

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2013-CA-00406-COA**

**LOWNDES COUNTY, MISSISSIPPI BY AND  
THROUGH ITS BOARD OF SUPERVISORS**

**APPELLANT**

**v.**

**HAL H.H. MCCLANAHAN, III, MCCLANAHAN  
CAMP, LLC, JULIE GARTMAN AND DENNIS  
GARTMAN**

**APPELLEES**

DATE OF JUDGMENT:	02/04/2013
TRIAL JUDGE:	HON. HENRY L. LACKEY
COURT FROM WHICH APPEALED:	LOWNDES COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	TIMOTHY C. HUDSON COURTNEY BRADFORD SMITH
ATTORNEY FOR APPELLEES:	HAL H.H. MCCLANAHAN III
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	REVERSED THE LOWNDES COUNTY BOARD OF SUPERVISORS' ORDER ABANDONING A PUBLIC ROAD
DISPOSITION:	VACATED: 04/29/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**BEFORE IRVING, P.J., BARNES AND FAIR, JJ.**

**FAIR, J., FOR THE COURT:**

¶1. The Lowndes County Board of Supervisors voted to close a stretch of Co-Op Road, a paved county road near Columbus, Mississippi. A group of residents and landowners objected, contending that the road had provided the primary access to their properties and that the alternative access was too narrow.

¶2. On appeal, the circuit court found that the published notice of the hearing for the road closure had been insufficient. We conclude that the residents failed to take a timely appeal

from the Board’s resolution. Because a timely appeal is jurisdictional, we vacate the circuit court’s decision.

### FACTS

¶3. The portion of Co-Op Road at issue had been a railroad crossing, connecting two public roads running parallel to the tracks. A few hundred yards away, another public road provided another crossing connecting the same two roads. On October 31, 2011, the Board passed a resolution abandoning the Co-Op Road crossing. The resolution found among other things that the crossing “[did] not provide primary access to occupied premises” and “serve[d] only one land-owner who has requested abandonment.” After passing the resolution, the County erected barriers bearing “Road Closed” signs. The owner of the property on which the road had been situated, C & G Railroad, then destroyed the roadbed.

¶4. On November 30, 2011, the residents, in two groups, filed separate “Motion[s] for Reconsideration” contending, in identical language, that the Board “failed to comply with the statutory requirements of [Mississippi Code Annotated section] 65-7-121 under the four requirements for the abandonment of public roads.”<sup>1</sup> On February 5, 2012, the residents, now all together, submitted an “Amended Motion for Reconsideration.” This was followed by a “Second Amended Motion for Reconsideration” on February 6. The amended motions added the contention that the County should not have “closed” the road. Among other things, the residents claimed to have a private easement over the railroad crossing, and they

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<sup>1</sup> Presumably this is a reference to subsections (1)(a)-(d), though the statute sets out four independent grounds for abandoning a public road, not four requirements as the residents suggest.

requested that the County remove the barrier. The residents also suggested that the alternative route was too narrow to be used as a primary access to their properties.

¶5. On February 17, 2012, the Board, on the motion of one of its members, voted to “amend” its prior resolution to clarify that the County had not closed the road, but abandoned it.<sup>2</sup> The Board also ordered the barrier removed and replaced with a sign indicating the end of county maintenance. The residents filed a bill of exceptions from that decision, contending the Board acted “beyond the scope or power granted to [it] by statute, violate[d] the constitutional or statutory rights of the [landowners, and its action] is not supported by substantial evidence and/or is arbitrary and capricious.” This was supported by assertions relating to the underlying merits of abandoning the road.

¶6. On appeal, the circuit court was presented with competing “motions to dismiss.” The Board argued that the residents’ appeal should have been taken from the original resolution abandoning the road. In response, the residents filed a motion to amend their bill of exceptions to add the contention that they had not received sufficient notice of the October 31, 2011 hearing to abandon the road. The residents admitted that the notice had been published, but they contended it was not effective because the form of the publication – in the legal notices section of the local newspaper – was less conspicuous than the Board’s usual custom of purchasing large advertisements to announce road abandonments or temporary road closures. In support, the residents attached numerous published notices from

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<sup>2</sup> The October 2011 resolution said nothing about closing the road; it unambiguously “declare[d] [the road at issue] officially abandoned effective immediately.” Thus, the February 2012 “amendment” did not actually alter the prior resolution.

the past few years, all of which were set off from the body of the paper by an outlined box and a larger font.

