

State must pay for common area condemnation

N.C. DEP'T OF TRANSP. V. FERNWOOD HILL TOWNHOME HOMEOWNERS

The state must compensate lot owners for condemning a piece of their townhouse community's common area, the Court of Appeals has ruled in a first-impression decision.

The development's individually owned lots and the contiguous portion of the common area condemned for a Department of Transportation highway project formed a "single, unified tract," according to the unanimous Sept. 4 decision.

Even though the community's homeowners' association — not the individual lot owners — held title to the common area, the appellate court found that "substantial unity of ownership" existed.

This unity was created by each townhouse owner holding a fee simple estate in his or her unit along with an interest in the entire common area through a general easement and an interest in the other units through a restrictive covenant.

"The Association, therefore, has established a substantial unity of ownership across the entire development," wrote Judge Martha A. Geer.

The decision builds on a 2005 case, *N.C. Dep't of Transp. v. Stagecoach Village*, 360 N.C. 46, in which the Supreme Court held that individual townhouse owners were necessary parties in a case in which their community's common area was condemned.

In this case, the Court of Appeals made an important move by bringing the townhouse owners' property into the picture for the purpose of determining damages, said Raleigh attorney George B. Autry.



Stephanie
Autry



George
Autry

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Most Important Opinions

As a result, the state could end up paying higher compensation amounts for the taking of townhouse community common areas, Autry said.

"The issue of the property wasn't raised in the *Stagecoach Village* case, so the court couldn't fashion a remedy," said Autry, who represented the homeowners' association. "This case gives them a remedy."

The decision is *N.C. Dep't of Transp. v. Fernwood Hill Townhome Homeowners' Association, Inc.* (North Carolina Lawyers Weekly, No. 07-07-1071, 14 pages). Judges John M. Tyson and Ann M. Calabria concurred.

'NOVEL QUESTION'

When the Department of Transportation initiated the condemnation action in August 2004, it estimated that \$5,300 would be just compensation for taking the 0.14-acre piece of the Fernwood Hill townhouse development's common area.

This amount covered only the common area, which completely surrounded and lay contiguous to the development's six individual lots. It did not cover compensation for the individual lots, which DOT had not sought for its highway project.

The homeowners' association answered DOT's condemnation action by filing a motion to add all the individual townhouse owners as necessary and proper parties.

The association then filed a second motion under G.S. § 136-108, in which

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it sought a ruling that the “subject tract,” for the determination of just compensation, consisted not merely of the common area but the whole townhouse community, including the individually owned properties.

“As a matter of fairness, it did not seem right and what the law was supposed to be — that these townhouse owners could have a super slab highway built within a few feet of their units and not receive any compensation,” said Stephanie Autry, who also represented the homeowners’ association.

A Vance County Superior Court judge held for the association on both motions. The state appealed.

On appeal, the state conceded that *Stagecoach Village* required joinder of the individual townhouse owners as necessary parties in the condemnation action, but it raised the issue in order “to preserve these questions for possible further review” by the Supreme Court.

On that issue, the Court of Appeals followed *Stagecoach Village* and affirmed the trial court.

However, no North Carolina case directly addressed what the appellate court labeled “the crux of this appeal” — whether the individual lots and common area comprised a single, unified tract for the purpose of awarding damages or offsetting benefits.

This presented a “novel question,” the Court of Appeals said. According to the association’s attorneys, it also presented a research challenge.

“We had to be creative and go outside of the condemnation context to establish that the townhouse owners had a property right in the parent tract,” Stephanie Autry said.

“I think the court knew the right end result, but there were some tricky spots in the law,” George Autry said. “We

had to connect the dots, and I think we provided the court with some firm standing.”

UNITY OF OWNERSHIP

In particular, the attorneys turned up case law to support a key aspect of their argument — that unity of ownership could be established by showing the townhouse owners had a property interest in the common area.

In determining whether the condemned tract was part of a larger, unified tract, the appellate court said it needed to look for the presence or absence of three unities.

The DOT did not contest the trial court’s conclusion that two of those unities existed — the unity of use and physical unity — but it did challenge whether unity of ownership existed in the case.

Showing unity of ownership, the opinion said, was “indispensable.”

In its brief, the DOT argued that under *Bd. of Transp. v. Martin*, 296 N.C. 20 (1978), the homeowners’ association needed to show that the parties had both an interest *and* estate in the entire townhouse community tract in order to show unity of ownership.

However, a 1995 case raised by attorneys in the association’s brief, *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, established another proposition: The owners needed instead to only show that at least one party had some interest *or* estate in the entire tract — not both.

The appellate court, following *Yarbrough*, said this interest could be established by looking to two provisions in the townhouse community’s governing document:

- A right and easement of enjoyment in and to the common area, appurtenant and conveyable with the title to every lot; and

- A restrictive covenant regulating architectural control, animals on the premises and use of the parking lot (among other matters), with a right granted to each owner to enforce the covenant.

“We note the well-established principal that an easement is an ‘interest in land’ ... [and] ... the easement held by the individual owners is not an easement in some portion of the common area, but in the entire common area,” Geer wrote.

As far as the restrictive covenant, the appellate court found that it created an “incorporeal right” of “distinct worth.”

Even though the opinion said that the property interest established by these provisions meant the common area and individual townhouse lots could be treated as a “single, unified tract,” the opinion did not state the consequences of this treatment.

Stephanie Autry said that, in her view, treating the entire townhouse community as a single tract would mean that diminution of value to each townhouse lot would need to factor into an overall award of damages.

Instead of the state paying the homeowners’ association \$5,300 in compensation, the state could instead find itself paying “hundreds of thousands,” she said.

The impact will be seen in how the DOT handles future condemnation cases involving townhouse developments, George Autry said.

“If the taking of a common area has effect on the owners’ property rights, the DOT will need to look at that and bring all of the property into play in determining whether the property has been injured or not,” he said.

“For better or worse, I think that’s the way we’d all want to be treated if that was our home.”