

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 Pre-Hearing  
Brief for Class Certification

Comes now Michael D. Peck ("Plaintiff") on behalf of himself and the 121 proposed class members<sup>1</sup> (collectively, "Class") and shows the court as follows:

Statement of Facts

Plaintiff and Class are all persons who are owners of real property adjacent to Lanier Golf Club f/k/a Canongate on Lanier Golf Club ("Golf Club"). While the Scheduling Order stayed all discovery directed solely to the central issue, some brief background information should be helpful for the court to

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<sup>1</sup> See Exhibit 1 for list of proposed class members.

consider the required decision regarding certification of the Class.

The complaint lists that the roots of the Golf Club and all the land in the area can be traced back to the development of the Planned Unit Development of UniCity, Inc. ("UniCity"). The centerpiece of the UniCity Development was the 177-acre golf course known at that time as Canongate on Lanier.<sup>2</sup>

According to a Golf Course Operating Agreement on file in the Forsyth County Deed Records, the Golf Course was owned and managed in the early days by Canongate, Inc.<sup>3</sup> ("Canongate"). Habersham on Lanier, Inc. ("Habersham") was developing for residential purposes certain real property adjacent to the Golf Course.<sup>4</sup> UniCity owned all of the outstanding capital stock of both Habersham and Canongate.<sup>5</sup> J. William Martin was the president of both UniCity and Habersham and the Vice President of Canongate.<sup>6</sup>

According to a Golf Course Lease Agreement,<sup>7</sup> three banks had loaned Habersham a significant amount of money.<sup>8</sup> Canongate and

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<sup>2</sup> Complaint, Page 3, ¶ 9 & ¶ 13.

<sup>3</sup> The Golf Course Operating Agreement (Exhibit 2) was between UniCity, Canongate, and Habersham, dated March 6, 1974, filed in Deed Book 136, Pages 252-269.

<sup>4</sup> Exhibit 2, Page 1, ¶ 4.

<sup>5</sup> Exhibit 2, Page 1, ¶ 2.

<sup>6</sup> Exhibit 2, Page 12 & 13, also see Deposition of John P. Manton, February 28, 2008, Page 25, Lines 2-21.

<sup>7</sup> The Golf Course Lease Agreement (Exhibit 3) was between Canongate and Habersham, dated March 6, 1974, filed in Deed Book 136, Pages 270-287.

<sup>8</sup> Exhibit 3, Page 1, ¶ 5.

Habersham both agreed that "[T]he presence and availability of said golf course enhances the residential development being constructed by Lessee, and the Lenders have therefore required that such presence and availability be assured by contractual arrangement..."<sup>9</sup>

According to the Historical Affidavit of Carol A. McGregor,<sup>10</sup> sometime prior to 1973, 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.<sup>11</sup> 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.<sup>12</sup> This project is shown on a series of plats on file in the Forsyth County Plat Records by UniCity.<sup>13</sup>

The original planned development of UniCity included residential development in the middle of the golf course as well as tracts surrounding the Golf Course.<sup>14</sup> Because of the Oil Embargo in 1974, UniCity went into default.<sup>15</sup> Eventually, Cousins Mortgage and Equity Investments ("CMEI") acquired, through the foreclosure process, approximately 180 acres of land that had been part of

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<sup>9</sup> Exhibit 3, Page 1, ¶ 6.

<sup>10</sup> See Historical Affidavit of Carol A. McGregor filed on March 17, 2008.

<sup>11</sup> McGregor Affidavit, Page 3, ¶ 9.

<sup>12</sup> McGregor Affidavit, Page 5, ¶ 18.

<sup>13</sup> Exhibit 4 consists of six plats filed in Plat Book 9, Page 165 and Plat Book 9, Pages 45, 62, 118, 127, & 302.

<sup>14</sup> McGregor Affidavit, Page 5, ¶ 18.

