

ORDINANCE 2010- MLR

AN ORDINANCE AUTHORIZING THE EXECUTION OF A RELEASE AND SETTLEMENT AGREEMENT WITH POTTERHILL HOMES, LLC AND DECLARING AN EMERGENCY

WHEREAS, the Village of Greenhills is currently involved in litigation with Potterhill Homes, LLC; and

WHEREAS, the parties mutually desire to resolve the litigation through the terms of a Release and Settlement Agreement.

NOW, THEREFORE, be it ordained by the Council of the Village of Greenhills, Ohio, 5 members elected thereto concurring:

**Section 1.**

That the Municipal Manager, or Acting Municipal Manager as necessary, is hereby authorized to execute a Release and Settlement Agreement with said Agreement being substantially in the form of that attached hereto as Exhibit A, incorporated here in reference.

**Section 2.**

That all Village officials are further authorized to take any and all actions necessary to comply with the terms of said Agreement.

**Section 3.**

That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety of welfare, and shall be effective immediately. The reason for said declaration of emergency is the need to execute the settlement agreement at the earliest possible date in order to end the pending litigation.

Passed this 18<sup>th</sup> day of JUNE, 2010.

APPROVED:

  
MAYOR

ATTEST:

  
CLERK OF COUNCIL

## RELEASE AND SETTLEMENT AGREEMENT

### Exhibit "A"

This Release and Settlement Agreement is entered into by and between Potterhill Homes, LLC, (hereinafter "Releasor"), and the Village of Greenhills, Ohio, its agents, officers, servants, successors, assigns, heirs, representatives, insurers, including but not limited to the Scottsdale Indemnity Company, their employee, assigns and attorneys, (hereinafter "Releasees") and is to evidence the following understanding and agreements:

WHEREAS, Releasor filed a Complaint in the Hamilton County, Ohio, Court of Common Pleas, captioned *Potterhill Homes, LLC, et al. v. Village of Greenhills, Ohio, et al.*, Case No. A0912098, and which was removed to the United States District Court for the Southern District of Ohio, Western Division, as Case No. 1:10-cv-17, alleging claims of damages due to violations of Releasor's constitutional rights and asserting claims seeking declaratory judgment and an extraordinary writ of mandamus stemming from the Releasees' alleged failure to properly issue a Certificate of Occupancy to the Releasor for the residential dwelling Releasor constructed on real property located at 46 DeWitt Street in the Village of Greenhills; and

WHEREAS, Releasees have denied any liability to Releasor regarding Releasor's allegations of unlawful takings and other violations of Releasor's constitutional rights; and

WHEREAS, Releasor and Releasees desire to settle and fully, finally, and forever resolve the claims of Releasor against the Releasees, including Releasees' employees John J. Hester and Jane A. Berry, on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained and other valuable consideration, the sufficiency of which is hereby acknowledged, Releasor and Releasees hereby agree as follows:

1. Releasees shall pay to Releasor the sum of Sixty Thousand Dollars (\$60,000) in full and final settlement of Releasor's claims against the Releasees.

2. For and in consideration of the payment of \$60,000 in the form of draft or checks made payable to Potterhill Homes, the receipt and sufficiency of such consideration being hereby acknowledged, the undersigned, on behalf of Releasor itself, its heirs, executors, administrators, representatives, successors, assigns, beneficiaries, and employees, hereby releases and forever discharges Releasees, specifically including the Village of Greenhills, John J. Hester and Jane A. Berry, from any and all liability, negligence, claims, demands, damages (of all kinds, including punitive damages, attorney fees and pre and post-settlement interest), actions, liens, promises, trespasses, judgments, executions, debts, accountings, causes of action of every kind, known or unknown, arising out of or any way connected with the subject of the matter addressed herein.

3. Releasor agrees to dismiss any and all claims pending in the above referenced lawsuit, specifically including those against the Village of Greenhills, John J. Hester and Jane A. Berry, with prejudice. Releasor further agrees to dismiss its pending appeal before the Village of Greenhills Board of Zoning Appeals ("BZA"), Case No. Z-2010-1.

4. Recognizing that part of the underlying dispute in the Releasor's claims is the interpretation of zoning requirements described in the DeWitt Landing Planned Unit Development's Covenants and Restrictions and Design Guidelines, and in order to settle the claims herein, the Releasees agree that the subject residential dwelling located at 46 DeWitt

Street complies with the subject zoning requirements and will be eligible for a Certificate of Occupancy so long as the home otherwise passes a building inspection.

