

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
Case No. 18-CVS-3720 and 18-CVS-4384

UPRIGHT BUILDERS INC. and )  
LEGACY CUSTOM HOMES, INC., )  
 )  
Plaintiffs )  
 )  
v. )  
 )  
TOWN OF APEX, )  
 )  
Defendant )  
 )

**STIPULATION OF SETTLEMENT AND  
RELEASE**

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**IT IS HEREBY STIPULATED AND AGREED**, by and between Upright Builders Inc. and Legacy Custom Homes, Inc. on behalf of themselves and all others similarly situated (collectively, the “Plaintiffs”) and Defendant Town of Apex (“Town”), each through their duly authorized counsel, that subject to court approval as required by Rule 23(c) of the North Carolina Rules of Civil Procedure, the actions listed below are settled according to the terms and conditions as set forth in this Agreement:

- 1) *Upright Builders, Inc., and Legacy Custom Homes, Inc. vs. Town of Apex* (18-CVS-3720), Wake County Superior Court (Sewer and water Impact Fee case);
- 2) *Upright Builders, Inc., vs. Town of Apex* (18-CVS-4384), Wake County Superior Court (Transportation Impact Fee case);

The above are collectively herein after referred to as the “Action.”

**1. HISTORY OF THE LITIGATION AND RECITATION OF FACTS**

**1.1.** On March 23, 2018, Plaintiff Upright Builders, Inc., filed a putative class action lawsuit against the Town in Wake County Superior Court, seeking relief under a cause of action seeking a judgment declaring that the Town’s collection of “Capacity Fees” (a/k/a “Impact

Fees”) in addition to regular fees for sewer and water, exceeds the Town’s legal authority and is *ultra vires*, based on allegations that the Town improperly collected Capacity Fees for water and sewer over the past ten years in order to retain funds for use on future projects and development. Plaintiff’s claims were in all respects similar to the litigation giving rise to the North Carolina Supreme Court’s holding in *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 789 S.E.2d 454 (2016), containing allegations that the Town improperly collected water and wastewater fees for services “to be furnished” which the Court held was improper in *Carthage*.

**1.2.** The Town timely responded to the complaint, raising numerous justifications and defenses to its collection of Capacity Fees over the past ten years.

**1.3.** Additionally and separately, on April 9, 2018, Plaintiff Upright Builders, Inc., through the undersigned Class Counsel, filed a putative class action lawsuit against the Town in the Superior Court of Wake County, seeking relief under a cause of action seeking a judgment declaring that the Town’s collection of “Transportation Fees” in addition to regular fees, exceeds the Town’s legal authority and is *ultra vires*, based on allegations that the Town improperly collected Transportation Fees over the past ten years without the requisite statutory authority to do so.

**1.4.** On June 26, 2018, the Upright Builders Capacity Fee class action lawsuit complaint was amended in order to add Legacy Custom Homes, Inc. as a class representative.

**1.5.** Upon receipt of the June 2018 amended Capacity Fee complaint, the Town timely responded to the complaint, raising multiple justifications and defenses to its collection of Capacity Fees over the past ten years.

**1.6.** On April 20, 2018, before the Town’s period to answer the original Complaint expired, Upright Builders filed an amended Transportation Fee complaint to clarify previously

made allegations and add further case law.

**1.7.** The Town timely responded to this additional Transportation Fee complaint, raising multiple justifications and defenses to its collection of Transportation Fees over the past ten years.

**1.8.** After the respective lawsuits were initiated, Class Counsel initiated discovery proceedings where the relevant records at the Town were made available to and were thereafter retrieved and investigated by Class Counsel, the deposition of an accounting manager was taken, two Town employees were taken in a Rule 30(b)(6) deposition, a project manager was deposed, and interrogatories and requests for production were served on the Town, and the Town timely responded to all discovery matters.

**1.9.** In a good faith and arm's length effort to address their disputes, Class Counsel and counsel for the Town agreed to discuss the possibility of settlement based on the necessity of a required and court ordered mediation.

**1.10.** The Parties agreed to conduct a court ordered mediation before Robert Beason and a mediation was thereafter held by the Parties on January 16, 2019, in an effort to negotiate in good faith and at arms-length to determine if settlement between the parties was possible or if protracted litigation would be required.

**1.11.** As a result of the mediation, the parties reached an impasse after over 8 hours of contentious mediation. Following the mediation, the parties worked through the remaining issues resulting in this Agreement.

**1.12.** This Agreement reflects a proposed compromise between the Plaintiffs and the Town, and shall in no event be construed as or deemed to be an admission or concession by any Party as to the truth of any allegation or the validity of any purported claim or defense asserted in

any of the pleadings in the Action, or of any allegation of fault on the part of the Town, and all such allegations are expressly denied. Nothing in this Agreement shall constitute an admission of liability or be used as evidence of liability, by or against any Party hereto. It is expressly agreed by all Parties that this Agreement shall not, in whole or in part, be admitted into evidence against the Town in any civil, criminal, regulatory or administrative proceeding in any court, administrative agency or other tribunal, other than in such proceedings as may be necessary to consummate or enforce this Agreement or the Final Order and Judgment.

**1.13.** The Town expressly denies any similarity of its practice in collecting certain fees to that of the practice of the Town of Carthage and the Supreme Court's holding in *Carthage*, it expressly denies wrongdoing and does not admit or concede any actual or potential fault, wrongdoing, or liability to Plaintiffs, the Settlement Class, Class Counsel, or to any other person or entity in connection with any facts or claims that have been alleged against it in the Action, and in fact the Town expressly denies all such liability. The Town also denies that the Action meets the requisites for certification as a litigated class action under federal, North Carolina or any other state law, or certification for any purpose except for purposes of the settlement described in this Agreement. The Town intends to vigorously defend the Action in the event the Final Order and Judgment is not entered. Nevertheless, the Town considers it desirable to resolve this Action on the terms stated herein, in order to avoid further expense, inconvenience, interruption in its provision of water or wastewater service, and interference with its governmental operations, and to dispose of costly and burdensome litigation. Therefore, the Town has determined that settlement of this Action on the terms set forth herein is in its best interest.

**1.14.** Based upon their review, investigation, inspections, testing and evaluation of the

facts and law relating to the matters alleged in the pleadings, Plaintiffs and Class Counsel believe that this Settlement is in the best interests of the Class as a whole, and, on behalf of the other members of the proposed Settlement Class, have agreed to settle the Action pursuant to each and all of the provisions of this Agreement, after considering, among other things: (a) the benefits offered to the Settlement Class Members under the terms of this Agreement; (b) the risks, costs, and uncertainty of protracted litigation, especially in complex actions such as this, as well as the difficulties and delays inherent in such litigation; and (c) the desirability of consummating this Agreement promptly in order to provide immediate relief to the Settlement Class Members.

## **2. DEFINITIONS**

**2.1.** As used in this Agreement and the attached exhibits (which are an integral part of this Agreement and are incorporated in their entirety by reference), the following terms have the following meanings, unless this Agreement specifically provides otherwise:

**2.1.1.** “Action” means the lawsuits collectively: *Upright Builders, Inc., and Legacy Custom Homes, Inc. vs. Town of Apex* (18-CVS-3720) and *Upright Builders, Inc., vs. Town of Apex* (18-CVS-4384), which are both pending in the Superior Court Division of Wake County, North Carolina.

**2.1.2.** “Agreement” means this Stipulation of Settlement and Release and the exhibits attached hereto or incorporated herein, including any subsequent amendments agreed to by the Parties and any exhibits to such amendments, which together are the settlement (the “Settlement”).

**2.1.3.** “Attorneys’ Fees and Expenses” as further defined in Section 9, means such funds as may be awarded by the Court to Class Counsel in accordance with all the terms and conditions of this Settlement, in order to compensate Class Counsel for all of the past,

present and future attorneys' fees, costs (including court costs), expenses and disbursements earned or incurred collectively and individually by any and all of them, their investigators, experts, staff and consultants combined in connection with the Action, and the Settlement.

**2.1.4.** "Capacity Fee" or "Impact Fee" means any Capacity Fee, Capital Reimbursement Fee or System Development Fee alleged by any Claimant or Plaintiff in the Action to have been collected improperly by the Town for water and/or sewer as a condition of building a structure in the planning jurisdiction of the Town.

**2.1.5.** "Claim" means the claim of a Settlement Class Member or his or her representative submitted on a Claim Form as provided in this Agreement.

**2.1.6.** "Claimant" means a Settlement Class member who has timely and correctly submitted a Claim.

**2.1.7.** "Claim Form" means the document, in substantially the same form as the version attached to other papers and affidavits filed to effectuate this Agreement and Settlement.

