

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FULTON COUNTY, GEORGIA,	:	
	:	
Petitioner,	:	
	:	
v.	:	CIVIL ACTION
	:	FILE NO. 2009-CV-17723
	:	
CITY OF ALPHARETTA,	:	
GEORGIA, ET AL.,	:	
	:	
Respondents.	:	

REPORT TO COURT AT CONCLUSION OF MEDIATION

INTRODUCTION

In 1999 Fulton County (the "County") and all of the existing cities lying within the County (the "Affected Municipalities") agreed upon and adopted a Service Delivery Strategy ("SDS") as required by Article 2 of Chapter 70 of Title 36 of the Official Code of Georgia. The SDS was amended several times as new municipalities were created. On or about June 2, 2008 the Georgia Department of Community Affairs ("DCA") notified the County and all of the Affected Municipalities that a new SDS was required pursuant to O.C.G.A. § 36-70-28(b). The DCA imposed an October 31, 2009 deadline for the new SDS to be agreed upon and filed with the DCA.

By early October, 2009 the County and the Affected Municipalities had not reached agreement on the new SDS and decided they should proceed with voluntary mediation. Around October 9, 2009 they selected the undersigned Norman S. Fletcher (the "Mediator") to mediate their dispute in a good faith effort to resolve their differences.

The Mediator set mediation sessions with the County and the Affected Municipalities for October 14 and October 29, 2009. The sessions were well attended;

however, it quickly became obvious that resolution could not be reached between so many governments within such a short time frame. At the October 29th session it was determined that the County would prepare and file in Fulton Superior Court a Petition for Mandatory Mediation pursuant to O.C.G.A. § 36-70-25.1 and, among other things, request the Court to appoint Norman S. Fletcher as the Mediator and enter an Order holding in abeyance the sanctions authorized by O.C.G.A. § 36-70-27(a). Such Petition was filed on November 2, 2009, being Civil Action File No. 2009-CV-17723. In accordance with Georgia law, an Order was entered on December 8, 2009 appointing Judge Linda Hunter of the Stone Mountain Judicial Circuit to preside over this action and on December 16, 2009 Judge Hunter entered an Order appointing Norman S. Fletcher as Mediator as well as an Order holding in abeyance any sanctions authorized by O.C.G.A. § 36-70-27 during the pendency of this Civil Action.

Between October 9, 2009 and the date of this Report, mediation sessions were conducted on October 14, October 29 and December 3, 2009; January 27, March 5, May 14, July 16, September 10, and November 12, 2010; June 22, August 12, August 23, September 13 and December 2, 2011; and January 24, 2012. Many of these sessions involved all of the Governments, with some sessions being directed to unresolved issues between specific Governments. Additionally, at the request of the Mediator, many negotiating sessions were conducted by various Parties, and the Mediator, by means of telephone and email, conferred with Representatives of the Parties on many occasions, attempting to bring resolution on the few remaining issues, other than Road issues which will be addressed in the next paragraph of this Report. These efforts resulted in most of the issues being resolved. However a few remain unresolved.

A major dispute between the County and the Affected Municipalities relates to the source of funding that the County uses to construct and maintain the Roads in unincorporated Fulton County. At the May 14, 2010 mediation session all Parties acknowledged that no agreement could be reached on this issue and that it would have to be resolved by this Court in the manner authorized by O.C.G.A. § 36-70-25.1(d)(2). Thereafter, all efforts for resolution focused on the other unresolved issues.

One of the stumbling blocks to resolving the remaining water issues was and continues to be the Consent Order entered in an action in federal court against the City of Atlanta around 2004. Because of the scope of that Order and the effect the water issues arising from any new SDS might have on Atlanta's ability to comply with that Consent Order, in late 2009 the City of Atlanta filed a Motion for Joinder of Parties so that the City could file a Third Party Complaint against the Cities of Sandy Springs, College Park, Union City, Fairburn, Palmetto and the South Fulton Municipal Regional Water and Sewer Authority. The style of that case in the United States District Court for the Northern District of Georgia is Civil Action File Nos. 1:95-CV-2550-TWT and 1:98-CV-1956-TWT. The federal court action is discussed fully in the first prayer for relief in City of Atlanta's Response to the County's Petition in the Civil Action for which this Report is made and filed.

