

Local Government Law

by **R. Perry Sentell, Jr.***

In the early 1950's, condemnation was rare and political suicide. A popular limited access road was being delayed by a farmer. When the State survey crew showed up, the farmer was standing at a fence with his shotgun. He never moved, but the survey crew would not go beyond the fence.

After the Attorney General, District Attorney, and Sheriff failed, the assignment devolved to the County Attorney. I walked up to the fence. "John, we have known each other a long time." "You take one step further," replied the farmer, "and we will not know each other for a longer time."¹

The more things change in the ethereal realms of local government law, the more they remain the same.

I. MUNICIPALITIES

A. *Officers and Employees*

The wheels of local government go around, but they are propelled by its officers and employees—inevitably, conflicts arise in the ranks. Representing a considerable stand-off between the municipal mayor and

* Carter Professor of Law Emeritus, University of Georgia School of Law. University of Georgia (A.B., 1956; LL.B., 1958); Harvard University (LL.M., 1961). Member, State Bar of Georgia.

1. R. PERRY SENTELL, JR., LOCAL GOVERNMENT LAW: LITE 34 (1997). For a more substantive "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 also* R. Perry Sentell, Jr., *Georgia Local Government Law: A Reflection on Thirty Surveys*, 46 MERCER L. REV. 1 (1994); R. Perry Sentell, Jr., *Local Government Litigation: Some Pivotal Principles*, 55 MERCER L. REV. 1 (2003); R. Perry Sentell, Jr., *Local Government Law*, 56 MERCER L. REV. 351 (2004).

members of the council, *Griffin v. City Council of Milledgeville*² focused upon a local statute³ changing the municipality's form of government.⁴ Objecting to his conversion from "strong" to "weak" mayor,⁵ the plaintiff challenged the statute's validity on assorted grounds.⁶ Affirming the trial court's rejection of those challenges, the supreme court perused the charter amendment from several perspectives.⁷ Initially, the court refuted the mayor's contention that his office had been unlawfully abolished.⁸ "The office still involves the performance of numerous duties,"⁹ the court observed, and "the mayor . . . remains mayor, albeit a 'weak' mayor rather than a 'strong' mayor."¹⁰ Additionally, the court rejected the mayor's equal-protection arguments of personal vindictiveness and of racial discrimination.¹¹ No evidence rebutted the council's stated purpose of accomplishing a more efficient city government,¹² the court reasoned, nor had the plaintiff's proof raised "even an inference . . . [of] further[ing] racial discrimination."¹³

Terminated municipal employees sought solace during the survey period from the court of appeals, with mixed results. In *Reid v. City of Albany*,¹⁴ a former at-will employee protested his dismissal from the engineering department, alleging "he was terminated in retaliation for

2. 279 Ga. 835, 621 S.E.2d 734 (2005). The plaintiff sought to enjoin the statute's operation. *Id.* at 835, 621 S.E.2d at 735.

3. 2003 Ga. Laws 3661.

4. *Griffin*, 279 Ga. at 835, 621 S.E.2d at 735.

5. *Id.* Under the local statute amending the charter, "most of the mayor's substantive administrative duties would be handled by a city manager answerable only to the council." *Id.*

6. *Id.*

7. *Id.* The plaintiff contended that the statute violated O.C.G.A. section 1-3-11 (2000), declaring that "a local or special act cannot abolish an office to which a person has been elected during the term for which such person was elected unless the change is approved in a referendum by the voters affected by the change." *Id.* at 837, 621 S.E.2d at 736.

8. *Id.* at 837, 621 S.E.2d at 736.

9. *Id.* at 838, 621 S.E.2d at 736. One of those remaining duties, the court emphasized, included the casting of a vote to break a council tie, "a not inconsiderable power given a city council composed of six members." *Id.*

10. *Id.* "Nothing in O.C.G.A. § 1-3-11 prohibits the Legislature from altering the nature of the duties that devolve upon the holder of an office as long as the remaining duties are appropriate to the office." *Id.*

11. *Id.* at 839-40, 621 S.E.2d at 737-38. The plaintiff constituted the municipality's first African-American mayor. *Id.* at 836, 621 S.E.2d at 735.

12. *Id.* at 839, 621 S.E.2d at 737. The court quoted a statement by a council member that the charter amendment "doesn't have anything to do with who the mayor is." *Id.*

13. *Id.*, 621 S.E.2d at 738. The court thus affirmed the trial court's summary judgment for the defendants. *Id.* at 839-40, 621 S.E.2d at 738.

14. 276 Ga. App. 171, 622 S.E.2d 875 (2005).

reporting his superior's wrongful use of city resources."¹⁵ "Under Georgia law," affirmed the court, "at-will employees may be terminated for any or no reason, and they generally cannot recover for wrongful discharge."¹⁶ Contrarily, the "cause" or "reason" assumed pivotal significance in *City of Atlanta v. Harper*,¹⁷ the court's review of an internal auditor's termination.¹⁸ Emphasizing the plaintiff's civil service status, as well as the city's reliance upon its "reduction in force" ordinance,¹⁹ the court found sufficient evidence supporting the civil service board's reinstatement.²⁰ On the one hand, the ordinance authorized termination only "because of lack of work, shortage of funds or reorganization."²¹ On the other hand, "there was direct and indirect evidence that [the plaintiff's] severance had resulted from unacceptable work performance—a circumstance expressly outside the purview of [the ordinance]."²²

Matters of municipal pensions and retirements concluded the litigated concerns of the survey period. In *City of Atlanta v. Southern States Police Benevolent Ass'n of Georgia*,²³ the court of appeals interpreted local statutes and charter provisions involving the independence of three

15. *Id.* at 172, 622 S.E.2d at 877.

16. *Id.* at 171, 622 S.E.2d at 877. As for the plaintiff's claim that the defendant falsified information concerning him to the state department of labor, the court observed these allegations might implicate criminal responsibility, but "[n]othing in the statutes . . . authorizes a wrongful discharge claim on this basis. . . ." *Id.* at 173, 622 S.E.2d at 878. The court affirmed the trial court's dismissal of the plaintiff's action. *Id.*

17. 276 Ga. App. 460, 623 S.E.2d 553 (2005).

18. *Id.* at 460-61, 623 S.E.2d at 554. The issue on appeal was whether the superior court erred in denying the city's petition for certiorari when the city had terminated the employee and the city's civil service board had reinstated him. *Id.*

19. ATLANTA, GA., ORDINANCE ch. 114, art. IV, div. 12, § 114-379 (1977); *Harper*, 276 Ga. App. at 461-62, 623 S.E.2d at 555. "At the Board hearing, the City claimed that [the plaintiff's] termination was authorized by City Ordinance 114-379, entitled 'Layoff or reduction in force.'" *Harper*, 276 Ga. App. at 462, 623 S.E.2d at 555. The employee contended that the city was "misapplying [the] Ordinance . . . to mask a wrongful severance." *Id.* at 463, 623 S.E.2d at 555.

20. *Harper*, 276 Ga. App. at 465, 623 S.E.2d at 557. The court emphasized its "any evidence" standard of review. *Id.* at 461, 623 S.E.2d at 554 (quoting *City of Atlanta Gov't v. Smith*, 228 Ga. App. 864, 865, 493 S.E.2d 51, 52 (1997)).

21. *Id.* at 462, 623 S.E.2d at 555. The ordinance itself directed city compliance with "two factors: length of service and performance appraisal." *Id.* at 464-65, 623 S.E.2d at 556. Said the court: "[T]here is nothing in the record indicating that the two-step process employed to restructure the Office incorporated retention points." *Id.* at 465, 623 S.E.2d at 556.

22. *Id.* at 464, 623 S.E.2d at 556. The court thus affirmed the trial court's denial of the city's petition for certiorari. *Id.* at 465, 623 S.E.2d at 557.

23. 276 Ga. App. 446, 623 S.E.2d 557 (2005).

city pension fund organizations.²⁴ More specifically, the court held, the boards of trustees for those funds possessed “broad authority to appoint a third-party administrator to perform benefit administration services,” independent of the municipality itself.²⁵ Additionally, those same provisions empowered “the pension boards to independently hire outside legal counsel to advise them on their authority and duties without input or interference from the City . . . Law Department.”²⁶ Accordingly, the court affirmed the trial court’s issuance of a declaratory judgment and permanent injunction against the municipality.²⁷

Finally, in *Westmoreland v. Westmoreland*,²⁸ the supreme court drew upon equity’s historic power to change an employee’s retirement beneficiary.²⁹ The court sketched the prerequisites: the employee intended to change beneficiaries for all his benefits; he requested forms for doing so; and he completed all forms given him.³⁰ “The only reason he did not complete the form relating to the [retirement] plan at issue is because the human resources employee mistakenly never gave it to him.”³¹ Affirming the trial court’s direction that benefits be paid to the

24. *Id.* at 453-57, 623 S.E.2d at 564-67. The plaintiffs were participants in three city pension funds (police, fire, and general) who sought a declaratory judgment as to their powers, as well as an injunction to prevent the city’s interference with their actions. *Id.* at 446-47, 623 S.E.2d at 560.

25. *Id.* at 455, 623 S.E.2d at 565. The court construed that authority from local statutes and charter provisions authorizing the boards “to manage” the funds and “make all rules” for payments, and “to see that the provisions of the Act are carried out.” *Id.* “Any other reading of these provisions would unnecessarily curtail the authority of the pension boards to carry out their fiduciary responsibilities for the benefit of public employees in a flexible and efficient manner.” *Id.*

26. *Id.* at 457, 623 S.E.2d at 566. As for the statutory language concerning the city attorney, the court said that “this language does not impose a duty upon the respective pension boards to obtain approval from the City Legal Department before hiring or consulting with outside counsel. Rather, it imposes a duty upon *the Law Department* to provide free legal services to the pension boards, when those boards otherwise request it.” *Id.*, 623 S.E.2d at 566-67.

27. *Id.* at 447, 623 S.E.2d at 560. “There is nothing in the record affirmatively showing that the trial court failed to weigh and balance the conveniences of the parties before granting plaintiffs a permanent injunction.” *Id.* at 460, 623 S.E.2d at 568.

28. 280 Ga. 33, 622 S.E.2d 328 (2005).

29. *Id.* at 34-35, 622 S.E.2d at 329-30. The municipal employer had filed the interpleader action to determine whether the deceased employee’s retirement benefits should be paid to the designated beneficiary or the intended beneficiary. *Id.* at 34, 622 S.E.2d at 329.

30. *Id.* at 33-34, 622 S.E.2d at 329. The employee had changed the beneficiary on the three benefit packages for which he received forms. *Id.*

31. *Id.* at 34, 622 S.E.2d at 329.

intended beneficiary,³² the court explained that “[e]quity considers that done which ought to be done and directs its relief accordingly.”³³

B. Powers

The local government operates in sundry capacities and in response to limitless confrontations—it exercises whatever powers the contest calls to hand. The municipality’s powers as a landlord soared to fruition in *S.S. Air, Inc. v. City of Vidalia*,³⁴ the city’s dispossessory action to remove an airplane hangar from its property at the defendants’ expense. Reviewing evidence that the defendants had maintained the hangar on city property rent-free since 2001,³⁵ the court of appeals determined that a landlord-tenant relationship existed between the parties.³⁶ Moreover, the court reasoned, “[e]vidence supports the conclusion that, despite its size, the hangar was a trade fixture.”³⁷ As tenants at will, the defendants were “obligated to remove their trade fixture . . . at their own expense upon the request of the City.”³⁸

C. Regulation

In the regulatory maze that is modern-day government, controversy looms perpetual.³⁹ On the whole, municipal regulatory power fared rather poorly in the appellate courts over the review period. In *Folsom*

32. *Id.* at 35, 622 S.E.2d at 329-30. The court reasoned that the employee’s actions amounted to vastly more than a mere expression of intent to change beneficiaries without an overt act. *Id.*

33. *Id.*, 622 S.E.2d at 329 (brackets in original) (quoting O.C.G.A. § 23-1-8 (1982 & Supp. 2006)).

34. 278 Ga. App. 149, 628 S.E.2d 117 (2006).

35. *Id.* at 150, 628 S.E.2d at 119. “No formal lease agreement exists between the City and [the defendants] that requires them to pay rent to the City for allowing them to maintain their hangar on City property.” *Id.*, 628 S.E.2d at 118.

36. *Id.*, 628 S.E.2d at 119. “A landlord-tenant relationship may exist even where the purported tenant is not required to pay rent” *Id.*

37. *Id.* at 151, 628 S.E.2d at 119. “The hangar was bolted to the ground in such a way that it could be disassembled and rebuilt elsewhere.” *Id.*

38. *Id.* at 152, 628 S.E.2d at 120 (citing O.C.G.A. § 44-7-12 (1991 & Supp. 2006)).

39. 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).

v. City of Jasper,⁴⁰ the supreme court sustained a challenge to the validity of a city ordinance prohibiting “advertisement[s] of any kind advertising alcoholic beverages for sale or advertising the brand names or prices of alcoholic beverages.”⁴¹ Initially, the court reasoned, “[t]he City has provided no evidence whatsoever that the ban on alcohol advertising will ‘significantly advance the [City’s] interest in promoting temperance.’”⁴² Additionally, the municipality had failed to show the measure’s restriction on speech to be “no more extensive than necessary.”⁴³ Finally, the court condemned the city’s license-revocation power should the council determine “that the licensee is guilty of ‘any violation of federal or state law.’”⁴⁴ Finding “no ascertainable standards” limiting the council’s decision, the court held that “absolute discretion in both the determination of the occurrence of the violation as well as the relevance of the violation does not comport” with due process.⁴⁵

It was the court of appeals’s interpretation of the regulation that worked adversely to municipal interests in *Northside Corp. v. City of Atlanta*.⁴⁶ There, an ordinance⁴⁷ prohibited expanding a “location” licensed as a package store and situated within a stated distance of a

40. 279 Ga. 260, 612 S.E.2d 287 (2005). The plaintiff challenged the city’s thirty-day suspension of her liquor license and imposition of a one-year probationary period imposed after the city found the plaintiff guilty of three violations of the alcoholic beverages ordinance. *Id.* at 260, 612 S.E.2d at 288.

41. *Id.* at 260, 612 S.E.2d at 289 (brackets in original). The court tested the ordinance as a “blanket prohibition on truthful, non-misleading speech,” employing “the four-part test for commercial speech, originally set forth by the U.S. Supreme Court in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York* [447 U.S. 557 (1980)].” *Folsom*, 279 Ga. at 261, 612 S.E.2d at 289.

42. *Folsom*, 279 Ga. at 262, 612 S.E.2d at 290 (brackets in original). The court forcefully rejected the city’s “speculation” that restricting information regarding alcohol sales would reduce both underage drinking and fortuitous drinking. *Id.*

43. *Id.* “[T]he City has numerous other means to reduce alcohol consumption without curtailing speech.” *Id.*

44. *Id.* at 263, 612 S.E.2d at 290.

45. *Id.* at 264, 612 S.E.2d at 291-92. Accordingly, the court reversed the trial court’s judgment upholding the city’s punishment of the plaintiff. *Id.* at 265, 612 S.E.2d at 292.

46. 275 Ga. App. 30, 619 S.E.2d 691 (2005). Indeed, the issue of interpretation itself loomed large in the case as the trial court had refused to interpret the zoning ordinance, reasoning that its only function was to determine the reasonableness of the zoning board’s interpretation. *Id.* at 30, 619 S.E.2d at 692. Holding that approach applicable only to reviewing zoning board decisions and not to the interpretation of a zoning ordinance, the court of appeals proceeded to construe the ordinance. *Id.*

47. ATLANTA, GA., ORDINANCE § 16-28.024 (repealed in full by ordinance number 2005-15, § 1 (2005)).

residential district.⁴⁸ Under that prohibition, the city denied the plaintiff a building permit to add floor space to his store thus situated, on grounds that enlarging the store would expand the “location.”⁴⁹ Rejecting that position and advancing an approach of “strict construction,”⁵⁰ the court held that the ordinance’s reference to “location” pertained to “the entire parcel of land, which would not expand with the [store’s] addition.”⁵¹ This interpretation mandated reversal of the trial judge’s permit denial.⁵²

It was the issuance of a permit that claimed the supreme court’s attention in *McKee v. City of Geneva*,⁵³ a permit concerning waste management. The plaintiff sought to mandamus the city’s verification that his proposed waste handling facility was, as required by statute,⁵⁴ consistent with the municipal solid waste management plan (“SWMP”).⁵⁵ Observing that the city’s “regional SWMP,” adopted in 1993, did not preclude the facility, the court found the requisite “consistency.”⁵⁶ The court thus rejected the trial court’s actions in determining the SWMP to incorporate by reference a 1995 multi-jurisdictional comprehensive plan (“CP”):⁵⁷ “[T]he CP was not even in existence when

48. *Northside Corp.*, 275 Ga. App. at 31, 619 S.E.2d at 693. The zoning ordinance, section 16-28.024, provided that “a *location* licensed for the retail sale of packaged alcoholic beverages on or before May 6, 1997 shall not be required to comply with the distance requirements set forth in subsection (2)(a)-(g) above provided that such *location* is not expanded or enlarged.” *Id.* at 32, 619 S.E.2d at 693 (emphasis supplied by the court).

