

In the Superior Court
of Forsyth County
State of Georgia

Michael D. Peck on Behalf of)
Himself and All Homeowners) Civil Action
Adjacent to Lanier Golf Club) File Number 07CV-2147
f/k/a Canongate on Lanier)
Golf Club,)
Plaintiffs,)
v.)
Lanier Golf Club, Inc.,)
Defendant.)

Plaintiff's Post-Hearing
Brief for Class Certification

Comes now Michael D. Peck ("Plaintiff") on behalf of himself and the 121 proposed class members¹ (collectively, "Class") and shows the court as follows:

Statement of Facts

All Statement of Facts that were listed in the Plaintiff's Pre-Hearing Brief for Class Certification of March 25, 2008 are incorporated herein by reference as if it had been set forth verbatim. Further, all testimony and documents admitted to evidence at the hearing on April 16, 2008 ("Hearing") are incorporated herein by reference as if it had been set forth verbatim.

¹ Plaintiff's Exhibit 1.

The Plaintiff testified at the Hearing² that he and the proposed Class are all persons who are owners of real property adjacent to Lanier Golf Club f/k/a Canongate on Lanier Golf Club ("Golf Course"). Plaintiff has requested that the court certify the Class as all persons who are owners of real property adjacent to the Golf Course. Defendant is opposed to this request based solely on their claim that the Plaintiff does not have a cause of action: "As you have well read, I'm sure, in our briefs, we don't think Mr. Peck has standing, he's not a representative, he has no claim³."

The Defendant never filed any affidavits to support their positions and only called two witnesses at the Hearing. The first, Mr. Edwin Burke⁴, was qualified as an expert in title examination. This witness offered no testimony which could be used by this court for consideration of certification of the Class. His testimony related to the chain of title for the Golf Course and the surrounding property⁵.

Mr. Burke did opine that documents in the deed records indicated that the owners of Habersham were using the Golf Course to help them sell lots: "Q. Just looking at that document [Plaintiff's Exhibit 2], would it appear to you that the owners of Habersham were using the golf course to help them sell lots? A. I think that's reasonable⁶." Over objection, the court allowed this witness to give his opinion on documents in the deed records: "Well, some languages are rather arcane and some phrases often

² Transcript, Pages 112-159.

³ Mr. Dillard, Transcript, Page 8, Lines 2-11.

⁴ Transcript, Pages 160-215.

⁵ See Defendant's Exhibits 1, 2, 3, & 4.

⁶ Transcript, Page 212, Lines 22-25.

require interpretation. I don't have any problem with the man rendering and entering an opinion on phrases, particular words and phrases and languages on a deed or agreements or whatever. I don't see anything wrong with it⁷."

The only other witness called by the Defendant was one of its owners, John P. Manton⁸. Mr. Manton stated over and over again that Mr. Peck should not be the class representative for one single reason, he has no cause of action.

Q. Do you think that [Mr. Peck]'s not qualified to be the class representative?

A. I don't personally think he's qualified to be the representative of the class because I don't personally think he has a cause of action⁹.

...

THE COURT: His [Manton] bottom line response is he doesn't think he [Peck] has a cause of action¹⁰.

The Plaintiff proved at the Hearing that when the potential class members purchased their Golf Course Lots, (1) the Golf Course was a material part of the value of their property, (2) they paid a premium value for the Golf Course Lots that they purchased, and (3) the Golf Course was the principal incentive for the Class or their predecessors in title to purchase their property. These statements are in all of the nine proposed class members affidavits: Paul Baron, Randall Bassett, Charles Pratt, Gerald Buran, Jack Waters, Jeffrey Hayes, John Allen, Gerry Sullivan, and Martina Power. No evidence was presented at the hearing to contradict any of these statements.

⁷ Transcript, Page 164, Lines 11-16.

⁸ Transcript, Pages 216 -229.

⁹ Transcript, Page 238, Lines 4-8.

¹⁰ Transcript, Page 246, Lines 4-5.

