



TOWN OF APPLE VALLEY

TOWN COUNCIL STAFF REPORT

To: Honorable Mayor and Town Council **Date:** October 24, 2017

From: Brad Miller, Town Engineer **Item No:** 13
Engineering Department

Subject: SUBDIVISION IMPROVEMENT SECURITY, LIEN IN-LIEU OF BONDS

T.M. Approval: _____ **Budgeted Item:** Yes No N/A

RECOMMENDED ACTION:

Receive and file. Provide direction to staff.

SUMMARY:

Per Council's request, this report explains the Town's method of securing the completion of required public improvements relating to the subdivision of land, and offers for discussion an additional method of security that involves accepting Lien Agreements as security for the delayed installation of those improvements.

BACKGROUND:

Prior to subdivision maps being approved and recorded, public improvements that are required by our Development Code must be either installed and completed, or the developer may enter into a Subdivision Agreement and guarantee that the required improvements will be completed with 24 months of Final Map recordation. The Subdivision Map Act enables a local jurisdiction to accept certain types of securities to ensure that required improvements are completed. The Town of Apple Valley Municipal Code allows acceptance of surety bonds, letters of credit, or cash deposits to secure the installation of public improvements prior to Subdivision Final Map recording.

At the request of Town Council, staff has investigated the feasibility of including what are called Lien Agreements in lieu of the currently accepted public improvement securities to allow a Final Map to be recorded. Staff has investigated other County and Municipal jurisdictions in our region, and discovered that the City of Victorville, and the County of Riverside have adopted Ordinances that accept Lien Agreements as security for future public improvements. In an interview with Victorville City Engineer, Mr. Brian Gengler, it was learned that the acceptance of Lien Agreements as security for new maps does have

limitations and a measure of risk for the municipality. Those risks include the fluctuation of land value, and the lack of access to funds should the Town need to seize assets. However, in a limited capacity, Lien Agreements may be a reasonable and economical alternative that enables a subdivision to complete the Final Map and entitlement process, and yet be able to delay the construction of required public improvements until up to six years after Final Map recordation.

In the Victorville Ordinance, (copy attached), the primary purpose and benefit of the Lien Agreement is to enable a Final Map to be recorded, and prevent a Tentative Map from expiring. It enables the developer to initially delay installation of public improvements for three years, plus the ability to request a one-time extension of an additional three years, thus delaying any construction activity on the property for a maximum of six years after the Final Map has recorded. The purpose is to finalize property entitlements, record the map, but not begin any construction on the site for several years.

In the Victorville Ordinance, there are a number of conditions that must be satisfied, land appraisals performed, and administrative fees and deposits that must be paid. A Lien Agreement must be entered into and accepted by the Town, and the Council must find that it would not be in the public's best interest to require the installation of the required improvements sooner than two years after the Map has been recorded. In the Victorville Ordinance, there are a number of conditions, including the ability by Council to revert the property back to acreage should the developer default on any part of the Agreement. Also, the developer must replace the Lien Agreement with a conventional Subdivision Agreement, with standard security for Public Improvements, prior to receiving any permits for work on the property. No lots may be sold while the Lien Agreement is in effect. Under no circumstances shall the Lien Agreement compel or require the Town to construct any required improvements. A default on any part of the Agreement would trigger a reversion to acreage, at developer expense, (using deposited funds).

The Victorville Ordinance is very thorough and well detailed. It is intended as a tool to allow a proposed subdivision to reach the Final Map stage, and then enable it to stand dormant for a prescribed period before work on the public improvements must begin. Under certain market conditions, this may be beneficial. Staff would suggest that any consideration of the Lien Agreement concept be patterned in a fashion consistent with the Victorville model.

FISCAL IMPACT:

N/A

ATTACHMENT:

Sample copy of Victorville Ordinance 2365, Lien Agreements.

