Local Government Law

by R. Perry Sentell, Jr.*

> As a county attorney, I was involved in a zoning case. . . . One day, . . . the judge summoned all of us to his chambers for a conference concerning the case. As we sat around his conference table, his law clerk brought in the accumulated papers in the case. The papers were then placed in two stacks: one stack originating from the landowner's attorneys, and the other from us. The judge then brought out a ruler and measured the two stacks. He then turned to the landowner's attorney and said, "Mr. Attorney, you have exceeded 12 inches. I will receive and consider no more documents in your behalf."[1]

Both the courts and the legislature risked the peril of the "twelve-inch rule" this year.

I. MUNICIPALITIES

A. Annexation

In what is becoming a familiar pattern, *Fayette County v. Steele*[2] featured a county's effort to prevent municipal annexation.[3] The county

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1. R. PERRY SENTELL, JR., LOCAL GOVERNMENT LAW: LITE 54-55 (1997). For a more serious "profile" of local government law, those who practice it, and the practice itself, see R. PERRY SENTELL, JR., A PROFILE: THE PEOPLE AND THE PRACTICE OF GEORGIA LOCAL GOVERNMENT LAW (1996). *See generally* R. Perry Sentell, Jr., *Georgia Local Government Law: A Reflection on Thirty Surveys*, 46 MERCER L. REV. 1 (1994).

2. 268 Ga. App. 13, 601 S.E.2d 403 (2004).

3. *Id.* at 13, 601 S.E.2d at 404. The municipality purported to annex the landowner's two parcels of land under the "100% method" of annexation. *Id.*; *see* O.C.G.A. § 36-36-21 (2000 & Supp. 2005). For perspective on the Georgia law of municipal 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-*

objected to the landowner's exception of a ten-foot strip from the parcels being annexed. That exception, the county contended, violated the authorizing statute's contiguity requirement that the owner's "entire parcel" be annexed.[4] The court of appeals reviewed the process and affirmed the trial judge's validation of the annexation.[5] The court reasoned that "[t]he ten-foot strip was excepted not in an effort to evade the 'entire parcel' requirement, but to annex the property without creating an unincorporated island" in violation of yet another statute.[6]

The court proved equally unreceptive to an annexation challenge launched by landowners in *Bradley Plywood Corp. v. Mayor & Aldermen of Savannah*.[7] Initially, the court denied that the annexation had not occurred in a regular meeting of the governing authority:[8] "At the time the City published its schedule of regular 2002 meetings, it included a notation that the December meeting would need to be held on a different date than a Thursday because of a conflict with Christmas."[9] Additionally, the court sustained the city's annexation notice provided twenty-eight days prior to its action. The governing statute, the court asserted, required that "the annexation must happen *no later than* 30 days after the notice is mailed, not no sooner than 30 days after the notice is mailed."[10]

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annexation: The Ins and the Outs, 24 GA. ST. B.J. 118 (1991).

4. 268 Ga. App. at 14, 601 S.E.2d at 404. O.C.G.A. section 36-36-20(a) requires contiguity and that "the entire parcel or parcels of real property owned by the person seeking annexation is being annexed; provided, however, that lots shall not be subdivided in an effort to evade the requirements of this paragraph . . . ." *Id.* at 15, 601 S.E.2d at 404.

5. *Id.* at 15, 601 S.E.2d at 405. "There is no showing here that the landowner subdivided the property in an attempt to evade the [statutory] requirements . . . and we decline to reach a conclusion that would, in effect, leave the landowner in this case no way of having his property annexed." *Id.*

6. *Id.* O.C.G.A. section 36-36-4(a) prohibits the creation of an unincorporated island. *Id.*

7. 271 Ga. App. 828, 611 S.E.2d 105 (2005). Plaintiffs were the owners of the property annexed.

8. *Id.* at 828, 611 S.E.2d at 106. The regular meeting requirement is contained in O.C.G.A. section 36-36-92(b). *Id.* at 829, 611 S.E.2d at 107.

9. *Id.* at 829, 611 S.E.2d at 107. "Thus, the date was actually first set for the December 2002 regular meeting on October 3, 2002; there was no rescheduling that turned a regular meeting into a special meeting as argued by plaintiffs." *Id.* at 829-30, 611 S.E.2d at 107.

10. *Id.* at 830, 611 S.E.2d at 107. "[Section] 36-36-92(b) provides that annexation 'shall be accomplished by ordinance at a regular meeting of the municipal governing authority *within* 30 days after written notice of intent to annex . . . is mailed to the owner.'" O.C.G.A. § 36-36-92(b) (2000 & Supp. 2005). The court thus sustained the validity of the challenged annexations. *Bradley Plywood Corp.*, 271 Ga. App. at 830, 611 S.E.2d at 107.

B. Officers and Employees

The survey period presented myriad issues concerning municipal officers and employees. In *Willis v. City of Atlanta*,[11] an employee argued that although assigned to a higher classification, he did not receive commensurate pay as required by a municipal ordinance.[12] In review, the court of appeals rejected the city's argument that the "continuing violation rule" is inapplicable to a claim for back pay pursuant to an ordinance.[13] Deciding "an issue of first impression,"[14] the court asserted that "[i]f the city failed to pay [the plaintiff] in accordance with municipal ordinance from December 1995 until his reassignment in March 1998, . . . each paycheck constituted a new violation for which [the plaintiff] can seek recovery."[15]

Less successful, the plaintiff police officer in *Mayor & Aldermen of Savannah v. Stevens*[16] sought workers compensation for injuries suffered in a collision while driving her personal vehicle to work.[17] Reversing the court of appeals,[18] the supreme court emphasized the two-pronged statutory requirement for coverage: the injury must arise

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11. 265 Ga. App. 640, 595 S.E.2d 339 (2004).

12. *Id.* at 640, 595 S.E.2d at 340. The plaintiff was a long-time employee in the city's motor transport department who had been transferred and reassigned over the years. He sought back-wage recovery under a municipal ordinance governing compensation for temporary work at a higher classification. *Id.* at 641, 595 S.E.2d at 341.

13. *Id.* at 644, 595 S.E.2d at 343. "[T]he [C]ity argues . . . that [the plaintiff's] reclassification in 1992 started the running of the two-year statute of limitation, such that he is forever barred from recovering any wages allegedly due him after December 1995." *Id.* at 645, 595 S.E.2d at 343.

14. *Id.* at 644, 645, 595 S.E.2d at 343. "Indeed, this is an issue of first impression in our appellate courts . . ., [and] we are persuaded that the continuing violation doctrine . . . applies equally to the case at bar." *Id.*

15. *Id.* at 645, 595 S.E.2d at 343. The court explicitly expressed no opinion on whether the city actually had failed to pay the plaintiff in accordance with the ordinance. In another back-pay controversy of the survey period, *City of Griffin v. McCoy*, 269 Ga. App. 1, 602 S.E.2d 897 (2004), the court affirmed a trial judge's order of compensation, it having been determined as a matter of law that the reason for which the plaintiff employee was terminated (making false statements about another worker) lacked foundation. "Since it was determined as a matter of law that [the plaintiff] did not make false statements about [a fellow worker] and that his termination was error, [the plaintiff] should receive the salary he would have received had the error not been made." *City of Griffin*, 269 Ga. App. at 3, 602 S.E.2d at 899.

16. 278 Ga. 166, 598 S.E.2d 456 (2004).

17. *Id.* at 166, 598 S.E.2d at 457. For perspective, see R. Perry Sentell, Jr., *Workers' Compensation in Georgia Municipal Law*, 15 GA. L. REV. 57 (1980).

18. City of Savannah v. Stevens, 261 Ga. App. 694, 583 S.E.2d 553 (2003).

"out of and in the course of the employment."[19] Here, the court reasoned that the off-duty officer was required to enforce the law at all times while inside municipal limits, and thus the injury arose "in the course of" her employment.[20] However, the court delineated, "[t]he hazards she encountered were in no way occasioned by her job as a police officer."[21] Accordingly, the officer's injuries "did not arise out of her employment," and her claim for benefits failed.[22]

Equally unsuccessful, a retired police officer in *Dodd v. City of Gainesville*[23] sought damages for breach of contract, negligence, and negligent infliction of emotional distress. The plaintiff's claim originated from the city's reduction of his retirement benefits following overpayments for a period of three years.[24] First, the court of appeals emphasized that the city breached no retirement contract by mistakenly paying the plaintiff more benefits than he was entitled to receive,[25] and that the clerical error did not change the terms of the contract.[26] As for the city's negligently causing the plaintiff's early retirement, the court held that the municipality lacked the authority to pay greater benefits than provided in the retirement plan, and that early retirement did not constitute an injury.[27] Finally, the plaintiff's emotional harm claim fell

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19. 278 Ga. at 166, 598 S.E.2d at 457; O.C.G.A. § 34-9-1(4) (2004 & Supp. 2005). "The test presents two independent and distinct criteria, and an injury is not compensable unless it satisfies both." 278 Ga. at 166, 598 S.E.2d at 457.

20. 278 Ga. at 167, 598 S.E.2d at 458. "Accordingly, under the doctrine of continuous employment, [the plaintiff's] injury arose in the course of her employment." *Id.*

21. *Id.* "At the time of the accident, she was not actively engaged in any police work nor was she responding to a law enforcement problem." *Id.*

22. *Id.* "Because there was no causal connection between her employment and her accident, [the plaintiff's] injuries did not arise out of her employment." *Id.* The court overruled its prior decision in *Board of Trustees of the Policemen's Pension Fund of Atlanta v. Christy*, 246 Ga. 553, 272 S.E.2d 288 (1980).

23. 268 Ga. App. 43, 601 S.E.2d 352 (2004).

24. *Id.* at 43, 601 S.E.2d at 353. The secretary of the retirement board had given the bank instructions to make payments in an erroneous amount. Three years later, the error was discovered and the plaintiff's benefits were reduced to the correct amount. *Id.* at 44, 601 S.E.2d at 354.

25. "Here, the City agreed to pay retirement benefits, and it did exactly that. In fact, the City paid *more* benefits than [the plaintiff] was entitled to receive." *Id.* at 45, 601 S.E.2d at 354-55.

26. *Id.*, 601 S.E.2d at 355. "It is also undisputed that [the secretary] had no authority to change the terms of the retirement plan . . . ." *Id.* at 44, 601 S.E.2d at 354.

27. *Id.* at 46, 601 S.E.2d at 355. The court stressed that the plaintiff never asked for a written explanation of his benefits and "cannot show that he justifiably relied on what he contends was [the secretary's] sole oral communication to him prior to his retirement regarding the amount of his benefits." *Id.*

to the Georgia law's requirement of "a physical impact resulting in physical injury."[28]

The defendant police officer in *State v. Galloway*[29] harbored far different concerns: he sought to quash his indictment for rape on grounds he was denied access to the grand jury.[30] Conceding a police officer's right to a grand jury appearance,[31] the court stressed the condition that the officer's charged conduct must occur during the performance of his official duties.[32] Those duties, the court asserted, "[do] not include rape or any other sort of sexual assault."[33]

Finally, in two cases of the period, the court of appeals held adversely to municipal officials pursuing defamation actions.[34] *McDonald v. Few*[35] featured a firefighter's suit over a report sent by the public information officer to various city officials, accusing the plaintiff of ordering too many souvenirs for a fire chiefs' convention.[36] That report, the court held, was submitted as "a part of [the defendant's] official duties," and "was not as a matter of tort law published for purposes of defamation."[37] *Jessup v. Rush*[38] presented a police officer's libel action against a county sheriff whose letter to the police chief charged that the

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28. *Id.*, 601 S.E.2d at 356. "In Georgia, . . . the impact rule is applied to cases in which a party attempts to recover for mental anguish caused by the negligence of another party." *Id.*, 601 S.E.2d at 355. The court thus affirmed the grant of summary judgment to the municipality. *Id.*

29. 270 Ga. App. 184, 606 S.E.2d 273 (2004).

30. *Id.* at 184, 606 S.E.2d at 274. See for discussion, R. Perry Sentell, Jr., *Georgia Local Government Officials and the Grand Jury*, 26 GA. ST. B.J. 50 (1989).

31. 270 Ga. App. at 185, 606 S.E.2d at 274; O.C.G.A. § 17-7-52 (2004 & Supp. 2005); O.C.G.A. § 45-11-4 (2002 & Supp. 2005).

32. *Galloway,* 270 Ga. App. at 184, 606 S.E.2d at 274. "However, these rights have been found not to apply to situations where officers have stepped aside from the performance of their official duties in order to commit crimes." *Id.* at 185, 606 S.E.2d at 274.

33. *Id.* at 185, 606 S.E.2d at 274. "The trial court therefore erred in issuing an order granting [the officer's] motion to quash the indictment . . . ." *Id.*, 606 S.E.2d at 275.

34. For perspective, see R. Perry Sentell, Jr., *Defamation in Georgia Local Government Law: A Brief History*, 16 GA. L. REV. 599 (1982).

35. 270 Ga. App. 671, 607 S.E.2d 265 (2004).

