

ATTACHMENT 5

RECORDING REQUESTED BY
and WHEN RECORDED MAIL
TO:

City of Hesperia
9700 Seventh Avenue
Hesperia, CA 92345
Attn: City Clerk

SPACE ABOVE FOR RECORDER'S USE ONLY

DENSITY BONUS AND INCENTIVE AGREEMENT AND COVENANT RESTRICTING USE (Hickory II Apartments – DA18-00001)

THIS DENSITY BONUS AND INCENTIVE AGREEMENT AND COVENANT RESTRICTING USE (this "Agreement") entered into as of _____ by and among HickoryTree II, LP, a California limited partnership ("Owner"/"Builder"), Investment Concepts, Inc. General Partner, and the CITY OF HESPERIA, a municipal corporation ("City"), is made with reference to the following ("Recitals"):

Recitals

- A. Owner is the owner in fee of that certain real property (the "Site") described on Exhibit A attached hereto and incorporated herein by reference, which is located within the City, on the west side of Eleventh Avenue, Hesperia, CA 92345, 250 feet south of Main Street, and assigned County of San Bernardino Assessor Parcel No. 0408-183-12.
- B. Owner has submitted Site Plan Review SPR18-00010 and Density Bonus Agreement DA18-00001 together, the ('Application') for approval of, and intends to construct, an apartment rental residential development (the "Project") on the Site containing 50 senior rental units (the "Units"). The units will consist of (36) 1 Bedroom, 1 Bath units, and (14) 2 Bedroom, 2 Bath units. Eighty percent of the units will be market rental units, (1) of which shall be designated for an on-site manager. Twenty percent of the development or (10) units shall be restricted to Low-income Qualified Households.
- C. Under the High density land use designation for the Property, the maximum allowable number of residential units on the property is 46 units.
- D. City desires to, and under City of Hesperia Municipal Code ("Municipal Code") Section 16.20.190, et seq. ("City's Density Bonus Program"), and California Government Code Section 65915, et seq., is required to grant Owner a density bonus and additional incentives in consideration

for Owner's commitment to restrict occupancy of 10 of the Dwelling Units to lower income senior citizen households, as set forth in this Agreement.

E. Owner agrees to enter into this Agreement and hereby consent to be regulated and restricted by the City as provided herein.

NOW, THEREFORE, Owner and City mutually agree as follows:

1. Term. The Term ("Term") of this Agreement shall commence on the date of its execution by all parties and shall continue in full force and effect until the date that is the 55th anniversary of the date on which the final certificate of occupancy for the Project is received from the City.
2. Owner's Covenants. Owner hereby covenant by and for themselves, and for their representatives, successors and assigns and every successor in interest to the Site or any part thereof to comply with the covenants, reservations and restrictions set forth in this Agreement. Owner further covenant that during the Term, Owner shall devote the Site to be used for the Project only, and in conformance with this Agreement. Each and every contract, deed or other instrument hereafter executed covering the conveying of the Site or any portion thereof shall conclusively be held to have been executed, delivered and accepted subject to such covenants, reservations and restrictions, regardless of whether such covenants, reservations and restrictions are set forth in such contract, deed or other instruments.
 - a. Owner agrees that the Project shall be constructed in accordance with the plans, drawings and specifications approved by the City.
 - b. The units will consist of (36) 1 Bedroom, 1 Bath units, and (14) 2 Bedroom, 2 Bath units. Eighty percent of the units will be market rental units, (1) of which shall be designated for an on-site manager. Twenty percent of the development or (10) units shall be restricted to Low-income Qualified Households.
 - c. Owner shall ensure that ten (10) Rental Units be restricted to occupancy by Qualified Households at Qualified Rent Levels, defined as follows:
 1. For Lower Income Households as defined in Health & Safety Code 50079.5, the monthly Qualified Rent Level shall not exceed 30% Of 60% of the Area Median Income Adjusted for Household Size as Appropriate for One Unit, and as adjusted annually by HUD, divided by twelve (12);
 2. The manager's unit may be occupied by maintenance or management personnel employed by the property management company.
 3. "Adjusted for Household Size as Appropriate for the Unit" for purposes of this section, shall mean for a household of two persons in the case of a one-bedroom unit and three persons in the case of a two-bedroom unit.
 4. Owner shall obtain and maintain or cause to be obtained and maintained reasonable verification in written form as to the income of each household for

Certification of Continuing Program Compliance in substantially the form attached hereto as Exhibit B and incorporated herein by this reference and executed by the Owner.