ORDINANCE NO. 2365

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF VICTORVILLE AMENDING SECTION 17.64.060 AND ADDING SECTION 17.64.065 TO CHAPTER 17.64 OF THE VICTORVILLE MUNICIPAL CODE RELATING TO THE CITY'S ACCEPTANCE OF LIEN AGREEMENTS AS SECURITIES FOR SUBDIVISION IMPROVEMENT AGREEMENTS

WHEREAS, the Subdivision Map Act, California Government Code section 66410 *et seq.* (the "Act"), gives the authority to cities to adopt ordinances permitting lien agreements in lieu of other forms of security based upon a finding that it would not be in the public interest to require the installation of the required improvements sooner than two years after the recordation of a subdivision map; and

WHEREAS, on March 16, 2010, the City Council of the City of Victorville (the "City Council") passed, approved and adopted Ordinance No. 2257 which amended Section 17.64.060 of the Victorville Municipal Code (the "Code") to permit the City of Victorville (the "City") to accept lien agreements in lieu of other forms of securities (*i.e.* bonds, instruments of credit, and cash deposits) as substitutes for securities previously posted by subdividers under the limited conditions and circumstances set forth therein; and

WHEREAS, the City Council passed, approved and adopted Ordinance No. 2268 on January 4, 2011 which further amended Section 17.64.060 of the Code to clarify the provisions of Ordinance No. 2257 and the terms and conditions under which lien agreements would be accepted by the City as substitutes for existing securities; and

WHEREAS, the City has entered into twenty-six (26) lien agreements pursuant to the above-referenced ordinances to date; and

WHEREAS, in order for subdividers to record subdivision maps prior to completing the public improvements required by such maps and the conditions of approval imposed by the City, the Code currently requires subdividers to enter into subdivision improvement agreements and post securities (bonds, letters of credit or cash deposits, but not lien agreements) to secure the completion of the public improvements required by such improvement agreements; and

WHEREAS, despite some recovery from the Great Recession of 2008, subdividers are still experiencing difficulty obtaining surety bonds, stalling development for an indeterminate period of time; and

WHEREAS, the Building Industry Association ("BIA") and other interested parties have requested the City consider an alternative to the posting of traditional securities as allowed by the Act and the City's current Code; and

WHEREAS, the revisions to the City's Code proposed by Ordinance No. 2365 would permit the City to accept Lien Agreements in lieu of traditional securities only when the City determines it is in the public interest not to require the public improvements secured thereby to be completed sooner than two (2) years after recordation of the map and where the property secured by the lien is at least equal in value to the cost of the public improvements to be installed; and

WHEREAS, the revisions proposed by Ordinance No. 2365 further only permit such Lien Agreements to remain in place initially for a period of three (3) years (and one additional three-year period if certain requirements are met) to ensure that public and other improvements are constructed by a date certain; and

WHEREAS, while Ordinance No. 2365 proposes some relaxation of the City's rules to provide relief to subdividers/developers at this time, it contains an automatic sunset provision to ensure the City does not continue to accept Lien Agreements in perpetuity if such agreements do not serve their intended purpose and/or when the economic conditions necessity their use no longer exist; and

WHEREAS, the adoption of this ordinance is not subject to the California Environmental Quality Act ("CEQA"), pursuant to Sections 15060(c)(2) and 15060(c)(3) of the CEQA Guidelines (California Code of Regulations, Title 14, Chapter 3) because the ordinance relates to implementation of provisions of the Subdivision Map Act and is not a project as defined in Section 15378 of the CEQA Guidelines and will not result in a direct or reasonably foreseeable indirect physical change in the environment.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF VICTORVILLE, CALIFORNIA, DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. RECITALS.

The recitals set forth above are true and correct, and are hereby incorporated in their entirety by this reference.

SECTION 2. SECTION 17.64.060 OF CHAPTER 17.64 OF TITLE 17 OF THE VICTORVILLE MUNICIPAL CODE IS HEREBY AMENDED IN ITS ENTIRETY TO READ AS FOLLOWS:

17.64.060 - Improvement Security.

