Local Government Law

by R. Perry Sentell, Jr.*

> After an attorney's bill of more than $600 for February, the town council passed a law Tuesday that limits the ability of the mayor and city clerk to call the attorney. The mayor and clerk were criticized for contacting the town attorney to answer what one council member called "useless questions . . . ." The solution was a new town law requiring that if the mayor, council member, or clerk need to discuss a town issue with the attorney, the mayor and at least three council members must approve the question before the call.[1]

Generally, a little knowledge is a dangerous thing. In local government law, too much knowledge is a fate to be avoided at all costs.

I. MUNICIPALITIES

A. *Annexation*

Under general statute, municipalities possess power to annex unincorporated "islands" which, on January 1, 1991, were contiguous to the city and completely surrounded by it.[2] *City of Smyrna v. Adams*[3] featured municipal employment of that statute to annex two parcels contiguous to a street allegedly annexed in 1985.[4] Because the city's

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1. An account from R. PERRY SENTELL, JR., LOCAL GOVERNMENT LAW: LITE 19 (1997). For a more serious "profile" of Georgia local government law, those who practice it, and the practice itself, see PERRY SENTELL, A PROFILE: THE PEOPLE AND PRACTICE OF LOCAL GOVERNMENT LAW (1994). *See also* R. Perry Sentell, Jr., *Georgia Local Government Law: A Reflection on Thirty Surveys*, 46 MERCER L. REV. 1 (1994).
2. O.C.G.A. § 36-36-92 (1995).
3. 255 Ga. App. 453, 565 S.E.2d 606 (2002).
4. *Id.* at 453, 565 S.E.2d at 607. "If the street was not within the city limits on or before January 1, 1991, then the two parcels did not abut city property on or before January 1, 1991, and the purported annexations in 2000 and 2001 are null and void." *Id.*

evidence failed to substantiate the 1985 effort, however, the court of appeals invalidated the "island" annexations.[5] Of city council minutes showing that in 1985 the Department of Transportation approved the street's annexation, the court observed that "[t]he DOT . . . does not have the authority to give away state land."[6] The 1985 annexation having failed, the court concluded, the subject street could not supply the necessary contiguity for the later island annexations.[7]

Although typically deemed a municipal procedure, annexation inevitably impacts the county as well, a point graphically illustrated by *Coweta County v. City of Senoia*.[8] The case presented a pre-annexation agreement between the governments, one "mitigative measure"[9] being that "'[a]ll lots developed along the common boundary of the City and County shall have a minimum lot size of 1.6 acres . . . .'"[10] When the municipality's subsequent annexation plat showed a fifty-foot buffer along the city-county boundary,[11] the county charged violation of the agreement and sought injunctive relief.[12] Focusing upon "the actual language of the mitigative measure,"[13] the supreme court noted its applicability to all lots developed on the boundary.[14] The buffer "is not a lot,"[15] the court reasoned, and "can never be developed."[16] Accordingly, "[i]f there are no developed lots on the boundary, it follows that

5. *Id.* at 455, 565 S.E.2d at 608. "[C]ontemporaneous city council minutes show that the council acted on the presumed authority of the DOT as owner of the street, held a public hearing, and then passed a motion to annex the street." *Id*. at 454, 565 S.E.2d at 608.

6. *Id*. at 454, 565 S.E.2d at 608. Rather, "'[t]he power to dispose of property belonging to the State is vested in the legislature.'" *Id*. (quoting W. Union Tel. Co. v. W. & Atl. R.R., 142 Ga. 532, 534, 83 S.E. 135 (1914)).

7. *Id.* at 455, 565 S.E.2d at 608. "The plaintiffs also had standing to bring suit, not only because the Code specifically allows them to sue, but also because if the city annexed their property, they would be obligated to pay city taxes." *Id.*

8. 275 Ga. 707, 573 S.E.2d 21 (2002).

9. *Id.* at 708, 573 S.E.2d at 22.

10. *Id.* (citation omitted). The agreement was part of the dispute resolution process for annexations, provided by O.C.G.A. section 36-70-24 (1995). *Id.* at 707, 573 S.E.2d at 22.

11. The municipality submitted the plat pursuant to the agreement as well. *Id.* at 707, 573 S.E.2d at 22.

12. *Id.* "The County contends on appeal that since the buffer is not a lot, it cannot be considered to comply with the mitigative measure." *Id.* at 708, 573 S.E.2d at 22.

13. *Id.* at 708, 573 S.E.2d at 22.

14. *Id.*, 573 S.E.2d at 23.

15. *Id.*

16. *Id.*

there are no lots to which the mitigative measure would apply,"[17] and the municipality had complied with the agreement.[18]

B. *Officers and Employees*

The court of appeals resolved several issues touching upon assorted rights of municipal officers and employees. The typically included issue of workers' compensation[19] found representation in *Pitts v. City of Rome*,[20] in which there was a benefits claim for a police major's job-related stroke.[21] Emphasizing both the State Board's denial of the claim and its own relegation to the "any evidence" standard of review,[22] a majority of the court carefully canvassed the conflicting evidence linking stress to the officer's stroke.[23] The administrative law judge found "'only a *possibility* that this stress contributed to the onset of the stroke,'"[24] the court recounted, and "the evidence supported the fact-finder's determination."[25]

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17. *Id.*

18. *Id.* at 709, 573 S.E.2d at 23. The court thus affirmed the trial court's judgment in favor of the municipality. *Id.* For additional perspective on the Georgia law of annexation, see R. Perry Sentell, Jr., *The Law of Municipal Annexation in Georgia: Evolution of a Concept?*, 2 GA. L. REV. 35 (1967); R. Perry Sentell, Jr., *Municipal Annexation in Georgia: Nay-Sayers Beware*, 5 GA. L. REV. 499 (1971); R. Perry Sentell, Jr., *Municipal Annexation in Georgia: The Contiguity Conundrum*, 9 GA. L. REV. 167 (1974); R. Perry Sentell, Jr., *Municipal De-Annexation: The Ins and the Outs*, 27 GA. ST. B.J. 118 (1991).

19. For perspective, see R. Perry Sentell, Jr., *Workers' Compensation in Georgia Municipal Law*, 15 GA. L. REV. 57 (1980).

20. 256 Ga. App. 278, 568 S.E.2d 167 (2002).

21. *Id.* at 281, 568 S.E.2d at 169. The major had worked for the municipality for thirty-one years and had various responsibilities including, most recently, the supervision of the construction of a firing range and public safety building. *Id.* at 278-79, 568 S.E.2d at 168.

22. The evidence must be construed "'in a light most favorable to the party prevailing before the board,'" the court observed, and the fact finder's determination must be sustained if any evidence supported it. *Id.* at 278, 568 S.E.2d 168 (citing Sutton v. B & L Express, 215 Ga. App. 394, 450 S.E.2d 859 (1994)).

23. *Id.* at 281, 568 S.E.2d at 169. The claimant's doctor "cited work-related stress as a contributing factor," but the municipality countered with doctors who "found no basis for such a causal link and testified that tying stress to the stroke would be mere speculation." *Id.*

24. *Id.* at 280, 568 S.E.2d at 169. "Finding that [claimant] did not sufficiently prove her claim, the ALJ denied the requested benefits. The appellate division adopted the ALJ's conclusions, and the superior court affirmed that decision." *Id.*

25. *Id.* at 281, 568 S.E.2d at 169. "And once the trier of fact locates and draws that line, we are required to affirm if any evidence supports the factfinder's determination." *Id.* at 280, S.E.2d at 169. A dissenting opinion for two judges argued that "the ALJ's statement in this case that work duties must be the primary cause of the stress that contributed to the injury is clearly incorrect." *Id.* at 281-83, 568 S.E.2d at 170 (Barnes, J.,

Employee compensation drew the court's attention in *City of Atlanta v. Miller*;[26] specifically, the court addressed the issue of the number of hours firefighters must work to qualify for "emergency compensation."[27] Unlike other employees, "firefighters work[ed] 24/48 work shifts, i.e., 24 hours on duty followed by 48 hours off duty."[28] Under an ordinance requiring emergency compensation for employees temporarily serving in higher positions for more than thirty work days,[29] the municipality counted one twenty-four-hour shift for firefighters as only two eight-hour days. Under that interpretation, firefighters must serve forty-five days (rather than thirty) to become eligible for the higher pay.[30] Rejecting the city's position,[31] the court found nothing in the ordinance to suggest "that the lawmakers intended that firefighters should be required to work more hours than other City employees"[32] to receive emergency compensation.[33]

Georgia statutory law affords peace officers a number of rights, including the right of prosecution only upon grand jury indictment.[34] In *State v. Lockett*,[35] a municipal police officer claimed that right to

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dissenting).

26. 256 Ga. App. 819, 569 S.E.2d 907 (2002).

27. *Id.* at 821-22, 569 S.E.2d at 910. *I.e.*, compensation temporarily received "'[u]pon an employee being required to perform the duties of a higher classified position for a period of time in excess of [thirty] work days.'" *Id.* at 820, 569 S.E.2d at 909 (quoting ATLANTA CITY CODE § 114-134 (1995)).

28. *Id.* at 820, 569 S.E.2d at 909.

29. ATLANTA CODE § 114-134 (1995).

30. 256 Ga. App. at 821, 569 S.E.2d at 909. "Under the City's interpretation, a firefighter must work at the higher classified position for 15 consecutive shifts, or 45 days, before becoming eligible for the higher pay." *Id.*

31. *Id.* "The City's argument for treating firefighters differently consists of merely restating the policy without elucidating a basis for it." *Id.*

32. *Id.* at 822, 569 S.E.2d at 910.

33. *Id.* "We find nothing in the record or in the City's ordinances that justifies treating firefighters differently from other city workers." *Id.* at 821, 569 S.E.2d at 909.

In *City of Atlanta v. Lane*, 276 Ga. 339, 578 S.E.2d 420 (2003), the supreme court focused exclusively upon the city code to invalidate the city's retroactive suspension and dismissal of a police officer based on the officer's pleading guilty to federal crimes. *Id.* at 339, 578 S.E.2d at 420. Because the city had not appealed the civil service board's reversal of its previous dismissal of the officer for work violations unrelated to the federal crimes, the city must, under its own code, physically rehire the officer as an employee administratively (though state statute prevented a felon from serving as a police officer) for the purpose of calculating his back compensation up to the time he could have been lawfully dismissed for the federal crimes. *Id.*

34. *See* O.C.G.A. § 17-7-52 (1997 & Supp. 2002); O.C.G.A. § 45-11-4 (2002). Dudley v. State, 273 Ga. 466, 542 S.E.2d 99 (2001). *See generally* R. Perry Sentell, Jr. *Georgia Local Government Officials and the Grand Jury*, 26 GA. ST. B.J. 50 (1989).

35. 259 Ga. App. 179, 576 S.E.2d 582 (2003).

quash an accusation charging the misdemeanor offenses of "speeding and driving too fast for conditions."[36] Rejecting a state argument that the grand jury procedure existed only for "public officers,"[37] the court held that "peace officers" are entitled to the same protections.[38] "Clearly, through the enactment of [the peace officers statute], the legislature intended to grant to 'peace officers,' who are empowered to perform various law enforcement functions, the protections afforded to 'public officers' under [the public officers statute]."[39] Consequently, the court affirmed the trial judge's actions in quashing the accusation.[40]

C. *Regulation*

In *City of Decatur v. DeKalb County*,[41] the "dispositive issue [was] whether a county government [was] exempt from all municipal regulation of construction projects undertaken by the county with respect to county-owned property located within the city and used for governmental purposes."[42] Specifically, the county "accepted a bid from a contractor to commence construction on the courthouse before obtaining permits from [the city] and further did not apply for city permits relating

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36. *Id.* at 179, 576 S.E.2d at 583. The officer presented evidence that he was on duty when the incident occurred, and the state presented no evidence to the contrary. *Id.* "[T]he state chose to file an accusation charging [the officer] with the commission of misdemeanors under [O.C.G.A. sections] 40-6-181 and 40-6-180." *Id.* at 181, 576 S.E.2d at 584.

37. "The state contends that the right to grand jury presentment applies only to the offenses enumerated in [O.C.G.A. section] 45-11-4(b), which include malpractice, misfeasance, or malfeasance in office, and other offenses not relevant here." *Id.* at 180, 576 S.E.2d at 584.

38. *Id.* "[W]e conclude that the legislature did not intend to limit the application of [O.C.G.A. section] 17-7-52 to the offenses enumerated in [O.C.G.A. section] 45-11-4(b)." *Id.*

39. *Id.* The court explained that "'all statutes relating to the same subject-matter, briefly called statutes in pari materia, are construed together, and harmonized wherever possible, so as to ascertain the legislative intendment and give effect thereto.'" *Id.* (quoting Lawson v. State, 224 Ga. App. 645, 647, 481 S.E.2d 856 (1997)). *See generally* R. PERRY SENTELL, JR., STATUTORY CONSTRUCTION IN GEORGIA: STATUTES IN PARI MATERIA (1996).

40. 259 Ga. App. at 181, 576 S.E.2d at 585. "Because the state failed to present the matter to a grand jury for indictment as required by [O.C.G.A. section] 17-7-52, we affirm [the trial court's order quashing the accusation]." *Id.* at 179, 576 S.E.2d at 583.

41. 256 Ga. App. 46, 567 S.E.2d 376 (2002).

42. *Id.* at 46, 567 S.E.2d at 377. For treatment of municipal regulatory powers in an assortment of litigated contexts, see R. Perry Sentell, Jr., *"Ascertainable Standards" versus "Unbridled Discretion" in Local Government Regulation*, 41 GA. COUNTY GOV'T MAG. 19 (Dec. 1989); R. Perry Sentell, Jr., *Discretion in Georgia Local Government Law*, 8 GA. L. REV. 614 (1974); R. Perry Sentell, Jr., *Local Government Law and Liquor Licensing: A Sobering Vignette*, 15 GA. L. REV. 1039 (1981); R. Perry Sentell, Jr., *Reasoning by Riddle: The Power to Prohibit in Georgia Local Government Law*, 9 GA. L. REV. 115 (1974).

to renovations on another . . . [c]ounty government building."[43] Reversing the trial judge's decision for the county,[44] the court of appeals held that, aside from zoning regulations,[45] "county government building projects . . . are subject to other municipal regulation[s] (as indicated by the Georgia Legislature)."[46] Relying upon both the constitution[47] and general statutes,[48] the court instanced fire safety matters and land-disturbing activities as two areas "where the legislature has expressed an intent for municipalities to have some authority to regulate the building activities associated with county construction within [municipal] boundaries."[49]

Regulation in the guise of taxation doomed the "occupation tax" ordinance challenged in *City of Atlanta v. Barnes*.[50] The litigated measure imposed an annual levy on attorneys practicing in the municipality,[51] a levy the supreme court denominated a "precondition on the practice of law."[52] Emphasizing the ordinance's requirement of payment "in advance of practicing law,"[53] as well as its penalty of incarceration for nonpayment, the court viewed the measure as one "imped[ing] the practice of law."[54] Those features rendered the

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43. 256 Ga. App. at 46-47, 567 S.E.2d at 377. The county sought a declaratory judgment and a permanent injunction "forbidding [the municipality] from enforcing its zoning, building, and other ordinances with respect to the construction of the . . . [c]ounty courthouse and other county government building projects conducted within . . . city limits." *Id.* at 46, 567 S.E.2d at 377.

