

To Council
4/9/2013



**FROM THE OFFICE OF THE
CITY ATTORNEY**

Memorandum

TO: Honorable Mayor and City Council
FROM: Stephen P. Deitsch, City Attorney
DATE: April 9, 2013
RE: Abstract of Agreements Governing City Owned Affordable Housing
Developments

The City Attorney has been asked to prepare a summary of the various agreements governing certain City-owned senior affordable housing developments. The developments governed by these agreements are: Indian Wells Villas; Mountain View Villas Phase I (formerly known as Whitewater Villas); Mountain View Villas Phase II; and Garden Villas (sometimes referred to as Village Apartments). Only two of these developments (Indian Wells Villas and Mountain View Villas Phase I) were ever developed.

The City owns the property upon which these developments are located, and developed affordable housing developments on each of the properties with assistance from the former Redevelopment Agency of the City of Indian Wells (the "Redevelopment Agency"). The City and Redevelopment Agency entered into a series of agreements for each of these properties, primarily to ensure that the properties will continue to be operated as affordable housing. Under these agreements, the City is responsible for maintaining and operating the properties as affordable housing. The City, in turn, entered into a sublease agreement with Southern California Housing Development Corporation ("SoCal") to manage all of the properties on behalf of the City. SoCal subsequently changed its name to National Community Renaissance of California ("NCORE").

Attached to this cover memo as Attachment No. 1 is an abstract that first describes the agreements between the City and the Redevelopment Agency that govern each of the City's properties, then summarizes the terms of the sublease agreement between the City and NCORE (the "Abstract"). Some questions have been raised related to these agreements because the parties to some of the agreements have changed since their execution. First, as noted above, SoCal changed its name in 2007, and is now referred to as NCORE. Second, in 2012, the Redevelopment Agency was dissolved. All housing assets of the Redevelopment Agency were subsequently transferred to the Housing

Authority of the City of Indian Wells (the "Housing Authority") as the housing successor to the Redevelopment Agency. The former Redevelopment Agency's interest in the agreements discussed in the Abstract are housing assets that were transferred to the Housing Authority.

We are not recommending that the City take any action to amend the agreements to clarify that SoCal is now referred to as NCORE. SoCal did not alter its ownership or corporate structure, it simply changed its name. In order to avoid confusion, we do recommend that the City attach copies of the documentation of the name change provided in 2007 to its file copies of the sublease with SoCal, so City staff is aware that SoCal and NCORE are the same entity. However, it is not necessary to require any amendment or assignment of the sublease agreement from SoCal to NCORE.

The Redevelopment Agency, on the other hand, no longer exists, and its interest in the agreements governing these properties has been transferred to the Housing Authority. We do recommend that the Successor Agency to the Redevelopment Agency formally assign the Redevelopment Agency's interests in these agreements to the Housing Authority, to commemorate the transfer of the Redevelopment Agency's interests. A sample assignment and assumption agreement between the Successor Agency and the Housing Authority is attached to this memorandum as Attachment No. 2. A memorandum of this assignment can be recorded against each of the City's properties so that the Housing Authority will replace the Redevelopment Agency in the chain of title.

The City and Housing Authority also should consider making a number of amendments to the agreements. First, the agreements governing the Garden Villas property should be terminated, if they have not already. The City has confirmed that it will not develop those properties with affordable housing, and so the agreements are no longer necessary. The City may also want to update the City-Agency agreements to reflect more current affordable housing restrictions. Lastly, the City should consider amending the sublease agreement with NCORE to update the properties that are covered under that agreement, clarify a typographical error in the terminations provision (which is discussed in the Abstract), and to acknowledge the assignment and assumption agreement between the Successor Agency and the Housing Authority, as discussed above.

Finally, we recommend that the City take steps to ensure that NCORE is providing the City with the budgets and other reporting information that is required under the sublease agreement, so that the City can ensure that it is receiving the appropriate rent amounts under the sublease.

