



# TOWN OF APPLE VALLEY TOWN COUNCIL STAFF REPORT

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To: Honorable Mayor and Town Council Date: January 8, 2013

From: Lori Lamson Item No: 14  
Director of Community Development  
Community Development

Subject: AMENDMENT NO. 3 TO THE HAPPY TRAILS VILLAS OWNER PARTICIPATION AGREEMENT FOR THE CONSTRUCTION OF THIRTY-FOUR (34) SINGLE-FAMILY ATTACHED UNITS AT THE NORTHWEST CORNER OF KIOWA AND HIGHWAY 18.

T.M. Approval: \_\_\_\_\_ Budgeted Item:  Yes  No  N/A

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## RECOMMENDED ACTION:

Approve Amendment No. 3 of the Owner Participation Agreement between AVHTV, LP and the Town for the Happy Trails Villas project for the construction of thirty-four (34) single-family attached units at the northwest corner of Kiowa and Highway 18; and, authorize the Town Manager to execute the agreement on behalf of the Town.

## SUMMARY:

On June 22, 2010 the Town entered into the Owner Participation Agreement (OPA) with AVHTV, LP for the construction of Happy Trails Villas, which is a thirty-four (34)-unit attached single-family project. The OPA was amended on November 9, 2010 and October 31, 2011. The OPA requires that the owner sell eight (8) units to moderate income buyers and twenty-six (26) units to low-income buyers. The project owner has requested modifications to the OPA's eligibility requirements to increase sales and improve the long term stability of the project. This third amendment to the OPA would reduce the number of low-income units to eight (8), and would effectively increase the number of moderate units to fourteen (14). The third amendment would allow the remaining twelve (12) units to be sold to buyers that are low-, moderate- and above moderate-incomes. The proposed changes to the OPA's eligibility requirements are permitted by the laws and rules of the federal programs, which partially fund the project.

## BACKGROUND:

In 2007, work ceased on the thirty-four (34)-unit condominium project that later went into foreclosure. On June 22, 2010, the Town entered into an OPA with AVHTV, LP to complete the construction by using a combination of private and

public (federal and state) housing funds. The project is restricted with covenants requiring qualified low- and moderate-income buyers. The project was intended to be a high quality affordable mixed income project. The typical intended buyer would be teachers, nurses, office assistants, warehouse workers, and government/first responders. The units were completed in mid-2012 and the models have been open for sale since March.

Since the opening of the models, over 1,000 potential buyers have visited Happy Trails Villas. More than half of these potential buyers are current residents of Apple Valley. The OPA eligibility requirements have made it difficult for most buyers to qualify. Typically, issues pertain to buyers having enough income for the first loan and the homeowners association dues; however, too much income for OPA's eligibility requirements. In other words, the window of income eligibility is very narrow, making it extremely challenging to find qualified buyers.

As of the writing of this report, eleven (11) out of the thirty-four (34) units have closed escrow. Before the end of the calendar year, the owner expects three (3) more sales to close escrow. Of these fourteen (14) buyers, eight (8) are low-income and six (6) are moderate-income. These buyers consist of the targeted groups of professionals, but also include several retirees.

The third amendment will broaden the income range of eligible buyers, while still exceeding federal regulations which require a minimum of three (3) low-income units and eight (8) moderate-income units. In many cases, easing up the restrictions will allow individuals that were barely over the moderate-income level, to qualify, where they have been turned away in the past. It is expected that a mix of higher earnings within the project will delay re-sales, increase homeowner capacity to operate the homeowner association, and benefit the project's long term stability. The following table identifies the existing and proposed unit count by income level and the owner's progress towards meeting the requirements.

Affordability	Low CA	Low HOME	Moderate NSP	Moderate CA	Above Moderate
Income Level	< 80% of AMI	< 80% of AMI	< 120% of AMI	< 120% of AMI	Any Income
Existing OPA	8	18	0	8	0
Amendment	8	0	8	0	Up To 12

Closed by 12/18/12	5	3	0	3	0
Closed by 1/8/13	0	0	0	3	0
In Escrow	2	1	0	4	0
Total Closed/Escrow	7	4	0	10	0

The OPA established a minimum household size of two (2). Staff has permitted the owner to close sales to one person households (3 of the 14 closed/closing buyers have 1 person households.) The third amendment formalizes this minor modification. The owner has stated that the condominium units attract a wide range of buyers with some young families but also a significant percentage of older, smaller households including a number of one (1) person households due to:

- 1) the comparable cost of single-family detached homes, which provide a yard and space for children to play, and thus may be more attractive to young households;
- 2) older smaller households, and retired households in particular, being attracted to the reduced maintenance burden of a condominium; and,
- 3) women headed households being drawn to the security provided by a gated community.