44. *Id.* at 46, 567 S.E.2d at 377. "[W]e reverse the trial court's order to the extent that it exempts the county from *all* municipal building regulations beyond zoning regulations." *Id.*

45. *Id.* For discussion of this portion of the court's decision, see *infra* text accompanying note 43.

46. 256 Ga. App. at 46, 567 S.E.2d at 377. "'[Z]oning is to be distinguished from other regulations with which a developer must comply, such as requirements for a building permit. Each type of regulation is independent of the other and seeks to accomplish its purpose by a different means.'" *Id.* at 48, 567 S.E.2d at 378 (quoting Fairfax MK, Inc. v. City of Clarkston, 274 Ga. 520, 521, 555 S.E.2d 722 (2001)).

47. GA. CONST. art. IX, § 2, para. 3(a).

48. O.C.G.A. § 12-7-1 to -18 (2001 & Supp. 2002).

49. 256 Ga. App. at 49, 567 S.E.2d at 379. The court observed that "[t]hrough more cooperative efforts, the counties and cities may in the future be able to avoid the very types of lawsuits generated by the events of this case." *Id.* at 50, 567 S.E.2d at 379.

50. 276 Ga. 449, 578 S.E.2d 110 (2003).

51. *Id.* at 449, 578 S.E.2d at 111-12. Plaintiff attorneys had demanded a refund for taxes paid in past years and, receiving no action by the city for a year, then challenged the constitutionality of the ordinance under authority of O.C.G.A. section 48-5-380(c) (1999). *Id.*

52. *Id.*, 578 S.E.2d at 112.

53. *Id.* at 450, 578 S.E.2d at 112.

54. *Id.*

ordinance "an unconstitutional regulation of the practice of law,"[55] a function "which is reserved by Georgia's constitution to this Court."[56] Rejecting the city's arguments of severability[57] and prospective invalidity,[58] the court proceeded to overrule a prior decision "that there can be no class actions brought for tax refunds."[59] Accordingly, the court affirmed the trial judge's class certification for plaintiffs claiming municipal tax refunds.[60]

D. Finances

The survey period confronted the Georgia Supreme Court with a novel issue arising under the Joint County and Municipal Sales and Use Tax Act.[61] In *Wells v. City of Baldwin*,[62] the court reviewed a tax "roll back" ordinance adopted by a municipality lying partly in two counties, one of which imposed a local option sales tax.[63] Under the ordinance, the municipality used the sales tax proceeds from the taxing county to

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55. *Id.*

56. *Id.* For its rationale and decision, the court adopted its prior decision in *Sexton v. City of Jonesboro*, 267 Ga. 571, 481 S.E.2d 818 (1997).

> This Court made clear in *Sexton* that municipalities may impose an occupation tax that includes lawyers within its scope so long as the tax is a revenue measure only and does not act effectively as a precondition or license for engaging in the practice of law . . . . [T]his Court enumerated a number of elements showing the true nature of the tax ordinance . . . .

Id.

57. *Id.* at 451, 578 S.E.2d at 112-13. "The requirement that the tax be paid prior to practicing law in [the city] could not be severed without radically rewriting the ordinance, which is not a judicial function." *Id.*

58. *Id.* at 453, 578 S.E.2d at 114. The court reasoned that the city had been aware of its prior decision (*Sexton*) invalidating such measures and could have chosen "a tax scheme that did not act as a precondition to the practice of law" but did not, and that the city "has had the use of the money it collected under the occupation tax ordinance and the lawyers from whom it was collected have lost that use." *Id.* Thus, the court was "not persuaded that justice require[d] prospective application." *Id.*

59. *Id.* at 452, 578 S.E.2d at 113 (citing Henderson v. Carter, 229 Ga. 876, 195 S.E.2d 4 (1972)). "We conclude, therefore, that the holding in *Henderson* that there can be no class actions brought for tax refunds was error and that *Henderson* must be overruled . . . ." *Id.*

60. *Id.* at 454, 578 S.E.2d at 115. "Since . . . we have overruled *Henderson*, no basis for reversal of the trial court ruling on that issue appears." *Id.* at 452, 578 S.E.2d at 113.

61. O.C.G.A. §§ 48-8-80 to -95 (2002). "The Act created 159 special districts within the State, with the geographical boundary of each county corresponding to and coterminous with the geographical boundary of one of the 159 special districts." Wells v. City of Baldwin, 275 Ga. 228, 229, 565 S.E.2d 439, 440 (2002).

62. 275 Ga. 228, 565 S.E.2d 439 (2002).

63. *Id.* at 228, 565 S.E.2d at 439.

reduce the millage rate for all city residents in both counties.[64] On the complaint of city residents in the taxing county, a unanimous supreme court held the tax statute's "plain language" to invalidate the municipal ordinance.[65] Indeed, "[l]anguage throughout the Act reflect[ed] the Legislature's understanding that there are municipalities which are located only 'partially' within special districts in the State."[66] That understanding, the court perceived, "limits the application of the rollback provision . . . to those residents of the special district [county] where the tax is imposed . . . ."[67] In reaching its conclusion, the court rejected the municipality's argument that a rollback in only a part of the city would violate the "uniformity" requirement of the Georgia Constitution.[68] Rather, the constitution's authorization of the sales tax statute "specifically provides for the levy of taxes to pay the cost of providing services within the limited territory of the special district."[69]

E. Liability

Municipal liability remained a litigated subject of high profile during the survey period, with that litigation touching various facets of governmental responsibility.[70] Focusing upon the nature of the harm, *Canberg v. City of Toccoa*[71] featured claims for emotional distress allegedly suffered when municipal firefighters refused to suppress a fire which consumed the plaintiffs' home.[72] As for the claim of negligent

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64. *Id.*, 565 S.E.2d at 440.

65. *Id.* at 229, 565 S.E.2d at 440.

66. *Id.* at 230, 565 S.E.2d at 441. The court noted O.C.G.A. section 48-8-89.3, providing that "'[f]or the purpose of all population based calculations under this Code section, only that portion of the population of a qualified municipality which is located within the special district shall be computed.'" *Id.* (quoting O.C.G.A. § 48-8-89.3(d) (2002)).

67. *Id.* at 229, 565 S.E.2d at 440.

68. *Id.* at 230-31, 565 S.E.2d at 441; GA. CONST. art. VII, § 1, para. 3(a).

69. 275 Ga. at 231, 565 S.E.2d at 441; GA. CONST. art. IX, § 2, para. 6. Article IX, section two, paragraph 6 of the Georgia Constitution "requires that taxes levied and collected within a special district be used to pay the cost of providing local government services within that district." 275 Ga. at 231, 565 S.E.2d at 441. The court thus reversed the trial court's decision upholding the validity of the challenged municipal ordinance. *Id.*, 565 S.E.2d 442.

70. For perspective and a general chronology, see R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA (4th ed. 1988); R. Perry Sentell, Jr., *Georgia Local Government Tort Liability: The "Crisis" Conundrum*, 2 GA. ST. U. L. REV. 19 (1985); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993).

71. 255 Ga. App. 890, 567 S.E.2d 21 (2002).

72. *Id.* at 890, 567 S.E.2d at 22. The firefighters contended that plaintiffs' home was not within the city limits and discounted their possession of a city garbage can with the

infliction, the court of appeals affirmed the trial judge's summary judgment for the city.[73] Although plaintiffs had alleged physical impact and resulting physical injuries, they did not "claim that their physical injuries caused their mental suffering or emotional distress."[74] On the contrary, the court did find a jury issue regarding plaintiffs' claim of intentional infliction.[75] Refusal to fight the fire and charging plaintiffs with attempting to defraud the city[76] might be found "'sufficiently outrageous and egregious to support an award of damages for intentional infliction of emotional distress.'"[77]

Municipal response to an injunction sharply divided the supreme court in *City of Roswell v. Eller Media Co.*,[78] in which the issue was the city's alleged violation of an order to permit a company's construction and operation of advertising signs.[79] A majority of the court reviewed the litigation producing the order as well as the municipality's subsequent conduct.[80] "The record demonstrates . . . that after the signs were constructed, the Mayor, using extensive City resources and personnel, contacted every business or organization that displayed a message or advertised on [the company's] signs in the City . . . and strongly discouraged them from advertising on such signs."[81] Accordingly, the

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response that anyone could procure such a container "to try to convince people that the house was inside the city limits." *Id.* at 891, 567 S.E.2d at 22.

73. *Id.* at 890, 567 S.E.2d at 22.

74. *Id.* at 891, 567 S.E.2d at 23. "Georgia's current impact rule has three elements: (1) a physical impact to the plaintiff; (2) the physical impact causes physical injury to the plaintiff; and (3) the physical injury to the plaintiff causes the plaintiff's mental suffering or emotional distress." *Id.*

75. *Id.* at 892, 567 S.E.2d at 23.

76. *Id.* The court reasoned that the firefighters "essentially accused the [plaintiffs] of attempting to defraud the City by taking a city garbage can and placing it in their driveway . . . ." *Id.*

77. *Id.* (quoting S & W Seafoods Co. v. Jacor Broad. of Atlanta, 194 Ga. App. 233, 236, 390 S.E.2d 228, 231 (1990)). Consequently, the court reversed the trial judge's grant of summary judgment to the city on the charge of intentional infliction. *Id.* at 892-93, 567 S.E.2d at 23.

78. 275 Ga. 379, 566 S.E.2d 659 (2002).

79. *Id.* at 379, 566 S.E.2d at 659-60.

80. *Id.*, 566 S.E.2d at 659.

> The injunction at issue arose out of contentious litigation in which the City sought to preclude [defendant company] from constructing and operating advertising signs within the City . . . . Ultimately, the trial court ruled in favor of [defendant company] and entered its order directing [the mayor] and the City to 'permit [the company] to construct and operate each and every sign' involved in the action.

Id.

81. *Id.*, 566 S.E.2d at 659-60. "In response to the Mayor's numerous threats and actions, several businesses canceled their contracts to advertise on [the company's] signs." *Id.*, 566 S.E.2d at 660.

court found no abuse of discretion in the trial judge's conclusion of contempt.[82] Additionally, the court rejected defendants' claim of First Amendment protection: "There is no constitutional protection for the Mayor's acts not involving speech or for his use of explicit and implicit threats of official sanctions and economic reprisals against those who contracted with [the company]."[83]

A difference of opinion also surfaced in the court of appeals, its disagreement arising over the reach of Georgia's statute declaring municipal liability (to the extent of insurance) for injuries caused by high-speed chases.[84] The statute's coverage is limited to injury resulting from a suspect's fleeing from a municipal officer who "acted with reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit."[85] In *City of*

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82. *Id.* at 380, 566 S.E.2d at 660. The court emphasized that "[a] trial court has wide discretion in determining whether its orders have been violated and such determination will not be disturbed absent a gross abuse of discretion." *Id.* at 379, 566 S.E.2d at 660.

83. *Id.* at 380, 566 S.E.2d at 660. "The trial court found that appellants engaged in a 'course of conduct,' including the use of threats, the clear intent of which was to interfere with and impede the operation of [the company's] signs." *Id.*

A forceful dissenting opinion of three justices argued that the contempt action arose "not from actions taken under any city ordinance to prohibit [the company] from constructing and operating the signs, but from separate and distinct actions taken by the mayor to contact advertisers and discourage them from advertising in the city." *Id.* at 381, 566 S.E.2d at 661 (Sears, P.J., dissenting). This conduct, the dissent urged, "simply is not prohibited by and exceeds the scope of the trial court's judgment involving the litigation over the city ordinances . . . ." *Id.* The dissent further maintained that the contempt order violated the First Amendment rights of the mayor and municipality. *Id.*

84. City of Winder v. McDougald, 254 Ga. App. 537, 562 S.E.2d 826 (2002); O.C.G.A. § 40-6-6(d)(2) (2001 & Supp. 2002). For discussion of the motor vehicle insurance statute, see R. Perry Sentell, Jr., *Tort Liability Insurance in Georgia Local Government Law*, 24 MERCER L. REV. 651 (1973).

Another instance of statutory liability exists for the municipality's negligence in maintaining its streets and sidewalks if it has actual or constructive knowledge of the defect in time to repair or provide warning. O.C.G.A. § 32-4-93(a) (2001). The survey period case of English v. City of Macon, 259 Ga. App. 766, 577 S.E.2d 837 (2003) presented an action under that statute. In *English* the plaintiff allegedly fell on the sidewalk due to uneven surfaces caused by recent city repairs. Reversing a judgment for the city on grounds of insufficient knowledge, the court of appeals reasoned that "the pleadings [were] sufficient to raise the inference that the City, having 'repaired' the sidewalk, had implied knowledge of the defect therein. 'The City failed to meet its burden on summary judgment to negate such inference.'" *Id.* at 768, 577 S.E.2d at 839 (quoting Godinho v. City of Tybee Island, 231 Ga. App. 377, 380, 499 S.E.2d 389, 392 (1998)).

85. O.C.G.A. § 40-6-6(d)(2) (2001). The statute provides that

> the law enforcement officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect unless the law enforcement officer acted with reckless disregard for proper

Winder v. McDougald,[86] a majority of the court applied the statute to an action by parents of an unlicensed underage driver killed while fleeing a city police officer.[87] Denying the municipality's motion for summary judgment, the court relied upon evidence that the officer disregarded a fellow officer's instructions to end the pursuit after the minor "recklessly drove past parked cars and started driving [seventy miles per hour] on the wrong side of the road."[88] In a vigorous dissent, two judges read the statutory duty as limited to injuries received by innocent third persons.[89] Otherwise, the dissent reasoned, the statute would "stand for the absurd proposition that a pursuing officer may be held liable as 'the proximate cause' of a fleeing suspect's injury or death when the injury or death was 'caused by the fleeing suspect.'"[90]

A concern over decedent's own conduct likewise influenced the court's disposition in *Spooner v. City of Camilla*,[91] a wrongful death action for

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> law enforcement procedures in the officer's decision to initiate or continue the pursuit.

Id.

86. 254 Ga. App. 537, 562 S.E.2d 826 (2002).

87. *Id.* at 539-40, 562 S.E.2d 828. The fourteen-year-old minor had sneaked out of her home at 3:00 a.m. and taken her parents' car without permission. When the officer attempted to stop her for driving without lights, she accelerated, sped through a parking lot where she damaged her parents' car, and drove on the wrong side of the road at speeds over seventy miles per hour. She sped through a curve and crashed into a utility pole. *Id.* at 537-38, 562 S.E.2d at 827.

88. *Id.* at 540, 562 S.E.2d at 828. "The [parents] therefore presented some evidence that the pursuing officer acted with reckless disregard for proper police procedures, and the trial court properly denied [the city's] motion for summary judgment." *Id.*

89. *Id.* at 540-41, 562 S.E.2d at 829 (Andrews, P.J., dissenting). "Georgia's appellate courts have not previously addressed such a claim by a fleeing violator for damages suffered during unlawful flight from an identified police pursuer." *Id.* at 541, 562 S.E.2d at 829 (Andrews, P.J., dissenting).

90. *Id.* at 542, 562 S.E.2d at 830 (Andrews, P.J., dissenting): "To impose this duty would discourage police officers from pursuing the violators and encourage flight, thereby leaving potentially dangerous drivers on the road. It would also reward fleeing violators with causes of action for damages flowing from their own wrongdoing." *Id.* at 543, 562 S.E.2d at 830.