- d. In addition, Owner shall provide daily front door trash pick-up, weekly transportation services to and from the Target Shopping Center, Wall-Mart, and a local Grocery Store, and shall provide to residents, (at their cost), daily lunches, contracted household cleaning service and dry-cleaning services.

3. City's Covenant's

- a. Density Bonus. Pursuant to Municipal Code Section 16.20.205 and California Government Code Section 65915, et seq., the City hereby grants to Owner a density bonus for the Project as follows:
 - (1) The City grants the Owner a density bonus of 4 Dwelling Units above the 46 Dwelling Units allowed by the High Density land use designation of the Property.
 - (2) The Owner agrees that the Owner is not entitled to any further density bonus or the financial equivalent thereof beyond those set forth in this Section 3.a.
- b. Incentives. Pursuant to Municipal Code Section 16.20.230 and California Government Code Section 65915, et seq., the City hereby grants to Owner the following incentives to encourage the supply of affordable housing through development of the Project:
 - (1) The City accepts 69 parking spaces, instead of 79 parking spaces.
 - (2) The City accepts a front yard setback of 15-feet, instead of a front yard setback of 25-feet.
- c. Definitions. As used in this Agreement, the following underlined and close quoted terms shall have the following meanings:
 - (1) "Area Median Income" means median income levels for San Bernardino County as calculated annually by the U.S. Department of Housing and Urban Development ("HUD") based on the Primary Metropolitan Statistical Area median income levels by family size. Such levels are calculated on the basis of gross annual household income, considering household size, income of all wage earners and all other sources of household income.
 - (2) "Qualified Household" is defined as households whose income does not exceed eighty percent (80%) of the Area Median Income.

- (3) "Qualified Rent Level" is defined as the maximum allowable rent for Qualified Households as defined in Section 2 above.
- (4) "Senior" is defined as set forth within Section 16.20.195 of the Municipal Code as any person 55 years of age or older or as otherwise permitted under California State Law.

4. Occupancy of Project by Qualified Households.

- a. **Occupancy By Qualified Household.** A Unit occupied by a Qualified Household shall be treated as occupied by a Qualified Household until a recertification of such Household's income in accordance with this Section demonstrates that such Household no longer qualifies as a Qualified Household.
- b. **Income Computation Certificate.** Immediately prior to a Qualified Household's occupancy of a Unit, Owner shall obtain and maintain on file an Income Computation and Certification form (which form shall be approved in advance by the City) from each such Qualified Household dated immediately prior to the date of initial occupancy in the Project by such Qualified Household. In addition, the Owner will provide such further information as may be required in the future by the City. Owner shall use its best efforts to verify that the income provided by an applicant is accurate by taking the following steps as a part of the verification process: (i) obtain three (3) pay stubs for the most recent pay periods; (ii) obtain a written verification of income and employment from applicant's current employer; (iii) obtain an income verification form from the Social Security Administration and/or California Department of Social Services if the applicant receives assistance from either agency; (iv) if an applicant is unemployed or did not file a tax return for the previous calendar year, obtain other verification of such applicant's income as is satisfactory to the City; or (v) such other information as may be reasonably requested by the City. A copy of each such Income Computation and Certification shall be filed with the City, upon request, prior to the occupancy of a Unit by a Qualified Household whenever possible, but in no event more than thirty (30) days after initial occupancy by said tenant.
- c. **Rental Priority.** During the term of this Agreement, and to the extent allowed under applicable laws, Owner shall use its best efforts to lease vacant Units reserved for Qualified Households to residents of the City of Hesperia. Owner shall and City may maintain a list (the "Housing List") of persons who have filed a complete application with Owner to rent a Unit in the Project and who have incomes which would qualify them as a Qualified Household, and Owner shall offer to rent Units on the above referenced priority basis. Should multiple tenants be equally eligible and qualified to rent a Unit, Owner shall rent available Units to Qualified Households on a first-come, firstserved basis.
- d. **Income Recertification.** Immediately prior to the first anniversary date of the occupancy of a Unit by a Qualified Household and on each anniversary date thereafter, Owner shall recertify the income of such Qualified Household by obtaining a completed Income Computation and Certification based upon the current income of each occupant of the Unit. Upon request, Owner shall provide