It is anticipated that these changes will increase sales velocity and allow the owner to sell to buyers (many of whom are Town residents), who did not previously qualify. Finally, all units, including the units sold to above moderate-income buyers, will be subject to an owner occupancy restriction.

**THIRD AMENDMENT TO OWNER PARTICIPATION AGREEMENT  
(HAPPY TRAILS VILLAS -TRACT 18235)**

This Third Amendment to Owner Participation Agreement (Happy Trails Villas) (the "Third Amendment"), is made and entered into by and between the Town of Apple Valley, a municipal corporation (the "Town"), and AVHTV, LP, a California limited partnership (the "Owner") this 8th day of January, 2013.

RECITALS

A. Whereas, the Town and Owner entered into the Owner Participation Agreement dated June 22, 2010 and recorded in the Office of the San Bernardino County Recorder on July 2, 2010 as Document No. 2010-0267364 (the "OPA").

B. Whereas, the Town and Owner entered into the First Amendment to the OPA dated November 9, 2010 and recorded with the Office of the San Bernardino County Recorder on January 7, 2011 as Document No. 2011-0010034 (the "First Amendment").

C. Whereas, the Town and Owner entered into the Third Amendment to the OPA dated October 31, 2011 and recorded with the Office of the San Bernardino County Recorder on November 4, 2011 as Document No. 2011-0458946 (the "Third Amendment").

D. Whereas, the Town and Owner entered into The Regulatory Agreement and Declaration of Restrictive Covenants, Conditions and Restrictions dated June 22, 2010 and recorded with the Office of the San Bernardino County Recorder on July 2, 2010 as Document No. 2010-0267365 (the "Regulatory Agreement").

E. Whereas, the Town and Owner desire to amend the OPA, as previously amended, and the Regulatory Agreement to improve the marketability of the Units and the long term stability of the Project .

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION AND THE PROMISES AND COVENANTS SET FORTH IN THIS THIRD AMENDMENT, THE TOWN AND THE OWNER AGREE AS FOLLOWS:

AGREEMENT

1. Incorporation of Recitals. The Recitals set forth above are true and correct and are incorporated into this Third Amendment by this reference.

2. Effective Date. This Third Amendment is dated as of 8th day of January, 2013 for reference purposes only. This Third Amendment shall not become effective or operative until the first date on which all of the following are true ("Effective Date of Third Amendment"): This Third Amendment is approved by Owner and executed by the authorized representative of Owner and delivered to the Town, and this Third Amendment is executed by the Town Manager, after any required public hearings, and delivered to Owner.

3. Defined Terms. All terms, phrases and words indicated to be defined terms by initial capitalization that are not specifically defined in this Third Amendment shall have the meaning ascribed to the same term, phrase or word in the OPA.

4. Estoppel Provision. The Parties each acknowledge and agree that, as of the Effective Date of Third Amendment, no default exists under the OPA and the OPA is in full force and effect. Except as expressly amended by this Third Amendment, the OPA is in all respects ratified and confirmed and all of the terms and provisions and conditions of the OPA, as amended by this Third Amendment, shall be and remain in full force and effect.

5. Amendments to the OPA.

5.1 Section 1.1.28 of the OPA is replaced, in its entirety, with the following:

“1.1.28 **“Project”** means the acquisition and completion of a mixed income housing development on the Property. The Project shall consist of a total of thirty four (34) Units, sixteen (16) of which shall be available for sale to Qualified Households at Affordable Housing Costs for a period of not less than forty five (45) years, except as otherwise specified in the Affordability Covenant, as further proscribed in this Agreement and the Regulatory Agreement, and the remainder of which shall be Unrestricted Units. The Project, as that term is used herein, shall include completion of construction, resolution of remaining development issues, formation and management of a homeowner’s association, oversight of the Unit sales for the mixed income housing development on the Property.”

