STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON/RICHLAND

IN THE COURT OF COMMON PLEAS
C/A NO. 2021-CP-40-04582

Road/Route I-20/I-26/I-126 (Carolina Crossroads)
Project ID No. P027662
Tract 195

South Carolina Department of Transportation

Condemnor.

v.

Briargate Condominium Association, Inc. (HOA) and Mohammed Arabi, as class representative for himself and all unit owners, to pursue just compensation for all unit owners

Landowner(s),

and

Magna Capital, Mortgagee, The National Bank of South Carolina, Mortgagee, South Carolina Department of Revenue, Tax Liens, Arrow Financial Services, LLC, Judgment, Portfolio Recovery Associates, LLC, Judgment, The National Bank of South Carolina, Mortgagee, State Employees Credit Union, Mortgagee, NBSC a division of Synovus Bank, Mortgagee, Carolina First Bank, Mortgagee, Richland County, Judgment, Bank of America, N.A. c/o Cooling & Winter, LLC, Judgment, Department of Treasury-Internal Revenue Service, Judgment, HSBC Mortgage Corporation, Mortgagee, First Community Bank-Gilbert, Mortgagee, America's Wholesale Lender, Mortgagee, William R. Hollingsworth, Jr. and Myong Hollingsworth, Mortgagee, First Palmetto Savings Bank, Mortgagee, MERS as nominee for ERA Mortgage, Mortgagee, The Resolution Trust Corporation as Receiver for Metropolitan Federal Savings and Loan Association, Mortgagee, Wachovia Bank National Association, Mortgagee, The Resolution Trust Corporation as Receiver for Metropolitan Federal Savings and Loan Association, Mortgagee, Brittany Frances Minogue,

ORDER GRANTING MOTION TO CERTIFY CLASS AND SCHEDULING ORDER

Mortgagee, Mutual Savings Bank, F.A., Mortgagee, Richland County Tax Assessor, Delinquent Taxes, Bank of America, N.A., Mortgagee, UCC Financing, Miriam Properties Group, LLC, Turnberry Associates, Inc., Mathes Auto Sales, Inc., BB&T of South Carolina, Navy Federal Credit Union, Briargate Condominium Association, Inc., Foreclosure Action

Other Condemnee(s).

This matter came before this Court for a hearing held via WebEx on January 9, 2024. Attending the hearing were counsel for the Landowners, and David G. Pagliarini, Esquire, counsel for SCDOT. In support of to the Motion to Certify the Class, the Landowners have submitted the following affidavits: Affidavit of Mohammed Arabi, Affidavit of Michael Munson, Affidavit of Thomas H. Pope III, and Affidavit of Expert Gibson Solomons. The Landowners also submitted a Memorandum in Support of the Motion and a Supplemental Memorandum with attached exhibits. SCDOT submitted its Memorandum in Opposition to the Motion to Certify dated February 5, 2024. This Court has carefully considered the filings of the parties and the arguments of counsel and for the reasons set forth herein grants the Motion to Certify the Class. This Court notes that, in granting class with certification, it does not address or rule on the issues in this case – i.e., what just compensation should be awarded to the HOA or to the unit owners. The Court heard from counsel as to its Motion for Scheduling Order and accordingly will rule here on the specifics of same.

BACKGROUND

Briargate Condominium Association, Inc. ("Briargate" or "HOA") is a horizontal property regime as authorized by the South Carolina Horizontal Property Act, S.C. Code § 27-31-10 et. seq. Pursuant to state law, Briargate filed its Master Deed (with Bylaws attached) in the Office of Clerk

of Court of Richland County in Deed Book 689 at Page 01 on March 30, 1984. S.C. Code § 27-31-150 provides that the administration of property constituted into a horizontal property "shall be governed by bylaws which shall be inserted in or appended to and recorded with the Master Deed."

Briargate consists of approximately 20 acres, an office building, 14 condominium buildings (with 24 units each), a swimming pool, tennis court, playground area, hundreds of parking spots, garage buildings, roads, and sidewalks. There are a total of 336 units in these 14 buildings and they are owned by 164 persons or entities.

The Horizontal Property Act of South Carolina defines "common elements" in S.C. Code § 27-31-20(f) as follows:

> (f) "General common elements" means and includes:
>
> (1) The land whether leased or in fee simple and whether or not submerged on which the apartment or building stands; provided, however, that submerged land developed or used under this chapter is subject to any law enacted relating to the leasing of submerged lands by the State for the benefit of the public;
>
> (2) The foundations, main walls, roofs, halls, lobbies, stairways, moorages, walkway docks, and entrance and exit or communication ways in existence or to be constructed or installed;
>
> (3) The basements, flat roofs, yards, and gardens, in existence or to be constructed or installed, except as otherwise provided or stipulated;
>
> (4) The premises for the lodging of janitors or persons in charge of the property, in existence or to be constructed or installed, except as otherwise provided or stipulated;
>
> (5) The compartments or installations of central services such as power, light, gas, cold and hot water, refrigeration, reservoirs, water tanks and pumps, and the like, in existence or to be constructed or installed;
>
> (6) The elevators, garbage incinerators, and, in general, all devices or installations existing or to be constructed or installed for common use;

