

### **SETTLEMENT AGREEMENT**

This Settlement Agreement (the "Agreement") is made as of May 22, 2009 by and among Merryman Excavation, Inc. ("Merryman"), an Illinois corporation, Neumann Homes, Inc. ("NHI"), an Illinois corporation, the Village of Gilberts (the "Village"), an Illinois municipal corporation, and Consolidated School District No. 300 (the "School District"), an Illinois municipal corporation. Merryman, NHI, the Village and the School District may be referred to herein individually as a "Party" or collectively as the "Parties."

### **RECITALS**

WHEREAS, pursuant to certain agreements between NHI and the Village and/or the School District, NHI was the general contractor for a residential and school development in the Village known as the "Conservancy Development";

WHEREAS, pursuant to certain agreements between NHI and Merryman, Merryman performed certain sewer and water service work on the school site, on and around the public right-of-way of Galligan Road, and on an area known as "POD 4" in the Conservancy Development;

WHEREAS, NHI has not caused Merryman to be paid from SSA No. 19 (as defined herein below) funds in full for Merryman's work in the Conservancy Development;

WHEREAS, on or about November 1, 2007, NHI filed a voluntary petition for bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*, in the United States Bankruptcy Court for the Northern District of Illinois (the "Bankruptcy Court") captioned *In re Neumann Homes, Inc.*, which is currently pending as Case No. 07-20412;

WHEREAS, on or about March 31, 2008, Merryman initiated a lawsuit against the Village and the School District in the Circuit Court for the Sixteenth Judicial Circuit, Kane

County, Illinois captioned *Merryman Excavation, Inc. v. Village of Gilberts, et al.*, which is currently pending as Case No. 08 L 165 (the "Litigation"), seeking recovery against the Village and the School District for work Merryman performed in the Conservancy Development;

WHEREAS, to fund the construction of public improvements within the Conservancy Development, the Village, pursuant to its authority under the Special Service Area Tax Law, 35 ILCS 200/27 *et seq.*, established Special Service Area No. 19 ("SSA No. 19") and issued Special Tax Bonds Series 2006-1 (the "SSA No. 19 Bonds"), the proceeds of which are held by Wells Fargo Bank, National Association, as bond trustee pursuant to a certain trust indenture (the "Bond Trustee");

WHEREAS, on or about December 18, 2007, the Bankruptcy Court entered an Agreed Order (Docket No. 327) permitting the Village to pay Merryman certain funds from Disbursement No. 7 ("Draw No. 7") of the proceeds of the SSA No. 19 Bonds "upon the earlier to occur of (i) entry of an order allowing the claim of such contractor or (ii) [NHI's] agreement to the Village's payment of such contractor," which order was modified by a subsequent order entered on March 6, 2008 (Docket No. 609);

WHEREAS, the Village has represented to the Parties hereto that the amount to be paid to Merryman from SSA No. 19 funds herein is in settlement of amounts claimed by Merryman for work completed and accepted by the Village in compliance with the terms of applicable law, municipal code and SSA No. 19;

WHEREAS, the Parties have determined to fully and finally settle and resolve all matters in dispute between them related to or arising from that construction work completed by Merryman in the Village of Gilberts and more specifically in the Conservancy Development, without the admission of liability by any Party, upon the terms, conditions and provisions of this

Agreement;

WHEREAS, the Parties have carefully considered the terms, conditions and provisions of this Agreement and, after having had the opportunity to consult with their respective attorneys, are fully satisfied that the Agreement is fair and reasonable;

NOW THEREFORE, in consideration of the recitals, mutual promises, releases and obligations contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

### **AGREEMENT**

1. **Incorporation of Recitals.**

The recitals set forth above are incorporated herein as though set forth in full, and may be relied upon by the Parties hereto in entering into this Agreement.

2. **Settlement Payments.**

Subject to the approval of the Bankruptcy Court pursuant to Paragraph 3 of this Agreement, NHI, the Village and the School District agree that Merryman may be paid, and Merryman agrees to accept, the total sum of those payments enumerated Paragraphs 2(a) through 2(c) below in full and final settlement and satisfaction of all of Merryman's claims against NHI, the Village and the School District for Merryman's work in the Conservancy Development. This sum shall be paid from the proceeds of the SSA No. 19 Bonds and from certain funds held by the School District as follows (the "Settlement Payments"):

(a) Within seven (7) business days from the date that the Bankruptcy Court approves the Settlement Payments set forth in this Paragraph 2, the **Village shall pay Merryman** the sum of Four Hundred Eighty Five Thousand Nine Hundred Thirty Eight Dollars and Seventeen Cents (\$485,938.17) from Draw No. 7 of the proceeds of the SSA No. 19 Bonds

by a check payable to “Merryman Excavation, Inc.” and sent via courier to Merryman’s counsel Robert T. Hanlon, Esq., The Law Offices of Robert T. Hanlon & Associates, P.C., 14212 Washington Street, Suite No. 200, Woodstock, Illinois 60098.

