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STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
2019 MAY 28 PM 5:15
SUPERIOR COURT DIVISION
Case No. 18-CVS-4384
WAKE COUNTY, C.S.C.

UPRIGHT BUILDERS INC.,
individually and on behalf of all others
similarly situated,)
)
)
Plaintiffs,)
v.)
)
TOWN OF APEX,)
)
Defendant.)

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*copy
Final
Proposed
Order*

STATE OF NORTH CAROLINA
WAKE COUNTY

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

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

**ORDER APPROVING FINAL SETTLEMENT AND
AWARDING ATTORNEYS' FEES**

THIS MATTER comes before the Court on Plaintiffs' Motion for Final Approval of Settlement ("Approval Motion") and Unopposed Motion for Award of Attorneys' Fees and Expenses and Service Awards ("Fee Motion") (collectively, "Motions") pursuant to Rule 23 of the North Carolina Rules of Civil Procedure("Rule(s)"). Both Motions are unopposed by Defendant Town of Apex ("Apex"), and after appropriate notice to class members was provided

as required by the Court's Order Granting Preliminary Approval of Settlement, three objections were received pursuant to the settlement conditionally entered on March 25, 2019 ("Settlement"), however, those objections were withdrawn before the Final Approval hearing.

On May 28, 2019, the Court held a hearing on the Motions and is satisfied as to the fairness, reasonableness, and adequacy of the Settlement, and the fairness and reasonableness of the fees, expenses, and service awards provided herein. Therefore, having considered the Motions, the supporting Memorandums, materials filed with the Motion, discussions with counsel during hearing held May 28, 2019, and other appropriate matters of record, concludes that good cause exists to grant the Motions. Therefore, the Court GRANTS the Final Approval Motion, CERTIFIES the class as defined below for settlement purposes only, APPROVES the Settlement, and GRANTS the Fee Motion.

Whitfield Bryson & Mason LLP, by Daniel K. Bryson, and John Hunter Bryson for Plaintiffs.

Cranfill Sumner & Hartzog LLP, by Susan K. Burkhart, and Apex Town Attorney Laurie Hohe, for Defendant Town of Apex.

Background

1. Plaintiffs in these actions are builder who paid Capacity Fees and Transportation fees as preconditions to development approval in Apex, North Carolina
2. Plaintiff Upright Builders Inc. filed his complaint on March 23, 2018 as an individual and on behalf of a class of persons who paid Capacity Fees to the Town of Apex as a precondition to development approval. Upright Builders brought claims of Declaratory Judgment, Violation of N.C. Gen. Stat § 160A-363(e), and Violation of the Equal Protection and Substantive Due Process clauses under the North Carolina Constitution. Upright Builders alleged that Apex's Capacity Fees were *ultra vires* fees under the North Carolina Supreme

Court's holding in *Quality Built Homes, Inc. v. Town of Carthage*, 789 S.E.2d 454 (N.C. 2016) and other applicable law. On April 9, 2018, Upright Builders filed another complaint against Apex as an individual and on behalf of a class of persons who paid a Transportation Fee to the Town of Apex as a precondition to development approval. Upright Builders brought identical claims in this action as the claims asserted in his Capacity Fee action. Upright Builders alleged Apex's Transportation Fee was *ultra vires* because the Town did not have the statutory authority to charge him such a fee under applicable North Carolina law. On April 20, 2018, Upright Builder's amended his Transportation Fee Complaint as a matter of right to refine his allegations.

3. On or about June 26, 2018, Upright Builders' counsel asked counsel for Apex if they would consent to the amendment of his Capacity Fee Complaint to add in Legacy Custom Homes, Inc. ("Legacy Homes") as an additional named Plaintiff and Class Representative. Apex's counsel agreed to an amendment of the Capacity Fee Complaint with a reservation of rights to contest whether the amended complaint would relate back to the filing date of the original complaint.