On January 14, 2010 United States District Judge Thomas W. Thrash entered an Order which, among other things, granted the Motion for Joinder of Parties, allowing the City of Atlanta to file the requested Third Party Complaint against the aforementioned Cities and Authority, and appointed the undersigned Norman Fletcher as Mediator for the Service Delivery Act mediation as related to the sewer and water issues. Additionally, such Order granted various injunctive relief including enjoining

Fulton County from proceeding further in this case with regard to any matter relating to the water and sewer portions of the October 2005 Service Delivery Strategy as applicable to the City of Atlanta and the Third Party Defendants. The Third Party Defendants appealed that Order to the Eleventh Circuit Court of Appeals and I am informed that no decision has been made by that Court as of this date. I note that College Park was dismissed as a Defendant in this matter on July 22, 2010.

CONCLUSIONS

1. After some twenty-seven months of good faith efforts by all Parties to the mediation, agreement cannot be reached by the County and all of the Affected Municipalities as it relates to some of the services required to be included in a new SDS, as outlined in the following numbered paragraphs. Therefore, the Mediator hereby concludes the Court ordered mediation effective as of the date of this Report; subject, however, to such action as this Court may take or order after receiving this Report.

The Mediator commends the County and the Affected Municipalities for their dedicated and conscientious efforts. As a result of good faith negotiations, there are only a few unresolved issues, primarily involving the method of financing street construction and street maintenance in unincorporated Fulton County and water issues and sewer issues affecting the County and a small number of the Affected Municipalities.

2. While the many areas of agreement acknowledged by Representatives of the County and the Affected Municipalities have not been officially approved by the respective governments, the Mediator has been assured by those Representatives that, upon resolution of the issues outlined in the following numbered paragraphs of this

Report, they will recommend to their respective governing bodies that the governing bodies adopt such Resolution as is necessary to approve the new SDS

3. No Agreement can be reached under the required section of the SDS on street construction and maintenance as to the source of funding by Fulton County of street construction and maintenance in the unincorporated areas of the County. The County insists that a source of funds be general funds and the Affected Municipalities contend that the use of general funds for that purpose is an improper source of funding. This appears to have been an ongoing area of disagreement for a number of years. The cities feel that this is a double taxation issue. This issue is one of the issues that this Court will ultimately be required to determine and resolve.

4. There are three remaining unresolved issues relating to waste water treatment and collection. They are:

(a) Whether Union City will be allowed to purchase from Fulton County an additional 1.5 MGD of the reserve capacity in the County's Camp Creek Treatment Facility. Negotiations are ongoing but agreement has not yet been reached. If the issue is not timely resolved, Union City intends to build it's separate treatment facility. I do not think this issue affects the new SDS in any way and the attorneys for Fulton County and Union City agree that this matter does not affect the new SDS.

(b) There is an issue between East Point and the County arising from litigation which has been pending in Fulton Superior Court since 2002 in Civil Action File No. 2002-CV-54609. The attorneys for East Point and Fulton County agree that this matter does not affect the new SDS in any way.

(c) Currently the County does not agree on certain terms proposed by the Cities primarily relating to the effect of future annexations on retail customers and

sewer infrastructure located in the newly annexed property. The County and a representative group of the Cities are continuing to meet in an effort to resolve this issue. If these issues are resolved in the near future, the parties will notify this Court.

5. (a) There remain some water issues between Atlanta, on one side, and the Cities of Union City, Palmetto and Fairburn and the South Fulton Regional Water and Sewer Authority (the "Authority"), on the other side. These issues primarily relate to the creation of the proposed Bear Creek Reservoir and the respective service areas before Bear Creek comes on line and respective service areas after Bear Creek comes on line. This issue may be resolved by use of more general language in the Water Service Section of the SDS, but no agreement has currently been reached. Atlanta also takes the position that determining the service area of the Authority is premature and not yet ripe for determination.

(b) Currently, the City of Atlanta does not agree on certain terms proposed by the other Cities primarily relating to the effect of future annexations on retail customers and the legal rights of other Cities to provide retail water services in unincorporated Fulton County.

Atlanta, Union City, Palmetto, Fairburn and the Authority have been meeting in a good faith effort to resolve the above-referenced issues. They have reported to me that resolution will likely be agreed to by all parties in the near future. If that occurs, the parties will notify this Court.

6. Sandy Springs has disputes with Atlanta relating to rates, ownership of distribution service lines, and maintenance of such lines. While it appears that these are not issues that fall within a SDS, but rather are matters governed by O.C.G.A. § 36-70-24(2)(B) and by other remedies available under other Georgia law, these disputes are

mentioned in this Report because of the possibility that Sandy Springs may raise them in this Civil Action. Sandy Springs insists on language reserving its rights to determine how water treatment, distribution, and billing services are provided within the City and also on language reserving the option to select other water treatment service providers in the future and the right to provide distribution and billing services in its sole discretion. The City of Atlanta does not agree to these proposals of Sandy Springs. The Mediator has some reservations as to whether such issues are appropriate issues for a SDS.

Atlanta also contends that Sandy Springs rate differential claims must follow the procedure set forth in O.C.G.A. §36-70-24, which requires a separate mediation process as a prerequisite to a lawsuit challenging a rate differential. The Mediator agrees that such code section controls challenges to rate differentials.

7. In any future proceedings in this Civil Action, the parties should be required to address the action pending in the United States District Court referred to in the Introduction of this Report. Unless the 11th Circuit reverses the District Court's January 14, 2010 Order granting Atlanta's Motion for Joinder of Parties or the District Court lifts the injunctive relief imposed by that Order, it appears that any provisions of the new SDS as they relate to water and sewer services applicable to the City of Atlanta, Fulton County, and the Third Party Defendants (excluding College Park) will have to be approved by the District Court.

The City of Atlanta and the South Fulton Third Party Defendants have continued to negotiate in a good faith effort to resolve their differences relating to water service and territory. It is likely that these issues will be resolved in the near future and if they

are, it will result in the dismissal of the action pending in the Federal Courts. If this occurs, the Mediator has requested the parties to immediately notify this Court.

8. As an aid to this Court I direct the Court's attention to the Final Order entered in September 2011 in Civil Action File No. 09A01923-9, Superior Court of Gwinnett County, which action, like this action, was filed pursuant to O.C.G.A. § 36-70-25.1(d)(2). On page fifty-five of that Order under the heading "G. Water and Sewer Services", the trial court held as follows:

Although the Service Delivery Act, O.C.G.A. § 36-70-20 *et seq.* requires local governments to engage in a process to reach service delivery strategy agreements, it does not affect the threshold question of whether, and by what method, the city may extend a water line owned by the county in an annex area. See *Cobb County v. City of Smyrna*, 270 Ga. App. 471, 474 (2004). Thus, other than the regulating the fees for the provision of water and sewer services in accordance with O.C.G.A. § 36-70-24(2) & (4), the Court finds that the Act does not apply to county or municipal water and sewer services. Moreover, all of the Cities reserve the right to provide water services and sewer services within their respective jurisdictional boundaries. See Trial Exhibit "PT3R-135". The Cities reserve the right to serve or begin to serve customers outside the Cities' geographic area is authorized by law. *Id.* Therefore, the Cities and Gwinnett County have concurrent power conferred by the Georgia Constitution (Art. IX, §II, Para. III(a)(7) (1983) and the General Assembly to provide water and sewer service throughout all of Gwinnett County.

While a Notice of Appeal was filed in that action, I am informed that the Parties have settled the case by means of a Consent Order and the appeal has been dismissed or withdrawn. Therefore, there will be no guidance from an Appellate Court on the water and sewer service determination by the trial court in that action. However, the trial court Order may serve as an aid to this Court if it becomes necessary for this Court to address these issues.

9. As a result of good faith efforts by the parties since the final mediation session on January 24, 2012, it is highly likely that the sole issue which will have to be decided by this Court is that issue relating to the source of funding by Fulton County of street construction and maintenance in the unincorporated areas of the County which is referenced in numbered paragraph 3, above.

10. As required by O.C.G.A. § 36-70-25.1(c), copies of this Report are being forwarded to the County and to the Affected Municipalities where the Report will become a public record. A copy is also being sent to U.S. District Court Judge Thomas W. Thrash.

CLOSING REMARKS

I appreciate the confidence placed in me by this Court and by the Parties. It is with regret that I now report that the mediation ordered by this Court is concluded without resolving all issues, although most of the issues will likely be resolved soon. I hope that the Parties are successful in resolving the few remaining issues and a new SDS will be adopted by the County and the Affected Municipalities without extended litigation and expense.

If I can be of further service to this Court or to the County and the Affected Municipalities, I am willing to assist in any way that this Court requests or directs.

Respectfully submitted this 2nd day of April 2012.


Norman S. Fletcher, Mediator