(b) Upon the approval of the Bankruptcy Court of the Settlement Payments set forth in this Paragraph 2, the Village shall submit a request for Disbursement No. 8 (“Draw No. 8”) to the Bond Trustee which shall include the sum of One Hundred Eleven Thousand Five Hundred Dollars and no/Cents (\$111,500.00) to be paid to Merryman. Within seven business (7) days of its receipt of the Draw No. 8 funds, the **Village shall pay Merryman** the sum of One Hundred Eleven Thousand Five Hundred Dollars and no/Cents (\$111,500.00) from Draw No. 8 of the proceeds of the SSA No. 19 Bonds by a check payable to “Merryman Excavation, Inc.” and sent via courier to Merryman’s counsel Robert T. Hanlon, Esq., The Law Offices of Robert T. Hanlon & Associates, P.C., 14212 Washington Street, Suite No. 200, Woodstock, Illinois 60098.

(c) Within seven (7) business days from the date that the Bankruptcy Court approves the Settlement Payments set forth in this Paragraph 2, the **School District shall pay Merryman** the sum of Fifty One Thousand Three Hundred Ninety Seven Dollars and Forty Seven Cents (\$51,397.47) by a check payable to “Merryman Excavation, Inc.” and sent via courier to Merryman’s counsel Robert T. Hanlon, Esq., The Law Offices of Robert T. Hanlon & Associates, P.C., 14212 Washington Street, Suite No. 200, Woodstock, Illinois 60098.

(d) Within seven (7) business days from the date that Merryman receives the payment provided for in paragraph (a) above, **Merryman shall pay NHI**, without regard to any rights of setoff, recoupment or any other claim, the sum of Forty Seven Thousand One Hundred Seventy Five Dollars and 45 Cents (\$47,175.45), by a check payable to Neumann Homes, Inc.,

Debtor-In-Possession, and sent via courier to NHI's accountant, Steve King, Neumann Homes, Inc., 799 Roosevelt Road, Bldg-6, Ste-206, Glen Ellyn, Illinois 60137. Within seven (7) business days from the date that Merryman receives the payment provided for in paragraph (b) above, Merryman shall pay NHI, without regard to any right of setoff, recoupment or any other claim, the sum of Ten Thousand Eight Hundred Twenty Five Dollars and 55 Cents (\$10,825.55), by a check payable to Neumann Homes, Inc., Debtor-In-Possession, and sent via courier to NHI's accountant, Steve King, Neumann Homes, Inc., 799 Roosevelt Road, Bldg-6, Ste-206, Glen Ellyn, Illinois 60137.

3. Approval of the Bankruptcy Court.

Upon the acceptance of this Agreement by all Parties, NHI will seek the approval of this Agreement, including the Settlement Payments set forth in Paragraph 2, by the Bankruptcy Court. The Parties agree that this Agreement is expressly contingent upon the Bankruptcy Court's approval of the Agreement and the Settlement Payments and that in the event that the Bankruptcy Court fails to approve the Agreement and the Settlement Payments, this Agreement shall be null and void in its entirety.

4. Dismissal of Lawsuit.

Upon the Bankruptcy Court's approval of the Agreement and the Settlement Payments set forth in Paragraph 2 hereof, Merryman, the Village and the School District shall execute a Stipulation to Dismiss the Litigation **with prejudice** and with Merryman, the Village and the School District each agreeing to bear its own costs and attorneys' fees incurred in connection with the Litigation.

