

Administrative Law

by **Martin M. Wilson***
and **Jennifer A. Blackburn****

I. INTRODUCTION AND OVERVIEW

This Article surveys cases from the Georgia Supreme Court and the Georgia Court of Appeals from June 1, 2005 through May 31, 2006 in which principles of administrative law were either illuminated or formed an important piece of the decisionmaking. For a change, the Authors observed a significant decrease in the number of reported cases during the survey period, but that drop should certainly not be interpreted as any type of trend. No attempt has been made to survey cases that would properly fall under categories of more specific articles in this issue, although some degree of overlap is inevitable because of shared subject matter.

This Article begins with a discussion of cases on standing and moves to a review of defenses and immunities brought forward by administrative agencies. Standards of review for agency decisions are the next topic, followed by cases showing the effects of agency actions. The last topic for the survey of appellate cases reviews the differentiation between direct appeals and discretionary appeals. The Article concludes with a brief review of noteworthy enactments from the 2006 regular session of the Georgia General Assembly.

II. STANDING TO INITIATE PROCEEDINGS

Two of the cases in this year's survey period addressed standing. Both were brought by property owners asserting their right to file suit against

* Partner in the firm of Troutman Sanders LLP, Atlanta, Georgia. Mercer University (B.A., 1975; J.D., with honors, 1978). Member, State Bar of Georgia.

** Associate in the firm of Troutman Sanders LLP, Atlanta, Georgia. Georgia State University (B.A., 2000); Mercer University, Walter F. George School of Law (J.D., 2004). Member, State Bar of Georgia.

a government entity. In the first case, *Massey v. Butts County*,¹ the court of appeals affirmed the trial court's decision that the plaintiff lacked standing to bring suit because the plaintiff failed to demonstrate special damages.² The plaintiff, a property owner in Butts County, brought suit against Butts County, the Butts County Board of Zoning Appeals, and a neighboring property owner, alleging that a barn constructed on the neighbor's property violated certain zoning ordinances. The plaintiff sought removal of the barn and a permanent injunction to ensure that any future improvement to the neighbor's land would comply with applicable zoning ordinances.³ The trial court granted the neighbor's motion to dismiss for lack of standing, and the court of appeals affirmed.⁴ The court distinguished between cases brought against neighboring property owners for violations of local ordinances in which a building permit or approval from the municipality has already been issued versus those cases where the harm has not yet occurred.⁵

In cases where a plaintiff is seeking an injunction in order to protect, prohibit, or prevent from future wrongs, courts have held that the property owner does not need to show special damages.⁶ However, when a plaintiff is seeking action for harm that has already occurred and where a building permit has been issued by the municipality, the courts have held that a plaintiff must show special damages in order to achieve standing.⁷ In such a scenario, a plaintiff is essentially challenging the government's decision to grant the neighbor the building permit.⁸ Because the barn was already built and a building permit had been issued, the plaintiff was required to show special damages in order to achieve standing.⁹ In making this distinction, the court relied on the supreme court's decision in *Tate v. Stephens*,¹⁰ in which the court held that a property owner bringing suit over an allegedly wrongfully issued building permit must show special damages in order to gain standing.¹¹

1. 275 Ga. App. 478, 621 S.E.2d 479 (2005), *cert. granted*.

2. *Id.* at 478, 621 S.E.2d at 479.

3. *Id.*

4. *Id.*

5. *Id.* at 479, 621 S.E.2d at 480.

6. *Id.*

7. *Id.* at 480, 621 S.E.2d at 480 (citing *Tate v. Stephens*, 245 Ga. 519, 521, 265 S.E.2d 811, 813 (1980)).

8. *See id.* at 479, 621 S.E.2d at 480.

9. *Id.* at 479-80, 621 S.E.2d at 480.

10. 245 Ga. 519, 265 S.E.2d 811 (1980).

11. *Id.* at 519-21, 265 S.E.2d at 811-13.

In the second case, *Couch v. Parker*,¹² the supreme court upheld an administrative law judge's ("ALJ") decision that the plaintiff lacked standing to challenge the Director of the Environmental Protection Division's ("EPD") consent order because the director had not yet enforced the order.¹³ The plaintiffs were a group of residential property owners in Newton County, and the defendants were the owners of a disposal facility located on an adjoining tract. The Director of the EPD of the Department of Natural Resources determined that the defendants' disposal facility caused contamination to the plaintiffs' property.¹⁴ The director issued a consent order under authority granted to her in the Hazardous Site Response Act,¹⁵ which allowed the defendants an opportunity to correct the damage.¹⁶

The plaintiffs sought a hearing before an ALJ, claiming they were adversely affected by the consent order because the order was inadequate to repair the damage caused by the contamination.¹⁷ Relying on Official Code of Georgia Annotated ("O.C.G.A.") section 12-2-2(c)(3)(B),¹⁸ the ALJ concluded that the plaintiffs lacked standing because the director had not yet sought to enforce the order against defendants.¹⁹ Pursuant to the plaintiffs' request for judicial review, the superior court concluded that O.C.G.A. section 12-2-2(c)(3)(B) was unconstitutional and could not bar the plaintiffs' pursuit of an administrative appeal because the statute violated their right of access to the courts and their due process rights to seek redress for their grievances. The director then filed a discretionary appeal to the supreme court.²⁰

The supreme court determined that the superior court improperly based its conclusion that O.C.G.A. section 12-2-2(c)(3)(B) was unconstitutional on the plaintiffs' right under the Georgia Constitution to unfettered access to the courts.²¹ Furthermore, the court reiterated that there is no express constitutional right to unfettered access to the courts under the Georgia Constitution.²² In addition, the supreme court held that while Georgia has "long recognized that '[t]he right to be heard in matters affecting one's life, liberty, or property is one of the

12. 280 Ga. 580, 630 S.E.2d 364 (2006).

13. *Id.* at 584, 630 S.E.2d at 367.