**2.1.8.** "Claim Form Deadline" or "Claim Form Period" means the date by which completed Claim Forms must be received by the Settlement Administrator. The Claim Form Deadline shall be specified in the Settlement Notice, and the settlement website, and shall be the date corresponding to the 60th day following the Effective Date.

**2.1.9.** "Claims Process" means the process for submitting and processing Claim Forms.

**2.1.10.** "Class Counsel" means Daniel K. Bryson and John Hunter Bryson of the law firm of Whitfield Bryson & Mason LLP.

**2.1.11.** "Class Plaintiffs" means Upright Builders Inc., Legacy Custom Homes, Inc., and all others similarly situated as shown in Exhibit A.

**2.1.12.** “Court” means the Superior Court of North Carolina for Wake County, North Carolina, acting pursuant to its exclusive and continuing jurisdiction over the Action.

**2.1.13.** “Effective Date” means the date on which the Final Order and Judgment approving this Agreement becomes final and no longer subject to appellate review. For purposes of this Agreement, the Final Order and Judgment shall become final: (a) if no appeal is taken from the Final Order and Judgment, on the date on which the time to appeal therefrom has expired pursuant to North Carolina Rule of Appellate Procedure 3; or (b) if any appeal is taken from the Final Order and Judgment, on the date on which all appeals therefrom, including petitions for rehearing or re-argument pursuant to North Carolina Rule of Appellate Procedure 31 and petitions for *certiorari* pursuant to Rule 13 of the United States Supreme Court or any other form of appellate review, have been fully and finally disposed of in a manner that affirms all of the material provisions of the Final Order and Judgment.

**2.1.14.** “Final Approval Hearing” means the hearing held by the Court to consider evidence and argument for the purposes of determining, among other things, whether this Agreement and the Settlement are fair, reasonable and adequate; whether this Agreement should be given final approval through entry by the Court of the Final Order and Judgment; and whether certification of the Settlement Class should be made final.

**2.1.15.** “Final Order and Judgment” means an order entered by the Court granting final approval to the Settlement and this Agreement and making final its certification of the Settlement Class pursuant to Rule 23 of the North Carolina Rules of Civil Procedure; and the corresponding judgment entered pursuant to Rule 58 of the North Carolina Rules of Civil Procedure, which shall be in substantially the same form as is agreed to by the Parties and submitted to the Court at least ten (10) days before the Final Approval Hearing.

**2.1.16.** “Final Settlement Date” shall mean the date on which all sums claimed have been disbursed and the parties are discharged of all duties and obligations under the terms of this Agreement.

**2.1.17.** “Parties” means Class Plaintiffs and Town of Apex, collectively, as each of those terms is defined in this Agreement.

**2.1.18.** “Preliminary Approval Order” means the order to be entered by the Court preliminarily approving the Settlement as outlined in this Agreement.

**2.1.19.** “Release” and “Released Claims”: “Release” means the release and waiver set forth in Section 8 of this Agreement, and “Released Claims” means each and all claims described in said Release.

**2.1.20.** “Released Parties” means Town of Apex, and each and all of its subsidiaries, divisions, related and affiliated entities, principals, directors, officers, employees, attorneys, representatives and agents, and all individuals or entities acting by, through, under or in concert with any of them.

**2.1.21.** “Service Awards” means such funds as may be awarded by the Court to the Class Plaintiffs within the limits set forth in this Agreement, to compensate the Class Plaintiffs for the efforts and risks taken by them in bringing and prosecuting the Action on behalf of the Settlement Class and achieving the benefits of this Agreement on behalf of the Settlement Class.

**2.1.22.** “Settlement Administrator” means Angeion Group, who will administer the Settlement. The Parties have agreed to retain Angeion Group, as the Settlement Administrator, and to seek the Court’s approval of Angeion Group, in connection with the preliminary approval of this Agreement and Settlement. In addition to the Settlement Fund

defined in 2.1.23, the Town will contribute upon the date the Preliminary Approval order is entered, the sum of \$100,000 as its total contribution for the costs of notice and claims administration. The \$100,000 expended for notice by the Town is not deducted from the Settlement Fund.

**2.1.23.** “Settlement Fund” or “Fund” means an amount of money segregated by the Town that represents the maximum amount of full settlement value, equal to fifteen million three hundred fifty-six thousand six hundred seventy-three dollars (15,356,673). Within the fund, \$9,468,207 shall be reserved for Capacity Settlement Claimants who paid Capacity Fees, Capital Reimbursement Fees, or System Development Fees to Apex from 3/23/2015 to 10/1/17 and Transportation Settlement Claimants who paid Transportation Fees to Apex from 3/23/2015 to 6/1/2018. Within the fund, \$1,416,011 shall be reserved for Capacity Settlement Claimants who paid Capacity Fees, Capital Reimbursement Fees, or System Development Fees from 10/1/17-6/20/18. Within the fund, \$4,472,455 shall be reserved for Capacity Settlement Claimants who over paid water Capacity Fees, water Capital Reimbursement Fees, or water System Development Fees to Apex from 10/1/17 to 6/20/2018.

**2.1.24.** “Settlement Class” collectively hereinafter means, for purposes of the Settlement and this Agreement only, those persons or organizations who paid to the Town Capacity Fees or Transportation Fees at issue in the Action and all other similarly situated, on or between March 23, 2015, and June 20, 2018 and of which are at issue in the Action.

**2.1.25.** “Settlement Notice” means the legal notice of the terms of this Agreement. The Settlement Notice shall contain the following information:

**2.1.25.1.** A plain, neutral, and objective and concise summary description of the nature of the Action and the terms of the proposed Settlement. This

description shall also disclose, among other things, that: (a) any relief to Settlement Class Members offered by the Settlement is contingent upon the Court's approval of the Settlement, which will not become effective until the Final Order and Judgment date; (b) Town of Apex has agreed to state to the Court, if asked, that they are contractually bound not to object Class Counsel's application for an award of Attorneys' Fees and Expenses as defined in Section 9; (c) that the Settlement is not made contingent upon any Service Awards or Attorneys' Fees and Expenses being awarded by the Court, and that if such awards are approved by the Court, they will be paid by the Town from the relief offered to Settlement Class Members by this Agreement and Settlement; and (d) that the sums paid in this Agreement are made in exchange for release of the Released Claims by each of the Settlement Class Members and a copy of the Settlement Agreement is available for review from the Settlement Administrator.

**2.1.25.2.** The Settlement Notice shall include a description of the Settlement Class.

**2.1.25.3.** The Settlement Notice shall inform the Settlement Class Members of their right to seek exclusion from their applicable Settlement Class and the Settlement. The Settlement Notice shall provide the deadlines and procedures for exercising this right.

**2.1.25.4.** The Settlement Notice shall inform Settlement Class Members of their right to object to the proposed Settlement and to appear at the Final Approval Hearing. The Settlement Notice shall provide the deadlines and procedures for exercising these rights.

**2.1.25.5.** The Settlement Notice shall summarize the proposed terms of the Release contemplated by this Agreement.

**2.1.25.6.** To the extent the Settlement Administrator is directed within a timely and properly submitted Claim Form to forward settlement funds to a third party, the Settlement Administrator will do so.

**2.1.25.7.** The Settlement Notice shall disclose where Settlement Class Members may direct written or oral inquiries regarding the Settlement.

**2.1.26.** “Town” means Town of Apex, a North Carolina municipal corporation.

**2.1.27.** “Town Counsel” means Susan Burkhart of the law firm Cranfill Sumner & Hartzog and Laurie Hohe, Town Attorney of the Town of Apex.

**2.1.28.** “Transportation Fees” as alleged in the Action, means fees paid, per house, for impact to the existing transportation facilities within Town jurisdiction.

**2.1.29.** “Water Capacity Fees” means any Capacity Fee, Capital Reimbursement Fee or System Development Fee alleged by any Claimant or Plaintiff in the Action to have been collected improperly by the Town for water as a condition of building a structure in the planning jurisdiction of the Town.

**2.2.** Other capitalized terms used in this Agreement but not defined in this Section 2 shall have the meanings ascribed to them elsewhere in this Agreement and the exhibits attached hereto.

**2.3.** The terms “he or she” and “his or her” include “it” or “its” where applicable.

### **3. CERTIFICATION OF THE SETTLEMENT CLASS**

**3.1.** Class Plaintiffs and Class Counsel shall propose, without objection from the Town, that the Court: (1) certify the Settlement Class for settlement purposes only under Rule 23 of the North Carolina Rules of Civil Procedure; (2) appoint Class Plaintiffs as the representatives for the Settlement Class; (3) appoint Class Counsel as legal counsel for the Settlement Classes;

and (4) preliminarily approve this Settlement and the notice to Settlement Class Members which the Settlement contemplates.