> (7) All other elements of the property, in existence or to be constructed or installed, rationally of common use or necessary to its existence, upkeep, and safety;"

The Briargate Master Deed defines "Common Elements" (which are the responsibility of the Briargate HOA) as follows:

> "Land; parking areas; garages; swimming pools; pool house; tennis courts; laundries; club house; office; maintenance shop; entrance hallways; stairways; storage areas; sump pumps; landscaping improvements; all personal property held and maintained for the joint use and enjoyment of all Unit Owners; all leases of personalty and service contracts assigned to the Association by Declarant; those portions of any chute, flue, duct, wire, or conduit, located partially within and partially outside Unit which serve more than one Unit or any portion of Common Elements; load-bearing columns and load-bearing walls; all real property, improvements and facilities other than the Units and Limited Common Elements."

The Master Deed defines "Non-Common Elements" (which are owned by, and the responsibility of, the unit owners) as follows:

> "All components located within or constituting the boundaries of the unit including, but not limited to: wallboard; wallpaper; paint; all finished flooring; appliances; carpet; exterior doors, including sliding glass doors; windows; all pipes, ducts, electrical wiring and conduits located entirely withing Unit and serving only such Unit."

The unit owners, per the Master Deed and the law of South Carolina, have an undivided fee simple interest in all properties of the Briargate Condominium Association.

The elements of compensation asserted in a condemnation case include just compensation and remainder damages to each property interest of a landowner. Based on the definitions in South Carolina law and in the Master Deed, just compensation and damages sought by the HOA are entirely different from those sought by the unit owners.

This condemnation action was commenced by SCDOT's filing a Condemnation Notice on September 9, 2021.[1] The condemnation project includes the widening of I-20, which is contiguous to Briargate. The taking in this instance, based on the documents provided, includes the demolition and removal of Building 6 (with 24 units) as well as eliminating over 50 parking places, portions of several garage buildings, and a large segment of the perimeter road. In addition, the landowners assert that expansion of the existing right-of-way will bring the highway significantly closer to the remaining buildings of Briargate.

The Landowners have asserted in support of their Motion to Certify the Class that the most equitable and efficient way to resolve all just compensation issues in this case is for the 164 unit owners' claims to be resolved by designating a class representative to pursue all claims for just compensation for the unit owners ("non-common elements"). A class action will allow one representative to pursue these claims for all unit owners in one proceeding.

The SCDOT Memorandum in Opposition asserts that "this acquisition is solely for common elements" (Memorandum, p. 5); however, the Condemnation Notice, which lists as "Landowners" the HOA and all unit owners[2], does not restrict its scope to common elements only since the claims of unit owners must be addressed to have full closure of this matter. The Landowners have presented the class action device as a means to fully resolve all claims arising out of the taking.

[1] The Landowners were originally represented by different counsel who withdrew by Order of the Court dated April 3, 2023, due to health issues. Current counsel filed Notices of Appearance on July 12, 2023, and September 6, 2023.

[2] Exhibit C to the Affidavit of Landowners' Counsel includes a current list of all unit owners and notes that the Condemnation Notice filed by SCDOT incorrectly includes persons/entities that do not own units at Briargate and fails to include persons/entities that do own units.

LEGAL STANDARD

Rule 23(a), SCRCP, provides that one or members of any class "may sue or be sued as representative parties on behalf of all" only if the court finds:

(a) the class is so numerous that joinders of all members is impartial;

(b) there are questions of law or fact common to the class;

(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(d) the representative parties will fairly and adequately protect the interest of the class; and,

(e) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Proponents of class certification have the burden of proving that the prerequisites of class certification have been met. Waller v. Seabrook Island Property Owners Association, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990). The trial court is to apply a rigorous analysis to assume that the prerequisites of Rule 23(a) have been satisfied. Under the law of South Carolina, an analysis of the facts and law, both as to the claims and defenses asserted, must focus on the appropriateness of class treatment, not the merits of the case. King v. American General Finance, 687 S.E.2d 321 (2009). It is also the law of South Carolina that the proponents must satisfy all of the prerequisites of Rule 23(a) for a motion to certify to be granted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Landowners have satisfied all of the prerequisites of Rule 23(a), SCRCP.

1. **Numerosity.** The number of class members (there are 336 units which are owned by 164 unit owners) is so numerous that joined is impractical. The practicality of joinder depends on several factors, including, for example, the size of the class, the ease of identifying its numbers and determining their addresses, and the facility of making service on them. George v. Duke Energy Retirement Cash Balance Plan, 259 F.R.D. 225, 231 (D.S.C. 2009). Here, the

HOA has the names and addresses of the unit owners. Certifying the class will enable all 164 unit owners to have their claims adjudicated.

2. **Commonality.** All class members seek just compensation for their units, including proximity damages and damage to the remainder of their units. These issues of law and fact common to all are "of sufficient importance in proportion with the rest of the action to render it desirable that the whole of the matter should be disposed of at the same time." McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986); see also, Salmonsen v. CGD, Inc., 377 S.C. 442, 446-447, 661 S.E.2d 81, 84 (2008).