- (a) The improvement agreement referred to in Section 17.64.050 of this Chapter shall be secured by one of the following:
- (1) A bond or bonds by one or more duly authorized corporate sureties substantially in the form prescribed by the Subdivision Map Act;

- (2) A deposit either with the City or a responsible escrow agent or trust company approved by the City of cash or negotiable bonds of the kind approved for securing deposits of its public moneys;
 - (3) An irrevocable instrument of credit from one or more responsible financial institutions regulated by federal or state government and pledging that the funds are on deposit and guaranteed for payment on demand by the City;
 - (4) Secured recorded agreements, or acceptable "will serve letters" as approved by the City Engineer, as well as bonds or sureties for utility related improvements.
- (b) The improvement security shall be provided in the amount of:
- (1) One hundred percent (100 %) of the total estimated cost of the improvement or act to be performed conditioned upon the faithful performance of the act or agreement;
 - (2) Fifty percent (50 %) of the total estimated cost of the improvement or act to be performed securing payment to the contractor, the subcontractors and to the persons furnishing labor, materials or equipment to them for the improvement or the performance of the required act;
 - (3) The amount determined by the City Council necessary to guarantee or warranty the work for a period of one year following completion or acceptance thereof against any defective work or labor done or defective materials furnished;
 - (4) If the improvement security is other than a bond or bonds furnished by a duly authorized corporate surety, an additional amount shall be included as directed by the City Council as necessary to cover the cost and reasonable expenses and fees, including reasonable attorneys' fees which may be incurred by the City in successfully enforcing the obligations secured. The improvement security shall also secure the faithful performance of any changes or alterations in the work to the extent that such changes or alterations do not exceed ten percent (10 %) of the original estimated cost of the improvement.
- (c) In the event the required subdivision improvements are financed and installed pursuant to special assessment proceedings, the Subdivider may apply to the City Council for a reduction in the amount of the improvement security required under this Chapter up to an amount corresponding to the amount of faithful performance and labor and material bonds required by the special assessment act being used. The City Council may grant such reduction if it finds that such bonds have been, in fact, provided and that the obligation secured thereby is substantially equivalent to that required by this Title.

SECTION 3. A NEW SECTION 17.64.065 OF CHAPTER 17.64 OF TITLE 17 OF THE VICTORVILLE MUNICIPAL CODE IS HEREBY ADDED TO READ AS FOLLOWS:

17.64.065 - Lien Agreements as Security.

- (a) The Subdivider/property owner ("Subdivider") may, in lieu of posting a security described in Section 17.64.060(a) of this Chapter, enter into an agreement with the City to construct in the future the public portions of the subdivision improvements required by the map conditions of approval and/or Section 17.64.010 of this Chapter, as determined by the City Engineer, including, but not limited to: master planned or "missing link" streets, drainage and sewer improvements, community facilities, off-site improvements, fire access, fire flow and traffic signals (hereinafter "Required Improvements") and securing such performance by granting the City a lien on the real property to be divided. Such agreements shall be known as "Lien Agreements." The use of Lien Agreements shall only be allowed if all requirements in Section 17.64.065 of this Chapter are satisfied.
- (b) Government Code section 66499(a)(4) authorizes the City to enter into Lien Agreements if the City Council finds that it would not be in the public interest to require the installation of the Required Improvements sooner than two (2) years after the recordation of the map.
- (c) Where the City Council finds it would not be in the public interest to require the installation of the Required Improvements sooner than two (2) years after recordation of the map, the Subdivider may execute a Lien Agreement with the City at the time the Subdivider enters into the improvement agreement specified in Section 17.64.050 ("Subdivision Improvement Agreement").
- (d) At the sole discretion of the City, a Lien Agreement may be used to substitute an existing security furnished under Section 17.64.060(a) for Required Improvements under a previously-executed Subdivision Improvement Agreement, if: (i) no activity for the subdivision has transpired; (ii) no inspections have occurred; (iii) no permits for construction of improvements have been issued within one (1) year of the recordation of the subdivision map; and (iv) upon a finding by the City Council that it would not be in the public interest to require the installation of the Required Improvements sooner than two (2) years after the recordation of the map.
 - (1) The City will not accept a Lien Agreement from any Subdivider, either at the time of execution of the Subdivision Improvement Agreement, or as a substitute for existing security, if: (i) any individual lots have been sold; (ii) any construction permits, including but not limited to any grading or building permits, have been issued on any of the property; or (iii) construction of any of the Required Improvements has begun.