**3.2.** The Town without admitting that the proposed settlement class in the Action meets the requisites for certification of a litigation class under North Carolina Rule of Civil Procedure 23 or for class certification for any purpose other than this settlement, hereby consents, on each and all of the terms and conditions set forth herein, and solely for purposes and in consideration of the Settlement set forth herein, to the certification of the Settlement Classes, to the appointment of Class Counsel as legal counsel for the Settlement Class, and to the appointment of Class Plaintiffs as the representatives of the Settlement Class.

**3.3.** The Court's certification of the Settlement Class for settlement purposes only shall modify and supersede all prior class certification orders in this case, and shall not be deemed to be an adjudication of any fact or issue for any purpose other than the accomplishment of the provisions of this Settlement and this Agreement, and shall not be considered as law of the case, *res judicata*, collateral estoppel or judicial estoppel in the Action or in any other proceeding unless and until the Final Order and Judgment is entered. Whether or not the Final Order and Judgment is entered, the Parties' stipulation to class certification for settlement purposes only (and any and all statements or submission made by the Parties in connection with seeking the Court's approval of the Settlement and this Agreement) shall not be deemed to be any stipulation or grounds for estoppel as to the propriety of class certification, nor any admission of fact or law regarding any request for class certification, in any other action or proceeding, whether or not involving the same or similar claims. In the event the Settlement and this Agreement are not approved, or the Final Order and Judgment is not entered, or this Agreement is terminated, cancelled, or fails to become effective for any reason whatsoever, the Parties' stipulation to

certification of the Settlement Classes for settlement purposes shall be null and void, and nothing in this Agreement or other papers or proceedings related to the Settlement shall be used as evidence or argument by any Party concerning whether the Action may properly be maintained as a class action under applicable law, and the Town of Apex may continue to oppose certification on any available grounds. In the event the Settlement and this Agreement are not approved, or the Final Order and Judgment is not entered, or this Agreement is terminated, cancelled, or fails to become effective for any reason whatsoever, nothing in this Settlement or this Agreement shall be admissible in this or any other court under any circumstances.

#### **4. RELIEF FOR SETTLEMENT CLASS**

**4.1.** Pursuant to, subject to, and conditioned upon all other terms of this Agreement, and in consideration for the dismissal of the Action with prejudice on the merits and in consideration of the Release and the approval, entry and enforcement thereof by the Court, and provided the Final Judgment and Order is first entered, the Town has agreed to provide Plaintiffs and the Settlement Class with the following relief (and only the following relief), subject to each and all of the terms and conditions specified herein.

**4.2. Relief to Settlement Class for Settlement Claims.** Subject to the Final Judgment and Order being first entered, the Settlement Class Members who are proper Claimants through the Claim Form procedure for Capacity Settlement Claims shall be accorded relief in the following manner:

**4.2.1. Payments for Capacity Settlement Claimants who paid Apex from 3/23/2015 to 10/1/17 and Transportation Settlement Claimants who paid Apex from 3/23/2015 to 6/1/2018:** The Town will pay from the Fund to all proper Capacity Settlement Claimants who paid from 3/23/2015 to 10/1/17 and Transportation Settlement Claimants who

paid from 4/9/2015 to 6/1/2018, 60 days from the Effective Date, a pro rata amount up to 50% of the Fees paid to the Town by proper Capacity Settlement Claimants who paid from 3/23/2015 to 10/1/17 and proper Transportation Settlement Claimants who paid from 3/23/2015 to 6/1/2018, less awarded attorneys' fees, expenses, and service awards. These payments will be capped at \$9,468,207.

**4.2.2. Payments for Capacity Settlement Claimants who paid Apex Capacity**

**Fees from 10/1/2017 to 6/20/18:** The Town will pay from the Fund to all proper Capacity Settlement Claimants who paid from 10/1/2017 to 6/20/18, 60 days from the Effective Date, a pro rata amount up to 10% of the Capacity Fees paid to the Town by proper Capacity Settlement Claimants who paid from 10/1/2017 to 6/20/18, less awarded attorneys' fees, expenses, and service awards. This amount will be capped at \$1,416,011.

**4.2.3. Payments for Capacity Settlement Claimants who paid Apex Water Capacity**

**Fees from 10/1/2017 to 6/20/18:** The Town will pay from the Fund to all proper Capacity Settlement Claimants who paid Water Capacity Fees from 10/1/2017 to 6/20/18, 60 days from the Effective Date, a pro rata amount up to the amount of overpayment of Water Capacity Fees as such fees were established by the Town of Apex on 6/20/2018 paid to the Town by proper Capacity Settlement Claimants who paid from 10/1/2017 to 6/20/18, less awarded attorneys' fees, expenses, and service awards. This amount will be capped at \$4,472,455.

**4.2.4. Maximum Settlement Value for Capacity Settlement Claimants and**

**Transportation Settlement Claimants.** Subject to the Final Judgment and Order being first entered, the payments described above to the Settlement Class for Capacity Settlement Claims, including attorneys' fees and fees for the Settlement Administrator, are subject to a maximum payout, or maximum settlement value, of \$15,356,673. The Final Settlement amount shall be

determined upon receipt of all claim forms within the prescribed claim form period. The Final Settlement amount shall not exceed the aforementioned Settlement Fund and no payments pursuant to this Agreement shall be made by the Town except for those made from the Fund, and any excess to be distributed as set forth in Section 4.7 below.

**4.4. Claims Process.**

**4.4.1. Claim Form Submission.**

**4.4.1.1.** The Claim Forms for Settlement Class shall be included with the Settlement Notice, and shall also be made available on the internet settlement website created and maintained by the Settlement Administrator for purposes of this Settlement, or by contacting by telephone or mail the Settlement Administrator.

**4.4.1.2.** In order to be eligible for their desired relief provided in Paragraphs 4.2 and/or 4.3, Settlement Class Members must complete, personally sign and have notarized (if applicable as outlined below), submit proof of payment of a Capacity Fee or Transportation fee (as described below) and timely submit a Claim Form to the Settlement Administrator. The Claim Form must be postmarked to the Settlement Administrator on or before the Claim Form Deadline. Claim Forms will provide the sole means by which Settlement Class Members may seek and receive the relief for which they may be eligible under the Settlement. The Settlement Administrator shall review and process each timely and complete Claim Form in strict accordance with the terms of this Paragraph 4.4. Class Members who fail to submit a timely and complete Claim Form and do not opt out shall nevertheless be bound by all other terms of this Settlement, including but not limited to the Release set forth in this Agreement. The requirement of a notarized claim form is only applicable for claims in excess of \$5,000, and such requirement is only a precondition of payment and shall not serve to invalidate

a claim form otherwise timely filed.

**4.4.1.3.** The Settlement Administrator shall be responsible for receiving and processing Claim Forms, as well as requests for Claim Forms, and for promptly delivering Claim Forms to the Settlement Class Members who request them.

**4.4.1.4.** Beginning not later than thirty (30) days after the implementation of the notice plan and continuing on no less than a weekly basis thereafter, the Settlement Administrator shall provide periodic updates to Class Counsel and Town Counsel regarding the number, status, nature and disposition of Claim Forms that have been submitted to the Settlement Administrator, and the identities of the Claimants.

**4.4.1.5.** Class Counsel and Town Counsel shall have a right to examine Claim Forms received by the Settlement Administrator on reasonable notice, object and/or request the Settlement Administrator request verification of further documentation prior to approving said claim.

**4.4.2. Claim Form Review and Processing.**

**4.4.2.1.** The Settlement Administrator shall gather, review, prepare and address the Claim Forms received pursuant to the Claims Process.

**4.4.2.2.** Claim Forms that have been properly and timely submitted and which are complete and personally signed shall be designated as approved Claims unless the Settlement Administrator determines that a particular Claim Form fails and further investigation is needed. The Settlement Administrator shall examine the Claim Form before designating the Claim as an approved claim, to verify that the information on the Claim Form is complete and that the Claim Form is personally signed and notarized (if applicable) by the Claimant. The Settlement Administrator shall be further authorized to take steps it deems appropriate to prevent

fraud and abuse in the Claims Process, including, without limitation, exercising where it deems appropriate its discretion to request further verification that the Claimant paid Impact Fees or Transportation Fees to the Town. However, prior to issuing a request pursuant to Paragraph 4.4.1.3 to a Claimant, or taking other investigative steps not explicitly provided for herein, the Settlement Administrator shall inform Class Counsel and Town Counsel of its intent to make such a request or take such steps, and Class Counsel and Town Counsel may, by mutual agreement, direct the Settlement Administrator to dispense with making such a request or taking such steps and deem the Claim Form as complete and adequate. The Settlement Administrator shall deny any claim determined to be false or fraudulent in any respect. Any dispute by a Claimant as to a determination of his, her or its Claim by the Settlement Administrator shall be resolved solely and exclusively by the Settlement Administrator. No costs or fees associated with the resolution of any appeal, other than one half of the fees and expenses of the Settlement Administrator and the fees and expenses of its own counsel, shall be borne by the Town. The remaining one half of the Settlement Administrator's costs or fees and any other costs associated with the resolution of any appeal shall be borne by the Claimant.

