



Office of County Commissioners  
130 Jacob's Way, Suite 301, Clarkesville, GA 30523  
706-839-0200 Fax: 706-839-0209  
www.habershamga.com

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April 20, 2023

Mr. Thomas Wigley, CEO  
The Orchard Property Owners Association II, Inc.  
229 Pippin Circle  
Clarkesville, GA 30523

Dear Mr. Wigley:

As you and The Orchard Property Owners Association II, Inc. (The Orchard) are aware, Habersham County (HC) is the owner of Lot 20, Phase 9 of The Orchard subdivision by virtue of that certain Habersham County Deed for Public Use conveyed to Habersham County by Virgil E. Lovell on October 5, 1999, recorded in Deed Book 489, Page 910, Habersham County records. The deed expressly conveyed Lot 20 subject to the Declaration of Covenants and Restrictions for the Orchard subdivision dated November 21, 1988, as amended. The covenants restrict the use of all lots within the subdivision to residential uses. However, a water tower was constructed on the lot many years ago, presumably shortly after HC received the deed. The water tower is owned by the City of Demorest. Essentially, this creates a ground lease from HC to the City for public use.

HC has determined to proceed in erecting a public communications tower for use in its emergency response system. There were two issues considered by HC before deciding to proceed with the erection of the communications tower on this site. Before discussing the legal issues, it should be noted that HC has sought to shorten the tower below 200 feet in height so as to remove the requirement for a flashing light on top. In response the technical group advising the County has approved a shorter tower of 190 feet in height which does not compromise the effectiveness and feasibility of the tower at this site. Also, multiple alternate sites have been considered with none offering the coverage or feasibility of this site. Thus, the County intends to proceed with construction of the communications tower on its property.

As mentioned above, there are two primary issues: (1) whether the exercise of eminent domain can be used to free the lot from the restrictive covenants and (2) whether the County has the right to use the lot for public purposes without the exercise of eminent domain given the fact that the County owns the lot and has used the lot for public purposes for approximately 20 years or longer.

The Georgia Constitution grants the County a right to condemn property for "any public purpose". See [Ga. Const. Art. IX, Sec. II, Par. V](#). In the general provisions applicable to the exercise of the power of eminent domain, the term "interest" is defined as any title or nontitle interest other than fee simple title. O.C.G.A. § 22-1-1(6). Thus, Habersham County has the statutory authority to exercise the power of eminent domain as to any interest in property intended for public use and this

definition would give the County the authority to condemn any interest in the property, such as easements. This broad definition would also apply to any interests created by restrictive covenants. Notwithstanding the County's authority to condemn, there is an underlying issue as to whether restrictive covenants are construed as property rights. In that regard, Georgia law provides that restrictive covenants do not create property rights in favor of surrounding property owners which would give the surrounding property owners the right to enjoin the government's right to use the lot for public purposes. This particular issue was addressed by the Supreme Court of Georgia in *Anderson v. Lynch*, 188 Ga. 154, 3 S.E.2d 85 (1939). In *Anderson*, a lot owner in a subdivision sought to sell his lot to Fulton County for use as a public road. Other lot owners within the subdivision filed an action to enjoin the transaction claiming that the restrictive covenants for the subdivision prevented this use. The trial court dismissed the lawsuit and the lot owners appealed. The Supreme Court upheld the dismissal of the lawsuit as the Court determined that the covenants did not convey property rights to the surrounding lot owners. Further, the Georgia Supreme Court further reasoned that if restrictive covenants were construed to burden the free right of the county to acquire and use the property for the purpose of establishing a new public road, such a construction would be contrary policy and void. The Court ruled that the restrictions **should be construed as "not intended to apply so as to prevent the county authorities from acquiring and using any of the lots for the purpose of a public road, or to prevent anyone from selling or dedicating his lot for that purpose."**

Notwithstanding the fact that HC has the legal right to use eminent domain to condemn any interest in this parcel which would prevent the construction of the communication tower, it is obvious that HC has the right to construct the tower without condemnation. This parcel is uniquely situated in that (a) HC owns the lot in question; (b) the warranty deed in favor of HC was for public use and (c) HC has used the lot for public purposes for more than 20 years. Under *Anderson*, the surrounding property owners have no right to enjoin the construction of the tower since they have no property rights in the property. Consequently, HC will proceed to construct the necessary tower on parcel 20 for the public health, safety and welfare of the citizens of Habersham County. Our hope is that the residents of The Orchard also recognize the necessity of the tower and how it affects the health, safety and welfare of ALL citizens of Habersham County.

Sincerely,



Ty Akins  
Chairman

Habersham County Board of Commissioners



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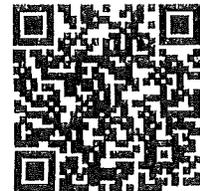
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PS Form 3800, April 2018 PSN 7530-02-000-9047 See Reverse for Instructions