

**SUBMITTAL TO THE BOARD OF SUPERVISORS  
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

216



**FROM:** Economic Development Agency

**SUBMITTAL DATE:**  
June 10, 2010

**SUBJECT:** Settlement Agreement and Mutual Release for Tierra Del Sol Senior Housing Apartments in Cathedral City

**RECOMMENDED MOTION:** That the Board of Supervisors:

1. Approve the attached Settlement Agreement between the County of Riverside, Tierra del Sol, Mercy Housing, Fassberg Construction Company, and Fidelity and Deposit Company of Maryland;
2. Authorize the Chairman of the Board to sign the attached Settlement Agreement; and
3. Authorize the Assistant County Executive Officer/EDA or his designee to take all necessary steps to implement the attached Settlement Agreement including, but not limited to, signing subsequent essential and relevant documents.

**BACKGROUND:** (Commences on Page 2)

*Robert Field*

Robert Field  
Assistant County Executive Officer/EDA

<b>FINANCIAL DATA</b>	Current F.Y. Total Cost:	\$ 0	In Current Year Budget:	N/A
	Current F.Y. Net County Cost:	\$ 0	Budget Adjustment:	No
	Annual Net County Cost:	\$ 0	For Fiscal Year:	09/10

**COMPANION ITEM ON BOARD OF DIRECTORS AGENDA:** No

<b>SOURCE OF FUNDS:</b> HOME Investment Partnerships Act Grant Funds	<b>Positions To Be Deleted Per A-30</b>	<input type="checkbox"/>
	<b>Requires 4/5 Vote</b>	<input type="checkbox"/>

**C.E.O. RECOMMENDATION:** APPROVE

BY: *Jennifer L. Sargent*  
Jennifer L. Sargent

**County Executive Office Signature**

FORM APPROVED COUNTY COUNSEL  
BY: MICHELLE CLACK  
DATE: 6/10/10  
Departmental Concurrence

Consent  
 Policy  
 Consent  
 Policy  
 Dept't Recomm.:  
 Per Exec. Ofc.:

**Prev. Agn. Ref.:** 3.21 of 2/9/2010; 3.10 of 1/14/03; 9.2 of 3/11/03; 3.13 of 4/01/03; 3.12 of 1/23/07

**District:** 4

**Agenda Number:**

3.17

ATTACHMENTS FILED  
WITH THE CLERK OF THE BOARD

**BACKGROUND:**

On April 1, 2003, the Board of Supervisors approved a Grant Agreement, in the amount of \$1,038,000, with Tierra Del Sol (TDS), a California non-profit public benefit corporation and subsidiary of Mercy Housing California, for the development and construction of a 76-unit rental housing complex for independent living seniors (Project) in the City of Cathedral City. The Project was completed in 2008 and received a temporary certificate of occupancy on March 20, 2008.

Subsequent to the Project being completed, a dispute arose between the Project's General Contractor, Fassberg Construction Company (Fassberg), and TDS arising from Fassberg's claims for payment of earned contract funds and earned retention, as well as compensation for extra work performed on the Project and TDS' claims that Fassberg failed to perform its work completely and in a timely and workmanlike manner. On March 18, 2008, Fassberg filed a Stop Notice, in the amount of \$2,582,741.02, with TDS. Subsequently, Fassberg recorded a Mechanic's Lien against the Project and filed a lawsuit against the TDS and Mercy in the action *Fassberg Construction Company v. Tierra del Sol, etc. et al.*, Riverside County Superior Court Case No. INC078096 (the Lawsuit).

The Project was covered by a Performance and Payment Bond, in the sum of \$8,544,751.00, in connection with the work being performed on the Project. The Performance and Payment Bond named Fassberg as principal, TDS, United States Department of Housing and Urban Development, County of Riverside and Redevelopment Agency of Cathedral City as co-obligees. Fidelity and Deposit Company, the issuer of the Performance and Payment Bond, has advanced funds to Fassberg for some of the work in question. TDS and Fassberg are looking to settle all pending issues, claims and disputes with regard to this Project. TDS has agreed to pay Fassberg \$240,000 and Fassberg, in return, has agreed to release all mechanic liens and stop notices.

On February 9, 2010, the Board of Supervisors approved a Settlement Agreement between Tierra del Sol, Mercy Housing California, County of Riverside, Redevelopment Agency of the City of Cathedral City ("RDA"), Fassberg, Fidelity and Deposit Company of Maryland and the United States Department of Housing and Urban Development ("HUD"). Subsequent to the Board's approval, the RDA and HUD released all rights as a co-obligees on the Payment and Performance Bond. Additionally, the County of Riverside was the only party that approved and executed the Settlement Agreement; therefore, it did not become enforceable. With the RDA's and HUD's release of all their rights, the Settlement Agreement was revised to remove the RDA and HUD as parties. The attached revised Settlement Agreement is essentially the same agreement approved by the Board in February with the RDA and HUD removed as a party.

TDS is requesting the County and all the other lenders listed on the Payment and Performance Bond approve the attached Settlement Agreement.

County Counsel has reviewed and approved the attached Settlement Agreement. Staff recommends that the Board approve the attached Settlement Agreement.

## SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (hereafter "Agreement") is made by and between Tierra del Sol ("TDS"), Mercy Housing California ("Mercy"), County of Riverside, ("County"), Fassberg Construction Company ("Fassberg") and Fidelity and Deposit Company of Maryland ("F&D"). Each party to this Agreement shall be referred to individually as a "Party" and collectively as "Parties." This Agreement shall be effective on and after the date in which it is last signed by all Parties (the "Effective Date").

### R E C I T A L S

A. TDS is the owner of certain real property located in the County of Riverside, State of California, commonly known as 37101 West Buddy Rodgers Drive, Cathedral City, California 92234, Assessor's Identification Nos. 687-211-020-9 through 687-211-021-0 ("Real Property").

B. Mercy is a nonprofit public benefit corporation and is the sole member of TDS, also a nonprofit public benefit corporation.

B. Fassberg entered into a written contract with TDS for the construction of certain improvements on the Real Property (the "Contract").

C. F&D issued Performance and Payment Bond No. 08696233, in the penal sum of \$8,544,751.00 in connection with the work being performed on the Real Property. Said bonds named Fassberg as principal and TDS, Secretary of Housing and Urban Development, County and Redevelopment Agency of the City of Cathedral City as co-obligees. The foregoing bonds shall be referred to as the "Performance Bond" and "Payment Bond."

D. A dispute arose between Fassberg, on the one hand, and TDS, on the other hand, arising from Fassberg's claims for payment of earned contract funds and earned retention as well as compensation for extra work performed and TDS' claims that Fassberg failed to perform its work completely and in a timely and workmanlike manner.

E. On or about March 18, 2008, Fassberg filed a Stop Notice, in the amount of \$2,582,741.02, with TDS. The foregoing Stop Notice shall hereafter be referred to as the "Stop Notice."

F. On or about March 20, 2008, Fassberg recorded a Mechanic's Lien in Riverside County, Instrument No. 2008-0138297, against the Real Property. The foregoing Mechanic's Lien shall hereafter be referred to as the "Mechanic's Lien."

G. On or about June 16, 2008, Fassberg filed a lawsuit against the TDS and Mercy in that action *Fassberg Construction Company v. Tierra del Sol, etc. et al.*, Riverside County Superior Court Case No. INC078096 (the "Lawsuit").

H. Notwithstanding the Mechanic's Lien, Stop Notice and Lawsuit, Fassberg continued to perform work on the Real Property assisted in that effort with funds advanced to Fassberg by F&D from the proceeds of the Performance Bond.

I. In consideration of the release of withheld contract proceeds by TDS to Fassberg totaling \$677,655, Fassberg executed two separate Releases of Mechanic's Lien partially waiving and releasing the Mechanic's Lien to the extent of the payments.

J. On or about May 3, 2010, Redevelopment Agency of the City of Cathedral City signed a Release Of Rights As Co-Obligee On Bond, a copy of which is attached hereto marked Exhibit 1 and incorporated herein by this reference.

K. The Parties to this Agreement now seek to resolve all issues, claims and disputes in connection with the improvements on the Real Property, the contract for those improvements, the Performance Bond, the Mechanic's Lien, the Stop Notice and the Lawsuit.

### **TERMS**

NOW THEREFORE, for good and valuable consideration, the Parties agree as follows:

1. Incorporation of Recitals

Each and every one of the above Recitals are hereby incorporated by this reference as if fully set forth in the Terms section of the Agreement.

2. Payment/Release of Lien and Stop Notice

Upon full execution of this Agreement by all of the Parties, a check in the sum of \$240,000.00 will be delivered to Fassberg in satisfaction of any and all claims by Fassberg against Mercy and/or TDS arising from or related to any and all work performed by Fassberg in connection with the construction of the improvements on the Real Property and the written agreement for those improvements. Simultaneously, Fassberg will execute and deliver to counsel for Mercy and TDS to be held in trust subject to the check for \$240,000.00 clearing a Full Release of Mechanic's Lien in recordable form and a Release of Stop Notice.

3. Dismissal

Upon fulfillment of paragraph 2, above, and confirmation that the settlement funds have cleared the bank upon which the funds are drawn, Fassberg shall file a dismissal, with prejudice, of the Lawsuit and provide counsel for Mercy and TDS with a conformed copy of the Request for Dismissal;

4. Mutual Release

Except as specifically set forth in Paragraph 5 below, upon the fulfillment of paragraphs 2 and 3, above, Mercy, TDS, and County, on the one hand, and Fassberg and F&D, on the other hand, for themselves and their directors, officers, employees, agents, attorneys, representatives, insurers, successors, and assigns hereby release each other and all of their respective directors, officers, employees, agents, attorneys, representatives, insurers, successors and assigns from any and all claims, liabilities, demands, losses, causes of action, costs, expenses, attorney's fees, and/or damages alleged in, which could have been asserted in, arising from, or related to any and all work performed for the improvements on the Real Property, the Contract, the Performance Bond, the Payment Bond, the Mechanic's Lien, the Stop Notice and the Lawsuit ("Released Claims").