4. On October 16, 2018, Plaintiff deposed Apex's accounting manager, Suzanne Parmentier, to understand the terms and interworking of Apex's accounting software and method of financial recordkeeping. On October 19, 2018, Plaintiffs deposed David Hughes, Assistant Town Manager, and Vance Holloman, Finance officer as rule 30(b)(6) designees. On November 14, 2018, Plaintiffs deposed Water Resources Director, Marty Stone. Following the depositions, the parties scheduled a mediation of both the Capacity Fee action and the Transportation Fee action with Robert A Beason in Raleigh, NC.

5. On January 16, 2019, the parties mediated both cases for nearly 8 hours in a contentious mediation in which each party insisted on the merits of their respective positions.

After nearly 8 hours of mediation, the parties reached an impasse. However, both parties continued to negotiate the terms of a potential settlement for weeks following the mediation. After numerous discussions with Mr. Beason and Apex, Plaintiffs sent a proposed memorandum of understanding to Apex for their consideration. Apex, made various edits to the proposed memorandum of understanding and negotiations continued through Mr. Beason through the end of January 2019.

6. On February 19, 2019, Apex's Town Council approved the settlement agreement (the "Settlement") and resolved the litigation.

7. On March 22, 2019, Plaintiffs filed their Unopposed Motion for Preliminary Approval of Class Action Settlement, Certifying Classes for Purpose of Settlement, Directing Notice To The Classes, and Scheduling of Final Approval Hearing. On March 25, 2019, after discussions with counsel for all parties, this Court entered its Order Granting Preliminary Approval of Settlement, Certifying Classes for Purposes of Settlement, Directing Notice to the Class, and Scheduling Final Approval Hearing ("Preliminary Approval"). Further, this Court set a hearing to consider certifying the class and final approval of the settlement for May 28 2019, and for determining attorneys' fees, expenses, and service awards.

8. Plaintiffs filed the Approval Motion and the Fee Motion, as well as supporting material, on May 20, 2019. This Court held a hearing on May 28, 2019.

9. In evaluating whether to finally approve a class action settlement, courts follow a two step process that first examines whether the proposed class satisfies North Carolina Rule of Civil Procedure 23, and second whether the settlement is "fair, reasonable, and adequate."

Class Certification

10. The Court first turns to whether the Settlement Classes should be finally certified. Rule 23 of the North Carolina Rules of Civil Procedure governs class actions. There are three basic requirements to establish class certification under Rule 23:

First, parties seeking to employ the class action procedure pursuant to our Rule 23 must establish the existence of a class. A class exists when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. The party seeking to bring a class action also bears the burden of demonstrating the existence of other prerequisites: (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class.

Beroth Oil Co. v. N.C. Dep't of Transp., 367 N.C. 333, 336 (2014) (citations omitted). “When all the prerequisites are met, it is left to the trial court's discretion whether a class action is superior to other available methods for the adjudication of the controversy.” *Id.*

11. The Court finds that the Settlement Class meet the prerequisites under Rule 23. The Settlement Class Representatives’ claims are typical of the claims of the respective Settlement Class members. The representatives for the Settlement Class Upright Builders Inc. and Legacy Custom Homes, Inc. all have the same interests getting a refund of unlawful fees exacted from them and their claims are based on the same legal injury—that Apex unlawfully charged them Capacity Fees and Transportation Fees without the requisite statutory authority.

12. The questions of fact and law are common to all Settlement Class members in the defined period, and predominate over any potential individual claim that might be asserted by the Settlement Class Representatives. The common questions of fact involved in this matter included whether Apex’s pattern, practice, and policy of Collecting Capacity Fees and Transportation

Fees violates applicable North Carolina law. The common legal issue, whether Apex improperly charged and collected Capacity Fees for the future expansion of its water and sewer systems or for services to be furnished, without being specifically authorized by the General Assembly of North Carolina to charge such fees. This single factual inquiry and legal issue makes the Settlement Class sufficiently cohesive. Because these issues predominate over any individual issue or interest of the Settlement Class Representatives, a proper class exists.