If you have any questions regarding this memorandum, the Abstract, or the agreements discussed therein, please contact me.

Attachments: Abstract of City of Indian Wells Affordable Housing Agreements
Assignment and Assumptions of Housing Assets
2 Maps: (1) Indian Wells Villas and (2) Mountain View Villas I & II and Garden View Villas Site (Proposed)

cc: Roderick J. Wood, Interim City Manager

ATTACHMENT NO. 1

ABSTRACT OF CITY OF INDIAN WELLS AFFORDABLE HOUSING AGREEMENTS

PART 1

CITY-REDEVELOPMENT AGENCY AGREEMENTS CITY VILLAS

I. Background

The City of Indian Wells and the Indian Wells Redevelopment Agency entered into a series of agreements affecting four separate affordable housing developments in the City. The developments covered by these agreements are: Indian Wells Villas; Mountain View Villas Phase I (formerly known as Whitewater Villas); Mountain View Villas Phase II; and Garden Villas (which was never construct, and sometimes referred to as Village Apartments). These properties are referred to in this Abstract as the “City Villas.” Each of the City Villas properties is owned by the City, but was developed as affordable housing with assistance from the Redevelopment Agency.

For each of the City Villas properties, the City and Agency entered into a lease-sublease agreement, pursuant to which the City leased the property to the Agency for \$1 per year, and the Agency subleased the property back to the City for \$1 per year. These lease/sublease agreements were entered into to ensure that the tenants of the property would not be subject to any property or possessory interest taxes as a result of living in the properties.¹ The City and Agency additionally entered into regulatory agreements and/or restrictive covenants that require the City to maintain the property as affordable housing, and establish the number of units and income levels for the various units. Each of these agreements contemplates that the property will be operated as rental housing, but provide that the City can sell the individual units, provided that they are sold to households at the income level required for the applicable unit.

The section below lists each of the City Villas properties, and briefly describes each development. The section then lists the City-Agency Agreements that apply to each of the City Villas properties, along with the fundamental terms of each agreement.

II. City Villas Properties

INDIAN WELLS VILLAS

- Located at 74-800 Village Center Drive
- Includes 90 housing units

¹ While the City is exempt from property tax, its tenants frequently must pay “possessory interest tax” on lease interests in City property. The lease-sublease arrangement is intended to ensure that the affordable housing tenants fit within an exemption to possessory interest tax set forth at Revenue & Taxation Code section 236.

Agreements between City and Agency for Indian Wells Villas

Low/Moderate Income Housing Agreement Containing Covenants, Conditions and Restrictions Affecting Real Property

- Dated June 1, 1995
- Term is 35 years (expires June 1, 2030)
- Requires that all property must be affordable to very-low, low and moderate income households

Agreement Between the City of Indian Wells and Indian Wells Redevelopment Agency Relating to the Indian Wells Villas

- Dated September 19, 1996
- Term is 35 years (expires September 19, 2031)
- Provides for the lease of the property from City to Agency for \$1/year, and sublease back to the City for \$1/year

Declaration of Restrictive Covenants Indian Wells Senior Apartments

- Dated December 4, 2003
- Term is concurrent with the Low/Moderate Income Housing Covenant referenced above (expires June 1, 2030)
- Requires that the property be operated as senior residential housing, at the following income levels:
 - 31 very-low income units (up to 50% of Area Median Income based on household size (“AMI”))
 - 38 low income units (up to 80% of AMI)
 - 21 moderate income units (up to 120% of AMI)
- If a resident exceeds the income level for their unit, the unit can be designated as a higher income unit (e.g., changed from very-low income to low income), and the resident’s rent can be increased accordingly. If a resident’s income increases above 120% of AMI, they must vacate the unit.