3. **Commonality.** The class representative's claims are typical of those of the class. Mr. Arabi owns 124 units at Briargate and at least one unit in each of the 14 condominium buildings. The class representative's claims are in no way adverse to those of the class; they are compatible and virtually identical to those of the class members in the 14 buildings at Briargate.

4. **Adequacy.** South Carolina law requires that a class representative not be antagonistic towards the interest of the class. Mr. Arabi, as stated above, owns units in each of the 14 condominium buildings. His ownership of 124 units constitutes over 36% of the total units at Briargate. He has a degree from the University of South Carolina and is an experienced business person. He has a keen interest in just compensation for all members of the class. Further, Mr. Arabi has hired qualified and experienced counsel (referenced above) and they are most adequate to handle this case and to guide the class representative in this case. This Court finds that class counsel are "qualified, experienced, and able to conduct the proposed litigation," South Carolina National bank v. Stone, 139 F.R.D. 325, 329 (D.S.C. 1991), and that the proposed class representative and his counsel will adequately represent the interests of the class.

5. **$100 Requirement.** This Court finds that the claims of Mr. Arabi and the class members' claims meet the requirement of Rule 23 that the claims have a value in excess of $100.00.

SCDOT asserts in its memorandum that class treatment should be denied because the court should only consider just compensation "for the common area acquired." It suggests that unit owners, to assert a claim, should bring separate actions for inverse condemnation claims (SCDOT Memorandum, p. 10). This is incorrect as this is a direct condemnation of Briargate in which the Notice attempts to name all unit owners. These owners have claims (or potential claims) for just compensation to 336 units and damages to remainder regardless of the fact that many claims may

be for damage to the remainder and outside the "common area acquired." An inverse condemnation is not a direct condemnation, but one which arises when a government agency commits a taking of private property through government action without exercising its formal powers of eminent domain. See, for example, Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (2004) (where the landowner claimed that the city's maintenance of its drainage systems caused flood damage to landowner, amounting to an inverse condemnation). SCDOT's position would require hundreds of separate cases for inverse condemnation to resolve the claims for unit owners when they are already named in, and impacted by, this direct condemnation. SCDOT's position is not efficient nor equitable, particularly for unit owners with smaller claims who could not afford their own lawyer or real estate appraiser. Further, SCDOT's suggestion is not only inapposite legally, but far less efficient and more inequitable than class treatment.

This Court further finds and concludes that, without class certification, adjudication of the just compensation claims would potentially involve over 160 trials and that closure would be protracted with no end in sight. Further, this Court finds that all prerequisites of Rule 23 have been satisfied and that the proposed class action here is an appropriate and efficient method of providing a resolution for both the unit owners and SCDOT.

THEREFORE, IT IS ORDERED as follows:

(a) The Court grants the Motion for Class Certification;

(b) The Court appoints Mohammed Arabi as class representative, for himself and all other unit owners;

(c) The Court appoints Thomas H. Pope III, Esquire, Walter H. Bundy, Jr., Esquire, and Michael Brent McDonald, Esquire, as class counsel;

(d) The definition of the class shall be: "All unit owners at Briargate seeking just compensation and/or damage to remainder who have not settled with SCDOT as of January 22, 2024";

(e) The caption of the case is revised as set forth above to include as landowners, Briargate Condominium Association, Inc. (HOA), and Mr. Arabi, as class representative for himself and all unit owners, to pursue just compensation for all unit owners;

(f) A proposed Class Notice (with Exclusion Form) will be agreed upon between counsel, or in any event submitted to this Court for approval. After approval, Landowners' counsel will arrange for service on the class members, which will give them the right to opt-out or exclude themselves from the class – deadline to opt-out is 30-days after service or by April 1, 2024, whichever is sooner; and,

(g) In the event this matter is settled (or concluded by trial), this Court will appoint a neutral third-party administrator to determine the allocation of money among the class members; this administrator has discretion with finality to resolve the allocation in a written report. The expenses of the third-party administrator will be paid pursuant to the Order of this Court based on either agreement of the parties or Order of the Court.

IT IS FURTHER ORDERED THAT the following Scheduling Order is applicable:

1. All appraisal reports will be served by April 15, 2024;

2. Discovery will be completed by June 10, 2024;

3. Mediation will be held by June 30, 2024;

4. Trial to be set not before August 15, 2024;

5. This Court will retain jurisdiction to approve the Class Notice; and,

6. This Scheduling Order can be revised by agreement of counsel or, upon motion, by Order of the Court for good cause.

AND IT SO ORDERED.

_____, 2024

_____
The Honorable Eugene C. Griffith, Jr.

Richland Common Pleas

Case Caption: South Carolina Department Of Transportation vs Briargate Condominium Association , defendant, et al

Case Number: 2021CP4004582

Type: Order/Class Certification

It is so ordered

Eugene C. Griffith, Jr. 2154