

TINA BROWN, individually and on behalf of others similarly situated, FIRST HOME BUILDERS OF FLORIDA, a Florida partnership, on its own behalf and on behalf of other general contractors similarly situated and LEE BUILDING INDUSTRY ASSOCIATION, INC., a Florida corporation, on its own behalf and on behalf of its members and others similarly situated,

Plaintiffs,

v.

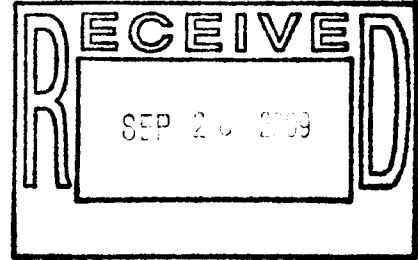
CASE NO. 01-011623-CA-H

LEE COUNTY, FLORIDA,

“CLASS REPRESENTATION”

Defendant.

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**FINAL ORDER APPROVING CLASS ACTION SETTLEMENT**

THIS CAUSE being heard at the Settlement Hearing on August 27, 2009 and the Court receiving testimony, hearing argument of counsel, having reviewed the Settlement Agreement along with its Order Preliminarily Approving Settlement and Providing for Notice and having reviewed the filings made in connection with the final approval of this settlement, finds as follows:

1. This action was originally filed on December 3, 2001. The Complaint asserted claims for injunctive relief and violation of constitutional rights regarding the enactment of the Lee County School Impact Fee. The constitutional claims asserted that the ordinance failed to meet the required dual rational nexus test and that the ordinance impaired the obligation of existing contracts.

2. On January 9, 2004 the Court entered an Order Granting Plaintiffs' Motion for Certification of Class and Designation of Class Counsel and certifying a class consisting of homeowners and contractors who had paid the school impact fee. The order was appealed and affirmed by the Second District Court of Appeal on August 18, 2004.

3. Shortly before the trial on the merits of the constitutional claims the parties and class member FIRST HOME BUILDERS OF FLORIDA stipulated to try the "dual rational nexus claim" first while the class certification was on appeal. This trial resulted in a ruling in favor of the Defendants which was appealed and affirmed by the Second District Court of Appeal on May 27, 2005.

4. Plaintiffs filed a Motion for Partial Summary Judgment on October 19, 2004 on the claim that the ordinance impaired the obligation of contracts. This motion was granted on March 14, 2005 and appealed and reversed by the Second District Court of Appeal on June 9, 2006. Shortly before the trial on the merits of the impairment claim, the parties entered into a Settlement Agreement.

5. On October 1, 2008, Plaintiffs filed their Motion for Preliminary Approval of Class Action Settlement.

6. On April 7, 2009, this Court entered its Order Preliminarily Approving Settlement and Providing for Notice.

7. Pursuant to Court Order, notice was given as follows: (a) Individual notice substantially in the form attached to the Motion for Preliminary Approval of Class Action Settlement as Exhibit B1 was mailed by ordinary mail to all class members who could be identified through reasonable effort; and (b) A short form of the notice, substantially in the form

attached as Exhibit B to the Motion for Preliminary Approval of Class Action Settlement, advising that there is a proposed settlement and that additional information can be received by mail or via the internet was published once a week for three (3) successive weeks in The News-Press on May 22, May 29 and June 5, 2009.

8. The notice provided included a requirement that any party objecting to the settlement file with the Court and serve on Class Counsel their objection. No such objections were filed or served.

9. Plaintiffs received some comment about the proposed settlement, all favorable and neither the parties nor the Clerk of Court received any objection to the settlement as required. Additionally, no Class Members appeared at the Settlement Hearing objecting to the settlement.

10. Fla R. Civ. P. 1.220(e) provides that a class action may not be settled without court approval. Court approval is appropriate if the Court determines that the settlement is “fair, adequate, and reasonable”. Ramos v. Philip Morris Co., 743 So.2d 24 (Fla. 3<sup>rd</sup> DCA 1999).

11. This Court has considered, among other things, a number of factors including the complexity and duration of the litigation, the favorable reaction of the Class to the settlement, the stage of the proceedings, the risk of establishing liability and damages, the risk of maintaining a class action and the reasonableness of the settlement in light of the best recovery and concludes that the settlement is fair, reasonable and adequate.

12. This Court, at the Settlement Hearing, also heard argument of counsel and received testimony on the issue of attorneys fees, costs and payment of an enhancement fee to the class representative.

13. This Court has determined that the awarding of an attorneys fee in a common fund

case is controlled by the Florida Supreme Court's decision in Kuhnlein v. Dept. of Revenue, 662 So.2d 309 (Fla. 1995). Pursuant to Kuhnlein this Court is required to use the lodestar method to determine a lodestar attorney's fee and subsequently to determine whether a multiplier of up to 5 is appropriate.

14. The notice provided to the class members disclosed that Class Counsel would limit its fee to 40 percent of the common fund irrespective of the substantially higher lodestar fees with multipliers. Only one objection to attorney's fees was received which was made by class member, FIRST HOME BUILDERS OF FLORIDA.

15. Based upon the filings and testimony, the Court has determined that Class Counsel has expended a total of 2,171 hours in the furtherance of representing the Class. Based upon the Court's extensive knowledge of the file, the testimony received, the affidavits, and the offerings of the class attorney as an officer of court, the Court has determined that the hours expended were reasonably necessary and appropriate to the representation of the class. Further, the Court has determined that the issues of rational nexus and impairment of contract were intertwined and not capable of separation. Additionally, even if they were capable of separation, the amount of hours expended solely on the issue of rational nexus, if removed, would still result in a "lodestar" fee in excess of the amount requested by Class Counsel.

16. The Court accepts the testimony of expert Ervin Gonzalez, Esquire, an attorney practicing in Miami, Florida with extensive experience in class action litigation. Mr. Gonzalez concluded that a fee of \$400.00 per hour, while reasonable, would be below the appropriate fee for Class Counsel based on the expertise of Class Counsel, the complexity of the litigation and a review of the Florida Bar factors relating to the determination of a reasonable fee.

17. This Court has considered not only the requirements of Kuhnlein but has also evaluated the Florida Bar factors contained in Rule 4-1.5(b)(1) for determination of an appropriate legal fee. The Court finds that a fee rate of \$400.00 per hour for Class Counsel is appropriate and reasonable. The Court finds that a lodestar fee based upon 2,171 hours with a multiplier would be appropriate, but given the amount of the settlement and the concession of counsel to a significantly reduced fee to realize more benefit to Class Members, this Court has determined that it is necessary to reduce the lodestar fee to \$400,000 and not apply a multiplier.

18. The Court has carefully considered the objection of Class Member FIRST HOME BUILDERS OF FLORIDA and finds the objection to be without merit. Upon inquiry from the Court, their counsel indicated that in determining the fee that 1,000 hours would be appropriate at a rate of \$300.00 per hour. The Court finds that with an appropriate multiplier, the resulting fee would still exceed the fee requested by Class Counsel.

19. The Court has reviewed the cost affidavit, and received testimony as to the costs, and finds that the costs expended of \$178,815.02 were reasonable and necessary to the prosecution of the class action.

20. The Court has also received testimony regarding the issue of an enhancement fee for the Class Representative, Patricia Shatto. The Court has concluded that the requested fee of \$7,500.00 is appropriate based upon the testimony that somewhere between 2 and 3 times the actual class member benefits is customarily awarded in class action cases. Further the Court has considered that Ms. Shatto expended considerable time as the Class Representative and served that post while she was employed as a school teacher with the Lee County School District, for whose benefit the school impact fee was enacted.

IT IS THEREFORE ORDERED:

1. The Settlement Agreement is hereby approved and the parties are directed to comply with the terms thereof.

2. Pursuant to the Settlement Agreement, the sum of One Million Dollars (\$1,000,000.00) shall be deposited into an interest bearing "Certificate of Deposit Account Registry Account" at Finemark National Bank & Trust from which the following disbursements shall be immediately made:

a. the sum of \$400,000.00 to Jeffrey R. Garvin, P.A., as attorney's fees for Class Counsel;

b. the sum of \$178,815.02 to Jeffrey R. Garvin, P.A., as costs for the pursuit of the class action; and

c. the sum of \$7,500.00 to Patricia Shatto, as the Class Representative.

3. The remaining funds, less payment to the Special Master, shall be disbursed to the Class Members pursuant to Court Order.

4. The Court hereby appoints James L. Nulman as Special Master.

5. The Special Master is hereby directed to determine which class members who signed construction contracts prior to the enactment of the impact fee are entitled to recover monies pursuant to the terms of the Settlement Agreement, the Order Preliminarily Approving Settlement and Providing for Notice and this Order.

6. The Special Master shall file a report every thirty (30) days, beginning 30 days from the date of this Final Order, and a final report shall be filed within 6 months of the date of this Order. In the event that the Special Master is not able to complete his task within 6 months, the

Special Master shall file a report with the Court documenting the progress and estimating the time for completion.

7. The Special Master shall charge no more than \$300.00 per hour for his services with a cap on his fees of \$30,000.00, which can only be exceeded by order of this Court.

8. The Court reserves jurisdiction to enforce the terms of the Settlement Agreement, the Order Preliminarily Approving Settlement and Providing for Notice and this Final Order Approving Class Action Settlement and any other matters the Court deems just and appropriate.

DONE AND ORDERED in Chambers, Fort Myers, Lee County, Florida, this 25 day of September, 2009.

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JAY B. ROSMAN, Circuit Court Judge

Copies furnished to:

Jeffrey R. Garvin, Esquire  
David Owen, Esquire  
John Turner, Esquire  
Gregory T. Stewart, Esquire  
Keith B. Martin, Esquire  
Charles A. Wachter, Esquire