13. Additionally, the Court concludes that the Settlement Class Representatives have no conflict of interest with the Settlement Class, and that they, as current builders, developers, or other entities that have a genuine personal interest in the outcome of the case and that interest is shared by all class members. The Settlement Class Representatives have shown a commitment to vigorously prosecute this action by complying with document requests, staying in contact with Class Counsel, and negotiating settlement terms with Settlement Class Counsel. Accordingly, the Settlement Class Representatives fairly and adequately represent the interests of the Settlement Class.

14. The Settlement Class now consists of 361 builders, developers, and other entities. Clearly, the class is so numerous that it is impractical to join all members. *See, e.g., Pope v. Harvard Banchares, Inc.*, 240 F.R.D. 383, 387 (N.D. Ill. 2006) (“Generally, where the membership of the proposed class is at least 40, joinder is impracticable and the numerosity requirement is met”).

15. Because Plaintiffs have satisfied all class action prerequisites, this Court has the discretion to determine whether a class action is superior to all other methods for adjudication of this controversy. *Beroth Oil Co.*, 367 N.C. at 336. After a thorough and careful review of the

Approval Motion, the affidavits and evidence provided in support of the Approval Motion, the Court concludes, in its discretion, that class certification is proper in this matter.

16. Accordingly, the Court certifies the following Settlement Class:

All persons or organizations who paid to the Town of Apex Impact 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 actions described herein.

Final Approval of Settlement

17. The Court next looks at the Settlement to determine whether the Settlement is “fair, reasonable, and adequate.” *Ehrenhaus v. Baker*, 216 N.C. App. 59, 73 (2011). The burden of showing that the Settlement satisfies this standard rests on Plaintiffs. *Id.* The determination of whether Plaintiffs have satisfied this burden rests in the trial court’s sound discretion. *Id.*

18. While there are a variety of factors used to evaluate a settlement, the court of appeals has identified two key factors in determining whether to approve a proposed settlement of a class action: “the first is the likelihood the class will prevail should litigation go forward and the potential spoils of victory, balanced against benefits to the class offered in the settlement.” *Id.* at 74. The second factor “is the class’s reaction to the settlement.” *Id.*

19. As to the first factor, this Court notes that the early resolution of this case illustrates that there is a likelihood of success if this action were to go to trial.

20. Notwithstanding these rulings, Plaintiffs would be faced with risks for the Class if this action were to proceed. For example, if filed, a summary judgement motion would turn on a court’s interpretation of the North Carolina Supreme Court’s holding *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 789 S.E.2d 454 (2016) in comparison with Apex’s conduct in

charging the Capacity Fees at issue and how it used such fees for furnished contemporaneous services rather than to “to be furnished” services. Apex contended that the Capacity Fees were used for contemporaneous services for water and sewer facilities.

21. Balanced against the likelihood that the class would prevail if the action were to continue are the benefits offered to the class in the settlement. Under the settlement, the Settlement Class is able to receive an appreciable cash refund percentage of the Capacity Fees and Transportation Fees they paid to Apex as a precondition to development approval.

22. The benefits available to the Settlement Class are in line with the damages they would receive if Plaintiffs were to proceed to a successful litigated result. The Settlement Class members would generally be entitled to the refund of Capacity Fees and Transportation Fees that were deemed unlawful and used for an unlawful future use if they were successful at trial.

23. Following sending notice to the class, the Settlement received objections from 3 Class Members out of the 361 total Class Members, however, those objections were withdrawn prior to the final approval hearing. “[T]he reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.” *Ehrenhaus v. Baker*, 216 N.C. App. 59, 74, 717 S.E.2d 9, 20 (2011). (quoting *Sala v. Nat’l R.R. Passenger Corp.*, 721 F. Supp. 80, 83 (E.D. Pa. 1989). See *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 25 I (D.N.J. 2005) (where only 0.06% of class members opted out, this weighed in favor of approval); *Bell Atlantic Corp., v. Bolger*, 2 F.3d 1304, 1313- 14 (3rd Cir. 1993) (where “[l]ess than 30 of approximately 1.1 million shareholders objected,” the “small proportion of objectors does not favor derailing settlement”); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003) (“If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.”).

