approves the last Improvement completed by the Developer.

7. **Commencement, Completion and Abandonment Periods:** The Developer will commence work on the Improvements within 14 days from the Effective Date of this Agreement 09/10/01 (set date) ("the Commencement Period") and the Improvements, each and every one of them, shall be completed by the end of the 8 month from the Effective Date of this Agreement 05/09/02 (set date) (the "Completion Period"). The Developer shall not cease construction activities for any period of more than 60 consecutive days ("the Abandonment Period").

8. **Compliance with Law:** The Developer shall comply with all applicable federal, state and local laws, ordinances and regulations in effect at the time of final approval when fulfilling its obligations under this Agreement. When necessary to protect the public health, safety or welfare, the Developer shall be subject to laws, ordinances and regulations that become effective after final development approval.

9. **Notice of Defect:** The Developer's Engineer shall provide timely notice to the Developer, contractor, issuer of security and the City Engineer whenever inspection reveals, or the Developer's Engineer otherwise has knowledge, that an improvement does not conform to City standards and any specifications approved in the development application or is otherwise defective. The Developer will have thirty (30) days from the issuance of such notice to correct the defect. The City may grant reasonable extensions.

10. **Acceptance of Improvements:** The City's final acceptance and/or approval of Improvements will not be given or obtained until the Developer presents a document or documents, for the benefit of the City, showing that the Developer owns the Improvements in fee simple or as accepted by the City Attorney and that there are no liens, encumbrances or other restrictions other than those that have been accepted by the City Attorney on the Improvements. Approval and/or acceptance of any Improvements does not constitute a waiver by the City of any rights it may have on account of any defect in or failure of the Improvement that is detected or which occurs after approval and/or acceptance.

11. **Reduction of Security:** After the acceptance of any Improvement, the amount which the City is entitled to draw on the guarantoc will be reduced by an amount equal to 90 percent of the estimated cost of such Improvement as shown in Exhibit B. At the written request of the Developer, the City will execute a certificate verifying the acceptance of the Improvement and waiving its right to draw on the guarantee to the extent of such amount. A Developer in default under this Agreement will have no right to such certification. Upon the acceptance of all of the Improvements the remaining balance that may be drawn under the guarantee shall be available to the City for 90 days after the expiration of the warranty period.

03/06/00

12. **Use of Proceeds:** The City will use funds deposited with it, drawn or guaranteed pursuant to any written agreement entered into between the parties only for the purpose of completing the Improvements or correcting defects in or failure of the Improvements.

13. **Events of Default:** The following conditions, occurrences or actions will constitute a default by the Developer during the Completion Period:

- a. Developer's failure to complete each portion of the Improvements in conformance with the time schedule provided in paragraph number seven (7.), above;
- b. Developer's failure to demonstrate reasonable intent to correct defective construction of any Improvement within the applicable correction period;
- c. Developer's insolvency, the appointment of a receiver for the Developer or the filing of a voluntary or involuntary petition in bankruptcy respecting the Developer; in such event the City may immediately declare a default without prior notification to the Developer;
- d. Notification to the City, by any lender with a lien on the property, of a default on an obligation; the City may immediately declare a default without prior notification to the Developer;
- e. Initiation of any foreclosure action of any lien or initiation of mechanics lien(s) procedure(s) against the Property or a portion of the Property or assignment or conveyance of the Property in lieu of foreclosure; the City may immediately declare a default without prior notification to the Developer.

Unless specifically provided herein the City may not declare a default until written notice has been sent to the Developer at the address on file with the development application. Notice is and shall be deemed effective two calendar days after mailing thereof by first class United States mail, postage prepaid.

14. **Measure of Damages:** The measure of damages for breach of this Agreement by the Developer will be the reasonable cost of satisfactorily completing the Improvements plus reasonable City administrative expenses. Administrative expenses may include but are not limited to contracting costs, collection costs and the value of planning, engineering, legal and administrative staff time devoted to the collection/completion of the Improvements. For Improvements upon which construction has not begun, the estimated costs of the Improvements as shown on Exhibit B will be *prima facie* evidence of the minimum cost of completion, however, neither that amount or the amount of a letter of credit, the subdivision improvements disbursement agreement or cash escrow or other guarantee establish the maximum amount of the Developer's liability.