<sup>15</sup> McGregor Affidavit, Page 4, ¶ 12.

the UniCity Development.<sup>16</sup> This transfer included property in the middle of the Golf Course and along the north, east, south and southwest side.<sup>17</sup> Because of the default, Patten Seed & Turf Grass Company ("Patten Seed") had to take back the Golf Course from UniCity.<sup>18</sup>

Eventually, all the property around the Golf Course which was not a part of Habersham was sold to a German company, Arasom, Inc.<sup>19</sup> Mrs. McGregor's husband's company, Outdoor Development Corp., handled development and sales for Arasom, Inc.<sup>20</sup> 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. "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.'"<sup>21</sup>

Notwithstanding the factual situation listed above, the Defendant claims that the Golf Club and UniCity never shared a common grantor.<sup>22</sup> They further claim that Habersham was developed

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<sup>16</sup> McGregor Affidavit, Page 4, ¶ 17.

<sup>17</sup> McGregor Affidavit, Page 4, ¶ 18.

<sup>18</sup> McGregor Affidavit, Page 6, ¶ 25. Also, see letter from William A. Roquemore and Nell P. Roquemore to UniCity, Canongate, and Habersham, dated March 6, 1974, filed in Deed Book 136, Pages 219-233. marked as Exhibit 5.

<sup>19</sup> McGregor Affidavit, Page 5, ¶ 18 & ¶ 19.

<sup>20</sup> McGregor Affidavit, Page 6, ¶ 23.

<sup>21</sup> See letter agreement between Andrew B. McGregor and William A. Roquemore, dated December 11, 1974 marked as Exhibit 6.

<sup>22</sup> See Defendant's Objection to Plaintiff's Motion for Class Certification, Page 2, ¶2.

separately from Canongate Golf Club, Inc. and never shared a common grantor.<sup>23</sup>

Pursuant to the requirements of the Scheduling Order,<sup>24</sup> Plaintiff submitted to Defendant's counsel the proposed affidavit of nine witnesses Plaintiff intends to offer on the issue of class certification. Plaintiff further made these witnesses available for deposition. On the other hand, Defendant has not provided any affidavits to Plaintiff.

When historical information was requested by the Defendant, the Plaintiff made James Quinn available for a deposition. When the Defendant requested a review of Mr. Quinn's documents, the Plaintiff scheduled a meeting at Mr. Quinn's house for complete review of his documents. Finally, the Plaintiff filed the Historical Affidavit of Carol A. McGregor and has made her available for a deposition on March 28, 2008.

Affidavits 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. Each of them swore 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.
- 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.

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<sup>23</sup> See Defendant's Objection to Plaintiff's Motion for Class Certification, Page 4, ¶2.

<sup>24</sup> Page 2, last paragraph.

- 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.

In the motion for class certification, the Plaintiff asserted 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 witnesses maintained their position under a thorough and sifting cross-examination by the Defendant's counsel.

As an example, John Henry Allen told of a house at 3610 Canon Creek Drive originally listed for \$389,000. When the purchaser found out about the problem with the Golf Course, the seller had to reduce it to \$307,500 to sell the house.<sup>25</sup> There are numerous other examples that were given by the witnesses, all of which the Defendant deposed. A select few of these examples follow.

John Henry Allen:

Page 15

10 Q What kind of premium do you believe  
11 you paid for your property when you bought  
12 it?

13 A Having lived on golf course property  
14 before, it's, you typically pay more money  
15 for property that adjoins a golf course than  
16 you would, for instance, for the property  
17 across the street from the property that  
18 adjoins the golf course.

19 I think it's established in the real

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<sup>25</sup> Page 15, Line 23 - Page 17, Line 3.

20 estate market that the property that adjoins  
21 something like a golf course or a lake would  
22 be more valuable because of what it adjoins.

Jeffrey Ross Hays:

Page 15

2 Q What documentation are you aware of that  
3 would show a loss in value to property around  
4 the golf course?

5 A Specific documentation would be  
6 fliers like this one that I have. This is my  
7 direct neighbor, and probably two or three  
8 other houses on my street have been listed  
9 for a long time, have not sold.  
10 I am of the opinion that, you know, the  
11 closing of the golf course, lack of not known  
12 or not knowing what's going to happen to the  
13 golf course is impacting these home sales.

...

