THE KILBY GROUP

A Review of The Bibb-Monroe county boundary line in dispute

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The Superior Court rejects the SOS's notion that Monroe County initiate the statutory process all over again starting with the Grand Jury a second time and with the governor appointing a new surveyor. SOS Kemp's balk to sign, stamp, and/or record the legal plat of survey ordered by the Governor is no different than if it were some subordinate member of his staff that refused. Just because Kemp is the Department Head, he has no authority to not fulfill his duty. It is his department that must provide the public service, that service being of an administrative nature (ministerial), not a judicial nature.

So when the SOS, Brian Kemp attempted to avoid his statutory responsibility of recording the plat depicting the official boundary line between the counties of Monroe and Bibb…thus as a result that's exactly why O.C.G.A. § 9-6-20 becomes necessary, to ensues a remedy in a two-pronged test through the writ of mandamus. The statute provides in relevant part "That all official duties should be faithfully performed and whenever from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights;" and;

O.C.G.A. § 36-3-24 provides that if a protest or exception to the survey and plat is filed in the Secretary of State's office within 30 days, it shall be the duty of the secretary of state to give, through the mail, ten days written notice of the time when he will hear the protest or exceptions at his office to the county governing authorities of the respective counties. Upon the hearing, the secretary of state shall determine from the law and evidence the true boundary line in dispute between the respective counties.

The Statutes permits the SOS some flexibility as to how he will hear the "protest or exceptions" from the objecting county before determining "from the law and evidence the true boundary line in dispute between the respective counties." O.C.G.A. § 36-3-24

The proceedings in this case were filed in an action for Judicial Review, filed by Monroe County challenging the action of the SOS in rejecting the survey and plat submitted for recording under the Statute; the ("2011 Action"). The Court dismissed the 2011 Action, finding, pursuant to Early County v. Baker County, 137 Ga. 126, 72 S.E. 905 (1911), that the legislature intended the SOS to perform ministerial acts, and not judicial acts, in determining the true boundary line between disputing counties. The Court further concluded that the record in the 2011 Action reveals that on August 9, 2005, Georgia Governor Sonny Perdue III appointed a surveyor, who was found to be independent and qualified to survey the boundary line in accordance with O.C.G.A § 36-3-20. On March 27, 2009, after eight months of work by himself and his crew, the surveyor submitted to Bibb and Monroe Counties and to the SOS, pursuant to the statutory procedure set out in O.C.G.A. § 36-3-22, his completed survey and plat along with a narrative report incorporating his assessment

of ancient history records pertinent to the location of the boundary line. Before completing the survey, the surveyor and his crew undertook extensive research and efforts on the ground to identify the beginning and end points of the disputed county line and the "Holt Alteration," which was created by the Georgia Legislature in 1877 so that the lands of Dr. Holt and his family would be in Bibb County, not Monroe, County.

The Surveyor took the position that he would not appear and testify until Bibb County had paid him for its portion of the survey fee…over $170,000. The Court does not condone the Surveyor's refusal to appear until paid. The Court notes, nevertheless, that the SOS, while well aware of the Surveyor's position did not use the power of his office to obtain Bibb's portion for the Surveyor's fee until after oral arguments on May 31, 2011, virtually assuring that the Surveyor would not participate in the process. Furthermore, the SOS rejected the Surveyor's subsequent attempts to appear and provide input after he was paid. Finally, the SOS denied Monroe County a hearing on reconsideration, when the Surveyor's resistance to appearing had been resolved.

Pursuant to O.C.G.A. § 36-3-23, Bibb County filed a protest to the survey triggering the SOS's responsibility to determine the true boundary line, pursuant to O.C.G.A. § 36-3-24. Undertaking her duties, on August 7, 2009, Karen Handel the predecessor to the current SOS, Brian Kemp, chose to refer the boundary dispute to the Office of State Administrative Hearings ("OSAH") for a preliminary hearing and counsel. OSAH assigned an Administrative Law Judge (ALJ) to the case. On October 9, 2009 the matter was withdrawn from the assigned ALJ and reassigned to a Special Assistant Administrative Law Judge (SAALJ), who was an attorney with real estate experience.

The SOS directed the SAALJ to address four specific issues, which are summarized as follows:

(1) Whether the survey depicts the true boundary line between Bibb and Monroe Counties as established by the Georgia General Assembly; and

(2) Whether the survey accounts for every change in the boundary line between Bibb and Monroe Counties, including all changes made pursuant to the Statute; and

(3) Whether additional evidence exists that may substantially alter or prove support to the results of the survey; and

(4) Whether the methods utilized by the surveyor in conducting the survey were in accordance with applicable principles and industry standards in Georgia.

Bibb and Monroe Counties presented evidence and oral arguments to the SAALJ and the SAALJ issued a detailed Finding of Facts and Recommendations. The SAALJ responded to each of the four questions raised by the SOS, finding for the four specific issues as follows:

1. That the survey does depict the true boundary line between Bibb and Monroe Counties as established by the Georgia General Assembly.

