

RESOLUTION 5 – SERIES 2012

**A RESOLUTION AUTHORIZING AMENDMENT TO
AGREEMENT REGARDING ESCROW FUNDS AND
FUNDING**

WHEREAS, The Town of Minturn, Colorado (the “Town”) entered into three escrow agreements on or about April 7, 2008 with Ginn Battle North, LLC, Ginn Battle South, LLC and Ginn-LA Battle One, LLLP (collectively “Battle”); and

WHEREAS, in accordance with those agreements, known as The Scholarship and Park Escrow Agreement, The Recreation Center and Trail Escrow Agreement and The Water Escrow Agreement Battle, escrowed a total of \$11,600,000 and

WHEREAS, the release of the escrow funds has been delayed by litigation; and

WHEREAS, the parties have met since August 2011 to negotiate distribution of the Battle Funds held in escrow; and

WHEREAS, the parties have reached agreement regarding partial distribution of Battle’s funds in escrow; payment of certain obligations to the Town for certain costs pertaining to the Battle Mountain development; and clarification of the payment of future expenses to the Town.

NOW THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF MINTURN, COLORADO:

The agreement regarding distribution of Battle’s funds in escrow; for payment of certain obligations to the Town for certain costs pertaining to the Battle Mountain development; and to clarify payment of future expenses to the Town attached hereto as Exhibit A, is hereby approved. The Mayor is authorized to sign the agreement.

INTRODUCED, READ, APPROVED, ADOPTED AND RESOLVED THIS 15th DAY OF FEBRUARY, 2012.

TOWN OF MINTURN, COLORADO

Hawkeye Flaherty

Mayor

ATTEST:

[Signature]

Town Clerk

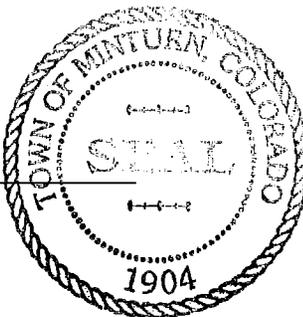


Exhibit A-1

Resolution 5 - Series 2012
(Re the Agreement Regarding Escrows and Funding)

See attached

AGREEMENT REGARDING ESCROWS AND FUNDING

This Agreement Regarding Escrows and Funding (the "Agreement"), dated February __, 2012, between Battle One Developer, LLLP (fka Ginn-LA Battle One Ltd., LLLP), Battle North, LLC (fka Ginn Battle North, LLC), and Battle South, LLC (fka Ginn Battle North, LLC) (collectively "Developer") and the Town of Minturn (the "Town"), sets forth the terms and conditions on which Developer and the Town are prepared to: (i) release certain escrowed funds to the Town and Developer, (ii) resolve all payment arrangements regarding Developer obligations to reimburse the Town for certain costs based on past letter agreements, and (iii) clarify payment agreements henceforth. This Agreement has been approved by resolution of the Town Council. Such terms and conditions are as follows:

1. **Escrow Agreements:** In April of 2008, Developer escrowed a total of \$11,350,000, and delivered an additional \$250,000 directly to the Town, pursuant to three (3) escrow agreements (collectively, the "Escrow Agreements"), commonly known as:
 - a. The Scholarship and Park Escrow Agreement;
 - b. The Recreation Center and Trail Escrow Agreement; and
 - c. The Water Storage Escrow Agreement.

The total amount held in escrow by the Town is \$11,600,000.

2. **Escrow Amendment:** In order to release the escrowed funds, each Escrow Agreement will need to be amended (collectively, the "Escrow Amendment"). Because the Escrow Agreements were initially adopted by a resolution of the Town Council, the Escrow Amendment shall also be adopted by a resolution of the Town Council (the "Resolution").
3. **Release of Escrowed Funds:** The Escrow Amendment shall provide for the release of the escrowed funds as follows and in accordance with Section 4 below:
 - a. to Developer in the total amount of \$7,210,000 ("Developer's Funds"); and
 - b. to the Town in the total amount of \$4,362,000 (inclusive of the \$600,000 previously delivered to the Town pursuant to the Scholarship and Park Escrow Agreement, the "Town's Funds").