The dissent proved prescient, for the Georgia Supreme Court granted certiorari and, after the cut-off date for the survey period, reversed. City of Winder v. McDonald, No. 50261156, 2003 Ga. LEXIS 616 (Ga. July 11, 2003). The "reckless disregard" pursuit statute, a majority of the court established, applies only to the claims of innocent parties. *Id.* at *2. A dissenting opinion of two justices protested the majority's distinction, in applying the statute, between innocent third parties and fleeing suspects. *Id.* at *3 (Benham, J., dissenting).

91. 256 Ga. App. 179, 568 S.E.2d 109 (2002).

a thirteen-year-old minor who drowned in a city-owned pit.[92] As for negligence liability, the court reasoned that "the undisputed evidence shows that [decedent] knew the pit was filled with water and that he could not swim, yet he chose to jump into the water."[93] Consequently, the court asserted, he "assumed the risk as a matter of law."[94] As to plaintiff's claim for nuisance, the court responded that "landowners are permitted to maintain ponds–either natural or artificial–on their property without erecting fences or barricades."[95] Here, the city had not "failed to act within a reasonable time after knowledge of the defect or dangerous condition."[96] On both counts, therefore, the court affirmed the municipality's summary judgment.[97]

The nuisance contention also confronted the court in *City of Gainesville v. Waters*,[98] in which homeowners sued for municipal failure to maintain its drainage system.[99] Reviewing evidence of a buried municipal pipe which caused repeated flooding and septic-tank backup during a period from 1993 to 1995,[100] the court upheld plaintiffs' showing of an "abatable nuisance."[101] Moreover, every continuance

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92. *Id.* at 179, 181, 568 S.E.2d at 110, 111. The city owned some thirty acres of land for industrial development from which it excavated dirt for building projects thereby creating the pit that filled with water. *Id.* at 179, 568 S.E.2d at 110.

93. *Id.* at 181, 568 S.E.2d at 111. The court found that the child "was capable of appreciating the risks associated with jumping into water, especially after having been told that very day that he could not go to the pool because he could not swim." *Id.* at 182, 568 S.E.2d at 112.

94. *Id.* at 183, 568 S.E.2d at 112. The court enumerated the requirements of assumption of risk as actual knowledge, appreciation of the danger, and voluntary exposure. *Id.* at 181, 568 S.E.2d at 111. "[A]ssumption of the risk," the court concluded, "serves as a complete defense to a claim of negligence." *Id.* at 183, 568 S.E.2d at 112.

95. *Id.* at 184, 568 S.E.2d at 113.

96. *Id*. at 183, 568 S.E.2d at 113. The court enumerated the three necessary conditions for a municipal nuisance: more than mere negligence, continuous or regularly repetitious conduct, and failure to act within a reasonable time after knowledge. *Id.* For treatment of nuisance liability in Georgia local government law, see R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 117-34 (1988); R. Perry Sentell, Jr., *Georgia County Liability: Nuisance or Not?*, 43 MERCER L. REV. 1 (1991); R. Perry Sentell, Jr., *Municipal Liability in Georgia: The "Nuisance" Nuisance*, 12 GA. ST. B.J. 11 (1975).

97. 256 Ga. App. at 184, 568 S.E.2d at 113.

98. 258 Ga. App. 555, 574 S.E.2d 638 (2002).

99. *Id.* at 555, 574 S.E.2d at 641.

100. *Id.* at 556, 574 S.E.2d at 641-42. "The expert further testified that the problem is caused by a buried 15-inch pipe that crosses under [plaintiffs'] street and ends in [plaintiffs'] yard. He concluded that the water comes 'out of the 15-inch pipe and out of the ground and across the ground and then into the end of the drain field.'" *Id.*

101. *Id.* at 557, 574 S.E.2d at 642. "'Where a municipality negligently constructs or undertakes to maintain a sewer or drainage system which causes the *repeated* flooding of property, a continuing, abatable nuisance is established, for which the municipality is lia-

afforded a fresh cause of action, the court held, and the only claims barred were those suffered more than four years prior to plaintiffs' action.[102] In addition to approving damages and injunctive relief,[103] the court also found evidence of the "bad faith" necessary for an award of attorney fees:[104] "[T]here was some evidence that, despite [plaintiffs'] numerous complaints and its knowledge that [plaintiffs'] property flooded as a result of its failure to act, the City refused to alleviate the drainage problems."[105]

The continuing nature of the harm also impacted a dispute over the historic ante litem notice mandate,[106] the statutory requirement that prior to filing money damage actions against municipalities, claimants must provide written notice within six months of the incident.[107] Plaintiffs in *City of Forsyth v. Bell*[108] alleged their negligent exposure to lead paint and asbestos in working on a city building in 1997,[109] that they discovered the danger in January 2000, and that they notified the city in April 2000.[110] Rejecting municipal reliance upon untimely notice, the court asserted that failure to warn of injury "due to continued exposure constitutes a continuing tort."[111] It was sufficient, the court held, that plaintiffs provided the city with notice of their claim "within

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ble.'" *Id.* (quoting Hibbs v. City of Riverdale, 267 Ga. 337, 338, 478 S.E.2d 121, 122 (1996)). The court emphasized that its review of the trial court's actions in denying the city's motion for directed verdict or j.n.o.v. was governed by the "any evidence" standard of appellate review. *Id.* at 556, 574 S.E.2d at 642.

102. *Id.* at 558, 574 S.E.2d at 643. "Because [plaintiffs] filed this action in April 1998, the only claims barred are those suffered more than four years before that date." *Id.*

103. *Id.* at 562, 574 S.E.2d at 645. "When a continuing nuisance is found, a property owner may obtain both damages and an injunction." *Id.*

104. *Id.* at 559-60, 574 S.E.2d at 643-44. Said the court: "[O.C.G.A. section] 13-6-11 allows recovery of attorney fees if the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." *Id.*

105. *Id.* at 560, 574 S.E.2d at 644.

106. O.C.G.A. § 36-33-5(b) (2000 & Supp. 2002).

107. *Id.* For perspective on the ante litem notice requirement, and its application in the cases, see R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 145-74 (1988); R. Perry Sentell, Jr., *Georgia Municipal Tort Liability: Ante Litem Notice*, 4 GA. L. REV. 134 (1969); R. Perry Sentell, Jr., *Ante Litem Notice: Cause for Pause*, URBAN GA. MAG. 24 (Oct. 1978).

108. 258 Ga. App. 331, 574 S.E.2d 331 (2002).

109. *Id.* at 332, 574 S.E.2d at 332. Plaintiffs were prison inmates assigned to a work detail which gutted the interior of a building for the city and hauled the debris to a landfill. *Id.* at 331-32, 574 S.E.2d at 331-32.

110. *Id.* at 332, 574 S.E.2d at 332. Plaintiffs alleged that the exposure put them at risk for developing lung cancer and other related diseases, and that the city knew of the danger and failed to warn them. *Id.* at 331-32, 574 S.E.2d at 331-32.

111. *Id.* at 332, 574 S.E.2d at 332. The court reasoned that the ante litem requirement is a statute of limitations and that it constitutes a prerequisite to a suit. *Id.*

six months after discovering their exposure to the hazard of which they complain."[112]

The notice defense fared markedly better in *Conley v. Dawson*,[113] an action against a municipal police officer in both his official and individual capacities.[114] Plaintiff charged the officer's "conspiracy" with parties to an automobile accident in which plaintiff's child was killed.[115] On grounds that an action against the officer in his official capacity constituted in reality an action against the municipality itself, the court declared the claim simply "not sustainable without the ante litem notice."[116]

As for plaintiff's claim against the officer individually, the court promptly invoked the concept of "official immunity," constitutionally conferred upon public agents for discretionary actions without actual malice.[117] Plaintiff's characterization of the officer's conduct as showing improper motive and thus actual malice left the court unpersuaded.[118] That characterization "requires that we speculate and make assumptions that simply are not justified by the record, even viewed

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112. *Id.* "The doctrine of continuing tort applies here," the court asserted, affirming the trial judge's denial of the city's motion to dismiss. *Id.*

113. 257 Ga. App. 665, 572 S.E.2d 34 (2002).

114. *Id.* at 665, 572 S.E.2d at 35. Plaintiff "brought this wrongful death action against . . . [the officer] in his individual and official capacity as a police officer of the [city]." *Id.*, 572 S.E.2d at 35-36.

115. *Id.* at 665-66, 572 S.E.2d at 36. The officer had investigated the accident, and plaintiff alleged that he "conspired with the remaining defendants to commit fraud. Specifically, [plaintiff] contends that [the officer] deliberately excluded from his police report information from a witness whose account of the accident placed fault [on the other party] and that the officer destroyed the contact information for that witness." *Id.*

116. *Id.* at 667, 572 S.E.2d at 37. "'[A]ny cause of action averred against a municipal police officer in his official, as opposed to his personal/individual, capacity is in reality suit[] against the municipality.'" *Id.*, 572 S.E.2d at 36-37 (quoting Pearson v. City of Atlanta, 231 Ga. App. 96, 101, 499 S.E.2d 89, 94 (1998)).

117. *Id.* at 667, 572 S.E.2d at 37; GA. CONST. art. I, § 2, para. 4. On the issue of liability of local government officers and employees, see R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights for Their Wrongs*, 13 GA. L. REV. 747 (1979); R. Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law: The Haunting Hiatus of Hennessy*, 40 MERCER L. REV. 27 (1988); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993).

118. 257 Ga. App. at 668, 572 S.E.2d at 37. "[Plaintiff] argues that a question of fact arises as to whether [the officer] acted with malice because of the business relationship with [the other party to the accident]." *Id.* "These facts, [plaintiff] contends, show that [the officer] acted with malice because he was motivated to help his . . . friends." *Id.*

most favorably to [plaintiff]."[119] Absent a showing of actual malice, official immunity required summary judgment in the officer's favor.[120]

F. Zoning

Zoning litigation frequently presents as an item for resolution the distinction between "zoning" and "regulation." The contrast, perhaps less apparent than commonly assumed, can color a host of issues both substantive and procedural. Substantively, the trial court in *City of Decatur v. DeKalb County*[121] reasoned that all municipal regulatory ordinances constituted zoning measures and enjoined the city from enforcing those ordinances against county construction projects inside the municipality.[122] On review, the court of appeals found error in the zoning-regulation assimilation[123] and delineated zoning ordinances as "'those which regulate by classifying property into separate districts.'"[124] Only municipal ordinances so characterized, the court held, could not be enforced against county property located within the city and used for governmental purposes.[125] Only for those ordinances, therefore, could the trial court's decision be affirmed.[126]

The supreme court likewise engaged the zoning-regulation distinction in *City of Walnut Grove v. Questco, Ltd.*,[127] regarding a comprehensive sign ordinance admittedly enacted in violation of the Zoning Procedures

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119. *Id.*

120. *Id.*, 572 S.E.2d at 38. "Because [plaintiff] cannot show [the officer] acted with malice, qualified [official] immunity provides [the officer] with protection from suit." *Id.*

121. 256 Ga. App. 46, 567 S.E.2d 376 (2002).

122. *Id.* at 48, 567 S.E.2d at 378. The litigation arose when the county accepted a construction bid for a new county schoolhouse on property inside the city without obtaining city permits and also began renovations on another county building so located. *Id.* at 47, 567 S.E.2d at 378.

123. *Id.* at 47, 567 S.E.2d at 378. "[W]e find that the trial court did err by concluding that all other municipal building regulations fell under the broad category of zoning . . . ." *Id.*

124. *Id.* at 48, 567 S.E.2d at 378 (quoting Fairfax MK, Inc. v. City of Clarkston, 274 Ga. 520, 521, 555 S.E.2d 722, 724 (2001)).

125. *Id.* at 47, 567 S.E.2d at 378. "The Supreme Court of Georgia has held that county-owned property that is used for governmental purposes is not subject to municipal zoning regulations." *Id.* (citing Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning Comm'n, 252 Ga. 484, 489, 314 S.E.2d 218 (1984)). For treatment of the principle, see R. Perry Sentell, Jr., *Local Government Exposure to Local Government Zoning*, 25 GA. ST. B.J. 180 (1989).

126. 256 Ga. App. at 47, 567 S.E.2d at 378. "Thus, the trial court did not err by concluding that the [county] courthouse and the other county building at issue were not subject to [municipal] zoning requirements." *Id.* For discussion of the regulation aspect of the case, see *supra* text accompanying note 125.

127. 275 Ga. 266, 564 S.E.2d 445 (2002).

Law.[128] Once again, judicial effort went to particularizing an overly encompassing formulation, the city's insistence that sign ordinances constituted "land use regulations."[129] A measure's characterization,[130] the court specified, depended on its "evaluat[ion] as a whole."[131] Applying that evaluation to the sign ordinance, the court deemed it "clear that the ordinance divided the City into districts (specifically, the existing zoning districts) and regulated the uses of signs relative to the districts in which the signs were located."[132] As a zoning measure, the ordinance fell subject to the Zoning Procedures Law.[133]

The alleged conflict presented by *M. Wayne Robinson Builder-Developer, Inc. v. City of Rome*[134] pitted the city's historic preservation zoning ordinance against its general zoning ordinance.[135] Specifically, challengers maintained, the preservation ordinance invalidly failed to require the planning commission's review as mandated by the general zoning ordinance.[136] Rejecting plaintiffs' position, the court of appeals emphasized the preservation ordinance's later enactment: "'Where there is a conflict between legislative acts, the later in time will control as it is presumed to be the last expression of legislative will.'"[137] Consequently, the court upheld municipal adoption of the preservation ordinance without a planning commission review.[138]

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128. *Id.* at 266, 564 S.E.2d at 446; O.C.G.A. §§ 36-66-1 to -5 (2000 & Supp. 2002).

129. 275 Ga. at 266, 564 S.E.2d at 446. "The City argues that sign ordinances are land use regulations not subject to the ZPL." *Id.*

130. "Clearly, sign ordinances may be subject to the ZPL when they are drafted in such a manner as to regulate the uses and development standards of property, i.e., signs, by means of zones or districts." *Id.* at 266-67, 564 S.E.2d at 446.

131. *Id.* at 267, 564 S.E.2d at 447. The land use regulation must be "evaluated as a whole to determine whether or not it involves dividing a governmental unit into zones or districts and applying different standards to such zones or districts in regard to property therein." *Id.*

132. *Id.*

133. *Id.* Accordingly, the ordinance was declared invalid and the trial court was held to have correctly ordered the city to issue permits to the plaintiff. *Id.* at 266, 569 S.E.2d at 446.

134. 255 Ga. App. 114, 564 S.E.2d 526 (2002).

135. *Id.* at 114, 564 S.E.2d at 527. "This case concerns a challenge to the validity of [the city's] Historic Preservation Zoning Ordinance and the amendment to that ordinance which added the street upon which [plaintiffs] own property." *Id.*

136. *Id.* at 115, 564 S.E.2d at 527. "Instead, the review was done by the Historic Preservation Commission." *Id.*, 564 S.E.2d at 528.

137. *Id.* at 117, 564 S.E.2d at 528-29 (quoting Patrick v. Head, 262 Ga. 654, 655, 424 S.E.2d 615, 616 (1993)).