5. Merryman's Releases.

(a) Upon the Village's payment of the Settlement Payments to Merryman set

forth in Paragraphs 2(a) and 2(b) of this Agreement, Merryman hereby irrevocably and unconditionally releases, acquits, remises, and forever discharges the Village, and as direct third-party beneficiaries hereof, its current and former parent companies, subsidiaries, divisions, affiliates, ventures, predecessors, successors, officers, directors, trustees, principals, members, managers, partners, owners, shareholders, employees, associates, spouses, heirs, executors, administrators, attorneys, agents, representatives and assigns, from and against any and all claims, liens, demands, charges, complaints, debts, liabilities, obligations, indemnities, agreements, suits, actions, causes and causes of action, losses, damages, penalties, costs, compensation, expenses, attorneys' fees or things of whatever kind, nature or description, in any capacity whatsoever, direct, derivative or subrogated, in law or in equity, whether based on tort, contract or any other theory of recovery whatsoever which Merryman had, now has, or may have, from the beginning of the world until and including the date of this Agreement against the Village which (a) were raised or could have been raised in the Litigation, (b) could have arisen or may arise from any of the facts, allegations or events set forth in the pleadings in the Litigation, or (c) in any way relate to or arise from Merryman's work in the Conservancy Development, including, without limitation, Merryman's work on the school site, on and around the public right-of-way of Galligan Road, and on POD 4 in the Conservancy Development. Notwithstanding anything to the contrary contained herein, the Release in this Paragraph 5(a) shall not apply to the claims asserted by Merryman against the individual defendant in the action captioned *Merryman Excavation, Inc. v. Wajda*, Case No. 09 L 186, currently pending in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

(b) Upon the School District's payment of the Settlement Payment to Merryman set forth in Paragraphs 2(c) of this Agreement, Merryman hereby irrevocably and

unconditionally releases, acquits, remises, and forever discharges the School District, and as direct third-party beneficiaries hereof, its current and former parent companies, subsidiaries, divisions, affiliates, ventures, predecessors, successors, officers, directors, trustees, principals, members, managers, partners, owners, shareholders, employees, associates, spouses, heirs, executors, administrators, attorneys, agents, representatives and assigns, from and against any and all claims, liens, demands, charges, complaints, debts, liabilities, obligations, indemnities, agreements, suits, actions, causes and causes of action, losses, damages, penalties, costs, compensation, expenses, attorneys' fees or things of whatever kind, nature or description, in any capacity whatsoever, direct, derivative or subrogated, in law or in equity, whether based on tort, contract or any other theory of recovery whatsoever which Merryman had, now has, or may have, from the beginning of the world until and including the date of this Agreement against the School District which (a) were raised or could have been raised in the Litigation, (b) could have arisen or may arise from any of the facts, allegations or events set forth in the pleadings in the Litigation, or (c) in any way relate to or arise from Merryman's work in the Conservancy Development, including, without limitation, Merryman's work on the school site, on and around the public right-of-way of Galligan Road, and on POD 4 in the Conservancy Development.

(c) Upon payment of Settlement Payments to Merryman set forth in Paragraphs 2(a) through 2(c) of this Agreement, Merryman hereby irrevocably and unconditionally releases, acquits, remises, and forever discharges NHI, and as direct third-party beneficiaries hereof, its current and former parent companies, subsidiaries, divisions, affiliates, ventures, predecessors, successors, officers, directors, trustees, principals, members, managers, partners, owners, shareholders, employees, associates, spouses, heirs, executors, administrators, attorneys, agents, representatives and assigns, from and against any and all claims, liens,

demands, charges, complaints, debts, liabilities, obligations, indemnities, agreements, suits, actions, causes and causes of action, losses, damages, penalties, costs, compensation, expenses, attorneys' fees or things of whatever kind, nature or description, in any capacity whatsoever, direct, derivative or subrogated, in law or in equity, whether based on tort, contract or any other theory of recovery whatsoever which Merryman had, now has, or may have, from the beginning of the world until and including the date of this Agreement against NHI which in any way relate to or arise from Merryman's work in the Conservancy Development, including, without limitation, Merryman's work on the school site, on and around the public right-of-way of Galligan Road, and on POD 4 in the Conservancy Development (hereinafter collectively referred to as the "Claims"). Upon such Settlement Payments, which the Parties hereto agree benefit all of them, the Parties hereto waive any claim in bankruptcy against the estate of NHI arising from or in any way connected to the Claims. Notwithstanding anything to the contrary contained herein, nothing in this Paragraph 5(c) shall be construed to release, discharge or compromise the claims that Merryman has against NHI, or that NHI has against Merryman, relating to work it completed for or on behalf of NHI in Wonderlake, Illinois or in Antioch, Illinois.

