Staff Report

Agenda Item: **SETTLEMENT AGREEMENT BETWEEN THE TOWN OF CLARKDALE AND ARCH INSURANCE COMPANY –** Discussion and consideration of a Settlement Agreement with Arch Insurance Company to accept payment of $150,572.04 as payment for the outstanding balance due by ARCH Insurance Company under that subdivision bond issued on behalf of Empire Residential Construction, LLP, to the Town of Clarkdale as payment in full.

Staff Contact: Sherry Bailey, Community Development Director

Meeting Date: October 28, 2008

Background: Since Empire Residential filed for bankruptcy reorganization staff has been working with the two bond companies to correct the problems covered by the bonds. Arch Bond Company holds the smaller of the two bond amounts and their bond covers only Phase I of the project. Staff has supplied an itemized accounting of the corrections and a cost list to the town attorney who in turn has been dealing with Arch. Arch has proposed issuing a check to the town for the remaining bond amount and has asked for an accounting as the items are corrected so that they can attempt to get repayment at some date from either Empire or any new owners.

Staff has reviewed the settlement agreement and agrees with the stipulation and is recommending the settlement and the release by the council.

Recommendation: Staff recommends that the Council accept the settlement agreement with ARCH Insurance Company.

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made between ARCH INSURANCE COMPANY ("ARCH"), a Missouri corporation; and THE TOWN OF CLARKDALE ("TOWN")a municipal corporation, ("The Parties").

1. RECITALS

This Agreement is made with reference to the following facts:

(a) On or about August 12, 2005, ARCH as surety for its principal EMPIRE RESIDENTIAL CONSTRUCTION L.P.("EMPIRE") issued a SUBDIVISION BOND for FAITHFUL PERFORMANCE by EMPIRE of an agreement described as "Mountain Gate, Phase I-Improvements for Roadway, Drainage, Water, Sewer" to TOWN as obligee, Bond Number SU5013728, in the penal sum of $3,011,440.83(the BOND.").

(b) On or about March 13, 2007, after partial performance of the underlying agreement by EMPIRE, the Common Council of the Town passed and adopted Resolution No. 1221 which, among other things, released 95% of the penal sum of Bond SU5013728. The remaining penal sum of the bond in effect after the release is $150,572.04.

(c) On or about February 26, 2008, TOWN notified ARCH of a default by EMPIRE in performance of the agreement, and made demand upon ARCH for payment of the remaining penal sum of the BOND. To date, TOWN has presented ARCH with estimates of the cost of completion and repair of improvements covered by the agreement in an amount in excess of the remaining penal sum of $150, 572.04.

(d) The TOWN's claim to ARCH for the remaining penal sum of the BOND based upon the default of ARCH's principal EMPIRE in an amount in excess of the remaining penal sum in performance of the bonded underlying agreement is referred to herein as the "CLAIM".

(e) The Parties now desire and intend by this Agreement, among other things, to settle finally and forever all existing and potential claims of any type concerning the

disputes that have arisen between them regarding the matters which were the subject of THE CLAIM;

NOW, THEREFORE, the Parties agree that the material terms of their Agreement are as follows:

2. DEFINITIONS

"CLAIM": All amounts of any type sought to be recovered by TOWN against ARCH, under the BOND and underlying bonded improvement agreement; including but not limited to all claims or damages sought from surety as a result of the default of its principal EMPIRE in performance of the underlying agreement, and all damages allegedly arising from any breach of the BOND by ARCH and its principal EMPIRE.

"The Parties": ARCH and TOWN

"The Underlying Agreement": Mountain Gate, Phase 1- Improvements for Roadway, Drainage, Water, Sewer

3. PAYMENT AND CONSIDERATION

(a) ARCH will pay $150, 572.04 to TOWN within 10 days of notification to ARCH by the TOWN of the passage of a resolution of the Mayor and Council accepting the $150, 572.04 payment from ARCH as full payment of the amount due under BOND SU5013728, and agreeing to provide a full release and exoneration of the BOND upon receipt of payment. The resolution shall be in a form substantially similar to the draft resolution attached hereto as Exhibit A.