**4.4.2.3.** No Claimant may submit a claim form on behalf of any third party, provided however that an entity (such as a corporation, limited liability company, or partnership) may submit a claim through its authorized agent. The Settlement Administrator shall endeavor to identify Claim Forms that appear to seek relief for the same property address for the associated fee ("Duplicative Claim Forms"). The Settlement Administrator shall verify and determine whether there is any duplication of Claims, if necessary, by contacting the Claimant(s) or, if applicable, their counsel. The Settlement Administrator shall designate all Duplicative Claim Forms as rejected Claims unless and until the rightful Claimant is determined by the

Settlement Administrator or by the Court under the Court's expressly reserved continuing exclusive jurisdiction over the Action and this Settlement.

**4.4.2.4.** If a Claim is rejected by the Settlement Administrator for any reason, including but not limited to the Claim Form being untimely or incomplete, or the Claimant failing to timely and/or adequately respond to a request by the Settlement Administrator for verification under oath of, or the Claim being deemed a Duplicative Claim Form, then the Settlement Administrator shall notify the Claimant in writing and provide the Claimant with twenty-one (21) days upon sending of the rejection to dispute the rejection and provide additional information. In the event the Claimant timely responds with documentation and/or verification deemed adequate by the Settlement Administrator, the Claim shall then be deemed an approved Claim. However, if the Claimant does not timely respond, or does not provide documentation and/or verification deemed sufficient by the Settlement Administrator, the Settlement Administrator shall send the Claimant a letter within five (5) days notifying the Claimant that the Claim is being denied.

**4.4.2.5.** Within ten (10) days following the Claim Form Deadline, the Settlement Administrator shall provide Class Counsel and Town Counsel with: (a) a list of Claims to be paid; and (b) a list of Claims that were rejected along with the reason(s) for the rejection of each Claim. Upon written request, the Settlement Administrator shall make available for review by Class Counsel and Town Counsel all data and documents relating to the Claims.

**4.4.2.6.** Within fifteen (15) days following distribution of the list described in Paragraph 4.4.2.5, Class Counsel and Town Counsel may by mutual agreement designate a rejected or denied Claim as an approved Claim. In the event of any dispute as to

whether a Claim was properly approved, denied or rejected, Class Counsel, Town Counsel or the affected Claimant may, within thirty (30) days of the Settlement Administrator's decision on the validity of the Claim, petition the Settlement Administrator to determine the validity of that Claim. The Settlement Administrator's decision will be binding. No costs or fees associated with the resolution of any such petition, other than the fees and expenses of the Settlement Administrator and the fees and expenses of its own counsel, shall be borne by the Town.

**4.4.3. Payment of Valid Claims.**

**4.4.3.1.** The Town shall begin to pay timely, valid and approved Claims for cash relief sixty (60) days following the Effective Date for all claims approved by the Settlement Administrator and in accordance with paragraphs 4.2.1, 4.2.2, and 4.2.3, and shall complete the payment of all timely, valid and approved Claims subject to availability of the Fund in accordance with paragraph 4.2.4 following the Claim Form Deadline.

**4.5. Attorneys' Fees and Expenses and Incentive Awards.** As additional consideration for the dismissal of the Action with prejudice on the merits and entry of the Release, the Town will pay or cause to be paid from the Fund any Attorneys' Fees and Expenses and Service Awards that may be awarded by the Court, subject to the terms, conditions, and maximum amount limitations set forth in this Agreement. Attorneys' fees in a maximum amount as determined by the Court shall be paid from the Fund within 60 days of the Effective date from the Fund.

**4.6. Notice and Settlement Administration Costs.** In addition to Attorneys' Fees and the Final Settlement detailed above any and all reasonable costs of notice and administration associated with this Settlement, including but not limited to, the fees and expenses of the Settlement Administrator and the cost of providing notice to the Settlement Classes which are

detailed in this Agreement, shall be paid by the Town from the Fund up to one hundred thousand dollars (\$100,000), with the balance, if any, to come from the Maximum Settlement Value, which may occur before complete payment to Capacity Settlement Claimants.

**4.7.** The Parties agree, that with the consent of the Court, that any remaining funds in the Settlement Fund shall revert to the Town for use in its capital and operational needs for the provision of clean potable water, sanitary sewer, and re-use water for the general benefit of the Class Plaintiffs, Class Members, and their respective successors and/or assigns, as well as the citizens and residents of the Town, generally.

**5. NOTICE TO, AND COMMUNICATIONS WITH, THE SETTLEMENT CLASS**

**5.1.** Subject to the requirements of the Preliminary Approval Order, and with the good faith cooperation of Town Counsel, notice to potential Claimants by the Settlement Administrator shall commence no later than ten (10) days after entry of the Preliminary Approval Order and to be substantially completed no later than ninety (90) days after the entry of the Preliminary Approval Order. The Settlement Administrator shall send the Settlement Notice and Claim Form by First-Class U.S. Mail, proper postage prepaid, to all Settlement Class members listed in Exhibit A, other than those who previously excluded themselves from this proceeding in response to said Class Certification Notice.

**5.2.** The Settlement Notice shall be the legal notice to be provided to the Settlement Class Members, and shall otherwise comply with North Carolina Rule of Civil Procedure 23 and any other applicable statutes, laws, and rules, including, but not limited to, the Due Process Clause of the United States Constitution.

**5.3.** Following issuance of the Preliminary Approval Order, Class Counsel and Town Counsel may by mutual written agreement make any changes in the font, format or content of the

Settlement Notice or the exhibits thereto any time before the Settlement Notice is first mailed to Settlement Class Members, so long as such changes do not materially alter the substance of the Settlement Notice. Any material substantive changes proposed by Class Counsel and Town Counsel following issuance of the Preliminary Approval Order must be approved by the Court.

**5.4.** The Settlement Administrator shall promptly notify Class Counsel of any Settlement Notice that is returned to it as undeliverable. In conjunction with the good faith cooperation by Town Counsel, Class Counsel shall cause the Settlement Administrator to re-mail any Settlement Notices returned by the United States Postal Service with a forwarding address that are received by the Settlement Administrator within five (5) days before the expiration of the Claim Form Deadline. With respect to Settlement Notices that are returned without a new or forwarding address, Class Counsel shall cause the Settlement Administrator to as soon as practicable determine whether a valid address can be located through use of the United States Postal Service's National Change of Address database and/or other reasonable means and without undue cost and delay. Class Counsel shall then cause the Settlement Administrator to promptly re-mail Settlement Notices to those persons and entities for whom the Settlement Administrator is reasonably able to locate a valid address in accordance herewith, so long as the valid address is obtained before the expiration of the Claim Form Deadline.

**5.5.** With the good faith cooperation of Town Counsel and Class Counsel, the Settlement Administrator shall establish an Internet website, whose address shall be included and disclosed in the Settlement Notice, which will inform Settlement Class Members of the terms of this Agreement, their rights, dates and deadlines and related information. The website shall include, in .pdf format, materials related to the Settlement as agreed upon by the Parties and/or required by the Court, and will be operational and live by the date of the first mailing of the

Settlement Notice. The internet website address shall be included in the Settlement Notice.

**5.6.** The Settlement Administrator shall prepare and file a declaration as an exhibit to motion for preliminary approval. The declaration will describe the plan to disseminate notice to the Settlement Class Members. Not later than ten (10) days before the date of the Final Approval Hearing, the Settlement Administrator, and to the extent necessary Class Counsel, shall file with the Court a declaration or declarations, based on the personal knowledge of the declarant(s), verifying compliance with these class-wide notice procedures.

**5.7.** Class Counsel expressly reserves, and the Parties agree that Class Counsel shall have the right to communicate with, and respond to inquiries from, Settlement Class Members.

**5.8. Media Communications.**

**5.8.1.** Neither Class Counsel, Settlement Class Members, Town Counsel, nor the Town will issue a press release in conjunction with this Agreement. Class Counsel, Settlement Class Members, Town Counsel, and the Town agree that they will not affirmatively reach out to any media representatives concerning this case. If any media representatives contact Class Counsel, Settlement Class Members, Town Counsel, or the Town, all parties agree: (1) to limit their comments to generally affirm that the parties are pleased to have resolved the litigation; and (2) to refer any media representatives to this Agreement.