14. *Id.* at 580, 630 S.E.2d at 365.

15. O.C.G.A. §§ 12-8-90 to -97 (2006).

16. *Couch*, 280 Ga. at 580-81, 630 S.E.2d at 365.

17. *Id.* at 581, 630 S.E.2d at 365.

18. O.C.G.A. § 12-2-2 (2006).

19. *Couch*, 280 Ga. at 581, 630 S.E.2d at 365.

20. *Id.*

21. *Id.*, 630 S.E.2d at 365-66.

22. *Id.* at 581-82, 630 S.E.2d at 366.

essential elements of due process of law,” that right is not absolute.²³ Instead, it is qualified by those limitations constitutionally established by the Georgia General Assembly.²⁴ The supreme court noted that “[t]he power of the legislature to create, modify or abolish rights to sue have been clearly and repeatedly recognized both by the U.S. Supreme Court and by this Court.”²⁵ The enactment of a statute that lessens or abolishes a cause of action deprives the plaintiff of no vested right.²⁶ The court further noted that O.C.G.A. section 12-2-2(c)(3)(B) does not prevent a plaintiff from seeking redress in the courts.²⁷ Instead, it provides that no person is considered to be aggrieved by an order entered by the director unless and until she seeks to enforce that order.²⁸ Thus, O.C.G.A. section 12-2-2(c)(3)(B) is simply a legislative limitation on standing to appeal the director’s order, not an absolute bar to pursuit of an administrative remedy.²⁹ The court noted the General Assembly’s intent in limiting the right to challenge an order until after it has been enacted was to enable the director to protect the public by facilitating the expeditious completion of those corrective measures ordered by the director.³⁰

III. AGENCY DEFENSES AND IMMUNITIES

The next line of cases revisits a topic discussed in depth in last year’s survey³¹—the scope of sovereign immunity for municipalities and for employees acting within their official capacity. The first case discusses the far-reaching scope of sovereign immunity and the procedural requirements of the Open Records Act (“ORA”).³² In *Wallace v. Greene County*,³³ the court of appeals affirmed the trial court’s grant of the defendants’ motion for summary judgment, holding that sovereign immunity barred the plaintiff’s suit against the county, the county manager, and the county attorney.³⁴ The case was remanded to

23. *Id.* at 582, 630 S.E.2d at 366 (quoting *S. Ry. Co. v. Town of Temple*, 209 Ga. 722, 724, 75 S.E.2d 554, 555 (1953)).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 583, 630 S.E.2d at 366.

29. *Id.*

30. *Id.*, 630 S.E.2d at 367.

31. Martin M. Wilson & Jennifer A. Blackburn, *Administrative Law*, 57 MERCER L. REV. 1, 2-12 (2005).

32. O.C.G.A. §§ 50-18-70 to -77 (2006).

33. 274 Ga. App. 776, 618 S.E.2d 642 (2005).

34. *Id.* at 776, 784, 618 S.E.2d at 644, 649.

determine whether the defendants' noncompliance with the ORA entitled the plaintiff to attorney fees under O.C.G.A. section 50-18-73(b).³⁵ The plaintiff, a disgruntled county employee, sought damages against the county, county manager, and county attorney, alleging that the county officials violated O.C.G.A. section 9-11-65(b)³⁶ by obtaining an ex parte temporary restraining order ("TRO") against the plaintiff without notice, and that the defendants further violated the ORA by failing to timely respond to the plaintiff's request for a copy of his personnel record.³⁷

The plaintiff asserted that the trial court erred in granting summary judgment to the defendants under the doctrine of sovereign immunity.³⁸ The court of appeals, however, affirmed the trial court's opinion for all of the defendants, holding that under the Georgia Constitution, the county was entitled to sovereign immunity for damage claims.³⁹ Furthermore, the court of appeals held that the plaintiff's suit against the defendants in their official capacity was also barred.⁴⁰ The court explained, "[A] suit brought against a county employee in his official capacity is in reality a suit against the county itself."⁴¹ In such a case, sovereign immunity extends to employees who are acting within their official capacity.⁴²

The plaintiff also sued the defendants in their individual capacity; however, the court held that these claims were also precluded by official immunity.⁴³ As explained in last year's survey, "Georgia law provides that a public officer may be personally liable only for 'ministerial acts' negligently performed or acts performed with malice or intent to injure, but cannot be personally liable for 'discretionary acts.'"⁴⁴ A ministerial act is defined as "one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty," and a discretionary act is defined as one that "calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed."⁴⁵ After the defen-

35. *Id.* at 784, 618 S.E.2d at 647; O.C.G.A. § 50-18-73 (2006).

36. O.C.G.A. § 9-11-65(b) (2006).

37. *Wallace*, 274 Ga. App. at 776, 618 S.E.2d at 644.

38. *Id.* at 778, 618 S.E.2d at 645.

39. *Id.*, 618 S.E.2d at 645-46; GA. CONST. art. I, § 2, para. 4.

40. *Wallace*, 274 Ga. App. at 778, 618 S.E.2d at 645-46.

41. *Id.*, 618 S.E.2d at 645.

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

43. *Id.* at 779, 618 S.E.2d at 646.

44. *Wilson & Blackburn*, *supra* note 31, at 8-9.