49. *Id.* at 30, 619 S.E.2d at 692. “The city contends that the location referred to in the code section is the building itself, which would expand if the proposed addition is allowed.” *Id.* at 32, 619 S.E.2d at 693.

50. *Id.* at 32, 619 S.E.2d at 693. “Zoning ordinances must be strictly construed in favor of the property owner and never extended beyond their plain and explicit terms.” *Id.*

51. *Id.* The court concluded that “the term ‘location’ . . . refers to the entire site occupied by the store, not simply to the building on that site.” *Id.*, 619 S.E.2d at 694.

52. *Id.* at 33, 619 S.E.2d at 694.

53. 280 Ga. 411, 627 S.E.2d 555 (2006).

54. O.C.G.A. § 12-8-24(g) (2006). “O.C.G.A. § 12-8-24(g) provides, in relevant part, that the verification must attest to the proposed facility’s compliance ‘with the local, multijurisdictional, or regional [SWMP] developed in accordance with standards promulgated pursuant to this part subject to the provisions of Code Section 12-8-31.1’” *McKee*, 280 Ga. at 411-12, 627 S.E.2d at 557.

55. *McKee*, 280 Ga. at 411, 627 S.E.2d at 557. The trial court had denied the plaintiff’s request for the mandamus. *Id.* On the problems encountered with the remedy of mandamus in local government law, see R. PERRY SENTELL, JR., *MISCASTING MANDAMUS IN GEORGIA LOCAL GOVERNMENT LAW* (1989).

56. *McKee*, 280 Ga. at 412, 627 S.E.2d at 557. “Thus, the SWMP, as it was approved in 1993, did not preclude locating a facility for the handling of solid waste in the City, because no unsuitable locations for such facilities were identified.” *Id.*

57. *Id.* at 412-14, 627 S.E.2d at 557-58. “By its terms, O.C.G.A. § 12-8-24(g) does not require compliance with both a SWMP and a CP.” *Id.* at 412, 627 S.E.2d at 557.

the City contends that it was incorporated by reference into the SWMP.⁵⁸ Because “[the plaintiff’s] facility would be located on a site which is not identified as unsuitable in the unamended 1993 SWMP, it does comply with that plan,” and the trial court erred in refusing mandamus.⁵⁹

The municipality found itself the subject of regulation in *City of Rincon v. Couch*,⁶⁰ as it appealed from a denial of its application to the State Environmental Protection Division (“EPD”) for an additional groundwater withdrawal permit. Reviewing the proceeding’s extensive background,⁶¹ and numerous objections to the administrative law judge’s decision,⁶² the court of appeals rejected the municipality’s position.⁶³ Primarily, the city disputed the EPD’s consideration of whether an alternative water source was available—thereby requiring the city to purchase water from the county at greater expense than it would incur in drawing water from its own well.⁶⁴ Even so, the court reasoned, “the EPD is entitled to weigh [the city’s] costs against other public policy concerns that must be taken into account . . . , such as the need for conservation of limited water resources.”⁶⁵

58. *Id.* at 412, 627 S.E.2d at 557. Rather incredulously, the court marveled that “[t]he City does not cite any authority for the proposition that the principle of incorporation by reference can apply prospectively to a document which has yet to be filed or made a public record because it is non-existent.” *Id.* at 412-13, 627 S.E.2d at 557.

59. *Id.* at 415, 627 S.E.2d at 559. Two justices dissented, arguing that the plaintiff’s application was not consistent with controlling standards and that the trial court did not err in refusing the mandamus. *Id.* at 415-19, 627 S.E.2d at 559-62 (Benham, J., dissenting).

60. 276 Ga. App. 567, 623 S.E.2d 754 (2005).

61. *See id.* at 567-68, 623 S.E.2d at 756-57. This background included a prior consent order between the EPD and the municipality which had been enforced and affirmed in *City of Rincon v. Couch*, 272 Ga. App. 411, 612 S.E.2d 596 (2005). *Couch*, 276 Ga. App. at 567, 623 S.E.2d at 757.

62. *Couch*, 276 Ga. App. at 568-74, 623 S.E.2d 757-61. “The ALJ’s decision constituted the final administrative decision of the Georgia Board of Natural Resources,” and was affirmed by operation of law when the superior court issued no order within 30 days of a hearing. *Id.* at 568, 623 S.E.2d at 757.

63. *Id.* at 567, 623 S.E.2d at 756.

64. *Id.* at 569-71, 623 S.E.2d at 758-59. The city argued that “the public interest is best served by having a safe and low-cost water supply source available to citizens.” *Id.* at 571, 623 S.E.2d at 759.

65. *Id.* at 572, 623 S.E.2d at 760 (citing O.C.G.A. § 12-5-91 (2006)). The court similarly denied arguments of due process, equal protection, and an unconstitutional taking. *Id.* at 574, 623 S.E.2d at 761.

D. Openness

Because “openness in government” constitutes a concept more heralded than practiced, most survey periods entertain an instance of litigation concerning the issue.⁶⁶ Georgia’s Open Records Act authorizes an award of attorney fees and litigation expenses should a party involved in an action for enforcement act “without substantial justification.”⁶⁷ The plaintiff in *Everett v. Rast*⁶⁸ sought to invoke that authorization regarding his efforts to obtain records on “compensation paid by the City to acquire certain rights of way during the previous two years.”⁶⁹ As described by the court of appeals, “[the plaintiff] requested the records; the City responded that it would comply with the request; and the City failed to hear from [the plaintiff], who then sued for access.”⁷⁰ Reasoning that “it was incumbent on [the plaintiff] to follow up with the City after the City indicated that it would provide the requested documents,”⁷¹ the court affirmed that the plaintiff had “rushed to litigation.”⁷² Consequently, the trial court had validly exercised its discretion in denying the plaintiff’s motion for fees and expenses.⁷³

E. Contracts

Typically, municipal contracts must conform to the authority under which they are made, and unambiguous municipal obligations are confined by their terms.⁷⁴ The court of appeals applied those principles in *Fulton Greens Ltd. Partnership v. City of Alpharetta*⁷⁵ regarding a

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

67. O.C.G.A. § 50-18-73(b) (2006).

68. 272 Ga. App. 636, 612 S.E.2d 925 (2005).

69. *Id.* at 636, 612 S.E.2d at 926.

70. *Id.* at 637, 612 S.E.2d at 926-27.

71. *Id.*, 612 S.E.2d at 927.

72. *Id.* “Instead, [the plaintiff] immediately sued to obtain the requested documents.” *Id.*

73. *Id.* The plaintiff had failed to show that the municipality had “acted without substantial justification . . . in not complying with [the Act].” *Id.* (brackets in original) (quoting O.C.G.A. § 50-18-73(b)).

74. 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 Governments 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).

75. 272 Ga. App. 459, 612 S.E.2d 491 (2005).

“Private Development Agreement” between the parties.⁷⁶ Under that contract the developer agreed to construct at its cost a road extension in order to develop its property, and the city agreed to reimburse the developer by way of impact fee credits.⁷⁷ Holding the agreement to control the parties’ respective obligations, the court denied the developer’s statutory claim for monetary reimbursement in excess of usable impact fee credits.⁷⁸ “By its plain terms, the private Development Agreement entered here obligates the City to compensate [the developer] for the Windward Parkway extension with impact fee credits that can be used in several ways. Nothing in the contract permits [the developer] to seek other reimbursement.”⁷⁹

F. Finances

The survey period presented the court of appeals with issues of municipal finance in strikingly different contexts. *Lines v. City of Bainbridge*⁸⁰ featured a lost-profits claim by successful bidders at a municipal tax sale, a sale later voided by reason of the city’s lack of notice to lienholders.⁸¹ Rejecting the plaintiffs’ position, the court emphasized undisputed facts that the sale was void and that the city had returned all payments to the bidders.⁸² Consequently, “[t]here was never any ‘sale’ from which appellants could expect any profits,” for the

76. *Id.* at 460, 612 S.E.2d at 492. The agreement was authorized by the “Georgia Development Impact Fee Act,” O.C.G.A. §§ 36-71-1 to -13 (2006). *Fulton Greens*, 272 Ga. App. at 461, 612 S.E.2d at 493.

77. *Fulton Greens*, 272 Ga. App. at 460, 612 S.E.2d at 492. The court noted:
As expressed in the contract, these credits are to be applied against road impact fees due for the shopping center development. To the extent the credits exceed such fees, the contract permits [the developer] to apply the credits against other development-related fees owed the City or to transfer them to third parties.
Id. at 463, 612 S.E.2d at 494.

78. *Id.* at 463-64, 612 S.E.2d at 494-95. The plaintiff made its claim under O.C.G.A. section 36-71-7(b), which the court agreed “generally authorizes developers to seek monetary reimbursement for excess development fee credits.” *Id.* at 463, 612 S.E.2d at 494. However, the court reasoned, “municipalities and developers may enter into private agreements that otherwise govern, and potentially alter, the reimbursement or payment methods for system improvements.” *Id.*

79. *Id.* at 463, 612 S.E.2d at 494. The court thus affirmed the trial court’s summary judgment for the municipality. *Id.* at 464, 612 S.E.2d at 495.

80. 273 Ga. App. 420, 615 S.E.2d 235 (2005).

81. *Id.* at 420-21, 615 S.E.2d at 235-36. The plaintiffs were the successful bidders on thirty-six properties at the tax sale only to be informed roughly a week later that the sale had been voided. *Id.* at 421-22, 615 S.E.2d at 236.

82. *Id.* at 422, 615 S.E.2d at 236.

reason that “[t]here can be no ‘lost profits’ from a sale that was void from the beginning.”⁸³

A somewhat more convoluted matter confronted the court in *Berry v. City of East Point*,⁸⁴ an intervenors’ appeal from the validation of revenue bonds for a new sewer facility owned by the building authority and leased to the municipality.⁸⁵ Rejecting numerous attacks against the proceeding,⁸⁶ the court initially affirmed the trial court’s requirement that the intervenors file a surety bond under the “Public Lawsuits Act.”⁸⁷ As for the alleged creation of an invalid municipal “debt,”⁸⁸ the court held the city’s obligation limited to making lease payments under the constitutionally anchored “intergovernmental contract.”⁸⁹ The arrangement neither created a prohibited “debt” absent voter approval, nor impermissibly pledged the city’s full faith and credit.⁹⁰ Finally, the court held the building authority’s creating statute⁹¹ to preempt the city charter’s 15-mill tax limitation.⁹² “To the extent that the [city’s tax power under the building authority statute] conflicts with the earlier enacted 15-mill limitation on the City’s taxing authority, the later-

83. *Id.* The court summarily rejected the plaintiffs’ claim for attorney fees: “[T]here is no evidence that [the city] engaged in any conduct that would authorize an award of attorney fees under O.C.G.A. § 13-6-11.” *Id.* The court thus affirmed the trial court’s grant of summary judgment for the municipality. *Id.*, 615 S.E.2d at 237.

84. 277 Ga. App. 649, 627 S.E.2d 391 (2006).

85. *Id.* at 649, 627 S.E.2d at 394-95. “The sewer project facilities would be owned by the Building Authority and leased to the City for an amount sufficient to pay the principal and interest on the bonds. The City would levy ad valorem taxes as necessary to make the payments required under the lease agreement.” *Id.*, 627 S.E.2d at 395.

86. *Id.* at 650-56, 627 S.E.2d at 395-99. For example, the court rejected the intervenors’ argument that the building authority had not properly registered with the Georgia Department of Community Affairs under O.C.G.A. section 36-80-16 (2006). *Id.* at 651-52, 627 S.E.2d at 396. “[T]he Authority demonstrated that it had properly registered before the bond proposal was validated by the trial court. Therefore, the procedural deficiency, if any, had been cured before the validation hearing.” *Id.*

87. *Id.* at 655-56, 627 S.E.2d at 399. “The Public Lawsuits Act [O.C.G.A. § 50-15-2] gives courts the authority to require a bond of any party who opposes a public improvement project in a public lawsuit.” *Id.* at 650, 627 S.E.2d at 395 (quoting *Haney v. Dev. Auth. of Bremen*, 271 Ga. 403, 404-06, 519 S.E.2d 665, 667(1999)). Under that statute, the court had required the intervenors to post a \$625,000 surety bond. *Id.*, 627 S.E.2d at 394.

88. *Id.* at 652, 627 S.E.2d at 397 (citing GA. CONST. art. IX, § 3, para. 2(a)).

89. *Id.* at 652-53, 627 S.E.2d at 397 (citing GA. CONST. art. IX, § 3, para. 1(a)). “Therefore, the City’s payment ‘for the use of the [sewer project] is a debt, but it is a debt authorized under the constitution.’” *Id.* (quoting *Clayton County Airport Auth. v. State*, 265 Ga. 24, 25, 453 S.E.2d 8, 10 (1995)) (brackets in original).

90. *Id.* at 653, 627 S.E.2d at 397. “[T]he pledge of the taxing power is permissible, and the trial court did not err in so ruling.” *Id.*

91. 1983 Ga. Laws 4309.

92. 1972 Ga. Laws 2201.

enacted provision must govern.”⁹³ The “[i]ntervenors’ claim lacked merit,”⁹⁴ the court declared, and their failure to post the surety bond doomed their effort.⁹⁵

G. Liability

Issues deriving from asserted municipal liability surfaced in several settings before the appellate courts over the past year—their resolution adding incrementally to a vast corpus of jurisprudence.⁹⁶ Operating as an historic exception to municipal tort immunity, a statute⁹⁷ imposes liability for injuries resulting from negligently defective streets “after actual notice, or after the defect has existed for a sufficient length of time for notice to be inferred.”⁹⁸ The plaintiffs in *Roquemore v. City of Forsyth*⁹⁹ sought unsuccessfully to invoke this exception for injuries suffered when struck by a motorist due to an allegedly malfunctioning streetlight.¹⁰⁰ The court of appeals appraised the record and found it markedly wanting: “Here,” said the court, “there is no evidence that the city had actual notice of the defect, nor is there any evidence that the problem with the streetlight had existed for any appreciable length of time so as to give rise to an issue of constructive notice.”¹⁰¹

93. *Berry*, 277 Ga. App. at 654, 627 S.E.2d at 398.

94. *Id.* at 655, 627 S.E.2d at 399.

95. *Id.* “Because the trial court properly required the [i]ntervenors to post a surety bond, and they did not, we dismiss the appeal . . .” *Id.*

96. For perspective on that jurisprudence, see R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* (4th ed. 1988); R. Perry Sentell, Jr., *Georgia Local Government Tort Liability: The “Crisis” Conundrum*, 2 GA. ST. U. L. REV. 19 (1985); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of ’92*, 9 GA. ST. U. L. REV. 405 (1993); R. Perry Sentell, Jr., *Local Government Liability Litigation: Numerical Nuances*, 38 GA. L. REV. 633 (2004).

97. O.C.G.A. § 32-4-93(a) (2006). For treatment of that statute in the appellate courts, see R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* 62-116 (4th ed. 1988).

98. *Roquemore v. City of Forsyth*, 274 Ga. App. 420, 423, 617 S.E.2d 644, 647 (2005) (quoting *Bush v. City of Gainesville*, 105 Ga. App. 381, 383, 124 S.E.2d 667, 669 (1962)).

99. 274 Ga. App. 420, 617 S.E.2d 644 (2005).

100. *Id.* at 420-21, 617 S.E.2d at 645-46. The plaintiffs were struck while crossing the street at night, and they alleged that a defective streetlight contributed to the accident because the light was, according to testimony, “tilt[ed] slightly downward.” *Id.* at 421, 617 S.E.2d at 646.