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15. **City's Rights Upon Default:** When any event of default occurs, the City may draw on the letter of credit, escrowed collateral, or proceed to collect any other security to the extent of the face amount of the credit or full amount of escrowed collateral, cash, or security less ninety percent (90%) of the estimated cost (as shown on Exhibit B) of all Improvements previously accepted by the City or may exercise its rights to disbursement of loan proceeds or other funds under the improvements disbursement agreement. The City will have the right to complete Improvements itself or it may contract with a third party for completion, and the Developer grants to the City, its successors, assigns, agents, contractors, and employees, a nonexclusive right and easement to enter the Property for the purposes of constructing, reconstructing, maintaining and repairing such Improvements. Alternatively, the City may assign the proceeds of the letter of credit, the improvements disbursement agreement, the escrowed collateral, cash, or other funds or assets to a subsequent developer (or lender) who has acquired the Property by purchase, foreclosure or otherwise who will then have the same rights of completion as the City if and only if the subsequent developer (or lender) agrees in writing to complete the unfinished Improvements and provides to the City reasonable security for the obligation. In addition, the City may also enjoin the sale, transfer, or conveyance of lots within the development, until the Improvements are completed or accepted. These remedies are cumulative in nature and are in addition to any other remedies the City has at law or in equity.

16. **Indemnification:** The Developer expressly agrees to indemnify and hold the City, its officers, employees, agents and assigns harmless from and against all claims, costs and liabilities of every kind and nature, for injury or damage received or sustained by any person or entity in connection with, or on account of the performance or non-performance of work at the Property or the Property being developed pursuant to this Agreement. The Developer further agrees to aid and defend the City in the event that the City is named as a defendant in an action concerning the performance or non-performance of work pursuant to this Agreement. The Developer further agrees to aid and defend the City in the event that the City is named as a defendant in an action concerning the performance of work pursuant to this Agreement except where such suit is brought by the Developer against the City. The Developer is not an agent or employee of the City.

17. **No Waiver:** No waiver of any provision of this Agreement by the City will be deemed or constitute a waiver of any other provision, nor will it be deemed or constitute a continuing waiver unless expressly provided for by a written amendment to this Agreement signed by both the City and the Developer; nor will the waiver of any default under this Agreement be deemed a waiver of any subsequent default or defaults of the same type. The City's failure to exercise any right under this Agreement will not constitute the approval of any wrongful act by the Developer or the acceptance of any Improvement.

18. **Amendment or Modification:** The parties to this Agreement may amend or modify the Agreement only by written instrument executed on behalf of the City by the City Manager or his designee and by the Developer or his authorized officer. Such amendment or modification shall be properly notarized before it may be deemed effective.

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19. **Attorney's Fees:** Should either party be required to resort to litigation to enforce the terms of this Agreement, the prevailing party, plaintiff or defendant, will be entitled to costs, including reasonable attorney's fees and expert witness fees, from the opposing party. If relief is awarded to both parties, the attorney's fees may be equitably divided between the parties by the decision maker.

20. **Vested Rights:** The City does not warrant by this Agreement that the Developer is entitled to any other approval(s) required by the City, if any, before the Developer is entitled to commence development or to transfer ownership of the Property being developed.

21. **Integration:** This Agreement, together with the exhibits and attachments thereto constitutes the entire agreement between the parties and no statement(s), promise(s) or inducement(s) that is/are not contained in this Agreement will be binding on the parties.

22. **Third Party Rights:** No person or entity who or which is not a party to this Agreement will have any right of action under this Agreement.

23. **Time:** For the purpose of computing the Abandonment and Completion Periods, and time periods for City action, such times in which war, civil disasters, or acts of God occur or exist will not be included if such times prevent the Developer or City from performing its obligations under the Agreement.