5.2 Section 1.1.32 of the OPA is replaced, in its entirety, with the following:

“1.1.32 **“Qualified Household”** shall mean and refer to persons and families that: (1) own and reside in the Unit; and (2) whose annual income, at the time of purchase of the Unit, does not exceed the maximum annual income permitted for the subject Unit as follows:

(a) HOME Low and Moderate Income Units/ CRL Low Income Units. Eight (8) of the Units shall be restricted by an Affordability Covenant and reserved for Qualified Households as follows:

(i) “Low and moderate income” Qualified Households, as defined pursuant to the HOME regulations, to be available at an Affordable Housing Cost for “low and moderate income” households, as determined pursuant to HOME regulations. Persons and families purchasing these Units shall have an annual income that does not exceed eighty percent (80%) of AMI, adjusted for family size in accordance with adjustment factors adopted by the United States Department of Housing and Urban Development in establishing income limits for lower income families; or

(ii) “Low income” Qualified Households, as defined pursuant to Section 50079.5 of the CRL, to be available at an Affordable Housing Cost for “low income” households, as determined pursuant to CRL Section 50052.5, as that section may hereafter be amended from time-to-time, and shall provide an allowance for utilities and maintenance costs established by the State of California Department of Housing and Community Development from time to time. Persons and families purchasing these Units shall have an annual income that does not exceed

eighty percent (80%) of the area median income, adjusted for family size in accordance with adjustment factors adopted by the United States Department of Housing and Urban Development in establishing income limits for lower income families.

(b) Moderate Income Units. Eight (8) of the Units shall be restricted by an Affordability Covenant in compliance with NSP requirements and reserved for “moderate-income” Qualified Households, as defined pursuant to NSP requirements, to be available at an Affordable Housing Cost for “moderate income” households, as determined pursuant to NSP requirements. Persons and families purchasing these eight (8) Units shall have an annual income that does not exceed one hundred and twenty percent (120%) of the area median income, adjusted for family size in accordance with adjustment factors adopted by the United States Department of Housing and Urban Development in establishing income limits for lower income families. The Affordability Covenant shall be as specified in the down payment assistance documents approved by the Town Manager with concurrence of the Town Counsel.

(c) Occupancy. Unless otherwise prohibited by law or regulation, including the HOME or NSP regulations, Qualified Households, as that term is used in this Agreement, shall include no less than one (1) person households at the time of purchase of a Unit.

(d) Unrestricted Units. The remainder of the Units in the Property may be made available for persons and/or families qualifying as “Market Rate” households and shall not be subject to any: i) income limitations or review; and/or, ii) requirements of NSP, HOME, and/or CRL (“Unrestricted Units”). The Unrestricted Units shall have an owner-occupancy covenant recorded against such Units requiring that the Units be occupied, at all times, by the purchaser of the Unit (“Owner-Occupancy Covenant”). The Owner-Occupancy Covenant shall be in a form approved by the Town.”

5.3 The Parties hereby revise the terms of the OPA, as previously amended, to specify that the Unrestricted Units shall not be considered as funded with the Town Loan, and shall not be subject to the Affordability Covenant requirements set forth in the Agreements, unless an Unrestricted Unit is made available to a Qualified Household, as defined in Section 1.1.32(a) or (b) of the OPA, and a Down Payment Assistance Loan is provided to such household. The Owner represents and warrants that it has utilized funding sources other than the Town Loan to fund the construction and development of the Unrestricted Units, as determined based on an analysis of the proportionate share of the federal funding on the Project as compared to the Owner provided non-federal funding, and in accordance with HOME and NSP rules and regulations.

5.4 Section 2.2.1, Paragraph 1 of the OPA, as previously amended, is hereby deleted, in its entirety, and replaced with the following paragraph:

“2.2.1 **HOME Funds**. The Project shall be funded in part, with HOME Funds. The HOME Funds shall be utilized for the development of the Project and/or for the provision of Down Payment Assistance to Qualified Households. In return for the receipt of the HOME Funds, the

Owner shall restrict eight (8) of the Units within the Project for Qualified Households as defined in Section 1.1.32(a) of this Agreement. The Owner shall comply with the HOME program requirements as set forth in Exhibit G attached to this Agreement and incorporated herein by this reference. All eight (8) of the Units shall be available for sale to Qualified Households with incomes at or below eighty percent (80%) of AMI, and shall be sold at an Affordable Housing Cost for Qualified Households as set forth in Section 1.1.32(a) of this Agreement, or shall be made available at such Affordable Housing Cost through the provision of Down Payment Assistance.”