**5.8.2.** The Town may disclose and discuss this Agreement to and with their parent companies, affiliated companies, customers and clients, and each of their respective accountants, shareholders, auditors, consultants and investors, as well as with government entities as necessary to comply with applicable law.

**5.8.3.** Other than the restrictions on post-filing publicity set forth above, nothing in this Agreement will preclude Class Counsel from freely communicating with Settlement Class

Members about the Action, discussing the terms of this Agreement with Settlement Class Members or posting the terms of this Agreement or the Settlement documents on Class Counsel's website.

**6. REQUESTS FOR EXCLUSION**

**6.1.** Any Settlement Class Member who wishes to be excluded from the Settlement Class must mail a written request for exclusion to the Settlement Administrator at the address provided in the Settlement Notice, and mail copies of that written request for exclusion to Class Counsel and Town Counsel at the addresses provided in the respective Settlement Notice, no later than thirty (30) days before the originally scheduled date of the Final Approval Hearing (if the Final Approval Hearing is continued, the deadline runs from the first scheduled Final Approval Hearing), or as the Court otherwise may direct. A written request for exclusion must: (a) contain a caption or title that identifies it as "Request for Exclusion in *Upright Builders, Inc. v. Town of Apex*, 18 CVS 003720; (Superior Court Division of Wake County, North Carolina);" (b) include the Settlement Class Member's name, business address, and address of the property where the alleged Impact Fees were paid and date of payment; (c) specify that he or she wants to be excluded from the Settlement Class; and (d) be personally signed by the Settlement Class Member for an applicable property. To be effective, a request for exclusion must be executed and notarized (if applicable) by the putative class member. If all such putative class members do not execute a request for exclusion, it shall be rendered ineffective and the property where such Impact Fees were paid shall remain within the class and subject to the terms of this Agreement. The requirements for submitting a timely and valid request for exclusion shall be set forth in the Settlement Notice.

**6.2.** Unless excluded by separate Order entered by the Court for good cause shown

prior to entry of the Final Order and Judgment, any member of the Settlement Class who fails to strictly comply with the procedures set forth in Paragraph 6.1 (and in the Settlement Notice) for the submission of written requests for exclusion will be deemed to have consented to the jurisdiction of the Court, will be deemed to be part of the Settlement Class, and will be bound by all subsequent proceedings, orders, and judgments in the Action, including, but not limited to, the Release, even if he or she has litigation pending or subsequently initiates litigation against the Town relating to the claims and transactions released in the Action.

**6.3.** The Settlement Administrator shall file with the Court, no later than ten (10) days before the Final Approval Hearing, a list reflecting all requests for exclusion it has received. The list shall also identify which of those requests for exclusion were timely and complied with the requirements of this Section 6, which requests for exclusion were received late, and which requests for exclusion failed to comply with the requirements of this Section 6.

## **7. OBJECTIONS TO SETTLEMENT**

**7.1.** Any Settlement Class Member who has not filed a timely written request for exclusion and who wishes to object to the fairness, reasonableness, or adequacy of this Agreement, or the proposed Settlement, or to the award of Attorneys' Fees and Expenses, or the Service Awards, or to any other aspect or effect of the proposed Settlement, must file with the Court, and deliver to Class Counsel and to Town Counsel, no later than thirty (30) days before the originally scheduled date of the Final Approval Hearing (if the Final Approval Hearing is continued, the deadline runs from the first scheduled Final Approval Hearing), or as the Court otherwise may direct, a written statement of his or her objection.

**7.2.** A written statement of objection must: (a) contain a caption or title that identifies it as "Objection to Class Settlement in *Upright Builders, Inc. v. Town of Apex*, 18 CVS 003720;

(Superior Court Division of Wake County, North Carolina);” (b) identify whether the objection is to the Settlement Class; (c) set forth the specific reason(s), if any, for each objection, including all legal support the Settlement Class Member wishes to bring to the Court’s attention and all factual evidence the Settlement Class Member wishes to introduce in support of the objection; (d) include the name and address of the Settlement Class Member; (e) be personally signed by the Settlement Class Member; (f) include an identification, by case style and number, of any other class settlements the objector or the objector’s attorney(s) have asserted an objection; and (g) include an identification of all attorneys having a financial interest or stake in the objection.

**7.3.** A separate copy of each objection must be sent to each of the following:

Daniel K. Bryson  
John Hunter Bryson  
WHITFIELD BRYSON & MASON LLP  
900 West Morgan Street  
Raleigh, North Carolina 27603

Susan Burkhart  
Cranfill Sumner & Hartzog, LLP  
5420 Wade Park Boulevard, Suite #300  
Raleigh, North Carolina 27607

Laurie Hohe  
TOWN OF APEX  
P.O. Box 250  
Apex, North Carolina 27520

Clerk of Superior Court  
Wake County Superior Court  
316 Fayetteville Street  
Raleigh, North Carolina 27601

**7.4.** A Settlement Class Member may file and serve a written statement of objection either on his own or through an attorney retained at his own expense; provided, however, that a written statement of objection must be personally signed and notarized by the Settlement Class Member, regardless of whether he has hired an attorney to represent him.

**7.5.** Any Settlement Class Member who properly files and serves a timely written objection, as described in this Section 7, may appear at the Final Approval Hearing, either in person or through personal counsel hired at the Settlement Class Member’s own expense, to object to the fairness, reasonableness, or adequacy of this Agreement or the proposed Settlement, or to the award of Attorneys’ Fees and Expenses, or to any other aspect or effect of the proposed

Settlement. However, any Settlement Class Member who intends to make an appearance at the Final Approval Hearing must include a statement to that effect in his or her objection. If a Settlement Class Member hires his or her own personal attorney to represent him or her in connection with an objection, and if the attorney wishes to appear at the Final Approval Hearing, the attorney must: (a) file a notice of appearance with the Clerk of Court in the Action no later than thirty (30) days before the originally scheduled date of the Final Approval Hearing (if the Final Approval Hearing is continued, the deadline runs from the first-scheduled Final Approval Hearing); and (b) serve and deliver a copy of that notice of appearance to Class Counsel and Town Counsel no later than thirty (30) days before the originally scheduled date of the Final Approval Hearing (if the Final Approval Hearing is continued, the deadline runs from the first-scheduled Final Approval Hearing).

**7.6.** Any Settlement Class Member who fails to strictly comply with the provisions and deadlines of this Section 7 shall waive and forfeit any and all rights he or she may have to appear separately and/or to object, and will be deemed to have consented to the jurisdiction of the Court, to be part of the Settlement Class, and to be bound by all subsequent proceedings, orders, and judgments in the Action, including, but not limited to, the Release.

**7.7.** Any Settlement Class Member who objects to the Settlement but does not file an exclusion request shall, unless he or she is subsequently excluded by Order of the Court, remain a Settlement Class Member and therefore be entitled to all of the benefits, obligations and terms of the Settlement if this Agreement and the terms contained therein are approved and the Final Order and Judgment is entered.

## **8. RELEASE AND WAIVER**

**8.1.** Plaintiffs and Town agree to the following release and waiver, which shall take

effect upon the Effective Date (the following, separately and severally, shall be referred to for purposes of this Agreement as the “Released Claims”):

In consideration for the Settlement benefits described in this Agreement, Plaintiffs and the other members of the Settlement Classes who do not timely and validly exclude themselves in accordance with the procedures set forth in the Settlement Notice, on behalf of themselves and on behalf of their heirs, guardians, executors, administrators, predecessors, successors and assigns, as well as any person accepting benefits under this Agreement, will, by virtue of this Agreement and by virtue of the Court’s Final Order and Judgment, be deemed to have fully, finally and forever released, remised, relinquished, acquitted, and forever discharged each and all of the Released Parties of and from, and shall not now or hereafter institute, maintain, or assert on their own behalf, on behalf of the Settlement Class or on behalf of any other person or entity, any claims, actions, causes of action, suits, rights, debts, obligations, reckonings, contracts, agreements, executions, promises, damages, liens, judgments and demands of whatever kind, type or nature whatsoever, both at law and in equity, whether past, present or future, mature or not yet mature, known or unknown, suspected or unsuspected, contingent or non-contingent, whether based on federal, state or local law, statute, ordinance, regulation, code (including but not limited to building code), contract, common law, or any other source, or any claim that Plaintiffs or Settlement Class Members had, or may have had against the Released Parties that were or reasonably could have been alleged by them or on their behalf in the Action or in any other court, tribunal, arbitration panel, commission, agency, or before any governmental and/or administrative body, or any other adjudicatory body, on the basis of, connected with, arising out of or relating to the charge of Capacity or Transportation Fees of Class members by the Released Parties from March 23, 2015, through June 20, 2018, or any other issues with their fees that were or reasonably could have been discovered and/or alleged in the Action, including, but without in any way limiting the generality of the foregoing, the claims alleged in the Action, and any claims for breach of contract, breach of express or implied warranty, tort, or statutory violations arising from, or directly or indirectly, or in any way whatsoever, pertaining to or relating to the charge or collection by the Town of Capacity or Transportation Fees by the Released Parties from March 23, 2015, through June 20, 2018.