The Town was delivered \$600,000 (\$350,000 held in escrow) so the total amount in the non-Town held escrow accounts is \$11,000,000 with the total amount under consideration for distribution between the Town and Battle Mountain being \$11,600,000, less the \$28,000 that shall remain in escrow.

The parties shall each retain any interest that may accrue on their respective Funds and may spend the same consistent with the terms hereof and such interest shall be considered to be included as a part of such Funds for purposes hereof, including any credits due Developer under Paragraph 11 below.

4. **Funds Remaining in Escrow:**

a. All Developer Funds and Town Funds (collectively, the "Funds") will remain in escrow for at least 30 days after the Town's adoption of the Resolution.

b. If no suit challenging the Resolution is filed within such 30 days, the Funds shall be released to the Developer and the Town as described in Section 3 above within 3 business days thereafter.

c. If a suit challenging the Resolution is filed within such 30 days, the Funds shall remain in escrow until the suit is resolved.

d. If a suit challenging the Resolution is filed and Developer and the Town agree to defend the suit, (i) the first \$25,000 in costs incurred in connection therewith shall be paid from the \$28,000 remaining in escrow, and (ii) Developer shall thereafter be responsible for all costs of defending the same.

e. At any time during the suit either Developer or the Town may decide to stop defending the suit. In that case, (i) the parties will take the necessary actions to stop litigation, (ii) the Town shall adopt a resolution to rescind the Resolution; (iii) if the Funds are in escrow, the Funds will remain in escrow, and (iv) if the Funds have been released from escrow, the Funds shall be replaced into escrow as the parties shall agree.

f. If the suit is defended and lost, the parties shall return their respective Fund amounts to escrow if, as and when required by any final unappealable order of the court to do so.

5. **Permitted Uses of Developer's Funds:** Developer shall use the Developer's Funds only for costs actually incurred by Developer with respect to Battle Mountain (the "Project"), which costs may include, without limitation, Developer's overhead and any fees payable to Developer's attorneys and other consultants. Developer shall provide the Town with the list of the categories of Developer costs budgeted to be incurred in connection with the Project.

6. **Permitted Uses of Town's Funds:** The Town may only use the Town's Funds to pay for: (a) the creation of a scholarship program as set forth in Paragraph 7 below, in the amount of \$350,000; (b) the Town's actual administrative costs, in an amount equal to \$15,000 in any given calendar month, not to exceed \$540,000 in the aggregate; (c) legal and consulting costs actually incurred by the Town that are directly related to the Project ("Legal and Consulting Costs"), not to exceed \$1,240,000 in the aggregate; and (d) the following costs to the extent they are actually incurred by the Town and directly and solely attributable to the Project:

- a. to purchase of one or more of the USFS parcels;
- b. for water infrastructure improvements to main water lines;
- c. to finish improvements to Little Beach Park;
- d. for Town street and streetscape improvements (provided that if and only if Developer is not required to pay such costs for the same improvements a second time, such as in

the case of a street improvement that is reconstructed in the future to accommodate utility installation);

e. to develop a Town recreation center (if and only if the parties obtain an agreement acceptable to both with the Vail Ski and Snowboard Club for its participation in the recreation center);

f. for such other projects, activities, purchases, improvements, facilities or the like, including but not limited to a bike/recreational trail, that the parties agree upon from time to time.

So long as a given cost meets the foregoing requirements, the Town shall have the right to use the Town's Funds to pay for such cost, in such amounts and at such times as the Town shall determine, without requiring the prior consent of Developer.

7. **Scholarship Program**: The Town shall earmark and set aside \$350,000 of the Town's Funds to be used solely for the creation of a scholarship program as set forth in Section 2 of the Scholarship and Park Escrow Agreement and Section 5.6 of the Annexation Agreement (the "Scholarship Funds").