Page 18

21 Q Now, you say we all paid a premium  
22 for living on the golf course. Tell me about  
23 the premium you paid for living on the golf  
24 course.

25 A I paid \$230,000 for the house in

Page 19

1 1998. I was not specifically looking at  
2 houses that weren't on the golf course, but a  
3 similar house across the street or in the  
4 subdivision, Habersham subdivision across  
5 Nuckolls Road would have been less than that.

Gerald W. Buran:

Page 21

9 So it would be, in my opinion, an amenity to  
10 the home just like in every other subdivision that has  
11 golf course lots where they charge a premium for  
12 properties adjoining the golf course.

Randall Bassett:

Page 9

25 Q Tell me what those common reasons are?

Page 10

1 A Like to golf, are members of the golf course

2 when we bought the homes. We had access to the golf  
3 course to walk and play in the evenings.

4 In addition, a few of us bought golf carts  
5 from George Bagley, one of the owners of the golf  
6 course, and was told that we could drive those on the  
7 course at any time, as long as we didn't play golf  
8 from the golf cart, and we did so on multiple  
9 occasions.

10 In addition, we paid a premium for being able  
11 to be on the golf course, so that our townhouse would  
12 cost more than it would if it was situated some  
13 distance away.

...

Page 14

5 Q I just want to know the facts. Did you, you  
6 know, other than there is a golf course next door to  
7 me, it's been there a long time, I guess it's going to  
8 always be a golf course, did you have any other reason  
9 for that assumption?

10 A No, I believed it would be a golf course  
11 forever. That's why I bought that townhouse there.

...

Page 16

7 Q So, the value of your townhouse, by virtue of  
8 being next to the golf course, that provides you for a  
9 basis of thinking that the golf course should always  
10 be there; is that what you're saying?

11 A No, no, the value of our townhouse is higher  
12 because there is a golf course there, and we paid more  
13 money for the townhouse than if it was not on a golf  
14 course.

Gerald Thomas Sullivan

Page 22

19 Q Do you mean a criteria for damages  
20 or for payment of some kind of damages?

21 A I don't expect it to go down that  
22 road, so it's tough to say that. As to, I  
23 guess if you take away an amenity such as the  
24 golf course which would definitely de-value  
25 the property, then I guess it would be

1 damages.

Page 23

Charles D. Pratt:

Page 14

11 I'm going to ask you some questions about  
12 yourself vis-a-vis the rest of the owners of the  
13 properties adjacent to the golf course.

14 And you say in paragraph number 4 of your  
15 affidavit, you refer to them as other similarly  
16 situated homeowners.

17 And other than the fact that you all like the  
18 golf course and feel like it should stay a golf  
19 course, how are you similarly situated?

20 A Well, nine of us live in the same building.  
21 36 of us live contiguous -- we basically live along  
22 the boundary of the golf course lake, and then almost  
23 to the end of green number 2.

24 We basically all bought our property because  
25 it's on a golf course. More importantly, we bought it

Page 15

1 because of the view that we have out of our backs.

2 I mean, you know, I think that's the reason  
3 they were built there, because they did a really nice  
4 job of locating it.

5 Almost all of us are retired. Almost all of  
6 us live here because we have family here. Most of us  
7 paid a premium for living on a golf course. We knew  
8 we were doing that.

...

Page 17

11 Q So what do you base your statement that you  
12 believe the contested facts would be the same on?

13 A The fact that we both live on a golf course.

14 Q That's it?

15 A And the golf course, if it sells, is going to  
16 impact us the same way.

Martina Williams Power:

Page 12

17 Q In what way, and I'm looking at  
18 paragraph five of your affidavit, in what way  
19 do you believe you're similarly situated to  
20 other homeowners around the golf course?

21 A We are, we all have the same vested  
22 interest. We all do not wish to lose our,  
23 quote, quote, golf course view as it would,

24 it would hurt our property value.

### 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. 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.

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).<sup>26</sup> 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 individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential

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<sup>26</sup> 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).

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").

#### 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 (11<sup>th</sup> 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 Fact 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 exist 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.



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