

RESOLUTION NO. 2022- 241

A RESOLUTION AUTHORIZING THE EXECUTION OF A SETTLEMENT AGREEMENT AND FINAL RELEASE IN THE MATTER OF CITY OF VINELAND v. BOND SAFEGUARD INSURANCE COMPANY, ET AL DOCKET NO. CUM-L-779-20.

WHEREAS, Tradition Homes at Vineland LLC acquired the approved Foxmoor Estates Subdivision on Maple and Brewster Avenues (Project) which was later determined to be constructed with drainage basins to assure that stormwater runoff would properly drain based upon faulty data and calculations; and

WHEREAS, the Project had a required Performance Bond posted to assure the construction of the Project was done completely and in accordance with the plans for Foxmoor Estates Subdivision; and

WHEREAS, as a result of the continued flooding issues, in 2019, the City commenced suit in the Superior Court of New Jersey Law Division under Docket No. CUM-L-779-20 against Bond Safeguard Insurance Company (Safeguard), alleging that the developer of the Project failed to meet the requirements of the approved Project and that Safeguard Performance Bond was responsible for the proper completion of the Project, which claims were denied by Safeguard; and

WHEREAS, as a result of required mediation, the parties intend upon settling their disputes amicably without either party admitting any liability under the Bond and/or with regard to any duty to remediate the basins with a payment made to the City of Vineland in the amount of \$55,000.00 and the City dismissing its law suit with prejudice and waiving any claims against Safeguard and Tradition Homes related to or in connection with and/or arising out of the bond or Foxmoor Estates.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Vineland that the Mayor and Clerk are hereby authorized to execute a Settlement Agreement and Final Release in the matter of City of Vineland v. Bond Safeguard Insurance Company, et al in the form attached hereto and made a part hereof.

Adopted:

President of Council

ATTEST:

City Clerk

SETTLEMENT AGREEMENT AND FINAL RELEASE

THIS SETTLEMENT AGREEMENT AND FINAL RELEASE (“Settlement Agreement”) entered into by and between the City of Vineland, a municipal corporation of the State of New Jersey (“Vineland”) and Bond Safeguard Insurance Company, a corporation duly licensed and authorized to transact surety business in the State of New Jersey (“Bond Safeguard”).

RECITALS

WHEREAS, on or about June 27, 2006, Tradition Homes at Vineland LLC (“Tradition Homes”) purchased plans and specifications for a fully approved development in Vineland known as Foxmoor Estates Subdivision (“Foxmoor Estates”).

WHEREAS, prior to Tradition Homes’ purchase of the plans and specifications, Vineland fully approved the development, including the stormwater management plan that included three retention basins.

WHEREAS, in accordance with N.J.S.A. 40:55D-53, on or about April 10, 2006, Vineland’s municipal engineer prepared an “Itemized Surety Amount” identifying certain public improvements necessary for the Foxmoor Estates, and prepared an estimated cost for the specified public improvements. The Itemized Surety Amount was specifically prepared to establish the penal sum for the Subdivision Bond.

WHEREAS, on or about August 3, 2006, in reliance upon the Itemized Surety Amount prepared by Vineland's municipal engineer, Bond Safeguard issued Performance Surety Bond No. 5019456 ("Bond") for the Foxmoor Estates.

WHEREAS, on the Bond, Bond Safeguard was the Surety, Tradition Homes was the Principal, and Vineland was the Obligee, and the Bond had an original penal sum of \$1,391,590.

WHEREAS, after the Bond was issued, Tradition Homes began construction of the homes and the public improvements of the Foxmoor Estates.

WHEREAS, on or about April 22, 2008, following an inspection by Vineland, Vineland through a Resolution reduced the penal sum of the Bond to \$782,800.

WHEREAS, Vineland experienced unprecedented precipitation that caused flooding in and around the Foxmoor Estates.