The Plaintiff proved via his testimony, the testimony of Carol McGregor¹¹, the aforementioned nine affidavits, Defendant's Exhibits, and even Defendant's expert witness that at one time, the approximate 1000 acres were transferred from the Mashburns to British American Development Corporation¹². By August of 1968, title to all this property was vested in Kenwood Corp and Edward S. Bivens¹³.

In 1969, the Golf Course was sold to Canongate Golf Club, Inc.¹⁴, which is a wholly own subsidiary of UniCity, Inc¹⁵. This transfer included 22.020 acres of property that would be subject to residential development on the interior of the Golf Course¹⁶. The actual Golf Course Property would consist of only 171.839 acres.

In June of 1971, UniCity purchased all the other areas surrounding the Golf Course¹⁷. Therefore, the roots of the Golf Club and all the land in the area can be traced back to the

¹¹ Transcript, Pages 55 - 112.

¹² Defendant's Exhibit 1.

¹³ Ibid.

¹⁴ Defendant's Exhibit 2.

¹⁵ Plaintiff's Exhibit 2 is a Golf Course Operating Agreement signed by J. William Martin as president of Habersham-on-Lanier, Inc., president of UniCity, Inc., and Vice-President of Canongate, Inc. The document indicates that UniCity, Inc., owns all the outstanding capital stock of both Canongate, Inc., and Habersham-on-Lanier, Inc. This document is recorded in Deed Book 136, Page 152, Forsyth County Records. See Transcript, Page 130. Plaintiff's Exhibit 3 is a Golf Course Lease Agreement with similar information contained therein. See Transcript, Page 132.

¹⁶ Ms. McGregor referenced this property as "pods." Transcript, Page 71, Line 22 - Page 72, Line 8.

¹⁷ Defendant's Exhibit 3 and Plaintiff's Exhibit 4.

development of the Planned Unit Development of UniCity, Inc. ("UniCity"). The centerpiece of the UniCity Development was the Golf Course.

Argument and Citation of Authority

The purpose of the litigation is to have the court declare and enforce against the Defendant an implied easement in the Golf Course Property. There is only one question before the court: Plaintiff's Motion for Class Certification. However, after the court ruled on the Defendant's Motion to Limit Testimony on Hearing on Motion for Class Certification, they continued to argue with the court (see below). In addition, early on in the Hearing, the court inquired as to what is the ultimate result that the Plaintiff is requesting in the case. Therefore, there will also be included herein some response to each of these questions.

One other issue that was presented at the Hearing was the court's numerous inquiries as to what is a Planned Unit Development or PUD¹⁸. Black's Law Dictionary, Sixth Edition, defines a Planned Unit Development as:

Planned unit development (PUD). An area with a specified minimum contiguous acreage to be developed as a single entity according to a plan, containing one or more residential clusters or planned unit residential developments and one or more public, quasi-public, commercial or industrial areas in such ranges of ratios of nonresidential uses to residential uses as shall be specified in the zoning ordinance.

Ms. McGregor stated that Canongate, Inc., UniCity, Inc., and

¹⁸ Transcript, Page 231, Line 11-Page 231, Line 20.

Habersham on Lanier, Inc., were all part of a Planned Unit Development:

- Q. [McFarland] And then one time it was Canongate, Inc that was owned by UniCity; is that correct?
- A. [McGregor] Yes; it was.
- Q. And UniCity also owned Habersham on Lanier, Inc; is that right?
- A. Yes.
- Q. Did you know of some relationship between the two of them?
- A. It was -- it was a planned development. It was the first large major land development in Forsyth County¹⁹.

Court's Ruling on Defendant's Motion
to Limit Testimony on Hearing on
Motion for Class Certification

At the hearing, Defendant's counsel alleged that the court should limit the hearing to whether or not the Plaintiff is a proper representative of the class. However, in making that request, the only reason they listed is their statement, over and over again, that Plaintiff does not have a claim and this is their sole reason that he has no standing: "...we think today's inquiry should be just to determine whether or not Mr. Peck is a proper representative of the class, whether or not he's got a claim²⁰."

The court granted the motion to limit the testimony at the first part of the hearing²¹:

If I grant it, then we are limiting our inquiry here to his status -- Mr. Peck's status.

