

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.)

Order after Hearing
on Class Certification

On April 16, 2008, a hearing was conducted in this court upon the motion of Michael D. Peck ("Plaintiff") for Class Certification as to 121 persons who live adjacent to Lanier Golf Club "(Class Certification Motion)". Lanier Golf Club, Inc. ("Defendant") opposed this motion. Prior to the hearing, Defendant filed Defendant's Motion to Limit Testimony on Hearing on Motion for Class Certification ("Limitation Motion"). This order addresses both the Limitation Motion and the Class Certification Motion.

After considering the arguments of counsel and the evidence presented at the hearing, as well as the Post-Hearing Briefs of each party and the transcript of the hearing, it is hereby Ordered and Adjudged as follows:

Statement of the Facts

Plaintiff 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"). Evidence was presented at the hearing that at one time, the approximate 1000 acres was transferred from the Mashburns to British American Development Corporation¹. By August of 1968, title to all this property was vested in Kenwood Corp and Edward S. Bivens².

In 1969, the Golf Course was sold to Canongate Golf Club, Inc.³, which is a wholly owned subsidiary of UniCity, Inc⁴. This transfer included 22.020 acres of property that would be subject to residential development on the interior of the Golf Course. The actual Golf Course property would consist of only 171.839 acres.

In June of 1971, UniCity, Inc. ("UniCity") purchased all the other areas surrounding the Golf Course⁵. Therefore, the roots of the Golf Course and all the land in the area can be traced back to the development of the Planned Unit Development of UniCity. Clearly, the centerpiece of the UniCity Development was the Golf Course⁶.

¹ Defendant's Exhibit 1.

² Ibid.

³ Defendant's Exhibit 2.

⁴ 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.

⁵ Defendant's Exhibit 3.

⁶ Plaintiff Exhibit 4.

The Defendant claims that the Golf Course and UniCity never shared a common grantor. However, it is abundantly clear that Habersham and the property that was eventually sold to Arasom, N.V.⁷ was not developed separately from the Golf Course.

Carol A. McGregor filed a Historical Affidavit, was deposed before the hearing, and appeared at the hearing as a witness⁸. She indicated that UniCity had acquired about 1000 acres in Forsyth County. UniCity then developed the Golf Course, Habersham Marina, and started the Habersham housing development off Nuckolls Road. Only the property to the west and northwest side (off Nuckolls Road) and called the Habersham Development was actually developed by UniCity prior to their bankruptcy. However, a land plan was developed for the entire project, and evidence of this plan is contained in the Forsyth County Plat Records under UniCity⁹.

Ms. McGregor also testified about the original planned development of UniCity which included residential development in the middle of the Golf Course, as well as tracts surrounding the Golf Course. However, because of the Oil Embargo in 1974, UniCity went into default. Eventually, Cousins Mortgage and Equity Investments ("CMEI") acquired, through the foreclosure process, approximately 180 acres of land that had been part of the UniCity Development. This transfer included property in the middle of the Golf Course and along the north, east, south and southwest side. Because of the default, Patten Seed & Turf Grass Company had to take back the Golf Course from UniCity. Patten Seed eventually sold the Golf Course to the Defendant. This information was

⁷ Defendant's Exhibit 3.

⁸ Transcript, Pages 55 - 112.

⁹ Plaintiff Exhibit 4.

confirmed by the testimony of Mr. Edwin Burke¹⁰ who was qualified as an expert in title examination. Mr. Burke presented proof of his title examination on all the property that was owned by UniCity¹¹.

All the property around the Golf Course which was not a part of Habersham was sold to a German company called Arasom, Inc. Mrs. McGregor's company, Outdoor Development Corp., handled development and sales for Arasom, Inc. Since there was now a different owner of the Golf Course and the surrounding property, Outdoor Development Corp. was required to obtain Patten Seed's approval to continue to market the Golf Course Lots. This was done in 1979 via an agreement between Andrew B. McGregor and William A. Roquemore. This letter included the following statement: "In addition, you have agreed to allow Arasom the permanent right to promote the property by the use of signs, ads, letters, etc., as homes and homesites available at 'Canongate on Lanier.'"

Pursuant to the requirements set forth by this court, the Plaintiff has tendered evidence via affidavit, deposition and live testimony at the hearing of numerous witnesses relative to the initial issue of class certification. Each of the witnesses testified that they and the other similarly situated homeowners around the Golf Course would be so numerous as to make it impracticable to bring all these persons before the court except in this one pending case. They all said that any contested issues of fact in Mr. Peck's case would be the same contested issues of fact for their other neighbors on the Golf Course. They all say that any claim their neighbors on the Golf Course may have would be similar to the claims of the Plaintiff. They all believe that Plaintiff will adequately represent their interest in this case.

¹⁰ Transcript, Pages 160-215.

¹¹ Defendant's Exhibits 1, 2, 3, & 4.

They believe that Plaintiff will provide information to them as to his position on pending matters. Finally, they believe that Plaintiff will support the objectives of the class.

Each of them stated that at the time they purchased their Golf Course Lots, the Golf Course was a material part of the value of their property. They said that they paid a premium value for the Golf Course Lots and that the Golf Course was the principal incentive for their purchase. These witnesses maintained their position under a thorough and sifting cross-examination by the Defendant's counsel.