WHEREAS, as a result of the flooding, Michael Bokma and Janis Bokma, who owned property adjacent to one of the basins filed suit seeking damages. Michael Bokma and Janis Bokma v. NVR, Inc. and Tradition Homes at Vineland, LLC, Docket No. C-13-10. Other lawsuits were also filed in connection with the Foxmoor Estates development, including Joyce Asante v. Tradition Homes at Vineland, LLC, NVR, Inc., Earth Engineering, Inc. and City of Vineland, Docket No. CUM-L-400-13 and Rudolph and Mary Jane Planter v. Tradition Homes at Vineland, LLC and the City of Vineland, Docket No. CUM-L-399-13.

WHEREAS, in approximately 2010 Vineland concluded that the plans and specifications for the Foxmoor Estates Subdivision that were reviewed and approved by Vineland contained certain errors in the design of the basins and/or the data and calculations upon which the basins were designed. Vineland alleges that the bottom of a basin did not have the proper separation from the estimated seasonal high groundwater level, and that the basins did not meet the required infiltration rate. When Tradition Homes purchased the fully approved plans and specifications of the Foxmoor Estates Subdivision, it was not aware of any design errors with the basins and/or the stormwater management system.

WHEREAS, as a result of the stormwater management issues with Foxmoor Estates, Vineland ultimately entered into a Stipulation of Settlement and Withdrawal of Hearing Request with Prejudice (“Stipulation”) with the New Jersey Department of Environmental Protection (“NJDEP”). Docket No. ECE 04293-2013 S; Agency No: PEA 120001-167095.

WHEREAS, pursuant to its Stipulation with the NJDEP, Vineland agreed to pursue responsible parties in connection with the stormwater management issues with the basins.

WHEREAS, Vineland sued Tradition Homes at Vineland, LLC, Docket No. CUM-L-264-17, and although it did not join Bond Safeguard as a defendant, it first notified Bond Safeguard of the suit while the suit was pending.

WHEREAS, in 2019, Vineland first formally asserted a claim against Bond Safeguard, and Bond Safeguard properly responded and conducted an investigation of Vineland's claims.

WHEREAS, on or about December 16, 2020 Vineland filed a Complaint and Amended Complaint against Bond Safeguard and Tradition Homes under Docket No. CUM-779-20. Although Tradition Homes was named as a defendant, it did not formally appear in the litigation.

WHEREAS, the Vineland and Bond Safeguard had engaged in written and preliminary documentary discovery, but had not conducted any depositions.

WHEREAS, as part of its document review, Vineland presented at least twelve (12) banker boxes of documents that were related to the design and approval of the plans and specifications for the Foxmoor Estates and the prior litigations. The documents date back to 2004.

WHEREAS, by Resolution dated November 23, 2021, Vineland reduced the penal sum of the Bond to \$417,477.

WHEREAS, Bond Safeguard disputed its liability under the Bond, and Vineland contended that the Bond included the proper functioning and design of the basins.

WHEREAS, Vineland provided an engineering estimate totaling \$675,500 to remedy the stormwater issues with the basins, and the new and additional improvements

to the basins that would also address stormwater management issues along North Brewster Road, which is owned by Cumberland County.

WHEREAS, Vineland and Bond Safeguard submitted their claims to mediation before Andrew J. Carlowicz, Jr., Esq.

WHEREAS, in addition to the parties, John Canuso and Andrew Martilini, the Principals of Tradition Homes, attended the mediation, and they participated in the general mediation sessions and caucused privately with Bond Safeguard.

WHEREAS, without either party admitting any liability under the Bond and/or with regard to any duty to remediate the basins, but cognizant of the substantial cost to litigate this case through a trial and appeal, the parties agreed to settle the case for the payment of the sum of \$55,000 from Bond Safeguard to Vineland.