MOUNTAIN VIEW VILLAS PHASE I

- Located North of CA State Highway 111, nearby to Mountain Cove Drive
- Includes 128 housing units
- Formerly known as Whitewater Villas

Agreements between City and Agency for Mountain View Villas Phase I

Agreement between the City of Indian Wells and the Indian Wells Redevelopment Agency Relating to the Lease and Sublease of the Mountain View Villas

- Dated December 20, 2001
- Term is 35 years (expires on December 20, 2036)
- Provides for the lease of the property from City to Agency for \$1/year, and sublease back to the City for \$1/year

Regulatory Agreement and Declaration of Restrictive Covenants between the Redevelopment Agency of the City of Indian Wells and the City of Indian Wells

- Dated December 20, 2001
- Term is 35 years, commencing on the date that the first unit in the development is occupied
- Requires that the property be operated as senior residential housing, at the following income levels:
 - 83 very-low income units (up to 50% of AMI)
 - 18 low income units (up to 80% of AMI)
 - 25 moderate income units (up to 120% of AMI)
 - 2 units are not restricted and are reserved for on-site managers

MOUNTAIN VIEW VILLAS PHASE II (NEVER DEVELOPED)

- Property is located North of CA State Highway 111 and south and east of Miles Avenue.
- Was to be developed in two parts.
- The first part, sometimes referred to as the “Mountain View Senior Apartments” is located

on property acquired by the City from Albert Lissoy. This is sometimes referred to as the "Lissoy Parcel." The first portion of the development consists of 65 units.

- The second part, sometimes referred to as "Mountain View Villas C Senior Apartments" is located adjacent to the first part on property sometimes referred to as the Whitewater Villas Phase III C parcel. This second part consists of 19 units, and is subject to a separate set of agreements.

Agreements between City and Agency for Mountain View Villas Phase II

Mountain View Villas Regulatory Agreement and Declaration of Restrictive Covenants between the Redevelopment Agency of the City of Indian Wells and the City of Indian Wells

- Applies to the 65 unit component of Phase II, to be constructed on the Lissoy Parcel.
- Dated December 20, 2001
- Term is 35 years, commencing on the date that the first unit in the development is occupied
- Requires that the property be operated as senior residential housing, at the following income levels:
 - 63 very-low income units (up to 50% of AMI)
 - 2 units are not restricted and are reserved for on-site managers
- Agreement originally provided that 63 of the units would be moderate income units, but that was corrected by a First Amendment executed on February 25, 2003 to clarify that the units would be very-low income.

Agreement between the City of Indian Wells and the Indian Wells Redevelopment Agency Relating to the Lease and Sublease of the Mountain View Senior Apartments

- Applies to the 65 unit component of Phase II, constructed on the Lissoy Parcel.
- Dated January 16, 2003
- Term is 35 years from the date of issuance of a Certificate of Occupancy for the first unit in this development
- Provides for the lease of the property from City to Agency for \$1/year, and sublease back to the City for \$1/year
- Was amended on February 25, 2003 to clarify that the property to be leased/subleased is the Lissoy Parcel

Agreement between the City of Indian Wells and the Indian Wells Redevelopment Agency Relating to the Lease and Sublease of the Mountain View Villas C Senior Apartments

- Applies to the 19 unit component of Phase II, constructed on the former Whitewater Villas Phase III C parcel.
- Dated January 16, 2003
- Term is 55 years from the date of issuance of a Certificate of Occupancy for the first unit in this development
- Provides for the lease of the property from City to Agency for \$1/year, and sublease back to the City for \$1/year

Regulatory Agreement and Declaration of Restrictive Covenants

- Applies to the 19 unit component of Phase II, constructed on the former Whitewater Villas Phase III C parcel
- Dated January 16, 2003
- Term is 55 years from the date the first unit in the development is occupied
- Requires that all 19 units on the property be operated as senior very-low income housing units

GARDEN VILLAS/VILLAGE APARTMENTS (NEVER DEVELOPED)

- Property is located between Miles Avenue and Fred Waring Drive, east of Warner Trail. This is the approximately site from which the City recently removed affordable housing covenants when the City was required to return \$6,185,000 to the Successor Agency that was paid in exchange for the recordation of certain affordable housing covenants against this site.
- Includes 84 units, which were never developed
- Referred to as both "Garden Villas" and "Village Apartments"