138. *Id.*, 564 S.E.2d at 529. "The . . . City Commission acted within its authority to adopt the 1996 Historic Preservation Zoning Ordinance, revising the 1979 Historic District

King v. City of Bainbridge[139] featured an asserted conflict of a more pervasive nature, that of federal preemption. There, a municipal zoning ordinance excluded mobile homes from residential districts,[140] an exclusion challenged as preempted by the National Manufactured Housing and Safety Standards Act.[141] Rejecting the challenge, the supreme court read the federal statute to preempt any other "safety or construction requirements."[142] However, the court observed, "nothing in the Act prevents localities from excluding mobile homes from certain zoning districts."[143] Additionally, the court confronted its own prior decision invalidating mobile home zoning based on aesthetics and protecting property values.[144] Explicitly overruling that decision,[145] the court sustained the ordinance as a valid means of "regulat[ing] the quality of housing stock and promot[ing] general safety concerns."[146]

A trial judge's disposition of constitutionality drew mixed reactions from the court in *Town of Tyrone v. Tyrone, LLC*.[147] On the one hand,

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Zoning Ordinance, without a review or recommendation by the Planning Commission." *Id.*

139. 276 Ga. 484, 577 S.E.2d 772 (2003).

140. The city sued a landowner to enjoin her placement of a mobile home upon a portion of her land lying within city limits, and the defendant challenged the validity of the zoning ordinance upon which the city relied. *Id.* at 484-85, 577 S.E.2d 772-73.

141. *Id.* at 485, 577 S.E.2d at 773; 42 U.S.C. §§ 5401-5426 (2000).

142. 276 Ga. at 485-86, 577 S.E.2d at 773; 42 U.S.C. §§ 5401-5426. "Thus, any attempt to place higher construction standards on mobile homes than those established under the Act is invalid." 276 Ga. at 485-86, 577 S.E.2d at 773.

143. 276 Ga. at 486, 577 S.E.2d at 773. "By excluding HUD-certified mobile homes from the R-2 district, the City has not imposed any safety or construction requirement on the homes, but has simply determined that this type of housing is inappropriate in an R-2 district." *Id.*

144. *Id.* at 487, 577 S.E.2d at 775. "Under *Cannon v. Coweta County* [260 Ga. 56, 389 S.E.2d 329 (1990)] . . . this [c]ourt held that a zoning ordinance that restricted mobile homes to mobile home parks, based on aesthetic and protection of property values concerns, was unconstitutional." *Id.*

145. *Id.* at 488, 577 S.E.2d at 775. "We now conclude that *Cannon* was wrongly decided and hereby overrule it." *Id.*

146. *Id.* "These reasons are not arbitrary or unreasonable and bear a substantial relation to the public health, safety, and general welfare. Therefore, the City's ordinance is not unconstitutional." *Id.*

A dissenting opinion for two justices maintained that the federal statute had preempted the zoning ordinance:

> When all is said and done, it is clear that in enacting its ordinance the City was motivated by a desire to legislate in the mobile home safety arena; and the City's interpretation of the ordinance gives it that effect. The ordinance should not be saved simply because it appears to be regular on its face.

Id. at 490, 577 S.E.2d at 777 (Thompson, J., dissenting).

147. 275 Ga. 383, 565 S.E.2d 806 (2002). A shopping center developer sought to have the town rezone property from "agricultural-residential" to "commercial"; the council denied

the court condemned the judge's order that the subject land be rezoned from "agricultural-residential" to "commercial."[148] "'Courts have no power to zone or rezone property,'"[149] the court asserted, and "[o]nce the trial court concluded that the current zoning was unconstitutional, it should have ordered the town council to rezone the property to a constitutional designation."[150] On the other hand, the court affirmed the judge's determination that a portion of the property's present zoning was invalid.[151] Given testimony of experts and even the town's planning consultant,[152] "the trial court did not clearly err in finding that the property zoned agricultural-residential cannot be developed under that classification."[153]

A prolonged zoning controversy finally concluded in *Powell v. City of Snellville*,[154] with the landowner's charge of a "temporary taking" coming to naught.[155] Reviewing contested zonings and rezonings of plaintiff's property between 1993 and 2000,[156] the supreme court reasoned that "[a] property owner does not suffer a compensable temporary taking under the Fifth Amendment to the U.S. Constitution unless the government has deprived a landowner of all use of the property."[157] Neither contested zoning action, the court held, amount-

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the request; and plaintiff sued to accomplish his ends. The trial court declared the property's current zoning unconstitutional and ordered the town to rezone the property as "commercial." *Id.* at 383-84, 565 S.E.2d at 807-08.

148. The judge's order constituted an excess of judicial power. *Id.* at 384, 565 S.E.2d at 808.

149. *Id.* (quoting Hall Paving Co. v. Hall County, 237 Ga. 14, 15, 226 S.E.2d 728, 729 (1976)).

150. *Id.*

151. *Id.* at 386, 565 S.E.2d at 809.

152. Plaintiff's expert testified that the portion could not feasibly be developed for residential use, and the planning consultant opined that the current zoning did not support establishment of economic uses. *Id.* at 385-86, 565 S.E.2d at 809.

153. *Id.* at 386, 565 S.E.2d at 809. The same conclusion did not hold for the remaining twenty-two acres of the property. *Id.*

154. 275 Ga. 207, 563 S.E.2d 860 (2002).

155. *Id.* at 207, 563 S.E.2d at 860.

156. Plaintiff owned property which she wished to sell for development as a parking lot; she consented to municipal annexation in 1993 and objected to its original zoning as "Office and Institutional" with an express parking lot prohibition; she protested a 1994 rezoning of the property to "Neighborhood Business" with a parking lot prohibition; and she consented to a 2000 rezoning to "Planned Residential Community." *Id.* at 207-08, 563 S.E.2d at 863. Plaintiff contended that she was "entitled to a jury trial to determine whether she suffered a temporary taking entitling her to damages from 1993, when the city initially improperly zoned her property, until the city zoned the property for a planned residential community in 2000." *Id.* at 209, 563 S.E.2d at 863.

157. *Id.* at 209, 563 S.E.2d at 863.

ed to such deprivation:[158] "'[T]he property owner still had possession and use of the land where she could have built in accordance with the existing zoning or applied for a different type of zoning.'"[159]

Another instance of insufficient interest for complaint, *Garden Hills Civic Ass'n v. Metropolitan Atlanta Rapid Transit Authority*,[160] focused on the issue of standing.[161] There, a civic association and a landowner challenged municipal rezoning of property being developed for "'office, housing and retail'" uses.[162] According to the evidence, however, the challenged rezoning had not "led to the development;"[163] rather, "defendants could have developed the property in the same manner under the existing zoning."[164] Consequently, the court of appeals held that plaintiffs "failed to demonstrate any special damages and, thus, lacked standing."[165]

The supreme court reached a similar conclusion, holding plaintiffs devoid of a vested interest, in *Meeks v. City of Buford*.[166] The case turned on a density variance on undeveloped land granted for the benefit of a potential purchaser who in fact never purchased the subject property.[167] Plaintiffs subsequently purchased the property and, some fifteen years later, claimed a vested entitlement to the variance.[168] On grounds that "since they purchased the property in 1986, [plaintiffs] have made no significant expenditures in reliance on the variance,"[169]

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158. *Id.*

159. *Id.* (quoting Cobb County v. McColister, 261 Ga. 876, 877, 413 S.E.2d 441, 443 (1992)).

160. 256 Ga. App. 367, 568 S.E.2d 586 (2002).

161. *Id.* at 367, 568 S.E.2d at 586.

162. *Id.*, 568 S.E.2d at 587.

163. *Id.* at 368, 568 S.E.2d at 587.

164. *Id.* "[T]he evidence shows that [plaintiffs] were subject to the same harm regardless of whether the property was rezoned." *Id.* Actually, "the rezoning was more restrictive than the original zoning." *Id.*

165. *Id.* The court reflected that "[t]he appellants' true complaint is not that the property was rezoned, but that it will be developed at all. However, such development is to be expected in a thriving urban community. And the increase in inconvenience stemming from urban growth–such as increased traffic–is insufficient to confer standing." *Id.* at 368-69, 568 S.E.2d at 587-88 (citations omitted).

166. 275 Ga. 585, 571 S.E.2d 369 (2002).

167. The city had granted the variance in 1985. *Id.* at 585, 571 S.E.2d at 370.

168. *Id.* at 586, 571 S.E.2d at 370. Although plaintiffs purchased the property in 1986, they did not lay claim to the benefit of the variance (for a potential sale) until 1999. *Id.* at 585-86, 571 S.E.2d at 370.

169. *Id.* at 587, 571 S.E.2d at 371. In order to acquire a vested right, "the landowner must in good faith have 'made a substantial change of position in relation to the land, made substantial expenditures, or have incurred substantial obligations.'" *Id.* (quoting Barker v. Forsyth County, 248 Ga. 73, 76, 281 S.E.2d 549, 552 (1981)).

the court held that they lacked a "vested right" to so use the property.[170]

II. COUNTIES

A. *Officers and Employees*

Office eligibility and job security constituted dominating concerns for county officers and employees during the survey period. *Hardin v. Brookins*[171] featured a citizen's quo warranto action against a county school board member on grounds that the latter, six years earlier, pleaded nolo contendere in Florida to possession of a controlled substance.[172] Plaintiff relied on a Georgia statute declaring one's ineligibility to public office if convicted and sentenced to a felony,[173] and defendant countered with a statute declaring a nolo plea insufficient to affect civil disqualification for public office.[174] The two statutes, reasoned the supreme court, "are in pari materia and must be construed together."[175] So positioned, the court rejected plaintiff's argument that the exemption enactment applied "only to one who enters a nolo plea in Georgia."[176] Accordingly, defendant "would be disqualified from

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170. *Id.* Accordingly, "the trial court did not err in refusing to give effect to the variance." *Id.* at 587-88, 571 S.E.2d at 371. A dissenting opinion maintained that a variance is not personal to the owner of land and is available to a subsequent purchaser as long as it has not expired or been revoked. *Id.* at 588, 571 S.E.2d at 371 (Carley, J., dissenting).

171. 275 Ga. 477, 569 S.E.2d 511 (2002).

172. *Id.* at 477, 569 S.E.2d at 511. For an extensive study of quo warranto and its pervasiveness in Georgia local government law, see R. PERRY SENTELL, JR., THE WRIT OF QUO WARRANTO IN GEORGIA LOCAL GOVERNMENT LAW (1987).

173. *Id.*; O.C.G.A. § 45-2-1(3) (2002). The statute applies to one "'finally convicted and sentenced for any felony involving moral turpitude under the laws of this or any other state when the offense is also a felony in this state . . . .'" 275 Ga. at 477, 569 S.E.2d at 511 (quoting O.C.G.A. § 45-2-1(3)).

174. 275 Ga. at 477-78, 569 S.E.2d at 511; O.C.G.A. § 17-7-95(c) (1997 & Supp. 2002). Section 17-7-95(c) provides that a nolo plea "'shall not be deemed a plea of guilty for the purpose of effecting any civil disqualification of the defendant to hold public office . . . .'" 275 Ga. at 478, 569 S.E.2d at 511 (quoting O.C.G.A. § 17-7-95(c).

175. 275 Ga. at 478, 569 S.E.2d at 512. For an extensive study of in pari materia and its pervasiveness in Georgia statutory construction, see R. Perry Sentell, Jr., *Statutory Construction in Georgia: The Doctrine of In Pari Materia*, printed in R. PERRY SENTELL, JR., STUDIES IN GEORGIA STATUTORY LAW 259 (1996).

176. 275 Ga. at 478, 569 S.E.2d at 512. Plaintiff "contends that [the disqualification statute] is applicable here, but that [the exemption statute] is not because [defendant] entered his plea in Florida." *Id.* Said the court: "Thus, the decisive factor is not where the nolo plea was entered, but simply whether the individual was convicted of a crime which is recognized as a disqualifying offense under Georgia law." *Id.* at 479, 569 S.E.2d at 512.

holding public office pursuant to [the disqualification statute], but he is exempted from such disqualification by [the exemption statute]."[177]

Challengers in *Wheeler County Board of Tax Assessors v. Gilder*[178] charged the ineligibility of a county tax assessor who simultaneously served on the county Board of Agricultural Stabilization and Conservation Committee ("ASC").[179] First, the court of appeals rejected plaintiffs' reliance upon a statute prohibiting tax assessors from holding "any state, county, or municipal office."[180] Defendant's ASC position was a "federal office,"[181] the court delineated, a position "clearly . . . excluded"[182] from the statutory prohibition.[183] Second, the court likewise held defendant excluded from a statute declaring ineligible for "any civil office"[184] persons who also hold "'any office of profit or trust under the government of the United States.'"[185] County ASC members are not determined by a county "popular election,"[186] the court reasoned, and thus fall within the statute's exemption for "appointed officers."[187]

Terminations and demotions also featured prominently in this year's litigational corpus. In *Grady County Board of Education v. Hickerson*,[188] the supreme court sustained a trial judge's mandamus ordering the school board to affirm or reverse an independent tribunal's decision

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177. *Id.* at 479, 569 S.E.2d at 512. "The trial court correctly construed the applicable statutes and properly ruled in favor of [defendant]." *Id.*

178. 256 Ga. App. 478, 568 S.E.2d 786 (2002).

179. "The county ASC committee is a federal committee created by authority of the Soil Conservation and Domestic Allotment Act and administers programs related to the prevention of soil erosion conducted by the United States Department of Agriculture . . . . 16 U.S.C. § 590a; 52 [F.R.] 48511; 7 [C.F.R.] Part 7." 256 Ga. App. at 478, 568 S.E.2d at 787.

180. 256 Ga. App. at 479, 568 S.E.2d at 788; O.C.G.A. § 48-5-295(a) (2002).

181. 256 Ga. App. at 479, 568 S.E.2d at 788; O.C.G.A. § 48-5-295(a) (1999 & Supp. 2003).

182. 256 Ga. App. at 479, 568 S.E.2d at 788.

183. *Id.* "The right to hold office is the rule and ineligibility is the exception." *Id.*

184. *Id.* at 479-80, 568 S.E.2d at 788.

185. *Id.* (quoting O.C.G.A. § 45-2-1 (2002)).

186. "[I]f membership of a governing structure is not determined through a popular election in which the residents of the county participate, the nature of the governing structure is appointive." *Id.* at 480-81, 568 S.E.2d at 789.

187. *Id.* at 481, 568 S.E.2d at 789. "Thus, the position of county ASC committee member is appointed and meets the first requirement for exemption from the ineligibility provision of [O.C.G.A. section] 45-2-1." *Id.* The court also held defendant's ASC position temporary in nature and not such as would "*materially* interfere with his duties as a tax assessor." *Id.*

188. 275 Ga. 580, 571 S.E.2d 391 (2002).

that the board had terminated a school superintendent without cause.[189] The parties having agreed to specified statutory procedures,[190] the court found the superintendent was entitled to the board's decision in order to exhaust his administrative remedies under the contract and pursue his claim in superior court.[191]

The court of appeals dealt with exhaustion of administrative remedies in *Crumpler v. Henry County*,[192] involving the county manager's demotion of a police officer.[193] Opposing the officer's effort at certiorari review by the superior court, the county insisted that plaintiff must first appeal to the county commissioners.[194] Denying the soundness of the county's position, the court employed a two-step reasoning process.[195] Initially, the court interpreted a county ordinance to provide plaintiff only the right of a "discretionary appeal" to the commissioners.[196] Second, the court held that the county manager's decision constituted a "quasi-judicial action subject to certiorari review."[197] Consequently, plaintiff "was entitled to petition for a writ of certiorari without first asking the board of county commissioners to review his case."[198]

In *Norris v. Henry County*,[199] the court rejected an employee's complaint that he was afforded no hearing prior to termination for

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189. "The Board failed to affirm or reverse the tribunal's decision, and [plaintiff] filed this mandamus action seeking a ruling that the Board was required to make such a decision." *Id.* at 580-81, 571 S.E.2d at 391.