36. *Id.* at 671, 607 S.E.2d at 266. The plaintiff alleged the report to contain falsehoods. *Id.*

37. *Id.* at 673, 607 S.E.2d at 267. Additionally, the court held one of the recipients possessed a financial interest in any profits from the convention, and thus "[a]ny communication to it came under a privileged communication, which prevents tort liability for defamation." *Id.*, 607 S.E.2d at 267-68. The court affirmed summary judgment against the plaintiff. *Id.*

38. 271 Ga. App. 243, 609 S.E.2d 178 (2005).

plaintiff "broke up a family in town."[39] Affirming summary judgment for the sheriff, the court designated the plaintiff a "public official" who must prove the sheriff's "actual malice" in order to recover.[40]

C. Elections

The Georgia Constitution requires that in order to hold office, one must be a registered voter.[41] In *Harvey v. Robinson*,[42] the supreme court relied upon that requirement to disqualify, from holding the office of mayor, one whose name failed to appear on the list of municipal voters.[43] Despite the fact that the defendant had received a majority of the votes cast in the election, both the constitution and the municipal charter mandated that the other (incumbent) candidate be declared the duly elected mayor.[44] "Because [the defendant] was not registered to vote, he did not meet the constitutional requirements to hold the office that he sought."[45]

D. Powers

The period's municipal power cases resulted from utility service controversies with counties. In *City of Griffin v. McDaniel*,[46] the municipality permitted the county to connect its new jail (located in the unincorporated area) to the city sewer system, and then sought to recover a sewer connection fee.[47] The county challenged the city's power to levy the fee on grounds that it had not adopted an impact fee ordinance as allegedly required by the "Georgia Development Impact Fee

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39. *Id.* at 243, 609 S.E.2d at 180. The sheriff also wrote to his deputies not to work with the city police department because plaintiff "doesn't know a felony from a misdemeanor." *Id.*

40. *Id.* at 244-45, 609 S.E.2d at 180. "A public officer who sues to recover for defamatory statements concerning matters affecting his ability or qualifications to carry out the duties of his office is to be considered a 'public official' and, therefore, is required to prove actual malice." *Id.* at 245, 609 S.E.2d at 180-81. The court found no evidence of actual malice in the record. *Id.*

41. GA. CONST. art. II, § 2, para. 3.

42. 278 Ga. 333, 602 S.E.2d 615 (2004).

43. *Id.* at 333, 602 S.E.2d at 616. "It is undisputed that [the defendant's] name does not appear either on the list of municipal electors or on the Secretary of State's official list of eligible and qualified voters." *Id.* at 334, 602 S.E.2d at 617.

44. *Id.* at 334, 602 S.E.2d at 617.

45. *Id.* The court thus affirmed the trial court's summary judgment for the incumbent candidate who received the lesser number of votes. *Id.*

46. 270 Ga. App. 349, 606 S.E.2d 607 (2004).

47. *Id.* at 349, 606 S.E.2d at 608. The county paid the actual connection costs, but disputed the city's power to levy the remainder of the fee. *Id.* at 350, 606 S.E.2d at 608.

Act."[48] Rejecting the county's position, the court of appeals interpreted an exception in the state statute[49] as "clearly designed to allow local governments providing water or sewer service to recoup part of the capital costs of their facilities from new or existing users, as a condition of providing services to those users."[50] The court held "the city's capacity recovery fee" to fall "within the exemption created," and reversed the trial judge's summary judgment for the county.[51]

Cobb County v. City of Smyrna[52] involved the municipal power to tie in to county-owned water lines in order to service an annexed area.[53] The city relied upon a statute empowering municipalities to extend water lines within their boundaries "by gift, by purchase, or by the exercise of the right of eminent domain. . . ."[54] The county rested its refusal to permit the tie-in upon a statute declaring that "ownership and control of county owned public properties and facilities are not diminished . . . by annexation of the area in which the county owned public property or facility is located."[55] Viewing the issue as controlled by the "interplay" of the two statutes,[56] the court of appeals adopted the *in pari materia* rule of statutory construction.[57] Under that rule, the court reasoned, "the statute dealing with the general effect of annexation

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48. *Id.* at 350, 606 S.E.2d at 608; O.C.G.A. §§ 36-71-1, 36-71-13 (2000 & Supp. 2005).

49. *City of Griffin*, 270 Ga. App. at 353, 606 S.E.2d at 610; O.C.G.A. § 36-71-13(c) (2000).

50. *City of Griffin*, 270 Ga. App. at 353, 606 S.E.2d at 610. The court based its interpretation of the statute on the administering agency's published guidebooks which exempt "'local governments that provide their own water and sewer service[] and do not want to implement impact fee systems from some of the planning and bookkeeping requirements it imposes on authorities.'" *Id.* (quoting Georgia Department of Community Affairs, *Special Provisions Related to Water and Sewer Improvements*, 1 A GENERAL OVERVIEW OF IMPACT FEES 18-19 (1992)). The court found "that the city is not a governmental entity subject to the requirements set forth in the second and third sentences of the statute." *Id.* at 354, 606 S.E.2d at 610-11.

51. *Id.* at 354-55, 606 S.E.2d at 611. "We hold that the city's capacity recovery fee falls within the exemption created by the first sentence of [section] 36-71-13(c), and that the trial court erred in concluding otherwise." *Id.* at 354-55, 606 S.E.2d at 611.

52. 270 Ga. App. 471, 606 S.E.2d 667 (2004).

53. *Id.* at 471, 606 S.E.2d at 668. The city sought a declaratory judgment against the county concerning its exercise of the power.

54. *Id.* at 474, 606 S.E.2d at 670; O.C.G.A. § 36-34-5 (2000 & Supp. 2005)).

55. *Cobb County*, 270 Ga. App. at 473, 606 S.E.2d at 669; O.C.G.A. § 36-36-7(b) (2000).

56. *Cobb County*, 270 Ga. App. at 474, 606 S.E.2d at 670. The court first determined that, generally, the Georgia Constitution (art. IX, § 2, para. 3) "gives local governments the power to deliver water to their residents." *Id.* at 473, 606 S.E.2d at 669.

57. *Id.* at 474, 606 S.E.2d at 670. For treatment of the construction maxim, see R. PERRY SENTELL, JR., STATUTORY CONSTRUCTION IN GEORGIA: THE DOCTRINE OF IN PARI MATERIA (1996), *reprinted* in R. PERRY SENTELL, JR., STUDIES IN GEORGIA STATUTORY LAW 259 (1997).

upon county-owned property . . . must yield to the specific law empowering the municipality to extend any water line located within its boundaries, either by gift, by purchase, or by the exercise of the right of eminent domain."[58]

E. Regulation

The municipal regulatory power litigated in *City of Macon v. Alltel*[59] focused upon a telephone service provider's use of city streets to locate fiber optic cables.[60] Specifically, could the city impose a permit fee in excess of those charged by the state Department of Transportation ("DOT") under the relevant state statute?[61] Rejecting the municipality's approach to construing the statute,[62] the Georgia Supreme Court emphasized the measure's express preemption provision that city regulations could not exceed the restrictions imposed by the DOT.[63] Given that unambiguous limitation, the court concluded that interpretation was forbidden.[64] Additionally, the court refused to view the imposition as a "tax" rather than a "permit fee."[65] As the court noted, "[t]he stipulations of the parties demonstrate that the fee is a condition

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58. *Id.* at 475, 606 S.E.2d at 671. The court thus agreed with the trial court's order favoring the city's power, but was "troubled by the implication . . . that the city need not purchase access to the line in question or use its power of eminent domain to obtain such access." *Id.* Accordingly, the court vacated and remanded. *Id.* at 476, 606 S.E.2d at 671-72.

59. 277 Ga. 823, 596 S.E.2d 589 (2004).

60. *Id.* at 824, 596 S.E.2d at 591. The challenged municipal ordinance more than doubled its previous charge. The supreme court took the case on a certified question from the Eleventh Circuit: *Alltel Communications v. City of Macon*, 345 F.3d 1219 (11th Cir. 2003). *Id.* at 823, 596 S.E.2d at 591.

61. *Id.* at 824, 596 S.E.2d at 591; O.C.G.A. §§ 32-4-92(a)(10), 32-6-174 (2001 & Supp. 2005).

62. *City of Macon*, 277 Ga. at 826, 596 S.E.2d at 593. The city argued "that the doctrines of statutory construction, noscitur a sociis and expressio unius est excelusio alterius, make it clear that [the state statute] deals only with technical issues . . . [and] does not apply to a municipality's right to charge 'a revenue producing and licensing fee.'" *Id.* at 828, 596 S.E.2d at 593. For discussion of the above statutory construction principles, see R. Perry Sentell, Jr., *The Canons of Construction in Georgia: "Anachronisms" in Action*, 25 GA. L. REV. 365 (1991), *reprinted in* R. PERRY SENTELL, JR., STUDIES IN GEORGIA STATUTORY LAW 185 (1997).

63. *Id.* at 828, 596 S.E.2d at 594. "[T]he statutory provision clearly limits these regulations in that they must 'not be more restrictive with respect to utilities affected thereby than are equivalent regulations promulgated by the [DOT] with respect to utilities on the state highway system . . . .'" *Id.* at 827-28, 596 S.E.2d at 593 (quoting O.C.G.A. § 32-4-92(a)(10)).

64. *Id.* at 829, 596 S.E.2d at 594.

65. *Id.*

precedent for engaging in business, therefore, it is a license fee."[66] Accordingly, the court held that the municipal ordinance was preempted "to the extent that the permit fees authorized by the ordinance exceed the rate charged by the [DOT] on its rights-of-way. . . ."[67]

F. Contracts

In exercising its power to contract, the municipality must ordinarily abide by the mandatory procedural requirements provided in its charter.[68] A failure of compliance can disastrously affect the private party to the contract, as illustrated by *H.G. Brown Family Ltd. Partnership v. City of Villa Rica*.[69] There, in purchasing property from the plaintiff,[70] the city had violated charter mandates that its contract must be: (1) presented to the city attorney, (2) approved by a quorum of the council, and (3) authorized by council before being signed by the mayor.[71] Subsequently, upon the city's failure to perform some of its contractual obligations,[72] the plaintiff sought to mandamus the contract's entry upon the minutes for validation. Rejecting that effort, a unanimous supreme court declared the contract "ultra vires, null and void,"[73] with the following results: neither estoppel nor ratification would operate against the city, and mandamus was unavailable to the

66. *Id.*

67. *Id.* at 824, 596 S.E.2d at 591. For treatment of municipal regulatory power in an assortment of 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).

68. *See generally* R. Perry Sentell, Jr., *The Legislative Process in Georgia Local Government Law*, 5 GA. L. REV. 1 (1969); *see also* R. Perry Sentell, Jr., *Local Government and Contracts that Bind*, 3 GA. L. REV. 546 (1969); R. Perry Sentell, Jr., *Local Government Litigation: Some Pivotal Principles*, 55 MERCER L. REV. 1 (2003).

69. 278 Ga. 819, 607 S.E.2d 883 (2005).

70. *Id.* at 819, 607 S.E.2d at 884. The municipality purported to purchase a right-of-way from the plaintiff, agreeing, inter alia, to reclaim wetlands on plaintiff's property. *Id.*, 607 S.E.2d at 885.

71. *Id.* at 819, 607 S.E.2d at 885. The court said these charter violations were undisputed, as was the City's failure to consider the contract in a public meeting as required by general statute, O.C.G.A. section 50-14-1(b). *Id.* at 821, 607 S.E.2d at 886.

72. *Id.* at 819, 607 S.E.2d at 885. The court said the city had performed most of its promised obligations, including the payment of all money due, but had not performed its obligation to reclaim the plaintiff's wetlands.

73. *Id.* at 821, 607 S.E.2d at 886. "[T]he City entered the contract in derogation of its limited grant of authority . . . [and] we have no choice but to conclude that the contract is *ultra vires*, null and void." *Id.* (emphasis added).

plaintiff.[74] Thus, "because the City acted without any power, we conclude the trial court did not abuse its discretion in denying mandamus relief that would have compelled the City to enter the contract in its official minutes, thereby validating it."[75]

The loss litigated in *Nationwide Mutual Fire Insurance Co. v. City of Rome*[76] resulted from a contract between several municipalities and a private business. Under the contract, the business was to prepare and submit applications for Housing and Urban Development grants, a service the business failed to perform. Upon the cities' claim of lost grant monies, the insurer of the private business sought a declaratory judgment as to its liability under a business owner's insurance policy.[77] Reviewing the policy, the court of appeals agreed with the insurer that the loss claimed by the cities did not constitute "property damage" as defined by the policy.[78] That loss, the court reasoned, "was for the use of the grant monies that [the cities] may have been awarded had the applications been properly prepared and timely submitted and approved. The applications have no value in and of themselves—they are merely the mechanism used by HUD to award grant money."[79] The court thus ordered summary judgment for the insurer.[80]

Fitzgerald Water, Light & Bond Commission v. Shaw Industries, Inc.[81] presented a customer's claim for excessive electric rates which, for seven years, it allegedly paid to the municipal electrical authority.[82] Rejecting that claim, the court of appeals emphasized that the customer had "paid its electrical bills upon receipt of invoices that set out, in detail, the actual rates used to calculate its bill."[83] Because the customer had possessed the means at hand to check the accuracy of

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74. *Id.* at 822, 607 S.E.2d at 887. Even though plaintiff had performed its share of the bargain, and the city had partially performed, neither estoppel, ratification, or mandamus was appropriate in the case. *Id.*

75. *Id.* at 822-23, 607 S.E.2d at 887.

76. 268 Ga. App. 320, 601 S.E.2d 810 (2004).

77. *Id.* at 320, 601 S.E.2d at 811. The trial judge found the policy to cover the claims and awarded summary judgment for the cities. The insurer appealed. *Id.* at 322, 601 S.E.2d at 812.

78. *Id.* at 320, 601 S.E.2d at 812. "Thus [,the insurer] argues that, since under Georgia law money is not considered tangible property, coverage would not be available under the policy for the lost grant money." *Id.* at 321, 601 S.E.2d at 812.

79. *Id.* at 321, 601 S.E. 2d at 812.

80. *Id.* at 322, 601 S.E.2d at 812.

81. 270 Ga. App. 68, 606 S.E.2d 10 (2004).

82. *Id.* at 68, 606 S.E.2d at 10. The customer alleged that the authority had used a higher than appropriate fuel cost recovery factor in calculating its bills. *Id.*, 606 S.E.2d at 11.

83. *Id.* at 70, 606 S.E.2d at 12.

those rates, and had failed to do so,[84] the doctrine of voluntary payment barred recovery of any excess payments.[85]

G. Finances

A citizen's complaint of misspent city funds brought *Harris v. Gilmore*[86] to the court of appeals. The plaintiff charged that the city manager had unlawfully donated those funds to charitable purposes in violation of the Georgia Constitution.[87] To the trial judge's issuance of an injunction, the city manager, seeking reversal, argued that the plaintiff had requested no such relief.[88] Refusing the defendant's request, the court emphasized that "the Georgia Constitution, which prohibits the granting of any donation or gratuity by the General Assembly, applies to cities."[89] Given the defendant's admission that some donations of city funds were "purely charitable," the court held, "the trial court did not err in granting the injunction."[90]

H. Liability

Municipal liability raised issues across the tort spectrum during the survey period, prompting numerous decisions by the court of appeals.[91] Negligence staples drew the court's attention in *Govea v. City of*

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84. *Id.* at 71, 606 S.E.2d at 12. "Thus, even though [the customer] complains that it lacked actual knowledge of the rates it was charged, it had 'the means of such knowledge' at its disposal." *Id.* (quoting Telescripps Cable Co. v. Welsh, 247 Ga. App. 282, 285, 542 S.E.2d 640, 642 (2000)).