And I am thinking I'm going to grant the motion. So, we're

¹⁹ Transcript, Page 66, Lines 13 - 22

²⁰ Transcript, Page 8, Lines 6 - 9.

²¹ Transcript, Page 10, Line 24 - Page 11, Line 5.

going to limit the first part of this discussion to his status. Is he or can he represent, as the class representative, these folks.

Then as the hearing progressed, the court ruled on this issue and stated that the Plaintiff had met the test for being the class representative and that he was suitable.

MR. MCFARLAND: So, Mr. Peck is qualified to proceed as the class representative and we shouldn't limit our testimony to that issue.

THE COURT: Okay. That's good.

MR. MCFARLAND: I mean, I don't know how to say it any other way. That's just the truth.

THE COURT: All right. Sounds good to me. Have a seat. How about it Mr. Dillard²²?

Opposing counsel did not agree with this ruling of the court and attempted to get the court to reverse this ruling²³:

THE COURT: I'm going to -- my -- my first ruling is going to deny your -- let's see, what is my first ruling? Hang on. Your motion to limit testimony on hearing --

MR. DILLARD: We just wanted to see if Peck has a claim.

THE COURT: Yes. I think Peck's got a claim. I think he, at least for purposes of going forward as a purported class rep. Now this -- don't read into that that I've decided the case, but just insofar as meeting a test for being the class rep I find that he is suitable in that limited sense.

MR. DILLARD: Yes, sir. Not to be argumentative, Your Honor, I just want to understand.

THE COURT: Okay.

MR. DILLARD: So, the commonality is the fact that he is an adjacent property owner to the golf course --

THE COURT: Yes.

MR. DILLARD: -- and that's it.

²² Transcript, Page 25, Lines 13-20.

²³ Transcript, Page 32, Line 20-Page 34, Line 17.

THE COURT: No, that's not necessarily it, but that's part of it. That's certainly part of it.

MR. DILLARD: The commonality part of it.

THE COURT: Sure.

MR. DILLARD: Okay.

THE COURT: The commonality part of it. I find that the case that's been cited, it leaves enough -- it gives enough food for thought for my concern about the Plaintiff's -- about the ultimate claim that he has individually and as a purported class rep to allow him to go forward.

MR. DILLARD: To determine whether he has or whether the Court --

THE COURT: Now, we simply go forward with the certification issue. He is a class rep. I'm not saying the class, at this point, has been certified.

You were asking me to deny his status as a class rep.

So, that's what we limited this first discussion to.

Can he Peck particularly go forward as a purported class rep of a purported class? Yes; he can. Now we move into the Plaintiff's case for certification of the class.

MR. DILLARD: Okay. And to do that you've got to find that Peck has a claim.

THE COURT: Well, I find that Peck -- I can't tell you that Peck has any better claim than anybody else. He's got a purported claim. He has a purported claim.

MR. DILLARD: Okay.

Ultimate issue in the case

At the hearing and in response to an inquiry from the court²⁴, counsel for the Plaintiff presented to the court and opposing counsel a number of cases upon which the ultimate relief in this case will be requested. Plaintiff's counsel has asserted, and opposing counsel apparently agrees, that there is no controlling authority in Georgia relative to the equitable relief

²⁴ Transcript, Page 22, Lines 14-20.

requested²⁵. However, in *Forsyth County v. Martin*, 279 Ga 215 (2005), the court clearly set forth the rights of adjacent homeowners in a lake in Forsyth County:

[2] As for the issue of the effect of the plaintiffs' ownership of lakefront property on the decision whether to breach or repair the dam, the plaintiffs established they purchased their lots according to a subdivision plat which had a lake area designated on it and paid more for their lakefront lots than the purchase price for non-lakefront lots, thereby acquiring an irrevocable easement in the lake. *Walker v. Duncan*, 236 Ga. 331, 223 S.E.2d 675 (1976). See also *Higgins v. Odom*, 246 Ga. 309, 271 S.E.2d 211 (1980); *Patterson v. Powell*, 257 Ga. App. 336, 571 S.E.2d 400 (2002).