190. *Id.* at 581, 571 S.E.2d at 391; O.C.G.A. § 20-2-940 (2001). "Those procedures include a requirement that, after an employment decision by a tribunal, a local board of education must issue a ruling on the tribunal's decision within ten days of the board's receipt of the transcript of the hearing before the tribunal." 275 Ga. at 581 n.2, 571 S.E.2d at 392 n.2.

191. 275 Ga. at 581, 571 S.E.2d at 391-92. For extensive examination of the role of mandamus in the law of local government, see R. PERRY SENTELL, JR., MISCASTING MANDAMUS IN GEORGIA LOCAL GOVERNMENT LAW (1989).

192. 257 Ga. App. 615, 571 S.E.2d 822 (2002).

193. Actually, the officer was demoted by the police department and he appealed to the county manager who affirmed the demotion. *Id.* at 615-16, 571 S.E.2d at 823.

194. *Id.* at 616, 571 S.E.2d at 823.

195. *Id.*

196. *Id.* at 617, 571 S.E.2d at 824. The county ordinance "provides that a county employee 'shall have the right to petition the Board of Commissioners to review a decision of the county manager which upholds or imposes . . . a demotion . . . .'" *Id.* at 616, 571 S.E.2d at 824. Observed the court: "[N]othing in the ordinance requires an employee to petition for discretionary review before seeking certiorari in the superior court." *Id.*

197. *Id.* at 618, 571 S.E.2d at 825. "The hearing before the county manager was a quasi-judicial hearing because it included notice, a hearing, and factual findings and conclusions." *Id.* at 617-18, 571 S.E.2d at 825.

198. *Id.* at 618, 571 S.E.2d at 825. The court thus reversed the trial judge's dismissal of the officer's petition for certiorari. *Id.* at 620, 571 S.E.2d at 826.

199. 255 Ga. App. 718, 566 S.E.2d 428 (2002).

incompetence.[200] A post-termination hearing before the county manager met all plaintiff's due process requirements,[201] the court reasoned, and the trial judge properly employed an "any evidence" standard of review.[202] Under that standard, there was "at least some evidence"[203] to uphold plaintiff's termination.[204]

B. Regulation

A major county regulatory issue of the survey period manifested itself in *Rabun County v. Georgia Transmission Corp.*,[205] an electric membership corporation's challenge to a county ordinance imposing a three-year moratorium on the construction of high-voltage power lines.[206]

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200. *Id.* at 718-19, 566 S.E.2d at 429. Plaintiff, a county pipe crew foreman, was in charge of a project in which a county track hoe was damaged. The following week, plaintiff's supervisor gave him a letter of termination based on plaintiff's incompetence as exhibited by the track hoe incident and by a long history of job performance problems. *Id.*

201. *Id.* at 719, 566 S.E.2d at 429-30. "Although due process entitles the public employee to a pre-termination hearing, the employer's failure to provide one is not a constitutional violation under the due process clause if the employer (as here) provides a later procedural remedy." *Id.* The county manager had provided plaintiff a two-day hearing attended by plaintiff and his attorney. As for plaintiff's argument that the county had failed to follow its own personnel manual, the court asserted that "the adequacy of due process is governed not by personnel manuals but by case law interpreting the federal and state constitutions, which only require that the employee (even if later) be notified and given an opportunity to be heard." *Id.* at 719-20, 566 S.E.2d at 430.

202. *Id.* at 720, 566 S.E.2d at 430. "'The appropriate standard of review to be applied to issues of fact on writ of certiorari to the superior court is whether the decision below was supported by any evidence.'" *Id*. (quoting City of Atlanta v. Smith, 228 Ga. App. 864, 865, 493 S.E.2d 51, 52 (1997)).

203. *Id.* at 721, 566 S.E.2d at 431.

204. *Id.* The court thus affirmed the trial judge's affirmance of the county's termination decision. *Id.*

In the period case of *Harris County Sheriff's Office v. Negrete*, 259 Ga. App. 891, 578 S.E.2d 579 (2003), the court of appeals affirmed a superior court in sustaining the administrative law judge's award of workers compensation to a county deputy sheriff injured in a collision while driving a county patrol car to his part-time job as a security guard. *Id.* at 891, 578 S.E.2d at 579. Reviewing county policies authorizing all the officer's actions, the court found that "the ostensibly 'off-duty' deputy is shown to have been acting in a capacity little different from an on-duty officer." *Id.* at 893, 578 S.E.2d at 581.

205. 276 Ga. 81, 575 S.E.2d 474 (2003). For perspective on local government regulatory power, see R. Perry Sentell, Jr., *"Ascertainable Standards" versus "Unbridled Discretion" in Local Government Regulation*, 41 GA. COUNTY GOV. MAG. 19 (Dec. 1989); R. Perry Sentell, Jr., *Discretion in Local Government Law*, 8 GA. L. REV. 614 (1974); R. Perry Sentell, Jr., *Reasoning by Riddle: The Power to Prohibit in Georgia Local Government Law*, 9 GA. L. REV. 115 (1974).

206. The ordinance elaborated the expressed fears of county citizens about possible health dangers from electromagnetic fields, and imposed the three-year moratorium on high-voltage lines in the county in order to await further research on the problem. 276 Ga.

Reviewing the ordinance's potential effects on the challenger's conceded power of eminent domain,[207] the supreme court invalidated the measure on two grounds.[208] First, the constitution's county home rule provision expressly precludes any "'[a]ction affecting the exercise of the power of eminent domain.'"[209] Under material eminent domain statutes,[210] "the condemning body, not the [county] governing authority, is to be the 'exclusive judge' of the 'necessities of the public needs.'"[211] Second, the court continued, under the constitution's interpreted principle of "state preemption,"[212] the county ordinance "directly contravenes the [statutory] mandate . . . that grants [plaintiff], as the condemning body, the exclusive power to decide the 'necessities of the public needs.'"[213]

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at 81-82, 575 S.E.2d at 475. Plaintiff electric membership corporation had for several years been planning the construction of a 115-kilovolt transmission line which would cross approximately seven miles of the county. *Id.* at 82, 575 S.E.2d at 475.

207. *Id.* at 84-85, 575 S.E.2d at 476-77. "Certainly, GTC is empowered to exercise eminent domain as provided in [O.C.G.A. section] 46-3-201(b)(9) . . . . It is undisputed that GTC will have to condemn property in order to effectuate the project as currently proposed, and that the ordinance will halt the project." *Id.*

208. *Id.* at 81, 575 S.E.2d at 474.

209. *Id.* at 86, 575 S.E.2d at 477 (quoting GA. CONST. art. IX, § 2, para. 1). For extensive treatment of local government home rule, see R. Perry Sentell, Jr., *The Georgia Home Rule System*, 50 MERCER L. REV. 99 (1998).

210. O.C.G.A. § 22-2-102.1 (1982 & Supp. 2002).

211. 276 Ga. at 86-87, 575 S.E.2d at 478. Even so, the court qualified, the condemning body is not absolutely unfettered in its determination of necessity. *Id.* at 87, 575 S.E.2d at 478. For treatment of possible limitations on local government condemnation, see R. Perry Sentell, Jr., *Condemning Local Government Condemnation*, 39 MERCER L. REV. 11 (1987).

212. 276 Ga. at 87, 575 S.E.2d at 478; GA. CONST. art. III, § 6, para. 4. For treatment of the court's move to "preemption" under the constitution's uniformity clause, see R. Perry Sentell, Jr., *The Georgia Supreme Court and Local Government Law: Two Sheets to the Wind*, 16 GA. ST. U. L. REV. 361 (1999).

213. 276 Ga. at 87, 575 S.E.2d at 478 (quoting O.C.G.A. § 22-2-102.1 (1982 & Supp. 2003)). The court said that the county ordinance made the determination that it was feasible to meet electric power needs in the area without construction of plaintiff's proposed high-voltage line, thereby directly contradicting statutory direction that the determination be made by the condemning body. *Id.*

A replay of the litigation occurred in *Cobb County v. Georgia Transmission Corp.*, 276 Ga. 367, 578 S.E.2d 852 (2003). The "only significant differences" observed the court, were the length of the prohibition (seven and one-half months instead of three years), the prohibition of all power lines ("regardless of whether they are above-ground"), and the prohibition's "application to lines which exceed 35, rather than 115, kilovolts." *Id.* at 367-68, 578 S.E.2d at 853. These were only "differences . . . in degree," the court asserted, concluding that the ordinance "on its face, violates the home rule provision of the Georgia Constitution." *Id.* at 368, 578 S.E.2d at 853.

The regulatory challenge of *Home Builders Ass'n of Savannah, Inc. v. Chatham County*[214] targeted the county's collection of fees for building permits and occupancy certificates.[215] Specifically, plaintiffs alleged, those fees exceeded the true costs of services for which they were charged and lacked a rational relation to the costs of services provided.[216] Reviewing the trial judge's summary judgment for the county, the supreme court noted evidence of a fee increase at a time when the reserve fund amounted to two million dollars,[217] as well as fund payouts to various county entities.[218] That evidence, the court concluded, raised outstanding issues of material fact remaining for decision and precluded the grant of summary judgment.[219]

Contrarily, but in the special context of a mandamus proceeding,[220] the court sustained the county's regulatory discretion in *Fulton County v. Congregation of Anshei Chesed*.[221] There, plaintiffs demanded issuance of a county permit authorizing the use of a single family residence as a place of worship.[222] Focusing upon the material resolution, the court emphasized both its conferral of limited discretion in evaluating use permit requests[223] and its list of general factors for the

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214. 276 Ga. 243, 577 S.E.2d 564 (2003).

215. *Id.* at 244, 577 S.E.2d at 565. The county Inspections Department

> issues building permits, certificates of occupancy, and enforces zoning ordinances and building codes in the unincorporated portions of [the county], also known as the Special Service District ("SSD"). Inspections collects [the fees] in addition to other fees in order to fund the services it provides. Fees obtained by Inspections are placed in the SSD special revenue fund.

Id.

216. *Id.* at 245, 577 S.E.2d at 566. "The various claims asserted by [plaintiffs] are grounded on the assertion that the County imposed unlawfully high fees throughout this entire period of time which were substantially in excess of its operating costs and that the surplus was improperly spent on other projects, departments, and governmental entities." *Id.*

217. *Id.* That fact, the court said, was some evidence of unreasonable excess. *Id.*

218. *Id.* It could not be determined as a matter of law, the court said, that the expenditures were solely for proper purposes. *Id.*, 577 S.E.2d at 565.

219. *Id.*, 577 S.E.2d at 566. "Because outstanding issues of material fact remain to be decided, we hold that summary judgment was improperly granted to the County." *Id.*

220. For an extensive examination of that context, see R. PERRY SENTELL, JR., MISCASTING MANDAMUS IN GEORGIA LOCAL GOVERNMENT LAW (1989).

221. 275 Ga. 856, 860, 572 S.E.2d 530, 533 (2002).

222. *Id.* at 856-57, 572 S.E.2d at 530-31. Plaintiffs "sought a court order requiring the county to permit the land [zoned single family residences] to be used for a house of worship." *Id.* The trial court found plaintiffs to possess a clear legal right to the permit and ordered the issuance of a mandamus. *Id.* at 857, 572 S.E.2d at 530-31.

223. *Id.* at 858, 572 S.E.2d at 532. "The Zoning Resolution of [the county] allows places of worship to be located in residential zoning pursuant to the approval of a use permit . . . and provides that the Board of Commissioners 'may exercise limited discretion in

county's consideration.[224] A mandamus applicant must show the county's "gross abuse of discretion"[225] in denying the permit,[226] the court reasoned—a showing rendered impossible by evidence supporting the county's decision.[227] Employing its requisite "any evidence standard of review,"[228] the court reversed the trial judge's issuance of the mandamus.[229]

The court of appeals primary venture into county regulation unfolded in *Cherokee County v. Greater Atlanta Homebuilders Ass'n*.[230] That episode featured a county ordinance (enacted under express authority of state statute)[231] imposing impact fees on new developments in the county's unincorporated area.[232] Developers attacked the ordinance's method of mandating the county's use of generated fees "to construct new facilities in six infrastructure areas."[233] Those facilities would also benefit new developments in the county's incorporated (municipal) areas, developments paying no impact fees.[234] This unequal treatment of incorporated and unincorporated areas, plaintiffs charged, violated both due process and equal protection.[235] Reversing the trial judge's decision of invalidity, the court reasoned that the resulting differentia-

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evaluating the site proposed for a use which requires a use permit.'" *Id.*

224. *Id.* at 859, 572 S.E.2d at 532. The resolution authorized the board to consider "eleven general factors" and "four factors specific to places of worship." *Id.* Necessarily, the court observed, the consideration of such criteria "requires the local governing body to exercise discretion." *Id.* n.7.

225. *Id.* at 859, 572 S.E.2d at 532.

226. *Id.* "[A] disappointed applicant who seeks mandamus relief from the superior court must show that the local governing body's denial of the special use permit constituted a gross abuse of discretion." *Id.*

227. *Id.* The transcript showed that several commissioners opposing the permit were opposed to introducing an "institutional" use to an area used for single family residences. *Id.*, 572 S.E.2d at 533.

228. *Id.*, 572 S.E.2d at 532. The standard of review "is whether there is any evidence supporting the decision of the local governing body, not whether there is any evidence supporting the decision of the superior court." *Id.*

229. *Id.* at 859-60, 572 S.E.2d at 533. "Since the record contains evidence supporting the decision of the Board of Commissioners, we must reverse the trial court." *Id.*

230. 255 Ga. App. 764, 566 S.E.2d 470 (2002).

231. *Id.* at 764, 566 S.E.2d at 470; O.C.G.A. §§ 36-71-1 to -13 (2000).

232. The court sketched the process via which the amounts of the fees would be calculated and the basis of those calculations. 255 Ga. App. at 765, 566 S.E.2d at 472-73.

233. *Id.*, 566 S.E.2d at 472. Infrastructure areas included libraries, parks, road services, and the like. *Id.*

234. "[Plaintiffs'] primary complaint about the impact fees is that the county imposed the fees only on new developments in unincorporated portions of the county, allowing new developments in incorporated portions of the county, which would also benefit from the countywide system improvements, a 'free ride.'" *Id.* at 766-67, 566 S.E.2d at 473.