5. Releasor owns six additional lots in the DeWitt Landing PUD. Releasor shall have the right to construct a single family residence on each of the remaining unimproved lots (Lot #: 6, 12-16) (the "Remaining Lots") within the DeWitt Landing PUD using materials which are equal to or greater in quality, quantity, design, type, texture, and appearance as those materials shown on the approved building plans for the residence constructed on Lot #5 of the DeWitt Landing PUD, including, but not limited to, the use of vinyl siding, non-architectural shingles, sliding glass rear patio doors, non-stamped concrete, and pre-fabricated lattice work, and using landscaping that is equal to or greater in quality, quantity, design, type, and scope as that installed on Lot #5. As long as Releasor constructs single-family residences in substantial conformance with the quality, materiality, and specifications of the residence constructed on Lot #5 and the residences otherwise comply with the adopted building code, the Releasees acknowledge and agree that there shall be no cause to deny Releasor a permanent, unconditional Certificate of Occupancy for such residences, and any such residences shall hereby be deemed to be constructed in full compliance with the declaration and the design guidelines contained therein. Notwithstanding the foregoing, Releasor shall have the right, but not the obligation, to construct any such residences using materials of greater quality, quantity, design, type, and scope than the residence on Lot #5, in Releasor's sole discretion. Nothing herein shall obligate Releasor to construct residences on the Remaining Lots that are architecturally similar to the residence constructed on Lot #5.

6. Releasor hereby warrants and represents that it has not assigned to any third party any claim asserted or which could have been asserted against the Releasees in the underlying lawsuit, in the BZA appeal, or in any other tribunal of competent jurisdiction.

7. It is further understood and agreed that the payment for and on behalf of Releasees to Releasor is made entirely for the purpose of settling a dispute and to settle and extinguish all actions, causes of action, suits, proceedings, damages, proceedings, damages, claims, and rights which Releasor has or may have had against the Releasees, specifically including the Village of Greenhills, John J. Hester and Jane A. Berry. By tendering the aforesaid consideration, the Releasees do not admit to any violation of law, liability, or invasion of any rights and any such invasion or liability is expressly denied by the Releasees.

8. It is further understood and agreed that the consideration contained and described in this Release and Settlement Agreement is the sole and only consideration for this Release and Settlement Agreement, and that no representations, promises, or inducements have been made by the parties hereto other than those that appear in this instrument.

9. The undersigned acknowledges and declares that it has read this Release and Settlement Agreement, has been represented by counsel concerning this matter, and fully understands its terms and voluntarily accepts the consideration as set forth herein above for the purpose of making a full and complete compromise, adjustment and settlement of all claims and potential claims which the Releasor has or could have asserted against the Releasees arising out of the alleged damages described herein.

10. Releasor and Releasees mutually agree not to disparage or make any false statement about the other. Nothing contained in this paragraph shall be interpreted as preventing

the parties from giving truthful testimony if they are subpoenaed or otherwise compelled by legal process. The parties hereby understand that a breach of this provision would cause the other immediate and irreparable harm. Accordingly, the parties shall be entitled to seek injunctive relief restraining each other from performing the act or acts which would constitute such a breach of this provision and to enforce the provisions herein. Nothing herein shall be construed as a limitation of the parties from pursuing any other or additional relief or remedy from a breach or anticipated breach of this provision or Agreement. In the event of a breach or anticipated breach of this paragraph, the non-breaching party shall be entitled to recovery of any and all attorney fees and/or costs incurred in enforcing this provision and/or seeking the appropriate relief.

11. In light of the acknowledgments, stipulations, and agreements set forth hereinabove, Releasor agrees as follows:

- a) Releasor has the right, power, legal capacity, and authority to enter into and perform its obligations under this Release and Settlement Agreement;
- b) Releasor has relied solely on its knowledge and information and has not relied on any representations, promises or agreements of any kind other than that which is contained in this Release and Settlement Agreement made by or on behalf of any party released hereby;
- c) This Release and Settlement Agreement shall be construed and interpreted in accordance with the law of the State of Ohio;
- d) In the event that one or more of the provisions of this Agreement may be deemed to be illegal or unenforceable, the remainder of this Release and Settlement Agreement shall not be affected thereby, and each remaining provision or portion thereof shall continue to be valid and effective and shall be enforceable to the fullest extent permitted by law.

12. This Agreement may be executed in counterparts, and each such counterpart shall be for all purposes deemed to be an original. All such counterparts shall together constitute the same instrument. Signatures transmitted by facsimile shall be deemed original signatures for purposes of this Agreement.

FOR POTTERHILL HOMES, LLC:

IN WITNESS WHEREOF, have hereunto set hand this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
Title, Potterhill Homes, LLC

FOR THE VILLAGE OF GREENHILLS, OHIO:

IN WITNESS WHEREOF, have hereunto set hand this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
Title, Village of Greenhills, Ohio