¶7. The circuit court found the notice of the public hearing on the closure of the Co-Op Road crossing to have been constitutionally deficient because the Board “failed to meet the fundamental requirement of publishing a notice reasonably calculated to appraise interested parties of [its] intended action . . . .” The circuit court set aside the resolution abandoning the road. The County appeals from that decision.

### **DISCUSSION**

¶8. Mississippi Code Annotated section 11-51-75 (Rev. 2012) provides in relevant part that “[a]ny person aggrieved by a judgment or decision of the board of supervisors . . . may appeal within [ten] days from the date of adjournment at which session the board . . . rendered such judgment or decision . . . .”

¶9. “The statute’s [ten-]day time limit in which to appeal the decision of a Board is both mandatory and jurisdictional.” *Newell v. Jones County*, 731 So. 2d 580, 582 (¶10) (Miss. 1999) (citation omitted). “Where an appeal is not perfected within the statutory time constraints no jurisdiction is conferred on the appellate court; and the untimely action should be dismissed.” *Id.*; *see also S. Cent. Turf Inc. v. City of Jackson*, 526 So. 2d 558, 560-62 (Miss. 1988). The time for an appeal under section 11-51-75 begins to run “from the date of adjournment at which session the board of supervisors or municipal authorities rendered such judgment or decision.” § 11-51-75; *see also Alias v. City of Oxford*, 70 So. 3d 1114, 1119-20 (¶18) (Miss. Ct. App. 2010); *Rankin Group Inc. v. City of Richland*, 8 So. 3d 259, 260 (¶¶6-12) (Miss. Ct. App. 2009).

¶10. The residents did not file their appeal within ten days of the adjournment of the October 31, 2011 meeting. They nonetheless contend that their right to appeal was preserved because the Board effectively granted their motion for a rehearing by entertaining the residents' concerns and passing a motion to modify the execution of the original resolution. According to the residents, acquiescence to their request for a rehearing amounted to a "waiver" of the ten-day deadline for appealing.

¶11. The Mississippi Supreme Court directly addressed and rejected this argument in *Gatlin v. Cook*, 380 So. 2d 236, 237-38 (Miss. 1980). In *Gatlin*, the Jackson City Council expressly purported to grant a rehearing, but the supreme court held that the statute does not permit rehearings; a timely appeal under section 11-51-75 is the exclusive remedy. *Id.*; *see also Alias*, 70 So. 3d at 1122 (¶24).

¶12. It may be that where the required notice was not given, section 11-51-75 and its ten-day limitation can be bypassed, whether by certiorari<sup>3</sup> or some form of collateral attack. But that possibility has not been briefed or argued by the parties, and this Court is called upon to decide only whether this appeal, having been filed under section 11-51-75, conforms with the statute's requirements. It does not.

**¶13. THE JUDGMENT OF THE LOWNDES COUNTY CIRCUIT COURT IS VACATED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.**

**LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, MAXWELL AND JAMES, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION.**

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<sup>3</sup> *See* Miss. Code Ann. § 11-51-95 (Rev. 2012).

**CARLTON, J., DISSENTING:**

¶14. I respectfully dissent from the majority's opinion. I disagree with the majority's finding that the residents filed an untimely appeal from the Board's decision. My disagreement with the majority stems from issues involving the following: (1) what constitutes an appealable decision of the Board; and (2) the Board's power to reconsider its own prior resolution. Based upon a review of the record in this case, I would not vacate the decision of the circuit court but would instead affirm the decision on its merits. This dissent addresses the timeliness of the residents' appeal rather than the merits of the circuit court's decision.

¶15. As acknowledged, the majority dismisses the residents' appeal for lack of jurisdiction, stating that the residents failed to timely appeal the Board's October 31, 2011 resolution. However, I find the appeal to be timely because the Board possessed the statutory authority to modify and reconsider its prior resolution, and the Board's reconsideration of the prior resolution placed the underlying matter back into issue at the Board's February 6, 2012 meeting. *See* Miss. Code Ann. § 19-3-40 (Rev. 2012). Since the Board granted the residents' motion to reconsider, the Board's action at its February 6, 2012 meeting constituted an appealable decision, and as the record reflects, the residents timely appealed that decision.<sup>4</sup>

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<sup>4</sup> *Compare Perkins v. Perkins*, 787 So. 2d 1256, 1261 (¶9) (Miss. 2001) (explaining that an appeal from the denial of a Mississippi Rule of Civil Procedure 59 motion to reconsider encompasses both the denial of the reconsideration and the merits of the entire underlying proceeding and judgment), *with Campbell v. State*, 126 So. 3d 61, 63-64 (¶4) (Miss. Ct. App. 2013) (explaining that an appeal from the denial of a Mississippi Rule of Civil Procedure 60(b) motion to reconsider encompasses only the denial of the