24. Due to the three objections received by Class Counsel, the parties amended the Settlement Agreement that was executed on 2/27/19 by the Town (“the Agreement”) in an amendment to the agreement (“the amendment”). The amendment to the Agreement, executed on 5/29/19 by the parties, the Court finds enhances the benefits to the Class. Nothing in the amendment has a material adverse effect of any of the Class Member’s rights, but rather enhances all of the available benefits available to the Class Members.

25. As to the adequacy of the settlement benefits, the Court notes that the Settlement was negotiated by adverse parties engaged in litigation for over a year and was the product of arms-length negotiating and compromise. Nothing in the record indicates that the Settlement involved any type collusion by the parties or was somehow not a result of arms length negotiating and bargaining. Apex continues to deny any and all liability about its collection of Capacity Fees and Transportation Fees and would have continued to litigate this case had the Settlement not been reached. Apex still contends all of those fees were legally collected and used.

26. Further, the Court expressly finds that redistributing any unclaimed funds at the conclusion of the claims period, after all distributions made pursuant to the Settlement Agreement, to Proper Settlement Class Members who made timely claims “furthers the purposes of the underlying causes of action” of their Transportation Fee and Capacity Fee claims consistently with NCGS 1-267.10. The Court specifically holds that this any distribution at the end of the claims period by Apex complies completely and entirely with NCGS 1-267.10 and furthers any and all purposes of Proper Settlement Class Members for Capacity Fee Claims and Transportation Fee Claims.

27. Ultimately, after thorough consideration of the nature and strength of Plaintiffs' claims, the numerous potential legal defenses they would have faced had the case continued to a dispositive motion stage, and the impact that prolonged litigation has already had and likely will continue to have on class membership had the case continued, the Court concludes, in its discretion, that the Settlement is fair, reasonable and should be approved.

Attorneys' Fees and Reimbursement of Expenses

28. Plaintiffs also move the Court to approve their request for an award of \$5,118,891 in attorneys' fees and reimbursement of expenses. The Settlement Agreement provides that "Class Counsel shall be entitled to apply to the Court for an award of Attorneys' Fees and Expenses in a total amount not to exceed one third of the Settlement Fund and that Apex will not object to any application by Class Counsel for an award of Attorneys' Fees and Expenses that does not exceed that total amount." The request is comprised of \$5,113,401 in attorneys' fees and \$5,489 in out of pocket expenses. Additionally, Plaintiffs request that each set of Settlement Class Representatives receive an award of \$5,000 for Legacy Custom Homes and \$5,000 for Upright Builders for a total of \$10,000. The attorneys' fees are not opposed by Apex and Apex agreed not to object up to \$10,000 in combined Service Awards. The settlement of this action is not contingent on the award of attorneys' fees to Settlement Class Counsel, and Settlement Class members are not being asked to pay any of the fees or expenses.

29. While a court may not modify a contractual attorneys' fees arrangement reached in a settlement of a Rule 23 class action, it nevertheless must review the fees sought for reasonableness and must approve any fees paid by way of settlement. *See Ehrenhaus*, 216 N.C. App. at 74 ("While any 'compromise' in a class action must be reviewed by a court, a court cannot modify a purely contractual settlement."). Here, the parties agreed that Plaintiffs could

apply to the Court for an award of attorneys' fees and reimbursement of expenses up to one third of the Settlement Fund, The determination of the amount of attorneys' fees to be awarded is in the sound discretion of the Court. *G.E. Betz, Inc. v. Conrad*, 231 N.C. App. 214, 242 (2013). Accordingly, the issue before the Court is whether Plaintiffs' counsel's request for \$5,118,891 in both fees and reimbursement of expenses is reasonable.

The Court notes that common fund cases like Class Counsel have created in this case, a situation where taxpayer money was misapplied, routinely result in attorneys' fees being awarded under a percentage of the fund method.¹

After discussing several cases from other jurisdictions, the Horner court concluded: that where, as in the present case, on refusal of municipal authorities to act, a taxpayer successfully prosecutes an action to recover, and does actually recover and collect, funds of the municipality which had been expended [wrongfully or misapplied, the court has implied power in the exercise of a sound discretion to make a reasonable allowance, from the funds actually recovered, to be used as compensation for the plaintiff taxpayer's attorney fees.

