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05-CV-2022-900658.00

Judge: J. CLARK STANKOSKI

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

DEBRA WYMER V. THE CITY OF GULF SHORES, ALABAMA ET AL
05-CV-2022-900658.00

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CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
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IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

WYMER DEBRA, OVERSTREET TONY JR., OVERSTREET DACRI, Plaintiffs, V. THE CITY OF GULF SHORES, ALABAMA, CRAFT ROBERT, GARRIS JOE, SINAK GARY ET AL, Defendants.	)	Case No.: CV-2022-900658.00

ORDER

This cause has come before the Court on the parties' Joint Motion for Provisional Class Certification and Approval of Settlement. Based upon the evidence of record, representations of counsel, and pleadings in this case, the Court **GRANTS** the parties' Joint Motion for Class Certification and Approval of Settlement on the terms contained in this Order.

As set forth below, Plaintiffs are ordered and directed to publish the notice to Settlement Class members appended hereto as **Exhibit A** within ten (10) days of the entry of this Order. Class members shall have the period of time set forth herein to object to this Court's provisional certification of the Class and approval of the parties' settlement of the Class's claims.

Procedural History

This case was filed on June 27, 2022 in the Circuit Court of Baldwin County, Alabama by Debra G. Wymer. On October 19, 2022, a Second Amended Complaint (hereinafter "Complaint") was filed adding Plaintiffs. The Complaint challenges the

City's assessment of an "impact fee" on most new developments within the City of Gulf Shores, Alabama.

Background

On April 4, 2006, the Alabama Legislature approved Alabama Legislative Act No. 2006-300, codified at Ala. Code § 45-2-243.80, et. seq. (the "Act"), a Local Act which authorized Baldwin County, Alabama and municipalities in Baldwin County to assess and collect impact fees on new development for governmental infrastructure purposes. Ala. Code § 45-2-243.83 (2006). The Act defines impact fees as a "charge or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of governmental infrastructure necessitated by and attributable directly to the new development." Ala. Code § 45-2-243.81(2).

A municipality in Baldwin County may not enact or impose an impact fee, except in accordance with the Act. Ala. Code § 45-2-243.82(a). The Act provides that Baldwin County "[m]unicipalities may enact or impose impact fees only on land within their corporate limits by complying with this subpart." Ala. Code § 45-2-243.82(b). The Act further provides that "[a]n impact fee per service unit of new development may be set by the political subdivision not to exceed one percent of the estimated fair and reasonable market value of the new development after completion." Ala. Code § 45-2-243.84(a)(1).

The City of Gulf Shores has adopted two ordinances—Ordinance 1480 on May 14, 2007 and Ordinance 1538 on March 23, 2009—which provide for the assessment and collection of Impact Fees on new development within the City. Ordinances 1480

and 1538 are referred to collectively herein as the “Ordinances,” and the same are codified in Article XV of the City’s Municipal Code. In order to calculate the amount of impact fees to be charged under the Ordinances, in 2006 the City engaged TischlerBise, a consulting firm based in Bethesda, MD, to complete an impact fee study (hereinafter, the “Study”). The Study set forth separate “maximum supportable” impact fees for new developments impacting (a) parks and recreation, (b) fire/rescue, (c) police, and (d) transportation. Each of these categories support a separately identifiable impact fee assessed on new developments on invoices submitted by the City to developers. The City adopted the “maximum supportable” impact fees from the Study to create an “Impact Fee Schedule.” This Schedule was adopted by the City through Impact Fee Resolution No. 4298-07 dated May 21, 2007 and has remained in effect since those fees were first established in 2007.

The statutory, one-percent cap for impact fees that may be imposed and collected by Baldwin County and the municipalities located within the county was incorporated into the City's Ordinance. For purposes of the one percent cap, the City calculates the estimated fair and reasonable market value of a prospective development by adding the following values associated with new developments: the value of the building, improvements value, and the land value associated with the building. The impact fee actually collected by the City often is equal to this one-percent cap rather than the fee from the Impact Fee Schedule.

Plaintiffs challenge several aspects of the City’s assessment of impact fees. The Act and the Ordinance state that Impact Fees must be “necessitated by and attributable directly to the new development.” Plaintiffs contend that the City has not properly

correlated its collection of impact fees to the expenditure of such fees on specific projects. The City disagrees with the Plaintiff's challenges, and contends that it properly collects, accounts for, and spends collected impact fees.

Because this case has not yet passed the class certification phase, this Court has had no opportunity to address the merits of any of these arguments, nor have the parties fully argued or briefed the merits. Alabama law requires this Court instead to first resolve the issue of class certification prior to addressing the merits of the arguments. *See*, *e.g.*, Ala. Code § 6-5-640 *et seq*. For purposes of this Order, the parties have agreed to a settlement of all claims, and the Defendants do not admit the Plaintiffs' allegations, either as to the merits or as to the issues of class certification. Plaintiffs Tony Overstreet, Jr. and Dacri Overstreet are proposed as Class representatives. On August 3, 2022, Mr. and Mrs. Overstreet submitted a building permit application to the City, and Mr. and Mrs. Overstreet obtained their residential building permit on or about August 10, 2022. As a condition to issuing the building permit, the City required that Mr. and Mrs. Overstreet pay the following impact fees: (1) Fire Impact Fee of $152.94, (2) Parks Impact Fee of $1,034.33, (3) Police Impact Fee of $113.18, and (4) Transportation Impact Fee of $788.31. The foregoing fees were paid on or about August 10, 2022. Plaintiffs subsequently completed the permitted construction activities.

The Settlement Class

Plaintiffs Tony Overstreet, Jr. and Dacri Overstreet have asked this Court to certify a Settlement Class of similarly situated individuals under Ala. R. Civ. P. 23(c)(4)(B). The proposed Class is defined as follows:

> All persons who have been charged by Defendant for an impact fee under City of Gulf Shores Municipal Ordinance Nos. 1480 and 1538, as amended.
>
> Excluded from the Class are Defendant, any entity in which Defendant has a controlling interest or which has a controlling interest of Defendant, and Defendant's legal representatives, assigns and successors. Also excluded are the judge to whom this case is assigned and any member of the judge's immediate family.

For purposes of this Settlement Class, the City agrees with the definition of the Settlement Class.

The applicable time period for the Settlement Class definition includes all persons who were charged an "impact fee" within the ten-year limitations period set forth in Ala. Code § 6-2-33 preceding the original filing of the case, which is June 27, 2022. Plaintiffs contend that the ten year limitations period is the appropriate limitations period because this case seeks the recovery of an interest in land. *See, e.g., Cove Properties, Inc. v. Walter Trent Marina, Inc.*, 702 So.2d 472, 473 (Ala. Civ. App. 1997) (applying ten year limitations period to action seeking declaratory judgment, damages, and injunctive relief to vindicate riparian rights); *see also Goodson v. Morrow*, 547 So.2d 856, 858 (Ala. 1989) (ten-year statute of limitations under Ala. Code § 6-2-33 applies to claims of ejectment); *CIT Bank, N.A. v. Andrews*, No. 2:15-CV-0091-VEH, 2016 WL 3439859, at *8 (N.D. Ala. June 23, 2016) (same); *Cook v. Exchange Realty & Mortg. Co.*, 374 So.2d 1339, 1341 (Ala. 1979) ("An action for breach of warranty in a real property deed has been held subject to the ten-year limitation prescribed by [Section 6-2-33(2)]." (citing *Lost Creek Coal & Mineral Land Co. v. Hendon*, 110 So. 308 (Ala. 1926)); *FSRJ Properties, LLC v. Walker*, 195 So.3d 970, 976 (Ala. Civ. App. 2015). In *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013), the

United States Supreme Court affirmed that a financial exaction required for permit approval (like the impact fee exaction at bar here) transfers an "interest in property" from the landowner to the government, clarifying that the Alabama ten-year statute of limitations governing interests in land applies here. For purposes of this Settlement Class only and as a compromise, the City agrees to a ten-year statute of limitations.

Plaintiffs have also moved to be appointed representative of the Class, and for the appointment of Yates Anderson and Blackburn & Conner as Class Counsel under Ala. R. Civ. P. 23(g). Again, for purposes of this Settlement Class, the City does not oppose these appointments.

Rule 23 Requirements

For purposes of this Order only, the parties agree that the requirements for class certification found in Rule 23 of the Alabama Rules of Civil Procedure are met. Should this Settlement Class ultimately not be approved, however, the Defendants do not waive any arguments or defenses to the class certification requirements or the merits of this case. Because the parties have reached a settlement, the Court now proceeds with a preliminary approval of the Settlement Class, subject to objections of class members and an approval hearing as discussed below. The Court understands that there are substantial disagreements as to the merits of this case, and whether a class should be certified, and the existence of those substantial disagreements was a significant factor bringing the parties together to resolve this case. If the Settlement Class ultimately is not approved, Defendants shall not be prejudiced in any way in challenging the propriety of a class action or in defending against the merits of Plaintiffs' claims.

For purposes of this Settlement Class only, the parties agree to the following:

The facts of this case fit within the requirements of Rule 23. Each Settlement Class member was charged an impact fee according to a defined formula that was paid before a building permit was issued.

The individual damages suffered by the Class members (the Overstreets' damages amount to $2,088.76 plus prejudgment interest) are generally too small to warrant prosecution of individual claims. The United States Supreme Court has stated that "[c]lass actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). This is because they permit plaintiffs to "vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338, reh'g denied, 446 U.S. 947 (1980).

A. Plaintiff's claims are due to be certified for class treatment under Rules 23(a)(1)-(4) and 23(b)(2).

1. The Court's Rule 23 Determination is a Two-Step Process.

The determination that an action is maintainable as a class action under Rule 23 is a two-step process. First, this Court must determine whether the four prerequisites set forth in Rule 23(a) are present. These four prerequisites are commonly referred to as numerosity, commonality, typicality and adequacy of representation:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately represent the interests of the class.

Ala. R. Civ. P. 23(a); *Ex parte Blue Cross and Blue Shield of Alabama* (Ala. 1991). These four prerequisites limit class claims to those which are fairly encompassed by the claims of the named plaintiff. *General Telephone Co*., 457 U.S. at 156.

If these four prerequisites are satisfied, the Court must then decide whether one or more of the three criteria set forth in Rule 23(b) have been met. Plaintiffs seek to certify a Class under Rule 23(b)(2). Plaintiffs may certify a Class under the criteria of Rule 23(b)(2) if:

> [T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

2. The Requirements of Rules 23(a)(1)-(4) are Satisfied.

a. The Class is so numerous that joinder of its members is impracticable.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all [class] members is impracticable." Ala. R. Civ. P. 23 (a)(1). Impracticability does not mean impossibility, only the difficulty or inconvenience of joining all members of the class. *Longden*, 123 F.R.D.547, 551 (N.D. Tex. 1988). While there is no set rule as to when the number of plaintiffs is too large to make joinder impracticable, the oft-cited benchmark is that a class action is presumptively appropriate when the members of the class exceed forty (40) persons. *See e.g., Cox v. American Cast Iron Pipe Co*., 784 F.2d 1546, 1553 (11th Cir.1986) (as a general rule, classes of more than 40 deemed to satisfy numerosity requirement); *Faulk v. Home Oil Co., Inc.*, 184 F.R.D. 645 (M.D.Ala.1999) (class of approximately 195 satisfied numerosity requirement); 5 James W. Moore, et al., Moore's Federal Practice, § 23.22[3][a] (3d ed.1997*);*); *see also* 1 Newberg, § 3.05 at 3-25 ("In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.").

In the present case, Plaintiffs seek certification of all persons or entities who paid the "impact fee" imposed by the City of Gulf Shores under its Impact Fee Ordinance, excluding those persons specified in the definition of the class within the pertinent ten-year limitations period. This proposed Class exceeds five hundred parties. Given that courts have certified classes as small as 40 members, the Court finds that numerosity has been met.

b. There are questions of law and fact common to the Class.

The threshold of the commonality is not high. *In re School Asbestos Litigation*, 104 F.R.D. 422,429 (E.D. Pa. 1984), aff'd in part, and vacated in part on other grounds, 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 852 (1986). The rule does not require that all questions be common, or even that common questions predominate. *Hummel v. Brennan*, 83 F.R.D. 141, 145 (E.D. Pa. 1979). Indeed, a single common question is sufficient to satisfy this requirement. *In re School Asbestos Litigation*, *supra*; *Simon v. Westinghouse Electric Corp*., 73 F.R.D. 480, 484 (E.D. Pa. 1977); *In re Agent Orange Product Liability Litigation*, 818 F.2d 145,167 (2d Cir. 1987), cert. denied, 484 U.S. 1004(1988); *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283,310 (3d Cir. 1998); *Ex parte Gov't Emps. Ins. Co.*, 729 So. 2d 299, 304 (Ala. 1999) ("The commonality requirement has been liberally construed, and it 'is aimed at determining whether there is a need for combined treatment and a benefit to be derived therefrom.'"). Generally, when the plaintiff alleges that the defendant has engaged in a course of conduct injuring the class, one or more elements of the cause of action will be common to all individuals affected. 1 Newberg, *supra*, § 310 at 154-155.

In this case, there are numerous questions of common fact and law including:

a. Is Defendant's calculation of impact fees unlawful?
b. Is Defendants' expenditure of impact fees unlawful?
c. Is Defendant's administration of the impact fee scheme unlawful?
d. Are Plaintiffs and the Proposed Class entitled to injunctive relief, declaratory relief, restitution, and other equitable relief?

The proposed Settlement Class satisfies the commonality test. The allegations and proof, summarized above, focus on the existence and nature of the City's impact fee program. Proof of liability will make the actions of the City proof common to all Class members, including (1) the City's uniform method of calculating impact fees, (2) the City's method of depositing and accounting for impact fees, and (3) the City's method of expending impact fee revenue on capital expenditures within the City.

c. The claims of the representative plaintiff are typical of the claims of the Class.

The typicality requirement of Rule 23(a)(3) focuses on the similarity of the legal and remedial theories behind the claims of the Plaintiffs and the Class members. *Jenkins*, 782 F.2d at 472. Professor Newberg summarized the concept of typicality as follows:

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature of the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiffs claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.

1 Newberg §3.13 at 3-76 to 3-77.

Even if there is a difference in the relative degree of the named plaintiffs' damages compared to other Class members, it would not impair typicality. Such factual

differences are acceptable provided the claim arises from the same event or course of conduct and is based on the same legal theory. *Id*.; *Jenkins*, 782 F.2d at 472; *Longden*, 123 F.R.D. at 556-57; *In re Texas International Secur. Litigation*, 114 F.R.D. 33, 44 (W.D. Okla. 1987); *School Asbestos*, 104 F.R.D. at 429. Simply put, Class members are not required to be clones.

The court in *Wadleigh* held that the typicality requirement is satisfied if the claim and legal theories of the class representative are the same as those of the absent class members, even though factual distinctions may exist:

> A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory... The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members. Thus, similarity of legal theory may control in the face of differences of fact.

Wadleigh, 157 F.R.D. at 417 (citing *De La Fuente v. Stokely-Van Camp, Inc*., 713 F.2d 225, 232 (7th Cir. 1983)). Thus, while it is widely recognized that even a significant variance in the individual circumstances of claimants does not destroy typicality, here, the circumstances of the representative Plaintiffs and the Settlement Class members are aligned.

By definition, the representative Plaintiffs and each member of the Settlement Class were subjected to an impact fee, assert the same legal theories of recovery, and seek recovery of the same relief. This is a similar scenario as that in *Town of Electic v. Mays*, 547 So. 2d 96, 102 (Ala. 1989) where the court affirmed class-wide relief to a group of citizens who, like Plaintiffs here, paid a "service fee." Consequently, the Defendants' liability for the damages which Class members seek does not depend on

the individual circumstances of the victims. To prevail, the named Plaintiffs and each member of the Settlement Class are relying upon the same factual presentation and legal argument with respect to the common questions of liability and damages. Accordingly, the common issues necessarily share "the same degree of centrality" to the named representatives' claims such that in litigating both the liability and damage issues the named Plaintiffs can reasonably be expected to advance the interests of all absent Settlement Class members. Accordingly, the typicality requirement of the rule is satisfied.

d. Plaintiffs and their counsel will fairly and adequately represent the Class.

Pursuant to Rule 23(a)(4), plaintiff must "fairly and adequately protect the interests of the class." Ala. R. Civ. P. 23(a)(4). To do so requires the satisfaction of two factors: (a) that the representative party's attorney be qualified, experienced, and generally able to conduct litigation; and (b) that the suit not be conclusive and plaintiffs interests not be antagonistic to the class. *Jenkins*, 782 F.2d at 472; *School Asbestos*, 104 F.R.D. at 430. The burden is on defendant to demonstrate that the representation will be inadequate. *Id*. As the court explained in *Cook v. Rockwell International Corp.*:

> Adequate representation presumptions are usually invoked in the absence of contrary evidence by the party opposing the class. On the issue of no conflict with the class, one of the tests for adequate representation, the presumption fairly arises because of the difficulty of proving negative facts. On the issue of professional competence of counsel for the class representative, the presumption fairly arises that all members of the bar in good standing are competent. Finally, on the issue of intent to prosecute the action vigorously, the favorable preemption arises because the test involves future conduct of persons, which cannot fairly be prejudged adversely.
> If there are doubts about adequate representation or potential conflicts, they should be resolved in favor of upholding the class, subject to later possible reconsideration or subclasses might be created initially.

151 F.R.D. at 389 (quoting 2 Newberg §7.24, 7-81, 2-82).

For purposes of this Settlement Class, Defendants are not contesting the presumption of adequate representation. With respect to the issue of adequacy of counsel, class counsel has appropriate experience in litigating class actions of a complex nature, as both firms representing the Plaintiffs have prior experience handling class action litigation within the State of Alabama. With respect to the representative Plaintiffs, there is nothing to suggest that they have any interest antagonistic to the vigorous pursuit of the Settlement Class claims against the Defendants. As Settlement Class representatives, they have vowed to fight for and protect the interests of the Settlement Class, and have done so. Accordingly, the requirement of adequate representation under Ala. R. Civ. P. 23(a)(4) is established.

3. The Requirements of Rule 23(b)(2) are Satisfied.

For an action to be maintained as a class action, Rule 23(b)(2) requires a finding that the party opposing the class has acted or refused to act on grounds generally applicable to the class. For purposes of this Settlement Class, the parties agree, and the Court finds, that the City acted or refused to act on grounds generally applicable to the class. Alabama courts have held that Rule 23(b)(2) certification is appropriate in cases with comparable facts, such as cases challenging the imposition of a tax, and seeking declaratory and injunctive relief, and for a refund of taxes improperly paid. *See, e.g.¸ Town of Eclectic v. Mays*, 547 So.2d 96, 102 (Ala. 1989) ("[a] class action is a permissible vehicle to restrain the enforcement of an allegedly invalid tax . . . and to recover any taxes illegally paid"); *Easerton v. Williams*, 433 So.2d 436,449 (Ala. 1983); *Thorn v. Jefferson County*, 375 So.2d 780.788 (Ala. 1979). Thus, for purposes of the Settlement Class, Rule 23(b)(2) is satisfied.

Settlement Terms

Plaintiffs and Defendants have proposed a settlement of Plaintiffs' claims on behalf of themselves and the Class. Rule 23(e) provides that the Class claims may only be settled with Court approval. In the Eleventh Circuit, federal courts consider the following factors when approving settlements of Class claims under Rule 23(e): (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Faught v. Am. Home Shield Corp*., 668 F.3d 1233, 1240 (11th Cir. 2011) (internal citations omitted). The Alabama Supreme Court has adopted these factors when considering court approval of settlements. *Adams v. Robertson*, 676 So. 2d 1265, 1273 (Ala. 1995).

The settlement terms to be evaluated and approved by the Court are as follows:

a. The City of Gulf Shores will pay the sum of $3,900,000 to be allocated as follows:

(1) $3,300,000.00 as a common fund to fund capital improvements of at least $1,000,000.00 for City schools, and the remainder for County Road 6 widening and expansion, Highway 59 widening and expansion, and public beach parking, all to be approved by the Court with an opportunity to object by Class Counsel;
(2) $5,000 to be paid to the Class Representatives Tony Overstreet, Jr. and Dacri Overstreet as reimbursement of their impact fee and related costs and expenses; and
(3) $595,000 to be paid to Class Counsel.

b. The City of Gulf Shores will diligently and promptly work with Class Counsel to rework the City's impact fee ordinance to include project-specific factors in

order to accord with the Fifth and Fourteenth Amendments to the United States Constitution, and to reform the City's accounting and expenditure of impact fee revenues to be explicitly project-related and in accord with the Enabling Act. This revised impact fee ordinance will be submitted to the Court for final approval pursuant to the terms of this settlement and compliance with the Enabling Act and relevant legal requirements. In order to assist this effort, the City will hire an urban planner to be approved by Class Counsel to assist in the development of these changes, which will also include the review of a proposed education impact fee to be applied prospectively.

With respect to the first factor, Plaintiffs and Defendants have different views of the likelihood of success at trial. While the claims asserted in this action have merit, the Court finds that the complexities and uncertainties characteristic of this type of litigation, and the sharply contested issues of fact, liability and damages exist which with respect to the contentions made on behalf of the class, create substantial risk for the class, and that the proposed settlement resolved these uncertainties for all parties to the litigation.

As to the second and third factors, the range of potential recovery for the class is from nothing to approximately $20,000,000 of potential relief. Given that Plaintiffs have secured both prospective injunctive relief repairing the City's impact fee program and a recovery of $3,900,000.00 which will go primarily to equitably and retroactively repairing the expenditure of impact fee funds on appropriate projects, the proposed settlement is fair and reasonable as it falls in the middle of the range of potential recovery.

The fourth factor considers the anticipated complexity, expense, and duration of litigation. This case has already been pending for more than a year, and is likely to

extend many more years, including likely appeals from whichever party would lose at the class certification phase and also at the merits stage. Considerable expenses for expert testimony, depositions, and investigatory work are avoided by settlement. This factor also supports the fairness and reasonableness of the proposed settlement. *See e.g., In re U.S. Oil and Gas Litigation*, 967 F.2d 489, 493 (11th Cir.1992); ("Public policy strongly favors the pretrial settlement of class action lawsuits. *See Cotton v. Hinton*, 550 [559] F.2d 1326, 1331 (5th Cir.1977). Complex litigation—like the instant case—can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly illusive."). Without a settlement, the Court understands that the Defendants intend to vigorously oppose class certification and defend the case on the merits, including appeals (potentially multiple), and this case will go on for years.

The fifth factor – opposition to the settlement – as of now fully supports settlement as there is no opposition of record. Only if a substantial percentage of Class members object to settlement after notice and an opportunity to be heard would this factor not support approval. *See Adams*, 676 So. 2d at 1292.

The final factor considers the stage of litigation at which a settlement was reached. Settlement was reached after discovery and mediation. Given the stage of the litigation and Plaintiffs' counsel's ability to explore Class claims, this factor also weighs in favor of approval of the settlement.

With respect to the attorneys' fee component of the settlement terms, this Court can evaluate the award for reasonableness under the common benefit doctrine, where "the plaintiff's successful litigation confers 'a substantial benefit on the members of an

ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.'" *Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973) (quoting *Mills v. Electric Auto–Lite Co.*, 396 U.S. 375, 393–94, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970)). The Alabama Supreme Court has recognized that attorneys who recover an award for the class are entitled to a reasonable fee for their services. *Edelman & Combs v. Law,* 663 So.2d 957, 958 (Ala.1995). When a class benefits through the use of Rule 23, the class generally bears the costs associated with the litigation, out of the proceeds collected through the litigation. *Id*. Where class counsel has provided a benefit to the class and an award of an attorney fee is appropriate, courts have used a percentage of the common fund generated as the starting point for determining an appropriate attorney fee. *Id.* at 959; *Union Fid. Life Ins. Co. v. McCurdy*, 781 So. 2d 186, 189 (Ala. 2000).

Here, the attorney fee award of $595,000 is approximately 15% of the common fund created by the settlement. Additionally, the settlement also affords the Class substantial injunctive relief, prospectively barring future constitutional, statutory, and common-law violations relative to the City's reformation of the impact fee ordinance. Such relief in the judgment of the court is considerably valuable, as each year the City collects millions in impact fees, meaning that the injunctive relief in this case is worth, at a minimum, over ten million dollars. This means that the attorney fee award at bar here equates to a percentage of about 5% of the common fund and common benefit created by this settlement. This amount is well within the general guidelines set forth by this Court. *See Edelman & Combs*, 663 So.2d at 961 (citing *Reynolds v. First Alabama*

Bank of Montgomery, N.A., 471 So.2d 1238 (Ala.1985)). It is important that attorney fees should be computed in light of the size of the recovery to the Class, without regard to sums actually paid to the Class. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); *City of Ozark v. Trawick*, 604 So.2d 360, 364 (Ala. 1992).

In *Peebles v. Miley*, 439 So.2d 137 (Ala.1983), the Alabama Supreme Court established several factors to be used in determining the reasonableness of an attorney fee. These same factors are also relevant when a court is calculating attorney fees in the class-action setting. *See Edelman & Combs*, 663 So.2d at 960 (applying the *Peebles* factors generally to class actions). In *Edelman & Combs*, the Court listed the Peebles factors:

> (1) the nature and value of the subject matter of the employment;
> (2) the learning, skill, and labor requisite to its proper discharge;
> (3) the time consumed;
> (4) the professional experience and reputation of the attorney;
> (5) the weight of the attorney's responsibilities;
> (6) the measure of success achieved;
> (7) the reasonable expenses incurred by the attorney;
> (8) [w]hether the fee is fixed or contingent;
> (9) [t]he nature and length of a professional relationship;
> (10) [t]he fee customarily charged in the locality for similar legal services;
> (11) [t]he likelihood that a particular employment may preclude other employment; and
> (12) [t]he time limitations imposed by the client or by the circumstances.

663 So.2d at 959–60 (quoting *Peebles*, 439 So.2d at 140–41).

These factors also support the reasonableness of the attorney fee award at bar. The nature of this litigation is highly complex, involving complex class litigation, nuanced constitutional claims under the U.S. Constitution, numerous statutory and common-law claims involving taxation and other sophisticated matters, and a lengthy

period of time. Class Counsel's learning, skill, and labor requisite to the discharge of such difficult legal questions are considerable. The time consumed by Plaintiffs' counsel is considerable and warrants the fee requested. Class Counsel includes four lawyers with collectively seventy years of professional experience and sterling reputations. The attorneys' responsibilities, first for conducting the litigation, and now for administering the common fund and assisting in development of changes to the City's Impact Fee ordinance and subsequent presentation to the Court for review and approval as part of the overall class settlement, are weighty. In the judgment of the Court, the measure of success achieved by Class Counsel on behalf of the Class is significant and worth more than ten million dollars. The expenses incurred by Class Counsel have been reasonable given the size of the Class and the recovery obtained. The fee was contingent, so Class Counsel undertook substantial risk to advance this litigation. As noted above, Class Counsel has advanced this litigation for more than a year, and such a devotion to this case has necessarily precluded certain other employment and imposed time limitations on other engagements. Finally, the percentage fee recovery of 15% is far less than the amount typically recovered in contingency engagements in this jurisdiction, which commonly amount to 40%. In summary, this Court finds that all of the Peebles factors support the reasonableness of the attorney fee award contained in the settlement between the parties.

Notice to the Class

The Court understands there is a considerable dispute as to who would be considered a class member, and how difficult it would be to notify each class member, given the variation in who actually paid an impact fee. In order to ensure that all

members of the Class have an opportunity to object to class certification and approval of settlement set forth in this Order, Plaintiffs through Class Counsel are directed and ordered to publish the notice appended hereto as **Exhibit A** in a legal newspaper in Baldwin County, Alabama for a period of thirty (30) consecutive days, commencing as soon as practicable after the entry of this Order. All Class members may object at any time during the time period from publication through the fourteenth (14th) day following the final date such notice is published. If any objections are timely filed, and received by the Court and counsel of record on or before the fourteenth (14th) day following the final date such notice is published, the Court will hear objections at a hearing on **JANUARY 8, 2024 at 10:00 am in Courtroom 5 of the Baldwin County Circuit Courthouse in Bay Minette, Alabama**. If no timely objections are received by counsel of record as set forth above, this order will become final and binding upon the parties and the Defendants shall fulfill the settlement terms as soon as practicable thereafter. The Court finds that the form and method of notice given to class members satisfies all legal requirements of Rule 23 and all constitutional requirements of due process. Such notice constitutes the best notice practicable under the circumstances, and the notice properly identifies the class and sufficiently describes the terms of the settlement so as to alert members with adverse viewpoints to investigate and come forward, object, and be heard.

EXHIBIT A

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

TO: MEMBERS OF THE FOLLOWING CLASS:

All persons who were charged an impact fee on new development by the City of Gulf Shores, Alabama pursuant to Ordinance No. 1480 since May 14, 2007 and Ordinance No. 1538 since March 23, 2009.

PLEASE READ THIS NOTICE CAREFULLY AS YOUR RIGHTS WILL BE AFFECTED BY THE LEGAL PROCEEDINGS IN THIS LITIGATION.

REASON FOR THE NOTICE

The Circuit Court of Baldwin County, Alabama ("the Court") authorized this notice ("the Notice") to you pursuant to Rule 23 of the Alabama Rules of Civil Procedure in the above-captioned action ("the Class Action Litigation"). On May 14, 2007 and on March 23, 2009, the City of Gulf Shores, Alabama ("the City") enacted two ordinances, pursuant to sections 45-2-243.80 et seq. of the Alabama Code, imposing an impact fee on all new development in the City. Plaintiffs, Tony Overstreet, Jr. and Dacri Overstreet, filed a lawsuit to challenge the impact fee they paid, and also sought to represent all others who have paid an impact fee to the City. The Court did not decide in favor of Plaintiffs or the City. Instead, both sides agreed to a settlement ("the Settlement"), the terms of which are discussed in more detail in the Court's Order published on the City's website at www.yatesanderson.com/gulfshoresimpactfee. If you are a member of the class, as defined above, you have an interest in the litigation.

THE SETTLEMENT HEARING

If any objections to the settlement set forth herein are timely filed, a settlement hearing

will be held on JANUARY 8, 2024, in the Circuit Court of Baldwin County, Alabama, 312 Courthouse Square, Bay Minette, AL 36507, Courtroom 5. At any such hearing, the Court would determine (i) whether the above-styled action should be maintained as a class action for purposes of settlement, (ii) whether the proposed settlement is fair and reasonable and adequate, and (iii) whether the Court should enter an Order ending the class action litigation and barring further lawsuits over the claims made or which could have been made against the City.

RIGHTS OF CLASS MEMBERS

If you are a class member, you have the following options:

1. You may do nothing at all. If you choose this option, you will be bound by the terms of the Settlement as approved by the Court.

2. You may object to the Settlement by filing an objection and appearing at the hearing contemplated above. You must object no later than 5:00 p.m. on the 14th day following the final publication of this notice by submitting (i) written notice of your intention to appear at the said hearing, (ii) a detailed statement of your objection and the grounds for your objection and (iii) the reasons why you desire to appear and to be heard, and (iv) all documents which you desire the Court to consider. Your objection as defined above must be filed with the Office of the Clerk of the Circuit Court of Baldwin County, Alabama. On or before the date of such filing, the objection must be served by hand, or by any mode of delivery providing proof of delivery, on all of the following counsel of record:

Attorney for Lead Plaintiffs:
Kris Anderson, Esq.
Yates Anderson
4851 Wharf Parkway, D-230

Gulf Shores, AL 36561

Attorney for the City:
Andy Rutens, Esq.
Galloway, Wettermark & Rutens, LLP
3263 Cottage Hill Road
Mobile, AL 36606

For more information, please visit www.yatesanderson.com/gulfshoresimpactfee.

Any notices not received before 5:00 pm on the 14th day following the final publication of this Notice will be untimely and will not be considered.

DONE this 8th day of November, 2023.

/s/ J. CLARK STANKOSKI
CIRCUIT JUDGE