45. *Banks v. Happoldt*, 271 Ga. App. 146, 149, 608 S.E.2d 741, 744-45 (2004) (quoting *Happoldt v. Kutscher*, 256 Ga. App. 96, 98, 567 S.E.2d 380, 382 (2002)).

dants received information on the plaintiff's disciplinary problems, the defendants exercised discretion in determining what actions to take to protect the public and workplace against the plaintiff's alleged threats.⁴⁶ The court reasoned that the decisions made by the defendants in obtaining the TRO were not simple, specific duties, but were instead based on personal judgment.⁴⁷ As such, they were discretionary, not ministerial, and would fall within the scope of official immunity.⁴⁸ In order to get beyond the shield of immunity, the plaintiff would have to show that the defendants acted with actual malice in failing to notify the plaintiff of the TRO.⁴⁹ However, the record only showed that the defendants negligently failed to comply with the notice requirements of O.C.G.A. section 9-11-65(b).⁵⁰ As a result, summary judgment on the plaintiff's cause of action for damages was proper under the official immunity doctrine.⁵¹

Next, the court of appeals examined the plaintiff's claim for attorney fees brought against the county and the county manager under the ORA.⁵² In order to obtain attorney fees under the ORA, the plaintiff must show the following: (1) the defendant's failure to produce the requested documents until after the lawsuit was filed violated the ORA and (2) if a violation occurred, that the defendant lacked "substantial justification" for the violation.⁵³ The record showed that the plaintiff's counsel sent a letter to the county manager requesting a copy of the plaintiff's personnel record, and the defendants did not produce the records until after the suit was filed.⁵⁴ The defendants argued that to constitute a violation under the ORA, the plaintiff must be denied access to the requested records, not just be delayed in receiving them; however, the court rejected this narrow construction of the ORA, concluding that the purpose of the ORA was to protect the public interest, and thus the ORA must be broadly construed to effectuate this purpose.⁵⁵ Moreover, the ORA provisions specifically require an affirmative response to an open records request within three business days.⁵⁶ Failure to provide

46. *Wallace*, 274 Ga. App. at 779, 618 S.E.2d at 646.

47. *Id.*

48. *Id.*

49. *Id.* at 780, 618 S.E.2d at 646.

50. *Id.*, 618 S.E.2d at 647.

51. *Id.*

52. *Id.*

53. *Id.* at 781, 618 S.E.2d at 647-48.

54. *Id.* at 782, 618 S.E.2d at 648.

55. *Id.*

56. *Id.* at 782-83, 618 S.E.2d at 649.

such a response results in a violation of the ORA.⁵⁷ The court held that the defendants' failure to respond to the record request within three business days constituted a violation of the ORA.⁵⁸ Thus, the first prong of the test was satisfied, and the case was remanded to the trial court to determine whether the plaintiff met the second prong of the test.⁵⁹

The ORA took center stage in recent litigation over the *Atlanta Journal-Constitution's* ("AJC") right to inspect Atlanta's NASCAR Hall of Fame and 2009 Super Bowl bids. In *Central Atlanta Progress, Inc. v. Baker*,⁶⁰ the court of appeals again held that the ORA must be broadly construed and affirmed the trial court's holding that the plaintiffs were required under the ORA to disclose the bids.⁶¹ The AJC requested copies of the 2009 Super Bowl and the NASCAR Hall of Fame bids from the Metro Atlanta Chamber of Commerce, Inc. ("MACOC") and Central Atlanta Progress, Inc. ("CAP"), respectively. Both MACOC and CAP are private corporations made up of Atlanta-area businesses that led the efforts to bring the two events to Atlanta and created committees to assist in the two bid proposals. Upon receipt of the requests, both groups refused to disclose the bids, arguing that the ORA did not apply because the bids were prepared neither by, nor on behalf of, public agencies. Upon the AJC's request, the attorney general issued an opinion on the matter, finding that the bids were subject to the ORA because of the involvement of public officials, public employees, public resources, and public funds. MACOC and CAP again refused to disclose the bids, and the attorney general filed a lawsuit against them seeking an order requiring disclosure of the bids. The AJC was permitted to intervene.⁶²

The superior court held that MACOC and CAP were required under the ORA to disclose the bids. MACOC and CAP appealed.⁶³ According to the court of appeals, "The Open Records Act was enacted in the public interest to protect the public from 'closed door' politics and the potential abuse of individuals and misuse of power such policies entail. Therefore, the Act must be broadly construed to effect its remedial and protective purposes."⁶⁴ The court noted that "[t]he Open Records Act provides . . . that all public records, except those which by order of a court or by law

57. *Id.* at 783, 618 S.E.2d at 649.

58. *Id.* at 784, 618 S.E.2d at 649.

59. *Id.*

60. 278 Ga. App. 733, 629 S.E.2d 840 (2006).

61. *Id.* at 733, 629 S.E.2d at 841.

62. *Id.* at 733-34, 629 S.E.2d at 841-42.

63. *Id.* at 734-35, 629 S.E.2d at 842.

64. *Id.* (footnote omitted).

are prohibited or specifically exempted from being open to inspection by the general public, shall be open for a personal inspection by any citizen of this state.”⁶⁵ “‘Public records’ include all documents ‘prepared and maintained or received in the course of the operation of a public office or agency . . . [and] such items received or maintained by a private person or entity on behalf of a public office or agency which are not otherwise subject to protections from disclosure.’”⁶⁶

On appeal, CAP argued that the trial court incorrectly held that CAP was acting “for or on behalf of” a public office or agency.⁶⁷ The court of appeals affirmed the superior court’s holding that CAP was acting “for or on behalf” of a public office or agency for the following reasons: (1) the bid involved the use of public funds, (2) the bid called for the future expenditure of substantial public resources, and (3) the bid involved the participation of public officials and employees.⁶⁸ CAP further argued that the ORA was not implicated because the public officials never “received” the bid. Instead, CAP asserted that it prepared and maintained the bid documents and those public officials merely reviewed and returned the documents to it.⁶⁹ The court of appeals rejected this argument, acknowledging the trial court’s determination from the evidence that CAP systematically and purposefully sought to evade the ORA by permitting public officials to review the documents and then retrieving the documents to prevent them from reaching government files.⁷⁰

MACOC asserted that the trial court erred in holding that its bid was prepared on behalf of a public agency because there were only a small number of government officials involved in the bid proposal and no public money was spent on the bid.⁷¹ The court of appeals affirmed the trial court’s holding for the following reasons: (1) the purpose of the bid was to allow the City of Atlanta to host the 2009 Super Bowl event, (2) the bid committee included numerous public officials, (3) public officials and employees were involved in the preparation of bid documents, and (4) the bid called for the use of future public resources.⁷² The court of appeals also rejected MACOC’s contention that the trial court erred in holding that public officials “received” a copy of the bid, determining that

65. *Id.* at 735, 629 S.E.2d at 842.