85. *Id.* at 70, 606 S.E.2d at 12. The court explained that the common law voluntary payment doctrine was codified at [section] 13-1-13. *Id.* The court thus reversed the trial judge's denial of summary judgment to the municipal authority. *Id.* at 68, 71, 606 S.E.2d at 10, 12.

86. 265 Ga. App. 841, 595 S.E.2d 651 (2004).

87. *Id.* at 841, 595 S.E.2d at 652; GA. CONST. art. III, § 6, para. 6(a). The plaintiff charged that officials had also converted city funds, but the court observed that there was no evidence in the record to support that charge. *Harris*, 265 Ga. App. at 841, 595 S.E.2d at 652.

88. *Harris*, 265 Ga. App. at 841, 595 S.E.2d at 652. The city manager argued that the injunction constituted a manifest abuse of discretion by the trial court. *Id.* at 843, 595 S.E.2d at 653.

89. *Id.* at 843, 595 S.E.2d at 653-54.

90. *Id.*, 595 S.E.2d at 654.

91. For perspective, see R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA (4th ed. 1988); R. Perry Sentell, Jr., *Georgia Local Government Liability: The "Crises" 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); R. Perry Sentell, Jr., *Local Government Liability Litigation: Numerical Nuances*, 38 GA. L. REV. 633 (2004).

Norcross,[92] an action for the death of a child permitted to examine a police officer's gun.[93] The plaintiffs sued two municipalities: the officer's former and present employers. Initially reversing summary judgment for the former city, the court reviewed evidence indicating the city's agreement not to reveal the officer's infractions of various rules and policies.[94] That evidence raised jury issues on both foreseeability and "proximate cause."[95] As for the officer's present employer, the court found sufficient evidence of negligent hiring and retention.[96] The officer's file suggested a propensity for causing injuries,[97] and his work for the city "continued a pattern of inattentiveness, carelessness, and disregard of safety procedures designed to protect property and person."[98]

White v. Georgia Power Co.[99] presented the plaintiff's argument of municipal negligence in failing to warn two boys who jumped from the city's boat ramp and drowned in the river. Conceding that "boys will be boys,"[100] the court nevertheless emphasized that the "open and obvious nature of a danger obviates the duty to warn of that danger."[101] These boys, the court held, "assumed the known risk . . . as a matter of

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92. 271 Ga. App. 36, 608 S.E.2d 677 (2004).

93. *Id.* at 39, 608 S.E.2d at 681. The child fatally shot himself in the officer's presence while examining the gun. *Id.*

94. *Id.* at 38, 608 S.E.2d at 681. The officer's personnel file in the former city contained notations of numerous rules and policy violations and performance appraisals describing that the officer "fails to follow accepted safety procedures." *Id.* at 37, 608 S.E.2d at 680. Evidence indicated that the police chief, in return for the officer's resignation, agreed to report the resignation as voluntary and that damaging documents would not be revealed to prospective employers. *Id.* at 38, 608 S.E.2d at 681.

95. *Id.* at 44, 608 S.E.2d at 684. Although holding that deceptively reporting the resignation as voluntary to the Georgia Peace Officer Standards and Training Council did not amount to negligence per se (the statute not expressly providing a private cause of action), the court concluded the evidence sufficient for a jury to find that the city could foresee the officer would obtain future police employment, and that the city misrepresented his employment history indicating that he would cause personal injury to another. *Id.*, 608 S.E.2d at 684-85.

96. *Id.* at 48, 608 S.E.2d at 687.

97. *Id.* at 37, 608 S.E.2d at 680. The court noted that indeed another municipality had so concluded and refused to hire the officer. *Id.* at 38, 608 S.E.2d at 681.

98. *Id.* at 48, 608 S.E.2d at 687. "Thus, the evidence sufficiently authorizes a jury to decide whether [the hiring municipality] could have foreseen from any of [the officer's] tendencies or propensities that, if retained, [the officer] would cause personal injury to another." *Id.*

99. 265 Ga. App. 664, 595 S.E.2d 353 (2004).

100. *Id.* at 666, 595 S.E.2d at 356.

101. *Id.*, 595 S.E.2d at 355.

law."[102] Likewise, the court rejected the plaintiff's nuisance contention.[103] Undisputed evidence revealed no other such drownings, and the ramp did not injure "those of the public who actually come in contact with it."[104]

The plaintiff's nuisance claim enjoyed greater success in *City of Roswell v. Bolton*,[105] an action for property flooded by the city's upstream installation of a parkway.[106] Sustaining the trial judge's refusal to grant the city a directed verdict, the court found sufficient evidence showing the creation of a condition subjecting the plaintiff's property to repeated flooding.[107] The harm was "repetitive and continuous," the court asserted, and the municipality failed to rectify it.[108]

The survey period's "constitutional tort" litigation consisted of *Byrd v. Cavenaugh,*[109] where the plaintiff alleged that a police officer violated the Fourth Amendment by jerking her handcuffs in such fashion as to break her arm.[110] Reversing the dismissal, the court reasoned as follows:

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102. *Id.* at 667, 595 S.E.2d at 356. "Stated differently, the defendants bore no duty to warn of an open and obvious danger." *Id.*

103. *Id.* at 666, 595 S.E.2d at 356. 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).

104. *Id.* at 668, 595 S.E.2d at 357. The court relied upon the statutory definition in O.C.G.A. section 41-1-2. *See* O.C.G.A. § 41-1-2 (1997 & Supp. 2005).

105. 271 Ga. App. 1, 608 S.E.2d 659 (2004).

106. *Id.* at 2, 608 S.E.2d at 661-62. Construction of the parkway increased water runoff so as to change a shallow creek behind the plaintiff's home to a streambed some four or five feet deep, resulting in damage to the plaintiff's real property and dwelling. *Id.*, 608 S.E.2d at 662.

107. *Id.*, 608 S.E.2d at 662. "The jury could also conclude the City was aware of the harmful condition, but failed to rectify it." *Id.* at 3, 608 S.E.2d at 662.

108. *Id.* at 3, 608 S.E.2d at 663. The court did hold, however, that "the jury awarded [the plaintiff] damages for the loss in fair market value caused by the flooding of the stream bank as well as the cost to repair his property so as to alleviate the flooding, thus making him twice whole." *Id.* at 9, 608 S.E.2d at 666. Thus, the court reversed and remanded for a new trial on the issue of damages. *Id.*

109. 269 Ga. App. 612, 604 S.E.2d 655 (2004), *cert. granted*. For background on Georgia local government law's experience with Section 1983 liability, see R. PERRY SENTELL, JR., GEORGIA LOCAL GOVERNMENT LAW'S ASSIMILATION OF MONELL: SECTION 1983 AND THE NEW "PERSONS" (1984); R. Perry Sentell, Jr., *Local Government and Constitutional Torts: In the Georgia Courts*, 49 MERCER L. REV. 1 (1997).

110. *Id.* at 613, 604 S.E.2d at 657. The court emphasized that in this context, the plaintiff's allegations must be accepted, but may not be the set of facts ultimately determined to be true by the appropriate factfinder.

> [W]e cannot say that the use of force powerful enough to break [the plaintiff's] arm after she was handcuffed and on her knees was reasonably necessary in making her arrest. Nor can we conclude that it would not be readily apparent to [the officer] that the use of such force was not excessive or in violation of [the plaintiff's] Fourth Amendment rights.[111]

The "ante litem notice" issue arises from the statutory requirement that a claimant provide the municipality with written notice of claim within six months of the event.[112] The court confronted that issue in *Vaillant v. City of Atlanta,*[113] featuring an airport patron's action for injuries when allegedly pushed down by an employee.[114] At the scene, the plaintiff completed an "Air Talk" form, a form addressing customer service and satisfaction.[115] For two primary reasons, the court held that the form failed substantial compliance with the notice mandate.[116] First, it did not suggest the plaintiff's intent "to present a damages claim

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111. *Id.* at 615-16, 604 S.E.2d at 658. The court did deny the plaintiff's claims of battery and due process. *Id.*

In litigation apparently not yet completed, *Common Cause/Georgia v. Campbell*, 268 Ga. App. 599, 602 S.E.2d 333 (2004), the plaintiff sued a former mayor, on behalf of the city (as an involuntary plaintiff) and citizens, for the defendant's failure to sign an airport parking contract within thirty days of approval and thereby causing the city's continuance of paying higher rates under the present contract. First, the court reasoned that no case or statutory authority existed allowing derivative actions by taxpayers in the name of the municipality, and affirmed the city's dismissal as a plaintiff. Second, the court read the plaintiff's complaint to show no more than the mayor, "by failing to perform his public duty, allowed excessive expenditure of City funds for a lawful purpose." *Common Cause/Georgia*, 268 Ga. App. at 602, 602 S.E.2d at 336. That, the court held, did not involve the diversion of city funds to an illegal purpose, and warranted dismissal. The Georgia Supreme Court has granted certiorari in the case. *Id.* at 602-03, 602 S.E.2d at 336, *cert. granted*.

112. O.C.G.A. § 36-33-5(b) (2000 & Supp. 2005). For treatment of the ante litem notice requirement, *see generally* 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).

113. 267 Ga. App. 294, 599 S.E.2d 261 (2004).

114. *Id.* at 294, 599 S.E.2d at 262. The plaintiff had only one leg and used crutches; she alleged that she was pushed down from behind as she boarded a train at the municipal airport by an airport employee. *Id.*

115. *Id.* An airport employee to whom the plaintiff complained gave her the form which requested customers to evaluate the airport services.

116. *Id.* at 296, 599 S.E.2d at 263. The court emphasized that oral notice was insufficient. *Id.*, 599 S.E.2d at 262-63.

for adjustment."[117] Second, the form provided "no indication as to when her injury occurred."[118]

The court similarly condemned the plaintiff's efforts in *Colvin v. City of Thomasville*,[119] an action for injuries allegedly received when exiting a police car while handcuffed.[120] A letter from the plaintiff's attorney notified the municipality of "medical and/or wage loss benefits arising out of an incident which occurred on April 16, 1996."[121] Once again, the court emphasized the letter's deficiencies.[122] It provided "no indication as to the time, place, and extent of the injury, information certainly within his knowledge at the time he mailed the notice."[123]

Somewhat out of the ordinary, the period presented three municipal efforts to obtain contribution from another tortfeasor. *Tensar Earth Technologies, Inc. v. City of Atlanta*[124] presented an action for a death resulting from the cave-in of a parking lot on an underground city sewer.[125] The municipality recovered a jury award for contribution

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117. *Id.* at 297, 599 S.E.2d at 263. Her statements on the "Air Talk" form were insufficient, the court said, to put the recipient on notice of an impending claim for money damages. *Id.*

118. *Id.* at 298, 599 S.E.2d at 264. "Absent *some* indication as to when the injury occurred, [the plaintiff's] written notice fails to satisfy [the code section]." *Id.* Accordingly, the court affirmed the trial judge's grant of summary judgment for the municipality. *Id.*

119. 269 Ga. App. 173, 603 S.E.2d 536 (2004).

120. *Id.* at 173, 603 S.E.2d at 537. The plaintiff alleged that the officer gave him insufficient assistance in exiting the rear door of the police car while handcuffed, resulting in his fall and injury. *Id.*

121. *Id.* at 174, 603 S.E.2d at 538. The letter added that as a result of the incident, the plaintiff suffered injury and sought medical treatment. *Id.*

122. *Id.* at 175, 603 S.E.2d at 538.

123. *Id.* "We find that the notice does not provide 'sufficient definiteness' to enable the municipality to inquire into the alleged injuries and determine whether the claim shall be adjusted without suit." *Id.* The court affirmed summary judgment for the municipality. The ante litem notice issue also arose in *City of Roswell v. Bolton*, 271 Ga. App. 1, 608 S.E.2d 659 (2004), involving a property owner's nuisance action against the municipality for increased water run-off upon his land from the city's upstream parkway development. The city complained, *inter alia*, of the trial court's admission of evidence of the property's flooding earlier than six months prior to plaintiff's notice. The court of appeals rejected that complaint on grounds that the "trial court instructed the jury that although they had heard evidence of events occurring before October 9, 1998, they may not award damages for events that happened before that date . . . ." *City of Roswell*, 271 Ga. App. at 5-6, 608 S.E.2d at 664. Otherwise, the court reasoned, the evidence was relevant to "the issue of bad faith and the award of attorney fees." *Id.* at 6, 608 S.E.2d at 664.

124. 267 Ga. App. 45, 598 S.E.2d 815 (2004).

125. *Id.* at 45, 598 S.E.2d at 817. The wrongful death action had been brought against the defendant, the municipality, and others. All other parties except defendant settled, and a trial was held later. Subsequently, the defendant settled, and the case proceeded on the city's contribution claim. *Id.*

from the supplier of an allegedly defective reenforcing safety net.[126] Reversing, the court of appeals found error in the exclusion of evidence showing the city's knowledge of the perilous condition and its inspection of the line immediately prior to the cave-in.[127] That evidence was relevant, the court reasoned, "on pertinent issues regarding whether the City . . . knew that [it was] facing an emergency situation and failed to take appropriate action."[128]

The municipal effort also failed in *City of Albany v. Pippin*,[129] a claim arising from a sludge application program operated by the city and others.[130] Landowners complained that sludge nitrates contaminated their wells and, despite considerable evidence to the contrary, the municipality settled with the landowners and sought contribution from its co-operators.[131] Sketching prerequisites for success, the court specified that, "the City must show that its own negligent actions and those of the appellees jointly caused contamination of the groundwater."[132] Here, the court concluded, "scientific reports and expert testimony"[133] indicated "that the bio-sludge application was not a source of the high nitrate levels."[134] Consequently, "the trial court did not err in dismissing the City's case."[135]

The contribution trilogy's most noteworthy development came in *City of College Park v. Fortenberry.*[136] There, the city settled the entire case of a plaintiff who was first struck by a police officer and then suffered additional injury from a treating doctor. Subsequently, the municipality sought contribution or indemnity from the doctor, but lost in the trial

126. *Id.*

127. *Id.* at 48-51, 598 S.E.2d at 819-21.

