

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

313A



FROM: TLMA – Transportation Department

SUBMITTAL DATE:

October 9, 2013

SUBJECT: Tract 29114, 29114-2 and 32049 Subdivision Settlement Agreement and Mutual Release, Third Supervisorial District/Third Supervisorial District [\$2,000,000] Settlement Funds

RECOMMENDED MOTION: That the Board of Supervisors approve and execute the attached Settlement Agreement and Mutual Release, which allows Arch Insurance Company to pay to the County of Riverside (County) the total sum of two million dollars and no cents (\$2,000,000.00) in connection with the above subdivisions and Mutual Release of Subdivision Bonds.

BACKGROUND:

Summary

On March 27, 2007, pursuant to Government Code Section 66462, the County, acting through the Board of Supervisors and Barratt American Incorporated, entered into Subdivision Improvement Agreements for the construction of streets and the installation of water and sewer systems within Tract 29114. Faithful Performance Bonds with Materials and Labor Bonds were posted by Arch Insurance Company to guarantee the completion of the improvements within the subdivision.

Juan C. Perez
Director of Transportation and Land
Management

FINANCIAL DATA	Current Fiscal Year:	Next Fiscal Year:	Total Cost:	Ongoing Cost:	POLICY/CONSENT (per Exec. Office)
COST	\$ 0	\$ 0	\$ 0	\$ 0	Consent <input type="checkbox"/> Policy <input checked="" type="checkbox"/>
NET COUNTY COST	\$ 0	\$ 0	\$ 0	\$ 0	

SOURCE OF FUNDS: N/A

There are not General Funds used in this project.

Budget Adjustment: N/A

For Fiscal Year: N/A

C.E.O. RECOMMENDATION:

APPROVE

BY

Tina Grande

County Executive Office Signature

MINUTES OF THE BOARD OF SUPERVISORS

FORM APPROVED COUNTY COUNSEL

BY: *Elena M. Boeva* DATE: 10-10-13

☐ Positions Added
☐ Change Order

☐ A-30
☐ 4/5 Vote

Prev. Agn. Ref.: 12/21/04, 2-20; 3/27/07, 2-19; 7/17/07, 2-41

District: 3/3

Agenda Number:

3-51

BACKGROUND:

Summary (continued)

On December 21, 2004, pursuant to Government Code Section 66462, the County, acting through the Board of Supervisors and Barratt American Incorporated, entered into Subdivision Improvement Agreements for the construction of streets and the installation of water and sewer systems within Tract 29114-2. Faithful Performance Bonds and Materials and Labor Bonds were posted by Arch Insurance Company to guarantee the completion within the subdivision. All Subdivision improvement work has been completed for Tract 29114-2, and the County has issued a Notice of Completion.

On July 17, 2007, pursuant to Government Code Section 66462, the County, acting through the Board of Supervisors and Barratt American Incorporated, entered in Subdivision Improvement Agreements for the construction of streets and the installation of water and sewer systems within Tract 32049. Faithful Performance Bonds and Materials and Labor Bonds were posted by Arch Insurance Company to guarantee the completion within the subdivision.

Tract 29114 has a portion of the total tract improvements complete with some residential dwelling units, which are constructed and occupied. Tract 32049 has a small portion of the total tract improvements complete with some residential dwelling units, which are constructed and are unoccupied.

Through a series of negotiations, the County and Arch Insurance Company reached an agreement whereby Arch Insurance Company will provide their share of the construction cost for the Skyview Road Bridge, and the County will cause the construction of the bridge at some point in the future when, the County determines that the bridge is necessary for public health and safety as the area continues to grow and develop. In consideration of this Agreement, Arch Insurance Company will pay to the County two million dollars and no cents (\$2,000,000) as full and complete satisfaction of any and all claims that the County has asserted against Arch Insurance Company. Once payment has been received by the County, a Mutual Release of Claims will be executed. The County has also entered into separate agreements with Ryland Homes and Bellacap for their contributions toward the channel and bridge improvements, which together with this settlement reached with Arch Insurance Company will provide the necessary funding for this future work.

Impact on Citizens and Businesses

The execution of this agreement allows for the funding of the construction of certain future improvements that may become necessary for the safety and welfare of the residents in these developments, the surrounding public, and environment.

SUPPLEMENTAL:

Additional Fiscal Information

There is no fiscal impact to the County.

Contract History and Price Reasonableness

N/A

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release ("Agreement") is made and entered into by and between Arch Insurance Company ("Arch") and the County of Riverside ("County") effective on the date this Agreement is approved by the Board of Supervisors for the County of Riverside ("Effective Date").