Agreements between City and Agency for Garden Villas

Agreement between the City of Indian Wells and the Indian Wells Redevelopment Agency Relating to the Lease and Sublease of the Garden Villas

- Dated January 16, 2003
- Term is 55 years from the date of issuance of a Certificate of Occupancy for the

dwelling units being constructed

- Provides for the lease of the property from City to Agency for \$1/year, and sublease back to the City for \$1/year

Village Apartments Regulatory Agreement and Declaration of Restrictive Covenants between the Redevelopment Agency of the City of Indian Wells and the City of Indian Wells

- Dated January 16, 2003
- Term is 55 years, commencing on the date that the first unit in the development is occupied
- Requires that the property be operated as senior residential housing, at the following income levels:
 - 34 low income units (up to 80% of AMI)
 - 38 moderate income units (up to 120% of AMI)
 - The Agreement declares that all units are “restricted” but does not specify the income levels for the remaining 12 units on this property.²

² This Regulatory Agreement should be amended to clarify the appropriate income level for these remaining 12 units.

PART 2

SUBLEASE AGREEMENT WITH NCORE FOR OPERATION AND MANAGEMENT OF CITY VILLAS PROPERTIES

I. Background

The Agreements described in Part 1 declared that the City would be responsible for the operation and management of the City Villas properties as affordable housing for the term of the applicable regulatory agreements and covenants. City opted to sublease the properties to the Southern California Housing Development Corporation, which subsequently changed its name to National Community Renaissance of California (“NCORE”).³ NCORE is required to manage all of the City Villas properties listed above in accordance with the sublease agreement, which is titled “Southern California Housing Development Corporation Sublease Agreement” (the “Sublease Agreement”). The terms of the Sublease Agreement are outlined below.

II. Terms of Sublease Agreement

- Term of the Sublease is from January 1, 2004-September 19, 2031.
- *Rent paid by NCORE*
 - NCORE pays base rent of \$1 per year, plus “Additional Rent” as defined below
 - For each individual property, NCORE is required to pay 75% of any excess funds to the City as additional rent, and NCORE retains the other 25% of excess funds.
 - The “excess funds” include the funds and revenue remaining from each project at the end of each month after payment of budgeted costs and expenses, including any money to be set aside to fund reserve accounts, capital improvements or repairs.
 - The allowed costs include a monthly fixed administrative/overhead charge retained by NCORE of \$40 per occupied rental unit.
 - NCORE is required to provide the City with a monthly financial statement (discussed in more detail below) that will establish the amount of excess funds to be disbursed to the City.
 - The excess funds must be paid to the City within 15 days after delivery of the monthly financial statement
- *NCORE Management Responsibilities*
 - NCORE is required to manage all of the properties in compliance with all of the

³ NCORE sent the City documentation on January 5, 2007 demonstrating that it had simply changed the name of the corporation, but did not otherwise make any changes to the corporation.

following:

- Provide general administrative, management and leasing services in compliance with all applicable laws, regulations, and the agreements governing the properties.
- Use best efforts to keep all the properties fully leased.
- Develop tenant guidelines that are consistent with the applicable regulatory requirements and review prospective tenants consistent with the guidelines.
- Develop a rental agreement for the properties, subject to approval by the City.
- Establish procedures for collection and receipt of rents and other charges, subject to approval by the City.
- Maintain all the properties in a decent, safe and sanitary condition.
- Contract for all services and utilities necessary for the operation of the properties.
- Maintain insurance for the properties at levels as required by the City.
- NCORE is required to provide an on-site manager for each property.
- NCORE must provide the City with the name and phone number of each manager, and the managers must be reasonably available to meet with the City during business hours and after hours, if deemed necessary by the City.
- ***NCORE Reporting Requirements***
 - Annual Budget: NCORE must submit an annual budget to the City for approval by the Council on or before April 1. The budget must cover the period from July 1 to June 30, and must include:
 - A statement of regularly incurred and extraordinary costs and expenses for that year; and
 - A statement of total estimated revenues for the year.
 - NCORE must comply with the Annual Budget, to the extent reasonably and commercially practicable. The actual amount expended by NCORE for the year shall not exceed the budget approved by the City Council.
 - NCORE may transfer expenses between line items on the budget, but any expenditures equal to or greater than \$5,000 shall be approved by the Finance Director, and expenditures equal to or greater than \$10,000 must be approved by the City Manager.
 - NCORE does have the authority to make expenditures in excess of the budget in case of emergency or to comply with insurance requirements.