128. *Id.* at 51, 598 S.E.2d at 821. "As we are unable to find the erroneous exclusions harmless, the judgment entered upon the jury's verdict is reversed." *Id.*

129. 269 Ga. App. 22, 602 S.E.2d 911 (2004).

130. *Id.* at 23, 602 S.E.2d at 912. The sludge was injected into farmland where it would provide nutrients to growing crops. *Id.* at 22, 602 S.E.2d at 912.

131. *Id.* at 23, 602 S.E.2d at 912. "The City did not consult with the appellees prior to this settlement. Thereafter, the City sought contribution from the appellees under [section] 51-12-32." *Id.*

132. *Id.*

133. *Id.* at 24, 602 S.E.2d at 913.

134. *Id.* at 22, 602 S.E.2d at 912. Again, "[t]he evidence submitted by the City on this issue . . . was insufficient to establish that operation of the bio-sludge program contributed to the excess nitrate levels." *Id.* at 23-24, 602 S.E.2d at 913.

135. *Id.* at 25-26, 602 S.E.2d at 914. "We have reviewed the trial court's order and there is significant evidence to support its findings." *Id.* at 25, 602 S.E.2d at 914.

136. 271 Ga. App. 446, 609 S.E.2d 763 (2005), *cert. granted*.

court.[137] On appeal, the court of appeals drew a crucial distinction. On the one hand, "an initial tortfeasor [cannot] seek contribution from a subsequent treating physician because the two are not jointfeasors."[138] As for "implied indemnity," however, that issue remained untreated by the courts and the legislature.[139] In this case, it seemed "unjust to penalize the City for its promptitude in making the plaintiff whole. . . ."[140] Consequently, the court concluded, "an initially negligent tortfeasor has a right to partial indemnity against a subsequently negligent treating physician."[141]

I. Zoning

JWIC, Inc. v. City of Sylvester[142] called for the supreme court's construction of a municipal zoning ordinance to determine whether apartments were permissible in the "Restricted Office-Institutional" (R-OI) zoning district.[143] Conceding grounds for the municipality's position in the negative,[144] the court focused upon the R-OI definition of a multi-family dwelling: "a building either designed, constructed, altered, or used for more than two adjoining dwelling units, with each dwelling unit having a common wall or common floor connecting it to at least one other dwelling unit in the building."[145] Because "ambiguities in a zoning ordinance must be resolved in favor of the property owner,"[146] the court held that an apartment "clearly falls within the

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137. *Id.* at 446-47, 609 S.E.2d at 764. A policeman pulled out in front of the original plaintiff who was injured and sued the municipality. Later, an anesthesiologist allegedly caused additional injuries by virtue of his treatment. The city eventually settled the case for the injured party's entire damages. *Id.*

138. *Id.* at 448, 609 S.E.2d at 765. This was true even though the initial tortfeasor was liable for the acts of a subsequently negligent treating physician. *Id.* at 451, 609 S.E.2d at 767.

139. *Id.* at 451, 609 S.E.2d at 767. The court said the question had not been addressed "since the last significant amendment to the indemnity statute was passed in 1972. See [section] 51-12-32(c)." *Id.*; *see* O.C.G.A. § 51-12-32(c) (2000 & Supp. 2005).

140. *City of College Park*, 271 Ga. App. at 452, 609 S.E.2d at 768.

141. *Id.* The court thus reversed the trial court's grant of summary judgment for the physician. *Id.*

142. 278 Ga. 416, 603 S.E.2d 247 (2004).

143. *Id.* at 416, 603 S.E.2d at 248. The plaintiff sought to mandamus the municipality's issuance of a land disturbance permit for a proposed 49-unit apartment complex in the R-OI district. *Id.*

144. *Id.* The only time the ordinance mentioned apartments was in regard to the R-M district, a "floating" district requiring a special permit. *Id.*

145. *Id.* at 417, 603 S.E.2d at 249.

146. *Id.*, 603 S.E.2d at 248.

[above] definition," and constituted a permitted use "as a matter of right."[147]

J. Authorities

A municipal housing authority's dispossessory action against its tenant reached the court of appeals in *Baker v. Housing Authority of Waynesboro*.[148] The action turned upon whether the tenant had timely paid her rent by mailing it on the tenth day of the month.[149] Answering that question in the negative, the court observed that the rental contract declared the rent delinquent "if not paid by the close of business (5:00 p.m.) on the tenth day of the same month."[150] The word "paid," the court held, meant the "receipt" of the rent and not its posting in the mail.[151] A debtor chancing payment by mail, the court concluded, "accepts the risks attendant thereto."[152] The court thus affirmed the trial judge's summary judgment for the authority.[153]

The authority also prevailed on the issue of punitive damages in *Doe v. Metropolitan Atlanta Rapid Transit Authority*.[154] In a patron's action for unsafe premises and inadequate security, the court conceded "the heinous facts" regarding the authority's conduct.[155] Nevertheless, the court concluded, "'public policy demands that [the authority] not be subject to awards of punitive damages, since such awards would seriously damage the public interest.'"[156]

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147. *Id.*, 603 S.E.2d at 249. The court thus reversed the trial judge's denial of relief to the plaintiff. *Id.*

148. 268 Ga. App. 122, 601 S.E.2d 350 (2004).

149. *Id.* at 122, 601 S.E.2d at 351. The authority alleged that the tenant had failed to pay her rent in July and August 2002, "after having already been in 'lease termination status' twice in the previous 12 months." *Id.* The tenant countered that she had paid her July rent (to be paid on the tenth of the month) by mailing it on July 10. *Id.*

150. *Id.* at 123, 601 S.E.2d at 351.

151. *Id.* at 124, 601 S.E.2d at 352. The court said that the payment of money meant its delivery to a creditor "where the money . . . is *tendered and accepted* as extinguishing debt or obligation in whole or in part." *Id.*, 601 S.E.2d at 351 (quoting BLACK'S LAW DICTIONARY 1016 (5th ed. 1979)).

152. *Id.* at 124, 601 S.E.2d at 351.

153. *Id.*, 601 S.E.2d at 352.

154. 272 Ga. App. 14, 611 S.E.2d 704 (2005), *cert. denied*.

155. *Id.* at 15, 611 S.E.2d at 705. The plaintiff had been brutally attacked at the transit authority's station and argued that the defendant had acted wilfully, wantonly, and with conscious indifference to the safety of its passengers. *Id.*

156. *Id.* (quoting MARTA v. Boswell, 261 Ga. 427, 427, 405 S.E.2d 869, 869 (1991)).

II. COUNTIES

A. *Officers and Employees*

Several county officers and employees protested being portrayed in an unflattering light. For example, in *In re July-August DeKalb County Grand Jury*,[157] a county CEO objected to criticisms appearing in a proposed grand jury presentment, and filed a motion to expunge.[158] Upon a superior court hearing and an order to expunge six paragraphs, the CEO argued for expunging the entire presentment.[159] The court of appeals reviewed the presentment, sustained the lower court's actions in expunging ultra vires portions,[160] and rejected the CEO's contention: "the remaining limited criticisms made by the grand jury come within the ambit of [statutory authority] and do not appear to be criticisms of 'misconduct in office' or 'impugned character' as 'politics and local feuds.'"[161]

The protest in *Cooper-Bridges v. Ingle*[162] took the form of a suit in slander.[163] Specifically, the plaintiff complained of the newly-elected sheriff's statement in a newspaper article that the plaintiff was not hired because she was intoxicated.[164] Affirming summary judgment for the sheriff, the court held the statement a privileged report on administrative agencies of government.[165] The statement was "taken directly

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157. 265 Ga. App. 870, 595 S.E.2d 674 (2004).

158. *Id.* at 870, 595 S.E.2d at 675. The grand jury had investigated the possible overpayment of salaries to county employees as well as the security detail for the CEO. *Id.*

159. *Id.* at 871, 595 S.E.2d at 676. The CEO argued that the grand jury had acted ultra vires and that the entire presentment should be expunged. *Id.*

160. "We further find that the expunged portions of the proposed presentment were in fact ultra vires and were properly expunged by the trial court." *Id.*

161. *Id.* at 874, 595 S.E.2d at 678 (quoting *In re* Floyd County Grand Jury Presentments, 225 Ga. App. 705, 705, 707, 484 S.E.2d 769, 770, 771 (1997)). "[T]he remainder of the presentment ceases to be ultra vires in violation of statutory limits and can be filed and published." *Id.* at 873, 595 S.E.2d at 677.

162. 268 Ga. App. 73, 601 S.E.2d 445 (2004).

163. *Id.* at 73, 601 S.E.2d at 446. For perspective on the Georgia law of defamation in local government, *see generally* R. Perry Sentell, Jr., *Defamation in Georgia Local Government Law: A Brief History,* 16 GA. L. REV. 627 (1982).

164. *Id.* "[The] article also reported that [the sheriff] had confirmed the statement taken from the DOL records stating, '[the plaintiff] had an extremely strong odor of alcohol upon her, . . . and she was terminated . . . .'" *Id.* at 75, 601 S.E.2d at 447.

165. *Id.* at 76, 601 S.E.2d at 448. The court observed that the plaintiff conceded that any statement by the sheriff to the labor department concerning unemployment compensation would constitute a qualified privilege. *Id.*

from the documents that [the sheriff] submitted in response to [the plaintiff's] application for unemployment benefits,"[166] the court explained, and the plaintiff failed to prove the sheriff's "actual malice."[167]

Coweta County v. Henderson[168] presented a fireman's challenge to his termination for failing both a random drug test and a subsequent "split test" done at his request.[169] Upon the trial court's reversal of the personnel panel's determination,[170] the court of appeals found error in the judge's standard of review.[171] Under the requisite "any evidence" standard, the court emphasized, there was "some evidence" supporting the panel's termination decision, and the trial judge's order of reinstatement must be reversed.[172]

A county sheriff's entitlement to an attorney attracted the supreme court's attention in *Board of Commissioners of Dougherty County v. Saba*.[173] There, the sheriff petitioned for an attorney's assistance in preventing the commissioners from discontinuing certain budget positions.[174] The commissioners objected that the material statute[175] provided an attorney only when the sheriff was a defendant, but the court disagreed.[176] The statute authorized the sheriff to employ separate counsel and receive reasonable fees and court costs "in any civil case in which the county attorney has an ethical conflict of interest, . . .

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166. *Id.*

167. *Id.* at 78, 601 S.E.2d at 449. "Therefore, absent the introduction of evidence by [the plaintiff] showing that [the sheriff] acted maliciously, summary judgment was justified." *Id.*

168. 270 Ga. App. 153, 606 S.E.2d 7 (2004).

169. *Id.* at 155, 606 S.E.2d at 9-10. The court emphasized that the county "followed appropriate procedures as outlined in the Personnel Management System." *Id.*, 606 S.E.2d at 9.

170. The trial court had professed to act "in a 'sense of fairness and equity'" and "discounted the evidence supporting the personnel board's decision." *Id.* at 154, 606 S.E.2d at 9.

171. *Id.* "[T]he superior court ignored the appropriate standard of review . . . ." *Id.*

172. *Id.* at 155, 606 S.E.2d at 9. "[W]e find that some evidence supported the personnel board's decision to terminate [the plaintiff's] employment." *Id.*

173. 278 Ga. 176, 598 S.E.2d 437 (2004).

174. *Id.* at 176, 598 S.E.2d at 438. Initially, the supreme court held the trial judge in error in deciding the budget issue. *Id.* at 178, 598 S.E.2d at 439-41. On remand, the court must determine whether the commissioners adopted a budget not reasonably adequate for the sheriff to perform his law enforcement duties. *Id.*

175. The statute in issue was O.C.G.A. section 45-9-21(e)(2), applying to four elected constitutional officers. *Id.* at 180, 598 S.E.2d at 441.

176. *Id.*

regardless of whether the [sheriff] is proceeding as a plaintiff or a defendant in such civil suit."[177]

The court of appeals considered legal representation in *Baker v. Gwinnett County*.[178] There, a sheriff's employee charged the county was in breach of contract by terminating his coverage under an ordinance[179] authorizing legal defense and indemnification.[180] The county defended that the ordinance authorized termination should the county attorney experience the employee's refusal to cooperate or assist in the litigation.[181] Here, the attorney had terminated legal services only after the plaintiff's deposition testimony differed substantially from his answers to interrogatories.[182] Under both the statute[183] and the ordinance, the court concluded, the attorney "had a reasoned, articulated basis for her decision to terminate [the plaintiff's] coverage under the plan,"[184] and her "decision was not arbitrary or capricious. . . ."[185]

The county's reduction of salaries led to several controversies, two involving the county chief magistrate. In *Maddox v. Hayes*,[186] the county recalculated the magistrate's salary, determined it to be erroneous, and reduced it accordingly.[187] Responding to the magis-

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177. *Id.* at 181, 598 S.E.2d at 442. Thus, the court affirmed the trial judge's grant of the sheriff's petition to hire an attorney and the county's payment of reasonable fees and costs. *Id.*

178. 267 Ga. App. 839, 600 S.E.2d 819 (2004).

179. O.C.G.A. § 45-9-21(a) (2002 & Supp. 2005).

180. *Baker*, 267 Ga. App. at 839, 600 S.E.2d at 820. The plaintiff and others were sued for sexual discrimination, and the county attorney sought to represent plaintiff under the county ordinance providing county employees with defense and indemnification when named in lawsuits alleging liability for performing their official duties. *Id.*

181. *Id.* at 840-41, 600 S.E.2d at 821.