NOW THEREFORE, for the sum of \$55,000 and other good and valuable consideration, the receipt and sufficiency of which is acknowledged and accepted, Vineland and Bond Safeguard agree as follows:

1. The recitals are true and correct and incorporated by reference herein.
2. Bond Safeguard shall make a payment in the amount of \$55,000 ("Payment") by check made payable to Vineland and sent to its counsel Justin R. White, Esq., Testa, Heck, Testa & White, P.A., 424 Landis Avenue, Vineland, New Jersey 08360.

3. Bond Safeguard shall issue the Payment within forty-five (45) days of Bond Safeguard's receipt of a copy of the Resolution by Vineland approving this Settlement Agreement.
4. In exchange for the Payment of the sum of \$55,000 from Bond Safeguard, Vineland hereby releases and discharges any and all rights, claims, and causes for action, known or unknown, that it has or may have against Bond Safeguard, the Bond and Tradition Homes, their successors and assigns from all demands, charges, debts, damages, claims and causes for action, known and unknown, whatsoever, in law and/or equity against Bond Safeguard and Tradition Homes, their administrators, successors and assigns in any way related to, in connection with and/or arising out of the Bond and/or Foxmoor Estates.
5. Vineland agrees to return to Bond Safeguard the original Bond that was posted.
6. Vineland and Bond Safeguard shall execute and file a Stipulation of Dismissal with Prejudice and without costs in the pending action under Docket No. CUM-L-779-20.
7. This Settlement Agreement shall be construed as a joint Settlement Agreement drafted by both parties and no party shall be deemed the drafter of this Settlement Agreement for the purposes of interpretation.

8. Each party acknowledges that they have had the opportunity to review this Settlement Agreement with legal counsel of their own choice.
9. This Settlement Agreement encompasses the full, final and complete agreement of the parties. This Settlement Agreement supersedes all prior communications, agreements, or understandings, if any, between the parties.
10. The parties agree that the courts of the State of New Jersey shall have primary and exclusive jurisdiction and venue concerning any and all claims and causes of action pertaining to, arising out of or in connection with this Settlement Agreement.
11. THE PARTIES AGREE TO WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY ACTION, LITIGATION OR PROCEEDING PERTAINING TO, ARISING OUT OF OR IN CONNECTION WITH THIS SETTLEMENT AGREEMENT. THE PARTIES REPRESENT AND ACKNOWLEDGE THAT THIS IS A KNOWING, VOLUNTARY AND INTENTIONAL WAIVER.
12. This Settlement Agreement may be executed by electronically scanned counterparts and/or by pdf and/or facsimile transmission, each of which, when executed and delivered shall be deemed an original, but such counterparts shall together constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have caused this Settlement Agreement to be executed and acknowledged by their duly authorized officers, agents or employees, on the date(s) set forth below.

City of Vineland

By: _____

ACKNOWLEDGEMENT

STATE OF NEW JERSEY)
 SS
COUNTY OF CUMBERLAND)

I CERTIFY that on _____, 2022, _____ personally came before me and stated under oath to my satisfaction that he:
 (a) is the maker of the attached instrument;
 (b) was authorized to and did execute this instrument as the _____ of the City of Vineland, the entity named in this instrument; and
 (c) executed this instrument as the voluntary act of the City of Vineland, the entity named in this instrument.

NOTARY PUBLIC

Bond Safeguard Insurance Company

By: _____
Lisa Jennings

ACKNOWLEDGEMENT

STATE OF NEW JERSEY)
 SS
COUNTY OF CUMBERLAND)

I CERTIFY that on _____, 2022, Lisa Jennings personally came before me and stated under oath to my satisfaction that he:

- (a) is the maker of the attached instrument;
- (b) was authorized to and did execute this instrument as the Assistant Vice President – Surety Claims of Bond Safeguard Insurance Company, the entity named in this instrument; and
- (c) executed this instrument as the voluntary act of Bond Safeguard Insurance Company, the entity named in this instrument.

NOTARY PUBLIC