**8.2.** Plaintiffs and Class Counsel represent and warrant that Settlement Class Members

and, where applicable, assignees, are the sole and exclusive owners of all claims that they personally are releasing under this Agreement. Plaintiff Settlement class members agree to indemnify the Town for any claim asserted by any record owner of the property for any capacity or transportation fee. Said indemnification may include refunding some or all of the Plaintiffs' recovery under this agreement. This would not prevent Plaintiff from disputing the validity of the claim. Under no circumstances shall the amount of indemnification exceed the amount recovered by the Settlement Class member in this Action.

**8.3.** Without in any way limiting its scope, and, except to the extent otherwise specified in this Agreement, this Release covers by example and without limitation, any and all claims for damages, equitable relief, attorneys' fees, costs, expenses, expert fees, or consultant fees, interest, or litigation fees, costs or any other fees, costs, expenses and/or disbursements incurred by Class Counsel, or by Class Plaintiffs or by the Settlement Class Members regarding Released Claims for which any of the Released Parties might otherwise be claimed liable.

**8.4.** Plaintiffs expressly understand and acknowledge, and all Settlement Class Members will be deemed by the Final Order and Judgment to acknowledge, that certain principles of law and equity, including, but not limited to, **Section 1542 of the Civil Code of the State of California, provide that “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 or her settlement with the debtor.”** To the extent that anyone might argue that these principles of law or equity are applicable, Plaintiffs hereby agree that the provisions of all such principles of law, equity or similar federal or state laws, rights, rules, legal or equitable principles, to the extent they are found to be applicable herein, are hereby knowingly and voluntarily waived, relinquished and

released by them and all Settlement Class Members.

**8.5.** Class Plaintiffs acknowledge, and all Settlement Class Members will be deemed by the Final Order and Judgment to acknowledge, that they are aware that they could conceivably hereafter discover claims that were existing in the past or present, that may be presently unknown or unsuspected, or facts in addition to or different from those that they now know or believe to be true with respect to the allegations or subject matters in the Action or with respect to the Released Claims but, nevertheless, intend to fully, finally and forever settle and release such matters, and all claims relating thereto, which exist, hereafter may exist, or might have existed (whether or not previously or current asserted in any action or proceeding) related in any way to the facts, transactions, and claims asserted in the Action or with respect to the Released Claims.

**8.6.** The Parties and each of the Settlement Class Members who do not timely and validly exclude themselves in accordance with the procedures set forth in the Settlement Notice shall be deemed to have agreed that the Release set forth herein will be and may be raised as a complete defense to and will preclude any action or proceeding based in whole or in part upon the claims released by and through this Agreement. Class Plaintiffs acknowledge and agree, and all Settlement Class Members (other than those who timely and validly exclude themselves in accordance with the procedures set forth in the Settlement Notice) will be deemed by the Final Order and Judgment to have agreed, that each of them shall be permanently barred and enjoined by the Final Approval Order from hereafter instituting, participating in, prosecuting or maintaining, either directly or indirectly, on their own behalf, or on behalf of the Settlement Class or any other Settlement Class Member, person or entity, any action or proceeding of any kind asserting any of the Released Claims.

**8.7.** Upon entry of the Final Order and Judgment, the Parties shall be deemed to have agreed that the Release set forth herein will be and may be raised as a complete defense to and will preclude any action or proceeding based on the claims released by and through this Agreement.

**8.8.** The Preliminary Approval Order shall contain a preliminary injunction against filing, prosecution, or maintenance by Settlement Class Members of actions asserting claims that would be subject to the Release provided for by this Agreement, in order to protect the Court's jurisdiction and facilitate the Court's consideration of whether final approval of this Agreement and the Settlement is appropriate.

**8.9.** Subject to the provisions of this Section 8 and the injunctions contemplated thereby, nothing in this Release shall preclude any filing in this Action seeking to have the Court enforce the terms of this Agreement, including participation in any of the processes detailed therein.

**8.10.** The Parties hereby agree and acknowledge that the provisions of this Release together constitute an essential and material term of this Agreement and shall be included in any Final Order and Judgment entered by the Court.

**9. ATTORNEYS' FEES AND EXPENSES AND SERVICE AWARDS**

**9.1.** The Parties' negotiations and mediation regarding attorneys' fees, costs and expenses took place only after they reached an agreement in principle as to all other material terms of this Agreement. As a result of their negotiations and compromises, and subject to the provisions of this Section 9, the Parties have agreed that Class Counsel shall be entitled to apply to the Court for an award of Attorneys' Fees and Expenses in an amount determined by the Court where the total amount is not to exceed one-third of the value of the Fund, to compensate Class

Counsel for all past, present and future attorneys' fees, costs (including court costs), expenses and disbursements of such attorneys, experts, investigators, staff and consultants combined, and that the Town will, if asked by the Court, state that it is contractually obligated not object to any application by Class Counsel for an award of Attorneys' Fees and Expenses for the Capacity Fees Claims and Transportation Fee Claims which will be determined by the Court under applicable law, that does not exceed that total amount, provided that Plaintiffs' attorneys shall advise the Court, at the time of the hearing on Attorneys' Fees and Costs, of: the number of similar actions or class actions in North Carolina, involving water, sewer and/or transportation impact or capacity fees, in which Plaintiffs' attorneys have represented or are representing the plaintiffs in such actions; and that the settlement documents submitted in the Actions are substantially the same form as the documents submitted in \_\_\_\_\_ prior actions (number to be inserted at the time of the hearing on Attorneys' Fees and Costs) ("Disclosures"). Alternatively, if Plaintiffs' attorneys do not make the Disclosures, the Town's attorneys will be free to oppose Plaintiffs' request for reasonable Attorneys' Fees. If asked, and provided the Disclosures are made by Class Counsel to the Court, the Town will indicate to the Court that the Town is contractually bound not to oppose Plaintiffs' request for reasonable attorneys' fees. Plaintiffs' attorneys agree not to seek and not to accept any amount or award of Attorneys' Fees and Costs which is in excess of the amount awarded by the Court under applicable law. The Town will pay, or cause to be paid, from the Fund any Attorneys' Fees, Costs and Service Awards that may be awarded by the Court by check made payable as Class Counsel may instruct.

Class Counsel agrees not to seek and not to accept any amount or award of Attorneys' Fees and Expenses which is in excess of this amount.

**9.2.** It is a condition of this Settlement that the Town shall not be liable to Class

Counsel or to anyone else for any further attorneys' fees and costs, or any claim by any other counsel or Settlement Class Member for any amounts other than those listed in this Agreement.

**9.3.** Plaintiffs, Class Counsel, the Town and Town Counsel agree to oppose, including on appeal, any request for attorneys' fees and costs, expert fees, service awards, costs and/or expenses by any Settlement Class Member, objector, intervenor or proposed intervenor, or any separate attorney hired by any of the foregoing, except as provided in this Agreement. If any other or additional attorneys' fees, costs, or expenses are awarded beyond those Attorneys' Fees and Expenses set forth in Paragraph 9.1, the Town at its sole option may declare this Agreement void as set forth in Section 11.

**9.4.** The Parties have also agreed that Class Counsel shall be entitled to apply to the Court for Service Awards of up to \$5,000 to each of the Plaintiffs captioned above. The Town will not object to any application by Class Counsel for Service Awards to these identified Plaintiffs of up to those amounts.

**9.5.** The Town will pay or cause to be paid any Attorneys' Fees and Expenses from the Fund to Class Counsel and Service Awards that may be awarded by the Court by check made payable as Class Counsel may instruct. Checks shall be distributed in the following fashion: checks for Service Awards shall be delivered to Class Counsel within seven (7) days after the Effective Date; checks for Class Counsel's Attorneys' Fees shall be paid in such amounts as is approved by the Court within seven (7) days of the Effective Date. Class Counsel, in turn, will be solely responsible for distribution of any Court-approved Service Awards awarded to Class Plaintiffs, and for distribution of the Attorneys' Fees and Expenses award between and among Class Counsel.

**9.6.** In the event the Final Order and Judgment is not entered or the Effective Date is

not reached, the Town will not be liable for, and shall be under no obligation to pay, any of the Attorneys' Fees or Expenses or Service Awards set forth in this Agreement.

**9.7.** The effectiveness of this Agreement and the Settlement will not be conditioned upon or delayed by the Court's failure to approve Class Counsel's applications for Attorneys' Fees and Expenses and Service Awards. The denial, downward modification, or failure to grant Class Counsel's request for Attorneys' Fees and Expenses and Service Awards shall not constitute grounds for modification or termination of this Agreement or the Settlement proposed herein.