RECITALS

A. WHEREAS, Barratt American Incorporated ("Barratt") was the owner and developer of a residential housing projects in the County of Riverside ("County"), on Tract Nos. 29114, 29114-2 and 32049. (Hereinafter, all of the Tracts are referred to collectively as the "Project").

B. WHEREAS, on or about December 21, 2004, Barratt entered into Subdivision Improvement Agreements with the County for the installation of street and drainage improvements, water system improvements, sewer system improvements and placement of survey monuments for Tract No. 29114-2.

C. WHEREAS, all Subdivision Improvement Work has been completed for Tract No. 29114-2, and the County has issued its Notice of Completion on said Tract.

D. WHEREAS, on or about March 27, 2007, Barratt entered into Subdivision Improvement Agreements with the County for the installation of streets and drainage improvements, water system improvements, sewer system improvements and placement of survey monuments for Tract No. 29114. The Subdivision Improvement Agreements are incorporated in this Agreement by reference as though fully set forth herein and are expressly made a part of this Agreement, and are attached hereto as Exhibit "A".

E. WHEREAS, on or about July 17, 2007, Barratt entered into Subdivision Improvement Agreements with the County for the installation of road and drainage improvements, water system improvements, sewer system improvements and placement of survey monuments for Tract No. 32049 for both onsite and offsite improvements. The Subdivision Improvement Agreements are incorporated in this Agreement by reference as though fully set forth herein and are expressly made a part of this Agreement, and are attached hereto as Exhibit "B". Barratt and the County also entered into an agreement entitled: Project Agreement Road and Bridge Benefit District (Southwest Area-Winchester Road) on or about July 31, 2007. A true and accurate copy of this agreement is attached hereto as Exhibit "C".

F. WHEREAS, on or about November 23, 2004, pursuant to California Government Code Section 66499 et seq., Arch issued Faithful Performance Bonds and Material and Labor Bonds each bearing number SU5011895 and Subdivision Monument Bond numbered SU5011896 (hereinafter the "Tract 29114-2 Bonds", and collectively with all other bonds referenced herein the "Bonds") for the Tract No. 29114-2 improvements, as

security for the construction of the public improvements to be installed under the Subdivision Improvement Agreements.

G. WHEREAS, on or about January 13, 2006, pursuant to California Government Code Section 66499 et seq., Arch issued Faithful Performance Bonds and Material and Labor Bonds each bearing number SU5018194, a Subdivision Monument Bond numbered SU5018195, (hereinafter the "Tract 29114 Bonds", and collectively with all other bonds referenced herein the "Bonds") for the Tract No. 29114 improvements, as security for the construction of the public improvements to be installed under the Subdivision Improvement Agreements. The Bonds are incorporated in this Agreement by reference as though fully set forth herein and are expressly made a part of this Agreement, and are attached hereto as Exhibit "D".

H. WHEREAS, on or about July 14, 2006, pursuant to California Government Code Section 66499 et seq., Arch issued Faithful Performance Bonds and Material and Labor Bonds each bearing number SU5020993, a Subdivision Monument Bond numbered SU5020994 (hereinafter the "Tract 32049 Onsite Bonds", and collectively with all other bonds referenced herein the "Bonds") for the Tract No. 32049 onsite improvements, as security for the construction of the public improvements to be installed under the Subdivision Improvement Agreements. The Bonds are incorporated in this Agreement by reference as though fully set forth herein and are expressly made a part of this Agreement, and are attached hereto as Exhibit "E".

I. WHEREAS, on or about July 14, 2006, pursuant to California Government Code Section 66499 et seq., Arch issued Faithful Performance Bonds and Material and Labor Bonds each bearing number SU5020995, (hereinafter the "Tract 32049 Offsite Bonds", and collectively with all other bonds referenced herein the "Bonds") for the Tract No. 32049 offsite improvements, as security for the construction of the public improvements to be installed under the Subdivision Improvement Agreements and the Project Agreement Road and Bridge Benefit District (Southwest Area-Winchester Road). The Bonds are incorporated in this Agreement by reference as though fully set forth herein and are expressly made a part of this Agreement, and are attached hereto as Exhibit "F".

J. WHEREAS, after construction of the public improvements on the Project commenced, Barratt experienced financial difficulties and was unable to complete the remaining work.