24. **Severability:** If any part, term, or provision of this Agreement is held by a court or courts of competent jurisdiction to be illegal or otherwise unenforceable, such illegality or unenforceability will not affect the validity of any other part, term, or provision and the rights of the parties will be construed as if the part, term, or provision was never part of the Agreement.

25. **Benefits:** The benefits of this Agreement to the Developer are personal and may not be assigned without the express written approval of the City. Such approval may not be unreasonably withheld, but any unapproved assignment is void. Notwithstanding the foregoing, the burdens of this Agreement are personal obligations of the Developer and also will be binding on the heirs, successors and assigns of the Developer and shall be a covenant(s) running with the Property. There is no prohibition on the right of the City to assign its rights under this Agreement. The City will expressly release the original Developer's guarantee or obligations if it accepts new security from any developer or lender who obtains the Property, however, no other act of the City will constitute a release of the original Developer from his liability under this Agreement. When the Improvements are completed and approved by the City, the City agrees to state same in writing, with appropriate acknowledgments. The City will sign a release only after all warranty periods, as extended by litigation, repair or alteration work, have expired.

26. **Notice:** Any notice required or permitted by this Agreement will be deemed effective two calendar days after deposit with the United States Postal Service, first class, postage prepaid and addressed as follows:

03/06/00

If to Developer:

If to City: City of Grand Junction  
Community Development Director  
250 N. 5th Street  
Grand Junction, Colorado 81501

27. **Recordation:** Developer will pay for all costs to record this Agreement or a Memorandum thereof in the Clerk and Recorder's Office of Mesa County, Colorado.

28. **Immunity:** Nothing contained in this Agreement constitutes a waiver of the City's sovereign or other immunity under any applicable law.

29. **Personal Jurisdiction and Venue:** Personal jurisdiction and venue for any action commenced by either party to this Agreement whether arising out of or relating to the Agreement, letter of credit, improvements disbursements agreement, or cash escrow agreement or any action to collect security will be deemed to be proper only if such action is commenced in Mesa County, Colorado. The Developer expressly waives his right to bring such action in or to remove such action to any other court whether state or federal.

30. a. **Conditions of Acceptance:** The City shall have no responsibility or liability with respect to any street, or other improvement(s), notwithstanding the use of the same by the public, unless the street or other improvements shall have been finally accepted by the City.
- b. **Phased Development:** If the City allows a street to be constructed in stages, the Developer of the first one-half street opened for traffic shall construct the adjacent curb, gutter and sidewalk in the standard location and shall construct the required width of pavement from the edge of gutter on his side of the street to enable an initial two-way traffic operation without on-street parking. That Developer is also responsible for end-transitions, intersection paving, drainage facilities, and adjustments to existing utilities necessary to open the street to traffic.
- c. Prior to requesting final acceptance of any street, storm drainage facility, or other required improvement(s), the Developer shall: (i) furnish to the City engineer as-built drawings in reproducible form, blue-line stamped and sealed by a professional engineer and in computer disk form and copies of results of all construction control tests required by City specification; (ii) provide written evidence to the City Engineer under signature of a qualified expert that the earth, soils, lands and surfaces upon, in and under which the improvements have been constructed, or which are necessary for the improvements, are free from toxic, hazardous or other

03/06/00

regulated substances or materials: (iii) provide written evidence to the City Attorney that the title to lands underlying the improvements are free and clear from all liens and encumbrances, except those items and encumbrances which may be approved in writing by the City Attorney.

City of Grand Junction  
250 North Fifth Street  
Grand Junction CO 81501

Kathleen M. Partum 9-11-01  
Director of Community Development date

Attest:

\_\_\_\_\_  
City Clerk date

By: City Market 9/10/01  
Developer date

Name (printed): Bob Letcher 9-10-01  
Bob Letcher

Its (position): Director Facility Engineering

Signed before me this 10<sup>th</sup> day  
September  
My commission expires 01/01/01  
Maile Schwab

Attest:

\_\_\_\_\_  
Secretary date

08/28/00

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TYPE LEGAL DESCRIPTION BELOW, USING ADDITIONAL SHEETS AS NECESSARY.  
USE SINGLE SPACING WITH A ONE INCH MARGIN ON EACH SIDE.