(b) TOWN agrees to accept payment of the $150,572.04 amount, and to release all claims for payments of all types above that amount against ARCH arising out of or in any way related to BOND SU 5013728 and the underlying bonded improvement agreement and TOWN's CLAIM.

4. RELEASES, WAIVERS AND INDEMNIFICATION

In consideration for and following receipt of the payments described above and in consideration of the mutual releases provided below:

(a) Except to the extent of the obligations and/or reservations provided for in paragraph (4) (e) below, which expressly survive performance of this Agreement, the Parties for themselves and their respective representatives, agents, employees, attorneys, predecessors, successors, sureties, assigns and all others, do hereby fully and forever release, discharge and forever acquit each other Party and its representatives, agents, employees, attorneys, predecessors, successors, sureties, assigns, and all others from any and all claims, demands, causes of action, obligations, rights, attorneys' fees, costs, and/or liabilities of any nature, whether anticipated or unanticipated, known or unknown, past or present, contingent or fixed, heretofore or hereafter arising from or relating to the matters and issues raised in the CLAIM and BOND including, but not limited to, the incurred to date interest, attorney's fees and litigation costs of the Parties herein, and covenant not to file suit of any other legal proceeding against each other with respect to the CLAIM and BOND ; provided, however, that nothing contained in this Agreement shall be construed as a release by any Party of any claim or demand for: (a) the falsity or inaccuracy of any representation or warranty made in this Agreement by any other Party; or (b) the breach by any Party of any executory obligation imposed upon that Party by the terms of this Agreement.

(b) **Indemnification Against Released Claims.** Each Party releasing any Claim under this agreement shall indemnify, defend and hold each other Party released under this Agreement harmless from and against any and all Claims arising directly or indirectly out of the assertion, enforcement, or attempted enforcement, by the Releaser, of any of the Claims herein released, or arising out of any breach of any representation or warranty made in this Agreement.

(c) **No Prior Assignment.** Each Party represents and warrants that they have not heretofore assigned or transferred, or purported to assign or transfer, to any person or entity, any Claims herein released, and that they are the sole owner of such Claims.

(d) In order to assist ARCH if ARCH chooses to prosecute any claims or actions against third parties to recover the amounts paid to TOWN under this agreement, TOWN agrees that it will provide ARCH copies of any invoices for the costs of completion of the underlying bonded agreements incurred by TOWN, within 30 days of any written request from ARCH.

5. DISMISSALS AND RELEASE DOCUMENTS

Within 10 days after all settlement payments required by paragraph 3 of this agreement have been made, TOWN will provide ARCH with a written release and exoneration of the BOND by a duly authorized representative of TOWN. If a further Common Council resolution is required in order to provide the release and exoneration, TOWN will provide for the release and exoneration at the next regularly scheduled council meeting following payment.

6. REPRESENTATIONS AND WARRANTIES

(a) Each Party has made such investigation of the facts pertaining to this settlement and this Agreement and of all the matters pertaining to it as it deems necessary.

(b) Each Party or responsible officer or agent thereof has read this Agreement and understands its contents. Each of the individuals executing this Agreement on behalf of the respective Party possesses the power, capacity and authority to do so and to thereby bind that respective Party.

(c) The Parties acknowledge that in entering into this Agreement, each of them is relying solely on the recitals, statements and other terms of this Agreement and the advice of its own attorneys and other advisors. The Parties acknowledge, further, that they are not relying on any written or oral statement, representation or warranty made by

any other Party, or the representative of any other Party, except as referenced in this Agreement. Except with respect to the representations and warranties made in this Agreement, each Party, in entering into this Agreement, assumes the risk that any fact upon which it relied in entering into this Agreement proves to be false, or that its understanding of the facts or the law was incorrect.

(d) This agreement is binding upon and shall inure to the benefit of each of the Parties hereto and to their respective parent companies, subsidiaries, affiliates, joint ventures, successors and assigns.

(e) The Parties agree to execute, acknowledge, and/or deliver any and all documents and to perform any and all acts reasonably necessary to carry out and perform their obligations hereunder.