Raleigh-Durham Airport Auth. v. Howard, 88 N.C. App. 207, 213, 363 S.E.2d 184, 187 (1987) (quoting Horner at 101, 72 S.E. 2d at 24).

The North Carolina Business Court in *Byers v. Carpenter*, 1998 NCBC LEXIS 3, **32 (January 30, 1998) held that the appropriate level of compensation in cases such as these is typically 25% of the relief obtained if the case is settled before filing; one-third if after filing; and 40% if after an appeal has been taken. This action settled after filing of the complaint, substantial and involved discovery in the complex issues into the case, and a mediation. Under *Byers*, and the above cited case law, Plaintiffs attorneys' fee request is therefore well within the

¹ See also *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997) (holding that the common-fund doctrine applied to a change in calculation of benefits under the State's retirement system resulting in the creation of a recovery fund). "As such, we are persuaded that the recovery at issue in this case properly constitutes a common fund for purposes of shifting attorney's fees under the common-fund doctrine of Horner and its progeny." *Bailey*, 348 N.C. 130, 162, at 500.

range of reasonable fees in this state. In addition the declaration of Plaintiffs' counsel Dan Bryson indicates that the Fee arrangement with the class representatives was for a one-third (1/3) contingency fee.

30. The Fee Motion is unopposed by Defendant, and Plaintiffs have provided sufficient information and evidence to establish the reasonableness of their fee request under Byers and other relevant North Carolina case law submitted in their other briefing. Settlement Class Counsel worked comprehensively and extensively for over a year on the case and anticipate working more to effectuate the Settlement and assist Settlement Class members in receiving the settlement benefits. Plaintiffs' counsel also has established that they obtained a highly favorable result for the Settlement Class by providing cash benefits. Settlement Class Counsel provided sufficient information to establish their experience, skill, and ability to successfully conduct complex litigation. Settlement Class Counsel represented the Settlement Class Representatives for a span of a year and engaged in lengthy discovery and navigated a contentious mediation. The skill and labor required to litigate this action over a year through complicated discovery and the fact that one firm performed the work, also favorably weighs in Settlement Class Counsel's favor.

31. After carefully reviewing the foregoing, the Court finds, in its discretion, that \$5,113,401 is a reasonable attorney fee.

32. Plaintiffs' counsel requested reimbursement of expenses of \$5,489 are also reasonable under the circumstances and the Court in its discretion awards the full amount of these expenses.

33. Accordingly, the Court concludes that Plaintiffs should be awarded \$5,118,891 in attorneys' fees and reimbursement of expenses.

34. Further, this Court finds in its discretion that \$5,000 for Legacy Custom Homes and \$5,000 for Upright Builders are reasonable for the Settlement Class Representatives' time and dedication to the Settlement Class.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, and DECREED, THIS

_____ DAY OF _____, 2019, AS FOLLOWS:

35. Unless otherwise defined herein, all defined terms shall have the meanings as set forth in the Settlement Agreement.

36. The Settlement Notice has been given to the Settlement Class pursuant to and in the manner directed by the Order Granting Preliminary Approval, proof of the mailing of the Settlement Notice has been filed with the Court and full opportunity to be heard has been offered to all parties to the Action, the Settlement Class and persons in interest. The form and manner of the Settlement Notice is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with each of the requirements of North Carolina Rule of Civil Procedure 23, due process and applicable law, and it is further determined that all members of the Settlement Class are bound by the Order and Final Judgment herein.