- (2) Notwithstanding the provisions of Subdivision 17.64.065(d)(1) above, the City may accept a Lien Agreement from a Subdivider as a substitute for an existing security if grading has commenced on the land divided, so long as the grading is in strict accordance with a valid grading permit and all the following conditions are met:
- A. There is no need for the City to construct the Required Improvements if the Subdivider's project is abandoned or delayed for any period of time;
 - B. The grading has no effect on the use, operation and maintenance of existing streets or highways, public or private;
 - C. The grading has not caused the modification or closure of any public access points, existing streets or highways, public or private;
 - D. Additional drainage improvements and/or erosion controls are not necessary and/or installed in the road right-of-way due to the grading;
 - E. Delay of the construction of the Subdivider's Required Improvements do not affect or delay the improvements of an adjacent Subdivider who has already commenced work on his/her Required Improvements;
 - F. The completion of any public improvements are not required by the City's general plan circulation element, master plan of drainage, master sewer plan or master water plan or for any other reason for the purposes of preserving public health, safety or welfare;
 - G. The Subdivider provides a separate security as specified in Section 17.64.060(a)(2) above, for the maintenance of the graded land, including without limitation, dust control, erosion control, fencing, and any other maintenance as required by the City; and
 - H. In the case that any individual lots have been sold, at the discretion of the City and only after the City has performed a comprehensive review of the development (which may include approval of a construction phasing plan); completion of Required Improvements to serve the individual lots as determined by the City Engineer; and other requirements and conditions to be met prior to acceptance of the Lien Agreement.
- (3) Lien Agreements used to substitute for existing security shall be recorded against all lots that have not passed a final inspection and for which all required associated improvements, as determined by the City Engineer, have not been completed ("Undeveloped Lots"). Such Lien Agreements shall also meet all of the requirements set forth in Sections 17.64.065(e) through 17.64.065(m), below.
- (e) Lien Agreements, including those used to substitute for existing security under Section 17.64.065(d), above, shall:

- (1) Be allowed only where the Subdivider provides a title insurance policy and title report from a title company approved by the City documenting that: (i) the Subdivider is the record owner of the entire property to be subdivided (or in the case of a substitute security, documenting that the Subdivider is the record owner of all Undeveloped Lots) against which the Lien Agreement is to be recorded; and (ii) such aforementioned property is not encumbered by any mortgages, deeds of trust, or liens. The title insurance policy and title report shall be issued forty-five (45) days prior to the execution of the Lien Agreement.
- (2) Be in a form acceptable to and approved by the City Council, the City Attorney and the City's Risk Manager.
- (3) Be executed by the mayor on behalf of the City, and by all current record owner(s) of the property to be divided (or in the case of a substitute security, all owners of the Undeveloped Lots), as evidenced by the title insurance policy and report specified in Section 17.64.065(e)(1), above.
- (4) Be used only to secure future improvements that would be required for any final map and/or when a Subdivider would be required by Chapter 17.64 to construct, or agree to construct, the Required Improvements for a subdivision.
- (5) Contain a detailed itemization of the Required Improvements (or in the case of a substitute security, any remaining Required Improvements) and an engineer's estimate of costs to construct same, as approved by the City Engineer, and specify that the Subdivider's obligation, and that of Subdivider's successors in interest, extends to the actual cost of construction of the aforementioned improvements if such costs exceed the estimate.
- (6) Be allowed if the City Engineer determines the estimated costs to construct the Required Improvements (or in the case of substitute security, the remaining Required Improvements) do not exceed the fair market value of the real property against which the Lien Agreement is to be recorded, based on an appraisal conducted by an independent, licensed real estate appraiser not more than sixty (60) days prior to the date any Lien Agreement is entered. Subdivider shall furnish such appraisal to the City at least forty-five (45) days prior to the date any Lien Agreement is entered.
- (7) Contain a legal description of the entire real property against which the Lien Agreement is being recorded as security for the Required Improvements (or in the case of substitute security, as security for the remaining Required Improvements).
- (8) Be recorded with the San Bernardino County Recorder against the entire property to be divided by the map (or in the case of substitute security, against

all Undeveloped Lots). The recorded Lien Agreement shall be indexed in the Grantor index to the names of all record owners of the real property as specified on the map and/or in Section 17.64.065(e)(1) above, and in the Grantee index to the City.

- (9) Be approved concurrently with the approval of the final map and the Subdivision Improvement Agreement executed by Subdivider, with a note of the Lien Agreement's existence placed on the map, except where the Lien Agreement is being used as substitute security after final map approval under Section 17.64.065(d) above, in which case the Lien Agreement shall be signed and acknowledged by all parties having any record title interest in the property against which the Lien Agreement is being recorded, as prescribed by Government Code section 66436, consenting to the subordination of their interests to the Lien Agreement.
- (10) Require the Subdivider to pay an application fee to the City for the processing of the Lien Agreement in an amount established and revised from time-to-time by resolution of the City Council and included in a schedule of fees.
- (f) From the time of recordation of the Lien Agreement, a lien shall attach to the real property described therein and shall have the priority of a judgment lien in an amount necessary to complete the Required Improvements (or in the case of substitute security, the remaining Required Improvements) and under no circumstances shall the City be obligated to agree to subordinate the lien.
- (g) The Lien Agreement shall provide that:
 - (1) the Subdivider must deliver acceptable replacement security to the City in the types and amounts specified in Sections 17.64.060(a) and (b) of this Chapter and approved by the City Council in place of the Lien Agreement and commence construction of the Required Improvements and any other improvements imposed as map conditions of approval (hereinafter "Other Improvements") within three (3) years following recordation of the map; or
 - (2) In the case of a substitute security, the Subdivider must deliver acceptable replacement security to the City (in the types and amounts specified in Sections 17.64.060(a) and (b) of this Chapter and approved by the City Council) in place of the Lien Agreement and commence construction of the remaining Required Improvements and Other Improvements within three (3) years following recordation of the Lien Agreement; and
 - (3) Once the Lien Agreement is recorded, the City shall not issue any development or construction permits for the property subject to the Lien Agreement until the aforementioned delivery of acceptable replacement security to the City has occurred.

- (h) The time for delivery of acceptable replacement security to the City and commencement of construction as specified in Sections 17.64.065(g)(1) and (2) above, may be extended once for an additional three (3) year period as approved by the City Engineer or his designee. A Lien Agreement may therefore only be in effect for a total of six (6) years. In order to receive an extension of time under this Subsection (h), both of the following conditions must be met:
- (1) The Subdivider shall provide a title insurance policy and title report from a title company approved by the City documenting that: (i) the Subdivider is the record owner of the entire subdivided property against which the Lien Agreement is currently recorded as security (or in the case of a substitute security, documenting that the Subdivider is the record owner of all Undeveloped Lots against which the Lien Agreement has been recorded); and (ii) such subdivided property or Undeveloped Lots are not encumbered by any mortgages, deeds of trust, or liens. The title insurance policy and title report shall be issued forty-five (45) days prior to the date the extension of time is requested; and
 - (2) The City Engineer determines that the estimated costs for the Required Improvements (or in the case of substitute security, the remaining Required Improvements) do not exceed the fair market value of the real property against which the Lien Agreement is recorded, based on an appraisal conducted by an independent, licensed real estate appraiser not more than sixty (60) days prior to the date an extension of time is requested. Subdivider shall furnish such appraisal to the City at least forty-five (45) days prior to the date the extension of time is requested.
- (i) The Lien Agreement shall specify that no individual lots shall be sold while the Lien Agreement is in effect. However, fee title to the entire property encumbered by the Lien Agreement or to all lots designated on any individual final map which is encumbered by the Lien Agreement, may be sold in the aggregate to a single purchaser, provided that the proposed purchaser must, prior to or concurrent with assuming title to the property, either;
- (1) Execute a new Lien Agreement in a form acceptable to the City which will encumber the property to be conveyed, specifying the respective obligations of the owners of the property subject to the original and new Lien Agreement.
 - (2) Deliver acceptable replacement security to the City as set forth in Section 17.65.060(g) as a condition to development of the property conveyed.
- (j) The Subdivider shall also be required to provide to the City a cash deposit per recorded subdivision tract map in an amount established and revised from time-to-time by resolution of the City Council and included in a schedule of fees, regardless of whether the project was subdivided by a single tract map or by multiple tract map

recordings through phasing, for the purpose of reverting the property to acreage if the Subdivider breaches or is in default of the terms of the Lien Agreement. Reversion to acreage and the cash deposit by reason of default or breach of the Lien Agreement shall only be applicable to properties where none of the Required Improvements for which securities were provided have been installed and/or have been constructed. Any unused portion of the cash deposit shall be refunded to the Subdivider who made such cash deposit, following completion of the reversion to acreage. If the cost of the reversion to acreage exceeds the amount deposited per recorded subdivision tract map, the Subdivider shall pay such additional costs to the City prior to recordation of the reversion to acreage map.

- (k) The Lien Agreement shall only be released: (i) upon delivery to the City of acceptable replacement security for such Lien Agreement prior to construction and issuance of permits as set forth in Section 17.64.065(g) above; (ii) to facilitate a sale as specified in Section 17.64.065(i) above; or (iii) upon recordation of a reversion to acreage map.
- (l) Under no circumstances shall any Lien Agreement compel the City to construct the Required Improvements, any remaining Required Improvements and/or Other Improvements.
- (m) Sunset Provision. Section 17.64.065 shall remain in effect only until June 15, 2023, and as of that date is repealed, unless a later-enacted ordinance, that becomes effective on or before June 15, 2023, deletes or extends that date. In the event Section 17.64.065 sunsets, any Lien Agreements entered into prior to the sunset date shall remain subject to the provisions of Section 17.64.065 as it existed at the time such Lien Agreements were entered, and such provisions shall continue to govern any such Lien Agreements until the date they are released by the City.

SECTION 4. SEVERABILITY.

The City Council declares that, should any provision, section, paragraph, sentence or word of this Ordinance be rendered or declared invalid by any final court action in a court of competent jurisdiction or by reason of any preemptive legislation, the remaining provisions, sections, paragraphs, sentences or words of this Ordinance as hereby adopted shall remain in full force and effect.

SECTION 5. CEQA EXEMPTION.

The City Council finds that the adoption of this ordinance is not subject to the California Environmental Quality Act ("CEQA"), pursuant to Sections 15060(c)(2) and 15060(c)(3) of the CEQA Guidelines (California Code of Regulations, Title 14, Chapter 3) because

the ordinance relates to implementation of provisions of the Subdivision Map Act and is not a project as defined in Section 15378 of the CEQA Guidelines and will not result in a direct or reasonably foreseeable indirect physical change in the environment.

SECTION 6. EFFECTIVE DATE.

This Ordinance shall take effect thirty (30) days after its final passage.

SECTION 7. REPEAL OF CONFLICTING PROVISIONS.

All the provisions of the Victorville Municipal Code as heretofore adopted by the City Council of the City Victorville that are in conflict with the provisions of this Ordinance are hereby repealed.

SECTION 8. CERTIFICATION.

The City Clerk of the City of Victorville is hereby directed to certify to the passage and adoption of this Ordinance and to cause it to be published as required by law.

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