**EXHIBIT A**

Tract of land situated in Section 7, Township 1 South, Range 1 East of the Utc Meridian in the City of Grand Junction, Mesa County, Colorado, described as follows:

Commencing at the point of intersection of the center line of North Avenue with the center line of 28-1/4 Road, running thence Easterly along said center line of North Avenue 132 feet, running thence Northerly 40 feet to the Northerly right of way line of North Avenue for a point of beginning, thence Northerly 285 feet, thence Westerly 112 feet to the Easterly right of way line of 28-1/4 Road, thence North 0°01' East along said Easterly right of way line of 29-1/4 Road 333.71 feet, thence North 89°57'41" East 972.23 feet, thence South 0°08' East 619.38 feet to the Northerly right of way line of North Avenue, thence Westerly along the Northerly right of way line of North Avenue 861.85 feet to the point of beginning.

CONTINUATION SHEET

AIA DOCUMENT G703

AIA DOCUMENT G703 APPLICATION AND CERTIFICATE FOR PAYMENT containing

APPLICATION NUMBER

01

Contractor's signed Certificate is attached

APPLICATION DATE

09/07/01

In tabulations below, amounts are stated to the nearest dollar

PERIOD TO:

09/07/01

Use Column I on contracts where variable reinsurance for fine items may apply

ARCHITECT'S PROJ NO

A	B	C	D	E	F	G	H	I	J	K	
ITEM NO	DESCRIPTION OF WORK	SCHEDULED VALUE	WORK COMPLETED FROM PREVIOUS APPLICATION (D+E)	THIS PERIOD	MATERIALS PRESENTLY STORED (NOT IN STORE)	TOTAL COMPLETED AND STORED TO DATE	% (G/F)	BALANCE TO FINISH (H-I)	REVENUE	COMMENTS	CONTRACTOR
CITY MARKET NO. 418 - SITEWORK											
1. DIVISION 1											
	General Conditions	With 8/13/01 Contract	0	0	0	0	0%	0	0		NYC
	Builder's Risk Insurance	2,582	1,281	0	0	1,281	50%	1,281	64		NYC
	Contingency	5,014	5,014	0	0	5,014	100%	0	251		NYC
	Fee	23,288	13,973	0	0	13,873	60%	9,315	689		NYC
2. DIVISION 2											
	Asphalt Patching	12,173	3,652	0	0	3,652	30%	8,521	183		Asphalt Spcl
	Selective Demolition, Site-Work	21,686	18,952	0	0	18,952	88%	2,634	948		NYC
	Landscaping and Irrigation	132,081	52,936	0	0	52,936	40%	79,155	2,947		Deep Creek
	Earthwork	2,173	1,087	0	0	1,087	50%	1,087	54		NYC
	Topsoil Material	33,801	16,450	0	0	16,450	49%	17,351	823		NYC
3. DIVISION 3											
	Curb and Gutter	33,276	27,658	0	0	27,658	83%	5,618	1,363		Vanes
4. DIVISION 15											
	Back-Flow Preventor Allowance	1,000	1,000	0	0	1,000	100%	0	50		CO Piping
5. CHANGE ORDERS											
	Change Order No.1	Pending	Pending	0	0	0	0%	0	0		
	TOTALS	266,864	142,002	0	0	142,002	53%	124,962	7,100		

To Remove Document Fold and Tear Along This Perforation

ANY LOGO CAN BE SEEN AS A WATERMARK ON THE BACK. HOLD AT ANGLE TO VIEW IF NOT PRESENT. DO NOT CASH

NEW YORK (DELAWARE) WARE 62-35/311 2001-09-07 3141357

**Kroger**

PAY TO THE ORDER OF **FIVE 15000000** ZERO ZERO ZERO ZERO CENTS

\*\$150,000.00

UNDRED FIFTY THOUSAND DOLLARS AND ZERO CENTS \*\*\*\*\*

CITY OF GRAND JUNCTION

250 NORTH FIFTH ST  
GRAND JUNCTION CO 81501-0000

Void Over \$150,000.00

*Lawrence M. Sumner*

THIS ACCOUNT CLEARS POSITIVE PAY

TS 5.197.785; 5.340.158

⑆141357⑆ ⑆031100351⑆ ⑆0300953429⑆

THIS CHECK CONTAINS MULTI-COLOR RAINBOW PRINTING IN THE BACKGROUND. IF NOT PRESENT, DO NOT CASH.