66. *Id.* (quoting O.C.G.A. §§ 50-18-70(a), (b)).

67. *Id.*

68. *Id.* at 735-36, 629 S.E.2d at 842-43.

69. *Id.* at 738, 629 S.E.2d at 844.

70. *Id.*

71. *Id.* at 739, 629 S.E.2d at 844.

72. *Id.*, 629 S.E.2d at 845.

the evidence discussed above was sufficient to show that the bid documents were “received” within the meaning of the ORA.⁷³

The next case, *Walker v. Department of Transportation*,⁷⁴ addressed judicial review of agency decisions. In *Walker* the Georgia Department of Transportation (“DOT”) denied the plaintiffs’ permit applications to erect outdoor advertising.⁷⁵ Following affirmation of the denial by an ALJ, the plaintiffs sought judicial review by the superior court under the Georgia Administrative Procedure Act (“GAPA”),⁷⁶ arguing that the DOT’s denial of the application was erroneous.⁷⁷ The superior court affirmed the ALJ’s decision by operation of law under the GAPA. While the GAPA provides for judicial review of agency decisions, it also provides limitations on this review, including O.C.G.A. section 32-6-95(c), which provides that when a petition for judicial review of an agency’s final decision is filed with the superior court, the petition must be heard within 120 days from the date of filing or the final agency decision shall be considered affirmed by operation of law.⁷⁸ Here, because of the parties’ stipulations, no hearing was scheduled within 120 days of the filing date and no ruling was issued within that time.⁷⁹ Accordingly, the court of appeals held that the superior court lost jurisdiction over the matter and the DOT’s decision was affirmed by operation of law.⁸⁰

Pursuant to O.C.G.A. section 32-6-95(d), which requires appellate review of an agency decision affirmed by operation of law,⁸¹ the court of appeals examined the DOT’s denial of the plaintiffs’ outdoor advertising permit applications and the ALJ’s ruling affirming that decision.⁸² The plaintiffs contended that the DOT’s decision denying their outdoor advertising permits because the property was improperly zoned should be reversed.⁸³ Because evidence in the record demonstrated that the DOT’s decision had a rational basis and was neither arbitrary nor capricious, the denial of the permit applications was proper.⁸⁴ Therefore, the court of appeals affirmed the superior court’s finding that (1) the ALJ’s decision was affirmed by operation of law and (2) the ALJ

73. *Id.* at 740, 629 S.E.2d at 845.

74. 279 Ga. App. 287, 630 S.E.2d 878 (2006).

75. *Id.* at 287, 630 S.E.2d at 880.

76. O.C.G.A. § 32-6-95(a) (2006).

77. *Walker*, 279 Ga. App. at 287, 630 S.E.2d at 880.

78. O.C.G.A. § 32-6-95(c).

79. *Walker*, 279 Ga. App. at 289, 630 S.E.2d at 881.

80. *Id.* at 290, 630 S.E.2d at 882.

81. O.C.G.A. § 32-6-95(d).

82. *Walker*, 279 Ga. App. at 290, 630 S.E.2d at 882.

83. *Id.*

84. *Id.* at 294-95, 630 S.E.2d at 885.

properly upheld the DOT's denial of the plaintiffs' permit applications.⁸⁵

In the final case, *City of Rincon v. Couch*,⁸⁶ the city appealed a superior court order that affirmed an ALJ's denial of the city's application for an additional groundwater withdrawal permit. The EPD initially denied the permit after which the city challenged the denial, and the matter was referred to an ALJ.⁸⁷ The court of appeals ultimately affirmed the superior court's decision, rejecting a host of arguments asserted by the city.⁸⁸ This Article will address the city's three arguments that relate to administrative law.

The city first asserted that the ALJ erred by failing to conclude that the EPD may deny the permit only after considering each of the ten factors set forth in the Groundwater Use Act.⁸⁹ The court held that "absent mandatory statutory language to the contrary, an administrative agency is entitled to place more emphasis on one statutory factor than another."⁹⁰ Moreover, "such emphasis is entitled to great deference by a reviewing court."⁹¹ The city also argued that the ALJ erred by failing to conclude that the EPD "abused its discretion" when it allegedly encouraged the city to install a well but then denied the city's permit application to draw water from that source.⁹² The court of appeals found nothing in the record to show that an EPD employee affirmatively promised the city the permit would be granted.⁹³ Furthermore, the court held that equitable doctrines such as equitable estoppel are not normally available against state agencies.⁹⁴ Finally, the city argued that the ALJ's decision was unconstitutional because it deprived the city of due process of law, denied the city equal protection of the laws, and constituted a taking of property without just compensation.⁹⁵ The court held that the city's failure to raise the constitutional claims before the ALJ waived their ability to raise them before the court.⁹⁶ The court

85. *Id.* at 295, 630 S.E.2d at 885.

86. 276 Ga. App. 567, 623 S.E.2d 754 (2005).

87. *Id.* at 567-68, 623 S.E.2d at 757.

88. *Id.* at 574, 623 S.E.2d at 761.

89. *Id.* at 568, 623 S.E.2d at 757 (citing O.C.G.A. §§ 12-5-96(d)(1)-(10) (2006)). The Groundwater Use Act is codified at O.C.G.A. §§ 12-5-90 to -107 (2006).

90. *Rincon*, 276 Ga. App. at 569, 623 S.E.2d at 758 (citing Dep't of Cmty. Health v. Gwinnett Hosp. Sys., 262 Ga. App. 879, 888-89, 586 S.E.2d 762, 770 (2003)).

91. *Id.*

92. *Id.* at 573, 623 S.E.2d at 760.

93. *Id.*, 623 S.E.2d at 760-61.

94. *Id.*, 623 S.E.2d at 761.

95. *Id.* at 574, 623 S.E.2d at 761.

96. *Id.*

noted that Rule 22(3) of the Administrative Rules of Procedure⁹⁷ states that “[a]lthough the ALJ lacks jurisdiction to rule on constitutional claims, like all other claims, constitutional claims must be pled and supported in the Administrative court.”⁹⁸

IV. STANDARDS OF REVIEW FOR AGENCY DECISIONS

Sometimes, “affirmed for any reason” means that the appellate court has affirmed because it discovered what *could* have been a reason. Such was the case in *Davis v. Brown*.⁹⁹ Brown was arrested for drunk driving and refused to give the police officer a breath test. Brown was given a copy of a form telling him that his driver’s license would be suspended by the Department of Motor Vehicle Safety because of his failure to consent, and he would have ten days to contest that suspension by filing a request for hearing. Brown claimed that he never had possession of the notice form. He pleaded guilty to the charges against him, and at that time, he found out about his license suspension.¹⁰⁰

Brown never entered the administrative arena and instead went straight to the superior court to appeal the license suspension. That court set the suspension aside, citing an effective lack of service of the notice form. Although it could be shown that Brown had received the form roughly at the time he was jailed, the superior court found that there presumably had been a confiscation of the form when Brown was assigned to his cell and that the form was not later returned. That confiscation removed an effective notice of the license suspension, and absent such knowledge, Brown had no opportunity to file an appeal.¹⁰¹

Commissioner Davis sought review in the court of appeals. His primary argument was that the superior court had no power to set aside the license suspension because there was evidence to support it. The appellant further contended that the superior court had additionally erred by using equitable principles to find that the appellee, Brown, was entitled to an administrative hearing.¹⁰²

The court of appeals held that the superior court erred, in effect, by rejecting the evidence cited by the agency.¹⁰³ The agency had concluded that the police officer’s service of the notice form upon Brown was sufficient notice, and the superior court disagreed with that conclusion

97. GA. COMP. R. & REGS. 616-1-2-22(3) (2004).

98. *Couch*, 276 Ga. App. at 574, 623 S.E.2d at 761.

99. 274 Ga. App. 48, 616 S.E.2d 826 (2005).

100. *Id.* at 48-49, 616 S.E.2d at 827.

101. *Id.* at 49, 616 S.E.2d at 827.

102. *Id.*

103. *Id.* at 50, 616 S.E.2d at 828.

only because its view of the evidence differed from that of the appellant.¹⁰⁴ Citing a departmental rule that allows a hearing to be granted after the ten day period has elapsed,¹⁰⁵ the court of appeals agreed with the conclusion of the superior court that somehow Brown was prevented from making his request for the administrative hearing.¹⁰⁶ As the court noted, “the superior court properly could have found under the appropriate standards that the DMVS acted arbitrarily and capriciously and abused its discretion in applying the ten-day notice requirement under the facts present here.”¹⁰⁷

*Georgia Department of Education v. Niemeier*¹⁰⁸ involved a squabble between the Georgia Department of Education (“Department”) and the State Personnel Board (“Board”) regarding the appropriate punishment for a teacher who was charged with ethics violations. Niemeier was a teacher who was charged with two ethics violations. After the Department conducted a hearing, Niemeier was dismissed from employment. He requested and obtained a hearing on his dismissal before an ALJ, who issued findings of fact and conclusions of law agreeing with the Department’s termination of Niemeier.¹⁰⁹

Instead of pursuing a more familiar procedural route, Niemeier was next allowed to appeal to the Board. The Board prepared its own findings of fact and conclusions of law, which reversed the decision of the ALJ and contained an additional determination that the two charges against Niemeier had not been proven by a preponderance of the evidence presented at the hearing. The Department took great exception to this development, and after the Board’s decision had been affirmed by the superior court, an appeal to the court of appeals ensued.¹¹⁰

The Department viewed the role of the Board as similar to that of a reviewing or appellate body, not possessing fact-finding power beyond that of determining if there was evidence to support the decision.¹¹¹ Using the rules of statutory construction, the court of appeals held that the later but more general provisions of the GAPPA did not displace the “specific, comprehensive expression” defining the Board’s role in this

104. *Id.*

105. *See* GA. COMP. R. & REGS. 375-3-3-.04 (2005).

106. *Davis*, 274 Ga. App. at 50-51, 616 S.E.2d at 828.

107. *Id.* at 51, 616 S.E.2d at 829. The court cited O.C.G.A. § 50-13-19(h)(6) (2006) as a proper ground for the holding. *Davis*, 274 Ga. App. at 51, 616 S.E.2d at 829.

108. 274 Ga. App. 111, 616 S.E.2d 861 (2005).

109. *Id.* at 111-13, 616 S.E.2d at 862-63.

110. *Id.* at 113, 616 S.E.2d at 863.

111. *See id.*

type of personnel proceeding.¹¹² The Board had sufficient statutory authorization to completely rewrite the determination using the entire record of the proceeding.¹¹³ Accordingly, the court affirmed the dismissal of charges against Niemeier.¹¹⁴

Before concluding that the Board is too lenient, consider the ruling in *Georgia Department of Natural Resources v. Willis*.¹¹⁵ Willis was a law enforcement officer for the Department of Natural Resources (“DNR”) and tried to assert his authority on behalf of a friend in a dispute involving a matter not within the DNR’s jurisdiction. An ensuing investigation resulted in the DNR terminating Willis both for his actions and for supposedly lying to superiors who had questioned him. Willis took his case before an ALJ who found support for the first violation, which related to the misuse of his authority. However, the second violation, which related to lying to his superiors, was deemed unsubstantiated. The ALJ determined in his order that Willis should not be discharged but should suffer a thirty-day suspension.¹¹⁶

The DNR was not satisfied with this result and filed an appeal with the Board. Using most of the ALJ’s decision, the Board deleted one conclusion of law, opined that the suspension was too lenient a punishment, and concluded that the dismissal sought by the DNR was proper punishment. Willis, dissatisfied with the decision, appealed to the superior court.¹¹⁷ Because the Board did not enumerate additional evidence to support the increase in punishment, the superior court concluded it must have been based on “prejudice or preference” and reversed the Board’s dismissal order.¹¹⁸

The court of appeals granted the DNR an appeal, and the DNR argued that the superior court erred when it held that the Board should have more fully explained its decision to increase the sanction recommended by the ALJ.¹¹⁹ Largely relying upon *Georgia Board of Dentistry v. Pence*¹²⁰ and *Georgia Department of Human Resources v. Odom*,¹²¹

112. *Id.* at 114-15, 616 S.E.2d at 863-64. The conflict was between the general GAPA provision regarding appellate review found at O.C.G.A. section 50-13-41 (2006) and the state personnel appeal provisions in O.C.G.A. section 45-20-9 (2002). *Niemeier*, 274 Ga. App. at 114, 616 S.E.2d at 863.

113. *Niemeier*, 274 Ga. App. at 115-16, 616 S.E.2d at 864.

114. *Id.* at 116, 616 S.E.2d at 865.

115. 274 Ga. App. 801, 619 S.E.2d 335 (2005).

116. *Id.* at 801, 619 S.E.2d at 336.

117. *Id.* at 801-02, 619 S.E.2d at 336-37.

118. *Id.* at 802, 619 S.E.2d at 337.

119. *Id.* at 801, 619 S.E.2d at 336.

120. 223 Ga. App. 603, 478 S.E.2d 437 (1996).

121. 266 Ga. App. 493, 597 S.E.2d 559 (2004).

the appellate court held that once an offense punishable by dismissal was determined, the Board was under no compulsion to change the order as written by the ALJ any further than to explain that its opinion differed from that of the ALJ on the appropriate punishment.¹²² The exercise of the discretionary evaluation of the proper penalty was not an arbitrary or capricious act, and the termination of Willis was reinstated by a reversal.¹²³

Getting tough on drunk drivers can mean getting tougher procedurally on superior court judges. Such was the case with *Dozier v. Pierce*.¹²⁴ Pierce was stopped at a roadblock and suspected of drunk driving. He refused field sobriety evaluations. After his arrest, he agreed to breath testing but would not blow hard enough into the device to complete a test. This was interpreted by the policeman to be a refusal to submit to the test, and Pierce's driver's license was suspended. A subsequent hearing before an ALJ upheld the suspension. There was a specific finding that Pierce had refused to give a breath sample, but no findings in the decision were made regarding equipment testing or what breath test procedures were used.¹²⁵

Pierce sought review in the superior court, which apparently struggled with its interpretation of the case. The court first determined that the matter was a de novo hearing not governed by the GAPA. It next concluded that Pierce's breathalyzer tests were improperly administered because the police did not allow enough time to pass between the first and second attempts, and this was cause to throw out the suspension.¹²⁶

The Department of Driver Services obtained discretionary review in the court of appeals and findings of error were plentiful.¹²⁷ First, the superior court should have entertained the appeal under the GAPA because that was clearly required by statute.¹²⁸ Next, citing *Davis v. Brown*,¹²⁹ de novo review was improper, and the role of the superior court should have been that of an appellate body.¹³⁰ If the superior court had acted accordingly, it would have only questioned whether the

122. *Willis*, 274 Ga. App. at 803-04, 619 S.E.2d at 338.

123. *Id.* at 804-05, 619 S.E.2d at 338.

124. 279 Ga. App. 464, 631 S.E.2d 379 (2006).

125. *Id.* at 464-65, 631 S.E.2d at 380-81.

126. *Id.* at 465-66, 631 S.E.2d at 381-82.

127. *Id.* at 466-68, 631 S.E.2d at 382-83.

128. *Id.* at 466, 631 S.E.2d at 382. The statutory requirement is found at O.C.G.A. section 40-5-67.1(h) (2004 & Supp. 2006).

129. 274 Ga. App. 48, 616 S.E.2d 826 (2005). See an earlier discussion in this Article, *supra* notes 99-107.

130. *Dozier*, 279 Ga. App. at 466, 631 S.E.2d at 382.

record contained evidence that Pierce had effectively refused the breath test by failing to cooperate in providing breath samples.¹³¹ If that evidence existed, and the appellate court easily found that it did, further inquiry into the propriety of the testing or the equipment was not warranted.¹³² Because the decision of the ALJ should have been affirmed, the case was reversed and the suspension reinstated.¹³³

Sometimes superior court judges have problems, but *James v. Davis*¹³⁴ demonstrates that ALJs can have bad days, too. The Department of Motor Vehicle Safety ("Department") found James to be a habitual violator and his driver's license was administratively revoked. He appealed to an ALJ under the GAPA, questioning the habitual violator status in the proceeding. The ALJ's decision contained findings and conclusions that James should not have been found to be a habitual violator. Based on this action, James sought to regain his driver's license, but the Department refused. Instead of an administrative appeal of the Department's action, James sought an order of mandamus in superior court. For reasons not contained in the opinion, the superior court refused to grant the relief, and James brought the matter to the supreme court.¹³⁵

In four short paragraphs, the court held that the ALJ did not possess jurisdiction to rule on the habitual violator determination, which made the ALJ's determination void on its face.¹³⁶ Under the appropriate statute, an appeal to superior court (as opposed to an original extraordinary action) or an internal review within the Department were the only two allowable avenues for relief.¹³⁷

V. EFFECTS OF AGENCY ACTIONS

Only one appellate case during the survey period truly centered on the validity of a rule. Obviously, whether a rule is interpreted to mean one thing or another depends upon which court is providing the interpretation. However, in *Northside Corp. v. City of Atlanta*,¹³⁸ the reviewing court furnished no interpretation at all, and this formed a question for appellate review. Northside Corporation owned a package store and wished to add space to the building. Both the zoning director and the

131. *Id.* at 467, 631 S.E.2d at 383.

132. *Id.*

133. *Id.* at 468, 631 S.E.2d at 383.

134. 280 Ga. 497, 629 S.E.2d 820 (2006).

135. *Id.* at 497, 629 S.E.2d at 820.

136. *Id.* at 498, 629 S.E.2d at 821.

137. *Id.* (citing O.C.G.A. § 40-5-66 (2004)).

138. 275 Ga. App. 30, 619 S.E.2d 691 (2005).

City of Atlanta Board of Zoning Adjustment rejected Northside's application.¹³⁹ At issue was a distance provision applicable to package stores, which provided that they must be located more than 600 feet from certain types of buildings.¹⁴⁰ Northside's package store violated this distance provision but fell under an exception allowing such nonconformity for licensees who first held a license prior to May 6, 1997. Pursuant to a limitation on this "grandfather clause," the exception would end if the location was ever expanded or enlarged. The city administrators determined that the term "location" meant the building. Under this interpretation, if Northside received the very building permit it requested, then the exception allowing it to be licensed within 600 feet of certain structures would expire, and thus Northside would no longer be able to maintain its business.¹⁴¹

Upon appeal to superior court, the judge, relying upon *Board of Zoning Adjustments v. Fulton Federal Savings*,¹⁴² ruled that he could not interfere with the city zoning board's interpretation because the record did not indicate that it was an arbitrary or capricious decision.¹⁴³ Northside obtained a discretionary appeal, and the matter was taken up by the court of appeals.¹⁴⁴ The court of appeals initially ruled that the superior court's reliance on *Fulton Federal* was incorrect because that case was a review of a zoning decision, not the review of a regulation.¹⁴⁵ Turning to the merits of the case, the court of appeals noted that there were two ways the distance measurement interpretation could be handled.¹⁴⁶ The term "location" could refer to either the building on the property or to the property itself.¹⁴⁷ Citing a continuation of the provisions of the zoning ordinance that set out how distances were measured, the court noted that measurements began and ended at property lines.¹⁴⁸ Using this as a cue, the court interpreted "location" to refer to the property.¹⁴⁹ Thus, adding on to the building was not the

139. *Id.* at 30, 619 S.E.2d at 692.

140. *Id.* at 31, 619 S.E.2d at 693. The zoning provision was City of Atlanta Zoning Code section 16-28.024. *Northside*, 275 Ga. App. at 30, 619 S.E.2d at 692.

141. *Northside*, 275 Ga. App. at 31-32, 619 S.E.2d at 694.

142. 177 Ga. App. 219, 338 S.E.2d 730 (1985).

143. *Northside*, 275 Ga. App. at 30-31, 619 S.E.2d at 692.

144. *Id.* at 30, 619 S.E.2d at 692.

145. *Id.* at 31, 619 S.E.2d at 692-93.

146. *Id.* at 31-32, 619 S.E.2d at 693.

147. *Id.* at 32, 619 S.E.2d at 693.

148. *Id.*, 619 S.E.2d at 693-94.

149. *Id.*, 619 S.E.2d at 694.

same as enlarging the location, and the superior court's ruling was reversed.¹⁵⁰

The second case on the validity of rules actually involved judicial notice. In *State v. Ponce*,¹⁵¹ a rare criminal case involving administrative law, the court of appeals failed to review rules of the Department of Motor Vehicle Safety (also relating to the Public Service Commission) because the rules were not included in the record.¹⁵² The state appealed the matter to the supreme court, which treated the question as one involving rules promulgated under the GAPA.¹⁵³ Citing O.C.G.A. sections 50-13-2(1)¹⁵⁴ and 50-13-8,¹⁵⁵ the court stated that because the Department of Motor Vehicle Safety and the Public Service Commission were not excluded agencies under the GAPA, judicial notice of rules promulgated under the GAPA was required.¹⁵⁶ Accordingly, the judgment of the court of appeals was reversed and remanded.¹⁵⁷

On remand, an even stranger thing happened.¹⁵⁸ The court of appeals reviewed the apparently proffered rules and discovered that they had never been sent to the Secretary of State for filing under O.C.G.A. section 50-13-6.¹⁵⁹ Because the filing process was not completed, the rules technically did not become effective under the GAPA and there could be no judicial notice.¹⁶⁰

VI. DIRECT OR APPLICATION TO APPEAL

Only one notable discretionary appeal case, *Ladzinske v. Allen*,¹⁶¹ emerged during the survey period. As with many cases from prior years, this case involved disagreements about zoning decisions. Ladzinske was a resident who lived across the street from a charter school that had obtained a building permit for additional construction. He waited until after the construction began and then complained. DeKalb County's

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

151. 279 Ga. 651, 619 S.E.2d 682 (2005), *rev'g* Ponce v. State, 271 Ga. App. 408, 609 S.E.2d 736 (2005).

152. *Id.* at 651, 619 S.E.2d at 682-83.

153. *Id.*, 619 S.E.2d at 683.

154. O.C.G.A. § 50-13-2(1) (2006).

155. O.C.G.A. § 50-13-8 (2006).

156. *Ponce*, 279 Ga. at 651, 619 S.E.2d at 683. The GAPA provision was O.C.G.A. section 50-13-8. *Ponce*, 279 Ga. at 651, 619 S.E.2d at 683.

157. *Ponce*, 279 Ga. at 651, 619 S.E.2d at 683.

158. *Ponce v. State*, 279 Ga. App. 207, 630 S.E.2d 840 (2006).

159. *Id.* at 210, 630 S.E.2d at 843.

160. *Id.*

161. 280 Ga. 264, 626 S.E.2d 83 (2006).

zoning officials investigated and concluded that all was as it should be for construction to recommence.¹⁶²

Ladzinske then filed in superior court for extraordinary relief and damages. Finding that Ladzinske could have lodged an appeal to the county's zoning appeals board, the court dismissed counts for extraordinary relief because of Ladzinske's failure to exhaust administrative remedies. Other counts of the complaint were also decided in favor of the defendants.¹⁶³

Ladzinske filed a direct appeal to the supreme court based on the extraordinary relief counts.¹⁶⁴ Citing prior cases such as *Ferguson v. Composite State Board of Medical Examiners*¹⁶⁵ and *Rebich v. Miles*,¹⁶⁶ the supreme court concluded that it is the underlying subject matter brought on appeal that matters, not the form of pleadings used for the original case.¹⁶⁷ Where that subject matter was basically a building permit and zoning appeal, it boiled down to the review of an administrative decision and should have been subject to discretionary appeal procedures.¹⁶⁸

Ladzinske was not persuasive in arguing that he had never been a party to the building permit or zoning decision-making.¹⁶⁹ The court noted that the procedures of the county zoning appeals board allowed anyone who was aggrieved by the decision to enter an appeal.¹⁷⁰ Because Ladzinske was a property owner just across the street, he would certainly be categorized as an aggrieved party.¹⁷¹ His failure to take advantage of that opportunity, which the superior court concluded when it dismissed for failure to exhaust administrative remedies, indicated to the supreme court the true nature of the underlying case.¹⁷² Therefore, the appeal was dismissed.¹⁷³

II. RECENT LEGISLATION

Perhaps owing to the fact that 2006 is an election year for all members of the Georgia General Assembly and for the majority of

162. *Id.* at 264, 626 S.E.2d at 84.

163. *Id.*

164. *Id.*

165. 275 Ga. 255, 564 S.E.2d 715 (2002).

166. 264 Ga. 467, 448 S.E.2d 192 (1994).

167. *Ladzinske*, 280 Ga. at 265, 626 S.E.2d at 85.

168. *Id.*

169. *Id.* at 265-66, 626 S.E.2d at 85.

170. *Id.*

171. *Id.* at 266, 626 S.E.2d at 85.

172. *Id.*, 626 S.E.2d at 86.

173. *Id.* at 266-67, 626 S.E.2d at 85-86.

statewide elected officers, changes in state government agencies at the General Assembly's 2006 regular session were relatively minor. Unlike heavy-duty governmental reorganization or the creation of new governmental functions through more departments, most of the topics this year were of only modest interest to the everyday citizen. The following were noteworthy:

(1) There is now a brand new Agricultural Commodity Commission for Equines;¹⁷⁴

(2) The Herty Foundation became the Herty Advanced Materials Development Center with a changed mission;¹⁷⁵

(3) There is now a High School Athletics Overview Committee functioning jointly with members of the House and Senate;¹⁷⁶

(4) An Agricultural Advisory Commission will now work with the General Assembly on education programs;¹⁷⁷

(5) A Career and Technical Education Advisory Commission will likewise look after career and technical education issues;¹⁷⁸

(6) The Georgia Medical Center Authority again underwent major changes;¹⁷⁹

(7) There is now a Georgia Higher Education Facilities Authority;¹⁸⁰

(8) The Georgia Commission on Interstate Cooperation underwent a change in its directions and members;¹⁸¹

(9) The Suicide Prevention Program was established in the Department of Human Resources;¹⁸²

174. Ga. S.B. 380, §§ 1-2, Reg. Sess. (2006) (amending O.C.G.A. § 2-8-10 (2002 & Supp. 2006) and enacting new O.C.G.A. §§ 2-8-120 to -135 (Supp. 2006)).

175. Ga. H.B. 1184, §§ 1-8, Reg. Sess. (2006) (amending O.C.G.A. §§ 12-6-131, -133 to -139 (2006)).

176. Ga. H.B. 1316, § 1, Reg. Sess. (2006) (enacting new O.C.G.A. §§ 20-2-2100 to -2105 (Supp. 2006)).

177. Ga. H.B. 1227, § 1, Reg. Sess. (2006) (enacting new O.C.G.A. § 20-14-90 (Supp. 2006)).

178. Ga. H.B. 1228, § 1, Reg. Sess. (2006) (enacting new O.C.G.A. § 20-14-90 (Supp. 2006)).

179. Ga. H.B. 1083, §§ 1-7, Reg. Sess. (2006) (amending O.C.G.A. §§ 20-15-2, -4 to -7 (2005 & Supp. 2006) and enacting new O.C.G.A. §§ 20-15-5.1 to -5.7 and 20-15-16 (Supp. 2006)).

180. Ga. S.B. 562, § 1, Reg. Sess. (2006) (enacting new O.C.G.A. §§ 20-16-1 to -18 (Supp. 2006)).

181. Ga. H.B. 1067, §§ 1-4, Reg. Sess. (2006) (amending O.C.G.A. §§ 28-6-2, -3, -7 (2003 & Supp. 2006) and enacting new O.C.G.A. § 28-6-1.1 (Supp. 2006)).

182. Ga. H.B. 1092, § 1, Reg. Sess. (2006) (enacting new O.C.G.A. § 31-2-9 (Supp. 2006)).

(10) The Capitol Art Standards Commission replaces the Georgia Art Policy Committee;¹⁸³

(11) A brand new state retirement system was created and called the Magistrates Retirement Fund;¹⁸⁴ and

(12) The Civil War Commission moved from the Department of Natural Resources to the Department of Economic Development.¹⁸⁵

183. Ga. H.B. 978, § 1-2, Reg. Sess. (2006) (enacting new O.C.G.A. §§ 45-13-70 to -74 (Supp. 2006) and repealing O.C.G.A. § 50-16-5.2).

184. Ga. S.B. 244, § 1, Reg. Sess. (2006) (enacting new O.C.G.A. §§ 47-25-1 to -101 (Supp. 2006)).

185. Ga. S.B. 445, §§ 1-4, Reg. Sess. (2006) (enacting new O.C.G.A. §§ 50-7-60 to -64 (2006)).