- NCORE and the City are to meet on a quarterly basis to discuss the budget and any need for amendments or revisions. Any material amendments must be approved by the City Council.
- Monthly Financial Statements: NCORE must provide unaudited statements each month showing all revenues, receipts, expenditures and disbursements from the previous month for each of the City Villas properties. The monthly statement should include:
 - The revenues and expenditures by category in the budget for each of the Properties;
 - A comparison of the actual revenues and expenditures to the budgeted amounts, both for the preceding month and year to date;
 - A statement of all delinquent rents and other charges;
 - A profit and loss statement for each property for the month and year to date, with sufficient detail to calculate the “Additional Rent” owed to the City; and
 - Bank reconciliations.
- Audited Financial Statements: NCORE is required to have an independent certified public accounting firm prepare audited financial statements for each of the Properties within 60 days after the end of each year.
- **Termination Provision**: In the event of default by NCORE the City can terminate immediately, or may terminate upon 60 days⁴ notice without cause. Upon such termination, the City will assume possession of all the City Villas properties, all personal properties located thereon, and all accounts associated with the properties. NCORE is required to render a final accounting to the City within 30 days following termination or expiration of the Agreement.

⁴ The termination provision allows for termination without cause with “thirty (60) days” notice. [Emphasis added.] If the City were to terminate the sublease without cause, I recommend giving the longer notice, in an excess of caution.

ATTACHMENT NO. 2

ASSIGNMENT AND ASSUMPTION OF HOUSING ASSETS

This ASSIGNMENT AND ASSUMPTION OF HOUSING ASSETS (the "Assignment and Assumption") is entered into as of _____, 2013, by and among the SUCCESSOR AGENCY TO THE REDEVELOPMENT AGENCY OF THE CITY OF INDIAN WELLS as assignor ("Assignor") and the HOUSING AUTHORITY OF THE CITY OF INDIAN WELLS, a public body ("Assignee" or "Housing Authority").

RECITALS:

A. Prior to February 1, 2012, the Redevelopment Agency of the City of Indian Wells (the "Agency") was a public body, corporate and politic, which was actively engaged in redevelopment work in the City of Indian Wells pursuant to the powers granted by the Community Redevelopment Law (Health & Safety Code §§33000 *et seq.*), including but not limited to the increasing, improvement and preservation of housing affordable to low and moderate income households in the City of Indian Wells.

B. As part of the 2011-12 State budget bill, the California Legislature enacted, and the Governor signed, companion bills AB 1X 26 and AB 1X 27, requiring that each redevelopment agency be dissolved unless the community that created it enacts an ordinance committing it to making certain payments.

B. A Petition for Writ of Mandate was filed in the Supreme Court of the State of California on July 18, 2011 (*California Redevelopment Association, et al. v. Ana Matosantos, et al.*, Case No. S194861), challenging the constitutionality of AB 1X 26 and AB 1X 27 on behalf of cities, counties and redevelopment agencies and requesting a stay of enforcement.

E. On December 29, 2011, the Supreme Court issued its final decision in the aforesaid litigation, upholding AB 1X 26, invalidating AB 1X 27, and extending all statutory deadlines under AB 1X 26, essentially dissolving all redevelopment agencies throughout the State effective February 1, 2012, including the Agency.

