



# TOWN OF APPLE VALLEY

## TOWN COUNCIL STAFF REPORT

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**To:** Honorable Mayor and Town Council **Date:** February 13, 2018

**From:** Brad Miller, Town Engineer **Item No:** 9  
Engineering Department

**Subject:** ADOPT ORDINANCE NO. 496 – AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY, CALIFORNIA, TO AMEND TITLE 9 DEVELOPMENT CODE BY AMENDING SECTION 9.71.140 OF CHAPTER 9.71 RELATING TO THE TOWN'S ACCEPTANCE OF LIEN AGREEMENTS AS SECURITIES FOR SUBDIVISION IMPROVEMENT AGREEMENTS

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

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### RECOMMENDED ACTION:

Adopt Ordinance No. 496.

### SUMMARY:

At its January 23, 2018 meeting, the Town Council reviewed and introduced Ordinance No. 496 which amends the Development Code by modifying Chapter 9.71 relating to the Town's acceptance of lien agreements as securities for subdivision improvement agreements.

As part of the requirement to adopt any new ordinance, Ordinance No. 496 has been scheduled for adoption at the February 13, 2018 Town Council meeting.

### FISCAL IMPACT:

Not Applicable

### ATTACHMENT:

Ordinance No. 496

**ORDINANCE NO. 496**

**AN ORDINANCE OF THE TOWN OF APPLE VALLEY  
AMENDING SECTION 9.71.140 OF CHAPTER 9.71 OF THE  
TOWN OF APPLE VALLEY MUNICIPAL CODE RELATING TO  
THE TOWN'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 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**, despite some recovery from the Great Recession in 2008, subdividers are still experiencing difficulty obtaining surety bonds, stalling development for an indeterminate period of time; and

**WHEREAS**, the revisions to the Town's Code proposed by this Ordinance would permit the Town to accept lien agreements in lieu of traditional securities only when the Town 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 this Ordinance further only permit such lien agreements to remain in place initially for a period of three (3) years (with 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 this Ordinance proposes to relax certain Town rules to provide relief to subdividers/developers at this time, it contains an automatic sunset provision to ensure the Town does not continue to accept lien agreements in perpetuity if such agreements do not serve their intended purpose and/or when the economic conditions necessitating 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 TOWN COUNCIL OF THE TOWN OF APPLE VALLEY DOES ORDAIN AS FOLLOWS:**

**SECTION 1.** Subdivision d is hereby added to Section 9.71.140.B.5 of Chapter 9.71 of the Town of Apple Valley Municipal Code to read in full as set forth below:

"d. Lien Agreements in compliance with the following terms:

- 1) The Subdivider/property owner ("Subdivider") may enter into an agreement with the Town to construct in the future the public portions of the subdivision improvements required by the map conditions of approval, as determined by the Town 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 Town 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 this subdivision B.5.d of this Section 9.71.140 are satisfied.
- 2) California Government Code section 66499(a)(4) authorizes the Town to enter into Lien Agreements if the Town 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.
- 3) Where the Town 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 Town at the time the Subdivider enters into the improvement agreement specified in Section 9.71.140.B.3 ("Subdivision Improvement Agreement") of this Chapter 9.71.
- 4) At the sole discretion of the Town, a Lien Agreement may be used to substitute an existing security furnished under Section 9.71.140.B.5 for Required Improvements under a previously-executed Subdivision Improvement Agreement, if: (1) no activity for the subdivision has transpired; (2) no inspections have occurred; (3) no permits for construction of improvements have been issued within one year of the recordation of the subdivision map; and (4) upon a finding by the Town Council 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 the map.
  - i. The Town 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: (1) any individual lots have been sold; (2) any construction permits, including but not limited to any grading or building permits, have been issued on any of the property; or (3) construction of any of the Required Improvements has begun.
  - ii. Notwithstanding the provisions of Subdivision 140.B.5.d.4.i above, the Town 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: (1) there is no need for the Town to construct the Required Improvements if the Subdivider's project is

abandoned or delayed for any period of time; (2) the grading has no effect on the use, operation and maintenance of existing streets or highways, public or private; (3) the grading has not caused the modification or closure of any public access points, existing streets or highways, public or private; (4) additional drainage improvements and/or erosion controls are not necessary and/or installed in the road right-of-way due to the grading; (5) 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; (6) the completion of any public improvements are not required by the Town'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; (7) the Subdivider provides a separate security as specified in Section 9.71.140.B.5 above, for the maintenance of the graded land, including without limitation, dust control, erosion control, fencing, and any other maintenance as required by the Town; and (8) in the case that any individual lots have been sold, at the discretion of the Town and only after the Town 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 Town Engineer and other requirements and conditions to be met prior to acceptance of the Lien Agreement.