6. Releases by the Village, School District and NHI.

Upon payment of the Settlement Payments set forth in Paragraphs 2(a) through 2(d) of this Agreement, and the dismissal **with prejudice** of the Litigation, the Village, the School District and NHI each hereby irrevocably and unconditionally release, acquit, remise, and forever discharge Merryman, and as direct third-party beneficiaries hereof, its current and former parent companies, subsidiaries, divisions, affiliates, ventures, predecessors, successors, officers, directors, trustees, principals, members, managers, partners, owners, shareholders, employees, associates, spouses, heirs, executors, administrators, attorneys, agents, representatives and



assigns, from and against any and all claims, liens, demands, charges, complaints, debts, liabilities, obligations, indemnities, agreements, suits, actions, causes and causes of action, losses, damages, penalties, costs, compensation, expenses, attorneys' fees or things of whatever kind, nature or description, in any capacity whatsoever, direct, derivative or subrogated, in law or in equity, whether based on tort, contract or any other theory of recovery whatsoever which the Village, the School District or NHI had, now has, or may have, from the beginning of the world until and including the date of this Agreement against Merryman which in any way relate to or arise from Merryman's work in the Conservancy Development, including, without limitation, Merryman's work on the school site, on and around the public right-of-way of Galligan Road, and on POD 4 in the Conservancy Development.

7. No Admission.

This Agreement effects the compromise and settlement of disputed and contested claims related to the Conservancy Development and nothing contained herein shall be construed as an admission by any Party hereto of any liability of any kind to any other Party or of any other wrongdoing under any law.

8. No Assignment.

Merryman hereby represents and warrants that there has been no assignment of any claims encompassed by this Agreement to any individual, corporation or other entity whatsoever.

9. Reserved.

10. Binding Agreement.

This Agreement is binding upon and shall inure to the benefit of the Parties hereto and their respective current and former parent companies, subsidiaries, divisions, affiliates,

ventures, predecessors, successors, officers, directors, trustees, principals, members, managers, partners, owners, shareholders, employees, associates, spouses, heirs, executors, administrators, attorneys, agents, representatives and assigns.

11. Entire Agreement.

This Agreement sets forth the entire agreement between the Parties and fully supersedes any and all prior agreements and understandings, written or oral, between the Parties pertaining to the subject matter hereof. No modification or amendment of this Agreement shall be binding or enforceable unless in writing and signed by all Parties.

12. Ambiguities.

The Parties acknowledge and agree that each has negotiated and reviewed the terms of this Agreement. The Parties further agree that the rule of construction that any ambiguities are resolved against the drafting party will be subordinated to the principle that the terms and provisions of this Agreement will be construed fairly as to both Parties and not in favor or against either Party.

13. Lack of Duress.

The Parties represent and warrant that they have each read this Agreement and that this Agreement has been executed of their own free will. The Parties further warrant and represent that no statements, representations, duress, coercion, promises or warranties were made by any other Party or its representatives to influence, induce or cause them to enter into this Agreement, other than statements and representations specifically recited in this Agreement.

14. No Mistake.

The Parties warrant and represent that they enter into this Agreement freely and voluntarily upon their own information and investigation. The Releases contained in this

Agreement shall be fully and completely operative notwithstanding the discovery of any different or additional facts. This Agreement is intended to be final and binding regardless of any mistake of fact or law.

15. Severability.

To the extent any part of this Agreement shall be deemed unenforceable by any court of competent jurisdiction, then that part only of the Agreement shall be deemed unenforceable and all other parts of the Agreement shall remain in full force and effect.

16. Construction.

This Agreement shall be construed in accordance with the laws of the State of Illinois without regard to any conflict of law analysis.

17. Review by Counsel.

The Parties to this Agreement represent and warrant that they have had full opportunity to consult with counsel of their selection in the negotiation and execution of this Agreement, that their counsel have, in fact, reviewed this Agreement, and that they have been fully advised by their counsel of the legal and practical effects of this Agreement.

18. Counterparts.

This Agreement may be executed in one or more counterparts, including by facsimile, each of which shall be deemed an original and all of which together constitute one and the same instrument.

19. Authority.

Each undersigned person executing this Agreement on behalf of Merryman, NHI, the Village and the School District affirms by his or her signature hereto that he or she has been authorized to execute this Agreement.

IN WITNESS HEREOF, the undersigned, being duly authorized, have caused this Agreement to be executed as of the date first indicated above.

MERRYMAN EXCAVATION, INC.

NEUMANN HOMES, INC.

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Its: \_\_\_\_\_

VILLAGE OF GILBERTS

CONSOLIDATED SCHOOL DISTRICT  
NO. 300

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Its: \_\_\_\_\_