101. *Id.* at 423, 617 S.E.2d at 647. Accordingly, the city was “relieved of all potential liability for the malfunctioning streetlight under O.C.G.A. § 32-4-93(a), and the trial court properly granted its motion for summary judgment.” *Id.* at 424, 617 S.E.2d at 648.

In concept, governmental immunity is also avoided by a claimant's establishing the municipality's creation or maintenance of a nuisance.¹⁰² Effectuating that concept, however, represents a considerable hurdle for injured claimants—rendering somewhat notable the plaintiffs' success on the issue in *City of Atlanta v. Landmark Environmental Industries, Inc.*¹⁰³ There, a property owner (and lessee) recovered at trial for a municipality's nuisance in allowing leaking sewage to invade the property and, in 1999, to render it unusable.¹⁰⁴ On appeal, the city challenged the finding of causal knowledge on its part, a challenge rejected by the court of appeals.¹⁰⁵ Citing testimony from the city's public works manager and the plaintiffs' expert geologist, the court asserted that “as early as the summer of 1998, the City knew that raw sewage was floating in the ravine across the street from the Property.”¹⁰⁶ Moreover, “in February 1999, the city was persistently contacted about an odor in that area.”¹⁰⁷ This evidence, the court concluded, “authorized the jury to reject the City's position and find that it knew or should have known that it was maintaining a nuisance.”¹⁰⁸

In contrast, the plaintiff enjoyed far less success in *Goode v. City of Atlanta*,¹⁰⁹ a nuisance action for damage to his home following the rupture of a water main allegedly caused by the city's repair of a sewer cave-in.¹¹⁰ Reviewing the necessary nuisance “factors,”¹¹¹ the court

102. For treatment of nuisance liability in Georgia local government law, see R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* 119-34 (4th ed. 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).

103. 272 Ga. App. 732, 613 S.E.2d 131 (2005).

104. *Id.* at 732-36, 613 S.E.2d at 134-37. The lessee used the nineteen-acre tract to receive organic materials for a fee and to mix those materials into a soil amendment which it sold to various purchasers. *Id.* at 733, 613 S.E.2d at 135.

105. *Id.* at 733, 613 S.E.2d at 135. For a municipal nuisance, the court said, the plaintiff must show conduct exceeding mere negligence, a continuous or repetitious condition, and a failure to correct after acquiring knowledge of the condition. *Id.* (citing *City of Bowman v. Gunnells*, 243 Ga. 809, 811, 256 S.E.2d 782, 783-84 (1979)).

106. *Id.* at 736, 613 S.E.2d at 137.

107. *Id.*

108. *Id.* The court did hold that the jury verdict for the lessee was flagrantly excessive, and the court reversed on that point for a retrial. *Id.* at 740, 613 S.E.2d at 140. The court also reversed the trial court's decision against the property owner's motion for an award of attorney fees. *Id.* at 745-46, 613 S.E.2d at 143. The court concluded that there was some evidence of the city's “bad faith.” *Id.*

109. 274 Ga. App. 233, 617 S.E.2d 210 (2005).

110. *Id.* at 233, 617 S.E.2d at 211. The plaintiff alleged that “an excessive amount of dirt under the foundation of his home was washed away when the main ruptured, and water and mud flooded his basement.” *Id.*

initially focused upon the city's repair of the cave-in: "[A]n isolated act of negligence cannot form the basis of a nuisance claim."¹¹² Secondly, the court discounted the alleged "improper tamping" of the fill dirt: "The one-time repair cannot be deemed continuous or repetitive."¹¹³ Finally, on the necessity of knowledge, "the City had not received any complaints about flooding in the vicinity of [the plaintiff's] home."¹¹⁴ Accordingly, the court affirmed the city's summary judgment.¹¹⁵

The "knowledge" factor proved singularly pivotal in *Thompson v. City of Atlanta*,¹¹⁶ a rejection of a claimed municipal nuisance in designing and maintaining its drainage system.¹¹⁷ The plaintiff's car having hydroplaned on water in the street, she sued for wrongful death and personal injuries, only to suffer adverse summary judgment in the trial court.¹¹⁸ Making short shrift of the appeal, the court of appeals rested upon lack of knowledge.¹¹⁹ "The city submitted evidence that it had not received notice of street defects in the area of the intersection, and the only complaint the city received concerning drainage problems near the intersection occurred . . . nearly three years before the incident here."¹²⁰

Procedurally, the municipal liability landscape is littered with the remains of claims never substantively litigated—claims aborted by the plaintiffs' noncompliance with the mandate of "ante litem notice."¹²¹

111. *Id.* at 235-36, 617 S.E.2d at 212. The court extracted those "factors" from the supreme court's opinion in *Gunnells*, 243 Ga. 809, 256 S.E.2d 782. *Id.*

112. *Id.* at 236, 617 S.E.2d at 212.

113. *Id.*, 617 S.E.2d at 213.

114. *Id.*

115. *Id.* at 236-37, 617 S.E.2d at 213. "[T]he trial court concluded as a matter of law, and we agree, that the undisputed evidence failed to satisfy the above factors." *Id.* at 236, 617 S.E.2d at 212.

116. 274 Ga. App. 1, 616 S.E.2d 219 (2005).

117. *Id.* at 1, 616 S.E.2d at 220. The plaintiff sued the municipality in both negligence and nuisance. *Id.*

118. *Id.* at 2, 616 S.E.2d at 220.

119. *Id.* at 4, 616 S.E.2d at 221. As to negligence, the court held that the evidence showed no knowledge, as required by O.C.G.A. section 32-4-93(a). *Id.* at 2-3, 616 S.E.2d at 221.

120. *Id.* at 4, 616 S.E.2d at 221. "Knowledge or notice of the alleged defective condition is an element of this [nuisance] claim as well." *Id.*, 616 S.E.2d at 222.

121. See O.C.G.A. § 36-33-5 (2006). The statute requires written notice to the municipality of a claim for damages within six months of the happening of the event. *Id.* For treatment of that landscape, see R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* 145-74 (4th ed. 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). For a recent analysis of modern developments, see monograph, R. PERRY SENTELL, JR., ANTE LITEM NOTICE: RECENT

The court of appeals added to that legacy of frustration via two decisions during the period under scrutiny. *Rabun v. McCoy*¹²² featured a building official's action for false termination charges—he asserted claims for defamation, intentional infliction of emotional harm, and invasion of privacy.¹²³ Reviewing two letters to city officials by the plaintiff's attorney, the court declared a failure of notice for any acts allegedly occurring six months prior to the first letter.¹²⁴ As for alleged defamatory statements within six months of the second letter,¹²⁵ the court focused upon the contents: the letter “contains nothing that refers to any claims for intentional infliction of emotional distress or false light/invasion of privacy.”¹²⁶ Additionally, “there is no indication in that letter of the person to whom [the official] made these February statements or the specific content of these statements.”¹²⁷ Accordingly, the court declared all charges of falsehoods “inadequately noticed to the City,”¹²⁸ and properly subject to the trial court's dismissal.¹²⁹

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122. 273 Ga. App. 311, 615 S.E.2d 131 (2005).

123. *Id.* at 313, 615 S.E.2d at 134. The plaintiff also sued the city manager, both individually and officially. The plaintiff had been terminated for making alleged willful and reckless false statements against another official, but was subsequently reinstated by a special master. *Id.* at 312-13, 615 S.E.2d at 133-34.

124. *Id.* at 313-15, 615 S.E.2d at 134-35. The court noted:

In *City of Chamblee v. Maxwell*, 264 Ga. 635, 636-637, 452 S.E.2d 488, 490 (1994), the Supreme Court held that, under this statute, claims against municipalities based upon any event occurring more than six months before written ante litem notice was given were barred, even if the event was part of a continuing pattern of events, such as a continuing trespass or nuisance.

Id. at 313, 615 S.E.2d at 134.

125. *Id.* at 314-15, 615 S.E.2d at 135. The court reasoned that a letter of July 1 referenced defamatory statements allegedly made on or about February 19 and February 27, and “these dates are within the six months of the . . . letter.” *Id.*

126. *Id.* at 315, 615 S.E.2d at 135.

127. *Id.*

128. *Id.*

129. *Id.*, 615 S.E.2d at 136. Although the ante litem mandate did not apply to the plaintiff's action against the city manager in his individual capacity, the court proceeded to review facts relating to actual malice on his part. *Id.* at 317-18, 615 S.E.2d at 136-37. It found that the manager had presented evidence establishing lack of malice and then examined nine facts employed by plaintiff to carry his resulting burden on the issue. *Id.* at 318-19, 615 S.E.2d at 137-38. The court concluded that “[t]he nine ‘facts’ pointed to by [the plaintiff] do not rise above the level of conclusory allegations and speculation and do not suffice to create a jury issue” on actual malice. *Id.* at 320, 615 S.E.2d 139. Thus, the court reversed the trial court's summary judgment, adverse to the city manager. *Id.*

Claimants also impaled themselves upon the “notice” petard in *Davis v. City of Forsyth*,¹³⁰ a “continuing nuisance” action for repeated sewage overflows onto the plaintiffs’ property.¹³¹ The court made short work of a complaint amendment claiming personal injuries: “Significantly, the [prior] letter does not state that [the plaintiffs] seek to recover for personal injuries.”¹³² As for alleged property damages dating “to the early 1990s,” the court again ruled out all harms occurring six months preceding the notice.¹³³ “The [plaintiffs] cannot recover damages for any injury to their property that happened prior to six months before May 9, 2001, the date on which they sent the notice.”¹³⁴

Finally, each appellate court confronted an issue off the beaten path of “municipal liability,” a novel issue of distinctive proportions. In *Georgia Interlocal Risk Management Agency (“GIRMA”) v. Godfrey*,¹³⁵ the court of appeals construed liability insurance coverage provided by a unique “statutory association” for municipalities and their employees.¹³⁶ Specifically, the court determined whether a police trainee who used a city police car to participate in a robbery and murder qualified as an insured “member” under the municipal policy.¹³⁷ Analogizing to the

130. 275 Ga. App. 747, 621 S.E.2d 495 (2005).

131. *Id.* at 747, 621 S.E.2d at 497. The plaintiffs provided notice and filed suit in 2001, seeking damages for overflows dating back to the early 1990s. They amended their complaint in 2003 to add a personal injury claim. The trial judge found that the personal injury claim was barred for lack of notice and ruled that all claims for property damage occurring prior to six months preceding the notice were barred. *Id.*

132. *Id.* at 748, 621 S.E.2d at 498. “A statement that sewage overflows pose a ‘health hazard’ does not serve as notice of . . . a personal injury claim.” *Id.*

133. *Id.* at 749, 621 S.E.2d at 498. “In *City of Chamblee v. Maxwell*, [264 Ga. 635, 452 S.E.2d 488 (1994)] our Supreme Court construed this Code section as barring claims against municipalities based upon any event occurring more than six months before written ante litem notice was given, even if the event was part of a continuing trespass or nuisance.” *Id.*, 621 S.E.2d at 498-99.

134. *Id.*, 621 S.E.2d at 499. The court also denied the plaintiffs’ claim of a “public nuisance” because it did not injure all members of the public who came in contact with it: “As there is no evidence that the sewer line at issue injured more than a few individuals who came into contact with it, it did not constitute a public nuisance.” *Id.* at 750, 621 S.E.2d at 500.

135. 273 Ga. App. 77, 614 S.E.2d 201 (2005).

136. *Id.* at 78, 614 S.E.2d at 202. “GIRMA is a statutory association formed by municipalities pursuant to O.C.G.A. § 36-85-1 et seq.” *Id.* It “provides a mechanism for municipalities to pool their general liability, motor vehicle liability, and property damage risks. A municipality that enters a GIRMA coverage agreement in effect purchases liability insurance.” *Id.*

137. *Id.* at 80-83, 614 S.E.2d at 204-06. The police trainee had been tried and found guilty of the robbery and murder, and the victim’s family brought a wrongful death action against the municipality. GIRMA sought summary judgment, contending that it was not obligated to provide coverage for the claim. *Id.* at 78, 614 S.E.2d at 202-03. The coverage

test of “respondeat superior” for construing the authorizing statute,¹³⁸ the court reasoned that the trainee “did not commit any of the acts at issue here on behalf of the City or its police department.”¹³⁹ Contrarily, the court emphasized, “[the trainee] acted for purely personal reasons, completely disconnected from the authorized business of his employer.”¹⁴⁰ The municipality exercised no “direction or control” over the trainee’s commission of the acts, and “he certainly was not operating within the scope of his employment . . . at that time.”¹⁴¹ To claimants’ argument of “apparent authority,”¹⁴² the court remained adamant: “[R]egardless of how the public might have viewed [the trainee’s] use of the police car, he stepped aside from his police employment and performed acts for entirely personal reasons that led to the robbery and murder of [the deceased].”¹⁴³ Accordingly, the court concluded, GIRMA bore no coverage responsibility.¹⁴⁴

The supreme court’s opportunity for originality arose in *Common Cause/Georgia v. City of Atlanta*,¹⁴⁵ an action on behalf of the municipality (and its citizens and taxpayers) seeking damages from a former mayor.¹⁴⁶ Because the mayor had failed to sign a municipal contract in timely fashion, the plaintiffs alleged, the city unnecessarily paid a higher rate under an existing contract.¹⁴⁷ Although it had granted

agreement defined “Member” as the City and any “[e]mployee . . . acting for and on behalf of the [City], and under its direction and control or appointed by the [City] while acting within the scope of [his] duties as such.” *Id.* at 79, 614 S.E.2d at 203 (brackets in original).

138. *Id.* at 80-81, 614 S.E.2d at 204. “The statutory [O.C.G.A. §§ 36-85-1 to -20] and coverage language is similar to that used by our courts in applying the theory of respondeat superior.” *Id.* at 80, 614 S.E.2d at 204.

139. *Id.* at 81, 614 S.E.2d at 205.

140. *Id.*

141. *Id.* at 82, 614 S.E.2d at 205.

142. *Id.* “[T]he . . . family asserts that a police department employee driving a police car has the apparent authority of the police department.” *Id.*

143. *Id.*

144. *Id.* at 83, 614 S.E.2d at 206. “As a matter of law, [the trainee] was not a ‘Member’ under the coverage agreement when he committed the acts giving rise to the . . . family’s claims.” *Id.* For perspective on municipal liability insurance in Georgia local government law, see R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 177-88 (4th ed. 1988); R. Perry Sentell, Jr., *Tort Liability Insurance in Georgia Local Government Law*, 24 MERCER L. REV. 651 (1973).

145. 279 Ga. 480, 614 S.E.2d 761 (2005).

146. *Id.* at 480-81, 614 S.E.2d at 762-63. “Common Cause and [a taxpayer] brought suit on behalf of the City and its taxpayers seeking a judgment against [the mayor] individually. . . .” *Id.* at 481, 614 S.E.2d at 763.

147. *Id.* at 480-81, 614 S.E.2d at 762-63. The city opened bidding for a five-year contract to manage parking lots at the municipal airport. The service submitting the low

certiorari to review dismissal of the action, the supreme court now provided the claimants cold comfort indeed.¹⁴⁸ First, it denied their assertion “that a taxpayer citizen of a Georgia municipality has the power to sue, in the name of that municipality, an officer of the municipality”¹⁴⁹ Rather, the court insisted, “[m]unicipal corporations are creatures of the State, . . . and it is for the General Assembly to specify any such power to sue on the part of taxpayers.”¹⁵⁰ As for a taxpayer’s claim against the mayor in his individual capacity, the court emphasized the constitution’s grant of official immunity for the negligent performance of a “discretionary duty.”¹⁵¹ The relevant city ordinance “gives the Mayor the *choice* to sign or not to sign a prepared contract,”¹⁵² and plaintiffs asserted no “actual malice or actual intent to cause injury.”¹⁵³ The court affirmed the suit’s dismissal.¹⁵⁴

bid was already managing airport parking under an existing contract. However, the mayor failed to sign the resulting contract within the specified time. *Id.* “In the interim, [the service] was paid at the higher rate under the existing contract, and received approximately \$300,000 more than it would have under the new rate.” *Id.* at 481, 614 S.E.2d at 763. The plaintiffs sued for the overpayment. *Id.*

148. *Common Cause/Georgia v. Campbell*, 268 Ga. App. 599, 602 S.E.2d 333 (2004).