City with a copy of each such recertification with the next submission of the Certificate of Continuing Program Compliance.

- e. Certificate of Continuing Program Compliance. Upon the issuance of the Certificate of Occupancy and annually by January 31 of each year, or at any time upon the written request of City, Owner shall advise City of the occupancy of the Project by delivering a Certificate of Continuing Program Compliance in the form attached hereto as Exhibit "B," certifying: (i) the number of Units of the Project which were occupied or deemed occupied by a Qualified Household during such period, and (ii) to the knowledge of Owner either (a) no unremedied default has occurred under this Agreement, (b) a default has occurred, in which event the Certificate shall describe the nature of the default and set forth the measures being taken by the Owner to remedy such default.

5. Management.

- a. Designation of Project Manager. Subject to the terms and conditions contained hereinbelow, Owner shall at all times during the operation of the Project pursuant to this Agreement retain an entity to perform the management and/or supervisory functions ("Project Manager") with respect to the operation of the Project including day-to-day administration, maintenance and repair. Owner shall, before execution or any subsequent amendment or replacement thereof, submit and obtain City's written approval of a management contract ("Management Contract") entered into between Owner and a Project Manager acceptable to City. The Management Contract shall also provide that the Project Manager shall be subject to termination for failure to meet project maintenance and operational standards set forth in the management contract. Owner shall promptly terminate any Project Manager which commits or allows such failure, unless the failure is cured within a reasonable period in no event exceeding 60 days from Project Manager's receipt of notice of the failure from Owner or City. Owner's obligation to retain a Project Manager shall remain in force and effect for the same duration as the use covenants set forth in this Agreement. Notwithstanding anything to the contrary in this Section, the Project may be self-managed by Owner with the prior approval of the City Manager.

In addition to the Project Manager, one Resident Manager shall be designated as necessary by Owner or Project Manager, with written notice to Agency of the Resident Manager's name, address and telephone number.

- b. Serious Mismanagement. In the event of "Serious Mismanagement" (as that term is defined below) of the Project, Agency shall have the authority to require that such Serious Mismanagement cease immediately, and further to require the immediate replacement of the Project Manager or Resident Managers. For purposes of this Agreement the term "Serious Mismanagement" shall mean management of the Project in a manner which violates the terms and/or intent of this Agreement and/or the Management Contract to operate an affordable housing complex of the highest standard, and shall include, but is not limited to, the following:

- (1) Knowingly leasing to ineligible tenants or tenants whose income exceeds the prescribed levels;
- (2) Knowingly allowing the tenants to exceed the prescribed occupancy levels without taking immediate steps to stop such overcrowding;
- (3) Failing to timely submit the reports as required by this Agreement or failing to submit materially complete reports (including applicable cure periods);
- (4) Fraud in connection with any document or representation relating to this Agreement or embezzlement of Project monies; and
- (5) Failing to fully cooperate with the City's Police Department in maintaining a crime-free environment at the Project.