- iii. 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 Town Engineer, have not been completed ("Undeveloped Lots"). Such Lien Agreements shall also meet all of the requirements set forth in Sections 9.71.140.B.5.d.5 through 9.71.140.B.5.d.13 below.
- 5) Lien Agreements, including those used to substitute for existing security under Section 9.71.140.B.5.d.4, above, shall:
- i. Be allowed only where the Subdivider provides a title insurance policy and title report from a title company approved by the Town documenting that: (1) 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 (2) 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.
  - ii. Be in a form acceptable to and approved by the Town Manager and the Town Attorney.

- iii. Be executed by the Mayor or his or her designee on behalf of the Town, 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 9.71.140.B.5.d.5.i, above.
- iv. 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 9.71 to construct, or agree to construct, the Required Improvements for a subdivision.
- v. 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 Town 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.
- vi. Be allowed if the Town 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 Town at least forty-five (45) days prior to the date any Lien Agreement is entered.
- vii. 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).
- viii. 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 9.71.140.B.5.d.5.i above, and in the Grantee index to the Town.
- ix. 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 9.71.140.B.5.d.4 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 California Government Code section 66436, consenting to the subordination of their interests to the Lien Agreement.

- x. Require the Subdivider to pay an application fee to the Town for the processing of the Lien Agreement in an amount established and revised from time-to-time by resolution of the Town Council and included in a schedule of fees.
  - xi. Be recorded concurrently with the Map.
- 6) 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 Town be obligated to agree to subordinate the lien.
- 7) The Lien Agreement shall provide that:
- i. The Subdivider must deliver acceptable replacement security to the Town in the types and amounts specified in Sections 9.71.140.B.5.a. through 9.71.140.B.5.c. and Section 9.71.140.B.7 and approved by the Town 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
  - ii. In the case of a substitute security, the Subdivider must deliver acceptable replacement security to the Town (in the types and amounts specified in Sections 9.71.140.B.5.a. through 9.71.140.B.5.c. and Section 9.71.140.B.7 and approved by the Town 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
  - iii. Once the Lien Agreement is recorded, the Town 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 Town has occurred.
- 8) The time for delivery of acceptable replacement security to the Town and commencement of construction as specified in Sections 9.71.140.B.5.d.7.i and 9.71.140.B.5.d.7.i above, may be extended once for an additional three (3) year period as approved by the Town 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, both of the following conditions must be met:

- i. The Subdivider shall provide a title insurance policy and title report from a title company approved by the Town 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
  - ii. The Town 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 Town at least forty-five (45) days prior to the date the extension of time is requested.
- 9) 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:
- i. Execute a new Lien Agreement in a form acceptable to the Town 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.
  - ii. Deliver acceptable replacement security to the Town as set forth in Section 9.71.140.B.5.d.7 above as a condition to development of the property conveyed.
- 10) The Subdivider shall also be required to provide to the Town a cash deposit per recorded subdivision tract map in an amount established and revised from time-to-time by resolution of the Town 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 Town prior to recordation of the reversion to acreage map.

- 11) The Lien Agreement shall only be released: (1) upon delivery to the Town of acceptable replacement security for such Lien Agreement prior to construction and issuance of permits as set forth in Section 9.71.140.B.5.d.7 above; (2) to facilitate a sale as specified in Section 9.71.140.B.5.d.9 above; or (3) upon recordation of a reversion to acreage map.
- 12) Under no circumstances shall any Lien Agreement compel the Town to construct the Required Improvements, any remaining Required Improvements and/or Other Improvements.
- 13) Sunset Provision. Section 9.71.140.B.5.d shall remain in effect only until March 15, 2024, and as of that date is repealed, unless a later-enacted ordinance, that becomes effective on or before March 15, 2024, deletes or extends that date. In the event Section 9.71.140.B.5.d sunsets, any Lien Agreements entered into prior to the sunset date shall remain subject to the provisions of Section 9.71.140.B.5.d 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 Town.”

**SECTION 2.** The Town Council finds 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 3.** Severability. If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications, and to this end the provisions of this ordinance are declared to be severable.

**SECTION 4.** Effective Date. This Ordinance shall become effective thirty (30) days after the date of its adoption.

**SECTION 5.** Notice of Adoption. The Town Clerk of the Town of Apple Valley shall certify to the adoption of this ordinance and cause publication to occur in a newspaper of general circulation and published and circulated in the Town in a manner permitted under Section 36933 of the Government Code of the State of California.

**APPROVED**, and **ADOPTED** by the Town Council and signed by the Mayor and attested by the Town Clerk this 13<sup>th</sup> day of February 2018.

\_\_\_\_\_  
Honorable Art Bishop, Mayor

**ATTEST:**

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La Vonda M. Pearson, Town Clerk

**APPROVED AS TO FORM:**

**APPROVED AS TO CONTENT:**

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John Brown, Town Attorney

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Douglas B. Robertson, Town Manager