182. *Id.* In his interrogatory answers, the plaintiff had omitted to note his prior employment in another sheriff's department. In his deposition responses, the plaintiff immediately mentioned the employment and remembered its details. *Id.* at 840, 600 S.E.2d at 821. The county attorney subsequently terminated his ordinance coverage and plaintiff was required to retain his own counsel. *Id.* at 840-42, 600 S.E.2d at 821. The litigation was ultimately resolved in favor of the county employees. *Id.* at 841, 600 S.E.2d at 821.

183. O.C.G.A. section 45-9-21(a) empowers counties, in their discretion, to provide legal defense and indemnification to their employees. This language, the court said, provided the county with considerable latitude. *Baker*, 267 Ga. App. at 842, 600 S.E.2d at 822.

184. *Id.* at 843-44, 600 S.E.2d at 823.

185. *Id.* at 844, 600 S.E.2d at 824. "[T]he record supports [defendant's] conclusion that [plaintiff] deliberately withheld information in his interrogatory responses and, consequently, that he failed to cooperate fully with the county attorney." *Id.* The court thus affirmed summary judgment for the county. *Id.* at 845, 600 S.E.2d at 824.

186. 278 Ga. 141, 598 S.E.2d 505 (2004).

187. *Id.* at 141, 598 S.E.2d at 506. The chief magistrate had originally calculated her own salary; the county later recalculated under a different method and determined the

trate's suit for mandamus,[188] the supreme court conceded the constitution's prohibition against reducing a judge's salary during a term of office.[189] However, the court delineated, "this is not to say that a county cannot reduce a judge's salary when it is shown to be inflated erroneously."[190] Denying the magistrate's estoppel argument, the court reversed the trial judge's mandamus award.[191]

The court relied upon *Maddox* when it similarly denied a magistrate's mandamus action in *Poppell v. Gault*.[192] There, the plaintiff was elected chief magistrate and, for three years of his term, received the statutorily provided salary.[193] When he refused to certify the time spent performing his duties (after it was revealed that he worked only two days a week),[194] the commissioners reduced his compensation to that of a part-time magistrate.[195] Again sustaining the commissioners' actions, the court asserted that "[a] chief magistrate working less than full-time is not entitled to the salary of a full-time chief magistrate."[196]

Finally, in *Sears v. Dickerson,*[197] the court manifested scant sympathy for a county assistant appraiser who failed to obtain a required certification in real estate appraisal.[198] Employing a "rational basis" standard of review,[199] the court deemed the county commissioners'

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amount excessive; subsequent salary payments were made under the revised method. *Id.*

188. For treatment of the mandamus remedy generally in the law of local government, see R. PERRY SENTELL, JR., MISCASTING MANDAMUS IN GEORGIA LOCAL GOVERNMENT LAW (1989).

189. *Maddox*, 278 Ga. at 142, 598 S.E.2d at 506; GA. CONST. art. VI, § 7, para. 5.

190. *Maddox*, 278 Ga. at 142, 598 S.E.2d at 506. "Simply put, a county cannot reduce a judge's correctly calculated salary or supplement; but an incorrectly calculated salary is not the amount due the recipient; and the county can, and should, reduce it." *Id.*, 598 S.E.2d at 506-07.

191. *Id.*, 598 S.E.2d at 507. For treatment of estoppel generally in the law of local government, see R. PERRY SENTELL, JR., THE DOCTRINE OF ESTOPPEL IN GEORGIA LOCAL GOVERNMENT LAW (1985).

192. 278 Ga. 437, 438, 603 S.E.2d 271, 273 (2004).

193. *Id.* at 437, 603 S.E.2d at 272; O.C.G.A. § 15-10-23(a)(2) (2005).

194. *Poppell*, 278 Ga. at 437, 603 S.E.2d at 272. "The means by which the number of hours served by the chief magistrate is determined is the chief magistrate's certification to the county governing authority . . . ." *Id.* at 438, 603 S.E.2d at 272.

195. *Id.* at 437, 603 S.E.2d at 272; O.C.G.A. § 15-10-23(a)(3).

196. *Poppell*, 278 Ga. at 438, 603 S.E.2d at 272-73. The court thus affirmed the trial judge's denial of a mandamus. *Id.* at 439, 603 S.E.2d at 273.

197. 278 Ga. 900, 607 S.E.2d 562 (2005).

198. *Id.* at 902-03, 607 S.E.2d at 565. Plaintiff had failed to pass an examination required for all assistant chief appraisers in the office of county tax assessor, and suffered both a demotion and reduction in pay. *Id.* at 900-01, 607 S.E.2d at 563.

199. *Id.* at 901, 607 S.E.2d at 564. On grounds the issue had not been passed upon below, the court refused to rule on due process contentions. As for equal protection the court said the case involved neither a suspect classification nor a fundamental right.

requirement to "clearly further a rational purpose."[200] As for the plaintiff's alleged greater difficulties with the exam,[201] the court was unrelenting: "[A] continuing education requirement does not violate equal protection merely because some public employees are motivated to conform sooner than others to their employer's desire that they satisfy such a requirement."[202] On these grounds, the court rejected the plaintiff's challenge to her demotion and salary reduction.[203]

B. Elections

The supreme court considered an intriguing challenge to the primary election for county chief magistrate in *Banker v. Cole*.[204] Of the three candidates for election, one withdrew from the race after absentee ballots were printed and early voting had commenced, and election managers posted notices of the withdrawal at the polling places.[205] Nevertheless, the withdrawn candidate received 1,817 votes which, according to the defeated candidate, invalidated the election.[206] Reviewing the trial judge's rejection of the plaintiff's position, the supreme court agreed that the challenged notices were "prominently" displayed, but deemed them insufficient to indicate the "legal impact of the withdrawal."[207] Even so, however, "only those [votes] cast after [the] withdrawal . . . may be counted as having been affected by the

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"[Plaintiff] simply failed to attain the same certification which was required of all the others who were similarly situated." *Id.* at 901-02, 607 S.E.2d at 564-65.

200. *Id.* at 902, 607 S.E.2d at 564.

201. The trial court found that the other appraisers, who had worked in the real estate area, were better prepared to pass the exam. The supreme court rejected that analysis: "[W]here . . . a restrictive classification has some reasonable basis, it does not violate equal protection merely because it is not made with perfect symmetry or because in practice it results in some inequality." *Id.*, 607 S.E.2d at 564-65.

202. *Id.*, 607 S.E.2d at 565.

203. *Id.* at 902-03, 607 S.E.2d at 565. The court reversed the trial court's award of back pay. *Id.* at 903, 607 S.E.2d at 565.

204. 278 Ga. 532, 604 S.E.2d 165 (2004).

205. *Id.* at 532, 604 S.E.2d at 166. The notices simply stated that the candidate had withdrawn from the election. *Id.*

206. *Id.* Plaintiff alleged the notices to fail both in prominence and in contents. *Id.*

207. *Id.* at 534, 604 S.E.2d at 167. O.C.G.A. section 21-2-134(a)(2) (2003 & Supp. 2005) requires the notice to state that "all votes cast for such withdrawn candidate shall be void and shall not be counted." *Id.* at 532, 604 S.E.2d at 167; O.C.G.A. § 21-2-134(a)(2). The court conjectured that "[w]ithout awareness of the legal effect of voting for a withdrawn candidate, voters might believe their votes would function as write-in votes, with the possibility of persuading the withdrawn candidate to take office if enough votes are cast for that candidate." *Banker*, 278 Ga. at 534, 604 S.E.2d at 168. The court concluded that "the fact of withdrawal and the legal effect of voting for a withdrawn candidate must be included in the notice . . . ." *Id.*

irregularity in the notice . . . ."[208] The paintiff's failure to show which of the 1,817 votes were so affected, the court held, also failed to demonstrate that the irregularity placed the result of the election in doubt.[209] The court thus affirmed the trial judge's conclusion for the winning candidate.[210]

C. Powers

Unified Government of Athens-Clarke County v. Hospital Authority of Clarke County[211] resolved a political war over the unified government's power to fill hospital authority vacancies with candidates not nominated by the authority.[212] The supreme court traced the lengthy history of authority nominations,[213] observing its continuation even after creation of the unified government.[214] Although the historic practice was never committed to written document, the court asserted, "[o]bligations and responsibilities can be established by custom and practice as well as by written resolution."[215] The court thus affirmed the trial judge's order that "the Unified Government . . . fill the vacancies on the board by appointing individuals who first have been nominated by the Hospital Authority."[216]

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208. *Banker*, 278 Ga. at 535, 604 S.E.2d at 169. "Thus, of the 1,817 votes cast for [the withdrawn candidate], only those cast after his withdrawal, i.e., on election day or in early voting . . . may be counted as having been affected by the irregularity in the notice of withdrawal." *Id.*

209. *Id.* "[Plaintiff] did not carry her burden of demonstrating an irregularity or illegality sufficient to change or place in doubt the result of the election." *Id.*

210. *Id.* at 536, 604 S.E.2d at 169.

211. 278 Ga. 17, 596 S.E.2d 164 (2004).

212. *Id.* at 17-18, 596 S.E.2d at 165. The unified government had suddenly asserted that power after many years of following a contrary practice, and the hospital authority sought both mandamus and injunctive relief. *Id.*

213. *Id.* at 17, 596 S.E.2d at 165. The former county government had created the hospital authority in 1960, and in 1961 began the practice of filling vacancies thereon only from nominations made by the authority. A general statute of 1964, GA. H.R. BILL 162, Reg. Sess. (1964), expressly permitted the filling of vacancies in the same manner as before the statute's passage, and the county and authority continued as in the past. *Id.*

214. *Id.* at 17-18, 596 S.E.2d at 165. The unified government continued to follow the past practice from the time it was created in 1991 until 2003 when it asserted the power to fill vacancies with individuals not nominated by the authority.

215. *Id.* at 18, 596 S.E.2d at 166.

216. *Id.* The court rejected the government's argument that the authority was estopped by its statements to investors that the government was not bound by the authority's vacancy nominations. *Id.* For perspective on that issue, see R. PERRY SENTELL, JR., THE LAW OF ESTOPPEL IN GEORGIA LOCAL GOVERNMENT LAW (1985).

D. Regulation

County regulatory power attracted litigation in distinctly different contexts during the survey period,[217] two of those instances involving business regulation. In *Effingham County Board of Commissioners v. Shuler Brothers, Inc.*,[218] the county sought to limit a wood chipping plant's hours of operation,[219] charging that otherwise the plant constituted a public nuisance. The court of appeals rejected that charge,[220] emphasizing the plant's operation "in a location specifically negotiated and rezoned for the operation of a chip mill."[221] "Since the chip mill was lawful," the court reasoned, "it could have become a nuisance only if conducted in an illegal manner."[222] The plant's lawful operation being "undisputed,"[223] the court was left to one conclusion: "Because the chip mill was a legal enterprise operated as the law authorized, it cannot have been a nuisance."[224]

The supreme court sided with county regulation in the setting of *Pawnmart, Inc. v. Gwinnett County*,[225] litigation challenging a county ordinance requiring pawnbrokers to maintain records and obtain information.[226] In response to plaintiff's primary contention of state

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217. For perspective on the 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 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).

218. 265 Ga. App. 754, 595 S.E.2d 526 (2004).

219. *Id.* at 754, 595 S.E.2d at 527. The county had previously approved the rezoning of the property for the plant's location, and plaintiffs had constructed the chip mill at a cost of ten million dollars. Once in operation, the county cited the plant for violation of its noise ordinance, providing that the plant could operate only between the hours of 7:00 a.m. and 6:00 p.m. *Id.* The trial judge declared the noise code unconstitutional, and the county did not appeal that ruling. *Id.* at 755, 595 S.E.2d at 528.

220. *Id.* at 755, 595 S.E.2d at 528. "'That which the law authorizes to be done, if done as the law authorizes, cannot be a nuisance.'" *Id.* (quoting City of Douglasville v. Queen, 270 Ga. 770, 773, 514 S.E.2d 195, 199 (1999)).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* The court thus affirmed the trial judge's grant of summary judgment for the plaintiff. *Id.*

225. 279 Ga. 19, 608 S.E.2d 639 (2005).

226. *Id.* at 19, 608 S.E.2d at 641. The records and information pertained to persons pawning property and included fingerprints, photographs, and sales receipts for new merchandise. *Id.*

preemption,[227] the court summarized the constitution:[228] general statutes preempt an ordinance on the "same subject" unless the ordinance is "(1) authorized by general laws, and (2) does not conflict with them."[229] Here, although the material statute preempted pawnbroker ordinances, it also "expressly preserved" them.[230] By express preservation, "the legislature has in effect 'authorized' them."[231] Finally, the court concluded, there was no "conflict": the statute applied to pawnbrokers' disclosures to pledgors;[232] the ordinance regulated information obtained from them.[233]

The court again sustained the county's regulatory power in *McLeod v. Columbia County*,[234] a landowner's challenge to a county stormwater management ordinance imposing monthly utility charges "based on the amount of impervious surface area located on [an owner's] property."[235] Initially, the court found authority for the ordinance in "the Home Rule section of the Georgia Constitution,"[236] as implemented by a provision in the "Revenue Bond Law."[237] Secondly, the court rejected the

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227. *Id.* Plaintiff alleged preemption by O.C.G.A. section 44-12-130 to -138. *Id.* at 19-20, 608 S.E.2d at 641.

228. *Id.* at 19, 608 S.E.2d at 641; GA. CONST. art. III, § 6, para. 4(a). On the history of this provision, see R. Perry Sentell, Jr., *When is a Special Law Unlawfully Special*?, 27 MERCER L. REV. 1167 (1976); R. Perry Sentell, Jr., *Unlawful Special Laws: A Postscript on the Proscription*, 30 MERCER L. REV. 319 (1978).

229. *Pawnmart, Inc.*, 279 Ga. at 20, 608 S.E.2d at 641. The court relied on *Franklin County v. Fieldale Farms*, 270 Ga. 272, 507 S.E.2d 460 (1998). *Id.* at 19 n.2, 608 S.E.2d at 641 n.2. For discussion of that decision, *see generally* R. Perry Sentell, Jr., *The Georgia Supreme Court and Local Government Law: Two Sheets to the Wind,* 16 GA. ST. U. L. REV. 361 (2000).