37. Factual differences between the Settlement Class members do not defeat predominance where "the principle questions surrounding plaintiffs' ... claim are the same." *Id.* (citing *Martinez-Hernandez v. Butterball, LLC*, No. 5:07-CV-174-H(2), 2008 U.S. Dist. LEXIS 111931, at *13 (E.D.N.C. Nov. 14, 2008)). Furthermore, the likelihood that class members may have suffered individual damages does not impact the predominance analysis. *See Gunnells v. Healthplan Servs.*, 348 F.3d 417 at 427-28 (4th Cir. 2003) ("Rule 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification."). Parties seeking to employ the class

action procedure pursuant to Rule 23 must establish the existence of a class. *Neil v. Kuester Real Estate Servs.*, 237 N.C. App. 132, 141, 764 S.E.2d 498, 505 (2014). A class exists when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. *Id.*

38. Apex's records that were produced to Class Counsel indicate the class to be 361 members. The number of Settlement Class members is sufficient to satisfy the numerosity requirement because there are 361 class members at issue. *See Olivera- Morales v. Int'l Labor Mgmt. Corp.*, 246 F.R.D. 250, 256 (M.D.N.C. 2007) (quoting *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 215 (D. Md. 1997)) (finding that large numbers alone "may allow the court to presume impracticality of joinder and find that the numerosity requirement has been met").

39. Here, Plaintiffs can establish Apex's liability using common class-wide evidence. Common questions include, but are not limited to: whether Apex's pattern, practice and policy of collecting Capacity Fees violates applicable North Carolina law; whether Apex improperly charged and collected Capacity Fees pursuant to its Code of Ordinances for future expansion of its water and sewer systems or services to be furnished without being specifically authorized by the General Assembly of North Carolina to charge such fees; whether Plaintiffs have been deprived of their property interests by the actions of Apex which has no rational relation to a valid governmental objective. Depositions of Apex's Town employees, its Consolidated Annual Financial Reports, its Annual Budgets, budget amendments, and town minutes, are all evidence that would prove Apex's liability. Representatives maintain that Defendants' conduct presents common operative facts and common questions of law. This common evidence forms the basis the Settlement Class Members' claims. Importantly, Defendants have not identified individual

issues that would compromise the legal claims of the Settlement Classes and Plaintiffs cannot identify individual issues that would predominate over the common legal claims and questions in light of Defendants' uniform conduct.

40. The named representatives must show that there is no conflict of interest between them and the members of the class who are not named parties, so that the interests of the unnamed class members will be adequately and fairly protected. *Crow*, 319 N.C. 274, 282, 354 S.E.2d 459, at 465. The named parties also must have a genuine personal interest, not a mere technical interest, in the outcome of the action. *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 7, 254 S.E. 2d 223, 230, disc. rev. denied, 297 N.C. 609, 257 S.E. 2d 217 (1979), citing *Hughes v. Teaster*, 203 N.C. 651, 166 S.E. 745 (1932).

41. First, the interests of the Class Representatives fully align with the members of the Settlement Classes and have no conflicts of interest. The Class Representatives are prosecuting the same claims as the Settlement Classes and these claims uniformly arise from Apex's practice of improperly charging them Capacity Fees and Transportation Fees in violation of North Carolina law. The Class Representatives have also demonstrated their commitment to monitor and supervise the prosecution of the case on behalf of the Settlement Classes. They have, among other things, reviewed the pleadings, provided documents in support of the case, one attended mediation, and maintained regular communications with Counsel. Second, the Class Representatives have a genuine personal interest in the outcome of the action. Both of the Class Representatives have built homes in Apex and paid either a Capacity Fee, a Transportation Fee, or both. Thus, if the Settlement is approved, the Class Representatives would receive a partial refund for all the fees paid in connection with the homes they have built within the Town of Apex. Therefore, the Class Representatives are adequate Class Representatives.

42. Therefore, based on the record of the Action, the Court expressly and conclusively finds, pursuant to North Carolina Rule of Civil Procedure 23, as follows:

- a. that (i) the Settlement Class, as defined above, are so numerous that separate joinder of all members is impracticable, (ii) there are questions of law and fact common to the Settlement Class, (iii) the claims of the Settlement Class Representatives are typical of the claims of the Settlement Class, and (iv) the Settlement Class Representatives and their counsel have fairly and adequately protected the interests of the Settlement Class; and
- b. that the requirements of North Carolina Rule of Civil Procedure 23 have been satisfied;

43. The Action is finally certified as a class action, pursuant to North Carolina Rule of Civil Procedure 23.

44. Pursuant to North Carolina Rule of Civil Procedure 23, Plaintiffs Upright Builders Inc. and Legacy Custom Homes, Inc. are finally certified as the Settlement Class Representatives. Daniel K. Bryson and John Hunter Bryson of Whitfield Bryson & Mason LLP is finally certified as Settlement Class Counsel.