8. **Records and Reports**: Developer, with respect to the Developer's Funds, and the Town, with respect to the Town's Funds, shall each maintain complete and accurate records of all costs paid using such funds. Each party shall provide the other with monthly reports summarizing such records.

9. **Effect of De-Annexation**:

a. If pursuant to the Tucker 106 litigation, Developer's property is de-annexed from the Town, the Town shall immediately pay to Developer an amount equal to the original amount of the Town's Funds, less

i. the amount of the Town's Funds actually spent in accordance with the terms hereof as of the date of such deannexation;

ii. amounts not spent, but which the Town is contractually committed to pay to independent third parties as of the date of such deannexation, on the condition that such commitments comply with the terms hereof;

iii. \$180,000 for Town administration costs;

iv. \$200,000 for Legal and Consulting Costs;

v. \$250,000 for Little Beach Park; and

vi. the unspent balance of the Scholarship Funds.

b. If after deannexation, Developer and the Town agree to a new annexation pursuant to a new annexation agreement or pre-annexation agreement, Developer shall escrow funds if and when required by that agreement.

10. **Replenishment of Funds if No De-Annexation:**

a. If the parties prevail in both (i) the Tucker 106 case, and (ii) the Tucker Quiet Title case (collectively the "Tucker Cases"), the parties shall negotiate in good faith to amend the existing Annexation Agreement.

b. If the parties execute an amendment to the Annexation Agreement, Developer shall replenish the escrow if and when required therewith.

c. If the parties abandon their efforts to execute an amendment to the Annexation Agreement, Developer shall replenish Developer's Funds, less those for which Developer shall receive a credit for spending consistent with the terms of this Agreement, to escrow within one year thereafter or at the time that Developer files a revised development plan with the Town consistent with the provisions of the Municipal Code, whichever is earlier.

11. **Developer's Credits:** For every dollar of the Town's Funds used by the Town, Developer shall receive a dollar credit to be applied by Developer against any current or future obligations that Developer has to the Town under the Annexation Agreement, as it may be amended, or any new annexation agreement, as the case may be. Any credit should only be against the obligations as agreed listed above, but not as against the administrative, legal or consulting costs provided for in Paragraph 6.

12. **Disputed Obligations:** In consideration of Developer consenting to the Town's use of the Town's Funds to pay the Legal and Consulting Costs, the parties acknowledge and agree that: (a) upon the release of the Town's Funds pursuant to the Escrow Amendment, Developer shall be automatically released from all obligations, if any, under that certain letter agreement between the Town and The Ginn Development Company, dated March 4, 2005 (the "Letter Agreement"), which Letter Agreement is referenced in three (3) letters from The Ginn Development Company to the Town, dated May 16, 2008, June 20, 2008 and November 21, 2008, respectively (collectively, the "GDC Letters"); and (b) until the parties enter into the Future Funding Agreement provided for in Paragraph 14 or other appropriate subsequent funding agreement, the only funding the Town shall receive from Developer with respect to the Town's costs and expenses attributable to the Project shall come from, and the Town shall have no right to look to Developer for any funds in addition to, (i) the release and use of the Town's Funds pursuant to the Escrow Amendment; (ii), funding provided for pursuant to this Agreement; and (iii) pursuant to the budgeting and payment procedures previously agreed to by the Town and Developer for, (A) Developer's ongoing funding of the costs actually incurred by the Town in connection with the Tucker 106 litigation and the Tucker quiet title litigation and (B) Developer's funding of costs actually incurred by the Town as a result of any specific written request from Developer.

13. **Satisfaction of PDP Planning Condition #22:** Entering into this Agreement satisfies the condition set forth in Paragraph 22 of the PUD Planning Conditions of the Preliminary Development Plan approval.