6. Accounting to the City

- a. The books and accounts of the Project shall be kept in conformity with generally accepted accounting practices.
- b. The Owner shall maintain a complete and accurate rent roll listing all Units, the names of all Tenants, the dates of their tenancies and the amount of rents charged and collected.
- c. The City, its agents and employees, shall have the right, after giving reasonable notice, to review and inspect the books, records and accounts of the Owner specifically regarding the Project.
- d. These reviews and inspections shall occur at reasonable times during normal business hours and shall commence from the date of recordation of this Agreement and expire at the termination of this Agreement.

7. Inspections. Subject to the rights of the tenants, the City shall have the right, upon request, to perform an on-site inspection of the Units, common areas and grounds.

8. Default.

- a. Failure or delay by the Owner to perform any term, provision or comply with any covenant of this Agreement constitutes a default under this Agreement, except that the Owner shall not be in default of its obligation to ensure that the Units are occupied by Qualified Households if the Owner shows that it reasonably relied on a tenant's representations regarding income level and household size. Should Owner default and fail to cure such default to the City's satisfaction within thirty (30) days after the date the City delivers written notice of the default to the Owner, then the City may, at its option, take one or any combination of the following actions:

Owner, than the City may, at its option, take one or any combination of the following actions:

- (1) Demand the Owner to cause the Site to be brought into compliance with the development requirements that would apply to the Site absent this Agreement. However, the Owner may propose alternative measures that the City may approve at its sole discretion to achieve the objectives of Government Code Section 50105, or Code Section 50079.5, the City's Incentive program and this Agreement;
- (2) Declare the Site and/or the Project a public nuisance under Chapter 8.32 of the City of Hesperia Municipal Code and take all actions authorized therein with respect to the public nuisance and the abatement thereof, including, but not limited to, summary abatement and recordation of a nuisance abatement lien to collect abatement and related administrative costs;
- (3) Bring actions to a court of competent jurisdiction to enforce the provisions of this Agreement and record a lis pendens against the Site providing notice of same.

The remedies of the City herein are cumulative and the exercise of one or more of such remedies shall not be deemed an election of all remedies. It shall not preclude the exercise by the City of any one or more of its other remedies.

- b. Notwithstanding subparagraph (a) above, violations of the Hesperia Building Code shall be handled by the appropriate building officials and resolved under the same terms as available to any other development.
- c. It shall constitute a default for Owner to charge or accept for a Unit rent amounts in excess of the amount provided for in Section 2 of this Agreement. In the event that Owner charges or receives such higher rental amounts, in addition to any other remedy City shall have for such default, Owner shall be required to refund to the overcharged tenant(s) the entire amount of rent received in excess of the amount permitted pursuant to this Agreement. In the event such tenants cannot be located, the Owner shall deposit such funds in a separate account for use in providing programming, activities, or amenities to the residents of the Units. No less than annually Owner shall provide to City an accounting of funds deposited into this account, if any, and what programs, activities, amenities were provided if such default exists.

9. Subordination. This Agreement shall be subject and subordinate to the liens of the Owner's construction and permanent financing. The City agrees to execute additional subordination agreements in a form and content reasonably acceptable to the Owner's lenders and letter of credit providers confirming such subordination.

10. Successors Bound. This Agreement and the covenants, reservations, restriction and agreements contained herein shall be a burden upon the Site and shall bind the Owner and their successors, assigns, transferees and every successor in interest to the Site. The Owner may not assign any of the benefits of this Agreement, nor delegate any of its obligations hereunder, voluntarily or by operation of law without the prior written approval of the City.

11. Benefit of Covenants Reservations and Restrictions. The City and Owner hereby declare their understanding and intent that the covenant, reservations and restrictions set forth herein directly benefit the land by enhancing and increasing the enjoyment of use of the Site by certain low-income residents of the City of Hesperia and benefit the City as owner of the public right of way in the adjacent streets. The City and its successors and assigns are deemed the beneficiary of the covenants, reservations and restrictions contained herein, regardless of the technical classification and designation. The covenants, reservations and restrictions shall benefit and run with the land in favor of the City, its successors and assigns until the date set forth in Paragraph 1, "term". They shall be enforceable by same without regard to whether same has been remains or is an owner of any land or interest therein.