If the holding in *Martin* is extended to a golf course, then there would be controlling authority in Georgia on this issue. When a Georgia court must make a decision on a case of first impression, the holding of other states are normally considered: "Because this is a case of first impression, it is instructive to examine how other states have proceeded." *Russaw v. Martin*, 221 Ga. App. 683 (1996).

In *Ute Park Summer Homes Assn v. Maxwell Land Grant Co, N.M.*, 83 N.M. 558, 494 P.2d 971 (1972) the New Mexico Supreme Court upheld the injunction against the real estate from selling the tract without restricting its use to a golf course, playground or recreational area. Their reasoning was that there was repeated references to use of a plat as well as oral representations by developer's sales personnel in selling lots:

²⁵ Transcript, Page 20, Lines 1-13.

On the first appeal²⁶, in which plaintiffs sought reversal of an adverse summary judgment, the question presented was: "... (W)hether or not some legal right in, or relative to the use of, the 'golf course' area, which right is properly enforceable by the plaintiffs, came into existence by the use of the plat and the representations by the defendant's agents in accomplishing the sales of the lots, and which legally enforceable right is still in existence." 77 N.M. at 733, 427 P.2d at 252.

The holding in *Ute Park* has been upheld in a number of cases. Two cases that were presented at the Hearing was *Shalimar Ass'n v. D.O.C. Enterprises, Ltd*, 142 Ariz. 36, 688 P.2d 682 (1984) and a 2006 bankruptcy case from South Carolina, *In re T 2 Green, LLC*, 363 B.R. 753 (2006).

The court apparently thought that the purpose of the sales material in the instant case that was admitted into evidence²⁷ was used to entice a prospective land purchaser's interest in this area around the Golf Course:

THE COURT: Let me ask you a question about this thing here. I don't know what it's called, this brochure Canongate on Lanier Community. By asking the question, I'm not saying that I agree necessarily with the thesis of the question, but under the heading Fairway Estates, I'm going to just read it. It says Fairway Estates includes Section C, E, F, G, H, and J of Canongate on Lanier which are nestled in the meticulously sculptured landscape of this 18-hole golf course. This well-established course was designed by the internationally known golf architect Joseph L. Wieland and is considered one of the finest courses in

²⁶ This was the second appeal. The first was *Ute Park Summer Homes Assn v. Maxwell Land Gr. Co.*, 77 N.M. 730, 427 P.2d 249 (1967).

²⁷ Plaintiff's Exhibit 7.

the Atlanta area.

Now, that was put in here I think we can both agree with an eye toward enticing to a prospective land purchaser his interest in this area around the golf course.

A. [MR. MANTON] It is what it is, Your Honor. Yes; it is.

THE COURT: There's no way of getting around there.

A. [MR. MANTON] Yes²⁸.

Decision on Plaintiff's Motion
for Class Certification

The decision of this court on the Plaintiff's Motion for Class Certification is the only issue for the court to decide at this time. Class action lawsuits have long been recognized in Georgia as an efficient way of resolving the problems of many persons who have a common interest in the outcome.

This issue is to be decided by consideration of four issues: numerosity, commonality, typicality, adequate representation. This issue is now ripe for consideration in that the court set down a schedule in its order of January 25, 2008, for the hearing and for discovery limited to the issue of class certification. Not one single member of proposed class has objected to certification.

No objection was made to the affidavits which have been filed by proposed class members, Paul Baron, Randall Bassett, Charles Pratt, Gerald Buran, Jack Waters, Jeffrey Hayes, John Allen, Gerry Sullivan, and Martina Power. Not one scintilla of evidence was presented to contradict each of their consistent testimony that:

- They and the other similarly situated homeowners around the Golf Course would be so numerous as to make it impracticable

²⁸ Transcript Page 248, Line 18 - Page 249, Line 12.

to bring all these persons before the court except in this one pending case.

- Any contested issues of fact in Mr. Peck's case would be the same contested issue of fact for their other neighbors on the Golf Course.
- Any claims that their neighbors on the Golf Course may have would be similar to the claims of the Plaintiff.
- They believe that Plaintiff will adequately represent the interest of this Class.
- They believe that Plaintiff will provide information to them as to his position on pending matters.
- They believe that Plaintiff will support the objectives of the Class.