2. That the survey did account for every change in the boundary line between Bibb and Monroe Counties, including all changes made pursuant to the Statute.

3. That no additional evidence has been shown that may substantially alter or prove support to the results of the survey and;

4. That the methods utilized by the surveyor in conducting the survey were in accordance with applicable principles and industry standards in Georgia.

Based on the law and evidence, the SAALJ concluded that the survey is "an accurate description of the true boundary line between Bibb County and Monroe County" and recommended that the SOS accept the survey. Common wisdom provides him with the answer, but no; the current SOS decided after considering the SAALJ's finding of fact and recommendations, he rejects the SAALJ's recommendation and just walks out on the survey. In his final determination he asserts that the decision was not subject to appeal, except on the grounds of "fraud and abuse" and that the only way to establish the disputed boundary line was to begin the statutory process all over again from the grand jury level.

Monroe County filed a Motion for Reconsideration, requesting the SOS to reconsider his final determination or hold a new evidentiary hearing. The SOS denied the Motion and the proposal for a new evidentiary hearing. The Court determined that Judicial Review is not an available remedy to challenge the final determination. Nonetheless the Court held that the statute gives Monroe County the right to a "definitive boundary line once the SOS concludes the statutory process of hearing, protest and exceptions. O.C.G.A. § 36-3-24"

In Early County v. Baker County, the Supreme Court definitively state as follows:

The 1899 statute at issue in Early County involves the exact same delegation of duty to the

SOS…to determine the location of county boundary lines as the statute.

The [1899] statute did not contemplate a lawsuit between the counties; it devised a process by which the line as originally fixed by the Legislature in the formation of the counties, shall be ascertained and made certain…the scope of the legislation is to ascertain the location, which the Legislature has previously established[.]

Early County v. Baker County, 72 S.E. at 906 (emphasis added).

And therein the Court reaffirmed the holdings from the (2011) action, citing that Statute mandates, that at the end of that process the disputing counties have a definitive boundary line. The Court rejected the SOS's argument that the SOS has discretion, in the exercise of his judgment, to avoid his statutory obligation to set a boundary line by closing the record and rejecting the survey.

And finally, there is no remedy other than mandamus by which Monroe County can adequately obtain the relief it seeks. The court rejects the option proposed by the SOS…that Monroe County initiate the statutory

process all over again starting with the Grand Jury a second time and with the governor appointing a new surveyor. The residents of Bibb and Monroe Counties have lived with uncertainty concerning development, allocations of taxes and the jurisdiction of police and fire for decades. These counties have been engaged in the statutory process since 2005, outliving the administration of the governor who appointed the surveyor and spanned the administrations of two secretaries of State.

The purpose of O.C.G.A. § 36-3-20 et seq. is to provide certainty and resolution for counties such as Bibb and Monroe who have devoted eight years and spent roughly two million taxpayer dollars only to arrive back where they started. Furthermore, without the issuance of a mandamus there can be no assurance that initiating another statutory process the second time, the third, etc. would result in the determination of the boundary line, given the SOS's historic performance. The SOS is specifically charged with determining the county boundary line. Twice the SOS has failed to do so. Accordingly, given these extraordinary circumstances presented by this case, granting a writ of mandamus was warranted. And that is why the court issued a writ of mandamus to the SOS requiring him to comply with O.C.G.A. § 36-3-20 et seq. and establish the Bibb County/Monroe County boundary line by the recording of the March 27, 2009 Plat by Terry M. Scarborough.

O.C.G.A. § 36-3-24 states that "[u]pon the making of a decision by the Secretary of State…the Secretary of State shall cause the survey and plat to be recorded in a book to be kept for that purpose, whereupon the same shall be final and conclusive as to the boundary line in dispute."

Meanwhile residents along the Bibb-Monroe county line are left in shock with suspicion. The SOS continues to delay fulfillment of his ministerial duty of confirming the true boundary line dividing Bibb and Monroe County. The SOS is causing even more cost to the taxpayers by appealing to the Georgia Supreme Court. Why did he do this? Two Judges have fully endorsed the survey ORDERED by the Georgia Governor, Sonny Perdue…the Scarborough Survey!

Providing the Georgia Supreme Court doesn't send the appeal back to the Superior Court Judge and they agree to hear the SOS's appeal, the Court's schedule is late June of 2013. It's anyone's guess as to when the Supreme Court's official opinion will come; certainly it'll be some subsequent time thereafter.

The $64,000.00 dollar question is…will the SOS comply with O.C.G.A. § 36-3-24 and the Order of the Superior Court Judge, "by causing the survey and plat to be recorded in a book to be kept for that purpose, whereupon the same shall be final and conclusive as to the boundary line in dispute"…or, at the burden of the taxpayers, will the SOS reject the Statutes, the "law of the land" as "treacherous, ambiguous, and antiquated" and thereby leave the appearance of protecting the interests of Bibb County? If he chooses the latter, the SOS may well eliminate any remaining doubt regarding his servitude.