235. *Id.* at 767, 566 S.E.2d at 473-74.

tion did not equal county discrimination.[236] The county had imposed fees in all areas statutorily authorized,[237] and it "simply has no power or control over developments in municipal limits."[238] Thus, the absence of impact fees on developments in municipalities resulted not from county action,[239] but rather from municipal decisions against imposing the fees.[240] Plaintiffs' attack, the court asserted, "falls of its own weight."[241]

C. *Openness*

The court of appeals dealt with issues of governmental openness in two contexts: "open meetings" and "open records."[242] As for meetings, Georgia's Open Meetings Act[243] requires the award of attorney fees

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236. *Id.* at 769, 566 S.E.2d at 475. Equal protection, the court reasoned, does not prevent a reasonable classification, and due process requires only a "rational basis." *Id.* at 767, 566 S.E.2d at 473-74.

237. *Id.* at 768, 566 S.E.2d at 474. The court noted that plaintiffs had been "careful not to challenge the constitutionality of the enabling statutes," but only the county ordinance. *Id.*

238. *Id.*

239. *Id.* "The county has imposed an impact fee on all new developments within the unincorporated portions of the county, which is all it has the power to do. It has not made a 'classification' exempting incorporated developments from the fees . . . ." *Id.*

240. *Id.*

> The reason new developments in municipalities do not pay the fees is not because of any legislative distinction or action by the county, but results from decisions by the municipalities not to impose such fees and not to enter into optional intergovernmental agreements with the county regarding such.

Id.

241. *Id.* "We hold that the entire ordinance and CIE [method for calculating expenditures of fees] are constitutional and in conformance with the enabling statute . . . ." *Id.* at 766, 566 S.E.2d at 473.

Finally, though not technically a county "power" case, *Bickford v. Yancey Development Co.*, 258 Ga. App. 371, 574 S.E.2d 349 (2002), featured a controversy over restrictive covenants on defendant's land for which the county had issued a clearing permit. Adjoining landowners argued that the covenants were created in 1977 and automatically renewed in 1993. *Id.* at 372, 574 S.E.2d at 350. Holding that no covenants presently existed, the court of appeals reasoned that under general law (O.C.G.A. § 44-5-60(b) (1991 & Supp. 2003)), covenants established in 1977 automatically expired twenty years later in 1997. *Id.* at 373, 574 S.E.2d at 351. Moreover, the court held, the automatic renewal statute of 1993 (O.C.G.A. § 44-5-60(d) (1991 & Supp. 2003)) did not retroactively apply to covenants which arose prior to 1993. *Id.* For a discussion of restrictive covenants and zoning in local government law, see R. Perry Sentell, Jr., *Restrictive Covenants and Zoning: A Dynamic Duo*, 30 URBAN GA. MAG. 16 (Sept. 1980).

242. For an early discussion of the "openness movement" in Georgia local government law, see R. Perry Sentell, Jr. *The Omen of "Openness" in Local Government Law*, 13 GA. L. REV. 97 (1978).

243. O.C.G.A. §§ 50-14-1 to -5 (2002).

upon the court's determination that an agency violated the statute "without substantial justification."[244] In *Evans County Board of Commissioners v. Claxton Enterprise*,[245] the court inquired whether a judge could award such fees once the judge had determined that erring county commissioners had not acted in "bad faith."[246] Affirming the award, the court asserted that "acting without substantial justification and acting in bad faith are not synonymous."[247] The court did, however, view the evidence to sustain the judge's finding that "the Board's closure of the meetings and untimely filing of the minutes and affidavit lacked substantial justification."[248]

A second issue in the case, an issue of "first impression" in Georgia, concerned the availability of attorney fees for work done in appellate litigation.[249] Upholding that award as well, the court relied both upon specific statutory language and upon the statute's general purpose of encouraging private enforcement.[250] "Because appeal is often an integral part of litigation to enforce the Act, recovery of attorney fees should not exclude those incurred on appeal."[251]

In *Wiggins v. Board of Commissioners of Tift County*,[252] a county official charged the county commissioners' violations of the Open and Public Meetings Act[253] and sought injunctive relief.[254] The court of

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244. *Id.* § 50-14-5(b).

245. 255 Ga. App. 656, 566 S.E.2d 399 (2002).

246. *Id.* at 656, 566 S.E.2d at 399. The trial judge had reached this determination in his first consideration of the case, remanded by virtue of the court of appeals decision in *Claxton Enterprise v. Evans County Board of Commissioners*, 249 Ga. App. 870, 549 S.E.2d 830 (2001). On remand, the judge had found that the county commissioners' violation lacked substantial justification. *Id.* at 657, 566 S.E.2d at 401. The county contended that the judge's original determination on lack of bad faith foreclosed his remand decision on lack of substantial justification. *Id.* at 658, 566 S.E.2d at 401-02.

247. *Id.* at 658, 566 S.E.2d at 401.

248. *Id.*, 566 S.E.2d at 402. "One meaning of 'lacked substantial justification' is 'substantially groundless.'" *Id.*, 566 S.E.2d at 401.

249. *Id.* at 657, 566 S.E.2d at 401. "[T]he Board argued that the [plaintiff] could recover only attorney fees associated with trial court litigation, not those for appellate litigation." *Id.*

250. *Id.* at 659, 566 S.E.2d at 402. The court asserted that "nothing in the Act limits recovery of attorney fees to those incurred in trial court litigation." *Id.* Rather, the statute's use of the word "proceeding" might apply "to a court of any level." *Id.*

251. *Id.* The court noted that courts in other states had reached similar conclusions. *Id.* n.11.

252. 258 Ga. App. 666, 574 S.E.2d 874 (2002).

253. O.C.G.A. §§ 50-14-1 to -5 (2002).

254. 258 Ga. App. at 666-67, 574 S.E.2d at 875. The court deemed it curious that plaintiff (the Director of the County Office of Community Development) sought only relief from future violations of the statute while at the same time he alleged such past violations

appeals disapproved of the trial judge's injunction mandating county compliance with "all provisions of the Act."[255] By granting injunctive relief against the board from future violations, the judge had simply required the board's compliance with the law, "a duty which it already had and as to which relief in equity is generally unavailable."[256] Moreover, the court concluded, "courts of equity jurisdiction will not intervene to 'allay mere apprehensions of injury . . . .'"[257]

D. Roads

"[T]he legal mechanism for a county to abandon a road,"[258] the subject of *Talbot County Board of Commissioners v. Woodall*,[259] requires that the "county must give notice to property owners located on the road . . . ."[260] Because at the time in issue (1984),[261] the relevant statute made no mention of notification method,[262] the supreme court looked to "later enactments to determine the legislative intent."[263] In 1994 the legislature had amended the statute to require notice by publication,[264] but also retained the former statute's "language requiring 'notice to property owners located thereon.'"[265] Accordingly, the court reasoned, "the legislature must have intended to add a requirement different from the requirement of notice to adjoining property owners."[266] That indicated intention, the court concluded, "demonstrates that notice by publication does not satisfy the notice to adjoining property owners requirement."[267] Thus, the court held that petitioners'

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as a closed meeting, a lack of notice, the absence of an accurate agenda, and untimely publication of the minutes. *Id.* at 668, 574 S.E.2d at 875-76.

255. *Id.* at 667, 574 S.E.2d at 875. However, the trial judge also ordered all discovery terminated, a decision which the court here affirmed "under the right for any reason principle." *Id.*

256. *Id.* at 668, 574 S.E.2d at 876 (citing O.C.G.A. § 9-5-2 (1982 & Supp. 2002)).

257. *Id.* at 669, 674 S.E.2d at 876 (quoting Morton v. Gardner, 242 Ga. 852, 856, 252 S.E.2d 413, 416 (1979)).

258. Talbot County Bd. of Comm'rs v. Woodall, 275 Ga. 281, 282, 565 S.E.2d 465, 466 (2002).

259. 275 Ga. 281, 565 S.E.2d 465 (2002).

260. *Id.* at 282, 565 S.E.2d at 466.

261. Landowners sought a declaratory judgment that the county had abandoned two roads in 1984 and that title had passed to the landowners. As for the statutorily required notice to adjoining landowners, petitioners could only show the county's publication of notice in the county's legal organ. *Id.* at 281, 565 S.E.2d at 466.

262. O.C.G.A. § 32-7-2 (2001 & Supp. 2002).

263. 275 Ga. at 282, 565 S.E.2d at 466.

264. 1994 Ga. Laws 294; O.C.G.A. § 32-7-2(b)(1) (2001).

265. 275 Ga. at 282, 565 S.E.2d at 466 (quoting 1994 Ga. Laws 294, § 1).

266. *Id.* at 282-83, 565 S.E.2d at 466.

267. *Id.* at 283, 565 S.E.2d at 466-67.

showing of notice by publication failed to show sufficient notice for county abandonment of the roads.[268]

E. Finances

At issue in *City of Decatur v. DeKalb County*[269] was the validity of a county's contract to disburse annually to municipalities a portion of proceeds collected under the Homestead Option Sales and Use Tax ("HOST") statute.[270] Because of minimal county controls over the disbursed funds, the court of appeals held that the agreement violated the HOST statute.[271] Although the statute requires the expenditure of not more than twenty percent of tax receipts for capital outlay projects,[272] the court emphasized other mandates that the tax be exclusively collected for and distributed to the county.[273] In violation of those mandates, the court perceived, the contract sought "to shift that [expenditure] responsibility to the municipalities."[274] In the absence of "some form of legislative authority, it is inappropriate for a county to simply give its tax revenue to a municipality and allow that municipality to control what is done with the revenue."[275] The contract, the court concluded, "is contrary to the express language of the HOST statute, is not authorized by law, and therefore cannot stand."[276]

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268. *Id.*, 565 S.E.2d at 467. "Therefore, [petitioners'] showing that notice was made by publication did not satisfy the statutory requirement." *Id.*

269. 255 Ga. App. 868, 567 S.E.2d 332 (2002).

270. O.C.G.A. §§ 48-8-100 to -109 (2002); 255 Ga. App. at 868, 567 S.E.2d at 333.

271. 255 Ga. App. at 870, 567 S.E.2d at 334. "Contrary to the structure set forth in the statute, the county has little power under the agreement to control what is done with the tax proceeds once they are given to the municipalities." *Id.*

272. O.C.G.A. § 48-8-104(c)(2)(A) (2002).

273. 255 Ga. App. at 870, 567 S.E.2d at 334; O.C.G.A. §§ 48-8-104(a), (c)(2)(A).

274. 255 Ga. App. at 870, 567 S.E.2d at 334. "Although the statute expressly provides that the county bears the responsibility for expending the tax proceeds for capital outlay projects, the Intergovernmental Agreement seeks to shift that responsibility to the municipalities." *Id.*

275. *Id.* "'[I]t can never be a valid county purpose to provide [its tax] revenue to a municipality, because municipalities are not citizens of nor creatures of counties–they are an entirely different form of government.'" *Id.* (quoting City Council of Augusta v. Mangelly, 243 Ga. 358, 362, 254 S.E.2d 315, 319 (1979)).

276. *Id.* at 871, 567 S.E.2d at 334. "If the legislature had intended for counties to share HOST proceeds with cities in the manner described in the Intergovernmental Agreement, it could have so stated." *Id.* at 870-71, 567 S.E.2d at 334.

As this Article went to press, the Georgia Supreme Court reversed the court of appeals decision. City of Decatur v. DeKalb County, No. S02G1617, 2003 WL 22532528 (Ga. Nov. 10, 2003). The supreme court held that, via both constitutional provision (art. IX, § 2, para. 6) and the "HOST" statute itself, the county's agreement with the cities was authorized. "Thus, HOST . . . implements a district tax under the 'special district'

Randolph County v. Settles Bros.[277] involved a county's security interest in machinery under a 1992 promissory note obtained by the county for a loan to defendant.[278] In 1995 another entity assumed defendant's indebtedness on the note and purchased defendant's assets (including the pledged machinery), but defendant remained liable on the note. Under the 1995 agreement, the county was to file a financial statement to continue its security interest in the machinery, but the county failed to file the statement. Later, the acquiring entity allowed the note to go into default,[279] and the original financing statement expired by law after five years.[280] Upon the county's subsequent suit against defendant,[281] the court held the county had lost its perfected security interest by failing to file the continuation statement.[282] Accordingly, the court affirmed a decision releasing defendant from liability on the note to the extent of the value of the machinery.[283]

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[c]onstitutional provision." *Decatur*, 2003 WL22532528, at *1. The court reasoned that the court of appeals reliance upon *City Council of Augusta v. Mangelly* "is misplaced." *Id.*

In the survey period case of *Plyman v. Glynn County*, 276 Ga. 426, 578 S.E.2d 124 (2003), taxpayers sued to enjoin the county's collection of a special local option sales tax ("SPLOST") on grounds that the county could not (as it had agreed to do) lawfully "expend SPLOST funds to improve facilities owned and operated by the City and [a state park authority]." *Id.* at 427, 578 S.E.2d at 125. Observing that plaintiffs had waited forty-two days after certification of the SPLOST vote results to file the action, the court analogized to the statute (O.C.G.A. § 21-2-524 (2003)) requiring election contests to be brought within five days. *Id.* at 428, 578 S.E.2d at 126. Because this SPLOST had gone into effect only one hundred days after vote certification, the court reasoned that "by the time plaintiffs brought suit, the revenue department had already expended a considerable amount of resources to prepare for [the tax]." *Id.* Given the need to avoid uncertainty and confusion in the operation of government, the court held "that plaintiffs' claim is barred by the doctrine of laches." *Id.*

277. 259 Ga. App. 395, 577 S.E.2d 1 (2003).

278. *Id.* at 395, 577 S.E.2d at 1. "The loan was made pursuant to the Employment Incentive Program administered by the Georgia Department of Community Affairs." *Id.* n.1.

279. This happened in May 1997. *Id.*

280. This happened in September 1997. *Id.*

281. *Id.*, 577 S.E.2d at 2. In February 1998, the county sued defendant to collect the remaining balance due on the note. *Id.*

282. *Id.* at 396, 577 S.E.2d at 2.

283. *Id.* at 395, 577 S.E.2d at 1.

> When the County lost the machinery as collateral without the consent of [defendant] by failing to timely record a continuation UCC-1, this damaged [defendant] by exposing it to greater liability for payment of the note, and discharged [defendant] from its obligation to pay the note to the extent of the value of the machinery at the time it was lost as collateral.

Id. at 396, 577 S.E.2d at 2.

In *Columbus-Muscogee County Consolidated Government v. CM Tax Equalization, Inc.*,[284] the supreme court appraised the validity of a local constitutional amendment[285] freezing the county ad valorem tax value of homestead property in the county to its fair market value as of 1983.[286] As for plaintiffs' contention that the provision violated the constitution's tax uniformity command,[287] the court reviewed the uniqueness of a local constitutional amendment[288] and held it a valid "subsequent amendment to the uniformity clause."[289] The court likewise rejected challengers' equal protection attack, noting that the provision "must meet only the rational relationship test."[290] Because it "'was enacted precisely to achieve the benefits of an acquisition-value system,'"[291] the freeze provision was invalid neither "because of the classifications it draws among homeowners based upon purchase-date classification,"[292] nor "because of the separate classification of homeowners and renters."[293] Finally, the court also upheld the provision against a "right to travel" challenge.[294] "Nothing in the Homestead Freeze [local constitutional amendment] treats new arrivals to the County any differently from long-term County residents seeking to

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284. 276 Ga. 332, 579 S.E.2d 200 (2003).

285. 1981 Ga. Laws 1926-27.