45. The Settlement Agreement and the Settlement Notice are found to be fair, reasonable, adequate, and in the best interests of the Settlement Class, and are hereby approved pursuant to North Carolina Rule of Civil Procedure 23. The parties are hereby authorized and directed to comply with and to consummate the Settlement Agreement in accordance with the terms and provisions set forth in the Settlement Agreement, and the Clerk of Court is directed to enter and docket this Order and Final Judgment in the Actions.

46. This Order and Final Judgment shall not constitute any evidence or admission by any Party.

47. By order of this Court dated March 25, 2019 by the Honorable Judge Keith Gregory a preliminary approval of the settlement was granted. That order set forth a plan consistent with Rule 23 of the North Carolina Rules of Civil procedure to provide notice and due process to prospective class members (“Notice Plan.”).

48. The Notice Plan was administered and followed properly by a third party administrator, which affixed a date for class members to object or opt out of this settlement, and that date has passed without any objectors or parties opting out of the proposed settlement.

49. Plaintiffs and the other members of the Settlement Class who have 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, have, by virtue of this Agreement and by virtue of the Court’s Preliminary and Final Order and Judgment, are deemed to have fully, finally and forever released, remised, relinquished, acquitted, and forever discharged the Town of Apex 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 Town of Apex 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 Impact or Transportation Fees of Class members by the Town of Apex 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 any Impact or Transportation Fees charged or collected by the Released Parties from March 23, 2015, through June 20, 2018.

50. This order releasing the Defendant Town of Apex 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 Settlement Class Counsel, or by Settlement Class Representatives or by the Settlement Class members regarding Released Claims for which any of the Released Parties might otherwise be claimed liable.

51. All persons or corporations who did not timely and validly exclude themselves shall be permanently barred and enjoined 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.

52. The Parties shall be deemed to have agreed that the release described in the Settlement Agreement 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 the Settlement Agreement.

53. The release contemplated by the Settlement Agreement extend to claims that the parties granting the release do not know or suspect to exist at the time of the release, including, without limitation, claims which if known, might have affected the Releasing Parties' decision to grant the release. Plaintiffs, each member of the Settlement Class, Apex shall be deemed to relinquish, to the extent applicable, and to the full extent permitted by law, the provisions, rights, and benefits of Section 1542 of the California Civil Code, which provides:

“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.”

54. Settlement Class Counsel is hereby awarded attorneys' fees and reimbursement of expenses in the amount of \$5,113,401 from Apex to be paid from the Settlement Fund, as that term is defined in the Settlement Agreement, which amount the Court finds to be fair and reasonable and which shall be paid to Plaintiffs' counsel in accordance with the terms of the Settlement Agreement. The Court also finds to be fair and reasonable service awards of \$5,000 to Legacy Custom Homes and \$5,000 to Upright Builders each paid from the Settlement Fund.

55. Plaintiffs and Settlement Class Members, and any of their respective successors in interest, predecessors, representatives, trustees, executors, administrators, heirs, assigns or transferees, immediate and remote, are hereby individually and severally permanently barred and enjoined from commencing, prosecuting, instigating or in any way participating in the commencement or prosecution of any action asserting any Settled Claims, either directly, representatively, derivatively or in any other capacity, against any of the Released Persons.

56. Without affecting the finality of this Order and Final Judgment, jurisdiction is hereby retained by this Court for the purpose of protecting and implementing the Stipulation and the terms of this Order and Final Judgment, including the resolution of any disputes arising out of the Stipulation or Settlement, and for the entry of such further orders as may be necessary or appropriate in administering and implementing the terms and provisions of the Settlement and this Order and Final Judgment.

This is the 26 day of MAY, 2019.



Honorable Superior Court Presiding Judge