**10. PRELIMINARY APPROVAL ORDER, FINAL ORDER AND JUDGMENT, AND RELATED ORDERS**

**10.1.** Not later than February 22, 2019 the Parties shall file a motion and all supporting papers with the Court seeking entry of the Preliminary Approval Order.

**10.2.** At the hearing on the motion for entry of the Preliminary Approval Order, the Parties shall ask the Court to set a date for the Final Approval Hearing no earlier than sixty (60) days after the Court grants the Preliminary Approval Order.

**10.3.** Not later than ten (10) days before the Final Approval Hearing, the Parties shall file a motion and all supporting papers seeking entry of the Final Order and Judgment by the Court.

**11. MODIFICATION OR TERMINATION OF THIS AGREEMENT**

**11.1.** Prior to entry of the Final Order and Judgment, the terms and provisions of this Agreement may be amended, modified, or expanded by written agreement of the Parties and approval of the Court; provided, however, that after entry of the Final Order and Judgment, the Parties may by mutual written agreement effect such amendments, modifications, or expansions of this Agreement and its implementing documents (including all exhibits hereto) without further

notice to the Settlement Class or approval by the Court if such changes are not materially inconsistent with the Court's Final Order and Judgment and do not materially limit, or materially and adversely affect, the rights or obligations of Settlement Class Members under this Agreement.

**11.2.** This Agreement shall terminate at the sole option and discretion of either the Town or Plaintiffs if: (a) the Court, or any appellate court(s), rejects, modifies, or denies approval of any portion of this Agreement that the terminating Party in his, her or its sole judgment and discretion determine(s) is material, including, without limitation, the terms of relief, the findings or conclusions of the Court, the provisions relating to notice (including the proposed plan for the dissemination of notice to the Settlement Class set forth in Section 5), the definition of the Settlement Class and the terms and conditions for its certification, and/or the terms of the Release; or (b) the Court, or any appellate court(s), does not enter or completely affirm, or alters or expands, any portion of the Final Order and Judgment, or any of the Court's findings of fact or conclusions of law, that the terminating Party in his, her or its sole judgment and discretion determine(s) is material. However, under no circumstances shall the amount of any Service Award or Attorneys' Fees and Expenses awarded by the Court provide Plaintiffs or Class Counsel with a basis for terminating the Settlement.

**11.3.** The Town may also in its sole discretion elect to terminate this Agreement if: (1) the amount of Attorneys' Fees and Expenses awarded by the Court to Class Counsel exceeds the maximum aggregate total amount of one-tenth of the amount of the Fund; (2) any attorneys' fees and costs, expert fees, costs, expenses, or other monetary sums are awarded to any individual Settlement Class Member, objector, intervenor or proposed intervenor, or any separate attorney hired by any of the foregoing; (3) 5% or more of the total Settlement Class Members based on

the Maximum Settlement Value, or \$748,073 submit written requests for exclusion, and which reflect valid Impact, Capacity, or Transportation Fees paid, which are deemed timely, valid and effective by the Court; or (4) Town Council does not approve this Agreement when it is presented to them on February 5, 2019.

**11.4.** The terminating Party must exercise the option to withdraw from and terminate this Agreement, as provided in this Section 11, by a signed writing served on the other Party no later than fifteen (15) days after receiving notice of the event prompting the termination unless there is a motion or petition seeking reconsideration, alteration or appellate review of the event, in which case no later than thirty (30) days after the final conclusion of any such motion or petition seeking reconsideration, alteration, or appellate review thereof, whichever is later.

**11.5.** If an option to withdraw from and terminate this Agreement as provided by this Section 11 arises, none of the Parties is required for any reason or under any circumstance to exercise that option.

**11.6.** If this Agreement is terminated pursuant to the provisions of this Section 11, then:

**11.6.1.** This Agreement shall be null and void and shall have no force or effect, and no Party to this Agreement shall be bound by any of its terms, except for the terms of this Paragraph 11.6. and its sub-sections;

**11.6.2.** This Agreement, all of its provisions, and all negotiations, statements, documents, orders and proceedings relating to it shall be inadmissible in evidence for any purpose, and shall be without prejudice to the rights of the Town, Class Plaintiffs or any Settlement Class Member, all of whom shall be restored to their respective positions existing immediately before the execution of this Agreement, except that the Parties shall cooperate in requesting that the Court set a new scheduling order such that neither party's substantive or

procedural rights is prejudiced by the attempted Settlement;

**11.6.3.** The Released Parties, as defined in Section 2, expressly do not waive any, but instead affirmatively reserve all, of their defenses, arguments, and motions as to all claims that have been or might later be asserted in the Action;

**11.6.4.** Plaintiffs and all other Settlement Class Members, on behalf of themselves and their current and former predecessors, successors, heirs, executors, administrators, agents, attorneys, representatives and assigns, expressly and affirmatively reserve and do not waive any motions as to, and arguments in support of, all claims that have been or might later be asserted in the Action including, without limitation, any argument concerning class certification, liability and/or available remedies;

**11.6.5.** This Agreement, the fact of its having been made, the negotiations leading to it, any discovery or action taken by any of the Parties or Settlement Class Members pursuant to or as a result of this Agreement, and any documents, statements or communications pertaining to this Agreement shall not be admissible or be entered into evidence for any purpose whatsoever in the Action or in any other proceeding, by any Party or Settlement Class Member, other than to enforce the terms of this Agreement;

**11.6.6.** The Parties stipulate that upon termination of this Agreement pursuant to the provisions contained herein, any Settlement-related order(s) or judgment(s) entered in this Action after the date of execution of this Agreement shall be deemed vacated and shall be without any force or effect, and that any of the Parties may move the Court to vacate any and all orders entered by the Court pursuant to the provisions of this Agreement.

## **12. GENERAL MATTERS AND RESERVATIONS**

**12.1.** The obligation of the Parties to implement and conclude the proposed Settlement

is and shall be contingent upon each of the following:

**12.1.1.** Entry by the Court of the Preliminary Approval Order, followed thereafter by the Final Approval Hearing and subsequent entry by the Court of the Final Order and Judgment approving the Settlement, from which the time to appeal has expired or which has remained unmodified after the exhaustion and final disposition of any appeal(s) or petition(s) for appellate review; and

**12.1.2.** Any other conditions stated in this Agreement.

**12.2.** This Agreement reflects, among other things, the compromise and settlement of disputed claims among the Parties hereto, and neither this Agreement nor the releases given herein, nor any consideration therefore, nor any actions taken to carry out or obtain Court approval of this Agreement are intended to be, nor may they be deemed or construed to be, an admission or concession of liability, or the validity of any claim, or defense, or of any point of fact or law (including but not limited to matters respecting class certification) on the part of any Party. The Town expressly denies the allegations asserted in the Action. Neither this Agreement, nor the fact of the Settlement, nor the settlement proceedings, nor settlement negotiations, nor statements made in court proceedings, nor any related document, shall be used as an admission of any fault or omission by the Town, or be construed as, offered as, received as, or used as evidence of an admission, concession, presumption, or inference of any fact or of any liability or wrongdoing by the Town in any proceeding, or as a waiver by the Town of any applicable defense, or for any other purposes other than such proceedings as may be necessary to consummate, interpret, or enforce this Agreement.

**12.3.** Class Counsel represent that: (1) they are authorized by Class Plaintiffs to enter into this Agreement on their behalf, and on behalf of Class Counsel, with respect to the claims in

the Action; and (2) they are seeking to protect the interests of the entire Settlement Class.

**12.4.** Class Plaintiffs represent and certify that they: (1) have agreed to serve as the representatives of the Settlement Class; (2) are willing, able, and ready to perform all of the duties and obligations of a representative of the Settlement Class; (3) have read the complaints filed in the Action, or has had the contents of such pleadings described to them by Class Counsel; (4) are familiar with the results of the fact-finding undertaken by Class Counsel; (5) have been kept apprised of the progress of the Action and the settlement negotiations between the Parties, and have either read this Agreement (including the exhibits annexed hereto) or have received a detailed description of it from Class Counsel and they have agreed to its terms; (6) have consulted with Class Counsel about the Action, this Agreement and the duties and obligations imposed on a representative of the Settlement Class; (7) have authorized Class Counsel to execute this Agreement on their behalves; and (8) will remain and serve as the representatives of the Settlement Class until the terms of the Agreement are effectuated, this Agreement is terminated in accordance with its terms, or the Court at any time determines that they can no longer serve in a representative capacity on behalf of the Settlement Class.