286. 276 Ga. at 332, 579 S.E.2d at 201. The provision specified that

> "homestead property in [the county] shall be valued for purposes of ad valorem taxation for school and city-county government purposes based upon the fair market value of the property as of January 1, 1983; or as of January 1 of the first year when homestead exemption is allowed and claimed after January 1, 1983; or as of January 1 of the year following the last change of ownership after January 1, 1983, whichever is later."

Id. (quoting 1981 Ga. Laws 1926-27).

287. GA. CONST. art. VII, § 1, para. 3.

288. 276 Ga. at 333, 579 S.E.2d at 202. This provision, the court explained, had been adopted under the Georgia Constitution of 1976 (which permitted such measures), had been properly ratified by the county voters, and had subsequently been validly saved as permitted by the Georgia Constitution of 1983. *Id.* at 333, 579 S.E.2d at 201-02. That constitution "specifically provides that those pre-existing LCAs that were not repealed . . . 'shall be continued in force and effect as a part of this Constitution.'" *Id.* (quoting GA. CONST. art. XI, § 1, para. 4(b)).

289. *Id.* at 334, 579 S.E.2d at 202.

290. *Id.*

291. *Id.* at 336, 579 S.E.2d at 203 (quoting Nordlinger v. Hahn, 505 U.S. 1, 16 (1992)).

292. *Id.*

293. *Id.*

294. *Id.* at 338, 579 S.E.2d at 205.

purchase a home there."[295] Accordingly, the court reversed the trial judge's decision of invalidity.[296]

F. Liability

County liability may arise in a variety of contexts. *Dorsey v. Adams*[297] featured the county's liability for contempt of court, specifically the county's failure to comply with a settlement agreement to provide medical care for inmates at the county jail.[298] In defense, the county contended that its only obligation was to allocate funds to the sheriff, not to monitor the care provided.[299] That argument, said the court of appeals, "ignores the settlement agreement that [the county] entered into and the court order requiring the county to abide by the agreement."[300] The county attorney had signed the agreement as the county's "authorized representative," the court emphasized, and the county must fund and monitor medical care in accordance with the settlement terms.[301]

Most county liability litigation sounded in tort, thereby implicating the doctrine of county tort immunity.[302] A county may waive its immunity, to the extent of liability insurance, for claims "arising by reason of ownership, maintenance, operation, or use of any motor vehicle."[303] Unsuccessfully invoking that waiver, plaintiff in *Anderson v. Barrow County*[304] sought recovery for the death of his wife who was struck by

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295. *Id.*

296. *Id.*

297. 255 Ga. App. 257, 564 S.E.2d 847 (2002).

298. *Id.* at 257, 564 S.E.2d at 848. The trial judge had found the county to have wilfully disobeyed the agreement and declared the county in contempt. *Id.*

299. *Id.* at 259, 564 S.E.2d at 849-50. "[B]ecause it has allocated money to the sheriff to provide inmate medical care, the county reasons that it has met its obligation and cannot be held in contempt for failing to perform duties that fall exclusively to the sheriff." *Id.*

300. *Id.*, 564 S.E.2d at 850.

301. *Id.* "Contrary to [the county's] argument, the court's finding that the county is in contempt is not somehow based on the sheriff's statutory duty to maintain the jail, but is properly based on the county's own violations of the terms of the settlement agreement, which had been adopted by the court." *Id.* The court thus affirmed the trial judge's declaration of county contempt. *Id.* at 260, 564 S.E.2d at 830.

302. For perspective on county tort immunity, see R. Perry Sentell, Jr., *Georgia Local Government Tort Liability: The "Crisis" Conundrum*, 2 GA. ST. U. L. REV. 19 (1985); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993).

303. O.C.G.A. § 33-24-51 (1996 & Supp. 2002). For treatment of the statute and its history, see R. Perry Sentell, Jr., *Tort Liability Insurance in Georgia Local Government Law*, 24 MERCER L. REV. 651 (1973).

304. 256 Ga. App. 160, 568 S.E.2d 68 (2002).

a county emergency vehicle.[305] Specifically, plaintiff claimed that his wife's death resulted from the county's failure to enforce its safe driving policy.[306] Even so, the court reasoned, the jury had found that decedent's "own act of turning into the path of the emergency vehicle was the proximate cause of her death."[307] Consequently, "there is simply no causal connection between the accident and any alleged violation of [the county's safe driving] policy."[308] As for insurance waiver, the court was unyielding: "Even if the county's safe driving policy was violated, that violation did not arise 'by reason of ownership, maintenance, operation, or use of any motor vehicle,' but rather by failure to enforce the safe driving policy."[309]

Most of the survey period's tort litigation sought to impose personal liability upon the county officer, agent, or employee allegedly responsible for plaintiff's injury.[310] When the claim is directed to the officer's individual capacity, the concept of "official immunity" excludes liability for "discretionary functions" performed without malice or intent to injure.[311] Only for "ministerial functions" is the officer responsible in negligence.[312] In *Anderson* the plaintiff's action for his wife who was struck by an emergency vehicle provided apt illustration of the exercise.[313] There, the court of appeals reviewed plaintiff's charges of the driver's negligence but concluded that the decision to rush to the scene of an emergency lay within the officer's discretion.[314] Minus

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305. Plaintiff's decedent "was killed . . . when she pulled into the path of a . . . [c]ounty rescue vehicle driven by . . . a captain and volunteer firefighter who was responding to a two-car head-on collision." *Id.* at 160, 568 S.E.2d at 69.

306. *Id.*

307. *Id.* at 162, 568 S.E.2d at 71.

308. *Id.* at 163, 568 S.E.2d at 71.

309. *Id.*, 568 S.E.2d at 72.

310. For treatment of the personal liability of local government officers or employees, see R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights for Their Wrongs*, 13 GA. L. REV. 747 (1979); R. Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law: The Haunting Hiatus of Hennessy,* 40 MERCER L. REV. 27 (1988); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993).

311. *Anderson*, 256 Ga. App. at 163, 568 S.E.2d at 72.

312. *Id.*

313. *Id.* at 160, 568 S.E.2d at 69. Plaintiff's wife "was killed . . . when she pulled into the path of a . . . [c]ounty rescue vehicle being driven by . . . a volunteer firefighter . . . responding to a two-car, head-on collision." *Id.* Thus, the court asserted, "if the damages complained of arise from discretionary actions, [defendant] has official immunity; if, on the other hand, the damages arise from the performance or nonperformance of ministerial duties, [defendant] does not have official immunity." *Id.* at 161, 568 S.E.2d at 70.

314. *Id.* at 161-62, 568 S.E.2d at 70-71 (citing Logue v. Wright, 260 Ga. 206, 392 S.E.2d 235 (1990), which involved a police officer responding to an emergency). The court found

allegations of malice or intent, therefore,[315] "[the officer] is protected by official immunity and was entitled to summary judgment."[316]

The court employed a similar analysis in both *Anderson v. Cobb*[317] and *Aliffi v. Liberty County School District*.[318] *Anderson* featured an action for false arrest and malicious prosecution against a county detective for plaintiff's being charged with a battery.[319] On grounds that "[t]he decision to seek an arrest warrant is a discretionary act,"[320] the court promptly invoked the doctrine of official immunity which, absent evidence of "a deliberate intent to [do wrong],"[321] required judgment for the detective.[322] Similarly, the court in *Aliffi* affirmed summary judgment for a county school teacher who was sued for the death of a student in the school's storage garage.[323] The teacher's monitoring and supervising children in her classroom constituted an exercise of her "discretionary authority,"[324] and there was no evidence of malice or intent to injure.[325]

On occasion, plaintiff may concede the officer's discretionary function but rely upon the charge of "actual malice." *Tittle v. Corso*[326] presented such an instance regarding plaintiff's allegations of a deputy sheriff's

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"this reasoning to be equally applicable to a volunteer firefighter who has exercised his discretion in rushing to the scene of an accident." *Id.* at 162, 568 S.E.2d at 70.

315. "[T]here is no allegation of malice or intent to injure." *Id.* at 162, 568 S.E.2d at 71.

316. *Id.*

317. 258 Ga. App. 159, 573 S.E.2d 417 (2002).

318. 259 Ga. App. 713, 578 S.E.2d 146 (2003).

319. 258 Ga. App. at 159, 573 S.E.2d at 418. After being acquitted on the battery charge, plaintiff sued the detective and other county employees both individually and in their official capacities. The "official capacity" actions were denied on grounds of sovereign immunity. *Id.*

320. *Id.* at 160, 573 S.E.2d at 419.

321. *Id.* "[Plaintiff] must show that [defendant] acted with the deliberate intent to commit a wrongful act or with the deliberate intent to harm her." *Id.*

322. *Id.* Even assuming plaintiff's charges of incomplete investigation and poor interviewing procedures, the court held that those actions were insufficient to show the necessary "deliberate intent." *Id.* The court affirmed summary judgment for defendant. *Id.* at 161, 573 S.E.2d at 419.

323. 259 Ga. App. at 713, 578 S.E.2d at 146. Defendant sent the ten-year-old child to get paper from a large roll in the school storage garage, and the roll fell onto the child and killed her. Plaintiffs sued, alleging that defendant violated written school board policy in sending the unsupervised child to the garage. *Id.* at 713-14, 578 S.E.2d at 147.

324. *Id.* at 716, 578 S.E.2d at 148.

325. *Id.* "Accordingly, the court's grant of summary judgment on the claims against [defendant] in her individual capacity on the basis of official immunity was proper." *Id.*, 578 S.E.2d at 148-49.

326. 256 Ga. App. 859, 569 S.E.2d 873 (2002).

profanity, threats, and physical force during a nighttime investigation.[327] By virtue of a four-to-three division, the court of appeals found that defendant's conduct was insufficiently abusive: Although disapproving the deputy's actions, "we cannot conclude that [defendant's] profanity, threats, and 'slamming' showed a deliberate intent to commit a wrongful act . . . ."[328] For the dissenters, contrarily, plaintiff's charges of "actual malice" warranted a jury trial.[329]

Allegations sufficient to raise a jury issue appeared in *Bateast v. DeKalb County*,[330] a malicious prosecution action against a county police officer who charged plaintiff with giving a false name and date of birth.[331] Under plaintiff's version of the facts,[332] said the court, she provided the officer "with documents clearly showing her name and date of birth prior to the time [defendant] decided to arrest her."[333] From those facts, a jury might reasonably infer that defendant proceeded to arrest plaintiff, knowing of her innocence and "thereby deliberately intending to do a wrongful act."[334]

As noted, should plaintiff's harm result from "ministerial functions,"[335] official immunity does not protect the officer from negligence liability.[336] On occasion, the court may be called to crucially delineate between functions performed by the same officer in a single case. In *Happoldt v. Kutscher*,[337] for example, plaintiffs sued a county subdivision review officer for negligence in failing to ensure a road's compliance

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327. *Id.* at 861, 569 S.E.2d at 876. Defendant, an off-duty deputy sheriff, heard loud noises at night near his home and responded to a "shots fired" call when he encountered plaintiff's stopped vehicle and proceeded to investigate in a manner which prompted plaintiff's action "alleging a variety of torts." *Id.* at 859-60, 569 S.E.2d at 875.

328. *Id.* at 863, 569 S.E.2d at 877. "Although we in no way condone [defendant's] behavior, as described by [plaintiff], we must conclude that, as a matter of law, it does not rise to the level of actual malice." *Id.* at 862, 569 S.E.2d at 877.

329. *Id.* at 865, 569 S.E.2d at 879 (Mikell, J., dissenting) "In the case at bar, the evidence, when construed most favorably to [plaintiff], permits an inference that [defendant] acted with malice." *Id.*

330. 258 Ga. App. 131, 572 S.E.2d 756 (2002).

331. *Id.* at 131, 572 S.E.2d at 756-57. In a subsequent bench trial, plaintiff was found not guilty. *Id.* at 132, 572 S.E.2d at 757.

332. In reviewing the grant of a summary judgment against plaintiff, the court emphasized, it must accept her version of the facts. *Id.* at 132, 572 S.E.2d at 758.

333. *Id.* There was no question that the officer was engaged in a discretionary function. *Id.*

334. *Id.* The court thus reversed the trial judge's grant of summary judgment for the police officer. *Id.* at 133, 572 S.E.2d at 758.

335. *Id.* at 132, 572 S.E.2d at 757.

336. *Id.*

337. 256 Ga. App. 96, 567 S.E.2d 380 (2002).

with a county ordinance.[338] On the one hand, the ordinance required that the officer exercise his personal judgment in insuring "adequate drainage," a "determination [that] was discretionary in nature."[339] In contrast, the ordinance also specified precise grading requirements for different types of streets: "These instructions," the court asserted, "are sufficiently clear and definite as to call for exercise of a ministerial duty . . . ."[340]

Somewhat similarly, the court in *Clark v. Prison Health Services, Inc.*[341] analyzed an array of functions performed by different officers in the case.[342] There, plaintiff sued for her son's suicide while a prisoner in the county jail, naming various jail officers in their individual capacities.[343] In denying these officers the protection of official immunity, the court proceeded to isolate their respective "ministerial duties."[344] The classification officer, the court found, performed documentation work "governed by clear, definite, and certain procedures or instructions."[345] The booking sergeant worked under policies so definite "'as merely to require the execution of a relatively simple, specific duty.'"[346] The mental health counselor's failure to implement referral procedures after receiving telephone messages "constituted a ministerial act."[347] Finally, two floor officers held duties of cell

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338. *Id.* at 96, 567 S.E.2d at 381. Plaintiffs sued for personal injuries and death arising from an automobile collision at an intersection of a subdivision road and a county road. Plaintiffs alleged that defendant's failure to comply with county road construction standards in respect to the subdivision road caused the county road to wash out and result in the collision. Plaintiffs charged that defendant "breached ministerial duties imposed on him by the . . . County Subdivision Ordinance and Road Standards." *Id.* at 97, 567 S.E.2d at 381.

339. *Id.* at 99-100, 567 S.E.2d at 383. Thus, official immunity protected defendant against liability for his negligence in this respect. *Id.* at 100, 567 S.E.2d at 383.

340. *Id.* at 100, 567 S.E.2d at 383. For the officer's negligence in this respect, therefore, official immunity was not available. *Id.*, 567 S.E.2d at 384. However, the court concluded, there still could be no liability because plaintiffs presented no evidence that "the accident resulted from [defendant's] alleged failure to ensure that the subdivision road complied with the grading requirements in the county ordinance." *Id.*

341. 257 Ga. App. 787, 572 S.E.2d 342 (2002).

342. *Id.* at 790-91, 572 S.E.2d at 346.

343. *Id.* at 788, 572 S.E.2d at 345. Plaintiff's decedent was arrested for driving a stolen car into the county and committed suicide by hanging himself in his cell some five days later. *Id.* at 787, 572 S.E.2d at 344.

344. *Id.* at 788, 572 S.E.2d 347.

345. *Id.* at 792, 572 S.E.2d at 348.