230. *Id.* at 20, 608 S.E.2d at 641; O.C.G.A. § 44-12-135 (2002).

231. *Pawnmart, Inc.,* 279 Ga. at 20, 608 S.E.2d at 641.

232. *Id.* at 21, 608 S.E.2d at 642; O.C.G.A. § 44-12-138 (2002 & Supp. 2005).

233. *Pawnmart, Inc.,* 279 Ga. at 21, 608 S.E.2d at 642. "Therefore, the [o]rdinance does not conflict with [section] 44-12-138." *Id.* The court likewise rejected challenger's equal protection argument: "It is axiomatic that stolen property passes through pawnshops with higher frequency than it is returned to department stores, and thus the County had a rational basis for requiring receipts at pawnshops." *Id.* Similarly, the court held, the ordinance did not infringe on the right to contract, for "[it] serves the public purpose of impeding the sale of stolen property." *Id.* at 22, 608 S.E.2d at 642.

234. 278 Ga. 242, 599 S.E.2d 152 (2004).

235. *Id.* at 242, 599 S.E.2d at 153.

236. *Id.*; GA. CONST. art. IX, § 2, para. 3(a)(6).

237. *McLeod*, 278 Ga. at 243, 599 S.E.2d at 154; O.C.G.A. § 36-82-62(a)(2) (2000 & Supp. 2005). "Although this statute is part of the Revenue Bond Law, the power to operate and maintain an undertaking and the power to collect fees or charges from undertakings are 'clearly independent of the power to issue revenue bonds.'" *McLeod*, 278 Ga. at 243, 599 S.E.2d at 154 (quoting Krause v. City of Brunswick, 242 Ga. 659, 660, 251 S.E.2d 239, 240 (1978)).

challengers' contention that the county must first establish a community improvement district:[238] nothing in the constitution levied such a requirement.[239] Finally, the court rebuffed characterization of the imposition as a tax, thus requiring both uniformity and ad valorem applicability.[240] "A charge is generally not a tax if its object and purpose is to provide compensation for services rendered . . . . This trend extends to stormwater cases, where service charges have been sustained as fees and not taxes because of the indirect benefits to those assessed."[241]

Franklin v. State[242] featured a challenge to a county nuisance ordinance[243] targeting "accumulation(s) of litter or rubbish items" on property.[244] Rejecting the property owner's charge of unconstitutional vagueness, the supreme court examined the definitions and pronounced them sufficiently "instructive."[245] Its "examples provide more than adequate guidance" to persons of common intelligence who "can readily ascertain without guessing whether a particular item or substance will be considered 'litter' or 'rubbish' (or both) under the ordinance."[246]

Finally, in *Coffey v. Fayette County*,[247] the court considered a resident's constitutional challenge to an ordinance restricting non-commer-

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238. *McLeod*, 278 Ga. at 243, 599 S.E.2d at 154; GA. CONST. art. IX, § 7, paras. 1-6.

239. *McLeod*, 278 Ga. at 243, 599 S.E.2d at 154. "The constitutional CID provisions did not furnish the County with an opportunity to create a CID which, like the Stormwater Utility, would charge residents for stormwater management services, or in which a high volume of property within the CID was residential or agricultural." *Id.*

240. *Id.* at 245, 599 S.E.2d at 155; GA. CONST. art. VII, § 1, para. 3; GA. CONST. art. VII, § 2, para. 1.

241. *Mcleod*, 278 Ga. at 244, 599 S.E.2d at 155. "Therefore, we conclude that the utility charge is not an invalid tax." *Id.* at 245, 599 S.E.2d at 155. The court likewise rejected the charge that the imposition was arbitrary and capricious, on grounds that the charge is used only to pay for stormwater management within the designated service area and thus bears a reasonable relationship to the benefits received by individual developed properties. *Id.* at 246, 599 S.E.2d at 156.

242. 279 Ga. 150, 611 S.E.2d 21 (2005).

243. CHEROKEE COUNTY, GA., CODE OF ORDINANCE § 46-61(d).

244. *Franklin*, 279 Ga. at 151, 611 S.E.2d at 22. The challenger had been convicted of violating the ordinance. *Id*. at 150, 611 S.E.2d at 22.

245. *Id.* at 152, 611 S.E.2d at 23. "[T]he definitions are instructive in nature, providing concrete examples of the type of substances that may not be accumulated on either private or public property without creating a nuisance." *Id*.

246. *Id.* "With limited exception, all the Due Process Clause requires is that the law give sufficient warning so that individuals may avoid doing that which is forbidden." *Id*. The court thus sustained the challenger's conviction. *Id*. at 153, 611 S.E.2d at 24.

247. 279 Ga. 111, 610 S.E.2d 41 (2005).

cial signs in residential areas.[248] Reversing the trial judge's standard (that of "rational relationship") for appraising the ordinance,[249] the supreme court enumerated the proper bases for evaluation. The First Amendment required that the ordinance make no reference to speech content,[250] that it be narrowly tailored to serve a significant government interest,[251] and that it allowed alternative methods of communication.[252] Additionally, the court emphasized, the Georgia Constitution requires the "government to adopt the least restrictive means of achieving its goals."[253] These were the standards, the court held, by which the trial judge must evaluate the county ordinance.[254]

E. Openness

Both meetings and records constituted subjects of "openness" litigation during the survey period.[255] *Slaughter v. Brown*[256] featured a special meeting of the county school board, the posted notice having stated its location as the high school media center.[257] Because the meeting was held at the board's central office, the court of appeals found violation of the Open Meetings Act.[258] "It is undisputed that no notice was posted at the media center, and the Superintendent acknowledged that the notice that was posted gave the wrong location for the meeting."[259] Moreover, the court rejected the school board's position that the plaintiffs were not entitled to attorney fees:[260] "the trial court's finding

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248. *Id*. at 111, 610 S.E.2d at 42. The restriction was to one sign per lot, and no more than six square feet. *Id*.

249. *Id*. The trial judge had determined that "there is a rational relationship between the County's sign restrictions and its interests in aesthetics and traffic safety." *Id*.

250. *Id*. The court drew its standards from its prior decision in *Statesboro Publishing Co. v. City of Sylvania*, 271 Ga. 92, 93, 516 S.E.2d 296, 298 (1999). *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id*. at 112, 610 S.E.2d at 42. The court thus reversed and remanded. *Id*.

255. For perspective on the requirement of openness in local government law, *see generally* R. Perry Sentell, Jr., *The Omen of "Openness" in Local Government Law*, 13 GA. L. REV. 97 (1978).

256. 269 Ga. App. 211, 603 S.E.2d 706 (2004).

257. *Id*. at 212, 603 S.E.2d at 708. The notice was posted at the board's central office and at the county courthouse. *Id*.

258. *Id*. at 213, 603 S.E.2d at 708; O.C.G.A. § 50-14-1(d) (2002 & Supp. 2005).

259. *Slaughter*, 269 Ga. App. at 212-13, 603 S.E.2d at 708.

260. *Id*. at 213, 603 S.E.2d at 708. "The Board also argues the trial court erred in finding that the meeting was held without substantial justification and there were no special circumstances which would support the denial of attorney fees to plaintiffs." *Id.*

that the Board acted without substantial justification in holding a meeting without giving proper notice, was not clearly erroneous."[261]

The supreme court focused on the Open Records Act in *City of Atlanta v. Corey Entertainment, Inc.*,[262] an action seeking the city's disclosure of the successful bidder's tax records for an airport advertising contract.[263] Because those records were submitted to qualify the bidder as a "disadvantaged business enterprise,"[264] the court deemed them "'received in the course of the operation of a public office or agency,'"[265] within the Act's requirements.[266] The court denied that the defendants cited any "federal law that prevents the disclosure of the tax returns in accordance with a proper judicial order,"[267] and that the records fell under any privacy exemption of the Open Records Act.[268] "[The unsuccessful bidder] has a right to challenge the City's contract decision, and that right overrides [the successful bidder's] interests in maintaining the confidentiality of the documents."[269]

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261. *Id.* In addition, the court noted, "the Board's seemingly cavalier attitude to their obligations under the Act. . . ." *Id.* at 213-14, 603 S.E.2d at 708.

262. 278 Ga. 474, 604 S.E.2d 140 (2004).

263. *Id*. at 475, 604 S.E.2d at 141. Plaintiff was the unsuccessful bidder and sought the tax records under O.C.G.A. section 50-18-70. *Id.*

264. *Id*. at 476, 604 S.E.2d at 142. The U.S. Department of Transportation's program provided the city federal funds on the condition that at least 10% of all businesses at the airport were owned by socially or economically disadvantaged individuals. 49 U.S.C. § 47107(e)(1) (2005).

265. *City of Atlanta*, 278 Ga. at 476, 604 S.E.2d at 142; O.C.G.A. § 50-18-70(a) (2002 & Supp. 2005).

266. *City of Atlanta*, 278 Ga. at 476, 604 S.E.2d at 142. This was true "unless federal or state law specifically prohibits the disclosure of the tax returns." *Id.*

267. *Id*. at 477, 604 S.E.2d at 143. The court held that the records had nothing to do with defendant's personal wealth statement under 49 C.F.R. section 26.67(a)(2)(iv), and that a release consistent with state law, under 49 C.F.R. section 26.67(a)(2)(ii), required that they be released when properly ordered by a court. *Id*. at 476, 604 S.E.2d at 142-43.

268. *Id*. at 477-78, 604 S.E.2d at 143. "[T]he right of privacy . . . does not protect against 'legitimate inquiry into the operation of a government institution.'" *Id.* (quoting Athens Observer, Inc. v. Anderson, 245 Ga. 63, 65-66, 263 S.E.2d 128, 130 (1980)).

269. *Id.* at 478, 604 S.E.2d at 143-44. "[Defendant's] expectations of privacy are diminished when she submitted the documents in an attempt to receive favorable public contracts." *Id.*, 604 S.E.2d at 144. The court thus affirmed the trial judge's order of the release of the tax returns. *Id*. In one other "open records" case of the period, *Tobin v. Cobb County Board of Education*, 278 Ga. 663, 604 S.E.2d 161 (2004), plaintiffs sought to mandamus the board to permit inspection and copying of the records of the high school booster club. 278 Ga. at 663, 604 S.E.2d at 162. Affirming the trial judge's dismissal, the supreme court asserted that, "[t]he Open Records Act encourages public access to government information . . . [and] provides legal and equitable remedies to ensure compliance with its provisions." *Id*. "However, neither mandamus nor injunctive relief can be employed where the petitioner has an adequate legal remedy." *Id.* For comprehensive

F. Contracts

County contracting efforts came to naught in *Greene County School District v. Greene County*,[270] but to the disadvantage of the other contracting party. There, the county agreed to waive a portion of the commission received for collecting taxes for the school board,[271] in return for the board's conveyance of real property.[272] The parties abided by the agreement for five years,[273] until subsequent county commissioners reinstated the tax collection fee. In protest, the school board sought to enforce the agreement as an "intergovernmental contract."[274] Rejecting that position, the supreme court held, first, that the agreement did not involve the provision of services;[275] and second, that tax collection is not a service county commissioners are empowered to undertake.[276] Consequently, the agreement violated the statutory prohibition against a governing authority "bind[ing] itself or its successors so as to prevent free legislation;"[277] and the county was free to disregard the contract.[278]

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discussion of the attempted misuse of mandamus in local government law, *see generally* R. PERRY SENTELL, JR., MISCASTING MANDAMUS IN GEORGIA LOCAL GOVERNMENT LAW (1989).

270. 278 Ga. 849, 607 S.E.2d 881 (2005).

271. *Id*. at 850, 607 S.E.2d at 882. The county agreed to reduce the commission from 2.5% to 1%. *Id*.

272. *Id*. The property consisted of a building owned by the school board and desired by the county for the use of the Masonic Lodge. *Id*.

273. *Id*. The agreement contained no time limit. *Id*.

274. *Id.* The constitution, GA. CONST. art. IX, § III, para. I(a)), allows political subdivisions of the state to contract with each other for a term of fifty years.

275. *Id.* at 851, 607 S.E.2d at 882. The constitution specified that the intergovernmental contract must pertain to the provision of services; here, the court said, the commissioners "simply offered to waive a portion of the commission in exchange for the School District's property." *Id*., 607 S.E.2d at 883.

276. *Id*., 607 S.E.2d at 882. The constitution specified that the intergovernmental contract must concern activities or services the contracting parties are authorized to undertake; here, the court said, only the county tax commissioner possesses the exclusive authority to collect taxes. *Id.*, 607 S.E.2d at 882-83.

277. *Id*. at 850, 607 S.E.2d at 881; O.C.G.A. § 36-30-3(a) (2000 & Supp. 2005). For the convoluted history on the court's treatment of this statutory provision, see R. Perry Sentell, Jr., *Local Government and Contracts That Bind*, 3 GA. L. REV. 546 (1969); R. Perry Sentell, Jr., *Binding Contracts in Georgia Local Government Law: Recent Perspectives*, 11 GA. ST. B.J. 148 (1975); R. Perry Sentell, Jr., *Binding Contracts in Georgia Local Government Law: Configurations of Codification*, 24 GA. L. REV. 95 (1989); R. Perry Sentell, Jr., *Binding Contracts in County Government–Never Mind*, GA. COUNTY GOV. MAG. 28 (Mar. 1991); 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).