K. WHEREAS, the County, as a beneficiary under the Bonds, made a demand upon Arch to complete construction of the remaining public improvements at the Project, and on March 19, 2012 filed a complaint in the Superior Court for the County of Riverside, entitled County of Riverside v. Arch Insurance Company, case No. RIC 1203904 (the "Action") seeking damages for the completion of the bonded public improvements.

L. WHEREAS, Arch, on May 8, 2012, answered the complaint, denying any and all liability.

M. WHEREAS, in exchange for valuable consideration offered by each Party, the Parties have agreed to enter into this Agreement for the purpose of resolving all outstanding issues and claims arising from the Bonds, the Project, and the Action, subject to the terms and conditions of this Agreement.

N. WHEREAS, this Agreement is intended to resolve all issues between Arch and the County with regard to any claims arising from the Bonds, the Project, and the Action, fully, finally and forever, as set forth herein.

NOW, THEREFORE, based on the exchange of valuable consideration, the receipt and sufficiency of which is acknowledged, and based on the Recitals set forth above which form a part of this Agreement, Arch and the County mutually agree as follows:

1. The recitals set forth hereinabove in paragraphs A through N, inclusive, are incorporated herein by this reference as though fully set forth herein at length.

2. **Payment by ARCH.** In consideration for this Agreement and the terms and conditions set forth herein, Arch shall pay to the County the total sum of Two Million Dollars and No Cents (\$2,000,000.00) ("Payment") in full and complete satisfaction of any and all claims, including all interest, attorneys' fees, and costs that the County has asserted or could have asserted against Arch in connection with the Project, the Bonds, and the Action. Payment will be made by ARCH within twenty (20) days of the execution of this Agreement by the County. Within ten (10) business days of receipt of the Payment issued by Arch and clearance of the Payment by an appropriate financial institution, the County will dismiss the Action with prejudice.

3. **Mutual Release of Claims.** Except for the obligations set forth in, created by or reserved by this Agreement, the Parties, for themselves, and for all of their heirs, executors, administrators, successors and assigns, do hereby fully and forever release, discharge, and dismiss any and all present and future claims, demands, action, causes of action, rights, damages, costs, expenses and compensations whatsoever, in law or in equity, in the nature of an administrative proceeding or otherwise (known, unknown, contingent, accrued, inchoate or otherwise), that they have, have had or may have, now or in the future, against one another, and all companies, partnerships, individuals, associated or affiliated or otherwise connected with them, and of their agents, attorneys, servants, consultants, successors, heirs, executors, associations or partnerships, arising out of or relating in any way to the Project, the Bonds, and the Action.

Except for the obligations set forth in, created by or reserved by this Agreement, ARCH does hereby fully and forever release, discharge, and dismiss any and all present and future claims, demands, action, causes of action, rights whatsoever, in law or in equity that ARCH has, have had or may have, now in in the future, against Ryland Homes of California, Inc. (a Delaware Corporation), and Fidelity and Deposit Company of Maryland, their agents, attorneys, servants, consultants, successors, heirs, executors, associations or partnerships, arising out of or relating in any way to the Project and the Bonds.

4. **Release of Bonds.** Once the Payment has been made by ARCH to the County, the County shall release the Faithful Performance Bonds and Subdivision Monument Bonds, and return the originals of same to Arch.

5. **Waiver of Statutory Rights.** Except for the obligations set forth in, created by, or reserved by this Agreement, the Parties hereby acknowledge that they are familiar with California Civil Code §1542, which provides 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 settlement with the debtor.

Except as provided for under the terms of this Agreement, the Parties waive and relinquish any and all rights and benefits which they may have under, or which may be conferred upon them by, the provisions of § 1542 of the California Civil Code and/or by any similar law of any state or territory of the United States, to the fullest extent that they may lawfully waive such rights or benefits pertaining to the subject matter of this Agreement. In connection with such waiver and relinquishment, the Parties acknowledge that they are aware that they or their attorneys may hereafter discover claims or facts in addition to or different from those which each of them now knows or believes to exist with respect to the subject matter of, or any part to, this Agreement, but that it is the intention of the Parties to hereby fully, finally and forever waive said claims, whether known or unknown, suspected or unsuspected, which concern, arise out of, or are in any way connected with the Project, the Bonds, and the Action.

6. **Exclusion from Scope of Agreement.** Notwithstanding any provision to the contrary, this Agreement does not address and has no effect on any claims, demands, action, causes of action and rights, in law or in equity, in the nature of an administrative proceeding or otherwise (known, unknown, contingent, accrued, inchoate or otherwise), which Arch has or may have, now or in the future, against Barratt or any parties other than the County, Ryland Homes of California, Inc. and Fidelity and Deposit Company of Maryland.