¶16. Precedent reflects that no formal judgment is required for an act of the Board to be appealable and that, if aggrieved by a decision of the Board, a person may appeal.<sup>5</sup> As stated, in the present case, an appealable decision resulted when the Board: (1) entertained and granted a motion to reconsider its prior resolution based upon new information; and (2) voted to amend the prior resolution to clarify and add findings of fact. With respect to the right to appeal, the plain language of Mississippi Code Annotated section 11-51-75 (Rev. 2012) states that “[a]ny person aggrieved by a judgment or decision of the board of supervisors . . . may appeal within ten (10) days from the date of adjournment at which session the board of supervisors . . . rendered such judgment or decision . . . .” Clearly, section 11-51-75 provides a person who is aggrieved by a decision of the Board the right to appeal the decision. This remains true even though there is no formal “judgment” since the action or order denying or approving some action constitutes a decision of the Board.<sup>6</sup> In this case, the Board’s decision is evidenced by the following: (1) the bill of exceptions; (2) the residents’ motion to reconsider; (3) the Board’s delay in ruling on the motion; (4) the agenda for the February 6, 2012 meeting; and (5) the transcript and minutes of the February 6, 2012 meeting, where the Board reconsidered the resolution.

¶17. Section 19-3-40 establishes the Board’s power to adopt any order, resolution, or

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reconsideration and not the underlying judgment).

<sup>5</sup> See *S. Cent. Turf Inc. v. City of Jackson*, 526 So. 2d 558, 561 (Miss. 1988) (finding that the city counsel’s decision, while not a formal judgment, could be appealed because Mississippi case law recognizes “actions” of counties and municipalities as appealable events).

<sup>6</sup> See *S. Cent. Turf Inc.*, 526 So. 2d at 561.

ordinance regarding county affairs and to also alter, modify, and repeal such orders or resolutions. As acknowledged, in the present case, the minutes of the February 6, 2012 meeting reflect the Board's action and decision, and the minutes show that the Board indeed entertained the motion to reconsider, granted the motion, and then modified the prior resolution with factual findings. A review of the October 31, 2011 resolution reflects that the original resolution contained inaccurate factual assertions, mainly that the portion of the Co-Op Road at issue provided no primary access to occupied premises and served only one landowner, C & G Railroad, who requested the County's abandonment of the road. The factual statements in the original resolution impeded upon rights of existing private easements and upon the right of access that the Co-Op Road provided to the residents.

¶18. The Board issued its original resolution on October 31, 2011. The residents then filed a written motion to reconsider and, at the Board's February 6, 2012 meeting, presented new information to the Board that conflicted with the factual assertions contained within the resolution. As reflected by this case's procedural history, the residents now appeal the decision made by the Board at its February 6, 2012 meeting, where the Board reconsidered and amended its prior resolution from the October 31, 2011 meeting.

¶19. The record establishes that the Board issued an appealable decision at the February 6, 2012 meeting. The agenda for the February 6, 2012 meeting, and relevant portions of the transcript from that meeting, reflect the following: the action taken by the Board in rendering the decision to reconsider its prior order; the Board's consideration of the new information regarding the impact of the prior decision on private-easement rights; and the Board's decision and vote to amend the prior resolution. The agenda item "VI" for that meeting

references the “Board’s Order—Opening of Co-Op Road.” The transcript of that February 6, 2012 meeting reflects that the residents requested by prior written motion and ore tenus motion that the Board reconsider its prior order issued on October 31, 2011. The meeting transcript further reflects that the stated purpose of the motion for reconsideration was to seek amendment of the prior order and to allow the Board to consider new information about the impact of the prior resolution, which closed the Co-Op Road and adversely impacted the private-easement rights of private-property owners to access the road.

¶20. The February 6, 2012 meeting transcript also shows that, upon reconsidering the prior resolution, the Board discussed the County’s intent to absolve itself of responsibility to maintain the road. The transcript reflects, however, that the Board expressed that the County possessed no objections to maintenance of the road or to private easements by private-property owners or C & G Railroad. The transcript reflects that new information was provided to the Board to demonstrate that the prior resolution, which closed the road and directed it to be barricaded, adversely affected private-easement rights. This new information conflicted with the assertions of fact contained in the October 31, 2011 resolution, and the residents therefore asked the Board to reconsider its prior resolution to abandon, close, and barricade the road. The residents further asked that the Board amend and withdraw the prior resolution since the Board lacked awareness of the private easements when issuing the prior resolution containing the faulty assertions of fact.