5.5 Section 2.3 of the OPA is hereby deleted, in its entirety, and replaced with the following paragraph:

“2.3 **Understanding of Parties Regarding Units.** The Project, as defined in this Agreement and the Regulatory Agreement, is currently required to include Units to be available for sale to Qualified Households as follows:

(a) A total of eight (8) Units shall be:

(i) HOME Low and Moderate Income Units. “Low and moderate income” Qualified Households, as defined pursuant to the HOME regulations, to be available for sale at an Affordable Housing Cost for “low and moderate income” households, as determined pursuant to HOME regulations. Persons and families purchasing these Units shall have an annual income that does not exceed eighty percent (80%) of AMI, adjusted for family size in accordance with adjustment factors adopted by the United States Department of Housing and Urban Development in establishing income limits for lower income families; or

(ii) CRL Low Income Units. “Low” income Qualified Households, as defined pursuant to Section 50079.5 of the CRL, to be available for sale at an Affordable Housing Cost for “low” income households, as determined pursuant to CRL Section 50052.5, as that section may hereafter be amended from time-to-time, and shall provide an allowance for utilities and maintenance costs established by the State of California Department of Housing and Community Development from time to time. Persons and families purchasing these Units shall have an annual income that does not exceed eighty percent (80%) of the area median income, adjusted for family size in accordance with adjustment factors adopted by the United States Department of Housing and Urban Development in establishing income limits for lower income families.

(b) Moderate Income Units. Eight (8) of the Units shall be reserved for “moderate-income” Qualified Households, as defined pursuant to NSP requirements, to be available for sale at an Affordable Housing Cost for “moderate income” households, as determined pursuant to NSP requirements. Persons and families purchasing these eight (8) Units shall have an annual income that does not exceed one hundred and twenty percent (120%) of the area median income, adjusted for family size in

accordance with adjustment factors adopted by the United States Department of Housing and Urban Development in establishing income limits for lower income families.

(c) Unrestricted Units. The remainder of the Units in the Property may be made available for persons and/or families qualifying as “Market Rate” households and shall be Unrestricted Units. The Unrestricted Units shall have an Owner-Occupancy Covenant recorded against the Unit.

5.6 The Parties hereby revise the terms of the Agreements, as amended, to provide that any term or provision of the Agreements requiring the Units in the Project to be available at an Affordable Housing Cost for a period not less than forty-five (45) years (except as otherwise provided in the Affordability Covenant) shall be deemed not to apply to the Unrestricted Units, unless an Unrestricted Unit is made available to a Qualified Household, as defined in Section 1.1.32(a) or (b), and a Down Payment Assistance Loan is provided to such household.

5.7 Amendment to Section 3.2.3 of the OPA. Section 3.2.3 is amended to include the following paragraph as Section 3.2.5(e):

(e) Town Acquisition Loan Program Income. Subject to all federal laws, regulations, and/or policies including, but not limited to, the HOME and NSP rules and regulations and the Owner being in good standing under the OPA the following shall apply.

(i)NSP Program Income (as defined by HUD)related to the Town Acquisition Loan shall at the request of Owner be provided by the Town to: 1) the Owner for NSP eligible development costs in accordance with the terms of this Agreement, provided that if more than \$56,239 in NSP Program Income is provided to Owner, Owner shall restrict one (1) additional Unit for occupancy by a “moderate income” Qualified Household pursuant to an Affordability Covenant, or such further Units as required by the NSP regulations or, 2)a “moderate income” Qualified Household, as defined in Section 1.1.32(b) of this Agreement, as a down-payment assistance loan pursuant to the terms of the Down Payment Assistance Program authorized by Section 5.8 of the First Amendment; and,

(ii)HOME Program Income (as defined by HUD) related to the Town Acquisition Loan shall at the request of Owner be provided by the Town to: 1) the Owner for HOME eligible development costs in accordance with the terms of this Agreement; or, 2) a “low” or “low and moderate income” Qualified Household, as defined in Section 1.1.32(a) of this Agreement, as a down-payment assistance loan pursuant to the terms of the Down Payment Assistance Program authorized by Section 5.8 of the First Amendment.

6. Authority to Execute Documents to Effectuate Purpose of this Third Amendment. The Town Manager shall have the authority to amend, as may be necessary or appropriate, the Promissory Note, the Town Deed of Trust and the Regulatory Agreement on behalf of the Town to reflect changes agreed upon by the Parties pursuant to this Third Amendment.