278. *Green County Sch. Dist.*, 278 Ga. at 852, 607 S.E.2d at 883. "Accordingly, the contract is not a valid intergovernmental contract, and the School Board's attempt to

The contract itself yielded a decision for the county in *Handex of Florida, Inc. v. Chatham County*,[279] involving an agreement to move a county landfill. The contractor brought a third party complaint against the county, claiming responsibility for payments to the subcontractor based on a "truck-count method" of determining volume moved rather than the contract's stated "survey method."[280] Adopting the trial judge's opinion, the court of appeals held that the parties had mutually varied the terms of the contract in respect to interim payments.[281] In contrast, the plaintiff presented "no evidence that the parties agreed to abandon the contract provision requiring that the final quantification of waste removed be based upon topographic surveys."[282] The court thus affirmed the county's summary judgment.[283]

G. Finances

The supreme court impacted the law of local government finance with its decision in *Bauerband v. Jackson County*,[284] a challenge to the "lease-purchase contract" as a means of evading the constitution's "debt limitation."[285] The contract between the county and the Association of County Commissioners of Georgia ("ACCG")[286] called for financing and construction of a new courthouse via the following procedures: the county would lease the land from ACCG, which would sell "certificates of participation" to raise construction funds; the county would pay an annual rent for the courthouse, renewable each year for thirty years;

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assign a 50-year term of duration to the contract must fail. Under [O.C.G.A. section] 36-30-3(a), therefore, the current County Commissioners are not bound by the contract." *Id*.

279. 268 Ga. App. 285, 602 S.E.2d 660 (2004).

280. *Id*. at 286, 602 S.E.2d at 662. The "truck-count method" would result in considerably higher payments to the subcontractor, payments the contractor claimed the county owed by virtue of its practices under the contract. *Id*. at 287, 602 S.E.2d at 662.

281. *Id*. at 289, 602 S.E.2d at 664. During the course of the project, "the County agreed to make interim payments to [the contractor] for waste disposal based upon truck counts although the contract specifically provided that payments for waste excavation would be based upon before and after topographic/planimetric surveys." *Id*. at 287, 602 S.E.2d at 663.

282. *Id.* at 289, 602 S.E.2d at 664. "The foregoing evidence, which has been undisputed, supports the County's contention that despite the parties' agreement to use truck count estimates for interim payments, final determination of the actual amount of waste removed would be based upon land surveys as provided for in the contract." *Id.*

283. *Id*. at 290, 602 S.E.2d at 664.

284. 278 Ga. 222, 598 S.E.2d 444 (2004).

285. *Id.* at 222, 598 S.E.2d at 445; GA. CONST. art. IX, § 5, para. 1(a). This provision sets the county's debt limitation at ten percent of the assessed value of all taxable property, and prohibits any new debt without "the assent of a majority of the qualified voters." *Id*.

286. "[A] non-profit organization that assists county governments." *Bauerband*, 278 Ga. at 222, 598 S.E.2d at 445.

each renewal would terminate on December 31, with the county under no obligation to renew; and after thirty years the county would have the option to purchase.[287] County residents challenged both the contract and the authorizing statute[288] as violating the constitution's prohibition against incurring county debt without a public vote.[289]

Initially, the supreme court reconfirmed the validity of the statute authorizing such contracts as proper exceptions to the constitution's debt limitation.[290] Next, the court rejected the plaintiffs' plea that in "reality" the county was necessarily bound to renew the lease each year:[291] "Many policy choices made by local governmental bodies are difficult, but that does not render them unconstitutional."[292] The authorizing statute required the power to terminate in order to render the county's obligation "year to year," rather than an unconstitutional debt.[293] "That power is present in this agreement,"[294] the court declared, and the lease-purchase arrangement was valid.[295]

The court approved yet another financial arrangement in *Quarterman v. Douglas County Board of Commissioners*.[296] There, following voter approval of a Special Purpose Local Option Sales Tax ("SPLOST"),[297] the county entered into an intergovernmental contract with the county

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287. *Id*., 598 S.E.2d at 446. The rental payments went into a fund used for paying the holders of the certificates of participation. *Id*. at 225 n.3, 598 S.E.2d at 448 n.3. These provisions were made pursuant to O.C.G.A. section 36-60-13, which declares that such arrangements shall not constitute a "debt" within the meaning of the constitution's prohibition. *Id*. at 223, 598 S.E.2d at 446; O.C.G.A. § 36-60-13 (2002 & Supp. 2005).

288. O.C.G.A. § 36-60-13 (2002 & Supp. 2005).

289. *Bauerband*, 278 Ga. at 222, 598 S.E.2d at 446; GA. CONST. art. IX, § 5, para. 1(a).

290. *Bauerband*, 278 Ga. at 223-24, 598 S.E.2d at 446. The court rejected the plaintiffs' attack upon the court's earlier decision upholding the statute, *Barkley v. City of Rome*, 259 Ga. 355, 381 S.E.2d 34 (1989). *Id.* To plaintiffs' arguments that the case was not a genuine case or controversy, but simply arranged, the court said that it had earlier resolved those arguments in *Barkley* itself. *Id.* at 223, 598 S.E.2d at 446.

291. *Id*. at 224, 598 S.E.2d at 447. Renewal would be necessary, plaintiffs argued, "to avoid the consequences of terminating the arrangement that provides for the County's courthouse." *Id*.

292. *Id.* "However, hard choices regarding a decision to terminate a contract provided for under [O.C.G.A. section] 36-60-13, and the attendant difficult circumstances they may present, do not render meaningless the power of termination, which is required by the Code section to be included in such an agreement." *Id.*

293. *Id.*

294. *Id.* The court also rejected plaintiff's argument that the agreement constituted an invalid "gratuity." *Id*. at 225, 598 S.E.2d at 447.

295. *Id*. at 226, 598 S.E.2d at 448. The court thus affirmed the trial judge's summary judgment for the county. *Id*.

296. 278 Ga. 363, 602 S.E.2d 651 (2004).

297. *Id*. at 363, 602 S.E.2d at 652. The tax was approved for recreational facilities and roadway improvements. *Id*.

development authority.[298] Under the contract, the county issued revenue bonds for stated improvements and agreed to repay the funds from the SPLOST proceeds.[299] Some one and one-half years after the uncontested bond validation proceeding,[300] a county taxpayer sought to challenge both the revenue bonds and the intergovernmental contract.[301] In rejecting the challenge, the supreme court relied upon the constitution[302] and the statute[303] declaring bond validation judgments "incontestible" and "forever conclusive."[304] Thus, "the judgment of validation, from which timely appeal was not filed, is conclusive on the question of the validity of the revenue bonds and the intergovernmental contract."[305] Any other result, the court asserted, "'would place local financing in a precarious state.'"[306]

H. Liability

Increasingly in county tort liability litigation,[307] the plaintiffs direct their actions against county officers and employees personally.[308] Officers sued in their official capacity enjoy the county's "sovereign immunity."[309] Officers sued in their individual capacity enjoy "official

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298. *Id*. The development authority authorized the bond financing. *Id*.

299. *Id*. If there was a shortfall, the contract provided, payments would be made from any lawfully available funds. *Id*.

300. *Id*. "No person filed any motion to intervene in that proceeding or appealed from the validation order." *Id.*

301. *Id*. Plaintiff challenged the arrangement as an unauthorized county debt. *Id*.

302. GA. CONST. art. IX, § 6, para. 4.

303. O.C.G.A. § 36-82-78 (2000 & Supp. 2005).

304. *Quarterman*, 278 Ga. at 363-64, 602 S.E.2d at 652-53.

305. *Id.* at 365, 602 S.E.2d at 654.

306. *Id.* (quoting Turpen v. Rabun County Board of Commissioners, 251 Ga. App. 505, 509, 554 S.E.2d 727, 731 (2001)). The court thus affirmed the trial judge's dismissal of the taxpayer's suit. *Id*.

307. For perspective on county tort liability, 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); R. Perry Sentell, Jr., *Local Government Liability Litigation: Numerical Nuances*, 38 GA. L. REV. 633 (2004).

308. For perspective on 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).

309. *See generally* 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.

immunity" for "discretionary functions" performed without malice or intent; only for "ministerial functions" can they be held liable for negligence.[310]

The court of appeals rang all the changes in *Banks v. Happoldt*,[311] an action against county officials for injuries suffered by the plaintiff on a negligently-maintained road.[312] The plaintiff sued the officers in both their official and individual capacities, and the court acknowledged the results of that delineation.[313] Because the official-capacity suit constituted, in effect, an action against the county itself, sovereign (or "governmental") immunity barred the way.[314] As for the action against the officers individually, "no mandated county policy directed [their] actions in maintaining the roads,"[315] and thus "the duty to repair [the] road was discretionary."[316] Accordingly, the officers were protected by their official immunity.[317]

Several other individual-capacity actions suffered similar dispositions. These included: *Brown v. Taylor*,[318] in which the court held official

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U. L. REV. 405 (1993); *see also* the forthcoming article, R. Perry Sentell, Jr., *"Official Immunity" in Local Government Law: A Quantifiable Confrontation*, GA. ST. U. L. REV. (forthcoming 2006).

310. *See generally* 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); *see also* the forthcoming article, R. Perry Sentell, Jr., *"Official Immunity" in Local Government Law: A Quantifiable Confrontation*, GA. ST. U. L. REV. (forthcoming 2006).

311. 271 Ga. App. 146, 608 S.E.2d 741 (2004).

312. *Id*. at 146, 608 S.E.2d at 742. Plaintiff alleged that the road narrowed to "17 feet 4 inches with an 8-to-11 inch drop-off on the right shoulder," that his right front wheel ran off the pavement, and that the vehicle spun out of control into the path of an oncoming vehicle. *Id.*, 608 S.E.2d at 743.

313. *Id*., 608 S.E.2d at 743.

314. *Id*. at 148, 608 S.E.2d at 744. "Here plaintiffs advance no argument nor make any showing that an Act of the General Assembly specifically waived the sovereign immunity protecting these county officials." *Id. See* GA. CONST. art. I, § 2, para. 9(e).

315. *Happoldt*, 271 Ga. App. at 150, 608 S.E.2d at 745.

316. *Id.* The court reasoned that even if specified "minimum standards" had applied to the road, the officer's duties included "weighing various factors in deciding which roads to repair and how to repair them." *Id*. at 151, 608 S.E.2d at 746. In that event, accordingly, the duty would still be "discretionary." *Id.*

317. *Id*. at 154, 608 S.E.2d at 748. The court thus reversed the trial judge's denial of the officers' motion for summary judgment. *Id.* "While harsh rulings can result from the application of current Georgia law in cases like this, it is for the legislature to address such concerns, not this Court." *Id.* at 153, 608 S.E.2d at 747-48.

318. 266 Ga. App. 176, 596 S.E.2d 403 (2004). Plaintiff motorist alleged injury from running over a six-inch drop on the broken pavement at the shoulder of the road. *Id*. at

immunity to protect officers for negligently failing to inspect and repair hazardous road conditions;[319] *Cooper v. Paulding County School District*,[320] holding official immunity to cloak a school principal's negligence in maintaining a malfunctioning school gate;[321] *Harper v. Patterson*,[322] declaring official immunity to shield a special education teacher for negligent supervision of a paraprofessional who sexually molested handicapped children;[323] and *Delong v. Domenici*,[324] finding official immunity to cover a police officer in effecting a reasonable warrantless arrest.[325]

Failing to reach the issue of official immunity, the court in *Holcomb v. Walden*[326] exonerated a deputy sheriff on grounds of "duty."[327] There, the sheriff failed to arrest an unlicensed driver who shortly thereafter caused an accident.[328] The plaintiff, having received injury in the accident, sued the sheriff for his failure previously to arrest the

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176, 596 S.E.2d at 404.

319. *Id*. at 177, 596 S.E.2d at 405. The court reasoned that no evidence revealed formal or written policies regarding county road maintenance, and that "the acts upon which liability was premised in this case were discretionary." *Id.*

320. 265 Ga. App. 844, 595 S.E.2d 671 (2004). Plaintiff alleged that the school gate malfunctioned, hit her car, and caused injury to her and her children. *Id.* Evidence showed that a maintenance crew had worked on the gate the morning of plaintiff's injury. *Id*. at 844-45, 595 S.E.2d at 672.

321. *Id*. at 846, 595 S.E.2d at 672. The court observed that plaintiff alleged no malice or intent on the part of the principal, and asserted that "this is a situation where the school principal exercised his discretion in the maintenance of school facilities and is therefore immune from suit for alleged negligence." *Id.* at 845, 846, 595 S.E.2d at 672.

322. 270 Ga. App. 437, 606 S.E.2d 887 (2004).

323. The court held the school district itself entitled to sovereign immunity. *Id*. at 438, 606 S.E.2d at 890. As for the action against the teacher, "we find that this case is controlled by the line of cases holding that 'the supervision of student safety is a discretionary function, the proper exercise of which entitles school officials to immunity.'" *Id.* at 440, 606 S.E.2d at 892 (quoting Brock v. Sumter County School Board, 246 Ga. App. 815, 821, 542 S.E.2d 547, 552 (2000)).

324. 271 Ga. App. 757, 610 S.E.2d 695 (2005).

325. *Id*. at 759, 760, 610 S.E.2d at 698, 699. The court held it "clear" that the police officer "was performing a discretionary act in the lawful performance of his duties," and that his "belief that [plaintiff] had been driving drunk was certainly reasonable and the arrest was legally justifiable." *Id*. Thus, there was no evidence of malice or intent. *Id*. at 758, 610 S.E.2d at 698.

326. 270 Ga. App. 730, 607 S.E.2d 893 (2004).

327. *Id*. at 733, 607 S.E.2d at 896.

328. *Id*. at 730, 731, 607 S.E.2d at 895, 896. The deputy had been called to a roadside fight and subsequently the driver showed up. Although the sheriff discovered that the driver had no license, he believed the driver's excuse and permitted him to drive away. *Id*. at 731, 607 S.E.2d at 895. Shortly thereafter, the driver caused an accident with a motorcycle and was arrested for DUI. *Id*.

driver.[329] In response, the court of appeals reviewed the supreme court's adoption of the "public duty doctrine" as follows: "'[L]iability does not attach where the duty owed by the governmental unit runs to the public in general and not to any particular member of the public, except where there is a special relationship between the governmental unit and the individual.'"[330] Under that doctrine, the court held, the sheriff owed no duty to the plaintiff in this case.[331]

A prominent issue in *Forsyth County v. Martin*[332] went to the county's liability for litigation expenses and attorney's fees in a case involving the county's duty to repair its dam.[333] The county argued, "that a governmental entity cannot be subject to an award of litigation expenses and attorney fees under O.C.G.A. [section] 13-6-11,"[334] analogizing such an award to one for punitive damages.[335] Rejecting that analogy, the supreme court reasoned that such an award "is not intended to penalize or punish, but to compensate an injured party for the costs incurred as a result of having to seek legal redress for the injured party's legitimate grievance."[336] Accordingly, the court concluded, the county could be held liable for properly determined expenses and fees.[337]

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329. *Id*. at 730, 607 S.E.2d at 894. Plaintiff claimed that "the accident would not have occurred if [the deputy] had arrested [the driver] instead of allowing him to drive away in the car." *Id*.