FOLD



serving the community together

CITY ATTORNEY

June 23, 2005

King Soopers/City Market  
Attn: Marilou Loutzenhiser  
P.O. Box 5567  
Denver, CO 80217

Re: Development Projects in the City of Grand Junction

Dear Ms. Louztenhiser:

As we discussed previously, here is the information on the following development projects pending within the City of Grand Junction.

2830 North Avenue:

The Development Improvements Agreement ("DIA") for the City Market #418 - 2830 North Avenue- Grand Junction, Colorado project with the City of Grand Junction ("City") required security in the amount of \$150,000.00. Per the terms of the agreement ten percent (10%) of the security is to be held by the City for ninety (90) days after the warranty period. The warranty period is a period of twelve months in which the Improvements are to be free from defects. As the total estimated costs of the Improvements completed this year for the project was estimated to be \$40,998.06, the City has agreed to hold only ten percent (10%) of that amount. The City will retain the \$4,099.81 and return \$145,900.19.

Enclosed is your check for the \$40,998.06 which was provided in December 2004 for this project, but the City declined to amend the original DIA.

You will also be receiving a check for \$6,089.00. The City records show this security held for related matters to this project.

2439 River Road:

Enclosed are two original copies of the Maintenance Guarantee for the DIA for project #PFP-2003-248 concerning the Improvements at 2439 River Road other than the

Marilou Loutzehiser  
July 23, 2005  
Page 2

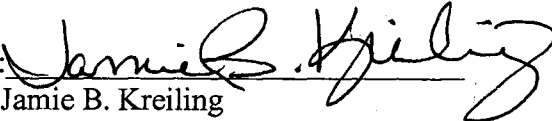
emergency access easement. A copy of the approved modification to the Letter of Credit is enclosed and the same was faxed to the number listed on the form.

There is another DIA regarding the emergency access easement which is to be replaced with a DIA from GJ Tech Center, LLC.

If you have questions, please inform.

Sincerely,

OFFICE OF THE CITY ATTORNEY

By:   
Jamie B. Kreiling  
Assistant City Attorney

Enclosures

pc: Kathy Portner, Planning Manager  
Eric Hahn, Development Engineer  
Lisa Cox, Senior Planner  
Rhonda Edwards, Associate Planner  
Laura Lamberty, Development Engineer  
Mike Shunk

*City Market  
Eastgate file*

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED  
Certified mail receipt no. 7004 0750 0003 1495 7635

June 24, 2005

King Soopers/City Market  
Attn: Marilou Loutzenhiser  
P.O. Box 5567  
Denver, CO 80217

Re: Development Improvements Agreements Securities

Dear Ms. Loutzenhiser:

As referenced in Assistant City Attorney Jamie B. Kreiling's June 23, 2005 letter to you, enclosed you will find the following:

- City of Grand Junction check no. 10114271 payable to The Kroger Company in the amount of \$6,089.00
- City of Grand Junction check no. 10114272 payable to The Kroger Company in the amount of \$145,900.19.

If you have questions or concerns, please contact Ms. Kreiling at (970) 244-1503.

OFFICE OF THE CITY ATTORNEY

By   
Donna L. Ross, Paralegal

:dlr  
Enclosures

CC: Jamie B. Kreiling, Assistant City Attorney  
Kathy Portner, Planning Manager  
Eric Hahn, Development Engineer  
Lisa Cox, Senior Planner  
Rhonda Edwards, Associate Planner  
Laura Lamberty, Development Engineer  
Mike Shunk