**12.5.** The person(s) executing this Agreement on behalf of the Town represents that (s)he is authorized to enter into this Agreement on behalf of the Town.

**12.6.** This Agreement, complete with its exhibits, sets forth the sole and entire agreement among the Parties with respect to its subject matter, and it may not be altered, amended, or modified except by written instrument made in accordance with the provisions of this Agreement and executed by Class Counsel and Town Counsel. The Parties expressly acknowledge that no other agreements, arrangements, or understandings not expressed in this Agreement exist among or between them and that in deciding to enter into this Agreement, they each have relied solely

upon their own judgment and knowledge. This Agreement supersedes any prior agreements, understandings, or undertakings (written or oral) by and between the Parties regarding the subject matter of this Agreement.

**12.7.** At the preliminary approval hearing by the Court, the Town shall provide to Court a list of all potential Capacity Fee and Transportation Class Claimants.

**12.8.** This Agreement and any amendments thereto shall be governed by and interpreted according to the law of the State of North Carolina, notwithstanding its conflict of laws provisions. The North Carolina Superior Court of Wake County shall retain jurisdiction over this Agreement.

**12.9.** Any disagreement and/or action seeking directly or indirectly to challenge, modify, construe, obtain relief from, extend, limit, or enforce this Agreement shall be commenced and maintained only in this Court and in this Action. Without in any way compromising the finality of the Final Order and Judgment, the Court shall retain exclusive and continuing jurisdiction over all matters related in any way to the Settlement and the Agreement, including but not limited to the implementation of the Settlement (including, but not limited to, the Claims Process) and the interpretation, administration, supervision, enforcement and modification of this Agreement.

**12.10.** Whenever this Agreement requires or contemplates that one of the Parties shall or may give notice to the other, notice shall be provided by e-mail and/or next-day (excluding Saturdays, Sundays and Legal Holidays) express delivery service as follows:

**12.10.1.** If to the Town, then to:

Susan Burkhart  
Cranfill Sumner & Hartzog, LLP  
5420 Wade Park Boulevard, Suite #300  
Raleigh, North Carolina 27607

Telephone: (919) 863-8709  
Email: skb@cshlaw.com

**12.10.2.** If to Class Plaintiffs, Settlement Class, or Class Counsel, then to:

Daniel K. Bryson  
John Hunter Bryson  
WHITFIELD BRYSON & MASON LLP  
900 W. Morgan Street  
Raleigh, North Carolina 27603  
Telephone: (919) 600-5000  
Email: dan@wbmlp.com  
Email: hunter@wbmlp.com

**12.11.** All time periods set forth herein shall be computed in calendar days unless otherwise expressly provided. In computing any period of time prescribed or allowed by this Agreement or by order of the Court, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a Legal Holiday (as defined by the North Carolina Rules of Civil Procedure), or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period shall run until the end of the next day that is not one of the aforementioned days.

**12.12.** The Parties reserve the right, subject to the Court's approval, to agree to any reasonable extensions of time that might be necessary to carry out any of the provisions of this Agreement.

**12.13.** Neither the Settlement Class, Class Plaintiffs, Class Counsel, the Town, nor Town Counsel shall be deemed to be the drafter of this Agreement or of any particular provision, nor shall any of them argue that any particular provision should be construed against its drafter or otherwise resort to the *contra proferentem* canon of construction. All Parties agree that this

Agreement was drafted by counsel for the Parties during and through extensive arm's length negotiations. No parol or other evidence may be offered to explain, construe, contradict, or clarify this Agreement's terms, the intent of the Parties or their counsel, or the circumstances under which this Agreement was made or executed.

**12.14.** The Parties expressly acknowledge and agree that this Agreement and its exhibits, along with all related drafts, motions, pleadings, conversations, negotiations, and correspondence, constitute an offer of compromise and a compromise within the meaning of North Carolina Rule of Evidence 408. N.G. Gen. Stat. § 8C-408. In no event shall this Agreement, any of its provisions or any negotiations, statements or court proceedings relating to its provisions in any way be construed as, offered as, received as, used as, or deemed to be evidence of any kind in the Action, any other action, or in any judicial, administrative, regulatory or other proceeding, except in a proceeding to enforce this Agreement or the rights of the Parties or their counsel. Without limiting the foregoing, neither this Agreement nor any related negotiations, statements, or court proceedings shall be construed as, offered as, received as, used as or deemed to be evidence of an admission or concession of any proposition of fact or law or of any liability or wrongdoing whatsoever on the part of any person or entity, including, but not limited to, the Released Parties, Class Plaintiffs or the Settlement Class or as a waiver by the Released Parties, Plaintiffs or the Settlement Class of any applicable privileges, claims or defenses.

**12.15.** Class Plaintiffs expressly affirm that the allegations asserted in the Action were made in good faith and have a basis in fact, but that they consider it desirable for the Action to be settled and dismissed because of the risks associated with continued litigation and the substantial benefits that the Settlement will provide to the Settlement Class Members.

**12.16.** The Town expressly denies all liability and affirms that the allegations asserted in the Action had no basis in fact, but the Town considers it desirable for the Action to be settled and dismissed because of the risks associated with protracted litigation and the substantial benefits the Settlement will provide to the Town.

**12.17.** The Parties, their successors and assigns, and their counsel undertake to implement the terms of this Agreement in good faith, and to use good faith in resolving any disputes that may arise in the implementation of the terms of this Agreement.

**12.18.** The waiver by one of the Parties of any breach of this Agreement by another of the Parties shall not be deemed a waiver of any prior or subsequent breach of this Agreement.

**12.19.** If one of the Parties to this Agreement considers another of the Parties to be in breach of its obligations under this Agreement, that Party must provide the breaching Party with written notice of the alleged breach and provide a reasonable opportunity to cure the breach before taking any action to enforce any rights under this Agreement.

**12.20.** The Parties, their successors and assigns, and their counsel agree to cooperate fully with one another in seeking the approval of the Court of this Agreement and in the event of any appeal(s), and to use their best efforts to effect the prompt consummation of this Agreement and the proposed Settlement.

**12.21.** Until final Court approval of this Class Action Settlement and Agreement, the contents of this Agreement and/or the mutual agreements herein, including but not limited to: payment amounts; terms; and list of any potential Capacity Settlement Claimants and Transportation Settlement Claimants, shall remain confidential; except as necessary to effectuate the settlement. After an order on final approval has been entered, there shall be no restrictions of any kind on Class Counsel regarding its ability to publicize the contents of the Agreement.

**12.22.** No opinion concerning the tax consequences, if any, of this Agreement and Settlement as to individual Settlement Class Members or anyone else is being given or will be given by the Town, Town Counsel, Plaintiffs or Class Counsel; nor is any representation or warranty in this regard made by virtue of this Agreement or Settlement. The Settlement Notice will direct Settlement Class Members to consult their own tax advisor(s) regarding the tax consequences of the Settlement and this Agreement, and any tax reporting obligations they may have with respect thereto. Each Settlement Class Member's tax obligations, and the determination thereof, are the sole responsibility of the Settlement Class Member, and it is understood that the tax consequences may vary depending on the particular circumstances of each individual Settlement Class Member. Nothing in this Agreement, or in the Settlement Notice is to be construed as tax advice of any kind.

**12.23.** The Parties agree that the full, written Agreement shall be completed prior to the February 5, 2019 Apex Town Council meeting, and that the Town Council shall be presented with this Agreement as soon as practicable and is expected to render a decision by February 19, 2019.

**12.23.** Headings contained in this Agreement are for convenience of reference only and are not intended to alter or vary the construction and meaning of this Agreement.

**12.24.** This Agreement shall be equally binding upon and inure to the benefit of the Class Plaintiffs and the Settlement Class Members, their representatives, heirs, successors and assigns, as upon and to the benefit of the Town.

**12.25.** This Agreement may be signed with a facsimile signature and in counterparts, each of which shall constitute a duplicate original.

Agreed to on the date(s) indicated below.

APPROVED AS TO FORM BY PLAINTIFFS' COUNSEL AND CLASS PLAINTIFFS:

WHITFIELD BRYSON & MASON LLP

Dated: \_\_\_\_\_

\_\_\_\_\_  
Daniel K. Bryson  
J. Hunter Bryson  
Attorneys for Plaintiffs

LEGACY CUSTOM HOMES, INC.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Ward Russell

UPRIGHT BUILDERS INC.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Wes Carroll

ON BEHALF OF TOWN OF APEX:

Dated: \_\_\_\_\_

TOWN OF APEX

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

Title: \_\_\_\_\_

APPROVED AS TO FORM BY TOWN OF APEX COUNSEL:

Dated: \_\_\_\_\_

CRANFILL SUMNER & HARTZOG, LLP

\_\_\_\_\_  
Susan Burkhart  
Attorney for Defendant