12. Notice. Any notice required to be given hereon shall be given by certified or registered mail, postage prepaid and return receipt requested at the addresses listed below. Other alternative addresses may be specified in writing by the parties hereto as follows:

If to the City: City of Hesperia
 9700 Seventh Avenue
 Hesperia, CA 92345
 Attn: City Manager
 (760) 947-1018
 (760) 947-2881 FAX

If to the Owner: HickoryTree II, LP
 1667 E. Lincoln Ave.
 Orange, CA 92877
 (714) 283-5800
 (714) 637-3098 FAX

If to the Owner:

13. Modifications. This Agreement may be amended or modified only by a written instrument signed by all parties hereto. The City agrees that its City Manager or his designee, with the concurrence of the City Attorney, shall have the authority to execute any such instrument on behalf of the City, without formal action by the Hesperia City Council. If such instrument materially alters the Agreement by altering the quantity or value of the incentives granted to the Owner, then the City Council must take formal action to approve the amendment or modification.

14. Attorney's Fees. In the event that a party to this Agreement brings an action against the other party hereto by reason of the breach of any condition, covenant, representation or warranty in this Agreement, or otherwise arising out of this Agreement, the prevailing party in such action shall be entitled to recover from the other reasonable expert witness fees, and its attorneys' fees and costs. Attorneys' fees shall include attorneys' fees on any appeal, and in addition a party entitled to attorneys' fees shall be entitled to all other reasonable costs for investigating such action, including the conducting of discovery.

15. Severability: Waiver: Integration.

- a. Severability. If any provision of this Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining portions hereof shall not in any way be affected or impaired thereby.
- b. Waiver. A waiver by either party of the performance of any covenant or condition herein shall not invalidate this Agreement nor shall it be considered a waiver of any other covenants or conditions, nor shall the delay or forbearance by either party in exercising any remedy or right be considered a waiver of, or an estoppel against, the later exercise of such remedy or right.

- c. Integration. This Agreement contains the entire agreement between the parties and neither party relies on any warranty or representation not contained in this Agreement.

16. Governing Law. This Agreement shall be governed by the laws of the State of California.

17. Recording and Filing. This Agreement shall be acknowledged by each of the parties and recorded by the City in the Official Records of San Bernardino County. This Agreement shall be indexed in the grantor index in the name of the Owner and in the grantee index in the name of the City.

In Witness Whereof, the parties hereto have entered into this Agreement as of the day and year first above written.

"Owner"

HickoryTree II, LP
1667 E. Lincoln Ave.
Orange, CA 92865
(714) 283-5800
(714) 267-4413 FAX

By: _____

Its: _____

"City"

City of Hesperia
9700 Seventh Avenue
Hesperia, CA 92345
Attn: City Manager
(760) 947-1018
(760) 947-2881 FAX

By: _____

Its: _____

Exhibit A

Legal Description of Subject Property

[NOTE: Subject to Verification]

Real property in the City of Hesperia, County of San Bernardino, State of California,
described as follows:

CERTIFICATION OF CONTINUING PROGRAM COMPLIANCE

_____ a California Limited Partnership, ("Owner"), hereby represents and warrants that:

1. Owner has read and is thoroughly familiar with the provisions of the Incentive Agreement and Covenant Restricting Use (the "Agreement") by and among the City of Hesperia, a municipal corporation, and Owner, dated of which a form _____ of this Certification is an attachment. As of the date of this Certification, at least ten (10) of the Units are occupied by Qualified Households as that term is defined in the Agreement.

2. As of the date of this Certification, the Units are all rented at no more than Qualified Rent Levels as described in the Agreement.

"Owner"

_____ a California Limited Partnership

ENTITIES TO BE DETERMINED

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Date:
