



COMMONWEALTH OF KENTUCKY
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OAG 19-016

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Subject: Whether a county judge-executive must appoint processioners upon the application of landowner pursuant to KRS 73.180.

Requested by: Brian Bayes
Carter County Attorney

Written by: Marc G. Farris
Assistant Attorney General

Syllabus: A county judge-executive is not required to appoint processioners because the statutory provisions concerning processioners have been repealed by implication.

Statutes construed: KRS 73.180; KRS 73.190; KRS 73.210, KRS 73.250;
KRS 322.400

OAGs cited: OAG 94-24

Opinion of the Attorney General

The Carter County Attorney has requested an opinion from this Office concerning KRS 73.180-73.250, which provide for the appointment and duties of processioners, persons “appointed . . . to determine the correct boundary” of land.¹ Specifically, he asks whether the county is required to appoint processioners upon the request of a landowner. For the reasons set forth below, we believe that the statutory provisions concerning processioners have been superseded by later-enacted statutes concerning the recording of deeds and licensing

¹ *Processioner*, Ballentine’s Law Dictionary (3d ed. 2010).

requirements for professional land surveyors. Accordingly, the county is not required to appoint processioners.

KRS 73.180 provides that a "county judge/executive shall appoint three (3) competent persons in the county to serve as processioners for a term of four (4) years." Processioners "shall, on the application of any person producing his title papers, go around his land, or the part he may desire, and re-mark it, taking care that the new marks are on the old lines. When they find any corner tree, post or stone removed, defaced or rotted down, the processioners shall mark a new corner tree, or place a stone or post, properly marked, where the old corner stood. The processioners shall report to the county judge/executive the land they have processioned, the lands it adjoins, and what alterations of corner trees, posts or stones have been made." KRS 73.190. The county surveyor is to "attend[]" the processioners while they work. KRS 73.210. Finally, the "reports of processioners, the plats and certificates of the surveyor, notices and affidavits, and depositions taken by the processioners, shall be filed and kept by the county clerk. The report, notice and plat shall be recorded, and shall be prima facie evidence against the parties interested and others claiming through or under them." KRS 73.250.

Thus, the work of processioners was to determine boundaries of land while accompanied by county surveyors, and to create reports documenting these boundaries that the county clerk recorded. *See, e.g., Shireman v. Null*, 212 S.W.2d 277, 279 (Ky. 1948) ("The purpose of processioning, under KRS 73.230, is to perpetuate evidence, . . .but this evidence may be rebutted in a subsequent proceeding.") (citations omitted); *Phillips v. Stewart*, 97 S.W. 6, 6-7 (Ky. 1906) (describing "appointment of processioners to establish and re-mark the obliterated corner," and process used by processioners to take testimony and provide evidence concerning property boundary).

Carter County has no processioners. Indeed, the Carter County Attorney has informed the Office that, based on his research and conversation with the Kentucky Association of Counties, no counties anywhere in the Commonwealth have appointed processioners.

Moreover, there have been no reported cases involving processioners since 1948, and that case declined to consider the processioners' report. *See*

Shireman, 212 S.W.2d at 280 (holding that “processioners’ report is entitled to little, if any weight”). *Shireman* is instructive as to why there are no processioners in the Commonwealth. There, the former Court of Appeals reversed a lower court ruling that relied on the processioners’ report as to the boundaries of a plot of land. *Id.* The lower court had deferred to the report pursuant to the provision in KRS 73.250 stating that the report is “prima facie evidence.” *Id.* at 279. The Court of Appeals rejected the report, however, because it was contradicted by other deeds, which showed indisputably that the boundary lines set out by the processioners were wrong. *Id.* (“A line thus drawn conforms to lines and corners in deeds to other tracts of land adjoining the two tracts owned by appellants and appellees.”). In sum, the availability of other deeds in *Shireman* – objective evidence that contradicted the processioners’ report – rendered irrelevant the inaccurate evidence from the processioners. *Id.*

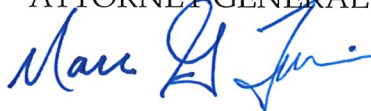
Other more recent cases confirm that processioners are not necessary for the determination of disputed land boundaries. *See, e.g., C. W. Hoskins Heirs v. Wells*, 560 S.W.3d 852, 860-62 (Ky. 2018) (describing licensed land surveyor’s expert testimony regarding his report, which included the consideration of conflicting deeds, to determine land boundary dispute); *Croley v. Alsip*, 602 S.W.2d 418 (Ky. 1980) (When parties claimed a private surveyor’s report was insufficient and incorrect, the trial court ordered and relied upon an additional expert report of professional surveyor and witness testimonies to determine the correct boundary).

Moreover, the General Assembly has enacted statutes since 1942, when KRS 73.180-73.250 became law, that conflict with the statutes governing processioners. Specifically, KRS 322.400 provides that “[n]o county clerk of any county, or any other public authority, shall accept for filing, file, or record any map, plat, survey, or other document related to the practice of land surveying, unless it evidences certification by a professional land surveyor by whom, or under whose personal supervision and direction, the map, plat, survey, or other document was prepared.” While repeal by implication is disfavored, courts will find that the General Assembly has implicitly repealed a statute where it is “disharmonious” with “a subsequent enactment.” *Commonwealth v. Reynolds*, 136 S.W.3d 442, 445 (Ky. 2004). Here, we believe that the General Assembly’s later-enacted requirement that *all* deed documents be signed by licensed surveyors is not consistent with the provision in KRS 73.250 requiring the county clerk to accept

the reports of processioners, who need not be licensed. *See* OAG 94-24 (opining that, unless a planning commission has previously approved a plat, the county clerk is not compelled to accept the report of anyone who is not a registered professional land surveyor); KRS 73.180 (requiring only that a processioner be "competent" and "take an oath to discharge the duties of his office to the best of his skill and judgment"). Accordingly, KRS 322.400 controls over that part of KRS 73.250 that provides that processioners may file reports with the county clerk.

In sum, processioners no longer serve a role in land boundary disputes in the Commonwealth. Accordingly, the county is not obligated to appoint processioners upon the application of land owners, despite the language of KRS 73.180-73.250. A landowner wishing to determine the boundaries of his or her property should instead retain the services of a licensed surveyor pursuant to KRS 322.400.

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