346. *Id.* (quoting *Happoldt*, 256 Ga. at 98, 567 S.E.2d at 382). These were applicable jail policies regarding handling of mental health referrals. *Id.*

347. *Id.* at 794, 572 S.E.2d at 348. Established policies required a mental health assessment upon receiving a communication from a family member suggesting the prisoner

inspection and location documentation which required no "exercise of personal judgment."[348] Accordingly, the court denied all these officers the summary judgment benefit of official immunity.[349]

A plaintiff may sue the county officer in his "official" rather than "individual" capacity.[350] The distinction is an important one, as evidenced by the court of appeals decision in *Soley v. Dodson*.[351] There, plaintiff first sued a deputy sheriff individually for injuries resulting from a high-speed chase.[352] Two months after expiration of the statute of limitations, plaintiff dismissed her action and immediately refiled a suit against the sheriff in both his individual and official capacities.[353] On review, the court conceded the renewal statute to permit plaintiff to refile the action within six months of dismissal.[354] To suspend the statute of limitations, however, "[t]here must . . . be a substantial identity of essential parties."[355] Because "[the sheriff] in his individual capacity is not substantially identical to [the sheriff] in his capacity as deputy sheriff,"[356] the court held plaintiff's official capacity action barred by the statute of limitations.[357]

G. Zoning

A county's zoning procedures may be impacted by a variety of other county developments. The procedure at issue in *Rock v. Head*[358]

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might harm himself. *Id.*

348. *Id.* These policies concerned inspecting and monitoring inmates. *Id.*

349. *Id.*

350. *Id.* at 791, 572 S.E.2d at 346.

351. 256 Ga. App. 770, 569 S.E.2d 870 (2002). *See also* Ward v. Dodson, 256 Ga. App. 660, 569 S.E.2d 554 (2002).

352. The sheriff was pursuing a fleeing motorist and struck the back of the car in which plaintiff was a passenger. 256 Ga. App. at 770, 569 S.E.2d at 871.

353. *Id.* at 771, 569 S.E.2d at 872.

354. *Id.*; O.C.G.A. § 9-2-61 (1982 & Supp. 2002).

355. 256 Ga. App. at 772, 569 S.E.2d at 872 (citing Sheldon & Co. v. Emory Univ., 184 Ga. 440, 191 S.E. 497 (1937)).

356. *Id.*, 569 S.E.2d at 873. "[W]hile a suit against [the sheriff] in his individual capacity seeks a recovery from [the sheriff], a suit against [the sheriff] in his capacity as deputy sheriff seeks a recovery from the employing county: 'Suits against public employees in their official capacities are in reality suits against the state and, therefore, involve sovereign immunity.'" *Id.* (quoting Cameron v. Lang, 274 Ga. 122, 126, 549 S.E.2d 341, 347 (2001)).

357. *Id.* at 773, 569 S.E.2d at 873. "'[T]he renewal statute may not be used to suspend the running of the statute of limitation as to defendants different from those originally sued.' Accordingly, [plaintiff's] action against [the sheriff] in his capacity as deputy sheriff is barred by the statute of limitation." *Id.* (quoting Wagner v. Casey, 169 Ga. App. 500, 501, 313 S.E.2d 756, 758 (1984)).

358. 254 Ga. App. 382, 562 S.E.2d 768 (2002).

prohibited approval of a zoning measure that did not receive the vote of the county commissioner representing the district in which the land was located or the vote of one of the then two at-large commissioners.[359] Subsequently, the two at-large commissioners were replaced by two commissioners elected from separate county "superdistricts."[360] The case in controversy featured a rezoning measure which received the votes of a majority of the commissioners, including the vote of the superdistrict commissioner whose superdistrict did not contain the subject land.[361] However, the commissioner representing the district in which the land was located, as well as the superdistrict commissioner representing that district, both voted against the measure.[362] In these circumstances, the court of appeals concluded, the rezoning measure did not receive valid approval.[363] The change from at-large commissioners to superdistrict commissioners did not simply substitute the latter for the former,[364] the court reasoned, but rather eliminated at-large county representation.[365] Accordingly, the favorable vote of the superdistrict commissioner from the district not containing the subject land did not meet the zoning law's requirement.[366] Rather, the court held, "no zoning changes can be approved without the vote of a commissioner in whose district the property is located"[367]—either the district representative or the superdistrict representative.[368]

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359. *Id.* at 382, 562 S.E.2d at 769; 1981 Ga. Laws 4304, 4311.

360. 254 Ga. App. at 383-84, 562 S.E.2d at 769. 1992 Ga. Laws 6567, 6572-6575. This statute did not expressly amend or repeal the 1981 statute. 254 Ga. App. at 383-84, 562 S.E.2d at 769.

361. The commissioners voted four-to-three in favor of the measure rezoning the property from residential to office use. Plaintiff property owners, relying upon the 1981 statutory zoning requirement, questioned the validity of the rezoning measure. 254 Ga. App. at 384, 562 S.E.2d at 770.

362. *Id.*

363. *Id.* at 382, 562 S.E.2d at 769. "[W]e conclude that the trial court correctly found that the board's vote did not constitute an approval of [the property owner's] application for rezoning." *Id.*

364. *Id.* at 384-85, 562 S.E.2d at 770. "[The property owner] urges us to conclude that the 1992 Act 'simply substitutes Super District Commissioners for At Large Commissioners.' . . . We do not agree." *Id.*

365. *Id.* at 385, 562 S.E.2d at 771. "The 1992 Act eliminated at-large commissioners and divided the county into two geographically distinct superdistricts, and one commissioner must be chosen from each." *Id.*

366. *Id.*

367. *Id.*

368. *Id.* Thus, the court affirmed the trial judge's summary judgment against the property owner even though the rezoning measure had received a four-to-three vote of the commissioners. *Id.* at 387, 562 S.E.2d at 772.

The court's perceived relationship between zoning and planning controlled its disposition of *Kingsley v. Florida Rock Industries, Inc.*[369] That case presented a challenge to the validity of the county's comprehensive plan because it was not adopted pursuant to zoning requirements.[370] Rejecting the challenge, the court distinguished the two functions.[371] As for zoning, the constitution[372] authorizes legislative enactment of the Zoning Procedures Law,[373] which requires notice some fifteen days prior to county action.[374] As for planning, the constitution[375] authorizes legislative creation of the Georgia Department of Community Affairs ("DCA")[376] which requires such notice as counties "normally use."[377] Because the zoning requirement does not control the planning function,[378] the county acted properly in adopting its comprehensive plan by providing such notice as it "'normally use-[d]'"[379] for public hearings.[380]

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369. 259 Ga. App. 207, 576 S.E.2d 569 (2002).

370. *Id.* at 207, 576 S.E.2d at 570. The immediate issue in the case was the county's denial of plaintiff's rezoning request on grounds that it did not comply with the county's comprehensive use plan. Plaintiff then challenged the validity of the comprehensive plan, on grounds that the county had adopted it by giving notice by publication some fourteen days prior to the hearing, instead of following a fifteen-day notice requirement contained in both the Zoning Procedures Law and an identical county zoning ordinance. Uncontradicted testimony established that notice by publication constituted the county's ordinary procedure on nonzoning matters. *Id.*, 576 S.E.2d at 570-71.

371. *Id.* at 210, 576 S.E.2d at 573. "[T]he planning process is separate and distinct from the zoning process and the two are fundamentally different." *Id.* Planning, the court said, is of a broader scope than zoning and "does not ordinarily impose any immediate restrictions upon land use . . . ." *Id.* at 211, 576 S.E.2d at 573. Contrarily, "[z]oning . . . is one of the means by which the comprehensive plan is carried out, and it is subject to constitutional demands of due process and equal protection and the constitutional prohibition against taking private property without just compensation." *Id.*

372. GA. CONST. art. IX, § 2, para. 4.

373. O.C.G.A. §§ 36-66-1 to -5 (2000 & Supp. 2002).

374. *Id.* § 36-66-4(a). Additionally, "the [county zoning ordinance] mimics the state law requirement" of fifteen-days notice. 259 Ga. App. at 209, 576 S.E.2d at 572.

375. GA. CONST. art. IX, § 2, para. 4.

376. O.C.G.A. § 50-8-3(a) (2002).

377. GA. COMP. R. AND REGS. 110-3-2-.06(4)(a): "Local governments should follow the public hearing notifications procedures they normally use in announcing and conducting public hearings." *Id.*

378. "Given these important distinctions between planning and zoning, we cannot agree that [the county zoning ordinance] somehow converts the [county] planning process into something akin to zoning, such that the stricter procedures applicable to zoning apply." 259 Ga. App. at 211, 576 S.E.2d at 573.

379. *Id.* at 209, 576 S.E.2d at 572 (quoting GA. COMP. R. AND REGS. 110-3-2-.06(4)(a)).

380. *Id.* The court thus reversed the trial judge's decision invalidating the county's denial of plaintiff's rezoning application. *Id.* at 212, 576 S.E.2d at 572.

Turtle Cove Property Owners Ass'n v. Jasper County[381] featured yet another issue of relationship—the relation between zoning and restrictive covenants.[382] By virtue of general statute, the county's adoption of a zoning ordinance limits existing subdivision covenants to a period of twenty additional years.[383] Consequently, the court held, forty-five-year covenants imposed in 1971 automatically expired in 1995, *i.e.*, twenty years after adoption of the 1975 county zoning ordinance.[384] Additionally, the general statute's automatic renewal provision[385] does not apply to covenants recorded prior to 1993.[386] Nevertheless, the declaration of covenants itself effected the covenants' automatic renewal for fifteen-year terms,[387] the court held, and that provision validly renewed the covenants for fifteen years following their 1995 expiration.[388]

III. LEGISLATION

The Georgia General Assembly's 2003 regular session set a record for its length; the session also yielded a number of enactments dealing with local governments. A few of the more significant measures might simply be noted.

Initially, the legislature addressed openness in government via at least two provisions. One of those measures exempts from the "open records" requirement the identity of a person placing an emergency "911"

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381. 255 Ga. App. 560, 566 S.E.2d 368 (2002).

382. The immediate issue in the case concerned the right of subdivision property owners to county property tax refunds on subdivision common property encumbered by restrictive covenants and thus having no taxable value. *Id.* at 560, 566 S.E.2d at 368. For treatment of the zoning-covenant relationship, see R. Perry Sentell, Jr., *Restrictive Covenants and Zoning: A Dynamic Duo*, 30 URBAN GA. MAG. 15 (Sept. 1980).

383. *Id.* at 561, 566 S.E.2d at 369; O.C.G.A. § 44-5-60(b) (1991 & Supp. 2002).

384. 255 Ga. App. at 561, 566 S.E.2d at 369. "[T]he initial term of the . . . covenants expired in 1995." *Id.*

385. O.C.G.A. § 44-5-60(d) (2001).

386. *Id.* "Because the . . . covenants were recorded before 1993, the automatic renewal provided by [the general statute] does not apply to them." 255 Ga. App. at 561, 566 S.E.2d at 369.

387. 255 Ga. App. at 561, 566 S.E.2d at 369. "This case therefore turns on whether the covenants were renewed after their 1995 expiration pursuant to the automatic [fifteen]-year renewal provision set forth in the declaration of covenants." *Id.* Said the court: "There is nothing in the governing [general] statute . . . which prohibits the automatic renewal of covenants." *Id.* at 562, 566 S.E.2d at 369.

388. *Id.* at 562, 566 S.E.2d at 369. The court thus reversed the trial judge's decision that the covenants did not renew. *Id.*

telephone call.[389] The second measure operates to exempt from that same requirement any public record compromising security against sabotage or terrorism.[390] This second enactment additionally exempts from the "open meetings" mandate any meeting at which those security compromising records are discussed.[391]

Among statutes affecting local government officers and employees, one measure expands disability compensation programs to include volunteer firefighters.[392] A second enactment relates to expenses incurred by a local government for the training of its peace officers.[393] That government may obtain reimbursement for those expenses from another local government which hires the officer within fifteen months of the training program.[394] The statute requires the local government demanding reimbursement to submit an itemized sworn statement and to make demand for payment.[395] Finally, all local governments must, by January 1, 2004, adopt written policies setting forth the manner in which emergency response and vehicle pursuits are to be conducted.[396]

The local government's power to zone property suffered encumbrance from a statute focusing upon military establishments.[397] The measure requires the local government to notify the commander of any military base or installation in respect to any change in zoning within three thousand feet of the facility.[398]

New legislation on local government authorities includes a statute impacting development authorities in two respects.[399] First, the enactment permits development authorities to operate sports facilities and amphitheaters.[400] Second, the measure authorizes the creation of

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389. Ga. H.R.B. 246, Reg. Sess. (2003). There is an exception if the request for the records is made by the accused in a criminal case. *Id.*

390. Ga. S.B. 113, Reg. Sess. (2003). This would include vulnerability assessments, building blueprints, and other security-related records. *Id.*

391. *Id.*

392. Ga. H.R.B, 166, Reg. Sess. (2003). Full time law enforcement officers and firefighters were already included. *Id.*

393. Ga. S.B. 215, Reg. Sess. (2003).

394. *Id.* If the officer is hired by another government within fifteen to twenty-four months of the training program, the hiring government must reimburse the other government by one-half the total expenses. *Id.*

395. *Id.* The demanding government must document the peace officer's acknowledgment of this statute prior to his or her employment. *Id.*

396. Ga. S.B. 292, Reg. Sess. (2003). Non-complying local governments may not receive state funding or state administered federal funding. *Id.*

397. Ga. S.B. 261, Reg. Sess. (2003).

398. *Id.*

399. Ga. H.R.B. 309, Reg. Sess. (2003).

400. *Id.* The facility must host regional, statewide, or national events. *Id.*

a joint development authority by a Georgia county and the contiguous county of an adjoining state.[401] Yet another statute, the "War on Terrorism Local Assistance Act,"[402] creates a "public safety and judicial facilities authority"[403] for each local government in the state.[404] The authority is activated by the local government's adoption of an ordinance or resolution and is empowered to construct judicial, public safety, and detention facilities.[405]

In the regulatory realm, the 2003 General Assembly adopted measures affecting local governments in a variety of contexts. One such enactment unequivocally prohibits any local government from performing inspections or investigations of residential rental property to ensure compliance with building and safety codes.[406] In the environmental sphere, new legislation requires local governments to adopt an ordinance governing land-disturbing activities and to meet state permitting standards for monitoring, reporting, and inspecting.[407] The local government's appropriate employees must take seminars and pass an examination for certification as erosion and sedimentation control regulators.[408] An additional measure requires that ordinances regulating land-disturbing activities and development must apply to property owned by the local government promulgating the ordinance.[409]

Finally, the General Assembly amended the statute providing for the fees paid by the Department of Motor Vehicle Safety to local governments that file their traffic citations electronically.[410] The amendment increases the fee from twenty-five cents to forty cents (while decreasing fees from twenty-five cents to ten cents for local governments that file citations by U.S. mail).[411]

IV. CONCLUSION

Although the cost of legal knowledge may be great, losses incurred from the lack of such knowledge are greater still. In local government

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401. *Id.*
402. Ga. S.B. 87, Reg. Sess. (2003).
403. *Id.*
404. *Id.* The authority is managed by an appointed board of directors. *Id.*
405. *Id.*
406. Ga. H.R.B. 748, Reg. Sess. (2003). The statute also amends the enterprise zone law to add retail and day care as businesses eligible for tax credit. *Id.*
407. Ga. H.R.B. 285, Reg. Sess. (2003).
408. *Id.* The statute is to increase the ability of the State Environmental Protection Division to review erosion and sedimentation control plans. *Id.*
409. Ga. H.R.B. 509, Reg. Sess. (2003).
410. O.C.G.A. § 40-5-53 (2001).
411. Ga. S.B. 229, Reg. Sess. (2003).

law, it appears, a call to the attorney may on occasion constitute a wise investment.