(f) Subject to the limitations, reservations and exceptions specifically set forth in this Agreement the Parties, and each of them, acknowledge that they are aware that they or their attorneys may hereafter discover facts different from or in addition to the facts which they now know or believe to be true with respect to the subject matter of this Agreement, but that it is their intention hereby to, and they hereby do, fully, finally, absolutely, and forever settle any and all claims, disputes and differences which do now exist, may exist, or heretofore have existed between them related to the Claims and the Lawsuit, and that in furtherance of such intention, the releases herein given by said Parties shall be and remain in effect as full and complete releases notwithstanding the discovery of any different or additional facts.

(g) The parties acknowledge that this settlement represents a compromise of disputed claims, and shall not be deemed as admission of liability on behalf of any party.

7. **GOVERNING LAW**

This Agreement shall be interpreted, enforced and governed by and under the laws of Arizona.

8. **INTEGRATION**

This Agreement memorializes and constitutes the final expression and the complete and exclusive statement of agreement and understanding between and among the Parties. Except as expressly provided in this Agreement, this Agreement supersedes and replaces all prior negotiations, proposed agreements, and agreements, whether written or oral. Each Party to this Agreement acknowledges that the Party neither executed this Agreement in reliance upon any promise, representation, statement, or warranty whatsoever, express or implied, which is not expressly contained in this Agreement, nor did such Party execute this Agreement in reliance upon any belief as to any fact not expressly recited herein.

9. ATTORNEYS FEES IN SUIT ON AGREEMENT

The prevailing party in any suit to enforce the terms of this settlement agreement shall be entitled to recover attorneys fees in such suit as a breach of contract damage.

10. NO CHANGES OR AMENDMENTS

No changes in, additions to, or modifications of this settlement agreement shall be valid unless set forth in writing and executed by all parties hereto.

11. INDEPENDENT ADVICE

The Parties each acknowledge that they have received independent legal advice with respect to the advisability of making this Agreement.

12. TAX CONSEQUENCES

The Parties each acknowledge and understand that there may be certain tax consequences connected with entering into this Agreement and by executing this Agreement, each Party confirms that no other Party nor any other Party's counsel has made any representations in that regard.

13. SEVERANCE

If a provision of this Agreement is adjudged illegal or invalid, such provision shall: (1) be rewritten by the court to be legal and valid as long as the rewritten provision

remains consistent with the Parties' mutual intentions expressed in this Agreement; or (2) be deemed severed and deleted, but only if any such severance and deletion will not affect the benefits of the Agreement which, according to its terms or as a whole, any Party is to receive.

14. COUNTERPARTS

This Agreement may be executed in one or more counterparts all of which together shall constitute one and the same Agreement. Facsimile signatures shall be deemed original signatures for all purposes.

15. EFFECTIVE DATE

This settlement agreement will become effective when it has been signed by authorized representatives of all Parties, and each Party has transmitted a copy of the signed agreement to all other Parties. The effective date shall mean and refer to the last date that a Party to this agreement executes this agreement and transmit the signed agreement to all other parties.

16. NOTICES

The Parties shall send the notices required by this agreement to the following party representatives at the address written below:

ARCH	Ronald W. Hopkins, Esq. Gascou Hopkins LLP 10990 Wilshire Blvd., Suite 1280 Los Angeles, CA 90024
TOWN OF CLARKDALE	Robert S. Pecharich, Esq. Town Attorney Boyle, Pecharich, Cline, Whittington & Stallings, P.L.L.C 125 North Granite Street Prescott, AZ 86301-3001

17. INTERPRETATION

Parties have each agreed to the use of the particular language of the provisions of this Agreement, and any question of doubtful interpretation shall not be resolved by any rule of interpretation providing for interpretation against the Parties who cause an uncertainty to exist or against the draftsman.

18. AUTHORIZED REPRESENTATIVE

Each signatory to this Agreement on behalf of a corporation or entity other than an individual, represents and warrants that he or she is the duly authorized representative of the Parties for whom the signatory executes this Agreement and may bind such corporation or entity to this Agreement.

Date:_____ Town of Clarkdale

By:_____

Date:_____ ARCH Insurance Company

By:_____

APPROVED AS TO FORM AND CONTENT:

Date:_____ Robert S. Pecharich, Town Attorney

By:_____
Attorneys for J&H

Date:_____ Ronald W. Hopkins

By:_____
Attorneys for ARCH Insurance Company