7. Indemnity. In addition to and in no way limiting Owner's indemnification obligations under the OPA, Owner shall defend, indemnify and hold the Town, and its officers, directors, agents, servants, attorneys, employees and contractors harmless from and against all liability, loss, damage, costs, or expenses (including reasonable attorneys' fees and court costs) (all of the foregoing collectively, "Liabilities") arising from or as a result of the amendments to the OPA, and implementation thereof, set forth in this Third Amendment. The Owner's obligations under this Section shall survive the expiration or termination of the OPA.

8. Warranty Against Payment of Consideration for Third Amendment. The Owner warrants that it has not paid or given, and will not pay or give, any second party any money or other consideration for obtaining this Third Amendment. Second parties, for the purposes of this Section 6, shall not include persons to whom fees are paid for professional services, if rendered by attorneys, financial consultants, accountants, engineers, architects and the like when such fees are considered necessary by Owner.

9. Acceptance of Third Amendment by the Owner. The Owner shall acknowledge its acceptance of this Third Amendment by delivering to the Town three (3) original counterpart executed copies of this Third Amendment signed by the authorized representative of Owner.

10. Counterpart Originals. This Third Amendment may be executed by the Town and the Owner in multiple counterparts, all of which together shall constitute a single agreement.

11. No Second-Party Beneficiaries. None of the terms or provisions of this Third Amendment are intended to benefit any person or entity other than the Town or the Owner. No affiliate of the Owner has any rights pursuant to this Third Amendment.

12. Governing Law. The Town and the Owner acknowledge and agree that this Third Amendment was negotiated, entered into and is to be fully performed in the Town of Apple Valley, California. The Town and the Owner agree that this Third Amendment shall be governed by, interpreted under, and construed and enforced in accordance with the procedural and substantive laws of the State of California, without application of conflicts of laws principles. Venue shall be in San Bernardino.

13. Partial Invalidity. If any term or provision or portion thereof of this Third Amendment or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Third Amendment, or the application of such term or provision or portion thereof to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each such term and provision of this Third Amendment shall be valid and enforced to the fullest extent permitted by law.

14. Waivers. No waiver of any breach of any covenant or provision contained in this Third Amendment shall be deemed a waiver of any preceding or succeeding breach of such provision, or of any other covenant or provision contained in this Third Amendment.

15. Construction. Headings at the beginning of each section of this Third Amendment are solely for the convenience of reference of the Town and the Owner and are not a part of this Third Amendment. Whenever required by the context of this Third Amendment, the singular shall include the plural and the masculine shall include the feminine and vice versa. This Third Amendment shall not be construed as if it had been prepared by one or the other of the Town or the Owner, but rather as if both the Town and the Owner prepared this Third Amendment. Unless otherwise indicated, all references to sections are to this Third Amendment. If the date on which

the Town or Owner is required to take any action pursuant to the terms of this Third Amendment is not a business day, the action shall be taken on the next succeeding business day.

16. No Other Changes. Except as herein expressly amended, all of the other terms and provisions of the OPA shall remain in full force and effect.

IN WITNESS WHEREOF, the Town and the Owner have executed this Third Amendment on the dates indicated next to each of their signatures or the signatures of their authorized representatives, as appear on the following page(s).

**[Signatures on following page]**

**Signature Page to the Third Amendment to the Happy Trails Villas OPA**

OWNER:

AVHTV, LP,  
A California limited partnership

By: AOF/Golden State Community Development  
Corp., a California non-profit corporation  
Its: General Partner

By: \_\_\_\_\_

Its: Vice-President

Date: \_\_\_\_\_

TOWN:

TOWN OF APPLE VALLEY,  
a municipal corporation

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
Town Clerk

APPROVED AS TO LEGAL FORM:  
BEST BEST & KRIEGER LLP

By: \_\_\_\_\_  
Town Counsel

**EXHIBIT "A"**

Legal Description

Lot 1 of Tract 18235 in the Town of Apple Valley, County of San Bernardino, State of California, as per Map recorded in Book 335, Pages 100 and 101 of Maps, in the Office of the County Recorder of said County.

EXCEPTING THEREFROM, all oil, gas and other hydrocarbons and mineral rights as reserved in various deeds of records covering Lots 126 to 502 of Tract 2915, Book 39, Pages 69 to 71, inclusive, records of said County as reserved in deed recorded June 27, 2005 as Instrument No. 454763 Official Records.

STATE OF CALIFORNIA )  
 )  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 2012, before me,

a notary public, personally appeared , who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under penalty of perjury under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Notary Public in and for Said County and State

[Seal]