On the other hand, the Defendant has not provided any affidavits of persons that object. Further, the only person that was presented by the Defendant at the hearing was Mr. Manton. Therefore, other than Mr. Manton's objection that the Plaintiff does not have a cause of action, there is not one scintilla of evidence in the record for opposition to class certification.

When pressed by the court at the Hearing for Defendant's best reason that the Plaintiff cannot be the class representative, they cited a document that he had signed at his closing which precludes him from serving as the class representative:

THE COURT: Give me your best shot on why he should not be in the class, why he cannot be, as you say, the class rep. Is it this clause that I made reference to?
MR. DILLARD: Yes. It's that clause.²⁹

On the other hand, Defendant's counsel admitted in their opening statement that implication, rather than expressed rights, was the only method upon which Mr. Peck could have any rights:

²⁹ Transcript, Page 15, Line 25 - Page 16, Line 3.

MR. DILLARD: Well, you know, I think that any rights that Peck has in this golf course, is only by implication³⁰.

It is axiomatic that an easement by "implication" is not an "expressed easement." An expressed easement by definition is an easement expressly agreed upon by contract between a landowner and another:

Easements expressly agreed upon by contract between a landowner and another are subject to the rules of the law of contracts, including the statute of frauds, and also to the rules governing the validity and construction of deeds. Such an agreement constitutes a contract concerning an interest in land such as is required to be in writing, signed by the party to be charged or his agent, except where the contract has been fully performed or there has been performance on one side accepted by the other³¹.

With respect to the issues of numerosity, commonality, typicality, and adequate representation, the Defendant has failed to present any evidence to support their position. No evidence was submitted by affidavit, deposition or live testimony to rebut all the evidence the Plaintiff presented. Further, none of the Defendant's exhibits 1 - 8, address in any way numerosity, commonality, typicality, and adequate representation.

Conclusions of Fact and Law

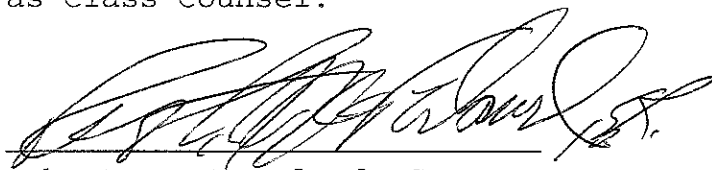
Due to the common factual issues relating to the rights of the 121 adjacent homeowners and the common legal relief sought for them, this action is appropriate for class action treatment. The prosecution of separate actions by individual members of the

³⁰ Transcript, Page 12, Lines 2 - 3.

³¹ *Pindar's Georgia Real Estate Law and Procedure*, § 8-17.

Class would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the Defendant. The Class is so numerous that a joinder of all members is required. There exists questions of law or fact that are common to all members of the Class. The claims of the Plaintiff are typical of the claims of the entire Class. The Plaintiff will fairly and adequately protect the interests of the entire Class and his counsel is qualified to represent the Class.

Plaintiff satisfies all of the requirements of O.C.G.A. § 9-11-23. There can be no serious dispute that, under the circumstances present here, a class action is the superior method for fairly and efficiently vindicating the rights of absent class members who may be unable or unwilling to bring an individual case. Therefore, the court should (1) grant Plaintiff's Motion for Class Certification and enter an order that certifies the Class defined by Plaintiff, (2) appoint Plaintiff as the Class Representative of the Class, and (3) appoint Plaintiff's attorney as Class Counsel.



Robert P. McFarland, Sr.
State Bar Number: 491250
Attorney for Plaintiff
(770) 889-2522

McFarland & McFarland, P. C.
309 Pirkle Ferry Road
Suite B-400
Cumming, Georgia 3004014

Certificate of Service

This is to certify that I have this day duly served opposing counsel with a true and accurate copy of the Plaintiff's Post-Hearing Brief for Class Certification in a manner prescribed by law by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Ms. Andrea Cantrell Jones
Law Offices of Dillard & Galloway, LLC
Suite 760
3500 Lenox Road
Atlanta, Georgia 30326

This June 4, 2008.



Robert P. McFarland, Sr.