14. **Legal and Consulting Costs/Future Funding Agreement:**

a. Developer shall reimburse the Town for all budgeted Legal and Consulting Costs actually incurred by the Town in connection with the negotiation and execution of the Escrow Amendment promptly after the Escrow Amendment is executed, not to exceed \$15,000.

b. Promptly after the parties execute the Escrow Amendment, they shall negotiate in good faith to enter into, by September 1, 2014, an agreement pursuant to which Developer shall fund certain Legal and Consulting Costs the Town incurs after January 1, 2015 (the "Future Funding Agreement").

c. The Future Funding Agreement shall provide that it will be null and void if Tucker prevails in either of the Tucker Cases.

d. If the parties fail to enter into the Future Funding Agreement by January 1, 2015 and the Developer's property is not de-annexed, then until (A) the parties enter into the Future Funding Agreement or (B) the parties abandon their efforts to amend the existing Annexation Agreement and the Tucker cases are resolved, whichever occurs first, Developer will fund budgeted fees and costs actually incurred by the Town after January 1, 2015 for:

- i. environmental approvals for the Project;
- ii. water rights to serve the Project (not the Town's separate water rights);
- iii. the Tucker 106 case;
- iv. the negotiation and execution of the amendment to the Annexation Agreement;
- v. the payment of \$15,000 each month to the Town for administrative costs;
- vi. costs actually incurred by the Town as a result of any specific written request from Developer; and
- vii. such other costs that the parties agree upon from time to time,

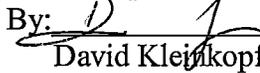
pursuant to quarterly budgets prepared by the Town (with input from Developer, as appropriate) and approved by Developer, which approval Developer will not unreasonably withhold; the administrative costs payment shall remain at \$15,000 per month and each budget shall reflect such amount. At such time that the Developer proceeds with the Town to process any land use applications and the Future Funding Agreement does not provide otherwise, Developer shall be obligated to pay to the Town any fees or costs required by the Municipal Code in connection with such process.

e. Developer shall reimburse the Town for all budgeted Legal and Consulting Costs actually incurred by the Town in connection with the negotiation and execution of the Future Funding Agreement promptly within 30 days after submission of invoices therefor to Developer by the Town.

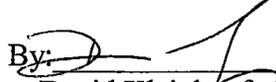
f. Except as expressly set forth herein, this Agreement does not amend, modify or change any approval or other agreements between the parties relating to the Battle Mountain project.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth below.

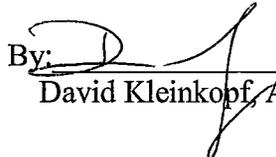
Battle One Developer, LLLP, a Georgia limited liability limited partnership
By: Loda LLC, its general partner, a Colorado limited liability company
By: Kleinkopf Battle Investment, LLC, a Colorado limited liability company

By: 
David Kleinkopf, Member

Battle North, LLC, a Georgia limited liability company

By: 
David Kleinkopf, Authorized Agent

Battle South, LLC

By: 
David Kleinkopf, Authorized Agent

Town of Minturn, Colorado
a home rule municipal corporation

By: 
Hawkeye Flaherty

Title: Mayor

Exhibit B

Wiring Instructions for the Developer

B B & T
1899 S Clyde Morris Blvd
Daytona Beach, Fl. 32119

Routing #: 263191387

For credit: Battle One Developer LLLP

Checking Account #: 0000149600531

Exhibit C

Payment Instructions for the Town

ACH and Wire Instructions

Wire Instructions

Following are the wire instructions to wire funds into your COLOTRUST account:

Bank Name: Wells Fargo Bank NA
ABA #: 121000248
Acct #: 1018043565
FFC: Your COLOTRUST Account Number
(e.g. CO-01-XXXX-XXXX) and Entity Name

↓ CO-01-0094-7058

ACH Instructions

ACH Instructions are as follows:

Bank Name: Wells Fargo Bank NA
ABA #: 102000076
Acct #: 1018043565
FFC: Your COLOTRUST Account Number
(e.g. CO-01-XXXX-XXXX) and Entity Name

↓ CO-01-0094-7058

679 18th Street, Suite 1010
Denver, Colorado 80202

T 303-733-0219
F 303-733-0220

clientservices@colotruster.com
www.colotruster.com