Statement of the Law

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. *Macon & B. R. Co. v. Gibson*, 85 Ga. 1 (1890). Traditionally, Georgia courts have given class action lawsuits liberal treatment. *O'Jay Spread Co. v. Hicks*, 185 Ga. 507 (1938).

This case is the quintessential class action because it will allow Plaintiff to vindicate the rights of individuals who might not otherwise consider litigation. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980).¹² The United States Supreme Court has noted that class actions are intended to protect groups of people who individually would be unable to bring their opponents into court at all:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any

¹² Georgia courts may look to federal case law interpreting Federal Rule of Civil Procedure 23 to determine whether the requirements of class certification have been met. See, e.g., *Sta-Power Industries, Inc. v. Avant*, 134 Ga. App. 952 (1975).

individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

Class actions provide a mechanism to resolve numerous related claims in one forum, establishing a uniform standard for conduct and preserving judicial resources. Accordingly, "when a court is in doubt as to whether to certify a class action, it should err in favor of allowing a class." *Adair v. England*, 209 F.R.D. 5, 8 (D.D.C. 2002). "Any doubts regarding the propriety of class certification should be resolved in favor of certification." *Buford v. H&R Block*, 168 F.R.D. 340, 346 (S.D. Ga. 1996).

O.C.G.A. § 9-11-23 provides that a class action is authorized if the members of the class share a common right, and common questions of law or fact predominate over individual questions of law or fact. See *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363 (2001). More specifically, Plaintiff must establish the following four criteria embodied in O.C.G.A. § 9-11-23:

- The class is so numerous that joinder of all members is impracticable ("numerosity").
- There are questions of law or fact common to the class ("commonality").
- The claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality").
- The representative parties will fairly and adequately protect the interests of the class ("adequacy").

Application of the Law to the Facts

The purpose of this litigation is to have the court declare and enforce against the Defendant an implied easement in the Golf Course Property. 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.

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.

Numerosity

The Class satisfies numerosity requirement because the class is so numerous that joinder of all class members would be impracticable. *Ford Motor Credit Co. v. London*, 175 Ga. App. 33 (1985). "Numerousness is thus the threshold factor, the sine qua non for class actions. If the number is so large that each cannot practically represent himself, either in the same or in separate lawsuits, then the court may allow this representative suit to bind all, if the other factors to be considered favor it." *Id.* A class with as few as twenty-five members is sufficiently numerous to satisfy this criterion. *Sta-Power, Supra.*

Here, there can be no dispute that Plaintiff easily satisfies the numerosity requirement. Plaintiff asserts that at least 121 persons would have the same claim against the Defendant. It would be impractical, if not impossible, to join all of these class members in this Court.

Commonality

The second requirement, commonality, requires an assessment of whether Plaintiff's claims raise at least one question of law or fact common to the members of the Class. *Nicholson, Supra.* "The threshold of commonality is not high" and "[f]actual differences

between class members do not preclude a finding of commonality." *Sta-Power, Supra*. 901. "Plaintiff need only show that there is a common nucleus of operative facts and that such questions predominate over any individual questions affecting individual class members." *Trend Star Continental, Ltd. v. Branham*, 220 Ga. App. 781 (1996).

Typicality

The typicality requirement ensures that the class representatives have the same interests as the class. Typicality is established "if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). "The focus of the inquiry is on the conduct of the defendants, not the plaintiff." *Nicholson, Supra*. Plaintiff has a home on the Golf Course and he will be impacted by the proposed development just as will all other members of the class.

Adequate Representation

The adequacy of representation requirement is met if (1) the interests of the plaintiff are not antagonistic to those of the rest of the class and (2) plaintiff's counsel is qualified, experienced and able to conduct the proposed litigation. *Kirkpatrick v. J. C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987).

Plaintiff has no conflict of interest with the Class. Plaintiff's claims arise from the same common nucleus of operative facts as the claims of the Class. Plaintiff seeks the same relief for himself as for the Class. Finally, Plaintiff is cognizant of, and determined to, faithfully discharge his fiduciary duties as Class representative and is willing to vigorously prosecute this action

on behalf of the absent Class Members.

Defendant has not challenged the adequacy of counsel. Plaintiff's counsel has been a member of the State Bar since 1977 and has litigated real estate issues for a number of years. He has argued four real estate related cases to the Georgia Supreme Court. He has obtained advice from an attorney who exclusively practices in the area of Class Actions. Plaintiff's counsel is competent and adequately prepared to prosecute this action. Thus, the adequacy of representation requirement is met.

Conclusions of Facts and Law

The prosecution of separate actions by individual members of the 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 facts 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.

Accordingly, this court hereby grants Plaintiff's Motion for Class Certification. The court certifies the Class defined by Plaintiff as shown on Exhibit A attached hereto. The court appoints Plaintiff as the Class Representative of the Class, and the court appoints Plaintiff's attorney as Class Counsel.

So Ordered this _____ day of _____, 20 ____, *Nunc Pro Tunc*
to April 16, 2008.

Albert M. Pickett
Superior Court of Forsyth County