

**TOWN OF  
APPLE VALLEY, CALIFORNIA**

**AGENDA MATTER**

**Subject Item:**

**AMENDMENT NO. 1 TO THE HAPPY TRAILS VILLAS OWNER PARTICIPATION AGREEMENT**

**Background:**

The Owner Participation Agreement (OPA) between the Town of Apple Valley and AVHTV, LP was approved by Council on June 22, 2010, in order to acquire and complete improvements required for an affordable housing development consisting of a 34-unit, for-sale, condominium project commonly known as Happy Trails Villas. The development is located on the N/W/C of Highway 18 and Kiowa Road. Because of the changes from rental to a for-sale product, and changing market conditions, staff determined that certain modifications and an amendment to the agreement are necessary to ensure the project may be implemented smoothly and accomplish its stated goal.

**Summary Statement:**

The proposed Amendment No. 1, although necessary, does not substantially change the structure of the agreement. Revisions are necessary to ensure that the Owner will be able to acquire financing for the project and to ensure that the units will be marketable. The proposed changes are summarized below:

- (1) The OPA and Regulatory agreement shall be subordinate to the construction loan, and, if approved by the Town Manager, may be subordinated to a Permanent Loan for the Project. This is necessary under today's market conditions since all local lenders contacted required subordination as part of their underwriting criteria. The request is not unusual and there is an established precedence for this type of subordination, as evidenced in the OPA executed for the Apple Valley Commons development.
- (2) The Town Loan shall be conditionally forgiven, in equal proportionate shares, as determined based on the total number of Units, upon the sale of a Unit. The Owner has provided staff with documentation that it would be infeasible to pass all of the Town Loan as a silent second to the home buyer. Regardless of the amount of the silent second, the Owner will be released from the Town Loan by an amount equal to 1/34 of the Town loan upon sale of each Unit.

**Recommended Action:**

That the Town Council approve the amendment to the Happy Trails Villas Owner Participation Agreement between the Town of Apple Valley and AVHTV, LP; and authorize the Town Manager to execute the agreement on behalf of the Town and approve any minor non-substantive changes.

Proposed by Economic Development & Housing Div. Item Number \_\_\_\_\_

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

**Happy Trails Villas (continued)**  
**Page 2**

- (3) The remaining Town funds shall be used for the development of the project. The amendment will allow the funds to also be utilized for down payment assistance to qualified households.
- (4) The Town shall modify its covenants and loan documents to conform with the requirements set by FHA, CalHFA, Fannie Mae and other forms of homeowner financing acceptable to the Town. This is necessary in order for home buyers to obtain first mortgage financing from these lenders.
- (5) The amendment provides clarification language regarding the Affordability Covenant, which shall include provisions to allow the sale of a Unit by the initial purchaser to a subsequent purchaser that is not a Qualified Household, pursuant to payment to the Town of an amount sufficient for the Town to recapture its investment in securing the affordability of the Unit.

Approving the proposed Amendment No. 1 will permit the developer to obtain construction financing and proceed with completing all improvements to the project.

A copy of a letter addressed to Council from AVHTV is attached for your information.

Staff recommends adoption of the form motion.

RECORDING REQUESTED BY AND  
WHEN RECORDED MAIL TO:

Town of Apple  
14955 Dale Evans Parkway  
Apple Valley, CA 92307

Attention: Town Manager

EXEMPT FROM RECORDING FEE PER  
GOVERNMENT CODE SECTION 27383

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(Space above for Recorder's Use)

## **TOWN OF APPLE VALLEY**

### **FIRST AMENDMENT TO OWNER PARTICIPATION AGREEMENT (Happy Trails Villas)**

This FIRST AMENDMENT to OWNER PARTICIPATION AGREEMENT (Happy Trails Villas) ("First Amendment"), is reference dated as of November 9, 2010, and is entered into by and between the Town of Apple Valley, a municipal corporation ("Town"), and AVHTV, LP, a California limited partnership ("Owner"). The Town and the Owner are sometimes referred to herein individually as "Party" and collectively as "the Parties". The Town and Owner enter into this First Amendment with reference to the following recited facts (each a "Recital"):

#### **RECITALS**

WHEREAS, the Town and Owner entered into that certain Owner Participation Agreement (Happy Trails Villas) reference dated June 22, 2010 (the "OPA") in order for the Owner to acquire and complete improvements required for an affordable housing development consisting of a 34-unit for-sale condominium project on certain real property commonly known as Happy Trails Villas, generally located at Highway 18 and Kiowa Road in the Town, and more specifically described in the OPA, (the "Property") and for the Town to provide funding assistance therefor; and

WHEREAS, the Town entered into the OPA to address the redevelopment of abandoned residential properties and to create opportunities for affordable housing; and

WHEREAS, the Parties now desire to amend the OPA in order to make certain revisions required to ensure that the Owner will be able to acquire financing necessary for the Project, as that term is defined in the OPA, and to ensure that the units in the Project will be marketable. Such revisions include changes to allow the remaining portion of the Town Loan to be utilized for the provision of down payment assistance, as further set forth herein.