¶21. The transcript of the Board’s February 6, 2012 meeting reflects that the residents suggested the following two options to the Board: (1) amend the prior order of the Board with a finding of fact that the County was unaware of the private easement; or (2) reopen the

road. The residents explained to the Board that closing the road impacted the private-easement rights existing between the landowners and C & G Railroad and affected the private landowners' rights to access the road. The new information demonstrated to the Board the unintended adverse effect that the prior resolution to close, or effectively abandon, the road and to erect barricades had produced on private-property owners' existing easement rights to use the road to access their property.

¶22. The Board then rendered an appealable decision at the February 6, 2012 meeting. After the residents raised their request that the Board reconsider and amend its prior resolution, Supervisor Leroy Brooks adopted the motion. As adopted by Supervisor Brooks, the motion showed the road as abandoned rather than closed, directed the barricades to be removed, and directed the placement of a sign indicating the end of the County's maintenance. The motion received a second from Supervisor Harry Sanders, and the vote on the motion passed unanimously by a 5-0 vote. By granting the motion to reconsider, the Board again placed the underlying matter of the prior resolution, and its merits, at issue before the Board at the February 6, 2012 meeting, wherein the resolution was amended.

¶23. With respect to the new evidence regarding private easements that the residents provided to the Board, the bill of exceptions reflected that a public easement existed for over eighty-five years.<sup>7</sup> The bill of exceptions also reflected a deed dated December 9, 1881,

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<sup>7</sup> From the east side of Highway 12, the easement crossed two railroad tracks, turned due north within the railroad's right-of-way line, and then went north until it joined Bethel Road on the east side of the two railroad tracks. Bethel Road then continued westward to the east line of Highway 12 to form a closed-loop public easement. The bill of exceptions provided that, for over eighty-five years, the easement had been maintained for the use and benefit of all the people, including the residents, living on the east side of the railroad tracks

conveyed from John Nelson, et al. to C & G Railroad's predecessor in title. The deed required the predecessor railroad to maintain three public crossings for the benefit of the landowners, and the bill of exceptions provided that C & G Railroad was bound by the deed's terms. Thus, the factual statements contained within the October 31, 2011 resolution conflicted with the evidence regarding these easements.

¶24. The procedural history of the Board's resolution reflects a proper procedural posture for the February 6, 2012 amendment of the resolution. *See* Miss. Code Ann. § 19-3-40. As reflected by the bill of exceptions, at the Board's September 15, 2011 meeting, C & G Railroad, while requesting to own the easternmost set of railroad tracks, raised a request to the Board to abandon the portion of Co-op Road that crossed the railroad. The Board acted on that request by scheduling a meeting for public input for October 31, 2011. The bill of exceptions further provided that on October 31, 2011, the Board, on its own motion, entered an order to abandon only that portion of Co-Op Road that crossed the two railroads and to also erect barricades across the western side of the railroad's right-of-way, even though the Board only possessed the right to abandon the road. Without dispute, the record reflects that, prior to enforcing its order, the Board received no information regarding affected public or private easements.

¶25. Regarding official decisions of the Board prior to the February 6, 2012 meeting, the bill of exceptions reflected that, at the Board's November 30, 2011 meeting, the residents filed a timely written motion asking the Board to reconsider the October 31, 2011 resolution. Then, at a hearing held December 5, 2011, the Board withheld voting on the residents' 

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to get to their land.

motion to reconsider and instead directed the residents to pursue meetings with the railroad. After negotiations with the railroad collapsed, the residents returned to the Board and filed an amended motion to reconsider. The residents then filed a second amended motion, and as reflected by the February 6, 2012 meeting agenda and the record, the Board considered the motion.

¶26. At the February 6, 2012 meeting, the supervisors entertained the motion to reconsider, and also at this meeting, Supervisor Brooks moved to reconsider and amend the resolution. As stated, the Board granted the motion to reconsider, and upon reconsidering the prior order, the Board considered the new information regarding the easement rights of the residents and private-property owners. Based on the new information concerning the prior order's adverse impact on private easements, the Board issued a decision to amend its prior resolution's factual findings. In so doing, the Board rendered an appealable decision. *See* Miss. Code Ann. § 11-51-75. I would therefore consider the merits of the circuit court's decision and affirm. Accordingly, I respectfully dissent from the majority's opinion.