7. **Representation and Warranties.**

7.1 Except as otherwise set forth in this Agreement, each of the Parties hereby represents and warrants that it has not previously assigned or transferred in any manner, or purported to have assigned or transferred in any manner, and is the sole owner of any of the claims described or set forth in Paragraph 2 above.

7.2 Except as otherwise set forth in this Agreement, each of the Parties hereby represent and warrant that the person executing this Agreement on its behalf is duly authorized to do so, and that he/she is authorized to bind the party to the terms set forth herein.

8. **Admission of Liability.** Nothing in this Agreement shall be construed as an admission of liability by any of the Parties to this Agreement.

9. **Governing Law.** This Agreement shall be governed by and interpreted in accordance with the laws of the State of California.

10. **Further Assurances.** Each party to this Agreement shall execute all instruments and documents and take all action as may be reasonably required to effectuate this Agreement.

11. **Time of Essence.** Time is of the essence with respect to each provision of this Agreement.

12. **Attorneys' Fees.** If any party shall bring an action or proceeding against another party to enforce any of the terms of this Agreement, the prevailing party shall be entitled to an award of reasonable attorneys' fees and costs.

13. **Modification.** This Agreement may be modified only by a contract in writing executed by the party to this Agreement against whom enforcement of such modification is sought.

14. **Prior Understandings.** This Agreement contains the entire agreement between the Parties with respect to the subject matter of this Agreement, is intended as a final expression of such Parties' agreement with respect to such terms as are included in this Agreement, is intended as a complete and exclusive statement of the terms of such agreement, and supersedes all negotiations, stipulations, understandings, agreements, representations and warranties, if any, with respect to such subject matter, which precede or accompany the execution of this Agreement.

15. **Interpretation.** Whenever the context so requires in this Agreement, all words used in the singular shall be construed to have been used in the plural (and vice versa), each gender shall be construed to include any other genders, and the word "person" shall be construed to include a natural person, a corporation, a firm, a joint venture, a trust, an estate, or any other entity.

16. **Partial Invalidity.** Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Agreement or the application of such provision to any person or circumstance is, to any extent, deemed to be invalid or unenforceable, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected by such invalidity or unenforceability, unless such provision or such application of such provision is essential to this Agreement.

17. **Successors-in-Interest and Assigns.** Except as otherwise set forth in this Agreement, the Parties, and each of them, shall not assign or delegate to any other person

this Agreement or any rights or obligations under this Agreement. Subject to any restriction on transferability contained in this Agreement, this Agreement shall be binding upon and shall inure to the benefit of the successors-in-interest and assigns of the Parties hereto, and each of them. Nothing in this Paragraph shall create any rights enforceable by any person other than the Parties, except for the rights of the successor-in-interest and assigns of the Parties, unless such rights are expressly granted in this Agreement to other specifically identified persons.

18. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original. All counterparts so executed shall constitute one Agreement binding all the Parties hereto. A photocopy or fax reproduction of an original copy of the Agreement shall be of the same binding effect as the original.

19. **No Inducement or "Drafting Party."** Each of the Parties has had the opportunity to, and has to the extent each deemed appropriate, obtained legal counsel concerning the content and meaning of this Agreement. Each of the Parties agrees and represents that no promise, inducement or agreement not herein expressed has been made to effectuate this Agreement, and that this Agreement represents the entire agreement between the Parties. Each of the Parties' respective legal counsel has reviewed and approved this Agreement. The rule of construction that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement.

WHEREFORE, the parties hereto have executed this Settlement Agreement by their authorized representatives.

DATED: 9-18-13

ARCH INSURANCE COMPANY

By: Susan D. Neft
Name: Susan D. Neft, Esq.
Title: Senior Surety Counsel

DATED: _____

COUNTY OF RIVERSIDE

By: John J. Benoit,
Chairman, Board of Supervisors

ATTEST:

KECIA HARPER-IHEM
Clerk of the Board

BY: _____
Deputy

APPROVED AS TO FORM:

DATED: 9-18-13

WILSON, ELSE, MOSKOWITZ,
EDELMA & DICKER LLP

By: 

JOHN J. IMMORDINO
Attorneys for ARCH INSURANCE
COMPANY

DATED: 9-26-13

PAMELA J. WALLS, County
Counsel

By: 

ELENA M. BOEVA
Deputy County Counsel
Attorneys for COUNTY OF
RIVERSIDE