F. Upon dissolution of the Agency pursuant to the requirements of AB 1X 26, all assets, contracts, right and obligations of the Agency were transferred to the Assignor by operation of law pursuant to Health and Safety Code Sections 34173 and 34175.

G. Health and Safety Code section 34176 provides that the housing assets and functions previously performed by the Agency shall be transferred to the Assignee unless the City of Indian Wells elected to retain those housing assets and functions. The City of Indian Wells did not elect to retain the housing assets and functions previously performed by the Agency and

therefore the housing assets and functions were as a result transferred to the Assignee upon dissolution of the Agency.

H. The California Legislature subsequently adopted AB 1484, which, among other things, required that the City submit to the State Department of Finance by August 1, 2012 a list of all housing assets transferred between February 1, 2012 and the date upon which the list is created. On July 31, 2012, the Housing Authority submitted the required housing asset transfer list (the "Housing Asset Transfer List") to the State Department of Finance. On August 31, 2012, the State Department of Finance approved the Housing Asset Transfer List.

I. In order to affirm and provide proper documentation that the housing assets as described in the Housing Asset Transfer List have been transferred to and are now properly held in possession of the Assignee, the Assignor and Assignee desire to enter into this Assignment and Assumption.

NOW THEREFORE, in consideration of the foregoing recitals which by this reference are incorporated herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor and Assignee agree and represent as follows:

1. Assignment. Assignor hereby affirms that it has assigned to Assignee all of Assignor's right, title and interest in and to, and obligations pursuant to, each and every one of the housing assets listed in Exhibit A, attached hereto and incorporated herein by this reference (the "Housing Assets").

2. Assumption. Assignee, for itself and its successors and assigns, hereby affirms that it has assumed and agrees to perform and be bound by the covenants, agreements, provisions, conditions, obligations and rights of Assignor as set forth in each and every one of the Housing Assets.

3. Further Actions. The parties each, jointly and severally, covenant to take such further actions as may be necessary to effect or commemorate the assignment and assumption of the Housing Assets.

4. Effect of this Agreement. Except as expressly modified by this Agreement, agreements that are included amongst the Housing Assets shall continue in full force and effect according to their respective terms. This Assignment and Assumption shall not be construed as (i) conferring upon Assignor or Assignee any greater rights than those contained in the Housing Assets, (ii) diminishing any rights under the Housing Assets, or (iii) modifying the Housing Assets in any respect.

5. Counterparts. This Assignment and Assumption may be executed in any number of identical counterparts, each of which shall be deemed to be an original, and all of which together shall be deemed to be one and the same instrument when each party has signed one such counterpart.

[SIGNATURE PAGE TO FOLLOW]

SIGNATURE PAGE FOR
ASSIGNMENT AND ASSUMPTION OF HOUSING ASSETS

IN WITNESS WHEREOF, Assignor and Assignee have executed this Assignment and Assumption as of the date set forth above.

ASSIGNOR:

SUCCESSOR AGENCY TO THE
REDEVELOPMENT AGENCY OF THE
CITY OF INDIAN WELLS, a public agency

ATTEST:

By: _____
Successor Agency Clerk

By: _____
Its: _____

APPROVED AS TO FORM:

By: _____
Successor Agency Counsel

ASSIGNEE:

HOUSING AUTHORITY OF THE CITY OF
INDIAN WELLS, a public body, corporate and
politic

ATTEST:

By: _____
Housing Authority Secretary

By: _____
Its: _____

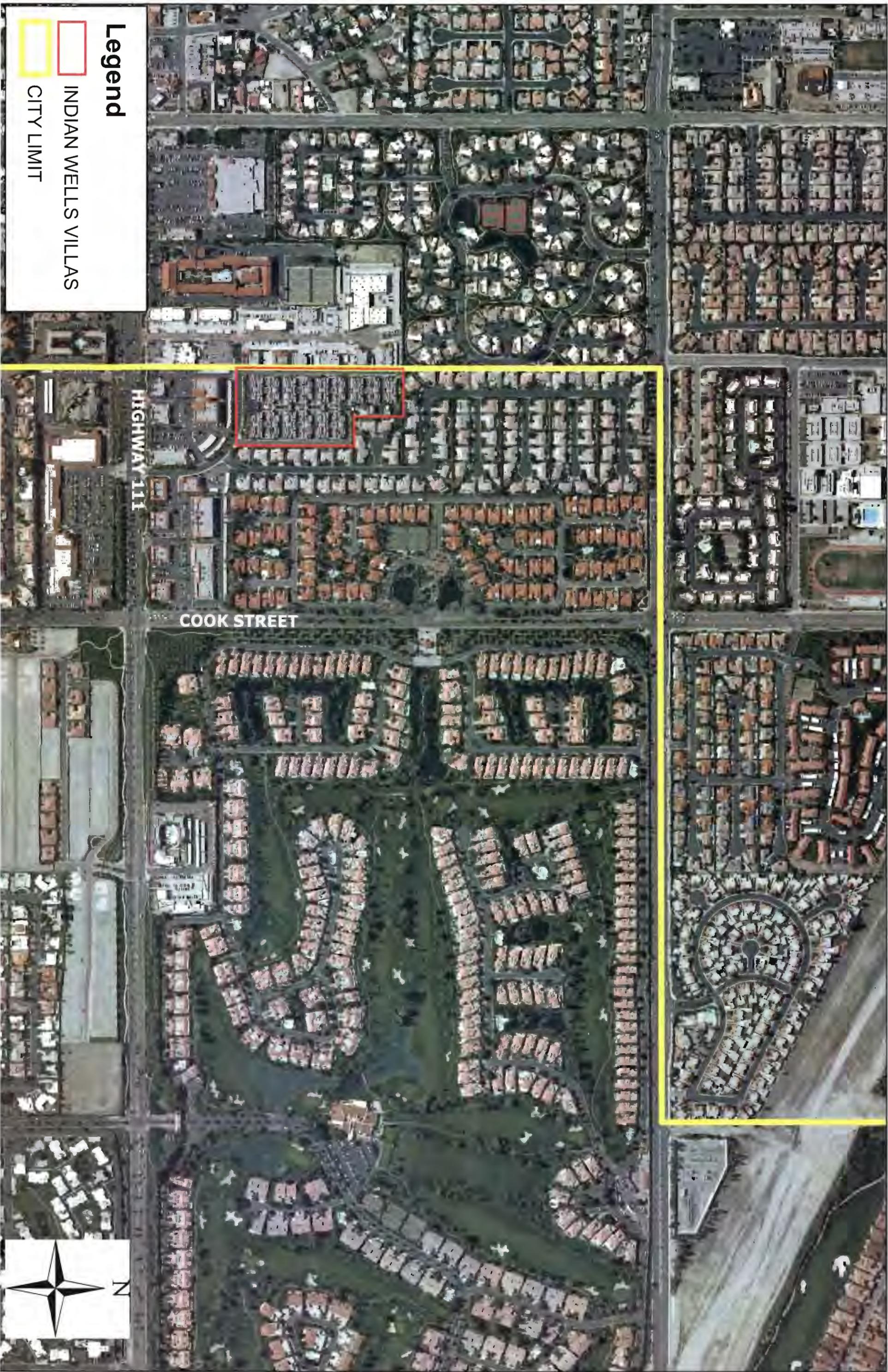
APPROVED AS TO FORM:

By: _____
Housing Authority Counsel

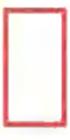
EXHIBIT A

LIST OF HOUSING ASSETS

[attached behind this cover page]



Legend



INDIAN WELLS VILLAS



CITY LIMIT

HIGHWAY 111

COOK STREET





Legend



MOUNTAIN VIEW VILLAS PHASE I & II



GARDEN VIEW VILLAS SITE (PROPOSED)



CITY LIMIT

PHASE II

PHASE I

HIGHWAY 111

MILES AVENUE