WHEREAS, consideration of this First Amendment was contemplated in the OPA.

WHEREAS, the development of the Property pursuant to the OPA, as amended by this First Amendment, and the fulfillment generally of the OPA, as amended by this First Amendment, are in the vital and the best interests of the Town and the health, safety, and welfare of its residents and in accord with the provisions of the applicable federal, state and local laws.

#### AGREEMENT

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

1. Incorporation of Recitals. The Recitals set forth above are true and correct and are incorporated into this First Amendment by this reference.
2. Effective Date. This First Amendment is dated as of November 9, 2010 for reference purposes only. This First Amendment shall not become effective or operative until the first date on which all of the following are true (“Effective Date of First Amendment”): this First Amendment is approved by the Owner and executed by the authorized representative of the Owner and delivered to the Town, and this First Amendment is executed by the Town Manager, after any required public hearings, and delivered to the Owner.
3. Defined Terms. All terms, phrases and words indicated to be defined terms by initial capitalization that are not specifically defined in this First 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 this First Amendment, no default exists under the OPA and the OPA is in full force and effect. Except as expressly amended by this First 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 First Amendment, shall be and remain in full force and effect.

5. Amendments to the OPA.

5.1 Amendment to Section 1.1.3 of OPA. Section 1.1.3 of the OPA, which provides the definition of the term “Affordable Housing Cost”, is hereby amended to include the following as the last sentence to this section:

Notwithstanding the foregoing reference to the term “sales price”, and subject to the foregoing rules and regulations, an Affordable Housing Cost for the applicable Qualified Household may be achieved through the provision of Down Payment Assistance.

5.2 Amendment to Section 1.1.34 of OPA. Section 1.1.34 of the OPA, which provides the definition of the term “Regulatory Agreement”, is hereby amended to include the following:

The Regulatory Agreement shall be subordinated to the Construction Loan, and, if approved by the Town Manager, may be subordinated to any Permanent Loan for the Project. Subordination to the Permanent Loan shall only be permitted if the Owner is otherwise unable to obtain long term financing for the Project on commercially reasonable terms, and the Owner provides evidence of such inability to the Town. The Town may require such reasonable provisions in any subordination agreement as the Town deems necessary or appropriate to protect its interests.

5.3 Addition of Section 1.1.48 to the OPA. Section 1.1.48 is hereby added to the Definitions section of the OPA and shall read as follows:

1.1.48 **“Down Payment Assistance”** means any assistance provided to a Qualified Household to pay for closing costs on a Unit, or to cover any gap between the sales price of a Unit and an Affordable Housing Cost for the relevant Qualified Household, whether provided through Town funds, Owner funds or any other funding source.

5.4 Amendment to Section 2.1, Paragraph 2 of the OPA. Section 2.1, Paragraph 2, of the OPA is hereby amended to include the following as the last sentence of said paragraph:

The provisions of the NSP, the Notice and the Substantial Amendment are incorporated into this Agreement by reference, as though fully set forth herein.

5.5 Amendment to Section 2.2.1, Paragraph 1 of the OPA. Section 2.2.1, Paragraph 1 of the OPA 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 eighteen (18) of the Units within the Project as HOME Low and Moderate Income Units. 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 eighteen (18) 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 the HOME Low and Moderate Income Units, as set forth in the HOME regulations, or shall be made available at such Affordable Housing Cost through the provision of Down Payment Assistance.

5.6 Amendment to Section 2.4 of the OPA. Section 2.4 of the OPA is hereby amended to include the following as a new second paragraph:

In order to enable the Owner to obtain a Construction Loan on commercially reasonable terms and to facilitate completion of the Project, this Agreement shall be subordinated to the Construction Loan, and, if approved by the Town Manager, may be subordinated to any Permanent Loan for the Project. Subordination to the Permanent Loan shall only be permitted if the Owner is otherwise unable to obtain long term financing for the Project on commercially reasonable terms, and the Owner provides evidence of such inability to the Town. The Town may require such reasonable provisions in any subordination agreement as the Town deems necessary or appropriate to protect its interests.

5.7 Amendment to Section 3.2.3(c) of the OPA. Section 3.2.3 (c) of the OPA is hereby deleted in its entirety and replaced with the following:

(c) Town Loan – Terms of Reconveyance. The Promissory Note and Deed of Trust shall provide that the Town Loan shall be conditionally forgiven, in equal proportionate shares, as determined based on the total number of Units, upon the sale of a Unit, provided that no Event of Default has occurred as defined under the Town Loan Documents. The Town shall, upon request, provide to the Owner a partial reconveyance of the Town Loan in the amount specified in the foregoing sentence, upon each sale of a Unit.

5.8 Amendment to Section 3.2.3(d) of the OPA. Section 3.2.3 (d) of the OPA is hereby deleted, in its entirety, and replaced with the following:

(d) Silent Second Deed of Trust for Town Funded Down Payment Assistance. If any Down Payment Assistance is provided to a Qualified Household for purchase of a Unit at an Affordable Housing Cost from the Town Loan (including funds derived from use of the Town Loan under this Agreement), the amount of the Down Payment Assistance shall be treated as a silent second granted by the Town to the purchaser of the Unit, and memorialized pursuant to a deed of trust in favor of the Town to the purchaser of the Unit, and recorded against said Unit (“Silent Second Deed of Trust”). The Silent Second Deed of Trust shall be non-recourse debt secured only by the Unit and subordinate to the first mortgage financing on the Unit, and shall provide that the deed may be assigned to subsequent Qualified Households purchasing the subject Unit. The Silent Second

Deed of Trust and the Affordability Covenant shall include restrictions, to be agreed upon by the Parties, on the Qualified Household's ability to refinance the Unit and/or to change the terms of the first mortgage.

5.9 Amendment to Section 3.3 of the OPA. The last sentence of Section 3.3 of the OPA, related to disbursement of the Town Loan, is hereby deleted, in its entirety, and replaced with the following:

The Town Loan shall be provided only for the costs attributable to the acquisition and Project development costs in accordance with the Schedule of Performance, and/or for the provision of Down Payment Assistance.

5.10 Amendment to Section 3.8 of the OPA. Section 3.8 of the OPA, related to requests for disbursement of the Town Loan, is hereby amended to include the following as the last sentence of said section:

If the request is for disbursement of a portion of the Town Loan to be utilized for purposes of Down Payment Assistance, the Owner shall provide a written request to the Town for disbursement for such purpose, including all materials related to such request reasonably required by the Town.

5.11 Addition of Section 3.9 to the OPA. Section 3.9 is hereby added to the OPA and shall read as follows:

**3.9 Income in Excess of Project Costs.** The Parties acknowledge and agree that if, through the provision of Down Payment Assistance obtained from alternative sources, Owner generates funds from the sale of the Units in excess of the Project Costs, including payment of the Developer Fee, ("Excess Funds") such funds shall be utilized as follows: (1) to provide for additional construction defect and Project maintenance reserves, in an amount to be approved by the Town; (2) to include additional amenities or improvements as part of the Project, including energy efficiency improvements, subject to prior written approval of the proposed improvements by the Town; and/or (3) to provide additional Down Payment Assistance to Qualified Households. Any Excess Funds remaining and not used for the foregoing purposes shall be returned to the Town.

5.12 Amendment to Section 4.2.2 of the OPA. Section 4.2.2 of the OPA is deleted, in its entirety, and replaced with the following paragraph:



4.2.2 The Town and the Owner shall agree upon the terms of an Affordability Covenant to be recorded against each Unit, specifying the affordability restrictions applicable to the relevant Unit. The Affordability Covenant shall contain substantially the terms contained in the Regulatory Agreement, but shall also include more specific information regarding the specific affordability requirements pertaining to the Unit, as well as any other provisions agreed upon by the Parties. Further, the Affordability Covenant shall include provisions to allow the sale of a Unit by the initial purchaser to a subsequent purchaser that is not a Qualified Household, pursuant to payment to the Town of an amount sufficient for the Town to recapture its investment in securing the affordability of the Unit, as determined by the Town.

The Affordability Covenant may, if required by the first mortgage financing to be provided to a Qualified Household for purchase of a Unit, be subordinated to such first mortgage financing pursuant to a subordination agreement. The Town shall have the right to review and approve any such subordination agreement as to form, and shall have the right to include such reasonable provisions in the subordination agreement as the Town deems necessary or appropriate to protect its interests. The Town's consent to any such subordination agreement shall not be unreasonably withheld, and may be exercised by the Town Manager or his designee. In addition, the Town shall allow the Affordability Covenant, Owner Participation Agreement, Regulatory Agreement and loan documents to be modified, subject to the Town's review and consent, as may be required to conform to the lending requirements of FHA, CalHFA, Fannie Mae and other forms of financing acceptable to the Town.

6. Authority to Execute Documents to Effectuate Purpose of this First 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 First Amendment.

7. Warranty Against Payment of Consideration for First Amendment. The Owner warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this First Amendment. Third parties, for the purposes of this Section 7, 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.

8. Acceptance of First Amendment by the Owner. The Owner shall acknowledge its acceptance of this First Amendment by delivering to the Town three (3) original counterpart executed copies of this First Amendment signed by the authorized representative of Owner.
9. Counterpart Originals. This First Amendment may be executed by the Town and the Owner in multiple counterparts, all of which together shall constitute a single agreement.
10. No Third-Party Beneficiaries. None of the terms or provisions of this First 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 First Amendment.
11. Governing Law. The Town and the Owner acknowledge and agree that this First 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 First 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.
12. Partial Invalidity. If any term or provision or portion thereof of this First Amendment or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this First 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 First Amendment shall be valid and enforced to the fullest extent permitted by law.
13. Waivers. No waiver of any breach of any covenant or provision contained in this First 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 First Amendment.
14. Construction. Headings at the beginning of each section of this First Amendment are solely for the convenience of reference of the Town and the Owner and are not a part of this First Amendment. Whenever required by the context of this First Amendment, the singular shall include the plural and the masculine shall include the feminine and vice versa. This First 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 First Amendment. Unless otherwise indicated, all references to sections are to this First Amendment. If the date on which the Town or Owner is required to take any action pursuant to the terms of this First Amendment is not a business day, the action shall be taken on the next succeeding business day.

**SIGNATURE PAGE  
TO  
FIRST AMENDMENT  
TO  
OWNER PARTICIPATION AGREEMENT  
(Happy Trails Villas)**

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

TOWN:

TOWN OF APPLE VALLEY  
a municipal corporation

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

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

Its: Town Manager

ATTEST:

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

APPROVED AS TO LEGAL FORM:

BEST BEST & KRIEGER LLP

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

(Signatures continued on following page)

**SIGNATURE PAGE  
TO  
FIRST AMENDMENT  
TO  
OWNER PARTICIPATION AGREEMENT  
(Happy Trails Villas)**

(Second of Two Pages)

OWNER:

AVHTV, LP,  
a California limited partnership

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

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

Name: \_\_\_\_\_

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

## AVHTV, LP

125 South Bowling Green Way, Los Angeles, California 90049  
Phone: 310.927.3675

*Via Email: [ewong@applevalley.org](mailto:ewong@applevalley.org)*

November 2, 2010

Mayor and Council Members  
Town of Apple Valley  
14955 Dale Evans Parkway  
Apple Valley, CA 92307

Re: Happy Trails Villas – AVHTV Loan Forgiveness Election

Dear Mayor and Council Members:

AVHTV wishes to explain why market conditions require the Town to forgive a portion of the Town's financing pursuant to Section 3.2.3(d) of the Owner Participation Agreement (OPA).

The OPA provides that approximately \$61,765 of Town soft second financing shall be assumed by each homebuyer (and \$2,100,000 for the entire project) unless market conditions don't allow such an assumption in which case the Town will forgive the necessary portion of the Town's financing to make viable both the homebuyer's purchase and AVHTV's sale. (Section 3.2.3(c) and 3.2.3(d)) Market conditions will not permit financing – market rate and/or soft financing - in excess of appraised value, we expect the townhouses to appraise for \$145,000 on average, and AVHTV and the Town's development plan requires that each homebuyer obtain approximately \$130,000 of market rate financing. As a result, the average homebuyer only can assume approximately \$15,000 of Town financing and the Town will have to forgive approximately \$45,000 per homebuyer and \$1,600,000 per project.

We have documented market conditions by providing Town staff with lender underwriting criteria, appraisals, and in person testimonials from local lenders.

Thank you for your consideration and we look forward to moving forward with the construction of this project.

Cordially,



Barry Ephraim  
AVHTV, LP



AOF/ Golden State Community Development Corp.,  
Managing General Partner,  
Raman Nayar, President

Cc: Frank Williams