5. Latent Defects

With respect to unknown claims, the parties expressly agree that Mercy and TDS are not waiving any rights with respect to claims for latent defects arising from any and all work performed by Fassberg in connection with the construction of the improvements on the Real Property and the written agreement for those improvements.

6. No Admission of Liability/Waiver of §1542

This Agreement embodies a compromise of disputed issues and is made in good faith. The parties understand that no party hereto admits any negligence, breach of contract or any wrongdoing in connection with the matters herein referred to, and that the compromise embodied in this Agreement is not an admission of any fault, liability or culpability by any party. Except as specifically set forth above in Paragraph 5, with regard to the matters expressly released under the provisions of this Agreement, the parties waive the rights, benefits and remedies conferred by Section 1542 of the California Civil Code, which states as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Except as specifically set forth above in Paragraph 5, the parties acknowledge that they may hereafter discover facts different from, or in addition to, those which they now know or believe to be true with respect to the releases herein, and agree that this Agreement shall be and remain effective in all respects notwithstanding such different or additional facts or the discovery thereof.

7. Indemnity Re: Assignment of Claims

The Parties hereby represent to each other that they have not heretofore assigned, transferred, pledged, or hypothecated, or purported to assign, transfer, pledge, or hypothecate, to any person, entity or individual, any of the rights or obligations set forth in this Agreement. The Parties agree to indemnify and hold harmless each other against any claim, demand, debt, loss, obligation, liability, cost, expense (including reasonable attorneys' fees), right of action, or cause of action, based on, arising out of, in connection with, in consequence of, or any way involving, any such transfer, assignment, pledge, or hypothecation, or purported transfer, assignment, pledge, or hypothecation.

8. Successors and Assigns

This Agreement benefits and is binding upon each Party hereto and his or her principals, agents, directors, officers, employees, representatives, successors, transferees and assigns.

9. Entire Agreement

This Agreement represents the entire agreement among the Parties hereto and supersedes all prior negotiations, representations or agreements among the Parties, either written or oral, on the subject hereof. This Agreement may be amended only by written instrument designated as an amendment to this Agreement and executed by all of the Parties hereto.

10. Voluntary Agreement With Advice of Counsel

The Parties warrant that they have had the opportunity to consult counsel and understand the terms of this Agreement, the consequences of executing it and enter into it freely and voluntarily. In addition, each Party acknowledges that the drafting of this Agreement was the product of negotiation, that no Party is the author of this Agreement, and that this Agreement shall not be construed against any Party on the grounds that such Party authored or drafted this Agreement.

11. Severance of Unenforceable Terms

If any provision of this Agreement is held, determined, or adjudicated to be invalid, unenforceable, or void for any reason, such provision shall be severed from the remaining provisions of this Agreement and shall not affect the validity and enforceability of the remaining provisions. To the best knowledge and belief of the Parties, this Agreement now contains no provisions that are contrary to Federal or State law.

12. Execution in Counterparts

This Agreement may be executed in counterparts, and a signature transmitted by facsimile shall be deemed the equivalent of an original signature. Each of said facsimile counterparts, when so executed and delivered, shall be deemed an original and, taken together, shall constitute but one in the same instrument.

13. Attorneys' Fees and Costs

In the event it is necessary for any Party to initiate legal action to enforce any term or condition of this Agreement, the prevailing Party shall be entitled to recover all costs and reasonable attorneys' fees incurred.

14. Governing Law

The Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of California.

15. Construction

It is understood and agreed by the Parties that this Settlement Agreement shall be construed without regard to any presumption or other rule requiring construction against the Party causing this Settlement Agreement to be drafted.

16. Captions

Any captions to the paragraphs or the subparagraphs of this Agreement are solely for the convenience of the Parties, are not a part of this Agreement, and shall not be used for the interpretation or determination of the validity of this Agreement or any provision thereof.

17. Authorization to Enter into Settlement

The Parties expressly represent that by affixing their respective signatures hereto; each is authorized to execute this Agreement.

IN WITNESS WHEREOF, the Parties hereto duly execute this Agreement on the date set forth as follows, to be effective as provided herein above.

DATED: \_\_\_\_\_

TIERRA DEL SOL, a California nonprofit public benefit corporation

By: \_\_\_\_\_  
Valerie Agostino, President

DATED: \_\_\_\_\_

MERCY HOUSING CALIFORNIA, a California nonprofit public benefit corporation

By: \_\_\_\_\_  
Benjamin Phillips, Vice President

DATED: \_\_\_\_\_

COUNTY OF RIVERSIDE, a public body

By: \_\_\_\_\_  
Chairman, Board of Supervisors

APPROVED AS TO FORM:

  
Pamela J. Walls, County Counsel **Michelle Clack**

ATTEST:

By: \_\_\_\_\_  
Kecia Harper-Ihem, Clerk of the Board

DATED: \_\_\_\_\_

FASSBERG CONSTRUCTION COMPANY, a  
California corporation

By: \_\_\_\_\_  
Abraham S. Fassberg, President

DATED: \_\_\_\_\_

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, a Maryland corporation

By: \_\_\_\_\_  
Dennis C. Harvey, Claims Counsel