149. *Common Cause*, 279 Ga. at 481, 614 S.E.2d at 763. The plaintiffs analogized to a suit by corporate shareholders against a corporate officer in a derivative action. *Id.*

150. *Id.* “[T]here is no basis in Georgia law for such an action.” *Id.*

151. *Id.* at 481-82, 614 S.E.2d at 763 (citing GA. CONST. art. I, § 2, para. 9(d)). For treatment of Georgia law on suits against local government officers and employees, see R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights for Their Wrongs*, 13 GA. L. REV. 747 (1979); R. Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law: The Haunting Hiatus of Hennessy*, 40 MERCER L. REV. 27 (1988); R. Perry Sentell, Jr., “Official Immunity” in *Local Government Law: A Quantifiable Confrontation*, 22 GA. ST. U. L. REV. 597 (2006).

152. *Common Cause*, 279 Ga. at 483, 614 S.E.2d at 764 (emphasis supplied by the court) (citing ATLANTA, GA., CODE § 2-176 (1977)). “Accordingly, the failure to execute a contract is not a violation of a ministerial duty, but rather an act of discretion.” *Id.*

153. *Id.* at 482, 614 S.E.2d at 763.

154. *Id.* at 483, 614 S.E.2d at 764. “The motion to dismiss established that the complaint disclosed that Common Cause would not be able to demonstrate the right to the requested relief.” *Id.* A dissenting opinion for one justice maintained that under the reasoning of the court’s previous decision in *Koehler v. Massell*, 229 Ga. 359, 191 S.E.2d 830 (1972), “Common Cause’s complaint does set forth a cause of action sufficient to survive a motion to dismiss.” *Common Cause*, 279 Ga. at 484, 614 S.E.2d at 765 (Fletcher, C.J., dissenting). The dissent observed that “the majority mistakenly limits the rights of taxpayers to hold public officials accountable for the wrongful expenditure of taxpayer funds. . . .” *Id.* at 485, 614 S.E.2d at 766 (Fletcher, C.J., dissenting).

II. COUNTIES

A. *Officers and Employees*

The supreme court considered two employee status-benefit claims during the survey period and reached opposing conclusions. In *Morgan County Board of Commissioners v. Mealor*,¹⁵⁵ the court sustained the county's decision "to include the Tax Commissioner within its pension plan while excluding the Superior Court Clerk."¹⁵⁶ That distinction rested upon the "rational basis"¹⁵⁷ that the tax commissioner's state pension plan "is funded without any contribution from the county,"¹⁵⁸ while the superior court clerk's plan "is funded in part by County fines and fees."¹⁵⁹ Thus, the court concluded, "[t]he County has quite rationally decided that it should contribute to each constitutional officer's retirement plan, but that it should only do so once."¹⁶⁰ Its action thus "furthers the legitimate governmental purpose of equalizing the County's pension contributions and fostering financial responsibility in the funding of its employees' retirement plans."¹⁶¹

155. 280 Ga. 241, 626 S.E.2d 79 (2006).

156. *Id.* at 244-45, 626 S.E.2d at 83. The superior court clerk sought to mandamus the county to include her within the county's pension plan. She protested the county's decision to leave her under the pension plan within the state's retirement system. The trial court had granted the mandamus. *Id.* at 242, 626 S.E.2d at 81.

157. *Id.* at 243, 626 S.E.2d at 82. Equal protection is served, the court reasoned, by a legislative classification scheme that survives the "rational basis" test. *Id.*

158. *Id.* at 244, 626 S.E.2d at 82. "[T]he only other retirement plan that the Tax Commissioner could participate in was funded by her own personal funds and by funds contributed by the State, but included no funds contributed by the County." *Id.* at 242, 626 S.E.2d at 81. Thus, the county moved the tax commissioner to the county's own pension plan. *Id.*

159. *Id.* at 244, 626 S.E.2d at 82. The clerk's pension plan "is funded in part by a portion of every fine and forfeiture collected by the . . . County Superior Court for the violation of a state law." *Id.* at 242, 626 S.E.2d at 81. The court rejected the trial judge's decision that those contributions did not represent county funds because state law specifically mandated their contribution to the pension plan. *Id.* at 242-43, 626 S.E.2d at 81.

160. *Id.* at 244, 626 S.E.2d at 82. "[T]he County's decision to include the Tax Commissioner within its pension plan, while excluding the other constitutional officers, is plain and reasonable." *Id.*

161. *Id.* The court thus reversed the trial court's issuance of a mandamus requiring that the clerk be included within the county's pension plan. *Id.* at 244-45, 626 S.E.2d at 83. For a detailed analysis of the "drastic remedy" of mandamus in local government law, see R. PERRY SENTELL, JR., MISCASTING MANDAMUS IN GEORGIA LOCAL GOVERNMENT LAW (1989).

In contrast, *Hill v. Watkins*¹⁶² found the court siding with employees of the county sheriff's office, employees held to be included in the county's 1994 civil service act.¹⁶³ That act drew authorization from a local constitutional amendment of 1963,¹⁶⁴ which a 1986 local statute had validly continued in effect.¹⁶⁵ Under the 1994 act, the court held, "[I]t is clear that the elected sheriff is not subject to the civil service system, but those occupying positions in his office are."¹⁶⁶ Accordingly, the plaintiff employees deserved injunctive relief against the sheriff's summary termination of their positions.¹⁶⁷ they could not be dismissed "except for good cause and in accordance with civil service system rules and regulations."¹⁶⁸

162. 280 Ga. 278, 627 S.E.2d 3 (2006).

163. *Id.* at 281, 627 S.E.2d at 6; 1994 Ga. Laws 4399.

164. *Hill*, 280 Ga. at 280-81, 627 S.E.2d at 6 (citing 1963 Ga. Laws 681 (proposing the local amendment)).

165. *Id.* at 279, 627 S.E.2d at 5.

166. *Id.* According to the court:

[T]he 1994 Act states: "Except as provided in this Act, all positions within the following offices are subject to and covered by the civil service system: . . . sheriffs" The next section expressly excludes from coverage, "elected officials" Viewing these provisions in *pari materia* as we must, . . . it is clear that the elected sheriff is not subject to the civil service system, but those occupying positions in his office are.

Id. For analysis of the statutory construction technique of "in *pari materia*" in Georgia case law, see R. PERRY SENTELL, JR., STATUTORY CONSTRUCTION IN GEORGIA: THE DOCTRINE OF *IN PARI MATERIA*, reprinted in R. PERRY SENTELL, JR., STUDIES IN GEORGIA STATUTORY LAW 259 (1997).

167. *Hill*, 280 Ga. at 278-79, 627 S.E.2d at 4. In 2005 the newly elected sheriff had summarily terminated twenty-seven employees of the county sheriff's office and advised them that they were not entitled to the protections of the county's civil service system. *Id.* at 278, 627 S.E.2d at 4.

168. *Id.* at 279, 627 S.E.2d at 5 (quoting 1994 Ga. Laws 4404). A dissenting opinion for one justice maintained that employees of the sheriff were not county employees and thus not covered by the county civil service act. *Id.* at 281, 627 S.E.2d at 6 (Benham, J., dissenting).

In *Marlowe v. Colquitt County*, 278 Ga. App. 184, 628 S.E.2d 622 (2006), the court of appeals invalidated a "buy out" clause in a county's multi-year employment contract with its county administrator (a lump-sum payment for early termination without cause) as inconsistent with the local statute (1986 Ga. Laws 3739) creating the position of county administrator. *Id.* at 186, 628 S.E.2d at 624. The local statute required reappointment for each twelve-month period, the court reasoned, and the employment contract's imposition of a multi-year obligation violated that requirement. *Id.* at 185-86, 628 S.E.2d at 623-24. "The buy-out obligation necessarily restricts the board of commissioners' discretion in appointing and retaining its county administrator in view of the substantial cost of severing the County's relationship with [the administrator] before the end of the contract term." *Id.* at 186, 628 S.E.2d at 624. The court thus affirmed the trial court's summary judgment for the county. *Id.* at 187, 628 S.E.2d at 624.

The heated context of property tax appraisals generated the defamation action featured in *Smith v. Henry*.¹⁶⁹ There, the chief appraiser for the county board of tax assessors sued a citizen who attended a meeting and stated that the plaintiff “took [her staff’s] appraisals and just arbitrarily raised the value of the land.”¹⁷⁰ Sketching the parties’ respective burdens in the case, the court of appeals reasoned that “[a] statement made before a governmental body in connection with an issue under consideration by that body is privileged.”¹⁷¹ Here, said the court, the defendant made a prima facie showing of this “conditional privilege.”¹⁷² In response, the plaintiff must “point to specific evidence of malice on [the defendant’s] part,”¹⁷³ evidence that the defendant “either knew his statement was false or made it with reckless disregard of the truth.”¹⁷⁴ That, “she did not do,” her failure prompting the court’s reversal of the trial judge’s refusal to grant the defendant’s motion for summary judgment.¹⁷⁵

B. Elections

Survey-period litigation illustrated irregularities plaguing local government elections and neatly delineated the types of defects sufficient to invalidate the electoral process. In *Jones v. Jessup*,¹⁷⁶ a contested election for county sheriff, the supreme court reviewed evidence offered by the plaintiff to invalidate his thirty-six-vote defeat and deemed it insufficient “to prove substantial error in the votes cast by 30 of those

169. 276 Ga. App. 831, 625 S.E.2d 93 (2005). For perspective on the issue, see R. Perry Sentell, Jr., *Defamation in Georgia Local Government Law: A Brief History*, 16 GA. L. REV. 627 (1982).

170. *Smith*, 276 Ga. App. at 831-32, 625 S.E.2d at 95 (brackets in original). “At the meeting, county commissioners and citizens discussed recent increases in the dollar value of property appraisals.” *Id.* at 831, 625 S.E.2d at 95.

171. *Id.* at 832, 625 S.E.2d at 95.

172. *Id.* at 832-33, 625 S.E.2d at 95-96. “According to [the defendant’s] affidavit, he based his comments on conversations he had with [the plaintiff] herself and other employees of the Tax Assessor’s office, and he believed his comments were true. This evidenced good faith.” *Id.* at 833, 625 S.E.2d at 96.

173. *Id.* at 833, 625 S.E.2d at 96.

174. *Id.*

175. *Id.* at 833-34, 625 S.E.2d at 96-97. The court also noted:

The only other evidence cited by [the plaintiff] to show malice is a letter from the Board of Equalization to the Board of Commissioners written in October 2003, over a year after the comment at issue here was made However, the letter is hearsay and cannot be considered as evidence.

Id. at 833, 625 S.E.2d at 96-97.

176. 279 Ga. 531, 615 S.E.2d 529 (2005).

37 witnesses.”¹⁷⁷ For example, the court discounted the failure of three electors to sign an application for an absentee ballot: countering testimony “established that [those] three electors had voted in person during the advance voting period and had provided positive identification. . . .”¹⁷⁸ Additionally, the court dismissed evidence that several voters misread the absentee ballot oath, thus failing to include date and place of birth: their ballots otherwise “substantially complied with all of the essential requirements of the form”¹⁷⁹ Accordingly, the court held that the challenger “failed to establish substantial error in the votes cast by ten of the thirty-seven witnesses he adduced,” and the trial court erred in invalidating the election.¹⁸⁰

Similarly, in *DeLeGal v. Burch*,¹⁸¹ the court of appeals rejected a county citizen’s challenge to a special election for the issuance of general obligation bonds.¹⁸² The plaintiff posited his objection upon a misstatement appearing in one of the five requisite advertisements¹⁸³—a reference to the bond issuer as the “school district” rather than the “county.”¹⁸⁴ Initially designating the proceeding as a “post-election challenge,”¹⁸⁵ the court denied the “typographical error” to constitute an “irregularity.”¹⁸⁶ Moreover, “even if the clerical error could be

177. *Id.* at 531-32, 615 S.E.2d at 530. The court stressed the presumption that election returns are valid, as well as the contestant’s burden of showing irregularity sufficient to place the election results in doubt. *Id.*

178. *Id.* at 532, 615 S.E.2d at 531.

179. *Id.* at 533, 615 S.E.2d at 531.

180. *Id.* at 533-34, 615 S.E.2d at 531.

181. 273 Ga. App. 825, 616 S.E.2d 485 (2005).

182. *Id.* at 825-26, 616 S.E.2d at 486-87. The county proposed to issue the bonds to fund hospital construction, and the voters had approved the bond issue. *Id.* at 826, 616 S.E.2d at 487.

183. See O.C.G.A. § 21-2-45.1 (2003).

184. *DeLeGal*, 273 Ga. App. at 827, 616 S.E.2d at 488. “The rest of the notice, which exceeded eight paragraphs, referred to the bond issuer as . . . ‘the County.’” *Id.*

185. *Id.* at 828, 616 S.E.2d at 488. This designation operated to reject the plaintiff’s argument that “in a challenge brought prior to an election, the failure to comply with any provision of the election law will invalidate the election, regardless of whether the failure placed the election result in doubt.” *Id.* The court stated that “by [the plaintiff’s] failure to preserve or pursue his injunctive remedies, [he] elected to pursue only a post-election challenge.” *Id.*

186. *Id.* at 828-29, 616 S.E.2d at 488-89. “The notice was also timely because it informed the voters of everything the law required within the requisite 30-day period. We agree with the superior court’s legal conclusion that notice was sufficient under O.C.G.A. §§ 21-2-45.1(a) and 36-82-1(b).” *Id.*

considered an ‘irregularity’ in the election process, it would not, as a matter of law, warrant setting aside the election.”¹⁸⁷

The supreme court drew the line in *Burton-Callaway v. Carroll County Board of Elections*¹⁸⁸ by invalidating a school-board referendum mandated by local legislation, which stated that it would “provide for the continuation in office of current members.”¹⁸⁹ “In fact,” the court declared, the bill “would shorten the term of some of those members by two years.”¹⁹⁰ This misrepresentation, the court concluded, violated the state’s statutory prohibition on abolishing or changing a term of office by local statute unless approved “by the people of the jurisdiction affected in a referendum on the question.”¹⁹¹ Here, the language on the referendum ballot “made no mention of its effect on the terms of current board members,”¹⁹² and could not withstand the challenge of a member whose term it thus shortened.¹⁹³ Accordingly, the court forcefully reversed the trial judge’s approval of the referendum.¹⁹⁴

C. Powers

The court of appeals turned a deaf ear to complaints leveled against the county’s power to provide for water service. In *Lancaster v. Effingham County*,¹⁹⁵ taxpayers challenged procedures via which the county constructed a water treatment facility for its unincorporated areas. Upholding the purchase of 500 acres of land (rather than the 200

187. *Id.* at 829, 616 S.E.2d at 489. “It has long been the law that an irregularity in an election notice provides no basis to contest the election results unless the contestant presents evidence showing that the irregularity is ‘sufficient to change or place in doubt the result.’” *Id.* (quoting O.C.G.A. § 21-2-522(3) (2003)).

188. 279 Ga. 590, 619 S.E.2d 634 (2005).

189. *Id.* at 590-91, 619 S.E.2d at 634. “The local bill, as well as the ‘Notice of Intention to Introduce Local Legislation,’ which was published in the County’s legal organ, stated that it would ‘provide for the continuation in office of current members.’” *Id.* at 591, 619 S.E.2d at 635 (quoting 2004 Ga. Laws 3592).

190. *Id.* at 592, 619 S.E.2d at 635.

191. *Id.* at 591, 619 S.E.2d at 634 (quoting O.C.G.A. § 1-3-11 (2000)). “In order for the people of the jurisdiction to properly alter a duly elected local official’s term, they must be informed of how their vote would affect such a change.” *Id.*, 619 S.E.2d at 635.

192. *Id.* at 591, 619 S.E.2d at 635. “Voters were never informed, therefore, that their approval of the referendum would shorten [the plaintiff’s] term of office by two years.” *Id.*

193. *Id.* at 592, 619 S.E.2d at 635. The court noted:

If the law requires that a referendum be held before a certain action may occur, then certainly, to be valid, the referendum must accurately inform voters of its effect with respect to that action. Otherwise, it cannot be said that the referendum even qualified as a “referendum on the question.”

Id. (quoting O.C.G.A. § 1-3-11).

194. *Id.*

195. 273 Ga. App. 544, 615 S.E.2d 777 (2005).

acres actually needed),¹⁹⁶ the court relied upon the county's "broad discretion" in acquiring property.¹⁹⁷ "[U]ndisputed evidence," the court insisted, revealed the county's "good-faith" efforts.¹⁹⁸ Likewise, the court approved the board's notice of a meeting to amend the annual budget, although that notice omitted the matter of borrowing from the general reserve fund.¹⁹⁹ The court simply found "no evidence" of a "purpose of deceiving the public."²⁰⁰ Although the fund contained monies from all areas of the county, "the ultimate cost of the land used . . . would not [in violation of the Service Delivery Act]²⁰¹ be borne by the residents of incorporated areas."²⁰² Rather, the board ultimately replenished the reserve fund by selling the surplus land,²⁰³ and the court deemed "[t]he taxpayers' contention that this fiscally responsible outcome somehow damaged them [to be] without merit."²⁰⁴

The state's "Service Delivery Act"²⁰⁵ likewise featured prominently in *Alcovy Shores Water & Sewerage Authority v. Jasper County*.²⁰⁶ There, an existing local water authority²⁰⁷ challenged the "Service Delivery Agreement" crafted by a county and two municipalities which empowered the county water authority to operate within the plaintiff's

196. *Id.* at 545, 615 S.E.2d at 779. The county explained that the seller did not wish to subdivide the land and that the board considered the purchase in the county's best interest. *Id.* at 544, 615 S.E.2d at 778.

197. *Id.* at 545, 615 S.E.2d at 779. The court relied upon GA. CONST. art. IX, § 2, para. 3(a)(7) and O.C.G.A. § 36-82-61, -62 (2005). *Id.*

198. *Id.* The county had subsequently sold the surplus land involved in the transaction, and the court noted that the taxpayers had "presented no evidence that the Board purchased the property in an attempt to benefit either the seller of the 500-acre parcel or the buyer of the 287-acre surplus." *Id.*

199. *Id.* at 546, 615 S.E.2d at 779. "Here, the Board gave proper notice of the meeting to amend the 2003 budget in accordance with the Open Meetings Act." *Id.*

200. *Id.* "This omission, moreover, did not preclude the Board from discussing this issue and acting upon it at the meeting." *Id.*

201. O.C.G.A. § 36-70-24(3)(A) (2006).

202. *Lancaster*, 273 Ga. App. at 546, 615 S.E.2d at 780.

203. *Id.* "Ultimately, the county was able to obtain over 200 acres of land for a water treatment plant at virtually no cost." *Id.*

204. *Id.* As for the plaintiffs' complaint that the county had improperly rezoned the surplus land which it sold, the court asserted that "none of the taxpayers in this case lived adjacent to or would be uniquely affected by the rezoned 287 acres. Thus the taxpayers do not have standing to challenge zoning decisions made with respect to the property." *Id.* at 547, 615 S.E.2d at 780.

205. O.C.G.A. §§ 36-70-20 to -28 (2006).

206. 277 Ga. App. 341, 626 S.E.2d 560 (2006).

207. *Id.* at 341, 626 S.E.2d at 561. The plaintiff's authority had been created by a 1979 local statute. *Id.*; see 1979 Ga. Laws 3177.

“project area.”²⁰⁸ Rejecting the challenge, the court denied the agreement to alter the plaintiff’s “project area.”²⁰⁹ Rather, the agreement only prohibited the use of governmental funds for the plaintiff’s operations outside its “service area.”²¹⁰ Accordingly, the defendants “acted in conformity with the [Service Delivery] Act in designating [the plaintiff’s] service area and were not required to designate a service area . . . which was the same as [the plaintiff’s] project area.”²¹¹

The supreme court considered an issue of county power in *R. D. Brown Contractors, Inc. v. Board of Education of Columbia County*,²¹² more specifically the county school board’s power to waive a requirement contained in its invitation for school construction bids.²¹³ Focusing upon a statutory mandate that the bid only conform “in all material respects” to the invitation,²¹⁴ the court held the board empowered to waive its requirement that the bid contain a list of subcontractors.²¹⁵ “We see no reason why the Board could not determine that it was not a material requirement, but rather a technicality that could be waived.”²¹⁶ The board’s actions enabled it to accept the low bid, the

208. *Alcovy Shores*, 277 Ga. App. at 341-42, 626 S.E.2d at 561-62. The agreement established the service area for the county water authority, which included a portion of the plaintiff’s service area. *Id.*

209. *Id.* at 343, 626 S.E.2d at 563.

210. *Id.*, 626 S.E.2d at 562-63. “The salient point, however, is that the Service Agreement and the Act do not alter [the plaintiff’s] project area as defined in its creating legislation.” *Id.*, 626 S.E.2d at 563.

211. *Id.* at 344, 626 S.E.2d at 563. The plaintiff also argued that the trial court failed to consider that although it was not a party to the service agreement, it could not get funding or a permit to operate in its remaining territory. *Id.* at 345, 626 S.E.2d at 564. Said the court: “[The plaintiff] was not a party to the Service Agreement because it was not a county or municipality directed by the Act to enter into an agreement setting forth a service delivery strategy.” *Id.* The court thus affirmed the trial court’s summary judgment for the defendants. *Id.* at 346, 626 S.E.2d at 564.

212. 280 Ga. 210, 626 S.E.2d 471 (2006).

213. *Id.* at 210-11, 626 S.E.2d at 473. The school board’s invitation for bids required that each bid include a list of major subcontractors, a step neglected by what turned out to be the low bidder. Although initially rejected by the bid administrator, the bidder provided the list later in the day and, at a subsequent meeting, the school board accepted the bid. The losing bidder requested the trial court to enjoin the board’s actions, only to suffer the court’s rejection. *Id.*

214. *Id.* at 212-13, 626 S.E.2d at 474 (quoting O.C.G.A. § 36-91-2(12) (2006)).

215. *Id.* at 213, 626 S.E.2d at 475. The plaintiff pointed “to no statute, regulation, or ordinance that requires that subcontractors be listed on bids; the only place such a provision appears is on the invitation for bids produced by the Board.” *Id.*

216. *Id.* at 214, 626 S.E.2d at 475. “The trial court did not err in concluding that the bid provision of a list of subcontractors was immaterial and could be waived.” *Id.* at 213, 626 S.E.2d at 475.

court emphasized, and “produced the lowest possible responsible price.”²¹⁷

D. Regulation

The county’s regulatory power, typically a high-profile issue for local government litigation, perpetuated its propensity during the survey period.²¹⁸ In *105 Floyd Road, Inc. v. Crisp County*,²¹⁹ the supreme court elaborated a “vagueness analysis” to conclude that a county’s development code²²⁰—defining sexually-oriented adult use according to an establishment’s “substantial business purpose”²²¹—violated due process.²²² The court reasoned that the definition “does not look to stock in trade, gross sales, floor space or some other readily quantifiable standard,” but “rather looks solely to the ‘purpose’ of the business.”²²³ It provided no “guidelines for those establishments seeking to operate within the County to enable them to determine what amount of ‘purpose’ qualifies as ‘substantial.’”²²⁴ Finally, “the ordinance provides no guidelines to enable a reasonable person to determine at what point the offering of sexually-explicit material to the public becomes a *substantial* purpose of its business.”²²⁵

217. *Id.* at 213, 626 S.E.2d at 475. “The trial court correctly found that it was unlikely that [the plaintiff] would prevail on the merits, and did not abuse its discretion in denying the interlocutory injunction.” *Id.*

218. For perspective on county 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).

219. 279 Ga. 345, 613 S.E.2d 632 (2005).

220. CRISP COUNTY, GA., UNIFIED LAND DEV. CODE § 3.01.02 (2001). The county argued that the defendant’s business would qualify under its code as a sexually-oriented business and challenged its operation without a special use permit. *105 Floyd Road*, 279 Ga. at 345, 613 S.E.2d at 632-33.

221. *105 Floyd Road*, 279 Ga. at 345, 613 S.E.2d at 632. The code defined a covered business as “[a]ny establishment that, as a regular and substantial business, offers services, . . . or materials” coming within the code’s definition. *Id.*

222. *Id.* at 350, 613 S.E.2d at 636.

223. *Id.* at 348, 613 S.E.2d at 635. To make that determination, “the County in reality focuses . . . on the nature of the other, non-sexually-explicit materials offered by the establishment to determine whether it qualifies as a sexually-oriented adult use.” *Id.* at 349, 613 S.E.2d at 635.

224. *Id.* at 348, 613 S.E.2d at 635.

225. *Id.* at 349, 613 S.E.2d at 635 (emphasis supplied by the court). “Reasonable persons are left to guess at the meaning of this language and differ as to its application.”

The “drastic remedy” of mandamus constitutes a popular effort at overcoming county regulatory schemes; the survey period accurately captured the supreme court’s pervading reluctance to embrace those efforts.²²⁶ An apt example, *Screven County Planning Commission v. Southern States Plantation, LLLP*,²²⁷ featured an action to mandamus county approval of a developer’s subdivision “sketch plan.”²²⁸ The county’s refusal rested upon its land development regulations, which it interpreted to require the developer’s paving of existing county roads abutting the subdivision.²²⁹ Although the supreme court affirmed the trial judge’s refusal to require the paving, the court balked at the lower court’s issuance of a mandamus.²³⁰ County regulations granted discretion to determine the adequacy of existing roads, asserted the court, and “because the Planning Commission has not exercised that discretion, the trial court erred in ruling that [the plaintiff] was entitled to approval of its sketch plan.”²³¹

The court’s reluctance likewise manifested itself in litigation over landfills. In *Jackson County v. Earth Resources, Inc.*,²³² the court

Id. Reversing the trial court’s injunction, the supreme court declared that “[t]he challenged definition is too vague to be enforced and is, therefore, unconstitutional under the due process clauses of the Georgia and United States constitutions.” *Id.* at 350, 613 S.E.2d at 636. Later in the year, in *105 Floyd Road, Inc. v. Crisp County*, 279 Ga. 825, 620 S.E.2d 826 (2005), the supreme court returned to the scene to declare that the store and manager could not be held in contempt for violating the trial court’s injunction, which had been granted while the defendants’ appeal to the supreme court was pending. *Id.* at 825, 620 S.E.2d at 826. “It is well established that ‘an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed.’” *Id.* (quoting *Fulton County Comm’rs v. Davis*, 213 Ga. 792, 794, 102 S.E.2d 180, 183 (1958)).

226. For extensive treatment of the phenomenon of mandamus, see R. PERRY SENTELL, JR., *MISCASTING MANDAMUS IN GEORGIA LOCAL GOVERNMENT LAW* (1989).

227. 279 Ga. 404, 614 S.E.2d 85 (2005).

228. *Id.* at 404, 614 S.E.2d at 86. The plan called for developing thirty-two lots, some of which would access the subdivision through two existing unpaved county roads. *Id.*

229. *Id.* at 404-05, 614 S.E.2d at 86. The county planning commission “stated that it interpreted Section 6.1 to require the paving of the county roads, and it specifically denied the sketch plan based on that interpretation.” *Id.*

230. *Id.* at 406-07, 614 S.E.2d at 87. “The key issue is whether the word ‘streets’ in Section 6.1 refers only to interior streets of a subdivision that will be constructed as part of the subdivision or also refers to existing public roads that abut a proposed subdivision.” *Id.* at 405, 614 S.E.2d at 86. The court concluded that the regulation “is at least ambiguous concerning whether it requires the paving of existing, unpaved county roads that abut a proposed subdivision.” *Id.* at 406, 614 S.E.2d at 87.

231. *Id.* at 407, 614 S.E.2d at 87. The planning commission had based its denial on the paving issue, said the court, and had not considered the regulation’s granted discretion to determine road adequacy. *Id.* at 406-07, 614 S.E.2d at 87.

232. 280 Ga. 389, 627 S.E.2d 569 (2006).

reversed the trial judge's mandamus of a conditional use permit for a construction and demolition landfill.²³³ Reviewing the two public hearings on the matter, as well as the county's zoning ordinance,²³⁴ the court held the latter to leave the board with discretion in making its decision.²³⁵ Inquiring as to the existence of "any evidence" to support that decision,²³⁶ the court noted "very specific concerns" over truck traffic to the site, inconsistency with the comprehensive use plan, and groundwater contamination.²³⁷ The evidence clearly indicated that the county board had committed no "gross abuse" of its discretion in denying the permit.²³⁸

The court reached a similar decision in *Murray County v. R & J Murray, LLC*,²³⁹ here involving the county's issuance of a verification to the state EPD for plaintiff's solid waste landfill.²⁴⁰ Once again reversing the trial court,²⁴¹ and overruling a prior decision by the court of appeals,²⁴² the supreme court focused upon the material statutes.²⁴³ Under those statutes, the court held, the county was not

233. *Id.* at 391, 627 S.E.2d at 572.

234. JACKSON COUNTY, GA., ZONING ORDINANCE § 13.60 (2004).

235. *Earth Resources*, 280 Ga. at 390, 627 S.E.2d at 571. The ordinance "sets forth guidelines to follow and minimum requirements to meet, but clearly leaves the Board with discretion." *Id.* Thus, mandamus would be proper "only if the denial of the permit was a gross abuse of discretion." *Id.*

236. *Id.* at 391, 627 S.E.2d at 571 (quoting *Fulton County v. Congregation of Anshei Chesed*, 275 Ga. 856, 859, 572 S.E.2d 530, 532 (2002)). The court stressed the test to be whether there was any evidence to support the county board, not the decision of the trial court. *Id.* Further, "it is not the law that only expert opinions could be presented to, and considered by, the Board, nor is the superior court to weigh the evidence before it; the question is whether there was any evidence before the Board to support its decision." *Id.*

237. *Id.*, 627 S.E.2d at 571-72.

238. *Id.*, 627 S.E.2d at 572. "As the record supported the Board's decision to deny the special use permit, the superior court erred in ordering that the Board issue it." *Id.*

239. 280 Ga. 314, 627 S.E.2d 574 (2006).

240. *Id.* at 314, 627 S.E.2d at 575. The verification was required by O.C.G.A. section 12-8-24 (2006). *Id.*, 627 S.E.2d at 575-76.

241. *Id.*, 627 S.E.2d at 576. The trial court held the county had abused its discretion in the matter and granted a writ of mandamus that the county issue the verification. *Id.* at 315, 627 S.E.2d at 576.

242. *Id.* at 315, 627 S.E.2d at 576 (discussing *Butts County v. Pine Ridge Recycling, Inc.*, 213 Ga. App. 510, 445 S.E.2d 294 (1994), *overruled by Murray County*, 280 Ga. 314, 627 S.E.2d 574). In *Butts County*, the court of appeals held that the county could only consider environmental and land use factors in determining whether to issue a verification. 213 Ga. App. at 512, 445 S.E.2d at 296. The court in *Murray County* expressly noted: "we hereby overrule the decision in *Butts County*." *Murray County*, 280 Ga. at 315, 627 S.E.2d at 576.

243. *Murray County*, 280 Ga. at 316-17 n.13, 627 S.E.2d at 577-78 n.13 (noting O.C.G.A. § 12-8-31 (2006), as well as rules promulgated by the Department of Community

restricted to environmental and land use factors in determining a proposal's consistency with its solid waste management plan ("SW-MP").²⁴⁴ Accordingly, the county had not erred in considering geographic proximity to its existing landfill nor economic factors in denying the plaintiff's proposal.²⁴⁵ Indeed, the court concluded, "we find that a local government is authorized to consider any relevant factor in determining whether a proposed facility is consistent with its SW-MP. . . ."²⁴⁶

E. Openness

The "openness in government" issue arose in rather odd guise during the survey period—at the behest of the government's own employee.²⁴⁷ In *Wallace v. Greene County*,²⁴⁸ a terminated county employee claimed attorney fees under the Open Records Act²⁴⁹ regarding a request for his personnel file. Although the defendants had failed to answer the request (until litigation),²⁵⁰ they urged that the plaintiff had shown no violation of the Act: he had shown neither a follow-up to his request nor his being denied the right of inspection. Rejecting that construction of the statute,²⁵¹ the court of appeals reasoned that "the person or agency having custody of the records" must "affirmatively respond to an open records request within three business days"²⁵² Although the plaintiff had sufficiently shown violation,²⁵³ the court nevertheless

Affairs ("DCA"), GA. COMP. R. & REGS. 110-4-3.01(2)(c).

244. *Murray County*, 280 Ga. at 317-18, 627 S.E.2d at 578. "The regulations issued by the DCA . . . make clear that a local government is not limited in its SWMP to consideration of environmental and land use factors." *Id.* at 317, 627 S.E.2d at 577. "Thus, in determining whether a proposed facility is consistent with its SWMP, a local government is authorized to consider any relevant factor that it appropriately considered in the SWMP itself." *Id.*, 627 S.E.2d at 578.

245. *Id.* at 317, 627 S.E.2d at 578.

246. *Id.* at 315, 627 S.E.2d at 576-77. The court thus reversed the trial court's mandamus. *Id.* at 318, 627 S.E.2d at 578.

247. For perspective, see R. Perry Sentell, Jr., *The Omen of "Openness" in Local Government Law*, 13 GA. L. REV. 97 (1978).

248. 274 Ga. App. 776, 618 S.E.2d 642 (2005).

249. O.C.G.A. § 50-18-73(b) (2005).

250. *Wallace*, 274 Ga. App. at 777-78, 618 S.E.2d at 645. Shortly after the plaintiff filed his lawsuit, the county manager mailed a copy of the plaintiff's entire personnel file to his counsel. The plaintiff sued both the manager and the county. *Id.*

251. See O.C.G.A. §§ 50-18-70(f), -72(h) (2006). "Construed together, these provisions require an affirmative response to an open records request within three business days." *Wallace*, 274 Ga. App. at 783, 618 S.E.2d at 648.

252. *Wallace*, 274 Ga. App. at 783, 618 S.E.2d at 649.

253. *Id.* at 784, 618 S.E.2d at 649. The court asserted that the Act "was violated when neither [the county manager] nor anyone else on behalf of the County responded in any

remanded the case in order to resolve the “second prong” issue; that is, whether defendants’ noncompliance was “substantially justified.”²⁵⁴ Only with the determination of that issue, the court held, could the plaintiff’s claim for attorney fees be decided.²⁵⁵

F. Contracts

Of the survey period’s two contractual claims against counties, neither comprised an ordinary contract action. A jury’s verdict in quantum meruit attracted the court of appeals’s review in *Brown v. Penland Construction Co.*,²⁵⁶ the plaintiff’s effort to recover from the county school district, school board, and former coach for construction of an indoor baseball facility.²⁵⁷ Because quantum meruit “is another name for an implied contract,”²⁵⁸ and because no written contract existed between the parties, the court rejected the trial verdict’s theory as precluded by the statutory mandate that county contracts “shall be in writing and entered on its minutes.”²⁵⁹ However, the court countered, it could sustain the verdict “for another reason,”²⁶⁰ a reason inhering in the constitutional precept of eminent domain.²⁶¹ That precept, an

manner to the open records request made by [the plaintiff’s] counsel within the required three-day period.” *Id.*

254. *Id.* The court noted that “it is unclear from the record if the trial court considered whether the appellees ‘acted without substantial justification . . . in not complying with [the ORA]’ or whether ‘special circumstances exist[ed]’ that counseled against awarding fees.” *Id.* (citing O.C.G.A. § 50-18-73(b) (2006)).

255. *Id.*

256. 276 Ga. App. 522, 623 S.E.2d 717 (2005), *cert. granted.*

257. *Id.* at 522-23, 623 S.E.2d at 718. The plaintiff construction company had dealt primarily with the former coach in erecting the facility. The project was approved by the school board, but upon its completion, the board refused to pay for the building. The jury had returned a verdict against the coach, the board, and the district in the amount of \$150,000. *Id.*

258. *Id.* at 524, 623 S.E.2d at 719.

259. *Id.* (quoting O.C.G.A. § 36-10-1 (2006)). For analysis of the statute, its history and application by the courts, see R. Perry Sentell, Jr., *County Contracts in Georgia: “Written and Entered,”* 32 MERCER L. REV. 283 (1980). Said the court in *Brown*: “To be enforceable, therefore, a contract with a county or subdivision of the county must comply with those requirements. . . . As a result, ‘quantum meruit is not available when a county is the defendant.’” 276 Ga. App. at 524, 623 S.E.2d at 719 (quoting *Cherokee County v. Hause*, 229 Ga. App. 578, 579, 494 S.E.2d 234, 235 (1997)).

260. *Brown*, 276 Ga. App. at 524, 623 S.E.2d at 719.

261. *Id.* at 524-25, 623 S.E.2d at 719-20. “Basic principles of constitutional law require that when property is taken by any governmental entity, including a county (or a subdivision or agency thereof), fair and adequate compensation must be paid to the owner of the property.” *Id.* at 524, 623 S.E.2d at 719 (citing GA. CONST. art. I, § 3, para. 1(a)).

express exception to governmental immunity,²⁶² found perfect application to the case: “Because the school district refused to pay for the building it is using for public purposes, its conduct is a ‘taking’ for constitutional purposes.”²⁶³ Rejecting requests that both the school board and the former coach be excluded from coverage,²⁶⁴ the court affirmed the jury’s verdict of liability.²⁶⁵

*Donnalley v. Sterling*²⁶⁶ featured a third-party beneficiary claim against a coach and school district for a player’s drowning at football camp.²⁶⁷ Seeking to avert the difficulties of tort immunity,²⁶⁸ the plaintiffs relied upon a rental contract the coach signed to use the camp.²⁶⁹ Reviewing their charge of a breached commitment to provide qualified supervisory personnel,²⁷⁰ the court sketched the plaintiffs’ prerequisite for standing: “The contracting parties’ intention to benefit the third party must be shown on the face of the contract.”²⁷¹ Here,

262. *Id.* at 524-25, 623 S.E.2d at 720. “[I]f the owner of property taken for a public purpose brings suit to enforce the constitutional right to just compensation, sovereign immunity is not a bar.” *Id.* at 525, 623 S.E.2d at 720.

263. *Id.* at 525, 623 S.E.2d at 720.

264. *Id.* at 525-26, 623 S.E.2d at 720-21. As for the board, “it is the named grantee on the deed to the property” and “has held itself out as a legal entity.” *Id.* at 526, 623 S.E.2d at 720. The coach had “benefitted [sic] economically” from baseball camps held in the facility, and it had “greatly enhanced his reputation.” *Id.*, 623 S.E.2d at 721.

265. *Id.* at 527, 623 S.E.2d at 721. “[W]e cannot conclude that the jury’s verdict of \$150,000 was so excessive that it warrants reversal.” *Id.*

266. 274 Ga. App. 683, 618 S.E.2d 639 (2005).

267. *Id.* at 683, 618 S.E.2d at 639-40. The plaintiffs’ son drowned on the first day of a three-day football training camp while the players were riding a “zip line” into the lake. The players were supervised by an assistant football coach who was certified to teach first aid but held no certificate in water rescue. After dropping from the line into the lake, the plaintiffs’ son began to struggle. Even though other players and coaches attempted to assist the boy, he was not breathing when he was finally pulled from the water. *Id.* at 683-84, 618 S.E.2d at 639-40.

268. *Id.* at 683, 618 S.E.2d at 640. The trial court found that the school district and the coach were shielded from tort liability on the grounds of sovereign and official immunity. *Id.*

269. *Id.* at 684, 618 S.E.2d at 640. The defendant coach had signed a one-page rental contract with the YMCA for the use of the Athens “Y” Camp, agreeing that the football team, not the YMCA, was responsible for providing qualified personnel to supervise the lake during water activities. *Id.*

270. *Id.* The plaintiffs argued that their son was a third-party beneficiary of the rental contract, which the defendants had breached by failing to provide qualified personnel at the lake. The trial court had denied the defendants’ motion for summary judgment on the contract claim. *Id.* at 684-85, 618 S.E.2d at 640.

271. *Id.* at 685, 618 S.E.2d at 641 (quoting *Brown v. All-Tech Inv. Group*, 265 Ga. App. 889, 897, 595 S.E.2d 517, 524 (2004)). It was not enough, said the court, that the party would benefit from the performance of the agreement. *Id.* at 686, 618 S.E.2d at 641.

the court distinguished, “[i]t is clear that the contract, when read as a whole, was intended to delineate the relative duties and responsibilities of the parties.”²⁷² Any benefit to the plaintiffs’ decedent “was merely incidental and did not render him a third-party beneficiary to the contract.”²⁷³ Minus the “intent to confer a direct benefit upon the individual players,”²⁷⁴ the defendants enjoyed “summary judgment on the [the plaintiffs’] breach of contract claim.”²⁷⁵

G. Taxation

County taxation claimed the attention of both appellate courts during the period, on issues highly diverse in context. *Community Renewal & Redemption, LLC v. Nix*²⁷⁶ featured uncertainty over when a county’s interest in property, acquired at a tax sale, ripened into fee simple.²⁷⁷ All agreed that until a 1989 statute required adverse possession, the county’s title had vested simply by the passage of time.²⁷⁸ Disagreement arose over whether the modifying statute took effect upon its passage or only when the court later recognized the change.²⁷⁹ A

272. *Id.* at 686, 618 S.E.2d at 641. The court observed that the intent of the contract was

merely to clarify that it was the football team, and not the camp, that had the responsibility over the lake area and its associated activities and specifically to relieve Athens “Y” Camp of this responsibility. While the members of the football team may have incidentally benefitted [sic] from this agreement, we find nothing in the language indicating an intent to confer a direct benefit upon the individual players to protect them from physical harm.

Id.

273. *Id.*

274. *Id.*

275. *Id.*, 618 S.E.2d at 642. The court thus reversed the trial court’s refusal to grant the defendants’ motion for summary judgment on the third-party contract claim. *Id.*

276. 279 Ga. 840, 621 S.E.2d 722 (2005).

277. *Id.* at 840, 621 S.E.2d at 722-23. At a tax sale in 1993, the county took a tax deed on the property and held it until selling it to the defendant in 1999. The former owner sold the property to the plaintiff in 2003, and the plaintiff sought to force redemption against the county’s purchaser. *Id.*

278. *Id.* at 842, 621 S.E.2d at 723. The former rule existed by virtue of O.C.G.A. section 48-4-48 (1999), which was amended in 1989 to make “clear that for all tax deeds executed after July 1, 1989, the ripening of title must occur by prescription, not by the mere passage of time.” *Id.* at 841, 621 S.E.2d at 723; see 1949 Ga. Laws 1132-33.

279. *Community Renewal*, 279 Ga. at 841, 621 S.E.2d at 723. The court had tendered that recognition by virtue of its decision in *Blizzard v. Moniz*, 271 Ga. 50, 518 S.E.2d 407 (1999): “[T]he plain language of O.C.G.A. § 48-4-48 [1999 & Supp. 2006] requires . . . adverse possession by the tax deed grantee in order for title to ripen under the statute.” *Community Renewal*, 279 Ga. at 841, 621 S.E.2d at 723 (quoting *Blizzard*, 271 Ga. at 54, 518 S.E.2d at 410-11). Here, the trial court held that the amendment to the statute did not change the existing rule until the court’s decision in *Blizzard* in 1999. *Id.* Therefore,

unanimous supreme court afforded the issue summary disposition: “The requirement for adverse possession . . . became effective in 1989 when the amendment to the statute became effective, not when [the court] recognized the change in 1999.”²⁸⁰ Accordingly, the court reversed the trial judge’s decision for the county’s purchaser.²⁸¹

In *Pope v. Board of Commissioners of Fulton County*,²⁸² the court of appeals reviewed the county’s removal of tax assessors for failing to complete the tax digest in a timely manner.²⁸³ Emphasizing the commissioners’ “wide latitude” in determining cause for removal,²⁸⁴ the court searched the record for “any evidence” supporting their decision.²⁸⁵ It promptly found that evidence in a letter the petitioners had submitted for their hearing: that letter “contained at least tacit admissions that Petitioners did not complete their revisions and assessments by the statutory deadline.”²⁸⁶ Accordingly, “[t]hese implicit acknowledgments constitute ‘some evidence’ that Petitioners failed to comply with O.C.G.A. § 48-5-302 and therefore establish cause for their removal.”²⁸⁷

the court rendered summary judgment for the county’s grantee, thereby denying the plaintiff’s power of redemption. *Id.* at 840, 621 S.E.2d at 723.

280. *Id.* at 841, 621 S.E.2d at 723. The court cited *Smith v. State*, 218 Ga. App. 429, 461 S.E.2d 553 (1995), “recognizing that subsequent statutory amendment supersedes an appellate court’s statutory construction.” *Id.* at 841-42, 621 S.E.2d at 723.

281. *Id.* at 842, 621 S.E.2d at 724. “Since the tax deed in this case was executed after July 1, 1989, the pre-1989 provision . . . was no longer in effect, and the trial court erred in ruling that title had vested in [the] County by virtue of the passage of time.” *Id.*, 621 S.E.2d at 723.

282. 276 Ga. App. 121, 622 S.E.2d 471 (2005).

283. *Id.* at 121, 622 S.E.2d at 472. O.C.G.A. section 48-5-302 (1999 & Supp. 2006) requires tax assessors to complete their county tax digests by July 1, or June 1 if taxes are paid in installments. The commissioners had notified petitioners of the charges, and had afforded them an opportunity to respond prior to a hearing. The petitioners had submitted a letter to the commissioners denying the charges and had attended the hearing. *Id.* at 121-24, 622 S.E.2d at 472-74.

284. *Id.* at 123-24, 622 S.E.2d at 474. As long as no “abuse of such discretion” was shown, said the court, it should not substitute its findings for those of the appointing authority. *Id.*

285. *Id.* at 124, 622 S.E.2d at 474. “We will uphold the decision if there is any evidence to support it.” *Id.*

286. *Id.* “[T]he letter stated, among other things, that it was ‘impossible’ to comply with O.C.G.A. § 48-5-302 and that no county . . . had done so since 1988. These sweeping avowals could not coexist with a claim that Petitioners had met the deadline.” *Id.* at 125, 622 S.E.2d at 475.

287. *Id.* at 125, 622 S.E.2d at 475. The court thus affirmed the trial judge’s decision upholding the removal. *Id.* at 126, 622 S.E.2d at 475.

Finally, *Greene County Board of Tax Commissioners v. Higdon*²⁸⁸ presented a taxpayers' challenge to the county's creation of a special tax district consisting of all real property in the county, and extracting an assessment from each land parcel to fund revenue bonds for hospital services.²⁸⁹ Receptive to that challenge, the trial court distinguished an "assessment" from a "tax," finding that the former must provide a benefit to each landowner, and invalidated the assessments.²⁹⁰ On the county's appeal, the court of appeals declared the trial judge's distinction "inapposite" and reversed.²⁹¹ Sketching the constitution's authorization for the tax district,²⁹² the court viewed the "benefit" issue as residing within the county's conclusive discretion, "except in the most extreme cases."²⁹³ Relying primarily upon tax cases throughout its opinion,²⁹⁴ the court finally turned to the assessment before it: "This is not an extraordinary case, and there is no evidence of abuse of legislative discretion."²⁹⁵

H. Liability

Claimants sought several avenues around the Georgia county's historic sovereign immunity during the survey period, enjoying varying (and limited) degrees of success.²⁹⁶ The plaintiff in *Currid v. DeKalb State*

288. 277 Ga. App. 350, 626 S.E.2d 541 (2006).

289. *Id.* at 350-51, 626 S.E.2d at 542-43. After creating the tax district and imposing an assessment of \$100 per parcel of land in the county, the commissioners entered into a contract with the county hospital authority which would issue revenue bonds for indigent care at the hospital with the county making bond payments from its assessments. The bonds received validation in a proceeding before the county superior court without taxpayer intervention. *Id.*

290. *Id.* at 352-53, 626 S.E.2d at 544. The trial court concluded that "the hospital service assessment was not authorized because it did not provide a benefit to each parcel of land owned by the Taxpayers." *Id.* at 352, 626 S.E.2d at 544.

291. *Id.* at 353, 626 S.E.2d at 544. The court noted that it was operating within "the context of constitutionally authorized special districts and the powers provided to those special districts. . . ." *Id.*

292. *Id.* at 352, 626 S.E.2d at 543-44 (citing GA. CONST. art. IX, § 2, paras. 3, 6; O.C.G.A. § 48-13-50.1 (2006)). "It follows that the county was authorized to create the District for the purpose of providing health services." *Id.*, 626 S.E.2d at 544.

293. *Id.* at 353, 626 S.E.2d at 544. As an example of an "extreme case," the court noted *City of Atlanta v. Hamlein*, 96 Ga. 381, 23 S.E. 408 (1895). *Id.*

294. See, e.g., *McLennan v. Aldredge*, 223 Ga. 879, 159 S.E.2d 682 (1968); *Bd. of Comm'rs of Taylor County v. Cooper*, 245 Ga. 251, 264 S.E.2d 193 (1980).

295. *Higdon*, 277 Ga. App. at 354, 626 S.E.2d at 545. The court thus reversed the trial court's order setting aside the assessment. *Id.*

296. For perspective on county liability (and immunity), see R. Perry Sentell, Jr., *Georgia Local Government Tort Immunity: 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.

*Court Probation Department*²⁹⁷ sued under “The Community Service Act”²⁹⁸ for the wrongful death of a probationer while performing court-ordered community service for the county’s public works department.²⁹⁹ The statute imposes liability for gross negligence,³⁰⁰ and the county had assigned decedent to stand on the back of a garbage truck without the requisite safety shoes.³⁰¹ Under those circumstances, held the court of appeals, the plaintiff had raised a jury question on the county’s gross negligence, thereby surviving a motion for summary judgment.³⁰²

The court considered two instances pursued under the waiver of immunity resulting from the local government’s purchase of motor vehicle liability insurance.³⁰³ Initially, *Spalding County v. Blanchard*,³⁰⁴ a county inmate’s action for injuries from a backhoe,³⁰⁵ focused upon burden of proof.³⁰⁶ To the claimant’s position that the

ST. U. L. REV. 405 (1993); R. Perry Sentell, Jr., *Local Government Liability Litigation: Numerical Nuances*, 38 GA. L. REV. 633 (2004).

297. 274 Ga. App. 704, 618 S.E.2d 621 (2005).

298. O.C.G.A. § 42-8-71 (1997). This statute “governs participation of probationers in community service programs.” *Currid*, 274 Ga. App. at 707, 618 S.E.2d at 624. The county’s public works department was an “agency” participating in the program. *Id.* at 704, 618 S.E.2d at 623.

299. *Currid*, 274 Ga. App. at 704, 618 S.E.2d at 623. The plaintiff’s decedent had been sentenced to twelve months probation and forty hours of community service. Upon reporting for service, the decedent was assigned to the county sanitation department and fell from the back of a garbage truck when it turned onto a side street at about fifteen miles per hour. *Id.* at 705-06, 618 S.E.2d at 623-24.

300. See O.C.G.A. § 42-8-71(d) (limiting liability of a participating agency only for actions “which constitute gross negligence, recklessness, or willful misconduct”).

301. *Currid*, 274 Ga. App. at 708-09, 618 S.E.2d at 625-26. Although the sanitation department required certain safety shoes for workers, the decedent wore his own while performing his service work. *Id.*

302. *Id.* at 709, 618 S.E.2d at 626. “On motion for summary judgment, we cannot resolve the facts; a jury must decide whether this evidence supports a finding of gross negligence.” *Id.* The court thus reversed the trial court’s grant of the county’s motion. *Id.* at 710, 618 S.E.2d at 626.

303. See O.C.G.A. § 33-24-51 (2005). For history and analysis of the statute, see R. Perry Sentell, Jr., *Tort Liability Insurance in Georgia Local Government Law*, 24 MERCER L. REV. 651 (1973).

304. 275 Ga. App. 448, 620 S.E.2d 659 (2005).

305. *Id.* at 448, 620 S.E.2d at 659. The plaintiff had been assigned to a work detail and, during the performance of his assignment, received injuries allegedly caused by a correctional officer’s misuse of a backhoe. *Id.*

306. *Id.* at 448-49, 620 S.E.2d at 660. Here, posited the court, “the question is whether the plaintiff or the defendants bear the burden of showing waiver of a well-pled defense of sovereign immunity.” *Id.* The trial court had denied the county’s motion for summary judgment. *Id.*

county had failed to show lack of waiver by the purchase of insurance,³⁰⁷ the court was adamant: Sovereign immunity constitutes a privilege that is subject to waiver, “and the waiver must be established by the party seeking to benefit from the waiver.”³⁰⁸ The plaintiff, having “failed to point to any evidence” of insurance, also failed summary judgment.³⁰⁹

The other case, *McElmurray v. Augusta-Richmond County*,³¹⁰ conceded the fact of insurance but queried whether the plaintiffs’ damages had arisen from the prerequisite county “use” of a motor vehicle.³¹¹ There, the parties entered into an agreement under which the county applied sewage sludge on the plaintiffs’ fields for a period of eleven years,³¹² allegedly causing damage to the plaintiffs’ livestock and lands.³¹³ The plaintiffs sued on a number of liability theories,³¹⁴ the county claimed sovereign immunity, and the plaintiffs pleaded insurance waiver. The county having used trucks to apply the sludge,

307. *Id.* at 448, 620 S.E.2d at 660. “[The plaintiff] argued that the burden was on the defendants to show that sovereign immunity had not been waived through the purchase of insurance.” *Id.*

308. *Id.* at 449, 620 S.E.2d at 660 (quoting *Ga. Dep’t of Human Res. v. Poss*, 263 Ga. 347, 348, 434 S.E.2d 488, 490 (1993), *overruled in part on other grounds* by *Hedquist v. Merrill Lynch*, 272 Ga. 209, 210, 528 S.E.2d 508, 510 (2000)).

309. *Id.* “[T]he trial court erred by denying summary judgment to the county, the warden, and the correctional officer in their official capacities.” *Id.*

310. 274 Ga. App. 605, 618 S.E.2d 59 (2005).

311. *Id.* at 610-11, 618 S.E.2d at 64-65. “O.C.G.A. § 33-24-51(a) authorizes a municipal corporation, a county, or any other political subdivision of this state to secure insurance to cover liability for damages ‘arising by reason of ownership, maintenance, operation, or use of any motor vehicle.’” *Id.* at 610, 618 S.E.2d at 64.

312. *Id.* at 606, 618 S.E.2d at 61-62. The defendant developed a land application program to dispose of sewage sludge and contacted farmers to promote the sludge as a fertilizer. *Id.*, 618 S.E.2d at 61. “Beginning in 1979, the [plaintiffs] entered into a series of agreements under which they granted the [defendant] temporary licenses and easements for the spreading of sewage sludge upon described tracts of land.” *Id.*

313. *Id.*, 618 S.E.2d at 62. “In the late 1980s, [the plaintiffs] began experiencing significant problems with crop growth and production on their lands” and their cows “began dying in excessive numbers.” *Id.*

314. *Id.* at 606-07, 618 S.E.2d at 62. The plaintiffs alleged the county’s misrepresentation of the sludge as a beneficial fertilizer and its concealment of metal contamination rendered the sludge an environmental hazard. *Id.* at 606, 618 S.E.2d at 62. They sued the county for “inverse condemnation, breach of contract, fraud, strict tort liability, negligence, products liability, nuisance, trespass, conversion, and violation of the Georgia Hazardous Site Response Act (‘HSRA’).” *Id.* at 605-06, 618 S.E.2d at 61. The court of appeals affirmed the trial court’s decisions against plaintiffs on inverse condemnation (barred because property owners consented to the actions), on violation of HSRA (does not expressly waive sovereign immunity), and on breach of contract (statute of limitations had run). *Id.* at 608, 613-14, 618 S.E.2d at 63, 66-68.

the claimants argued, the damage thus arose from the “use” of motor vehicles.³¹⁵ Agreeing, a sharply divided (four-to-three) court of appeals reversed the trial judge’s dismissal of the plaintiffs’ tort claims.³¹⁶ Statutes³¹⁷ permitted local governments to waive their immunity for claims arising from the negligent “use” of motor vehicles, the court reasoned, and here “motor vehicles were . . . used to spread the sludge on plaintiffs’ lands.”³¹⁸

The “constitutional tort” exception to sovereign immunity³¹⁹ claimed a period presence in *Brown v. Dorsey*,³²⁰ an action against the county for its sheriff’s murder of the sheriff-elect. Charging a violation of 42 U.S.C. § 1983 (2000), the plaintiff alleged the sheriff’s utilization of department resources and manpower to kill her husband. He had acted, she asserted, under color of state law and as county policymaker.³²¹ Reviewing the plaintiff’s charges under both federal³²² and state³²³

315. See *id.* at 606, 618 S.E.2d at 62. See generally O.C.G.A. § 33-24-51(b) (2005 & Supp. 2006).

316. *McElmurray*, 274 Ga. App. at 609, 618 S.E.2d at 63. The court viewed the case as controlled by *Mitchell v. City of St. Marys*, 155 Ga. App. 642, 271 S.E.2d 895 (1980), where “the city was using a motor vehicle to spray a toxic chemical.” *McElmurray*, 274 Ga. App. at 612, 618 S.E.2d at 66.

317. See, e.g., O.C.G.A. § 33-24-51(a).

318. *McElmurray*, 274 Ga. App. at 613, 618 S.E.2d at 66. “The trial court thus erred in dismissing [the plaintiffs’] tort claims on the ground that liability insurance for motor vehicle use would not be applicable.” *Id.* A spirited dissenting opinion for three judges argued that “[b]ecause the damages claimed in this case did not occur as a result of the county’s negligent use of a motor vehicle, they are not covered by the liability insurance purchased by the county.” *Id.* at 620, 618 S.E.2d at 71 (Andrews, P.J., dissenting). Rather, “[t]he damages claimed by [the plaintiffs] as a result of this sludge have no relation to the manner in which the sludge was applied to the land and did not occur during the spreading of the sludge.” *Id.* at 621, 618 S.E.2d at 71 (Andrews, P.J., dissenting). The dissent relied upon several earlier cases, including *Harry v. Glynn County*, 269 Ga. 503, 504 501 S.E.2d 196, 198 (1998) (holding that an ambulance was not in “use,” although parts of diagnosis and treatment were conducted while the appellant was being transported to the hospital in the vehicle).

319. For treatment of the “constitutional tort” in Georgia local government law, 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).

320. 276 Ga. App. 851, 625 S.E.2d 16 (2005).

321. *Id.* at 852, 625 S.E.2d at 18. “Specifically, she contends that the County is liable to her for the death of her husband because [the sheriff] used the powers of his office to accomplish the murder.” *Id.*

322. *Id.* at 855, 625 S.E.2d at 21. The court found “very persuasive” the reasoning of *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003). *Id.*

323. *Id.* at 855 n.25, 625 S.E.2d at 21 n.25. The court relied upon the Georgia Supreme Court’s decision in *Bd. of Comm’rs of Dougherty County v. Saba*, 278 Ga. 176, 598 S.E.2d 437 (2004). *Id.*

precedent, the court of appeals delineated the precise status of a county sheriff: “[T]he Constitution has made the sheriff independent from the County, notwithstanding the designation of the sheriff as a ‘county officer.’”³²⁴ Moreover, the county possesses no control over the sheriff’s department personnel,³²⁵ nor can the county control the manner in which the sheriff spends his allocated funds.³²⁶ “[T]he trial court did not err in dismissing the County as a party,” the court concluded, since the sheriff “was not a final policymaker for the County when he used departmental personnel and resources to kill [his successor].”³²⁷

Increasingly, claimants strive to circumvent sovereign immunity by recasting their county lawsuits into actions against county officers and employees personally.³²⁸ In this context, distinctions in both capacity and function play inordinately significant roles. Officers sued in their “official capacity” enjoy the county’s “sovereign” or “governmental immunity.”³²⁹ Officers sued in their “individual capacity” enjoy “qualified” or “official immunity” for “discretionary functions” performed without malice or intent.³³⁰ Officers sued in their “individual capacity” for “ministerial functions” enjoy neither “official immunity” nor “sovereign immunity” for their negligent conduct.³³¹ The survey period instanced all varieties and results.

The court of appeals opinion in *Wallace v. Greene County*³³² rang most of the changes. There, a terminated employee sued the county

324. *Id.* at 856, 625 S.E.2d at 21.

325. *Id.* “Therefore, the County cannot be held liable under § 1983 for [the sheriff’s] use of those personnel in connection with his heinous plot to kill [the sheriff-elect].” *Id.*

326. *Id.* “In the absence of the ability to control the funds after they have been allocated, the County cannot be held liable for the sheriff’s use of departmental resources to commit a § 1983 violation.” *Id.*

327. *Id.* at 856-57, 625 S.E.2d at 21. Although conceding that *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), prevented it “from affirming the dismissal on the ground that [the sheriff’s] decision to murder [the sheriff-elect] was one discrete decision and not a policy,” the court rested its conclusion on the point that the sheriff “was a policymaker for the state and not for the County with regard to the particular functions at issue.” *Id.* at 858-59, 625 S.E.2d at 23.

328. For treatment of the personal liability litigation in Georgia local government law, 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); R. Perry Sentell, Jr., “Official Immunity” in *Local Government Law: A Quantifiable Confrontation*, 22 GA. ST. U. L. REV. 597 (2006).

329. *See id.*

330. *See id.*

331. *See id.*

332. 274 Ga. App. 776, 618 S.E.2d 642 (2005).

manager and county attorney for obtaining an ex parte temporary restraining order against him.³³³ Initially, the court discounted the action against the officers in their “official capacity” as “in reality a suit against the county itself” and “barred by sovereign immunity.”³³⁴ As for the claim against the defendants in their “individual capacity,” the court held their “decisions . . . to seek a TRO in this case were not ministerial, but rather, were discretionary acts.”³³⁵ Accordingly, even “construed as gross negligence,”³³⁶ their statutory violation boded “insufficient to deprive [the defendants] of official immunity.”³³⁷

Yielding a similar conclusion, *Lancaster v. Effingham County*³³⁸ featured a taxpayers’ suit against county commissioners for an alleged assortment of unauthorized actions relating to the purchase, sale, and rezoning of lands in constructing a water treatment plant.³³⁹ Providing the most summary of dispositions, the court viewed the commissioners as having “exercised their discretion in connection with their official duties,” and absent malice or intent, “they are immune from personal liability.”³⁴⁰

Both the facts and the law presented closer questions for the court in *Hanse v. Phillips*,³⁴¹ a wrongful death claim for a motorist struck by

333. *Id.* at 776, 618 S.E.2d at 644. The plaintiff, the county’s former building and grounds maintenance superintendent, had a history of disciplinary problems on the job and other officers and employees had complained to the defendants that the plaintiff’s behavior was erratic toward them. *Id.* at 777, 618 S.E.2d at 644. The plaintiff charged the defendants with violating O.C.G.A. section 9-11-65(b) (2006) “when they obtained an ex parte [temporary restraining order (“TRO”)] against him without providing him notice as the adverse party.” *Id.* at 778, 618 S.E.2d at 645.

334. *Id.* at 778, 618 S.E.2d at 645-46.

335. *Id.* at 779, 618 S.E.2d at 646. “The manner in which concerns for public and workplace safety should be addressed is not a simple, specific duty,” said the court, and official immunity extended “to errors in the determination both of law and of fact.” *Id.* at 779-80, 618 S.E.2d at 646 (quoting *Partain v. Maddox*, 131 Ga. App. 778, 782, 206 S.E.2d 618, 621 (1974)).

336. *Id.* at 780, 618 S.E.2d at 647. “[The plaintiff] merely established that [the defendants] failed to comply with the requirements of O.C.G.A. § 9-11-65(b) in obtaining the TRO.” *Id.*

337. *Id.* “Accordingly, summary judgment as to [the plaintiff’s] cause of action for damages based on the ex parte TRO was proper under the official immunity doctrine.” *Id.*

338. 273 Ga. App. 544, 615 S.E.2d 777 (2005).

339. *Id.* at 544, 615 S.E.2d at 778. The court upheld the county’s power to take the various actions challenged. *Id.*

340. *Id.* at 547, 615 S.E.2d at 780. The court thus affirmed the trial court’s grant of summary judgment to the defendants. *Id.*

341. 276 Ga. App. 558, 623 S.E.2d 746 (2005), *cert. granted*.

a suspect fleeing the defendant police officer.³⁴² The plaintiffs charged violation of a “General Orders Manual” which vested the officer with pursuit responsibility but prohibited his “ramming” a fleeing vehicle.³⁴³ The trial court found a factual issue on whether the officer intentionally rammed the suspect, and “whether this action was willful, wanton and reckless.”³⁴⁴ Reversing, a four-judge majority in the court of appeals forcefully characterized the officer’s pursuit as “discretionary” conduct: “That he may have done so in contravention of certain directives in the policy manual does not change this pursuit into a ministerial function.”³⁴⁵ Moreover, the court adamantly rejected the trial judge’s rationale: “Willful, wanton and reckless conduct does not equate with the actual malice necessary to defeat a claim of official immunity.”³⁴⁶

Finally, the court reached its limit—and drew a crucial distinction—in *Leake v. Murphy*,³⁴⁷ an action for a stranger’s attack upon an elementary school student on school premises.³⁴⁸ The plaintiffs sued the county school superintendent and members of the school board³⁴⁹ for

342. *Id.* at 559, 623 S.E.2d at 747. The pursuit originated with the suspect’s allegedly striking an officer conducting a road safety check and concluded with his crashing into the decedent’s car. Plaintiffs sued the pursuing officer in his individual capacity. *Id.* at 558-60, 623 S.E.2d at 747-48.

343. *Id.* at 560, 623 S.E.2d at 748. “The manual also provides that ‘[d]eliberate physical contact between any two vehicles at any time will not be justified,’ and an ‘[o]fficer will not bump or ram a fleeing vehicle.’” *Id.*

344. *Id.* at 563, 623 S.E.2d at 750. “[T]he trial court’s order concludes that although the decision to initiate and continue a chase was discretionary, [the defendant] did not have discretion to violate county policy during the chase. The court found issues of fact as to whether [the defendant] had intentionally rammed the SUV.” *Id.* at 560-61, 623 S.E.2d at 748.

345. *Id.* at 562, 623 S.E.2d at 749.

346. *Id.* at 563, 623 S.E.2d at 750. “Here, there is nothing in the record which demonstrates any deliberate intention on the part of [the officer] to do a wrongful act or any intention to cause harm to [the decedent].” *Id.* at 564, 623 S.E.2d at 750. A dissenting opinion for three judges argued as follows: “[The officer] . . . was required to follow a simple, clear-cut directive that absolutely prohibited him from deliberately bumping or ramming a fleeing vehicle. . . . [T]he officer was therefore under a ministerial duty not to do just that. Whether he did so is a question of fact to be decided by a jury.” *Id.* at 566, 623 S.E.2d at 752 (Phipps, J., dissenting).

347. 274 Ga. App. 219, 617 S.E.2d 575 (2005).

348. *Id.* at 219, 617 S.E.2d at 577. A paranoid schizophrenic walked through the school’s front doors armed with a hammer and, coming upon a row of fourth grade students in a hallway, swung the hammer at the plaintiffs’ child and embedded the metal claws in her skull. *Id.* at 221, 617 S.E.2d at 577.

349. *Id.* at 219, 617 S.E.2d at 577. The plaintiffs also sued the school principal and her office staff for failing to comply with school policies and procedures on access and monitoring adopted after a previous incident, but the court affirmed the trial judge’s decision that they had failed to perform a discretionary act and were thus entitled to

negligence in failing to develop a statutorily required school safety plan,³⁵⁰ only to suffer the trial court's dismissal.³⁵¹ On appeal, the court of appeals highlighted the statute: it "mandates the preparation of a school safety plan which addresses security issues for every public school in this state."³⁵² The duty imposed, the court declared, "is absolute," thus "ministerial,"³⁵³ and the defendants' nonperformance received no protection by official immunity.³⁵⁴ It followed "that the trial court erred in dismissing that portion of the complaint which alleges that the Superintendent and the Board members failed to develop a safety plan for the school"³⁵⁵

With the case thus resolved "[a]t this procedural juncture,"³⁵⁶ the court nevertheless (and gratuitously) proceeded to extend its analysis. Accordingly, it took express issue with the plaintiffs' further contention "that the manner in which a school safety plan is prepared, and its ultimate contents, require solely the performance of ministerial functions."³⁵⁷ Rather, the material statute clearly indicated that "the development of the contents and manner of enforcement of a school safety plan are discretionary functions."³⁵⁸ Here, the court reiterated, "[i]t is the total absence of any plan which precludes dismissal of the lawsuit."³⁵⁹ Alternatively, however, "if a motion for summary judgment is filed and evidence of a plan that predates the attack . . . is presented, the defendants would be entitled to official immunity."³⁶⁰

official immunity from liability. *Id.* at 220, 617 S.E.2d at 577.

350. See O.C.G.A. § 20-2-1185 (2005).

351. *Leake*, 274 Ga. App. at 220, 617 S.E.2d at 577. "The defendants moved to dismiss the complaint on the basis of official immunity, and the trial court granted the motion." *Id.*

352. *Id.* at 222, 617 S.E.2d at 578. According to the court, "O.C.G.A. § 20-2-1185 states in part: 'Every public school *shall* prepare a school safety plan to help curb the growing incidence of violence in schools. . . .'" *Id.* at 221, 617 S.E.2d at 578 (emphasis in original).

353. *Id.* at 221, 617 S.E.2d at 578. "No exceptions are listed. Thus, the duty to prepare such a plan for a public school is ministerial, not discretionary." *Id.*, 617 S.E.2d at 579.

354. *Id.* at 224, 617 S.E.2d at 580.

355. *Id.*

356. *Id.*

357. *Id.* at 223, 617 S.E.2d at 579. "In terms of immunity, however, the duty to prepare the plan must be distinguished from its contents." *Id.* at 222, 617 S.E.2d at 579.

358. *Id.* at 224, 617 S.E.2d at 579. The court noted the statute's requirement of input from a variety of individuals and that it gave no specific directions on what elements to include in the plan. *Id.* at 223, 617 S.E.2d at 579. "These procedures would necessarily differ from school to school, and addressing these issues is left to the discretion of the school authorities." *Id.*

359. *Id.* at 224, 617 S.E.2d at 580.

360. *Id.* Apparently, this would be the result virtually irrespective of the contents of such a plan. See *id.*, 617 S.E.2d at 579-80.

At that “procedural juncture,” the court finally took its leave of the litigation.³⁶¹

I. Zoning

The plaintiff in *Buckner v. Douglas County*³⁶² sought enforcement of a letter from the county allowing development of his property under a prior zoning ordinance³⁶³ no longer in effect at the time he purchased the property.³⁶⁴ According to the court of appeals, the county’s letter, although not a textual amendment, “constituted an amendment to the zoning ordinance rezoning (or perhaps re-rezoning) the property from one classification to another”³⁶⁵ As such, the “amendment” fell within the mandate of the Zoning Procedures Law³⁶⁶ requiring a pre-amendment notice and hearing.³⁶⁷ Minus those prerequisites, the “amendment” constituted a nullity “without any legal force or effect,”³⁶⁸ and conferring the plaintiff no additional rights in his property.³⁶⁹ The court thus affirmed the trial judge’s refusal to enforce the county’s agreement.³⁷⁰

The supreme court considered an issue of constitutionality in *Legacy Investment Group, LLC v. Kenn*,³⁷¹ more specifically the plaintiff’s attack upon the present zoning of its property.³⁷² Reviewing expert

361. *Id.*, 617 S.E.2d at 580.

362. 273 Ga. App. 765, 615 S.E.2d 850 (2005).

363. DOUGLAS COUNTY, GA., CODE app. A, § 70.140.4.c (2001) (amended in 2002 by adding app. A, § 70.140.4.c(2)(c)).

364. *Buckner*, 273 Ga. App. at 765, 615 S.E.2d at 851. The plaintiff entered into an agreement to purchase the property in April; the county amended its zoning ordinance to more restrictive requirements (three-acre lots) in May; in September, the county agreed that the plaintiff could develop under the former less restrictive (one-acre lots) requirements; and the plaintiff concluded his purchase of the property the following February. Subsequently, the county refused to issue the plaintiff building permits because his plans did not comply with the more restrictive requirements. The plaintiff sought to mandamus the county’s compliance with its letter. *Id.* at 765-66, 615 S.E.2d at 851-52.

365. *Id.* at 768, 615 S.E.2d at 853.

366. *See generally* O.C.G.A. §§ 36-66-1 to -6 (2005).

367. *Buckner*, 273 Ga. App. at 768, 615 S.E.2d at 853.

368. *Id.*, 615 S.E.2d at 854 (quoting *Yost v. Fulton County*, 256 Ga. 324, 325, 348 S.E.2d 638, 640 (1986)).

369. *Id.* at 768-69, 615 S.E.2d at 854.

370. *Id.* at 765, 615 S.E.2d at 851. The court affirmed the trial court’s order “that the settlement agreement is unenforceable because it amounts to a zoning decision rendered in violation of Georgia’s Zoning Procedures Law (ZPL).” *Id.*

371. 279 Ga. 778, 621 S.E.2d 453 (2005).

372. *Id.* at 778, 621 S.E.2d at 454. The plaintiff entered into an agreement to purchase the property in January 2003, suffered the county’s denial of a request to rezone in May, and then purchased the property in January 2004. Under existing zoning, the plaintiff

testimony in the case,³⁷³ the court concluded as follows: “[T]he evidence authorizes the inferences that [the plaintiff] . . . would have had to pay as much as \$9,000 per acre for the property, and that the property could only be feasibly developed if [it] had purchased the property for \$5,838.”³⁷⁴ That evidence thus authorized “an inference that [the plaintiff] could not feasibly develop the property for residential use.”³⁷⁵ Accordingly, the court found an existing factual issue “regarding whether the existing zoning is significantly detrimental to [the plaintiff]”³⁷⁶ and reversed the trial court’s summary judgment for the county.³⁷⁷

III. LEGISLATION

The public controversy arising over the United States Supreme Court’s decision in *Kelo v. City of New London*³⁷⁸ ensured the center-piece prominence of eminent domain in the 2006 regular session of the Georgia General Assembly.³⁷⁹ In a drastic overhaul of existing statutory law, the legislature moved to restrict both the substance and the process of condemnation.³⁸⁰ Essentially, the revisions confine the power of exercising eminent domain to elected governing bodies and sharply limit the purposes for which private property may be condemned.³⁸¹

could build one single-family residence on each acre, but under the requested rezoning, the plaintiff could build two residences on each acre. *Id.* at 779, 621 S.E.2d at 454-55.

373. *Id.* at 781, 621 S.E.2d at 456. For the plaintiff to prevail on its claim of unconstitutionality, said the court, “it had ‘the burden to show by clear and convincing evidence that the existing zoning (1) causes [it] a significant detriment, and (2) is not substantially related to the public health, safety, morality, and welfare.’” *Id.* at 780, 621 S.E.2d at 456 (quoting *Town of Tyrone v. Tyrone, LLC*, 275 Ga. 383, 385, 565 S.E.2d 806, 809 (2002) (brackets in original)).

374. *Id.* at 781, 621 S.E.2d at 456. The court refused to resolve whether plaintiff paid a premium price for the property or the county’s contention “that a developer should not be able to purchase land at a greater-than-market cost and then use that cost to prove a significant detriment.” *Id.* Here, said the court, it would rely only on both parties’ experts regarding the property’s fair market value. *Id.*

375. *Id.*

376. *Id.* at 782, 621 S.E.2d at 456.

377. *Id.*, 621 S.E.2d at 457. Without analysis of the point, the court also found an issue of fact remaining on whether the existing zoning was not substantially related to the public welfare. *Id.*

378. 545 U.S. 469 (2005).

379. The legislative measures summarized are drawn from two helpful reports: “Final Legislative Report,” published by Association County Commissioners of Georgia (Apr. 2006), and “2006 Legislative Update,” published by the Georgia Municipal Association (June 2006).

380. Ga. H.B. 1313, Reg. Sess. (2006); Ga. H. Res. 1306, Reg. Sess. (2006).

381. *Id.*

Restraining the condemnation power for redevelopment purposes to “blighted” property, the statute sets forth specific conditions necessary to qualify a property as “blighted” and increases compensation for condemnees.³⁸² Similarly, the term “public use” receives restriction to basic governmental purposes.³⁸³ Procedurally, the statute mandates increased judicial review of eminent domain cases, specifies new notice requirements, provides for an owner’s reacquiring property not put to public use, and imposes court costs upon the local government when an owner successfully excepts to the special master’s award proceeding.³⁸⁴

The session yielded several notable items in the realms of finances and taxation. For example, local governments issuing bonds in excess of five million dollars must arrange for annual performance audits or reviews by an outside auditor or consultant, the audits revealing whether bonds funds are being spent in an efficient manner.³⁸⁵ In a different context, and for a residential property taxpayer’s appeal to superior court, the legislature required the government to pay litigation costs when the court establishes a value for the property that is fifteen percent less than the value set by the board of assessors.³⁸⁶

In the area of governmental regulation, the legislature enumerated six methods for governments to calculate regulatory fees.³⁸⁷ Moreover, the statute allows the service provider to pay the regulatory fees within two days after initiating the service, if necessary for health or safety of the service recipient.³⁸⁸ The General Assembly also addressed the process of building plan reviews. If a local government is unable to perform a building plan review within thirty days of a request, the builder or developer may contract with a professional engineer or architect to undertake the review.³⁸⁹ The individual or firm requesting the review bears the cost, and the private provider must attest to compliance with applicable codes and maintain liability insurance coverage.³⁹⁰ Finally, local governments are now preempted from regulating the sale of fireworks beyond those regulations provided by state law.³⁹¹

382. *Id.*

383. *Id.*

384. *Id.*

385. Ga. H.B. 1012, Reg. Sess. (2006). The local government may opt out of the requirement by publishing a legal advertisement that it is doing so. *Id.*

386. Ga. S.B. 597, Reg. Sess. (2006).

387. Ga. H.B. 304, Reg. Sess. (2006).

388. *Id.*

389. Ga. H.B. 1385, Reg. Sess. (2006).

390. *Id.*

391. Ga. H.B. 304.

Local governments are empowered—in their judicial facilities—to maintain a display described as the “Foundations of American Law and Government.”³⁹² The display includes the Mayflower Compact, the Declaration of Independence, the Magna Carta, the Ten Commandments, and the Bill of Rights; it is to require no state funding.³⁹³

Georgia’s legislative response to the issues of immigration and undocumented workers includes provisions addressed prospectively to local governments.³⁹⁴ The statute requires that every political subdivision verify the legal status of applicants for state or local benefits as defined by the federal work authorization program which includes grants, contracts, loans, and professional licenses provided by a state or local government.³⁹⁵

Environmental concerns surfaced in a statute updating and consolidating measures relating to littering.³⁹⁶ The statute clarifies definitions, increases fines, and mandates that convictions for “egregious littering” be published in the local government’s legal organ.³⁹⁷ Yet another measure prohibits billboards that advertise sexual entertainment,³⁹⁸ the statute also prohibits local governments from regulating political campaign signs on private property in respect to number of signs and length of time posted.³⁹⁹ Finally, the legislature authorized the Georgia Environmental Facilities Authority to make loans and grants to local governments for land conservation projects in accordance with the Georgia Land Conservation Act.⁴⁰⁰

Law enforcement and public safety drew the General Assembly’s attention on several fronts. The “TASER and Electronic Control Weapons Act”⁴⁰¹ requires training every two years in the use of tasers and stun guns by local government law enforcement personnel. The training program must be approved by the Public Officer Standards and Training Council, and the law enforcement agency must possess written policies on the use of the devices.⁴⁰² A municipal or county governing authority is now authorized, without action by the Governor, to offer and

392. Ga. H.B. 941, Reg. Sess. (2006).

393. *Id.*

394. Ga. S.B. 529, Reg. Sess. (2006).

395. *Id.*

396. Ga. H.B. 1320, Reg. Sess. (2006).

397. *Id.*

398. Ga. H.B. 1097, Reg. Sess. (2006).

399. *Id.*

400. Ga. H.B. 1319, Reg. Sess. (2006).

401. Ga. H.B. 1019, Reg. Sess. (2006).

402. *Id.*

pay a reward for the detention or apprehension of felons,⁴⁰³ each full-time local law enforcement agency may utilize one properly-marked vehicle without a roof-mounted lightbar for the purpose of traffic enforcement;⁴⁰⁴ and law enforcement officers may now utilize all-terrain vehicles (properly marked and equipped) on the public roads.⁴⁰⁵ Finally, local government probation officers are now subject to the same requirements as set forth by the County and Municipal Probation Management Council for private probation officers.⁴⁰⁶

Having failed to enact a bill requiring county commission approval of municipal annexation pursuant to a property owner's request, the General Assembly adopted a resolution exhorting city and county advocates "to make every effort" at resolving their annexation problems.⁴⁰⁷ The resolution calls upon the Georgia Municipal Association and the Association County Commissioners to prepare legislation accomplishing an annexation solution for the legislature's consideration in 2007.⁴⁰⁸

IV. CONCLUSION

The development of local government law, both decisional and legislative, surged significantly during the survey period. Cresting the tides of popular passions and temporal tensions, the evolution manifested an agenda of all persuasions. Distinctive beneath its roiling surface, however, an unchanging reflection: a farmer, with shotgun, standing at the fence.

403. Ga. H.B. 1302, Reg. Sess. (2006).

404. Ga. S.B. 64, Reg. Sess. (2006).

405. Ga. H.B. 1216, Reg. Sess. (2006).

406. Ga. S.B. 44, Reg. Sess. (2006).

407. Ga. S. Res. 1315, Reg. Sess. (2006).

408. *Id.*