330. *Id.* at 731, 607 S.E.2d at 895 (quoting City of Rome v. Jordan, 263 Ga. 26, 426 S.E.2d 861 (1993)). For critical treatment of the supreme court's "public duty doctrine," see R. Perry Sentell, Jr., *Georgia's Public Duty Doctrine: The Supreme Court Held Hostage*, 51 MERCER L. REV. 73 (1999).

331. *Id.* at 733, 607 S.E.2d at 896. "Because this case is controlled by the 'public duty doctrine,' we do not reach the issues of sovereign or official immunity." *Id*.

332. 279 Ga. 215, 610 S.E.2d 512 (2005).

333. *Id*. at 216, 610 S.E.2d at 515. The court refused the county's argument on dam ownership, noting that issue to have been previously determined in the appeal of an administrative order holding the county to be a partial owner for purposes of the Safe Dams Act, O.C.G.A. § 12-5-370 to -385. *Id*. at 217, 610 S.E.2d at 515.

334. *Id*. at 219, 610 S.E.2d at 517.

335. The county relied on *Marta v. Boswell*, 261 Ga. 427, 405 S.E.2d 869 (1991), a case holding counties not responsible for punitive damages. *Id*. at 218, 610 S.E.2d at 516.

336. *Id*. at 219, 610 S.E.2d at 516-17. The court held sufficient evidence existed to uphold the trial court's decision that the jury could find that, in the circumstances, the county had been "stubbornly litigious" under O.C.G.A. section 13-6-11. *Id*., 610 S.E.2d at 517.

337. *Id*., 610 S.E.2d at 517. The Court found error in the lower court's calculation of expenses and fees, and vacated and remanded for a hearing on the proper amounts. *Id*. at 220, 610 S.E.2d at 517.

I. Zoning

The survey period's county zoning controversies featured no particular unifying theme, but rather a series of unrelated issues. In *Flippen Alliance for Community Improvement, Inc. v. Brannan*,[338] the court of appeals reversed a summary judgment entitling a landfill operator to a permit.[339] Initially, the court found evidence for the jury on whether the landfill had violated the county zoning ordinance[340] existing at the time,[341] and on whether the landfill had predated the ordinance.[342] Both issues precluded the trial judge's decision that the landfill constituted a grandfathered non-conforming use.[343] Second, the court rejected the trial judge's finding that the county was estopped under the doctrine of laches: Estoppel could not prevent the county from exercising police power, reasoned the court, and "zoning . . . is a reasonable and proper exercise of the police power."[344]

The court of appeals affirmed summary judgment for a rezoning in *Schmitt v. Jackson County*,[345] rejecting a citizens' appeal on constitutional grounds.[346] The citizens' problem, the court found, was their failure to raise the issues at two preceding public hearings:

> Georgia law is clear that a constitutional attack on a zoning classification cannot be made for the first time in the superior court. Although [the citizens] may have raised other issues regarding the rezoning classification before the Board, the record is devoid of evidence that

338. 267 Ga. App. 134, 601 S.E.2d 106 (2004).

339. *Id*. at 138, 601 S.E.2d at 111. The landfill was located in the current zoning of "residential-agricultural" which did not permit a landfill. *Id*. at 135, 601 S.E.2d at 109.

340. HENRY COUNTY CODE, GA. § 3-7-336.

341. *Flippen Alliance*, 267 Ga. App. at 138, 601 S.E.2d at 111. "Such proof is lacking here because the record contains no evidence as to the content of [the county's] Zoning Ordinance at the time [the operator] purchased Tract 1." *Id*. at 136, 601 S.E.2d at 109.

342. *Id*. at 137, 601 S.E.2d at 110. "There is no evidence in the record which establishes when [the county] first enacted zoning controls or as to how those zoning controls might have classified Tract 1." *Id.* at 136, 601 S.E.2d at 110.

343. *Id*. at 136-37, 601 S.E.2d at 110.

344. *Id.* at 138, 601 S.E.2d at 111. On the use of estoppel in local government law, see R. PERRY SENTELL, JR., THE DOCTRINE OF ESTOPPEL IN GEORGIA LOCAL GOVERNMENT LAW (1985).

345. 267 Ga. App. 764, 601 S.E.2d 169 (2004).

346. *Id*. at 767, 601 S.E.2d at 172. A property owner sought rezoning as a part of a proposed residential development, the county planning commission held a public hearing and recommended denial. The county commissioners then held a hearing, and subsequently another meeting at which they approved the rezoning. Plaintiffs appealed the approval to the superior court. *Id*. at 764, 601 S.E.2d at 170.

> they raised any constitutional challenge prior to their appearance in superior court.[347]

Moreover, the objectors had been afforded two public hearings, and were not entitled to another at the commissioners' approval meeting.[348]

The supreme court did pass on the constitutional issue in *Rockdale County v. Burdette*,[349] and found no violation.[350] There, the county denied the plaintiff's request that his property be rezoned for a used-car lot.[351] On the same day, the county took action which resulted in another owner's use of his property for a used-car lot.[352] Rejecting the plaintiff's equal protection challenge, the court explained that the two property owners were not similarly situated.[353] "The owners of two separate parcels of property are prevented from being similarly situated for purposes of equal protection when one of the parcels has a pre-existing nonconforming use."[354]

J. Authorities

The court of appeals' distinction between hospital authorities and building authorities constituted the pivotal point in *English v. Fulton County Building Authority*.[355] Having suffered injuries in a building owned by the county building authority,[356] the plaintiff sought to defeat the authority's shield of sovereign immunity by analogizing the situation to *Thomas v. Hospital Authority of Clarke County*.[357] In the latter case, the supreme court denied sovereign immunity to a hospital

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347. *Id*. at 766, 601 S.E.2d at 171.

348. *Id*. The court likewise sustained the trial judge's taking judicial notice of decennial census figures: "Our Supreme Court has specifically found that judicial notice may be taken of census figures for determining population characteristics in counties." *Id.* at 767, 601 S.E.2d at 172.

349. 278 Ga. 755, 604 S.E.2d 820 (2004).

350. *Id*. at 755, 604 S.E.2d at 821.

351. Plaintiff had sought rezoning "in order to use the property as a small used-car sales lot, a use prohibited by the current C-1 ('local commercial') zoning." *Id.*

352. *Id*. The action resulted "in the second parcel being rezoned from C-2 conditional (limited to use as a used-car sales lot) to C-1, with the condition that the owner be permitted to operate a small used-car lot as a legal nonconforming use." *Id.*

353. *Id*. at 756, 604 S.E.2d at 822.

354. *Id.* "[Plaintiff's] lot zoned C-1 and the [other] lot zoned C-1, conditional, were not similarly situated and the difference in treatment does not amount to a violation of [plaintiff's] right to equal protection under the law." *Id.*

355. 266 Ga. App. 583, 597 S.E.2d 626 (2004).

356. *Id*. at 583, 597 S.E.2d at 626. Evidence indicated that the plaintiff's fall resulted from clear wax residue and that the building authority was responsible for cleaning duties at the building. *Id*. at 584, 597 S.E.2d at 627.

357. 264 Ga. 40, 440 S.E.2d 195 (1994).

authority on grounds that it operated as a private business enterprise and was authorized to obtain insurance.[358] In *English* the court of appeals rejected the analogy: the building authority was not "a self-sufficient entity,"[359] and it "holds no liability insurance."[360] Accordingly, the court concluded, the building authority "is entitled to assert the defense of sovereign immunity."[361]

III. LEGISLATION

The creation of new municipalities drew considerable legislative (and public) attention during the General Assembly's 2005 session. The emerging legislation removes the previous statutory prohibition against incorporating new cities within three miles of an existing city.[362] It also postpones mandated minimum municipal services to be offered by a new municipality for a two-year period following the election of the first city officials.[363] The measure further allows a two-year period for shifting the responsibility for services provided by the county to the new municipality.[364] During that period, the statute provides, the county will continue to provide the services in the new municipal limits.[365]

A second topic of major public concern, voting procedures, likewise underwent rather substantial modifications. These include changing the forms of identification necessary for voting, as well as revising the use of provisional ballots.[366] The measure also sets out procedures relating to nonpartisan candidates and the handling of absentee voting.[367]

Local governments benefitted from statutes expressly authorizing the use of federal grant funds to carry out virtually all manner of local

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358. *Id*. at 44, 440 S.E.2d at 198. There the court held it irrelevant that the hospital authority was created by the county, an agency of the state. "Given the economic realities, i.e., the availability of insurance and the ability of the hospital authority to budget the purchase of this insurance, there is no reason to provide a hospital authority with the protection of sovereign immunity." *Id.*

359. *English*, 266 Ga. App. at 586, 597 S.E.2d at 629. "The [building] Authority was designed solely to finance projects that primarily benefit the public." *Id*.

360. *Id.* "Consequently, any judgment entered against the Authority would cost taxpayers," one of sovereign immunity's primary underpinnings. *Id*.

361. *Id*. The court also rejected the argument that the building authority's enabling legislation gave it the power to "sue and be sued." For the history of the Georgia judiciary's treatment of this issue, see R. Perry Sentell, Jr., *"Sue and Be Sued" in Georgia Local Government Law: A Vignette of Vicissitudes*, 41 MERCER L. REV. 13 (1989).

362. Ga. H.R. Bill 36, Reg. Sess. (2005).

363. *Id.*

364. *Id.*

365. *Id.*

366. Ga. H.R. Bill 244, Reg. Sess. (2005).

367. *Id.*

projects.[368] Additionally, Georgia municipalities, counties, and their agencies are authorized to join with those of other states to exercise powers and provide various services.[369] This interstate cooperation may be effected via intergovernmental agreements or through separate administrative entities.[370] Finally, the legislature established land conservation trust and loan funds to enable local governments to increase greenspace protection.[371] Cities and counties may apply for funds with which to purchase conservation land or to purchase land and set aside conservation easements.[372] The measure seeks to encourage local governments to work with private entities in furtherance of ecologically valuable projects.[373]

Municipalities and counties anticipated indirect benefits from the so-called "tort reform" legislative package, particularly the provisions relative to joint and several liability.[374] Additionally, local government employees now enjoy exemption from the open records law in respect to certain personal information.[375] This measure extends confidentiality to the employees' home addresses, home telephone numbers, medical information, and social security numbers.[376] Finally, the legislature re-wrote much of the statute applicable to "9-1-1" mechanics, including the amount of local government cost recovery for wireless 9-1-1,[377] and procedures for maintaining local government 9-1-1 accounts.[378] Local governments must report on all 9-1-1 funds, and joint 9-1-1 authorities now enjoy a tax exemption.[379]

By way of legislative restrictions, local governments are prohibited from adopting any regulation having to do with seeds.[380] These include regulating labeling, packaging, sale, storage, transportation, distribution, or use of seeds.[381] Additionally, the recent changes to the Utility Facilities Protection Act[382] require local governments to provide

368. Ga. H.R. Bill 186, Reg. Sess. (2005).
369. Ga. H.R. Bill 570, Reg. Sess. (2005).
370. *Id.*
371. Ga. H.R. Bill 98, Reg. Sess. (2005).
372. *Id.*
373. *Id.*
374. Ga. S. Bill 3, Reg. Sess. (2005).
375. Ga. H.R. Bill 437, Reg. Sess. (2005).
376. *Id.*
377. Ga. H.R. Bill 470, Reg. Sess. (2005).
378. *Id.*
379. *Id.*
380. Ga. S. Bill 87, Reg. Sess. (2005).
381. *Id.*
382. Ga. S. Bill 274, Reg. Sess. (2005).

information on the location of sewer laterals,[383] and subject municipalities to civil penalties.[384]

County law enforcement constituted a target for newly adopted legislation. For instance, the office of county sheriff is now vacated by operation of law upon the Peace Officer Standards and Training Council's certification to the county probate judge that the sheriff's peace-officer certification is revoked.[385] Additionally, county police officers are now relieved from any statutory duty to inspect roads and bridges in their county of employment.[386] Finally, a statute now authorizes the exchange of national criminal background checks on care providers and on volunteers with youth sports organizations.[387]

Both legislative chambers were prolific during the 2005 session in creating study committees on various aspects of local government. For instance, a senate study committee will review the potential results of authorizing local government partnerships with private groups in an effort to facilitate infrastructure endeavors.[388] Another senate committee will study eminent domain and inverse condemnation laws in determining their effects on private property.[389] Finally, a committee will study the feasibility of the state's restricting local governments from adopting tree ordinances.[390]

As for house study undertakings, a committee will focus upon the possibility of eliminating the local government business inventory tax.[391] Yet another house study committee will consider the matter of funding public schools with a sales tax, thereby replacing the property tax for that purpose.[392]

IV. CONCLUSION

The law's tradition of proliferation continued its domination of both courtroom and legislative chamber during the survey period. As litigants and solons aggressively pursued the objects of their agenda, the corpus of local government law expanded exponentially. Those who

383. *Id.*
384. *Id.*
385. Ga. H.R. Bill 521, Reg. Sess. (2005).
386. Ga. H.R. Bill 557, Reg. Sess. (2005).
387. Ga. S. Bill 6, Reg. Sess. (2005).
388. Ga. S. Res. 163, Reg. Sess. (2005).
389. Ga. S. Res. 457, Reg. Sess. (2005).
390. Ga. S. Res. 458, Reg. Sess. (2005).
391. Ga. H.R. Res. 486, Reg. Sess. (2005).
392. Ga. H.R. Res. 488, Reg. Sess. (2005).

struggled to keep their heads above the surging tide of erudition could aspire with envy to evolution of the fabled "twelve-inch" criterion.